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SYMMETRY FOR SYMMETRY'S SAKE: WHY *BOSE* DOES NOT REQUIRE INDEPENDENT REVIEW OF A TRIAL COURT'S FIRST AMENDMENT-FAVORABLE FINDINGS OF FACT

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Introduction

It was Nathaniel Friday's job to secure an eagle for his tribe's annual religious ritual known as "Sun Dance."[1] Winslow Friday was his cousin, and he endeavored to help Nathaniel however he could.[2] The Fridays had not yet acquired an eagle, and Winslow one day noticed a bald eagle perched on a tree located on his reservation.[3] Believing that this was the eagle that God had provided for his family, Winslow shot it, and the eagle's tail was used on the offering pole of the 2005 Sun Dance.[4] Winslow never applied for a permit to take the eagle, as required by federal law.[5] The shooting was reported to the Bureau of Indian Affairs, and Winslow was charged with violating the Eagle Act.[6] Winslow moved to dismiss the charges against him on the ground that—as applied—the Eagle Act violated the Religious Freedom Restoration Act (RFRA).[7] The district court agreed and dismissed the charges, finding that the government's practical ban on eagle permits available to those in Winslow's position substantially burdened

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1 U.S. v. Friday, 525 F.3d 938, 945, 942 (10th Cir. 2008).

2 *Id*. at 945.

3 *Id*.

4 *Id*.

5 *Id*.

6 16 U.S.C. § 668 (2006).

7 *Friday*, 525 F.3d at 945.

Winslow's religion and could not be justified by the government's interest in preserving the eagle population.[8] Winslow Friday was spared from prosecution.

The Tenth Circuit, however, reversed and remanded to continue the prosecution.[9] That court found that the Eagle Act was permissible under RFRA and rejected several of the district court's factual findings with regard to the government's regulatory scheme.[10] While noting that judge-found facts in criminal cases are usually reviewed only for clear error,[11] the court of appeals examined the facts in the record and made certain factual determinations for itself.[12] The court relied on the United States Supreme Court's decision in *Bose Corporation v. Consumers Union of United States, Inc*,[13] to justify its authority to review the facts in the record itself as opposed to using a clear error standard.

In *Bose*, a defamation case, the Supreme Court drastically increased the power of appellate courts in First Amendment cases, specifically authorizing those courts to conduct an "independent review" of a trial court's factual findings.[14] Generally, appellate courts may only reverse a trial court's factual findings when those findings are "clearly erroneous."[15] When the power of "independent review" is employed, however, the appellate court is looking not only for factual findings that are clearly erroneous, but also for those findings with which it merely disagrees. An appellate court conducting an independent review of a record has significantly greater ability to reverse the trial court's factual findings than a court employing the clearly erroneous standard. This increased power is significant—especially in First Amendment cases—since whether certain speech is constitutionally protected often turns on seemingly minor factual distinctions.[16]

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8 U.S. v. Friday, No. 05-CR-260-D, 2006 WL 3592952, at *5 (D. Wyo. Oct. 13, 2006) ("The Court finds that the Government has failed to demonstrate that its policy of discouraging requests for eagle take permits for Indian religious purposes, and limiting the issuance of such permits to almost none, is the least restrictive means of advancing its stated interests in preserving eagle populations and protecting Native American culture. This is particularly so when considering the recent recovery of the species and that a more significant cause of eagle mortality is electrocution.").

9 *Friday*, 525 F.3d at 960.

10 *Id*. at 949.

11 *Id*.

12 *See id*. at 950.

13 466 U.S. 485 (1984). *See Friday*, 525 F.3d at 949-50. It must be noted that protections under RFRA and the First Amendment are not exactly the same and that *Friday* involved a free exercise claim, as opposed to a free speech claim like in *Bose*. Despite these important differences, *Friday* is a prime example of the inequity in permitting appellate courts to second-guess a trial court's factual findings where those findings were originally made in favor of a First Amendment claimant.

14 466 U.S. at 513–14.

15 FED. R. CIV. P. 52(a)(6).

16 *See* Dennis v. U.S., 341 U.S. 494, 499-00 (1951) (upholding petitioners' convictions for

The *Bose* court employed this new standard of review, examining the record for itself and independently making its own factual determinations[17]—specifically with reference to the mental state of one of the witnesses[18]—rather than deferring to the trial court's factual findings. The Court explained that this additional power of appellate courts to make factual determinations—absent clear error—derived from the First Amendment itself.[19]

In the wake of *Bose*, courts have struggled with the question of whether the independent review rule in First Amendment cases is limited only to factual determinations made by the trial court which *disparage* a First Amendment claim, or whether an appellate court *always* has a duty to independently examine the trial court's factual findings, regardless of which party prevailed below.[20] This question has been appropriately formulated as whether Bose is a "two-way street,"[21] and the distinction is significant; conducting independent review where the First Amendment claimant *won* below makes it much more difficult for a claimant to have his First Amendment victory upheld on appeal.

