

INDEPENDENT APPELLATE REVIEW AND THE FIRST AMENDMENT

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COURTNEY C. DOUGLAS*

Abstract: First Amendment independent appellate review, now known as the Constitutional Fact Doctrine, calls on federal appellate courts to review de novo facts that strike at the heart of speech freedom claims. Yet the doctrine's scope is underdefined, and the Court has never explained why, exactly, speech freedom interests warrant this special protection.

In search of the Constitutional Fact Doctrine's missing normative underpinnings, this Article recovers its overlooked origin story. This Article traces the doctrine's roots not to early speech cases, but rather to capital criminal appeals brought to the Supreme Court predominantly by Black men sentenced to death for rape and murder in Southern states. The Supreme Court recognized the egregious equal protection and due process violations these petitioners suffered only by refusing to defer to lower courts' factual findings in those cases. The doctrine migrated to the First Amendment realm in the 1960s through racial civil rights cases. This evolution suggests that independent appellate review was not motivated by an abstract reverence for speech. Instead, it sought to address entrenched inequities and to safeguard democratic principles.

To that end, this Article proposes a new, more focused framework for applying independent appellate review in the First Amendment context. Courts should apply the doctrine: (1) when it advances democratic interests weakened by structural forces or (2) when it resolves factual questions entangled with complex doctrinal standards. The Article applies this approach to the growing circuit split over the standard of review for true threats determinations and ultimately argues that independent appellate review is not warranted in that context. This Article aims to align First Amendment independent appellate review with its foundational purpose: ensuring that fundamental constitutional rights—including speech freedom—are vindicated with fairness and a pragmatic attention to power.

* J.D., University of Virginia School of Law. This Article received the 2025 Brown Award for Excellence in Legal Writing (Second Place). The Author thanks Dean Leslie Kendrick, Professor Payvand Ahdout, Dean Risa Goluboff, Charlotte Karlsen, Professor Frederick Schauer, Andrew S. White, the excellent editors of the *Boston College Law Review*, and Taylor K. Douglas.

INTRODUCTION

The Constitutional Fact Doctrine calls on federal appellate courts to review de novo facts central to adjudicating some First Amendment claims.¹ This practice of de novo appellate review has been gradually embraced by the U.S. Supreme Court,² applies to numerous types of factual determinations implicating constitutional rights beyond the First Amendment,³ and has fielded criticism for its “wandering”⁴ nature and hazy scope.⁵ First Amendment law deems this rigorous standard of appellate review essential, claiming that it reveals a doctrinal reverence for the unique value of speech. Appellate courts have an obligation to “in proper cases review the evidence to make certain that those principles have been constitutionally applied,” according to Supreme Court precedent.⁶ Federal appellate judges must “assure [them]selves that the judgment does not constitute a forbidden intrusion on the field of free expression,”⁷ and that any criminal or civil liability for speech is upheld only if it is truly outside “the majestic protection” provided by the First Amendment.⁸ Case law collectively connects this aversion to factual deference to special considerations related to speech and press freedom.⁹

So much for majesty. The claim that speech’s intrinsic, special value justifies de novo assessments of the record provides little guidance to practitioners

¹ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (describing the court’s duty to examine the evidence in a particular case when the question is one regarding “‘the line between speech unconditionally guaranteed and speech which may legitimately be regulated’” (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958))).

² See *infra* Part II.

³ See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 2–14, 25–26 (1983) (providing examples of de novo judicial review, including within the Administrative Procedure Act when agencies are interpreting statutes or the Constitution); Amanda Reid, *Fructifying the First Amendment: An Asymmetric Approach to Constitutional Fact Doctrine*, 11 FED. CTS. L. REV. 109, 116–17 (2019) (explaining how the doctrine originally emerged in administrative law).

⁴ See Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289, 293 (2017) (describing the various rationales for de novo judicial review and the way in which it has departed from its original usage in the administrative law context).

⁵ See Stephen A. Simon, *Unwarranted Hierarchy: The Supreme Court’s Failure to Explain the Differential Treatment of Rights in the Constitutional Fact Doctrine*, 54 U. MEM. L. REV. 571, 620 (2024) (criticizing the lack of adequate discourse and explanation surrounding the Constitutional Fact Doctrine for generating uncertainty regarding which issues are apt for de novo review).

⁶ *Sullivan*, 376 U.S. at 285.

⁷ *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (quoting *Sullivan*, 376 U.S. at 285).

⁸ *Bose Corp. v. Consumers Union*, 466 U.S. 485, 504 (1984).

⁹ Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 243 (1985); see also Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 759 (2009) (arguing that although the standard in most contexts is that a judge may dismiss a case only if “no reasonable jury” could have drawn such a conclusion, judges in contexts beyond the First Amendment cases discussed in this Article dismiss cases often based on their own evidentiary review and opinions).

and jurists seeking to determine appropriate standards of review in First Amendment appellate adjudication. This dynamic raises a host of unresolved questions: How should courts determine when a constitutional right is sufficiently at stake, and therefore when to activate the doctrine? How should judges address the federalism concerns that inevitably emerge with this *de novo* review? Most critically, what kinds of evidentiary findings qualify as constitutional facts? As one scholar put it: “[C]onstitutional facts are in an identity crisis” in the context of current doctrine.¹⁰ Another scholar has emphasized that the Supreme Court “has no overriding theory” governing when federal appellate courts should defer to other judicial and nonjudicial bodies that have made findings of constitutional fact.¹¹ Without a principled way to proceed, circuits are poised to part over these issues.¹²

Further, protecting speech solely because it is speech overlooks important considerations: it ignores power dynamics, the role speech plays in promoting an informed public, and the tensions that arise when expressive freedom conflicts with other essential values. Sustaining this special solicitude for speech without skepticism risks permitting harms—like threats of violence directed disproportionately at members of marginalized groups—to persist without sufficient scrutiny.¹³

Yet a path toward clarity may be waiting for us, hidden in plain sight in the shared doctrinal ancestry of *Bose Corp. v. Consumers Union* and *New York Times v. Sullivan*.¹⁴ Independent appellate review in the First Amendment context descends from a long line of cases emphasizing the Fourteenth Amendment due process rights of criminal defendants in capital murder and rape trials—particularly Black defendants condemned to death in Southern state

¹⁰ Allison Orr Larsen, *The Precarious Art of Classifying Facts*, 73 DUKE L.J. ONLINE 191, 192 (2024), https://scholarship.law.duke.edu/dlj_online/106/ [perma.cc/XJA5-RSXZ].

¹¹ DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 114 (2008).

¹² See *infra* notes 41–46 and accompanying text (detailing how federal courts of appeal have split on the application of the Constitutional Fact Doctrine to true threats determinations).

¹³ See *infra* Part IV; see also Jessica Miles, *Straight Outta SCOTUS: Domestic Violence, True Threats, and Free Speech*, 74 U. MIA. L. REV. 711, 749–50 (2020) (describing the connection between domestic violence and social justice issues like mass incarceration, and the fact that a low mens rea for true threats could contribute to these issues); see also MARY ANNE FRANKS, FEARLESS SPEECH: BREAKING FREE FROM THE FIRST AMENDMENT 112 (2024) (describing the ancient Greeks’ recognition of two conceptions of the freedom of speech: one being complete fearlessness in pursuing truth that applied to everyone, and the other being the license to say whatever one pleased that had a more oligarchic application).

¹⁴ See generally *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (holding that appellate courts must independently review the record in First Amendment cases to ensure that the constitutional standard of “actual malice” is satisfied); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (reaffirming that appellate courts must exercise independent judgment when reviewing constitutional facts in First Amendment cases).

courts in the mid-twentieth century.¹⁵ Although Supreme Court majorities occasionally reviewed the underlying factual record in early First Amendment cases, they often did not explicitly announce that they were doing so.¹⁶ This quiet skepticism of lower courts' factual findings meant that early speech cases played a surprisingly minor role in the development of First Amendment independent appellate review.¹⁷ The Constitutional Fact Doctrine is thus inextricably bound up with racial civil rights cases where the Supreme Court reckoned with prejudice in lower courts that resulted in discriminatory factfinding.¹⁸ This history reveals the doctrine's first instinct—not to protect any one right as superior because of its inherently “majestic”¹⁹ value, but to safeguard against discriminatory forces that deny members of marginalized groups equal justice.²⁰

This Article challenges the idea—advanced in *Sullivan*, *Bose*, and their progeny—that the Constitutional Fact Doctrine exists in the First Amendment context because speech is intrinsically worthy of special protection.²¹ With a renewed focus on the doctrinal origins of independent review in First Amendment cases, this Article seeks to participate in the project of clarifying First Amendment independent appellate review's proper scope. A close read of the line of cases leading up to *Bose* suggests the following limiting principle: Although judges ought to deploy independent appellate review in First Amendment cases where de novo analysis can advance appellate courts' supervisory role²² by safeguarding against discriminatory wrongdoing²³ or provide clarity after juries have sought to make factual findings tangled up in complex doctrinal nuances, First Amendment independent appellate review should not substitute for common-sense determinations most appropriately delegated to juries.²⁴

Part I assesses the convoluted and contradictory state of de novo “constitutional fact” review in today's First Amendment context.²⁵ This Part argues that because of the current doctrine's rudderless nature, scholars, jurists, and practitioners need to more seriously contemplate its normative foundation and

¹⁵ See *infra* Part II.

¹⁶ See *infra* Part II.D.

¹⁷ See *infra* Part II.D.

¹⁸ See *infra* Part II.D.

¹⁹ *Bose*, 466 U.S. at 504.

²⁰ See *infra* notes 296–308 and accompanying text.

²¹ See generally *Bose*, 466 U.S. 485; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (both treating speech protections as requiring heightened appellate scrutiny of constitutional facts).

²² See Redish & Gohl, *supra* note 4, at 322–34 (2017) (explaining that a more recently relevant rationale for the constitutional fact doctrine is a need to preserve the courts' “‘primary function’ as ‘expositor[s] of the law’” and the notion that appellate courts should supersede the role of lower courts as factfinders (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985))).

²³ See JAMES GOODMAN, *STORIES OF SCOTTSBORO* 298–99 (1994) (describing the Supreme Court's inclusion of politics and racial justice in its analysis of the facts of certain cases).

²⁴ See *infra* Part III.

²⁵ See *infra* Part I.

clarify its parameters.²⁶ Part II, the Article's primary contribution, tells the story of how independent appellate review in the capital criminal context laid the groundwork for the *de novo* evidentiary assessments in First Amendment and media law cases.²⁷ Part III explores the values driving this common law doctrine's origin story and posits takeaways that may refine our contemporary understanding of the role of independent appellate review in the First Amendment context.²⁸ This Part proposes a framework that seeks to help federal appellate courts determine when to engage in *de novo* appellate review for factual findings in First Amendment cases, and when to refrain.²⁹ Part IV applies these reflections to the question of whether the Constitutional Fact Doctrine ought to apply to true threats determinations, an issue that has divided circuits nationwide.³⁰ This Part contends that independent appellate review should *not* reach true threats determinations.³¹

I. FIRST AMENDMENT INDEPENDENT APPELLATE REVIEW'S CONTEMPORARY CHALLENGES

Under the constitutional fact doctrine, federal appellate courts review *de novo* facts central to the adjudication of First Amendment questions—all in service, so the story goes, of safeguarding speech freedom values.³² Speech, U.S. doctrine appears to say, is worthy of additional protection at the appellate level because it is special.³³ The intrinsic worth of the First Amendment, it seems, motivates these enhanced doctrinal protections.

The Supreme Court, however, does not explain why, specifically, this is so.³⁴ The underdeveloped normative underpinning of independent appellate review in the First Amendment context abandons advocates and jurists to stare out into a hazy abyss of indeterminacy. How should the law determine what kind of fact in a case involving a First Amendment claim qualifies as a *constitutional* fact worthy of *de novo* review? Should courts go further out of their way to safeguard First Amendment interests when they face off against digni-

²⁶ See *infra* Part I.

²⁷ See *infra* Part II.

²⁸ See *infra* notes 266–308 and accompanying text.

²⁹ See *infra* notes 266–308 and accompanying text.

³⁰ See *infra* notes 309–334 and accompanying text.

³¹ See *infra* notes 309–334 and accompanying text.

³² See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (holding that “[w]e must make an independent examination of the whole record, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression” (citation omitted)).

³³ See *infra* Part II and accompanying text.

³⁴ Beyond claiming that the Court seeks to protect its decisions from these “forbidden intrusion[s]” on First Amendment values, see *Sullivan*, 376 U.S. at 285, it does not explain *why* these unconstitutional intrusions warrant protection from federal appellate courts through this specific process of independent appellate review.

tary torts, or criminal statutes, or claims of government security? Do some categories of First Amendment liability warrant deference to the trier of fact? If so, how ought the law define those categories?

The Supreme Court has offered some piecemeal guidance as to the reach of First Amendment independent appellate review. For example, the finding that a work of literature, film, or the like is legally obscene—and is therefore unprotected by the First Amendment³⁵—is subject to independent appellate review.³⁶ Similarly, the question of whether a defendant in a libel case involving a public figure or public official acted with actual malice is subject to independent review.³⁷ Further, the Supreme Court has applied the doctrine to the question of whether a confession was voluntarily made.³⁸ These findings square with the Court's consistent inclination to deploy independent appellate review where speech-related factfinding is entangled with complicated doctrinal standards.³⁹ Yet independent appellate review does not, for example, apply to the question of whether an advertisement was misleading in the commercial speech context.⁴⁰ A principled articulation of the reach and the outer limits of the doctrine remains incomplete.

³⁵ Professor Frederick Schauer's First Amendment scholarship sheds light on the distinction between coverage and protection. If some speech is not "covered" by the First Amendment, it does not raise a speech freedom issue in the first instance. Indeed, that speech exists outside the bounds of the types of speech that *might* warrant constitutional protection. If speech is *protected*, it falls within the scope of language that raises a First Amendment issue and then actually triggers First Amendment safeguards from government regulation. See generally Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981) (discussing the separate questions of whether speech is covered and then whether it is protected by the First Amendment); Frederick Schauer, *Can Rights Be Abused?*, 31 PHIL. Q. 225 (1981) (same); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 89–92, 134–35 (1982) (same); Frederick Schauer, *Codifying the First Amendment*: New York v. Ferber, 1982 SUP. CT. REV. 285 (same); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769–70 (2004) (same) [hereinafter Schauer, *The Boundaries of the First Amendment*].

³⁶ See *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964) (reaffirming the position that in obscenity cases, the court will make an independent judgment as to whether the material is constitutionally protected).

³⁷ *Sullivan*, 376 U.S. at 269, 285.

³⁸ *Miller v. Fenton*, 474 U.S. 104, 115 (1985).

³⁹ *United States v. Hunt*, 82 F.4th 129, 135–37 (2d Cir. 2023) (emphasizing that independent appellate review is not necessary where factfinding "hinge[s] on the objective assessment of a reasonable person, and thus requires only 'ordinary principles of logic and common experience,'" but that it is properly deployed where "legal judgment" is necessary to make informed factual determinations (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 n.17 (1984)); *Bose*, 466 U.S. at 502–03 (emphasizing that independent appellate review is essential when factfinding is entangled with the application of constitutional rules).

⁴⁰ Schauer, *The Boundaries of the First Amendment*, *supra* note 35, at 1776 n.49 (2004); see Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1757–65 (1998) (discussing the incoherence and piecemeal nature of First Amendment procedural protections through the lens of libel law).

Indeed, circuits have split over whether to apply the *de novo* standard to certain factual findings in First Amendment cases. For example, federal appellate courts disagree as to whether to subject true threats determinations to *de novo* appellate review.⁴¹ On the one hand, the Fourth and Ninth Circuits have extended independent appellate review to true threats determinations.⁴² Alternatively, the Second and Tenth Circuits have held that courts are *not* required to independently examine true threats determinations.⁴³ As a third option, the Seventh and Eighth Circuits have declined to discuss the question, but have deferred to fact-finders at the lower court, whether that be the jury or the judge adjudicating a bench trial.⁴⁴

Without a principled lens through which to understand this doctrine, courts are left to themselves discern how, why, and to what extent to apply it. Advocates advancing arguments for a more robust application of the doctrine often claim that it is justified because factual questions at the heart of First Amendment issues are so often bound up in constitutional law. Ultimately, these determinations often turn out to be mixed questions of law and fact.⁴⁵ Courts that adopt this view are likely to describe speech freedom as a “precious constitutional libert[y]” that must be safeguarded not only by the stand-

⁴¹ Renee Griffin, Note, *Searching for Truth in the First Amendment's True Threat Doctrine*, 120 MICH. L. REV. 721, 733 (2022).

⁴² See *United States v. Bly*, 510 F.3d 453, 457–58 (4th Cir. 2007) (holding that “[w]hether a written communication contains either constitutionally protected ‘political hyperbole’ or an unprotected ‘true threat’ is a question of law and fact that we review *de novo*” (quoting *Bose*, 466 U.S. at 506–11)); *United States v. Hanna*, 293 F.3d 1080, 1088 (9th Cir. 2002) (explaining that “regardless of whether the case was properly submitted to the jury, we are usually obligated in speech cases 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.’ . . . [T]he appellate court defers to the jury’s findings on all but the constitutional facts. Constitutional facts are facts—such as the existence of actual malice or whether a statement is a true threat—that determine the core issue of whether the challenged speech is protected by the First Amendment. Deferring to the jury’s findings on historical facts, credibility determinations, and elements of statutory liability, we must consider whether the verdict is supported by substantial evidence. If we find that it is, we then conduct an independent review of the record to determine whether the facts as found by the jury establish the core constitutional fact, in this case, a ‘true threat’” (citations omitted)).

⁴³ See *Hunt*, 82 F.4th at 135–37 (“The nature of the substantive law at issue in this case supports letting the jury decide whether there was a true threat without any judicial second-guessing. Section 115(a)(1)(B) [(the federal statute at issue)] criminalizes threats that a reasonable person familiar with the context would view as genuine. Unlike ‘actual malice’ in *Bose* . . . the true threat determination will usually hinge on the objective assessment of a reasonable person, and thus requires only ‘ordinary principles of logic and common experience’ rather than legal judgment.” (citations omitted)); *United States v. Wheeler*, 776 F.3d 736, 741–42 (10th Cir. 2015) (noting that “the question [of] whether statements amount to true threats ‘is a question generally best left to a jury’” (citing *United States v. Malik*, 16 F.3d 45, 51 (2d Cir. 1994))).

⁴⁴ *United States v. Parr*, 545 F.3d 491, 497 (7th Cir. 2008); *United States v. Schiefen*, 139 F.3d 638, 639 (8th Cir. 1998).

⁴⁵ See *Bly*, 510 F.3d at 457–58 (“Whether a written communication contains either constitutionally protected ‘political hyperbole’ or an unprotected ‘true threat’ is a question of law and fact that we review *de novo*.” (citation omitted)).

ard processes of civil and criminal adjudication, but also by judges—“expositors of the Constitution”—who are divorced from ground-level fact-finders that threaten to diminish expressive liberties.⁴⁶ For example, in the true threats context, the concern motivating the doctrine’s applications might look like the following: Juries may be so appalled by the content of a true threat that the inherent First Amendment value of speech, even speech that injures, eludes them. In such cases, judicial figures, according to this account of a robust independent appellate review approach, must be able to override fact-finders.

On the other hand, those arguing against the application of the doctrine to true threats determinations and other frontier evidentiary issues in First Amendment cases tend to claim first that the determinations are fundamentally about common sense fact-finding.⁴⁷ Common-sense factual determinations are the province of the jury, and appellate courts ought to defer to their factual findings.⁴⁸ Second, if a complicated constitutional standard does not relate to the determination of the fact, judicial intervention is not necessary to clarify the factual issue at stake.⁴⁹ In these cases, to apply independent appellate review would be to interfere with the jury’s role.⁵⁰ An infringement like this, some say, raises a host of federalism problems.⁵¹

When courts must make decisions about the scope of First Amendment independent appellate review without a strong underlying normative framework detailing why *de novo* review is necessary and what aims it seeks to advance, abstract values vindicating doctrinal nuance or common sense, fundamental liberties or federalism—seem to face off in equipoise. To free the doctrine from this confusion, we need to have a better understanding of why federal appellate courts adjudicating First Amendment claims engage in this more skeptical review. Understanding where this practice came from in the first place may shed light on the motivations underlying this practice—and, hopefully, invite enhanced coherence for the doctrine’s future.

⁴⁶ *Bose Corp. v. Consumers Union*, 466 U.S. 485, 486, 511 (1984).

⁴⁷ See *Hunt*, 82 F.4th at 135–37 (emphasizing that true threat determinations hinge on common experiences and reasonable objective analyses rather than true legal judgments).

⁴⁸ *Id.*

⁴⁹ *Bose*, 466 U.S. at 501; *Hunt*, 82 F.4th at 135–37; *Hernandez v. New York*, 500 U.S. 352, 367 (1991) (holding that whether independent appellate review applies “turn[s] on the Court’s determination that” the question “involve[s] legal, as well as factual, elements”).

⁵⁰ *United States v. Viehhaus*, 168 F.3d 392, 397 (10th Cir. 1999); *Hunt*, 82 F.4th at 135–37; *Wheeler*, 776 F.3d at 742.

⁵¹ See ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 175 (1991) (quoting a handwritten note from Justice Hugo Black to Justice William Brennan, stating that “[c]onstruing [a] statute as authorizing our Court to *overrule* state laws as to a right to new trial would undoubtedly raise constitutional questions”).

II. FROM CAPITAL APPEALS TO ACTUAL MALICE AND BEYOND: INDEPENDENT APPELLATE REVIEW'S UNLIKELY JOURNEY

Beginning in the 1930s, the Supreme Court began deploying independent appellate review to assess facts critical to Fourteenth Amendment Due Process and Equal Protection claims advanced by Black men sentenced to death for rape and murder in Southern states.⁵² In particular, the Scottsboro Boys cases—which involved nine Black teenagers who were accused of raping two white women on a train in 1931—featured trials riddled with racial prejudice and due process violations.⁵³ The cases served as a powerful symbol of racial injustice in the courts.⁵⁴ The public outcry surrounding the Scottsboro trials likely inspired the Supreme Court to review more aggressively state court decisions in these and subsequent capital cases.⁵⁵ The Scottsboro cases—and the independent appellate review that the Supreme Court adopted in their wake—existed against the Jim Crow-era backdrop of widespread, systemic racial injustice in the criminal justice system and in the context of civic life.⁵⁶ As former Virginia Law Dean Risa Goluboff has documented, Jim Crow was both a racial and economic system that “existed because every day, in ways momentous and quotidian, governments, private institutions, and millions of individuals made decisions about hiring, firing, consuming, recreating, governing, educating, and serving that kept [B]lack[] [people] out, down, and under,” through these pervasive and normalized practices.⁵⁷

Over time, judicial rhetoric about the role of independent appellate review in those cases evolved. The Court extended this practice to a First Amendment challenge to a non-capital criminal case involving a Black man who had been protesting racial inequality in the South.⁵⁸ Then, the Court applied independent appellate review to a finding of actual malice in a newspaper advertisement

⁵² See, e.g., *Norris v. Alabama*, 294 U.S. 587, 589–90 (1935); *Pierre v. Louisiana*, 306 U.S. 354, 358–59 (1939); *Chambers v. Florida*, 309 U.S. 227, 229–30 (1940).

⁵³ See JAMES R. ACKER, *SCOTTSBORO AND ITS LEGACY: THE CASES THAT CHALLENGED AMERICAN LEGAL AND SOCIAL JUSTICE 196–98* (2008) (describing the legal precedent established by the Scottsboro cases, including the right to counsel and the elimination of racial discrimination in jury selection, as well as the many depictions of the Scottsboro cases in print and in the media throughout history).

⁵⁴ See *id.* (describing the highly publicized nature and visibility of the trials).

⁵⁵ See GOODMAN, *supra* note 23, at 248–50 (describing the massive national and international outcry surrounding the Scottsboro trials, including protests, press coverage, and organized advocacy campaigns). The Scottsboro cases decided by the U.S. Supreme Court include *Powell v. Alabama*, 287 U.S. 45 (1932); *Patterson v. Alabama*, 294 U.S. 600 (1935); and *Norris v. Alabama*, 294 U.S. 587 (1935).

⁵⁶ RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 7 & n.10 (2007).

⁵⁷ *Id.*

⁵⁸ See *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (describing petitioners' actions as a peaceful and valid exercise of their First Amendment freedoms as protected under the Fourteenth Amendment when making an independent examination of the facts on the record).

that criticized a Southern police force during the Civil Rights Movement.⁵⁹ Soon after that, the Court began applying independent appellate review to factual findings in First Amendment cases that had nothing to do with racial injustice.⁶⁰ In turn, the Court then began to claim that the doctrine exists—and has long existed—to protect First Amendment interests, seemingly for their intrinsic value.⁶¹

Accounting for the relationship between de novo review of facts central to constitutional claims seeking racial equality and independent appellate review of constitutional facts in contemporary First Amendment cases is a meaningful endeavor. It illuminates the short-sightedness of the declaration that independent appellate review has long sought to protect expressive freedom values for its own sake. Understanding this backstory will help us develop a normative theory of, and limiting principles for, First Amendment independent appellate review.

* * *

Long before independent appellate review began supercharging appellate courts' oversight of First Amendment values, members of the U.S. Supreme Court worried about Southern state courts denying Black individuals, specifically those who were criminal defendants, remedies for violations of their constitutional rights.⁶² Constitutional fact review's skeptical eye toward state courts revealed the Supreme Court's "need to guard against systemic bias brought about or threatened by other actors" in earlier stages of litigation.⁶³ The "systematic distortion of factfinding and law application"⁶⁴ in state courts led to a significant degree of "institutional distrust" that prompted the Supreme Court to review factual findings with an aura of skepticism.⁶⁵ This was espe-

⁵⁹ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285–86 (1964) (upon review of the record, holding that the proof presented to indicate actual malice was lacking).

⁶⁰ See generally *St. Amant v. Thompson*, 390 U.S. 727 (1968) (facts involving a televised speech falsely charging a public official with criminal conduct); *Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970) (involving a libel action brought by a state legislator); *Time, Inc. v. Pape*, 401 U.S. 279 (1971) (featuring a Chief of Detectives bringing a case against a publisher for libel).

⁶¹ *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510–11 (1984) ("The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. . . . The question [of] whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, 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.'").

⁶² See *infra* Part II.A–F.

⁶³ Monaghan, *supra* note 9, at 272.

⁶⁴ *Id.*

⁶⁵ *Id.*

cially the case when Southern state courts adjudicated alleged constitutional rights violations of Black people in the Jim Crow and Civil Rights eras.⁶⁶

Section A of this Part presents the application of independent appellate review in a line of cases imposing capital punishment.⁶⁷ Section B of this Part discusses the subsequent broadening of the doctrine,⁶⁸ and Section C explains how it came to be applied in the First Amendment realm.⁶⁹ Section D then discusses independent appellate review unrelated to the capital punishment cases.⁷⁰ Section E dives into a freedom of expression line of cases that applied Constitutional fact review in the speech and press freedom context.⁷¹ And Section F discusses the cases that formalized First Amendment independent appellate review.⁷²

A. Independent Appellate Review in Capital Criminal Adjudication, from Norris to Spano

In 1935, in *Norris v. State of Alabama*, the U.S. Supreme Court held that a petitioner, Clarence Norris, a Black man who had been sentenced to death for rape in Alabama, was denied due process because Black individuals had been excluded from his jury.⁷³ In so doing, the Court reversed the Alabama Supreme Court's affirmance of Mr. Norris's conviction.⁷⁴ To arrive at the ultimate holding that a due process violation had occurred, the U.S. Supreme Court had to reassess the Alabama trial court's factual finding that Black individuals were not excluded from the jury.⁷⁵ Justice Hughes's opinion gave considerable weight to the subsidiary facts that the jury rolls listed no Black individuals and that the county in question had never seen a Black person on the jury.⁷⁶ The majority also treated with skepticism the county commissioner's claim that although qualified Black jurors were left off of jury lists, racial animus played no role in those omissions.⁷⁷ The *Norris* court, justifying its decision to review the record in order to conclude that the county excluded qualified Black jurors, wrote:

⁶⁶ See *infra* Part II.

⁶⁷ See *infra* Part II.A.

⁶⁸ See *infra* Part II.B.

⁶⁹ See *infra* Part II.C.

⁷⁰ See *infra* Part II.D.

⁷¹ See *infra* Part II.E.

⁷² See *infra* Part II.F.

⁷³ See *Norris v. Alabama*, 294 U.S. 587, 599 (1935) (dismissing as violent the presumption that all Black people were simply unqualified for jury service).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See *id.* at 597 (spending significant time discussing the lack of reasoning for excluding all Black men in the county from the jury rolls and the fact that the State made no effort to justify the conclusion that they were unqualified).

⁷⁷ See *id.* at 598 (dismissing the argument that they simply did not consider race but instead based their selections only on qualifications for service on the grounds that the "long-continued exclusion"

When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.⁷⁸

Numerous aspects of this passage bear significance for future cases. First, the *Norris* court's articulation of independent appellate review is quite broad. Chief Justice Hughes does not clarify whether this principle applies to cases involving *all* federal rights, and he does not articulate which findings of fact are sufficiently tied to the vindication of the constitutional right in question. Although this passage's broad language suggests a capacious approach to such an inquiry, the *Norris* court was confronting a factual question well-suited for independent appellate review. First, the factual issue of whether qualified Black individuals were excluded from juries involved an intricate inquiry into the nature of jury selection procedure, jury selection standards, county governance norms, and astute analysis of jury roll documents that had potentially been the subject of fraudulent tampering.⁷⁹ A county commissioner in the case offered conclusory testimony, including the statement that no people of color were systematically excluded.⁸⁰ These complex factual details were intricately tied up in the ultimate legal question. Secondly, the Alabama Supreme Court's erroneous view of the facts was blatant: Testimony showed that there were hundreds of Black men qualified for jury service but that none of them had ever been called.⁸¹ These facts and the testimony of the commissioners were "so sweeping, and so contrary to the evidence"⁸² that they pointed to the "unvarying[] and wholesale exclusion"⁸³ based on the "violent presumption" that all Black men were "utterly disqualified by want of intelligence, experience, or moral integrity" to participate in jury service.⁸⁴

from jury service, taken together with the many Black men proved to be qualified for such service "could not be met by mere generalities").

⁷⁸ *Id.* at 590.

⁷⁹ *Id.* at 593–94.

⁸⁰ *Id.* at 594 (citation omitted).

⁸¹ *Id.* at 597.

⁸² *Id.* at 599.

⁸³ *Id.* at 597.

⁸⁴ *Id.* at 599.

The Court was also facing a criminal case that had become a symbol of American racial injustice. The underlying crime most likely had not occurred in the first place, and the stakes could not have been higher: an innocent man had been sentenced to death.⁸⁵ Perhaps Chief Justice Hughes, facing an evidentiary record ripe for independent review for numerous reasons, articulated a broader holding about independent appellate review than he might have meant had he contemplated future destinations on the journey the doctrine was to travel.

At the same time, Chief Justice Hughes himself drew on a broad swath of legal arenas to pull independent appellate review into the realm of constitutional criminal adjudication.⁸⁶ He cited previous U.S. Supreme Court cases adjudicating appropriation claims,⁸⁷ a case about intrastate railway rates for train cars carrying coal,⁸⁸ a claim brought by a group of sixty-seven Indigenous people claiming that an Oklahoma county forced them to hand over nontaxable money,⁸⁹ a personal injury claim involving a train passenger on a federally controlled railroad,⁹⁰ and First and Fourteenth Amendment challenges to a criminal syndicalism statute in Kansas.⁹¹ Because of this breadth, it is possible that Chief Justice Hughes meant what he said in the most literal sense—any claim implicating a federal right in state court should be reviewed *de novo* by a federal court. The *Norris* court, however, does not impose parameters on how closely the facts in question must strike at the heart of the federal right.⁹² It is possible that this complication only emerges in later cases, raising the question of how to define and confine the doctrine, despite the *Norris* court's capacious language.

The *Norris* court emphasized the notion of judicial duty⁹³ in safeguarding federal rights, a proposition that would later become central to First Amend-

⁸⁵ *Id.* at 588; see also Ellis Cose, *The Saga of the Scottsboro Boys*, ACLU (July 13, 2020), <https://www.aclu.org/news/racial-justice/the-saga-of-the-scottsboro-boys> [perma.cc/W823-P3RD] (reciting the history of the *Scottsboro* cases, the facts indicating that the defendants were innocent, and the national outcry at the injustice taking place).

⁸⁶ *Norris*, 294 U.S. at 590.