Courts that conduct independent review of the trial court's factual determinations in *all* First Amendment cases, regardless of whether the trial court upheld or rejected the First Amendment claim, reason that "the [*Bose*] Court stated the rule of independent review in terms broad, clear and without exception"[22] and in furtherance of "symmetry" in the law.[23] In contrast, courts that reject such an approach and conduct independent review *only* where the trial court rejected a First Amendment claim invoke the purpose behind the *Bose* rule, specifically

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violating the Smith Act and emphasizing the statute's intent requirement).

17 *See id*. at 512 (noting that it was "not establish[ed] that [the author] realized the inaccuracy [of his statement] at the time of publication").

18 *Bose*, 466 U.S. at 491 (quoting Bose Corp. v. Consumers Union of U.S., Inc., 508 F. Supp. 1249, 1277 (D. Mass. 1981), *rev'd*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984)).

19 "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 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.'" *Id*. at 510-11.

20 *See* Don's Porta Signs, Inc. v. City of Clearwater, 485 U.S. 981 (1988) (White, J., dissenting from denial of certiorari and noting circuit split); U.S. v. Friday, 525 F.3d 938, 950 (10th Cir. 2008) (conducting independent review despite the trial court's dismissal of a criminal information on First Amendment grounds, but noting that "the *Bose* opinion does not make clear whether its more searching review . . . applies" in such a case).

21 *See* Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1318 (1996).

22 Bartimo v. Horsemen's Benev. & Protective Ass'n, 771 F.2d 894, 897 (5th Cir. 1985).

23 *Friday*, 525 F.3d at 950.

"to assure 'that the [trial court's] judgment does not constitute a forbidden intrusion into the field of free expression.'"[24]

This Note argues that *Bose* does not support the symmetrical application of independent review of facts by appellate courts in First Amendment cases, regardless of whether the First Amendment claimant won or lost below. While symmetrical procedures and results may be desirable in most parts of the law, symmetry is not required where that symmetry will inhibit a greater constitutional interest. In the independent review context, symmetrical application of *Bose* results in the reversal of First Amendment wins that would otherwise be upheld under clear error review.[25] This result is clearly antithetical to *Bose's* purpose of enhancing First Amendment protections.

A review of other areas of the law where asymmetry exists indicates that *Bose* need not apply symmetrically, since the purpose of the *Bose* rule is to protect First Amendment claims and not the government's interest in restricting free speech. This Note explores the concept of symmetry in the law and argues that none of the purposes for symmetry apply in the *Bose* context; applying *Bose* symmetrically for the sake of symmetry actually inhibits the driving forces behind *Bose*. Part I examines the origins of the independent review rule and the purposes for which it was created, while also exploring the purposes behind symmetry in the law. Part II analyzes the cases and scholarly writing on each side of this issue and questions whether *Bose's* independent review rule actually expresses a preference for First Amendment claims or simply a desire to ensure that First Amendment cases are decided both legally and factually correct. Part II also compares other asymmetries in the law and concludes that the interest in protecting First Amendment freedoms—as exemplified in *New York Times Company v. Sullivan*[26] and *Bose*—outweighs any interest in symmetry for symmetry's sake. Part III proposes that *Bose's* independent review rule be used only when the First Amendment claimant loses below. Part III reasons that the purposes behind the *Bose* rule are actually inhibited by applying *Bose* regardless of which party wins below and that the interest in symmetry present here is not an interest which can justify greater restriction on free speech.

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[24] Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth., 767 F.2d 1225, 1229 (7th Cir. 1985) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964)); *see also* Daily Herald Co. v. Munro, 838 F.2d 380, 383 (9th Cir. 1988) (noting that the independent review rule "'reflects a special solicitude for claims that the protections afforded by the First Amendment have been unduly abridged,' while not affording special protection 'for the government's claim that it has been wrongly prevented from restricting speech'" (quoting Planned Parenthood Ass'n/Chicago Area, 767 F.2d at 1229)).

[25] *See* Friday, 525 F.3d at 949-50.

[26] 376 U.S. 254 (1964).