⁸⁷ *Creswill v. Knights of Pythias*, 225 U.S. 246, 261 (1912); *Ancient Egyptian Arabic Ord. of Nobles v. Michaux*, 279 U.S. 737, 745 (1929).

⁸⁸ *N. Pac. Ry. Co. v. North Dakota ex rel. McCue*, 236 U.S. 585, 593 (1915).

⁸⁹ *Ward v. Bd. of Cnty. Comm'rs*, 253 U.S. 17, 22 (1920).

⁹⁰ *Davis v. Wechsler*, 263 U.S. 22, 24–25 (1923) (“If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way.” (citations omitted)).

⁹¹ *Fiske v. Kansas*, 274 U.S. 380, 385, 386 (1927). *Fiske* will be further discussed in Part II.D.

⁹² See generally *Norris v. Alabama*, 294 U.S. 587 (1935) (undertaking its own review of the factual record to determine whether jury discrimination occurred, without articulating clear limits on when such independent review is required).

⁹³ See Monaghan, *supra* note 9, at 272 (discussing the preserved power of the Court to “respond to perceived dangers of distorted factfinding and law application” in lower courts as an important guard against systemic discrimination and bias).

ment independent appellate review practices.⁹⁴ Even when judges in cases following *Norris* would seem to be searching for an opportunity to re-examine the records before them, this language of judicial obligation—perpetuated in *Norris*’s progeny discussing the concept of independent appellate review—would afford them air cover to review lower courts’ factual findings even where it is not clear that the law actually required them to do so.⁹⁵

The Court’s opinion in *Norris* evoked a profound and positive response from Black Americans—not only for its outcome, but also for the result of the Court’s decision to engage in independent review of the record: “the resolution with which [Chief Justice] Hughes dismissed the state’s claim that the absence of Negroes did not prove exclusion,” a move that signaled meaningful judicial scrutiny of the record.⁹⁶ The case’s broad propositions about independent appellate review opened the door for promising, if unclear, possibilities for those seeking redress for constitutional rights violations.

In 1939, in *Pierre v. State of Louisiana* the Supreme Court engaged in independent appellate review to hold that a Black man, Hugh Pierre, was denied equal protection when Black individuals qualified to serve on juries were excluded from his jury.⁹⁷ The Court’s opinion, authored by Justice Black, cited to *Norris* to justify its decision to re-examine the record, finding that contrary to the Louisiana Supreme Court’s opinion, Black individuals were not considered from the court’s jury rolls for Mr. Pierre’s trial.⁹⁸ The Court cautioned that the Louisiana Supreme Court’s conclusions were “entitled to great respect,” yet it also acknowledged that when “a citizen whose life is at stake has been denied the equal protection of the country’s laws on account of his race, it becomes our solemn duty to make independent inquiry and determination” of the facts in the record.⁹⁹ Justice Black’s opinion added that “equal protection to all is the basic principle upon which justice under law rests.”¹⁰⁰ This conclusion allowed the Court to find that Louisiana state officers “‘systematically, unlawfully and unconstitutionally excluded [Black people]’ . . . ‘solely and only on the basis of their race and color’” from juries.¹⁰¹

⁹⁴ See *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (recognizing that appellate courts have a duty “to make an independent examination of the whole record”); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) (holding that “we are compelled to examine for ourselves the statements in issue . . . to see whether or not they do carry a threat of clear and present danger . . . or whether they are of a character which the principles of the First Amendment . . . protect”).

⁹⁵ See *infra* Part II.E.

⁹⁶ GOODMAN, *supra* note 23, at 249 (1994).

⁹⁷ *Pierre v. Louisiana*, 306 U.S. 354, 362 (1939). Pierre had been convicted of murdering a white man in Louisiana. *Id.*

⁹⁸ *Id.* at 358 n.7.

⁹⁹ *Id.* at 358.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 355.

The *Pierre* court's conception of independent review was much narrower than that suggested in Chief Justice Hughes's majority *Norris* opinion. The Court said that it was invoking independent review for a few reasons. First, Mr. Pierre's life was at stake.¹⁰² Second, the equal protection clause confers a special right because of its status as "the basic principle upon which justice under law rests," and Mr. Pierre had suffered discrimination on account of his race.¹⁰³ The Supreme Court stepped in with its power of independent appellate review to remedy what it saw as an injustice done to a member of a marginalized group.¹⁰⁴

Justice Black took great pride in the outcome of *Pierre*, which, as in *Norris*, was made possible by the Court's willingness to re-examine the record. He kept a note that read "[i]t is a delicate task, tactfully done" on a nearly-finalized draft opinion from Justice Reed.¹⁰⁵ After the Court published the opinion, Justice Black saved correspondence from numerous Black Americans who reached out to him and told him how much the opinion meant to them. A Black preacher who had formerly lived in Alabama wrote to Justice Black: "The Negro as such in this country is not seeking favors, but justice . . . God Bless you, Justice Black. Our people are singing your praises throughout the east."¹⁰⁶ Within a week, Justice Black responded, thanking the preacher for his correspondence and inviting him to visit his Supreme Court chambers in Washington.¹⁰⁷ Justice Black received an additional correspondence reading, "The decision which you have written for that great Court . . . marks another landmark in the struggle of the American people to realize the ideals of man's equality. Let me add my voice to the many expressions of congratulations which I am certain have reached you at this historic moment" from a Black

¹⁰² *Id.* at 358.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 355 ("His petition for certiorari to review the Louisiana Supreme Court's judgment rested upon the grave claim—earnestly, but unsuccessfully urged in both State courts—that because of his race he had not been accorded the equal protection of the laws guaranteed to all races in all the States by the Fourteenth Amendment to the Federal Constitution.").

¹⁰⁵ Note from Justice Stanley Reed to Justice Hugo Black, *Pierre v. Louisiana*, No. 142 (on file with Libr. of Cong. Manuscript Div., Hugo LaFayette Black Papers, Box 257, Folder 9).

¹⁰⁶ Letter from Reverend P.H. Hughes to Justice Hugo Black, *Pierre v. Louisiana*, No. 142 (Dec. 15, 1938) (on file with Libr. of Cong. Manuscript Div., Hugo LaFayette Black Papers, Box 257, Folder 9).

¹⁰⁷ Letter from Justice Hugo Black to Reverend P.H. Hughes, *Pierre v. Louisiana*, No. 142 (Dec. 15, 1938) (on file with Libr. of Cong. Manuscript Div., Hugo LaFayette Black Papers, Supreme Court Case File, Box 257, Folder 9).

lawyer in Chicago.¹⁰⁸ And the Justice saved news clipping about the *Pierre* decision featuring headlines such as, “Black Bars Bias Against Negro.”¹⁰⁹

The emphasis on remedying racial injustice in Justice Black’s *Pierre* case file—and his language about engaging in independent appellate review to remedy a race-based equal protection violation—may reveal the Court’s distrust of Southern state courts. From a more cynical perspective, Justice Black’s approach might also be a part of his lifelong efforts at reputational damage control after news of his ties to the KKK leaked to the press.¹¹⁰ What is obvious, however, is that the Court’s willingness to undertake independent appellate review of the lower court’s decision is inextricably bound to the Court’s concerns about racial injustice in capital criminal adjudication.

One year after the Supreme Court decided Mr. Pierre’s case, the Supreme Court in *Chambers v. Florida* reversed the convictions of four Black men who had been sentenced to death for the murder of an elderly white man.¹¹¹ The defendants had raised a due process challenge. Police had beaten them during their interrogations, and the defendants claimed that their confessions had been extorted.¹¹² Although the constitutional claim itself did not pertain to race, the opinion—authored again by Justice Black—was attentive to racial power dynamics in the interrogation room, which were at the center of the defendants’ due process claim. According to the majority, the record revealed “the dragnet methods of arrest on suspicion without warrant, and the protracted questioning and cross questioning of these ignorant young colored tenant farmers by state officers and other white citizens . . . without friends, advisers or counselors, and under circumstances calculated to break the strongest nerves and the stoutest resistance,” circumstances that called into serious question the voluntariness of the confessions.¹¹³

Justice Black’s probing of this story was, of course, made possible through the Court’s practice of independent appellate review. He reasoned that because the petitioners were challenging their convictions, in capital cases, on Fourteenth Amendment due process grounds, the Court “must determine inde-

¹⁰⁸ Telegram from Earl B. Dickerson to Justice Hugo Black, *Pierre v. Louisiana*, No. 142 (Mar. 2, 1939) (on file with Libr. of Cong. Manuscript Div., Hugo LaFayette Black Papers, Box 257, Folder 9).

¹⁰⁹ Newspaper Clipping, *Black Bars Bias Against Negro*, Int’l News Serv. Wire, *Pierre v. Louisiana*, No. 142 (Feb. 28, 1939) (on file with Libr. of Cong. Manuscript Div., Hugo LaFayette Black Papers, Box 257, Folder 9).

¹¹⁰ See generally Todd C. Peppers, *Justice Hugo L. Black, His Chambers Staff, and the Ku Klux Klan Controversy of 1937*, SUP. CT. HIST. SOC’Y (Apr. 27, 2021), <https://supremecourthistory.org/scotus-scoops/justice-hugo-black-ku-klux-klan-controversy-1937/> [perma.cc/5KDX-QLZV] (explaining Justice Black’s history with the KKK and his desire, once on the Court, to sever himself from his past in various ways, including by hiring a Catholic secretary).

¹¹¹ *Chambers v. Florida*, 309 U.S. 227, 229, 242 (1940).

¹¹² *Id.* at 238.

¹¹³ *Id.* at 238–39.

pendently whether petitioners' confessions were so obtained, by review of the facts upon which that issue necessarily turns."¹¹⁴ Here, Justice Black's explanation appears to confine the practice to the capital context, as he did in *Pierre*.¹¹⁵ The passage does not, however, appear to limit this doctrine only to Equal Protection violations, despite his comment in the *Pierre* majority about the Equal Protection Clause's special status.¹¹⁶

In 1959, the U.S. Supreme Court in *Spano v. New York* again engaged in independent appellate review to reverse the murder conviction of Vincent Joseph Spano.¹¹⁷ Mr. Spano's confession, the Court found, was coerced after he was interrogated for hours in the middle of the night by numerous men, all of whom ignored his request for an attorney.¹¹⁸ As part of the interrogation, the police convinced Mr. Spano's decade-long friend to deceive him and threaten that he would lose his job if he did not confess, which would be "disastrous" to his wife and children.¹¹⁹ The Court departed from the facts found by New York's highest state court in order to draw this conclusion.¹²⁰

"Because of the delicate nature of the constitutional determination which we must make, we cannot escape the responsibility of making our own examination of the record," the Court wrote.¹²¹ The Court did not elaborate on what it meant by its use of the term "delicate." Like the other capital defendants, Mr. Spano's life was at stake—and through the Court's independent appellate review intervention, his life was spared.¹²² He died of natural causes in 2016.¹²³ Chief Justice Warren's majority opinion also went to great lengths to describe Mr. Spano as an especially vulnerable defendant.¹²⁴ The Court noted that: Mr. Spano had immigrated to the United States from Italy; "he had a history of emotional instability"; he had only completed half a year of high school; his doctor deemed him "maladjusted"; he had failed the Army's intelligence test; and

¹¹⁴ *Id.* at 228–29.

¹¹⁵ *Id.* See generally *Pierre v. Louisiana*, 306 U.S. 354 (1939) (stressing that the defendants faced death sentences, signaling that heightened scrutiny was justified because the case involved the ultimate punishment).

¹¹⁶ See *Pierre*, 306 U.S. at 358 (emphasizing the Equal Protection Clause as "the basic principle upon which justice under law rests" and seemingly resting the decision on the importance of this singular right). As in *Pierre*, Justice Black kept dozens of letters from members of the Black community who praised his opinion and the ultimate outcome of the *Chambers* case. Justice Hugo Black, Case Notes, *Chambers v. Florida*, No. 195 (on file with Libr. of Cong. Manuscript Div., Hugo LaFayette Black Papers, Box 258).

¹¹⁷ *Spano v. New York*, 360 U.S. 315, 324 (1959).

¹¹⁸ *Id.* at 318–20.

¹¹⁹ *Id.* at 323.

¹²⁰ *Id.* at 323–24.

¹²¹ *Id.* at 316.

¹²² *Id.* at 323.

¹²³ *Obituary, Vincent Joseph Spano: October 6, 1930–October 30, 2016*, DIGNITY MEM'L, <https://www.dignitymemorial.com/obituaries/fort-myers-fl/vincent-spano-7146740> [perma.cc/N8LM-VE8J].

¹²⁴ *Spano*, 360 U.S. at 321–22, 322 n.3.

his mother had spent time in mental hospitals on three separate occasions.¹²⁵ Mr. Spano differed from Mr. Norris, Mr. Pierre, and Mr. Chambers in terms of his race and national origin; however, the *Spano* majority described the defendant's unique vulnerabilities—particularly his mental health struggles and status as an immigrant—to emphasize the urgency of vindicating his due process rights regarding his coerced confession.¹²⁶

In a June 10, 1959 note to Chief Justice Warren, sent only ten days before the opinion was published, Justice Frankfurter took issue with Chief Justice Warren's justifications for independent appellate review in the case. "I have for too long objected to this phrasing. We do not make 'our own independent examination' if independent means that we—this Court—decide, as a *de novo*, original tribunal," he wrote.¹²⁷ "I suppose[] that the determination of the highest State Court carries a good deal of weight with us, that, in fact, and law, we review that court's finding," he continued.¹²⁸ Justice Warren kept the draft language as-is, declining to soften the language, as Justice Frankfurter desired.¹²⁹ And Justice Frankfurter ultimately joined in the unanimous judgment, and did not concur to publicly note his disagreement.¹³⁰ This exchange did, however, foreshadow later exchanges between Justice Brennan and Justice Harlan about the extent to which the Court should be concerned about federalism in independent appellate review of state court decisions.¹³¹

*B. "Cases of This Nature": How Capacious Language in Blackburn
Footnote 5 Broadened the Doctrine's Possible Reach*

In 1960, the Supreme Court in *Blackburn v. Alabama* reversed Jesse Blackburn's twenty-year prison conviction for robbery.¹³² Mr. Blackburn, a twenty-four-year-old Black man, had a history of mental illness; he had been discharged from military service during World War II and was eventually hospitalized because he was suffering from psychosis.¹³³ The robbery he was alleged to have committed occurred when he was on an unauthorized leave from his mental

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Comments from Justice Felix Frankfurter to Chief Justice Earl Warren, *Spano v. New York*, No. 582 (June 10, 1959) (on file with Libr. of Cong. Manuscript Div., Earl Warren Papers, Box 587) (underlining in original).

¹²⁸ *Id.*

¹²⁹ *Spano*, 360 U.S. at 316.

¹³⁰ *Id.*

¹³¹ See LEWIS, *supra* note 51, at 175–78 (discussing correspondence between the two justices, in which Justice Brennan pushed for independent appellate review and characterized it as essential to protecting constitutional freedoms, whereas Justice Harlan maintained his position of unease surrounding aggressive examination of state court decisions).

¹³² *Blackburn v. Alabama*, 361 U.S. 199, 211 (1960).

¹³³ *Id.* at 200–01.

health hospital.¹³⁴ For years after his conviction, Mr. Blackburn, who had been declared “[s]chizophrenic,” “paranoid,” and “insane” by mental health professionals, maintained that his confession had been coerced.¹³⁵ Declared insane at the time of the alleged robbery, Mr. Blackburn confessed after he was interrogated for approximately ten hours without being informed of his rights, and without access to moral support from his friends and family.¹³⁶ The U.S. Supreme Court found a due process violation, holding that Mr. Blackburn’s confession was involuntary, and was able to reverse the Alabama Supreme Court’s affirmance only after engaging in independent appellate review.¹³⁷

The *Blackburn* opinion’s fifth footnote, which would go on to be cited by *Bose*, grounded the Court’s decision to review the case’s evidentiary record in its precedents.¹³⁸ Citing *Spano*, *Pierre*, and *Chambers*,¹³⁹ the Court wrote, “It is well established, of course, that although this Court will accord respect to the conclusions of the state courts in cases of this nature, we cannot escape the responsibility of scrutinizing the record ourselves.”¹⁴⁰ This footnote, which would go on to be cited by the *Bose* court in the First Amendment context, crystallizes the Court’s practice of independent appellate review into a singular principle.¹⁴¹

And yet, this forceful sentence leaves open a critical inquiry: what kinds of cases qualify as a “case[] of this nature”?¹⁴² First, it is plausible that the Court is referring to any case that implicates a fundamental right enshrined in the Court’s constitutional jurisprudence or the Constitution itself. This first possibility emerges from a capacious reading of *Norris*: Chief Justice Hughes claimed that independent appellate review was necessary “[w]hen a federal right has been . . . claimed,” if adjudicating that right requires a judicial re-examination of the evidence.¹⁴³ For this capacious reading to withstand the test of time, one would have to take the view that the specific language in *Pierre* and *Chambers* is merely making reference to examples of questions that warrant independent review, rather than acting as limiting principles that define

¹³⁴ *Id.* at 201.

¹³⁵ *Id.* at 202.

¹³⁶ *Id.* at 204.

¹³⁷ *Id.* at 205 (“After according all of the deference to the trial judge’s decision which is compatible with our duty to determine constitutional questions, we are unable to escape the conclusion that Blackburn’s confession can fairly be characterized only as involuntary.”).

¹³⁸ *Id.* at 205 & n.5.

¹³⁹ *Id.*; see *Spano v. New York*, 360 U.S. 315, 316 (1959); *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939); *Chambers v. Florida*, 309 U.S. 227, 228–29 (1940) (all emphasizing the need for independent review of the record).

¹⁴⁰ *Blackburn*, 361 U.S. at 205 & n.5.

¹⁴¹ *Bose Corp. v. Consumers Union*, 466 U.S. 485, 508 n.27 (1984).

¹⁴² *Blackburn*, 361 U.S. at 205 & n.5.

¹⁴³ *Norris v. Alabama*, 294 U.S. 587, 590 (1935).

which kinds of rights and which kinds of constitutional stakes have the power to activate the doctrine.

Secondly, it is possible to read *Blackburn* Footnote 5 narrowly, in light of language in *Pierre* and *Chambers*,¹⁴⁴ and in light of the facts of *Norris* and *Spano*.¹⁴⁵ Under this view, independent appellate review should only be triggered in high-stakes criminal cases—capital cases, and then perhaps cases with long prison sentences, as was the case in *Blackburn* itself—involving defendants from marginalized backgrounds in jurisdictions with known, rampant patterns of discrimination.¹⁴⁶ This confined reading of Footnote 5 reflects the notion that the Court has a duty to exercise its supervisory power to avoid the effects of discrimination that may scar judicial integrity. Yet this conception of Footnote 5 does not explain the Court’s use of the technique in subsequent cases that do not match those facts, and it does not create space for the possibility of the practice’s expansion to cases where other rights, arguably also worthy of heightened skepticism, are at stake.¹⁴⁷

A third option provides a middle ground between the first two paths. Under a third reading of *Blackburn* Footnote 5, one could argue that the Court intends to apply independent appellate review in cases where it must exercise its supervisory power because it is concerned about (1) systemic injustice involving (2) significant power imbalances between parties, which result in (3) constitutional rights violations. This conception is significantly broader than what *Pierre* and *Chambers* suggest.¹⁴⁸ Under this view, independent appellate review could be applied in non-capital cases or even in civil law. But it does not create a new adjudicatory expectation of appellate courts in *all* federal constitutional rights questions. Understanding *Blackburn* Footnote 5 in this moderate manner may be prudent. To adopt an overly narrow reading of the conse-

¹⁴⁴ See *Pierre*, 306 U.S. at 358 (“[W]hen a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied the equal protection of his country’s laws on account of his race, it becomes our solemn duty to make independent inquiry”); *Chambers*, 309 U.S. at 228–29 (“Since petitioners have seasonably asserted the right under the federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means proscribed by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioners’ confessions were so obtained, by review of the facts upon which that issue necessarily turns.”).

¹⁴⁵ See *infra* notes 73, 124–126 and accompanying text. *Norris* was a Black man in Alabama who was sentenced to death; *Spano* was an Italian man in New York, also facing a death sentence, who had struggled with a long history of mental illness.

¹⁴⁶ Jesse Blackburn was sentenced to a twenty-year prison term. *Blackburn*, 361 U.S. at 200.

¹⁴⁷ See, e.g., *Pennkamp v. Florida*, 328 U.S. 331, 335 (1946) (applying de novo review in a criminal contempt and First Amendment context, where no lengthy prison sentences or capital punishment were at stake); see *infra* notes 206–213.

¹⁴⁸ See generally *Pierre*, 306 U.S. 354 (independently reviewing the record in a capital prosecution to determine whether coercive police interrogation produced an involuntary confession); *Chambers*, 309 U.S. 227 (examining the full record to determine whether prolonged police interrogation of the defendants produced coerced confessions in violation of due process).

quential passage denies independent appellate review the power to remedy egregious constitutional violations in state courts. But to adopt an overly broad reading of the passage risks robbing juries of their factfinding role.

Chief Justice Warren's language in *Blackburn* illustrates the connection between the Court's practice of independent appellate review to their sense of anger at racism inhibiting due process rights and equal justice in state courts. "This insistence upon putting the government to the task of proving guilt by means other than inquisition was engendered by historical abuses," he wrote.¹⁴⁹ In a draft opinion, the Chief Justice included some sentences that were ultimately excised, but that suggest that the Court paid close attention to the dignitary interests of a vulnerable, Black defendant suffering from a mental illness, in the custody of law enforcement officials in Alabama: "The law will not suffer a prisoner to be made the deluded instrument of his own conviction."¹⁵⁰ "It would hardly do for the judiciary to blind itself to the findings of psychiatry" if appellate courts had to defer to lower courts' interpretations of the record to determine a confession's admissibility.¹⁵¹

The Court did not define the reach of the phrase "cases of this nature," as used in *Blackburn* Footnote 5.¹⁵² This ambiguity tees up for the Court an opportunity to apply independent appellate review, extended regularly and systematically not only to equal protection and due process questions in criminal law, but also to First Amendment questions in both civil and criminal cases.

*C. Racial Justice and the First Amendment: Delivering Independent
Appellate Review to the Realm of Speech Freedom
in Edwards v. South Carolina*

A Civil Rights-era First Amendment case advanced the Supreme Court toward the practice of explicitly recognizing independent appellate review as a means of safeguarding First Amendment interests.¹⁵³ On March 2, 1961, Black students marched together, carrying signs, in Columbia, South Carolina to protest segregation.¹⁵⁴ Law enforcement told the students that they had fifteen

¹⁴⁹ *Blackburn*, 361 U.S. at 207.

¹⁵⁰ See Chief Justice Earl Warren, Draft Dec. 30, 1959, *Blackburn v. Alabama*, No. 50, at 12 (Dec. 30, 1959) (on file with Libr. of Cong. Manuscript Div., Earl Warren Papers, Box 588, Folder 4).

¹⁵¹ *Id.* at 15.

¹⁵² See *Blackburn*, 361 U.S. at 205 & n.5 (omitting any further elaboration on the phrase).

¹⁵³ See *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (asserting the Court's duty to make an independent examination of the record in cases that implicate First Amendment rights and emphasizing the long-established truth that these freedoms are protected from invasion by the states through the Fourteenth Amendment).

¹⁵⁴ David L. Hudson, Jr., *Edwards v. South Carolina (1963)*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (Mar. 31, 2025), <https://firstamendment.mtsu.edu/article/edwards-v-south-carolina/> [perma.cc/6ZNK-L6QH].

minutes before they had to disperse.¹⁵⁵ The students refused to comply with the dispersal order, and instead broke out into song.¹⁵⁶ Many students were arrested under a breach of the peace statute.¹⁵⁷ The students were convicted under the statute, the South Carolina Supreme Court affirmed the lower courts' convictions, and the U.S. Supreme Court granted certiorari.¹⁵⁸

Reversing the state supreme court's conclusion, the U.S. Supreme Court emphasized that the convictions violated the students' First Amendment rights.¹⁵⁹ The Court reviewed the record to reach this conclusion—the petitioners, who “felt aggrieved by laws . . . which allegedly ‘prohibited Negro privileges in th[e] State,’ ” gathered peacefully and expressed their concerns peacefully to their fellow citizens.¹⁶⁰ The majority opinion, authored by Justice Potter Stewart, emphasized that the petitioners never engaged in or threatened violence, nor did any bystanders.¹⁶¹ Justifying their evidentiary exploration, the Court relied first on *Blackburn* and then on *Pennekamp* for the proposition that “it nevertheless remains our duty in a case such as this to make an independent examination of the whole record,” rather than accept as binding the state court's conclusion that the breach of the peace statute was violated.¹⁶²

It is notable that *Edwards* relied on *Blackburn* and *Pennekamp* to deploy independent appellate review. In many ways, the facts of *Edwards* created for the Court an opportunity to extend the practice of independent review from its firmly established status in the equal protection and due process realm to a future in the First Amendment context.¹⁶³ Like *Blackburn* and its doctrinal ancestors—*Norris*, *Pierre*, *Chambers*, and *Spano*—*Edwards* involved criminal defendants from a marginalized background, though they faced much lower penalties than did the defendants in the other cases.¹⁶⁴ At the heart of this case, however, was a First Amendment claim, not a due process or equal protection claim.¹⁶⁵

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*; See *Edwards*, 372 U.S. at 233 (quoting a city manager who described the conduct as “boisterous,” “loud,” and “flamboyant” and involved a “religious harangue” and loud singing of “The Star Spangled Banner”).

¹⁵⁷ Hudson, *supra* note 154.

¹⁵⁸ *Id.*

¹⁵⁹ See *Edwards*, 372 U.S. at 237 (holding that “[t]he Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views” and emphasizing the nonviolent nature of the protests).

¹⁶⁰ *Id.* at 235.

¹⁶¹ *Id.* at 236.

¹⁶² *Id.* at 235.

¹⁶³ See generally *id.* (independently reviewing the factual record in a case involving peaceful civil rights protest and concluding that the convictions violated the First Amendment).

¹⁶⁴ See generally *Norris v. Alabama*, 294 U.S. 587 (1935) (reversing convictions after reviewing the record and finding systematic exclusion of Black citizens from jury service in violation of the Equal Protection Clause); *Pierre v. Louisiana*, 306 U.S. 354 (1939) (reversing capital convictions after reviewing whether confessions obtained through coercive interrogation violated due process); *Chambers v. Florida*, 309 U.S. 227 (1940) (overturning convictions after examining the record and concluding

As Professor Harry Kalven has documented, it is possible that the Court conceived of cases like *Edwards* as part of a unified category of racial civil rights cases, where equal protection, due process, and First Amendment rights converged.¹⁶⁶ It is also possible that the Court's decision to borrow from the due process and equal protection contexts and extend independent appellate review to factual questions in First Amendment cases was a decision brought about by the immediate needs of the case at bar. The Court's citation to *Blackburn* and discussion of independent appellate review did not come into the *Edwards* majority's draft until the opinion was nearly published.¹⁶⁷ A preliminary draft opinion, circulated to all of the Justices from Justice Stewart's chambers, reviewed the record and declared a First Amendment violation without citing to any authority.¹⁶⁸ Subsequent draft opinions were devoid of references to past independent review cases.¹⁶⁹ Only in the last circulated opinion copy did the draft include a reference to the court's authority and duty to engage in independent appellate review.¹⁷⁰

Through the disposition and drafting history of *Edwards*, it is possible to identify the origin point at which the Justices begin to frame independent appellate review as a vehicle for safeguarding expressive rights. As the line of cases leading up to *Edwards* reveals, however, the interest in engaging in de

ing that confessions obtained through prolonged interrogation were coerced); *Spano v. New York*, 360 U.S. 315 (1959) (reversing a conviction after reviewing the circumstances of police interrogation and concluding that the defendant's confession was involuntary); *Edwards*, 372 U.S. 229 (reversing breach-of-the-peace convictions of civil rights protesters after examining the record and concluding that their conduct was protected by the First Amendment).

¹⁶⁵ See *Edwards*, 372 U.S. at 235 (describing the case as an exercise of free speech in its more "pristine and classic form").

¹⁶⁶ HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 3-4, 141-42 (1965); see also Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 441 (1967) (describing Justice Black's "views on the symbolic speech aspects of the civil rights movement"); *id.* at 451 (describing the interplay between First Amendment and due process rights); *id.* at 448 (same for equal protection).

¹⁶⁷ See Justice William J. Brennan, Jr., Draft, *Edwards v. South Carolina*, No. 86 (Feb. 25, 1963) (on file with Libr. of Cong. Manuscript Div., William J. Brennan Papers, Box I:87, Folder 6) (the first draft opinion that features the *Blackburn* citation found in the published version) [hereinafter Feb. 25, 1963 Draft of *Edwards v. South Carolina*].

¹⁶⁸ Justice William J. Brennan, Jr., Draft, *Edwards v. South Carolina*, No. 86 (Jan. 31, 1963) (on file with Libr. of Cong. Manuscript Div., William J. Brennan Papers, Box I:87, Folder 6) ("The state courts have held that the petitioners' conduct constituted breach of the peace under state law, and we may accept their decision as binding upon us to that extent. But it is clear to us that in arresting, convicting, and punishing the petitioners under the circumstances disclosed by this record, South Carolina infringed that petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances.").

¹⁶⁹ See Justice William J. Brennan, Jr., Draft, *Edwards v. South Carolina*, No. 86 (Feb. 1, 1963) (on file with Libr. of Cong. Manuscript Div., William J. Brennan Papers, Box I:87, Folder 6); Justice William J. Brennan, Jr., Draft, *Edwards v. South Carolina*, No. 86 (Feb. 6, 1963) (on file with Libr. of Cong. Manuscript Div., William J. Brennan Papers, Box I:87, Folder 6).

¹⁷⁰ Feb. 25, 1963 Draft of *Edwards v. South Carolina*, *supra* note 167.

novo review to protect speech interests comes into play after a longstanding judicial history of deploying this practice for a different reason: to ensure the legitimacy of the judicial process by protecting marginalized defendants from courts potentially biased by racism and disregard for their struggles with mental illness. This is not to say that these two goals advanced by independent appellate review—safeguarding the due process and equal protection rights of members of marginalized groups, and safeguarding free expression—are mutually exclusive. Yet because propositions about independent appellate review’s vindication of First Amendment interests depend on citations to cases that have nothing to do with free speech, it is prudent to consider the origins of this practice, and how the spirit of, and motivations as revealed through, that origin story ought to shape its application to First Amendment questions. Justice Black’s vague language in *Blackburn*—“in cases of this nature”—might have made it too easy for advocates and jurists to move on from this backstory and to consider independent review as a procedural safeguard meant to protect First Amendment values for their own sake.¹⁷¹

D. Early First Amendment Independent Appellate Review Unrelated to the Norris-to-Blackburn Case Line

Separate from the Equal Protection and Due Process cases arising in the criminal law context, independent appellate review echoes through the U.S. Supreme Court’s early First Amendment jurisprudence. This subpart provides an account of the ways in which some of the Court’s First Amendment cases decided in the early- and mid-twentieth century foreshadow its later declaration that independent appellate review is necessary to safeguard First Amendment interests.¹⁷² Yet this subpart will also show that compared to the Equal Protection and Due Process criminal cases, these speech freedom cases—even the ones that engaged in de novo review of the record, oftentimes without saying so—played a surprisingly minor role in the development of the explicit concept of First Amendment independent appellate review.¹⁷³ Without the *Norris-to-Blackburn* line of cases, the *Edwards v. South Carolina* and *New York Times v. Sullivan* courts would not have been poised to bring independent appellate review to the heart of First Amendment adjudication.¹⁷⁴

Without announcing its presence, independent appellate review powered a series of early-twentieth-century dissents that began to lay the groundwork for more robust First Amendment protections. In 1919, Justice Oliver Wendell Holmes dissented from the Court’s decision to affirm Espionage Act convic-

¹⁷¹ *Blackburn v. Alabama*, 361 U.S. 199, 205 n.5 (1960).

¹⁷² See *infra* notes 175–201 and accompanying text.

¹⁷³ See *infra* notes 201–222 and accompanying text.