I. SYMMETRY AND THE LAW OF INDEPENDENT REVIEW

A. Symmetry in the Law: A Worthy but Overvalued Goal

The notion that symmetry in the law is desirable is not a new idea. Courts have historically sought to impose symmetry in various contexts.[27] Legal writers traditionally use the term "symmetry" to refer to an implied function of the legal system, such as doing justice, staying faithful to the purposes of other lawmakers, making the law coherent, compensating for market imperfections, or providing justification for conclusions.[28]

Perhaps the most basic reason for favoring symmetry in the law is the belief that symmetry and fairness go hand-in-hand.[29] The sting of a seemingly "unfair" result or outcome may be lessened by noting that the same "unfair" rule applies to everyone.[30] Using symmetry as support for the notion that a particular result is fair permits a commentator or judge to justify a conclusion by characterizing it as embracing aspects of another acceptable proposition in some satisfactory but indeterminate way.[31]

The question arises, however, as to why treating like circumstances alike necessarily makes the outcomes arrived at in those circumstances correct. One answer is that drawing analogies and treating similar circumstances alike yields consistency and uniformity in the law.[32] Justice Douglas's concurring opinion in *Mapp v. Ohio*[33] is an

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[27] *See* Johnson v. State, 131 S.W.2d 934, 935 (Ark. 1939) ("[I]t is more important that the law's symmetry be preserved than it is that a criminal be punished in a particular case."); Todd v. Oviatt, 20 A. 440, 444 (Conn. 1889) (Pardee, J., dissenting) (arguing that the adoption of English law may "mar the symmetry of our law" and emphasizing that "the preservation of symmetry in our system I also view as a most important consideration"); State v. Pearson, 514 N.W.2d 452, 460 (Iowa 1994) (Snell, J., dissenting) (emphasizing that "there is a symmetry in law that is important to maintain" in arguing that the majority's interpretation of "sexual contact" in an Iowa statute rendered another, more specific statutory provision "purposeless"); State v. Fuller, 18 S.C. 246, 253 (1882) (noting that "[i]t is important to preserve the symmetry of the law" in holding that preservation of such symmetry "requires that a county treasurer shall not pay any claim against the county, except upon the check of the county commissioners, who are charged with the duty of raising the money for that purpose and giving checks for all proper county claims").

[28] Karen Petroski, *The Rhetoric of Symmetry*, 41 VAL. U. L. REV. 1165, 1187 (2007).

[29] *See id*. at 1188 ("Over time, opinion writers have come more often to present symmetry and justice as correlated properties of the correct result without asserting a logical relation between them. The concepts of symmetry and basic fairness remain strong rhetorical partners to this day.").

[30] *See* Legal Services Corp. v. Velazquez, 531 U.S. 533, 551 (2001) (Scalia, J., dissenting) (arguing that Legal Services Corporation (LSC) funds may not be used by challengers or defenders of existing welfare reform law and emphasizing that "[t]he litigation ban is symmetrical: [l]itigants challenging the covered statutes or regulations do not receive LSC funding, and neither do litigants defending those laws against challenge").

[31] Petroski, *supra* note 28, at 1189.

[32] *See id*. at 1197; *id*. at 1197 n.150 (compiling cases which adopt the notion that symmetrical treatment of cases means treating like cases alike).

[33] 367 U.S. 643, 670 (1961) (Douglas, J., concurring).

example of an instance in which symmetry was used to bring consistency and uniformity to the law. Prior to *Mapp*, evidence illegally obtained by federal officials was inadmissible in federal prosecutions, but the same illegally obtained evidence could be admissible in state prosecutions.[34] In *Mapp*, Justice Douglas noted that "this is an appropriate case in which to put an end to the *asymmetry* which *Wolf* imported into the law."[35] To Justice Douglas, consistency and uniformity were desirable objectives in and of themselves, and symmetry in search and seizure law would lead to such results.[36]

Another justification for symmetry is that even where an outcome is less than desirable, treating like cases and like parties alike is generally fair.[37] Justice O'Connor's concurring opinion in *Lawrence v. Texas* provides a nice example of this reasoning. *Lawrence* held invalid under the Fourteenth Amendment's Due Process Clause a Texas statute criminalizing homosexual, but not heterosexual, sodomy.[38] In her concurring opinion, Justice O'Connor rejected the Court's reliance on due process and instead argued that the Texas law violated the Equal Protection Clause.[39] In Justice O'Connor's view, it was unnecessary for the Court to go further than requiring equality and symmetry in the law. She reasoned that, where an intrusive law operates not only against a limited class of individuals, but against society as a whole, the law will likely be rejected through the democratic process.[40] Thus, to Justice O'Connor, the Court could fulfill its duty by requiring symmetry and equality in the law, which would in turn push any other undesirable effects of the law into the political process.

Many other courts and commentators, however, often allude to symmetry as a desirable object without actually explaining why symmetry is appropriate in a given circumstance.[41] For example,

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34 Wolf v. Colorado, 338 U.S. 25, 33 (1949).

35 367 U.S. at 670 (Douglas, J., concurring) (emphasis added).