¹⁷⁴ See *infra* notes 201–222 and accompanying text.

tions in *Abrams v. United States*.¹⁷⁵ Veering away from the majority,¹⁷⁶ his previous jurisprudence,¹⁷⁷ and his scholarship¹⁷⁸ to embrace a narrow definition of “intent,” Justice Holmes wrote that although “intent” is often used loosely in legal discussion to refer to mere awareness that certain consequences will follow from an act, properly understood the term is narrower: a person acts with intent only when producing that consequence is the objective or purpose of the act itself.¹⁷⁹ This narrower definition of intent, according to Holmes, was necessary to ensure that the Espionage Act’s reach was not absurdly broad.¹⁸⁰ Judge Learned Hand in another case insisted that the Act “should not be interpreted in a way that would suppress ‘all hostile criticism’ of the government or ‘all opinion except what encouraged and supported the existing policies.’”¹⁸¹

Once Justice Holmes articulated his narrower understanding of “intent,” as required by the Espionage Act, he had to re-examine the record in *Abrams* to conclude that that definition was not satisfied.¹⁸² The Justice opined on the lower court’s evidentiary finding, saying that he could not see how one could find the requisite intent in the leaflet and that “nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so”—emphasizing that the publication at the center of the case focused on the Russian Revolution rather than World War I military efforts against Germany.¹⁸³ Justice Holmes’s *Abrams*

¹⁷⁵ 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

¹⁷⁶ *Id.* at 619 (majority opinion) (“A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict.”).

¹⁷⁷ See *Schenck v. United States*, 249 U.S. 47, 51 (1919) (inferring intent from the natural tendency of the act rather than requiring proof of a narrowly defined purpose and accepting the jury’s conclusion that the leaflets were intended to obstruct the draft); *Debs v. United States*, 249 U.S. 211, 216 (1919) (declining to overturn the jury’s factual findings regardless of whether the Justices agreed with those factual findings).

¹⁷⁸ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 52 (1881) (arguing that “[i]ntent . . . is perfectly consistent with the harm being regretted as such, and being wished only as a means to something else”).

¹⁷⁹ *Abrams*, 250 U.S. at 626–27 (Holmes, J., dissenting).

¹⁸⁰ See *id.* at 627–28 (emphasizing the difference in this case as taking place during time of war and the peculiar dangers that do not exist in times of peace).

¹⁸¹ Thomas Healy, *Anxiety and Influence: Learned Hand and the Making of a Free Speech Dissent*, 50 ARIZ. ST. L.J. 803, 812 (2018) (citing *Masses Publ’g Co. v. Patten*, 244 F. 535, 539 (S.D.N.Y.), *rev’d*, 246 F. 24 (2d Cir. 1917)); see also Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment*: *Masses Publishing Co. v. Patten*, 61 U. COLO. L. REV. 1, 19–20 (1990) (emphasizing the parallels between Holmes’s opinions in *Abrams* and *Masses*, particularly the fact that Holmes’s push for a stricter definition of intent mirrors Hand’s push for an interpretation of the Espionage Act as “prohibit[ing] only explicit and direct advocacy of crime”).

¹⁸² Healy, *supra* note 181, at 812.

¹⁸³ *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

dissent foreshadowed First Amendment independent appellate review. But because Justice Holmes stayed quiet about what he was doing and did not articulate the fact that he declined to defer to the jury's evidentiary findings, his *Abrams* dissent, for all its transformative qualities, did not advance the project of transforming First Amendment independent appellate review into a doctrine.¹⁸⁴

Independent appellate review showed up explicitly in a dissent issued during the next term. In 1920, the U.S. Supreme Court decided in *Schaefer v. United States* to affirm three and reverse two Espionage Act convictions.¹⁸⁵ The defendants, employees of Philadelphia-based German newspapers, were accused of editing and republishing material that undermined U.S. military operations and recruitment efforts during the World War I era.¹⁸⁶ Applying the clear and present danger test¹⁸⁷ in an attempt to argue that all of the convictions should be overturned, the dissenting opinion, authored by Justice Brandeis and joined by Justice Oliver Wendell Holmes, emphasized that judges and juries both play a role in drawing the line between “the permissible curtailment of free speech” and expression protected by the First Amendment.¹⁸⁸ Although “the field in which the jury may exercise its judgment [in these cases] is necessarily a wide one,” Justice Brandeis wrote, the jury’s factfinding mandate does have constraints.¹⁸⁹ In the way that the *Norris v. Alabama* court would later underscore the importance of judicial duty, the *Schaefer* dissent emphasized that “[t]he trial provided for is one by judge *and* jury, and the judge may not

¹⁸⁴ See STEPHEN BUDIANSKY, OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS 391 (2019) (highlighting the fact that although Holmes argued that his dissent was consistent with his prior opinions, anyone who heard his opinion in *Abrams* understood that he was setting out a “completely new rationale” for speech protection).

¹⁸⁵ 251 U.S. 466, 467 (1920).

¹⁸⁶ *Id.* at 468–69; Christopher Capozzola, *Schaefer v. United States (1920)*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (Jan. 13, 2025), <https://firstamendment.mtsu.edu/article/schaefer-v-united-states/> [perma.cc/2QMN-9TLE].

¹⁸⁷ *Schenck v. United States*, 249 U.S. 47, 52 (1919) (setting out the clear and present danger test in the previous term):

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

Id.

¹⁸⁸ *Schaefer*, 251 U.S. at 483 (Brandeis, J., dissenting). The dissent was joined by Justice Oliver Wendell Holmes. *Id.*

¹⁸⁹ *Id.*

abdicate his function” to ensure that erroneous factfinding does not offend constitutional protections.¹⁹⁰

Therefore, Justice Brandeis proposed the following principle of independent appellate review:

If the words were of such a nature and were used under such circumstances that men, judging in calmness, could not reasonably say that they created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent, then it is the duty of the trial judge to withdraw the case from the consideration of the jury; and, if he fails to do so, it is the duty of the appellate court to correct the error.¹⁹¹

Operating under this theory of independent appellate review, Justices Brandeis and Holmes would have had the authority to review the evidence in the defendants’ convictions. In their view, taking up the record, the clear and present danger test set out in *Schenck* was not satisfied.¹⁹² Notable in Brandeis’s and Holmes’s discussion about independent appellate review here is the idea of “calmness.” Because higher courts are appropriately distanced from the sense of alarm and fear about speech challenging military and government power, the higher courts are in the best position of determining what kinds of words pose a clear and present danger to the public. Brandeis and Holmes suggested that federal appellate judges might not be swayed by cultural biases—in this case, an excessively heightened sensitivity to national security during wartime—that laypeople adjudicating facts might.¹⁹³

Five years later, as in the *Holmes* dissent, the Court’s majority in *Gitlow v. New York* silently drew upon independent appellate review when upholding a state criminal anarchy statute.¹⁹⁴ The Court’s majority opinion scrutinized the last two sentences of the manifesto at the center of the case: “The proletariat revolution and the Communist reconstruction of society—the struggle for these—is now indispensable. . . . The Communist International calls the prole-

¹⁹⁰ *Id.* See generally *Norris v. Alabama*, 294 U.S. 587 (1935) (focusing on the Court’s responsibility to undertake its own examination of the record).

¹⁹¹ *Schaefer*, 251 U.S. at 483 (Brandeis, J., dissenting).

¹⁹² See *id.* at 486 (looking to the article itself to conclude that no reasonable man could say that it “even remotely or indirectly . . . obstruct[ed] recruiting” thus clearly failing the test); *Schenck*, 249 U.S. at 52 (laying out the clear and present danger test).

¹⁹³ *Schaefer*, 251 U.S. at 486 (Brandeis, J., dissenting) (“Certainly men, judging in calmness and with this test presented to them, could not reasonably have said that this coarse and heavy humor immediately threatened the success of recruiting.”).

¹⁹⁴ See 268 U.S. 652, 664–65 (1925) (analyzing the content of the Manifesto at the center of the case themselves in order to affirm the jury verdict rather than simply asking whether there was sufficient evidence to support the verdict). *Gitlow* identified speech freedom as a fundamental right and incorporated the First Amendment against the states. *Id.*

tariat of the world to the final struggle!”¹⁹⁵ Those two sentences were a “call to action,” according to Justice Sanford and his majority.¹⁹⁶ Reviewing the jury’s factual findings as if they could depart from those findings if they wanted to, but then ultimately *agreeing* with the jury’s decision to convict the defendants, the majority emphasized that the manifesto qualified as “the language of direct incitement,” not a “philosophical abstraction” or a high-level critique of the American government.¹⁹⁷

In 1927, the Court in *Fiske v. Kansas* announced the use of independent appellate review.¹⁹⁸ The Court frames the use of independent appellate review in a broad manner that purports to protect federal rights in general.¹⁹⁹ This claim in *Fiske* would go on to lay the groundwork for independent appellate review in the Equal Protection context in *Norris*.²⁰⁰ Yet when it came time for the Court to recognize First Amendment Independent Review as its own doctrine in *Edwards*, *Sullivan*, and *Bose*, this case did not play a prominent role. In all three cases, *Fiske*—the first case to use independent appellate review to depart from a jury’s factual finding because of First Amendment considerations—is mentioned only in passing.²⁰¹

The fact that this line of cases was not the Court’s chosen vehicle for more explicitly crystallizing First Amendment Independent Appellate Review is curious. The majorities and dissents identified in the preceding passages, which tackle the question of when to vindicate First Amendment rights, do

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* The Court went on:

The means advocated for bringing about the destruction of organized parliamentary government, namely, mass industrial revolts usurping the functions of municipal government, political mass strikes directed against the parliamentary state, and revolutionary mass action for its final destruction, necessarily imply the use of force and violence, and in their essential nature are inherently unlawful in a constitutional government of law and order. That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end, is clear.

Id. at 665–66.

¹⁹⁸ See *Fiske v. Kansas*, 274 U.S. 380, 385–86 (1927) (reversing a criminal syndicalism conviction on First Amendment grounds through the use of independent factual review).

¹⁹⁹ *Id.* at 385–86 (“[T]his Court will review the finding of facts by a State court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.”).

²⁰⁰ *Norris v. Alabama*, 294 U.S. 587, 590 (1935) (citing *Fiske*, 274 U.S. at 385–86); see *supra* Part II.A.

²⁰¹ See *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (citing *Fiske* third in a string citation supporting independent appellate review); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 n.26 (1964) (citing *Fiske* last in a footnote assuring that First Amendment independent appellate review does not create a Seventh Amendment problem); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 506 n.24 (1984) (citing *Fiske* in a footnote as additional support for cases cited in the text of the opinion).

engage in independent appellate review, and they also focus on the inherent value of speech.²⁰² Because the justices authoring these opinions activated independent appellate review so quietly, however, they did not give future courts adjudicating future First Amendment questions the tools to pull the doctrine into the light and recognize it in an explicit manner. Possibly as a result of this shadow deployment of independent appellate review in early First Amendment cases, future courts relied instead on the civil rights line of cases, beginning with *Norris* and leading up to *Blackburn* Footnote Five—cases that had nothing to do with expressive freedom.²⁰³

Perhaps the Court in *Sullivan* or in *Bose* could have relied on the *Abrams* dissent, *Schaefer*, and *Gitlow* to underscore its claims about the inherent value of First Amendment interests, and to legitimize the use of independent appellate review in the First Amendment context.²⁰⁴ Yet doing this would require the justices to impose the label of independent appellate review on past scenarios where justices engaged in that practice without owning the fact that that was what they were doing. The connection between cases that are arguably more applicable to *Sullivan* and ultimately *Bose*, therefore, is more attenuated. And as discussed before, the ambiguous language intertwined in the independent appellate review discussions of the civil rights cases created an opening for the Court to rely on that precedent when it sought to activate the doctrine in the First Amendment context.²⁰⁵

In 1946, the Supreme Court cited the capital criminal cases invoking independent appellate review to enable itself to re-examine the evidentiary record in a First Amendment case unrelated to capital punishment or racial injustice.²⁰⁶ In *Pennekamp v. Florida*, the Supreme Court unanimously reversed a

²⁰² See *supra* notes 200–201 and accompanying text.

²⁰³ See generally *Norris v. Alabama*, 294 U.S. 587 (1935); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Chambers v. Florida*, 309 U.S. 227 (1940); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Watts v. Indiana*, 338 U.S. 49 (1949); *Blackburn v. Alabama*, 361 U.S. 199, 205 n.5 (1960).

²⁰⁴ See generally *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting) (arguing for heightened judicial scrutiny of speech restrictions and articulating an early vision of robust First Amendment protection grounded in the “marketplace of ideas”); *Schaefer v. United States*, 251 U.S. 466 (1920) (upholding convictions under the Espionage Act but prompting dissenting opinions that emphasized the need for careful judicial evaluation of speech-related prosecutions); *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating the First Amendment against the states via the Fourteenth Amendment while nonetheless upholding a conviction under a deferential standard of review); *Sullivan*, 376 U.S. 254 (holding that appellate courts must independently review the record to ensure that findings of “actual malice” satisfy First Amendment requirements); *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (reaffirming and formalizing the duty of independent appellate review in First Amendment cases as part of the constitutional fact doctrine).

²⁰⁵ See *supra* note 203 and accompanying text.

²⁰⁶ See *Pennekamp v. Florida*, 328 U.S. 331, 335 & n.3 (1946) (citing *Bridges v. California*, 314 U.S. 252, 267 (1941) and comparing with *Chambers v. Florida*, 309 U.S. 227, 228 (1940) and *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 659 (1945), *overruled by* *Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984)). The opinion stated:

contempt citation that a Florida court had issued to Pennekamp, a *Miami Herald* editor.²⁰⁷ The newspaper had run two editorials, including a cartoon, which chastised the way that the state court had adjudicated criminal cases.²⁰⁸ The Supreme Court found that the materials that the *Herald* and Pennekamp had published did not pose a clear and present danger—and therefore, that the contempt citation violated the First Amendment.²⁰⁹ Curiously, though, the Court relied on the Equal Protection and Due Process cases, rather than previous First Amendment cases engaged in independent appellate review, to arrive at this conclusion. In the majority opinion, the Court cited to *Chambers v. Florida* to justify its decision to engage in independent appellate review in the media law context.²¹⁰ The Court, drawing on its *Norris*-esque rhetoric about judicial duty, claimed that it was “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” safeguard.²¹¹ Although the Supreme Court claimed that it owed the Florida Supreme Court “most respectful attention” as to its factual findings, the highest state court’s authority is not final regarding constitutional factfinding.²¹² This evidentiary review allowed the Court to hold that the court’s contempt citation offended the First Amendment, vindicating expressive freedom through independent appellate review.²¹³ The *Pennekamp* court cited no authority when it claimed that it was “compelled” to undertake this evidentiary examination. Although a footnote directed the reader to *Gitlow v. New York* and *Near v. Minnesota* at the end of that sentence,²¹⁴ those cases

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. When the highest court of a state has reached a determination upon such an issue, we give most respectful attention to its reasoning and conclusion but its authority is not final. Were it otherwise the constitutional limits of free expression in the Nation would vary with state lines.

Id. at 335.

²⁰⁷ *Id.* at 350.

²⁰⁸ *Id.* at 336–37.

²⁰⁹ *Id.* at 340, 349–50.

²¹⁰ *Id.* at 335 n.3.

²¹¹ *Id.* at 335.

²¹² *Id.*

²¹³ *Id.* at 349.

²¹⁴ *Id.* at 335 & n.2.

supported only one of the Court's two propositions: that some forms of speech are beyond the scope of First Amendment coverage.²¹⁵ Because First Amendment independent review existed halfheartedly and in the shadows when the Court adjudicated cases like *Abrams* and *Gitlow*, the Court had to seek and find a more solid source of authority to engage in this practice.

It is true that *Pennekamp*, in a First Amendment context completely separate from the civil rights cases, foreshadowed the First Amendment independent appellate review that became central in *Edwards*, and then *Sullivan*, and ultimately *Bose*.²¹⁶ Yet when First Amendment Independent Appellate Review arrived on the scene in an official doctrinal way, the Court relied far more on the *Norris-to-Blackburn* line of cases than they did on *Pennekamp*. The *Pennekamp* court's remark on how appellate courts "are compelled to examine for [them]selves"²¹⁷ the record is cited in *Edwards*.²¹⁸ The *Edwards* court, however, cites *Blackburn* for its point about independent appellate review first.²¹⁹ Similarly, Justice Brennan's opinion in *Sullivan* mentions *Pennekamp*,²²⁰ but it relies primarily on *Edwards* when it discusses the Court's review of the record.²²¹ The *Bose* court similarly mentions *Pennekamp*,²²² but subordinates the citation, prioritizing its reference to *Edwards*, and going on to cite *Blackburn*.²²³ In short, although this First Amendment case separately advanced the idea of First Amendment Independent Appellate review, it played a surprisingly minor role in the development of the doctrine compared to the Equal Protection and Due Process cases that this Article discussed previously.