36 *See id*. Legal commentators have also endorsed the virtues of consistency and uniformity. For example, one commentator has proposed what she refers to as the "forced symmetry approach" for adoption in abortion law, in which a symmetrical legal definition can be applied for both the beginning and end of life. Kirsten Rabe Smolensky, *Defining Life from the Perspective of Death: An Introduction to the Forced Symmetry Approach*, 2006 U. CHI. LEGAL F. 41, 42 (2006). In making her proposal, Professor Smolensky espouses "consistency and transparency" as notable objectives and likely outcomes of her approach. *Id*. at 67 ("[T]he forced symmetry approach encourages a holistic view of what it means to be alive within the eyes of the law, meaning that a consistent use of the approach . . . ultimately may increase the consistency and transparency of the law.").

37 Lawrence v. Texas, 539 U.S. 558, 579–85 (2003) (O'Connor, J., concurring).

38 539 U.S. at 578.

39 *Id*. at 579.

40 *Id*. at 584–85 ("I am confident . . . that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society.").

41 *See* Petroski, *supra* note 28, at 1188 ("Like legal scholars, but for much longer, writers responsible for making law have largely treated conceptions of symmetry as self-evident

symmetry is often alluded to and used blindly to justify outcomes and legal reasoning that would otherwise be without justification,[42] or to comfort those who might be uncomfortable with a particular decision, as a reminder that the law or procedure at issue applies symmetrically is thought to console those who might otherwise oppose the decision being rendered. One instance of this use of symmetry as a justification is the majority's opinion in *Hill v. Colorado*,[43] a case in which the Supreme Court upheld restrictions on protesting in front of healthcare facilities as proper time, place, and manner restrictions. In finding that the Colorado statute at issue was content-neutral since the law did not treat speakers differently based on the content of their messages, the Court emphasized that "the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries."[44] Thus, the law was not constitutionally objectionable, in part, because it applied across the board to all types of speakers, regardless of their identities or the content of their messages.[45]

Justice Scalia's dissent in *Hill*, however, challenged the majority's assumption that symmetry provided a saving grace for the Colorado law. Indicating that the symmetry relied upon by the majority was nothing more than superficial symmetry, Justice Scalia referenced "Anatole France's observation that '[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges.'"[46]

While symmetry serves important functions in the judicial system, symmetry is just one of several interests to be considered in arriving at an outcome.[47] In the *Bose* context, symmetrical application

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principles driving reasoning and guiding decision-making."); *id*. at 1165 ("[A]lthough legal writers virtually always use the term 'symmetry' as if its meaning were self-evident, in fact they have used the same term to refer to a variety of distinct concepts, each with its own ambiguities.").

[42] *See* Dretke v. Haley, 541 U.S. 386, 396 (2004) (Stevens, J., dissenting) ("The unending search for symmetry in the law can cause judges to forget about justice.").

[43] 530 U.S. 703 (2000).

[44] *Id*. at 723.

[45] *Id*. at 725.

[46] *Id*. at 744 (Scalia, J., dissenting) (alteration in original) (quoting J. BARTLETT, FAMILIAR QUOTATIONS 550 (16th ed. 1992). Justice Scalia went on to argue that the Colorado law targeted only abortion protestors and was thus not content-neutral. *Id*. at 744 ("This Colorado law is no more targeted at used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries than French vagrancy law was targeted at the rich. We know what the Colorado legislators, by their careful selection of content ('protest, education, and counseling'), were taking aim at, for they set it forth in the statute itself: the 'right to protest or counsel against certain medical procedures' on the sidewalks and streets surrounding health care facilities.").

[47] *See, e.g.*, Jorhadl v. Berry, 75 N.W. 10, 11–12 (Minn. 1898) (holding that a default judgment in an action by a physician against his patient to recover for professional services does not bar an action by the patient against the physician for malpractice in the performance of such services and emphasizing that "it is more important to work practical justice than to preserve the logical symmetry of a rule, provided this can be done without destroying all rules, and leaving the law on the subject all at sea"); Ross v. Cuthbert, 397 P.2d 529, 531 (Or. 1964) ("Symmetry in the law or, termed otherwise, logical consistency is, of course, highly desirable; but of paramount

of the independent review rule can be said to create uniform procedures and ensure fairness for both sides. However, as the subsequent examples demonstrate, symmetry need not be an absolute requirement, and where other overriding interests are inhibited by a blind insistence on symmetry, the question which must be raised is at what cost is symmetry accomplished and whether that cost justifies a reliance on symmetry. The symmetrical application of *Bose* as a two-way street does further an interest in symmetry and uniformity, but at the cost of less rigorous and under—rather than over—protection of First Amendment freedoms. Since the Court's driving concern in *Bose* was to provide more painstaking protection of First Amendment rights,[48] the cost of symmetry in the *Bose* context is simply too great.

B. Independent Review Before Bose

Bose was not the first Supreme Court case to espouse the notion of independent review of factual findings in constitutional cases. Even before the Court's watershed decision in *Times v. Sullivan*, the Supreme Court hinted at its authority to make certain determinations that were not necessarily conclusions of law for itself.[49]

The Supreme Court's decision in *Times v. Sullivan* is most famously known for the great change in First Amendment analysis it

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importance is justice.").

[48] *See infra* notes 161–73 and accompanying text.

[49] *See* Edwards v. South Carolina, 372 U.S. 229, 235 (1963) ("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 nevertheless remains our duty in a case such as this to make an independent examination of the whole record."); Haynes v. State of Washington, 373 U.S. 503, 515–16 (1963) ("While, for purposes of review in this Court, the determination of the trial judge or of the jury will ordinarily be taken to resolve evidentiary conflicts and may be entitled to some weight even with respect to the ultimate conclusion on the crucial issue of voluntariness, we cannot avoid our responsibilities by permitting ourselves to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding. . . . [W]hen, as in this case, the question is properly raised as to whether a defendant has been denied the due process of law we cannot be precluded by the verdict of a jury from determining whether the circumstances under which the confession was made were such that its admission in evidence amounts to a denial of due process." (internal citations and quotation marks omitted)); Pennekamp v. State of Florida, 328 U.S. 331, 335 (1946) ("The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." (footnote omitted)); Fiske v. State of Kansas, 274 U.S. 380, 385–86 (1927) ("[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.").

produced, both in terms of its specific holding and its novel First Amendment theory and analysis.[50] A more subtle aspect of the majority opinion in *Times v. Sullivan*,[51] however, was the Court's discussion of independent review.[52] After enunciating an actual malice requirement for libel suits brought by public officials, the Court determined that it was required to independently review the record to decide whether the Constitution would permit a judgment for the plaintiff.[53] The Court concluded that its obligation was not limited to the explanation of constitutional principles, but that it must also independently review the evidence to ensure that constitutional principles were properly applied.[54] Determining that the case required independent review, since the issue involved the line between constitutionally protected free speech and speech which may be regulated by the state,[55] the Court then proceeded to examine the facts of the case—specifically whether actual malice existed and whether the statements in question were sufficiently connected to the plaintiff.[56]

While independent review was not a novel concept at the time *Times v. Sullivan* was decided,[57] the Court's use of independent review in that case exceeded the bounds of its previous use. Specifically, the *Times v. Sullivan* Court used independent review in an effort to avoid the possibility that the Alabama state court on remand could retry the defendants and impose liability under the *Times v. Sullivan* actual malice standard itself.[58] Despite the Court's qualification that considerations of effective judicial administration were what prompted its exercise of independent review,[59] the Court made clear that its examination of the facts in a case like *Times v. Sullivan* was a constitutional requirement.[60]

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50 Childress, *supra* note 20, at 1254.

51 *Id*.

52 *See N.Y. Times v. Sullivan*, 376 U.S. 254, 284–92 (1964).

53 *Id*. at 284–85.

54 *Id*. at 285.

55 *Id*.

56 *See id*. at 285–92 (finding that "there was no evidence whatever that [the individual defendants] were aware of any erroneous statements or were in any way reckless in that regard" and that "[a]s to the Times, we similarly conclude that the facts do not support a finding of actual malice").

57 *See* Bartimo v. Horsemen's Benev. & Protective Ass'n, 771 F.2d 894, 896–97 (5th Cir. 1985).

58 Childress, *supra* note,20, at 1255 ("Despite the opinion's references to earlier cases of record reexamination, and its almost silky introduction of the authority by way of 'efficient judicial administration,' the actual use was blunt and powerful, and fully intended to avoid the prospect that Alabama could retry the defendants and find liability under the new constitutional privilege because it was a qualified one.").

59 *Times v. Sullivan*, 376 U.S. at 284–85.

60 *Id*. at 285 ("This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied."); *see also* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485,

C. Bose Enters the Fray

Two decades later, in 1984, the Supreme Court decided *Bose*,[61] a product disparagement suit arising out of a review written by *Consumer Reports* in its May 1970 magazine issue.[62] A small portion of the review was dedicated to comments on the Bose 901 loudspeaker system,[63] which was designed and marketed by Bose Corporation.[64] The review made some general remarks about the speaker system, commented on a listener's ability to pinpoint the exact location of instruments, and stated that individual instruments heard through the Bose system "tended to wander about the room."[65] The review then suggested that prospective buyers hold off on purchasing the Bose 901 until they are sure they would be satisfied with the system in the long-term.[66]

Bose Corporation objected to several statements in the article, but *Consumer Reports* refused to issue a retraction, so Bose brought suit.[67] The district court found that Bose Corporation was a public figure and that to be successful it had to prove by clear and convincing evidence that *Consumer Reports* published its statements about the Bose 901 with "knowledge that they were false or with reckless disregard of their truth or falsity."[68]

The district court, however, found that this burden was met with regard to the article's statement that instruments heard through the speaker system tended to "wander about the room."[69] Based on the testimony of the two *Consumer Reports* personnel primarily responsible for the Bose 901 portion of the review, Arnold L. Seligson and Alan Lefkow (collectively, "panelists"), the court concluded that the panelists heard individual instruments wandering "along the wall," not wandering "about the room."[70] The court thus determined that the article's

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510–11 (1984) ("The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law.").