²¹⁵ *Id.*; see *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom."); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707–08 (1931) ("Liberty of speech, and of the press, is also not an absolute right, and the state may punish its abuse.").

²¹⁶ See generally *Pennekamp*, 328 U.S. 331 (reversing contempt convictions arising from newspaper editorials and independently reviewing the record to assess whether the speech posed a clear and present danger to the administration of justice); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (conducting an independent examination of the record to determine whether breach-of-the-peace convictions violated the First Amendment); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (requiring appellate courts to independently review the record to ensure that findings of actual malice meet constitutional standards); *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (formalizing independent appellate review as a constitutional requirement in First Amendment cases and situating it within the constitutional fact doctrine).

²¹⁷ *Pennekamp*, 328 U.S. at 335.

²¹⁸ *Edwards*, 372 U.S. at 235.

²¹⁹ *Id.*

²²⁰ See *Sullivan*, 376 U.S. at 285 (using *Pennekamp*, along with other cases, to outline the general rule about using independent appellate review in constitutionally-relevant circumstances).

²²¹ See *id.* (using *Edwards* for support that it is their duty to review the facts).

²²² *Bose*, 466 U.S. at 506.

²²³ *Id.* at 507 n.27 (citing *Edwards* and *Blackburn* in the footnote but not *Pennekamp*).

*E. Preventing “Forbidden Intrusion[s] on . . . Free Expression”
in New York Times v. Sullivan and Its Progeny*

After *The New York Times* had published the “Heed Their Rising Voices” advertisement in its March 29, 1960 edition, criticizing police officers in Montgomery, Alabama and seeking to shore up support for Martin Luther King, Jr.,²²⁴ and after the Montgomery police commissioner, L.B. Sullivan, sued for libel,²²⁵ and after an Alabama judge awarded Sullivan half a million dollars in damages,²²⁶ and after the Alabama Supreme Court affirmed the judgment,²²⁷ and after the U.S. Supreme Court made the decision to overturn the verdict and announce the actual malice standard for libel actions made by public officials,²²⁸ Justice Brennan, tasked with writing the Court’s opinion, had to decide what to do.

Justice Brennan had convinced his fellow Justices to hold for *The Times* and require any public official bringing a libel action to prove, by clear and convincing evidence, that the statement in question was made with reckless disregard for the truth or with knowledge of falsity.²²⁹ But Justice Brennan wanted to go further. Instead of remanding the case back to the Alabama trial court to adjudicate the case with the new standard in mind—which would have been standard—Justice Brennan sought to avoid a new trial.²³⁰ It was obvious that the libel question explicitly in front of the court existed in the context of Southern actors resistant to the Civil Rights Movement.²³¹ *New York Times v.*

²²⁴ See LEWIS, *supra* note 51, at 5–7 (describing the advertisement as a general criticism of “Southern violators of the Constitution” and omitting to name anyone specifically).

²²⁵ *Id.* at 12.

²²⁶ *Id.* at 43.

²²⁷ *Id.* at 44–45.

²²⁸ See *id.* at 147, 182 (illustrating the test itself and the broader doctrinal framing of the actual malice standard as announced by Justice Brennan in his opinion).

²²⁹ *Id.* at 147.

²³⁰ See *id.* at 170 (holding in draft opinion simply saying “Reversed”).

²³¹ *Id.* at 110. The four Black ministers named in Commissioner Sullivan’s lawsuit, in their separate petition for certiorari, emphasized that the *Sullivan* case was as much about racial injustice as it was about defamation. They wrote:

This case cries for review. The grave constitutional issues involved here and the impact of this decision on civil rights and the desegregation movement—burning issues of national and international importance—are clear and indisputable. What has happened here is further evidence of Alabama’s pattern of massive racial segregation and discrimination and its attempt to prevent its Negro citizens from achieving full civil rights under our Constitution . . . [Alabama] now strikes at the rights of free speech and press—roots of our democracy. To silence people from criticizing and speaking out against its wrongful segregation activities, Alabama officials now utilize civil libel. . . . The result of all of this, together with a trial of white against Negro, before an all-white jury, and an all-white judiciary (since Negroes are disenfranchised) is readily predictable as the judgment below shows. . . . If this case stands unreviewed and unreversed, not only will the struggles of Southern Negroes towards civil rights be impeded, but Alabama will have been given permission to place a curtain of silence over its wrongful activities. This curtain of silence will soon spread to other Southern States in their similar at-

Sullivan, argued First Amendment scholar Harry Kalven, “has to be read against the sociological reality which produced it,” namely that “although there was perhaps a technical libel involved, the impression is that the technicality was pounced on and exploited in Southern irritation over Northern interference” in civil rights matters.²³²

Justice Brennan and some of his colleagues on the Court had quietly “lost faith in Southern judges,” as they believed that if the case were remanded, the Montgomery County Circuit Court—protective of their police commissioner accused of racism—would find a way to hold for *Sullivan* again.²³³ Professor Kalven, the year after the case was decided, underscored that *The New York Times* would have had to pay hundreds of thousands of dollars for a substantially true statement published outside of Alabama.²³⁴ “I have no doubt that the Court, therefore, had to do something about the case, but I have rarely seen a case in which an inescapably right conclusion was so awkward to support” doctrinally.²³⁵

As an initial strategy, Justice Brennan sought to rely on a federal statute, 28 U.S.C. § 2106, a provision providing federal appellate courts the power to enter an appropriate “judgment, decree, or order,” or to require any additional proceedings that justice requires under the circumstances.²³⁶ Although this provision would have given the Justices a strong mandate to make an evidentiary finding in this case, some brief legal research revealed that this statute had only been used against federal district courts, not state trial courts.²³⁷ For a moment, Justice Brennan was stuck.²³⁸

But then, Justice Brennan turned to another approach, made possible by the fact that the Court had decided *Edwards* only one year before.²³⁹ The Court

tempts to resist civil rights and desegregation. For fear of libel and defamation actions in these States, people will fear to speak out against oppression; ministers will fear to assist the civil rights struggle which they did heretofore as part of their religious belief; national newspapers will no longer report the activities in the South.

Id.

²³² KALVEN, *supra* note 166, at 54–55.

²³³ SAMANTHA BARBAS, ACTUAL MALICE: CIVIL RIGHTS AND FREEDOM OF THE PRESS IN *NEW YORK TIMES V. SULLIVAN* 204 (2023). As Taylor Swift might say to the Alabama state courts if she were in Justice Brennan’s position: “I don’t like your little games / Don’t like your tilted stage / The role you made me play / Of the fool . . . I’ve got a list of [facts central to adjudicating this First Amendment question] / I check it once, then I check it twice.” TAYLOR SWIFT, *Look What You Made Me Do*, on Reputation (Big Mach. Recs., Nov. 10, 2017) (emphasis added).

²³⁴ KALVEN, *supra* note 166, at 55.

²³⁵ *Id.*

²³⁶ 28 U.S.C. § 2106.

²³⁷ LEWIS, *supra* note 51, at 174–75.

²³⁸ *See id.* at 176 (dropping all language about foreclosing a new trial based on § 2106 in a draft opinion).

²³⁹ *See id.* at 180 (adding in the words “effective judicial administration” to the opinion to support the need for judicial review of the evidence in order to get additional justices to sign on).

could invoke the idea of “effective judicial administration” to apply its newly articulated actual malice standard to the facts at issue in *New York Times v. Sullivan*.²⁴⁰ After a brief interlude raising Justice Harlan’s concerns about federalism in the context of this review,²⁴¹ the Court proceeded with the idea that “effective judicial administration” required that it “review the evidence in the present record to determine whether it could constitutionally support a judgment” in favor of the respondent.²⁴² The Court then pivoted to a *Norris*-esque discussion of judicial duty, claiming that its own review of the record was, on occasion, necessary to ensure that the constitutional rights of individuals were being protected in reality.²⁴³ Citing *Edwards*, Justice Brennan’s opinion insisted that the Court “must ‘make an independent examination of the whole record,’ so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression,” which the Court characterized as an essential liberty interest.²⁴⁴

Justice Brennan’s decision to deny the possibility for Sullivan to pursue a new trial was a remarkable act of judicial realism.²⁴⁵ Scholars have reported that he likely spared *The New York Times* years of uphill-battle litigation and racially charged harassment in Montgomery County.²⁴⁶

And from the perspective of the evolution of independent appellate review, Justice Brennan’s opinion had another effect. Justice Brennan borrowed from *Edwards* to draw independent appellate review into the First Amendment mainstream.²⁴⁷ Although this move may have been an intentional effort to harness appellate power to safeguard First Amendment rights in a more sweeping, long-term way, it is more likely that this was the product of instantaneous ex-

²⁴⁰ See *id.* at 181 (noting that the meaning of this additional phrase was not quite clear but was important to members of that Supreme Court and was seen as a “judicial wonder-drug” in difficult situations).

²⁴¹ *Id.* at 175.

²⁴² *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284–85 (1964).

²⁴³ To be sure, independent appellate review is not the only way that federal judges second-guess lower courts’ findings—or government regulations, or other state action—to ensure the vindication of fundamental rights. Heightened scrutiny, like independent appellate review, deploys a more searching review to the same end. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 1 (1967) (applying strict scrutiny to strike down Virginia’s ban on interracial marriage three years after *New York Times v. Sullivan* was decided). Thank you to Dean Risa Goluboff for this insight.

²⁴⁴ *Sullivan*, 376 U.S. at 285 (citing *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)).

²⁴⁵ See BARBAS, *supra* note 233, at 222 (opining that the unique circumstances of the case required Brennan, based on the knowledge that applying a negligence standard would not have protected the *Times*, to adopt the rule that actual malice required “clear and convincing” evidence).

²⁴⁶ See *id.* (explaining that if the case had been sent back to Alabama the *Times* would have faced harassment, the courts likely would have ruled in favor of Sullivan again, and they would have had to undertake more appeals and expenses).

²⁴⁷ *Sullivan*, 376 U.S. at 285.

pediency.²⁴⁸ Nevertheless, Justice Brennan's remarks in *New York Times v. Sullivan* put forth a proposition about independent appellate review as a mechanism to safeguard speech freedom for its own sake.²⁴⁹ This decision was likely made through the lens of a momentary need to evade the inefficacies of a Southern state court system hostile to First Amendment defenses protecting speech about the civil rights movement's quest for racial justice.²⁵⁰ So, it bore significant consequences for the future of appellate review involving speech and press freedom.²⁵¹

In the two decades after the Supreme Court decided the *Sullivan* case, First Amendment jurisprudence quickly evolved to embrace independent appellate review of the record. Safeguarding free speech because of the special normative value of First Amendment rights became the purported goal of this endeavor.²⁵² Months after the Court handed down *Sullivan*, it exercised independent review to determine that a film was not obscene.²⁵³ In 1969, to determine whether spoken words "were so inherently inflammatory as to come within that small class of fighting words which are likely to provoke the average person to retaliation, and thereby cause a breach of the peace," the Court re-examined the record itself.²⁵⁴ In 1973, the Court reviewed the record to determine whether speech was

²⁴⁸ See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510 (noting that "[t]he requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* . . . emerged from the exigency of deciding concrete cases").

²⁴⁹ Justice Brennan's focus on preventing "forbidden intrusion[s] on the field of free expression," directs the independent appellate review emphasis on the First Amendment specifically, rather than toward constitutional liberties in general. *Sullivan*, 376 U.S. at 285.

²⁵⁰ See *BARBAS*, *supra* note 233, at 222 (emphasizing how the unique nature of the case facilitated such a bold departure from typical procedure).

²⁵¹ See *supra* Part II.E.

²⁵² See, e.g., *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971) ("[I]n cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other, we have frequently had occasion to review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the plaintiff." (citations omitted)).

²⁵³ *Jacobellis v. Ohio*, 378 U.S. 184, 189–90 (1964) ("We cannot understand why the Court's duty should be any different in the present case, where *Jacobellis* has been subjected to a criminal conviction for disseminating a work of expression and is challenging that conviction as a deprivation of rights guaranteed by the First and Fourteenth Amendments. Nor can we understand why the Court's performance of its constitutional and judicial function in this sort of case should be denigrated by such epithets as 'censor' or 'super-censor.' In judging alleged obscenity the Court is no more 'censoring' expression than it has in other cases 'censored' criticism of judges and public officials, advocacy of governmental overthrow, or speech alleged to constitute a breach of the peace. Use of an opprobrious label can neither obscure nor impugn the Court's performance of its obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments and, in doing so, to delineate the scope of constitutionally protected speech. Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."). The *Jacobellis* court cited *Norris* to justify its independent appellate review vis-à-vis the First Amendment question.

²⁵⁴ *Street v. New York*, 394 U.S. 576, 592 (1969) (citation omitted).

directed to “inciting . . . imminent lawless action.”²⁵⁵ Also in 1973, the Court held that despite that the issues of what kinds of speech are “patently offensive” and appeals to the “prurient interest” are factual inquiries, independent appellate review is available.²⁵⁶ Numerous cases undertook independent appellate review to determine whether a media defendant had published an allegedly libelous writing with actual malice.²⁵⁷ In one case, the Supreme Court applied *de novo* review to First Amendment-sensitive factual findings coming out of a federal district court, rather than a state court.²⁵⁸

F. Formalizing, Without Confining, First Amendment Independent Review in Bose

Finally, the Supreme Court officially articulated its commitment to independent appellate review in First Amendment cases when it decided *Bose v. Consumers Union* in 1984, holding that it is the province of the Court to review the record while making an actual malice determination.²⁵⁹ Citing *Blackburn* Footnote 5, *Edwards*, and *Sullivan*, the Court drew on arguments about judicial duty and common-law tradition to justify its choice to transform independent appellate review into an official “Constitutional Fact Doctrine”:

The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It 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. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide wheth-

²⁵⁵ *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973).

²⁵⁶ *Miller v. California*, 413 U.S. 15, 24–25 (1973).

²⁵⁷ See, e.g., *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967); *St. Amant v. Thompson*, 390 U.S. 727, 732–33 (1968); *Greenbelt Coop. Publ’g Ass’n, Inc. v. Bresler*, 398 U.S. 6, 11 (1970).

²⁵⁸ See *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971) (noting that independent examinations “of this kind are familiar under the settled principle that ‘[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.’ . . . [I]n cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other, we have frequently had occasion to review ‘the evidence in the . . . record to determine whether it could constitutionally support a judgment’ for the plaintiff” (citations omitted)).

²⁵⁹ See 466 U.S. 485, 486 (1984) (asserting that such cases governed by *Sullivan* require actual malice to be established with clear and convincing evidence).

er 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." . . . The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review.²⁶⁰

Each of the Supreme Court's First Amendment decisions between 1964 and 1984 that explicitly acknowledge that the Court is re-examining the record²⁶¹ cite back to the *Sullivan* claim that "we must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."²⁶² As this Part mentioned previously, this sentiment in *Sullivan* descends from *Edwards*, which in turn descends from *Blackburn*, which in turn descends from *Spano*, *Pierre*, *Chambers*, and *Norris*.²⁶³

To enhance its authority to safeguard free expression values, the Court built upon a precedential foundation of cases deploying *de novo* review to safeguard vulnerable criminal defendants, particularly defendants of color, seeking redress for Due Process and Equal Protection violations. The *Bose* court insists that the notion of First Amendment independent appellate review emerges from common law tradition.²⁶⁴ The Justices in the majority are not wrong. But when the Court allowed the speech-freedom-centric storylines of *Edwards* and *Sullivan* to take center-stage, the racial justice contexts of both those cases faded into the background. The evidentiary skepticism that could have advanced the Court in its quest for equal justice and due process *by means* of expressive freedom transformed into a practice that safeguarded First Amendment values for intrinsic reasons. Because of this, independent appellate review in expressive freedom cases for the sake of the First Amendment itself is devoid of a coherent purpose.

III. ENVISIONING A MORE DEFINED SCOPE FOR THE FIRST AMENDMENT INDEPENDENT APPELLATE REVIEW

After *New York Times v. Sullivan*, and certainly after *Bose Corp. v. Consumers Union*, two ways of conceiving of First Amendment independent appellate review emerged.²⁶⁵ One framed the technique as a method of strengthening (1) democratic values and (2) judicial clarity. The other viewed the

²⁶⁰ *Id.* at 508 n.27, 510–11.

²⁶¹ See *supra* notes 244–258 and accompanying text.

²⁶² *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (citation omitted).

²⁶³ See *supra* note 164 and accompanying text.

²⁶⁴ *Bose*, 466 U.S. at 510–11.