61 466 U.S. 485 (1984).

62 *Id*. at 487.

63 *Id*. at 487–88.

64 Bose Corp. v. Consumers Union of U.S., Inc., 508 F. Supp. 1249, 1251-52 (D.C. Mass. 1981), *rev'd*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984).

65 466 U.S. at 488 (quoting Plaintiff's Exhibit 2, p. 274) ("Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists.").

66 *Id*. (quoting Plaintiff's Exhibit 2, p. 275).

67 *Id*.

68 *Bose*, 508 F. Supp. at 1274.

69 *Id*. at 1277.

70 *Id*. at 1266. This distinction was significant. At trial, the panelists testified "that the wandering sounds that they heard were confined to an area within a few feet of the wall near which the Bose 901 loudspeakers were placed." *Id*. at 1267. The trial court noted that "a certain degree of movement of the location of the apparent sound source is to be expected with all stereo loudspeaker systems," so "a reader would not be surprised to read about 'instruments' moving

assertion that individual instruments tended to "wander about the room" was false and disparaging.[71]

The district court went on to find that at the time of publication Seligson knew that the words "tended to wander about the room" did not accurately describe what he and Lefkow had observed when conducting their listening test of the Bose 901 system.[72] In reaching this conclusion, the court considered Seligson's testimony at trial that he did not know exactly why he chose the word "about."[73] The court, however, discredited that testimony and determined that Seligson knew the difference between the terms "about the room" and "along the wall."[74] On the basis of this finding, the court concluded that Seligson knew this statement in his review was false and that Bose had established actual malice by clear and convincing evidence.[75]

The First Circuit accepted the district court's conclusion that the review's description of the sound "tend[ing] to wander about the room" was fact, as opposed to an opinion, and that it was false.[76] Yet, determining that its review was not limited to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a)(6), the court proceeded to examine the statements in the *Consumer Reports* article for itself.[77] The court justified its independent examination of the record by the need to ensure that the lower court properly applied the controlling law and that the plaintiff had actually satisfied its burden of

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along the wall between two loudspeakers." *Id*. (emphasis added). The court, however, found that "[m]ovement throughout the other areas of the room . . . is not to be expected," and "that the location of the movement of the apparent sound source is just as critical to a reader as the fact that movement occurred." *Id*. Thus, the court determined that the panelists actually heard instruments moving "along the wall," which would be expected and not out of the ordinary. *Id*. The review, however, stated that instruments "tended to wander about the room," which would constitute an entirely different effect "contrary to what the average listener has become accustomed and would probably be found objectionable by most listeners." *Id*.

71 *Id*. at 1268.

72 *Id*. at 1277.

73 *Id*. at 1276–77.

74 *Id*. ("[A]ccording to Seligson, the words used in the Article 'About the room' mean something different to him than they do to the populace in general. If Seligson is to be believed, at the time of publication of the Article he interpreted, and he still interprets today, the words 'about the room' to mean 'along the wall.' After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible. Seligson is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible for the Court to believe that he interprets a commonplace word such as 'about' to mean anything other than its plain, ordinary meaning.").

75 *Id*. at 1277.

76 Bose Corp. v. Consumers Union of U.S., Inc., 692 F.2d 189, 194 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984). That court further noted that Bose conceded that it was a public figure and that the *Times v. Sullivan* standard applied. *Id*.

77 *Id*. at 195; FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").

proof.[78] The court did recognize, though, that questions of witness credibility and demeanor were to be left to the trier of fact.[79]

Based on its own examination of the record, the First Circuit determined that there was not clear and convincing evidence to establish that the article's authors published the statement that instruments tended to wander about the room with knowledge that the statement was false or with reckless disregard as to its falsity.[80] The First Circuit acknowledged that the authors' used imprecise language in their review but found that such imprecision did not support an inference of actual malice.[81]

Shortly after the decision, the Supreme Court granted certiorari to determine whether the First Circuit was required to apply the clearly erroneous standard of Rule 52(a)(6).[82] The Supreme Court upheld the First Circuit's independent review and concluded that it was not bound by the clearly erroneous standard of Rule 52(a)(6).[83] The Court noted that certain factual questions in particular areas of the law were too important and had significant far-reaching effects, such that their ultimate resolution should not be left in the hands of the trier of facts.[84] Recognizing that First Amendment cases often turn on the specific categorization of a particular statement, the Court acknowledged that it previously used independent review to ensure the proper categorization of speech and to properly confine the outer limits of any unprotected category.[85]

In condoning the First Circuit's use of independent review, the Court proclaimed that *Times v. Sullivan* announced a rule of federal constitutional law[86] when it used independent appellate review.[87] The Court reasoned that the rule derived from "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."[88] The Court went on to afford particular significance to questions of fact in defamation cases, noting that judges must independently examine the record to determine whether the actual

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78 692 F.2d at 195.

79 *Id*.

80 *Id*. at 197.

81 *Id*.

82 Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 493 (1984), *aff'g*, 692 F.2d 189.

83 *Id*. at 514.

84 *Id*. at 501 n.17.

85 *Id*. at 504-05.

86 *See id*. at 510-11. This is to be distinguished from a prudential or court-created rule which may be amended or disregarded in different circumstances. By proclaiming that independent review was a federal constitutional rule, the Court was essentially holding that the First Amendment itself required independent review.

87 *Id*. at 510.

88 *Id*. at 510-511.

malice standard is satisfied.[89]

The Court's conclusion that Rule 52(a)(6) did not govern review of an actual malice determination under *Times v. Sullivan* and that, in such a case, an appellate court "must" use its "independent judgment" to determine whether the actual malice standard has been met,[90] was limited by its refusal to require unbridled review of the facts in actual malice cases. Specifically, the Court cautioned that independent review should only be applied to those parts of the record which relate to the actual malice determination and should not amount to a *de novo* review of the ultimate judgment itself.[91]

Justice White filed a short dissent, disagreeing with the majority on its standard of review.[92] Justice Rehnquist also wrote a dissent, which Justice O'Connor joined, taking issue with the majority's rule of independent review and contending that appellate judges' factual determinations will be no more reliable than those of trial judges.[93] Whether intentional or not, Justice Rehnquist's dissent relied on an interpretation of the purpose of the Court's holding to be "greater protection for First Amendment values," as opposed to more accurate results regardless of the winner.[94]

D. Questions After Bose

Despite *the Bose* court's efforts to limit the use of independent review, many questions arose in the wake of *Bose* regarding the scope

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89 *Id*. ("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 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." (internal quotation marks omitted)).

90 *Id*. at 514.

91 *Id*. at 514 n.31 ("There are, of course, many findings of fact in a defamation case that are irrelevant to the constitutional standard of *New York Times Co. v. Sullivan* and to which the clearly-erroneous standard of Rule 52(a) is fully applicable. Indeed, it is not actually necessary to review the 'entire' record to fulfill the function of independent appellate review on the actual-malice question; rather, only those portions of the record which relate to the actual-malice determination must be independently assessed. The independent review function is not equivalent to a 'de novo' review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff. If the reviewing Court determines that actual malice has been established with convincing clarity, the judgment of the trial court may only be reversed on the ground of some other error of law or clearly erroneous finding of fact. Although the Court of Appeals stated that it must perform a de novo review, it is plain that the Court of Appeals did not overturn any factual finding to which Rule 52(a) would be applicable, but instead engaged in an independent assessment only of the evidence germane to the actual-malice determination.").

92 *Id*. at 515 (White, J., dissenting).

93 *Id*. at 520 (Rehnquist, J., dissenting).

94 *Id*. ("I believe that the primary result of the Court's holding today will not be *greater protection for First Amendment values*, but rather only lessened confidence in the judgments of lower courts and more entirely fact-bound appeals." (emphasis added)).

of its rule. While the Court noted that *Bose's* independent review was different from *de novo* review of a lower court's ultimate judgment,[95] it was unclear whether the evaluation of underlying facts and the drawing of inferences fell within the scope of the Court's independent review rule.

It was also unclear whether *Bose* applied in all First Amendment cases or just those involving an actual malice determination. The Court's language suggests that perhaps only actual malice determinations fall under the *Bose* rule,[96] but its logic arguably applies in other First Amendment contexts.[97] Even if it is assumed that *Bose* applies beyond actual malice determinations, the question remains open of the other types of cases in which it applies. *Bose* may not be limited to just actual malice determinations, but may be said to extend only to other defamation cases.[98] If *Bose* extends further, however, it is unclear whether it would be limited to just free speech cases or any type of First

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[95] *Id*. at 514 n.31.

[96] *See id*. at 514 ("We hold that the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times Co*. *v*. *Sullivan*. Appellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." (emphasis added) (footnote omitted)).