²⁶⁵ See generally *Sullivan*, 376 U.S. 254; *Bose*, 466 U.S. 485.

mechanism as a way to safeguard First Amendment values as an end in and of itself, for the sake of expressive freedom.

The democratic values justification of independent appellate review harkens back to two justifications for the First Amendment itself. Speech freedom, in part, exists to safeguard the public's right to know newsworthy information,²⁶⁶ rendering it more capable of democratic self-governance,²⁶⁷ and

²⁶⁶ Some have found the vague notion of the public's right to know as "hollow" and unpersuasive. See Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 787 (1986) (arguing that instead of appealing to the right to know, proponents of First Amendment theory should simply recognize that "a system of open commentary" is the best way to run a government). For additional critiques of the concept of "the public's right to know," see Potter Stewart, "Or of the Press," 26 HASTINGS L.J. 631, 636 (1975) (noting that "[t]he public's interest in knowing about its government . . . is indirect" because "[t]he Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act"); Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 275, 278–80 (1971) (asserting that the "right to know" is powerful rhetorically but not doctrinally); James C. Goodale, *Legal Pitfalls in the Right to Know*, 1976 WASH. U. L.Q. 29, 30–34 (characterizing the right as overstated, because courts have not recognized a broad affirmative right to information, and risky, because doing so would raise a host of judicial line-drawing problems); Walter Gellhorn, *The Right to Know: First Amendment Overbreadth?*, 1976 WASH. U. L.Q. 25, 26–28 (questioning whether framing disclosure claims as a broad "right to know" stretches the First Amendment beyond its doctrinal limits); William W. Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761, 769 (1977) (arguing that claiming special status for the press rather than relying on generally applicable First Amendment protections can be doctrinally unstable and strategically dangerous). Yet even if the idea of the public's *right to know* or *need to know* is a flawed conception of the First Amendment's pro-democracy role because, for example, the public might not be willing to listen to messages that the press conveys to them, it is the case that the public *deserves to know* newsworthy information about the people they have the power to elect and the policy issues they have the power to control at the polls. Regardless of what the public decides to do with this information, they deserve to have access to it if they so desire. See David M. O'Brien, *The First Amendment and the Public's "Right to Know,"* 7 HASTINGS CONST. L.Q. 579, 584 (1980) (addressing the right skeptically and then citing political theory that the public's interest in knowing about their government is required in a self-governing regime). Some other scholars understand the public's right to know as a composite right, which, if recognized in a more capacious manner, could be expanded to include more newsgathering rights, access rights to government institutions, and the like. See JAMES RUSSELL WIGGINS, *FREEDOM OR SECRECY* 3 (1956) (describing the various components of the right, including, generally, the right to information, the right to print without prior restraint or fear, the right to access to facilities and material, and the right to distribute material); Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 755 (1977) (arguing for the establishment of a broad right to know doctrinally, including giving standing to speakers, recipients, and listeners to assert the right against many instances of government intrusion on access to information across society); see also THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 94–95, 152, 463–65, 613–14, 649–50, 671–72 (1970) (emphasizing the interrelated domains of freedom of speech, freedom of the press, access to government records and proceedings, and the civic function of information to support the argument that the right to know should be a composite of constitutional guarantees, statutory protections, and practical mechanisms rather than a single legal right).

²⁶⁷ Press freedom empowers and enables the public's autonomy—after all, voters who decide matters of policy and power at the polls tend to rely on journalistic reports to form their views. See EMERSON, *supra* note 266, at 17 (framing press freedom as not only protection for journalists but a mechanism that empowers voters to form their own views and participate meaningfully in governance).

speech freedom also exists to protect dissenting political viewpoints on matters of public importance.²⁶⁸ For example, when the Court applies independent review as it makes an actual malice determination, it advances democratic values, including the public's right to know.²⁶⁹ It is often the case that public figures and public officials, displeased with critical coverage, file frivolous libel claims against media defendants.²⁷⁰ Verdicts in defamation-plaintiff-friendly jurisdictions like Virginia raise concerns about whether judgments fully account for the value of "uninhibited, robust, and wide-open"²⁷¹ discourse on issues of public importance.²⁷² This issue is even more ripe for independent appellate review in light of the devastating impact that the last two decades have had on the media's economic ecosystem.²⁷³ Local news outlets and independent journalists, in particular, are vulnerable to libel threats that, no matter how frivolous, may intimidate them out of publishing a newsworthy story critical of a powerful public official or wealthy public figure.²⁷⁴ Additionally, when the Court reviews the record to determine whether defendants who engaged in political speech breached the peace or incited violence, it makes an effort to protect individuals and groups apt to be punished for holding unpopular opinions.²⁷⁵ Independent appellate review in these cases is a way for the

²⁶⁸ As speech freedom philosopher Alexander Meiklejohn once aptly explained, the free press operates "to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal." ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 88–89 (1948); see also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971) (arguing that the government should not be able to intrude upon political speech).

²⁶⁹ Christina Koningisor & Lyrissa Lidsky, *First Amendment Disequilibrium*, 110 VA. L. REV. 1, 49–50 (2024) (discussing how the actual malice standard recognized the "precarity of the press in the face of defamation lawsuits" and that "constitutional protection helped stave off this financial threat").

²⁷⁰ *Understanding Anti-Slapp Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/resources/anti-slapp-laws/> [perma.cc/C89B-JPKU] (defining strategic lawsuits against public participation as "an all-too-common tool for intimidating and silencing criticism through expensive, baseless legal proceedings").

²⁷¹ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

²⁷² See, e.g., Brandon H. Elledge, Timothy Taylor & Christine N. Walz, *Virginia's Not for Lovers: Why Virginia May See More Defamation Claims After Depp v. Heard*, HOLLAND & KNIGHT (June 7, 2022), <https://www.hklaw.com/en/insights/publications/2022/06/virginias-not-for-lovers-why-virginia-may-see-more-defamation-claims> [perma.cc/4TVZ-YEAN] (discussing *Depp v. Heard* and the fact that Virginia's anti-SLAPP laws require defendants to take on significant economic risk because they can only be raised as a defense to the jury at trial, making the jurisdiction pro-plaintiff in defamation cases).

²⁷³ See Koningisor & Lidsky, *supra* note 269, at 6 (discussing how the power of the press at state and local levels has decreased dramatically, while at the same time many governmental checks on the executive branch have become ineffective, thus giving rise to a "First Amendment disequilibrium").

²⁷⁴ See Joel Simon & Carlos Lauria, *A Nefarious and Hidden Threat to Journalists Rises*, COLUM. JOURNALISM REV. (Sep. 1, 2022), <https://www.cjr.org/analysis/slapp-lawsuit-cadwalladr-ressa.php> [perma.cc/HAM6-ZQJQ] (discussing frivolous libel claims meant to intimidate economically vulnerable media actors from publishing critical stories).

²⁷⁵ This was true of *Edwards* in South Carolina in 1963 and of *The New York Times* in Alabama in 1964. See David A. Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 OHIO ST. L.J. 760, 782 (2020) (explaining why the Court has declined to adopt a negligence

Court to acknowledge our country's history of punishing individuals with left-leaning views, communists, anti-war protesters,²⁷⁶ and Civil Rights-era racial justice advocates²⁷⁷ for challenging the status quo. In sum, the first account of First Amendment Independent Appellate Review deploys the mechanism boldly yet selectively to safeguard First Amendment rights.

This first account also includes the decision to engage in First Amendment independent appellate review to offer judicial clarity when a factual finding is contingent on doctrinal nuances that would be difficult for a jury to fully appreciate. For example, the question of whether speech incited violence—whether it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action” is a question ripe for independent appellate review because of the intricate complexity of the doctrine underlying that question.²⁷⁸ Numerous cases inform the meaning of the individual terms “directed to,” “provoking,” “imminent,” “likely,” and “lawless action.”²⁷⁹ Be-

standard—because it would be too easily satisfied and fail to protect defendants like *The New York Times*); see also Robert D. Sack, *New York Times Co. v. Sullivan—50-Year Afterwords*, 66 ALA. L. REV. 273, 287 (2014) (claiming that because “[y]ou do not need a constitutional provision to preserve your right to say things at the risk of wide public approval and applause,” the First Amendment is focused on protecting speech that is less popular).

²⁷⁶ Rodney A. Smolla, “*And the Truth Shall Make You Free*”: *Schenck, Abrams, and a Hundred Years of History*, 72 SMU L. REV. 457, 461 (2019) (“*Schenck* and *Abrams* arose from prosecutions against protestors opposed to World War I and opposed more broadly to the state of American life after the industrial revolution. . . . Many in America responded with nativist fear to mass immigration, labor unrest, and anarchists. It is not surprising that this turbulent period tested the legal meaning of free speech. One hundred years ago, those invoking the protection of freedom of speech were on the left, seeking to invoke the First Amendment in defense of their expression against capitalism, nativism, racism, and war.” (citations omitted)).

²⁷⁷ See LEWIS, *supra* note 51, at 110 (discussing *Brown v. Board of Education* and the unconstitutional exclusion and silencing undertaken by Alabama following the landmark decision); see also *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (holding that citizens protesting against state laws that aggrieved them was a constitutionally protected exercise of free expression).

²⁷⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

²⁷⁹ FREDERICK SCHAUER & JESSE H. CHOPER, *THE FIRST AMENDMENT: CASES—COMMENTS—QUESTIONS* 47–52 (8th ed. 2023); see also Hans A. Linde, “*Clear and Present Danger*” Reexamined: *Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163, 1163 (1970) (showing that evaluating whether speech is likely to produce harm involves subtle judgments about imminence, probability, and context, supporting the idea that appellate courts need to review such determinations carefully rather than leaving them entirely to the jury); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754 (1975) (examining Learned Hand’s influential reasoning on advocacy and incitement and highlighting how the Court and lower courts wrestled with nuanced distinctions in speech law); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 955–58 (1978) (discussing methodological challenges in applying First Amendment protections outside the media context, including how courts interpret nuanced statutory and constitutional language); Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 655 (2009) (evaluating the *Brandenburg v. Ohio* framework for incitement and stressing that determining whether speech crosses the line into actionable incitement involves layered judgments about imminence, context, and the likelihood of lawless action).

cause it is so challenging to tease out these nuances, this factual determination is in reality a mixed question of law and fact. Therefore, de novo review is justified for the sake of judicial clarity.

Under this first account, the mechanism seeks to accomplish this goal not because First Amendment values are inherently superior to countervailing interests, such as providing redress to rightful defamation plaintiffs or enforcing criminal provisions that ensure public safety. Rather, independent appellate review exists as a response to external circumstances in lower courts or in society that threaten to diminish specific values that First Amendment rights vindicate. This account of First Amendment independent appellate review offers purpose and coherence. Because of its more confined nature, it raises fewer federalism concerns. This approach also sustains a connection between the mechanism and its origin story in the due process and equal protection contexts.

By contrast, according to the second account, vindicating speech freedom is itself the end game. The Court's use of First Amendment Independent Review after *Sullivan* and *Bose* suggest that this has been the Court's primary way of thinking about the practice.²⁸⁰ Speech is a "precious constitutional libert[y]"²⁸¹ that warrants special protection, and judges were obligated to prevent "forbidden intrusion[s]" on expressive freedom.²⁸² Justice Brennan's well-intended and capacious proposition from *Sullivan*, repeated over and over in the case's progeny,²⁸³ has established a sinuous and unprincipled practice of First Amendment independent appellate review.²⁸⁴ This raises concerns about federalism,²⁸⁵ interferes with the jury's sacred role of drawing on their common sense to determine factual issues,²⁸⁶ and sows doctrinal incoherence.²⁸⁷

If the second account of First Amendment independent appellate review has so many downsides, what are the factors that have driven its prevalence? Two explanations are plausible. First, as this Article has discussed, vague and capacious language defining independent appellate review in other fields made it possible to transfer the practice to new contexts in moments of judicial expedi-

²⁸⁰ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (focusing on the nature of free speech as requiring special attention by judges); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 486 (1984) (same).

²⁸¹ *Bose*, 466 U.S. at 486.

²⁸² *Sullivan*, 376 U.S. at 285.

²⁸³ See *infra* notes 249–264 and accompanying text.

²⁸⁴ See Redish & Gohl, *supra* note 4, at 292–94.

²⁸⁵ See LEWIS, *supra* note 51, at 175 (expressing the fact that Harlan's proposal of independent appellate review in *Sullivan* was extraordinary because it went against the long-established and respected notion that states maintain their own laws and courts).

²⁸⁶ See *United States v. Hunt*, 82 F.4th 129, 135–37 (2d Cir. 2023) (distinguishing true threats cases as requiring only common sense and reasonable, objective assessments that should be made by a jury).

²⁸⁷ See Redish & Gohl, *supra* note 4, at 296.

ency.²⁸⁸ In this way, the practice travelled to realms that the justices in *Norris*, writing about federal rights “specially set up and claimed in a state court,”²⁸⁹ or in *Spano*, writing about “the delicate nature of the constitutional determination which we must make,”²⁹⁰ or in *Blackburn*, talking about “cases of this nature,” might not have predicted.²⁹¹ Second, if this Article is correct that a primary motivation driving the Court to engage in independent review in the earlier cases—setting aside *Pennekamp* and *Spano*—is a realistic skepticism of racism in Southern state courts, justices in those earlier cases would have had to rely on vague propositions. If Justices had openly reasoned that they would review the evidence in this case because the defendant condemned to death was Black, and that they worried about racism in the criminal justice system, so they would treat this capital defendant’s case with special solicitude—but they would not do so for his white neighbor on death row—the Court may well have run headfirst into an equal protection problem. Justifying independent assessments through hazy uses of the words “specially”²⁹² and “delicate”²⁹³ and “this” allowed Justices Hughes, Warren, Black, and Brennan to protect criminal defendants and Northern journalists alike from the devastating effects of racist hatred and, eventually, animosity toward the Civil Rights Movement, without saying so.²⁹⁴ This strategic ambiguity, while advantageous in some respects, also created confusion and other adverse downstream effects later on.

In light of these challenges with the second, and more prevalent, account of First Amendment independent appellate review, it is necessary for us to begin reassessing the circumstances under which it is appropriate for judges to apply the mechanism. This Article proposes a test that Courts could use to determine whether to apply independent appellate review to the factual record in First Amendment cases before them. This test centers the first account because its reach is modest and because it is grounded in normative purpose. To determine whether to engage in de novo review of the factual record in a First Amendment matter, courts could ask the following:

Inquiry One: Would the judicial decision to engage in independent review of the facts in *this type* of First Amendment question advance democratic interests—such as the public’s right to know newsworthy information or robust public discourse—that legal, economic, or cultural forces have made vulnerable?

²⁸⁸ See *supra* Part II.E.

²⁸⁹ *Norris v. Alabama*, 294 U.S. 587, 590 (1935).

²⁹⁰ *Spano v. New York*, 360 U.S. 315, 316 (1959).

²⁹¹ *Blackburn v. Alabama*, 361 U.S. 199, 205 n.5 (1960).

²⁹² *Norris*, 294 U.S. at 590.

²⁹³ *Spano*, 360 U.S. at 316.

²⁹⁴ *Blackburn*, 361 U.S. at 205 n.5.

Inquiry Two: Do complicated legal principles underlie the determination of the facts at hand, rendering the task of making factual findings exceptionally difficult for juries?

If the answer to either of these questions is “yes,” the judges or Justices should go ahead and apply independent appellate review. If the answer to both questions is “no,” it is likely that the fact-finder, particularly if the fact-finder is a jury, is in the best position to make the factual findings. Thus, deference would be appropriate.

Critics might protest that it will be difficult for courts to develop a cogent answer for what counts as a democratic interest furthered by First Amendment values. It might be helpful to start with speech freedom philosophers’ instrumentalist views of First Amendment values. Speech and press freedom can facilitate productive discourse on a variety of subjects, advancing, to varying degrees of success, the search for policy solutions and empirical truth. As discussed before, speech and press freedom advances self-governance, as a core function of the First Amendment “is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal”; although this question informs a legal judgment call, context might also demand that the answer to this question emerge from outside the law.²⁹⁵ Sociology, philosophy, political science, and journalism could all inform future judicial reflections on the relationship between speech freedom and democracy.

Skeptics might also worry that courts will struggle to grow toward a judicial consensus on what it means for a democratic interest to have been made “vulnerable.” Courts might differ in their approaches to drawing lines between speech that genuinely requires heightened protection through the application of the Constitutional Fact Doctrine and controversial speech that, despite its unpopularity, does not face, systemic, meaningful barriers to its expression. Indeed, some might say that this is a distinction without a difference, and that the controversial nature or unpopularity of speech inherently *makes* it democratically vulnerable. Judges also might depart from one another on what qualifies as a “democratic interest” worthy of protection—although some judges might put a premium on religious speech or campaign contributions, others might view journalistic expression or progressive activism as more vulnerable to suppression. Inquiry One’s lack of a clear metric for assessing vulnerability—an absence that is in part, and perhaps ironically, born out of the proposal’s aspiration toward political neutrality—might make it ripe for manipulation. Without more clarity on this point, and left to proceed without a consistent

²⁹⁵ MEIKLEJOHN, *supra* note 268, at 88–89; *see also* Bork, *supra* note 268, at 26 (agreeing with Meiklejohn that our government depends on “vigorous debate about officials and their policies,” which ultimately requires protection of speech that is explicitly political in order to give the public self-governmental power).

standard, judges would be free to privilege speech that aligns with their own values (i.e., their own sense of what counts as a democratic interest that legal, economic, or cultural forces have made vulnerable). Fears about Inquiry One devolving into politicized, subjective decision-making would undermine the clarity and coherence that the proposal seeks to restore.

This concern, while important, is not insurmountable. Dr. Mary Anne Franks's 2024 book, *Fearless Speech*, offers a compelling and clarifying lens through which to understand the importance of Inquiry One when courts adjudicating First Amendment claims must determine whether to apply independent appellate review.²⁹⁶ Dr. Franks highlights the ways in which speech protections, although often framed in universalist and neutral terms, are frequently sculpted by underlying power dynamics, both in terms of how speech rights are exercised in the real world, and in terms of how the doctrine adjudicates First Amendment claims.²⁹⁷ Dr. Franks argues that First Amendment protections should prioritize what she terms *fearless speech*—speech that is “candid,” “critical,” and “courageous,”²⁹⁸ that advances the democratic function of the First Amendment, and that often challenges power.²⁹⁹ Viewing First Amendment independent appellate review in this light, the constitutional fact doctrine should not rest on an abstract reverence for speech for the mere sake of speech. Rather, independent appellate review of facts central to adjudicating First Amendment questions should turn on pragmatic considerations of power.

The Court, with its formalist conception of First Amendment independent appellate review, at least as far as the Court explains the doctrine on the page, might balk at this suggestion.³⁰⁰ Yet as Part II traced, the doctrinal trajectory of First Amendment independent appellate review's development reveals a quiet, underlying concern with fearless speech values.³⁰¹ When the Court applied independent appellate review to civil rights protestors in *Edwards v. South Carolina*,³⁰² it conferred tacit recognition on the idea that speech challenging entrenched racial hierarchies requires heightened judicial protection via factual review of the record.³⁰³ Again, in *New York Times v. Sullivan*,³⁰⁴ the Court was

²⁹⁶ See generally FRANKS, *supra* note 13 (arguing that orthodox First Amendment interpretations have elevated harmful “reckless” speech over democratic and justice-oriented “fearless” speech and calling for a reorientation of how courts and society assess what speech should be protected and promoted).

²⁹⁷ *Id.* at 3–4.

²⁹⁸ *Id.* at 113.

²⁹⁹ *Id.* at 112–13.

³⁰⁰ *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510–11 (1984) (“The requirement of independent appellate review . . . 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.”).

³⁰¹ See *supra* Part II.

³⁰² 372 U.S. 229, 235 (1963).

³⁰³ See *supra* notes 153–171 and accompanying text.

not simply affirming an abstract principle of speech freedom.³⁰⁵ Rather, the Court wanted to ensure that citizens' speech about racial injustice and the Civil Rights Movement was not undermined by state courts' willingness to flout constitutional protections and suppress progressive speech by mischaracterizing the record.³⁰⁶ The Supreme Court has never framed these instances of factual review in terms of power dynamics. Yet an implicit commitment to protecting the kind of speech that Dr. Franks identifies as democratically essential seems to have animated the Court's development of this doctrine.

Part II's history underscores how First Amendment independent appellate review has long accounted for—and now, why it must continue to account for—pragmatic considerations of speech and power.³⁰⁷ Without accounting for Inquiry One's considerations, and proceeding on the shallow theory that First Amendment independent review serves speech values for the sake of speech values, courts risk applying independent appellate review to scenarios where already-dominant actors weaponize speech protections to further advance their influence, rather than to safeguard voices that advance democratic discourse. Yet by using Inquiry One to assess whether to apply independent appellate review in the First Amendment contexts, courts can better align the constitutional fact doctrine with both its historical origin story and the First Amendment's pro-democracy function.³⁰⁸

Lastly, some might ask how courts should determine what counts as a sufficiently doctrinally complicated factual issue under Inquiry Two. Here, it is essential to tease out the distinction between a question being hard to answer because a significant amount of factual context and detail is in play, versus difficulty that arises from numerous subsidiary doctrinal issues that emerge based on facts. Independent appellate review would be more appropriate if an appellate panel concludes that the trier of fact would not be capable of appreciating the evidence *in light of a very complicated doctrinal background*, but not so much if the panel draws the same conclusion *in light of a very complicated fact pattern*. Additionally, appellate judges should almost never trigger independent review under the Inquiry Two theory if the trier of fact in the lower court was a judge.

³⁰⁴ 376 U.S. 254, 284–85 (1964).

³⁰⁵ See *supra* notes 224–250 and accompanying text.

³⁰⁶ See *supra* notes 224–250 and accompanying text.

³⁰⁷ See *infra* notes 73–264 and accompanying text.

³⁰⁸ One essential contribution press freedom makes to a democratic society “is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.” MEIKLEJOHN, *supra* note 268, at 88–89; see also EMERSON, *supra* note 266, at 17 (arguing that freedom of the press and of expression empowers citizens to make informed decisions in a democracy); Bork, *supra* note 268, at 26 (agreeing that the First Amendment protects not a “freedom to speak,” but “the freedom of those activities of thought and communication by which we ‘govern’” (citing Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255)).

IV. REEVALUATING THE TRUE THREATS CIRCUIT SPLIT

As this Article discussed previously, federal courts have not resolved the question of whether true threats determinations should be subject to independent appellate review.³⁰⁹ Although potential doctrinal complexity and the interest in safeguarding expressive freedom for its own sake are strong arguments favoring the application of independent appellate review to this question, concerns about federalism, common-sense determinations, and jury autonomy counsel against this route.³¹⁰ This Part endeavors to apply the test articulated in Part III, which was informed by Part II's takeaways, to the true threats determination question.³¹¹ Section A of this Part provides background on what constitutes a true threat and why they are categorically excluded from First Amendment protection.³¹² Section B of this Part applies the test established in Part III to true threats and ultimately concludes that such determinations should remain within the purview of the jury.³¹³

A. Overview of the True Threats Determinations

A true threat is “a statement that puts someone in fear of bodily harm or death.”³¹⁴ The Supreme Court has cited three reasons why true threats receive no First Amendment coverage. The Court has an interest in “protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.”³¹⁵

For a statement to qualify as a true threat, subject to liability and unprotected by the First Amendment, the fact-finder is often required to consider an array of factors, including the context of the statement, the medium through which the statement was communicated, the relationship between the speaker and the listener, and the recipient's reaction to the speech.³¹⁶

In 2023, the Court held that in a true threats determination, the First Amendment requires “that the defendant had some subjective understanding of the threatening nature” of his words.³¹⁷ The Court held that the proper mens rea for true threats determinations is “recklessness.”³¹⁸

³⁰⁹ See *supra* Part I.

³¹⁰ See *supra* Part I.

³¹¹ See *supra* Parts II–III.

³¹² See *infra* Part IV.A.

³¹³ See *infra* Part IV.B.

³¹⁴ *True Threats: Is It Illegal to Threaten Someone?*, FREEDOM F. (Oct. 30, 2023), <https://www.freedomforum.org/true-threats/> [perma.cc/PA3J-5UZQ].

³¹⁵ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

³¹⁶ This is Colorado's test for true threats determinations. See *Counterman v. Colorado*, 600 U.S. 66, 114 n.3 (2023) (Barrett, J., dissenting) (quoting *People in the Interest of R. D.*, 464 P.3d 717, 721–22 (Colo. 2020), *abrogated by Counterman*, 600 U.S. 66).

³¹⁷ *Id.* at 69.

³¹⁸ *Id.*

B. Applying True Threats Determinations to Part III's Test

The first test in the inquiry would ask whether the judicial decision to engage in independent appellate review to make a true threats determination—in order to safeguard First Amendment rights—would (1) advance democratic interests that (2) legal, economic, or cultural forces have made vulnerable. One might argue that a statement on the borderline of being a true threat might in some way contribute to public discourse, perhaps on unpopular topics. That is a tough claim to sustain, in large part because a true threat must be *directed at a particular person* or small group.³¹⁹ This narrow, interpersonal scope renders these statements ill-suited for open discourse on issues of public importance. Communicating to an individual in a Facebook message, for example,³²⁰ does very little to advance public discourse compared to the public speech at issue in *Edwards*, which focused on a student protest,³²¹ and *Sullivan*, which focused on an advertisement printed in a newspaper.³²² Ultimately, statements that are on the verge of being true threats have a very low chance of advancing democratic interests.

If one were persuaded that applying an additional layer of factual review to these determinations in order to safeguard First Amendment interests *would* advance the democratic interest in protecting unpopular ideas, the next question in the first inquiry is whether that interest had been made vulnerable through legal, economic, and cultural forces. In the broadest possible sense, perhaps this might be true.³²³ Yet many cases involving true threats determinations have involved men stalking and intimidating their female partners and other women.³²⁴ Others have involved a statement that the speaker would blow

³¹⁹ *Virginia v. Black*, 538 U.S. 343, 344 (2003).

³²⁰ These were the facts in *Counterman*. 600 U.S. at 70.

³²¹ *Edwards v. South Carolina*, 372 U.S. 229, 230 (1963).

³²² *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

³²³ See, e.g., Editorial, *America Has a Free Speech Problem*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html> [perma.cc/K622-Q7LG] (describing the current phenomenon of “cancel culture” and the way in which people are now afraid to speak freely in everyday situations out of “fear of retaliation or harsh criticism”); Emma Camp, *I Came to College Eager to Debate. I Found Self-Censorship Instead*, N.Y. TIMES (Mar. 7, 2022), <https://www.nytimes.com/2022/03/07/opinion/campus-speech-cancel-culture.html> [perma.cc/89M8-T3WH] (explaining the frequent self-censorship on college campuses because “backlash for unpopular opinions is so commonplace” that students fear that their grades will be lowered if they express unpopular views on controversial topics). According to Camp, “[h]ushed voices and anxious looks dictate so many conversations on campus.” *Id.*

³²⁴ See, e.g., Attorney General Phil Weiser Statement on *SCOTUS Decision in Counterman v. Colorado*, PHIL WEISER COLO. ATT’Y GEN. (June 27, 2023), <https://coag.gov/press-releases/6-27-23/> [perma.cc/8NKB-8R4W] (“[T]his decision will make it more likely that victims of threats—mostly women—will live in fear and will be discouraged from speaking out against their stalkers, believing there is little they can do to hold those stalkers accountable.”); Linah Mohammad, Patrick Jarenwattananon & Ari Shapiro, *Supreme Court Sets New Standards for What Constitutes ‘True Threats,’* NPR (June 27, 2023), <https://www.npr.org/2023/06/27/1184655817/supreme-court-sets-new-standards-for-what->

up a liquor store,³²⁵ a statement that the speaker would assassinate the President of the United States,³²⁶ and cross-burning as a method of intimidating Black individuals.³²⁷ Arguably, legal, cultural, and economic forces have made the articulation of these kinds of views vulnerable—our society has made it difficult to obtain a job or maintain one’s social standing if one is known to threaten one’s partner, intimidate members of racial minorities, or devise plans to commit violence against a political leader. Yet perhaps these destructive, misogynistic, racist, hate-filled impulses, expressed in a narrow and targeted way, are so low-value that they should not qualify as a legitimate democratic interest in the first place.³²⁸ To be sure, this is where some normative judgment calls come in, which this author is sure will concern some of those who care deeply about protecting expressive rights for the sake of expression (rather than for communal justifications for speech freedom, like effective self-governance), even when that expression offends or even emotionally maims. As Danielle Citron noted, “[t]rue threats fall outside the First Amendment’s protection because they have minimal expressive value and inflict considerable costs by instilling fear of violence, disrupting individuals and communities, and increasing the potential for violence Threats of violence cause people to withdraw from crucial life activities, including self-expression.”³²⁹ Indeed, true threats are often a vehicle of domestic abuse.³³⁰ Overall, true threats determinations should not qualify for independent appellate review under Inquiry One.

As for Inquiry Two: Despite recent constitutional updates to true threats decision-making, answering the questions necessary to adjudicate this issue is not a doctrinally complicated task. Unlike actual malice determinations—the canonical First Amendment scenario where we do apply the Constitutional Fact Doctrine³³¹—true threats determinations do not depend on “meaning [giv-

constitutes-true-threats [perma.cc/5FXR-UNZ4] (asserting that “[i]t seems pretty clear that this court is determined to provide First Amendment protections to the worst of the worst, not just in the sense of we have to protect bad speech to protect good speech, but to completely discount the fact that the freedom of speech of the victims of stalking is being compromised” and that “[t]hey’re striking a blow for free speech of the people who want to terrorize and to stalk and to abuse, especially women and other minorities and other vulnerable groups” (quoting Miami Law Professor Mary Anne Franks)).

³²⁵ *Perez v. Florida*, 580 U.S. 1187, 1187 (2017) (Sotomayor, J., concurring in the denial of certiorari).

³²⁶ *Watts v. United States*, 394 U.S. 705, 706–07 (1969).

³²⁷ *Virginia v. Black*, 538 U.S. 343, 347–49 (2003).

³²⁸ See Danielle Keats Citron, *From Bad to Worse: Stalking, Threats, and Chilling Effects*, 2023 SUP. CT. REV. 175, 182 (explaining that regulations of true threats have “coexisted comfortably” with free speech protections).

³²⁹ *Id.*

³³⁰ Miles, *supra* note 13, at 749–50.

³³¹ See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 514 (1984) (holding that determinations of actual malice, as governed by *Sullivan*, require appellate judges to exercise independent review to determine if the standard is met with convincing clarity).

en] through the evolutionary process of common-law adjudication.”³³² True threats determinations do not depend on a web of prior holdings that offer “the content of the rule . . . not revealed simply by its literal text.”³³³ A true threats determination, however, does present a factually complicated task. Because the determination hinges on facts like the defendant speaker’s intent, the listener’s perception, and the overall context of the communication between the defendant and the listener, common sense is paramount in making these determinations. Therefore, this determination is properly in the province of the jury under the second inquiry, as “the court is no better equipped than the jury—and is arguably less equipped—to answer whether a statement is a true threat,” as “the true threat standard spelled out in our cases constrains the role of judges and instead relies upon the sensibilities of ordinary people.”³³⁴

In sum, with respect to true threats determinations, courts should defer to lower-court fact finders and should not intervene with independent appellate review to further safeguard speech freedom interests.

CONCLUSION

After assessing First Amendment independent appellate review’s doctrinal ancestry, this Article has identified two ways of conceiving of the role of de novo appellate review of key facts in expressive freedom cases. On one view, this mechanism exists to vindicate vulnerable democratic interests that the First Amendment advances. On another view—the one that, on purpose or by jurisprudential accident, became prevalent after the Supreme Court decided *New York Times v. Sullivan* in 1964—independent appellate review exists in this realm to protect First Amendment values for their own sake. This view, this Article has argued, is misguided. It interferes with the jury’s rightful role as a common-sense factfinder, raises federalism concerns, and sows confusion. A reframing is necessary to provide the mechanism principled boundaries and clarity. Informed by First Amendment independent appellate review’s doctrinal ancestry, which grew out of equal protection and due process claims brought primarily by Black capital defendants in Southern states, this Article has argued that First Amendment independent appellate review is warranted to safeguard democratic interests rendered vulnerable by legal, cultural, or economic forces, or when the doctrine surrounding facts in First Amendment cases is so legally complex that the jury would struggle to make an informed determination. Outside of those two scenarios, it is in the best interest of the judiciary to defer to finders of fact.

³³² *Id.* at 502.

³³³ *Id.*

³³⁴ *United States v. Hunt*, 82 F.4th 129, 136 (2d Cir. 2023).