[97] *Id*. at 510–11 ("[Independent 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. 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."). The Court went on to tie this statement in with the actual malice standard, *id*. at 511 ("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."), but it is difficult to see a reasoned distinction between instances where actual malice is the burden which must be overcome and defamation cases that require only a showing of negligence. In fact, speech is already protected to a greater degree with the actual malice standard, and independent review—as used in *Bose*—will only strengthen that protection. Defamation cases requiring only a showing of negligence already receive weakened First Amendment protection by virtue of the significantly lesser burden on the plaintiff. To refuse to apply independent review to these cases further weakens the protection of speech in such instances as compared to actual malice cases. It can be argued that cases involving the actual malice standard involve speech requiring greater protection than those cases involving a mere negligence standard, but this distinction is not obvious from the Court's holding, and nothing in *Bose* purports to make such a claim. There might, however, be an argument that, unlike the question of whether a party *knew* something at the time he or she uttered or wrote a statement, whether that party was *negligent* is a question of law, not fact. *See id*. at 515 (White, J., dissenting) (arguing that the "reckless disregard" component of actual malice is not a question of fact). Accepting such an argument, it might not even be necessary to determine whether *Bose* was meant to apply to negligence cases, since whether someone was negligent is usually a question of law. This assumption does not end the debate, though, since, if *Bose* is applied to underlying facts and the drawing of inferences, then there might be other factual issues *contributing* to a negligence determination apart from that determination *itself* which could be independently reviewed. If such is to be the application of *Bose*, then it is difficult to see why underlying facts and inferences should be treated differently depending on the plaintiff's burden of proof.

[98] *See supra*, note 97.

Amendment challenges.[99]

Finally, *Bose* raised the question of whether it is to be applied even if the First Amendment claim prevailed below.[100] Applying independent review where a First Amendment claim is upheld below makes it easier for an appellate court to reverse and deny the claim, thus weakening protection for the claim. Some courts and commentators, however, have insisted on maintaining symmetry in the law and conducting independent review in First Amendment cases regardless of which party prevailed below.[101]

II. WHY SYMMETRY AND *BOSE* DO NOT GO HAND-IN-HAND

While the law has an interest in creating symmetrical procedures and outcomes, this interest must yield to other legal goals and concerns in certain circumstances. Various asymmetries exist in the law to further other important legal interests, thus demonstrating that symmetry for symmetry's sake is not necessary where other important interests are at stake.

A. Asymmetry in Summary Judgment Proceedings

The Supreme Court has expressly endorsed a procedural asymmetry in civil litigation. In *Celotex Corporation v. Catrett*, the Supreme Court held that, pursuant to Rule 56(c),[102] a party moving for summary judgment may show that it is entitled to judgment as a matter of law simply by showing that the nonmoving party failed to make a sufficient showing of the existence of an essential element of its case and on which the nonmovant bears the burden of proof at trial.[103] Under *Celotex*, the movant is merely required to inform the district court of the basis of its motion and identify those parts of the record which reveal the absence of a genuine issue of material fact.[104] The nonmoving party, however, is not required to support its motion with evidence refuting the movant's claims if it lacks the burden of proof on the particular issue at hand.[105]

Some commentators have described the Court's approach in

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99 *See* U.S. v. Friday, 525 F.3d 938, 950 (10th Cir. 2008) (conducting independent review in a challenge brought under the Religious Freedom Restoration Act (RFRA)).

100 *See* Don's Porta Signs, Inc. v. City of Clearwater, 485 U.S. 981 (1988) (White, J., noting split in the circuits over this issue and dissenting from denial of certiorari).

101 *See Friday*, 525 F.3d at 950 ("Although we have never explained why, this Circuit has applied *Bose* even when First Amendment claims prevailed below, and thus taken the side of symmetry."); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2441–43 (1998) (endorsing the symmetrical application of *Bose*).

102 FED. R. CIV. P. 56(c).

103 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

104 *Id.* at 323.

105 *Id.*

Celotex as creating an asymmetrical system under which defendants are heavily favored and a significant burden is placed on plaintiffs to produce documentary evidence, yet no similar burden is placed on the defendant.[106] This asymmetry enables a defendant—without producing any affidavits or evidence of its own—to force a plaintiff to produce extraneous evidence or else risk summary judgment in favor of the defendant. The *Celotex* approach arguably dispenses with a defendant's "price of admission" for filing a summary judgment motion, since the output cost of filing a summary judgment motion is significantly diminished for defendants as compared to plaintiffs.[107] Even where a nonmovant plaintiff prevails, that party will nonetheless have expended substantial resources and effort, as well as given the defendant a very clear bird's eye view of its case with very little effort.[108]

Despite the asymmetry created by the approach set forth in *Celotex*, the Court found that this asymmetry was justified, because the *Celotex* approach furthered one of the fundamental purposes of summary judgment: "to isolate and dispose of factually unsupported claims or defenses."[109] The Court noted that summary judgment is not a procedural shortcut but an essential aspect of the Federal Rules as a whole, "which are designed 'to secure the just, speedy and inexpensive determination of every action.'"[110] The Court further stated that Rule 56 must be construed so as to have "due regard" for those parties challenging a plaintiff's claim (or a defendant's defense) which has no factual basis.[111] Therefore, the Court implicitly accepted the asymmetry it had to have known its new approach would yield in an effort to

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106 *See, e.g.*, Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 82 n.49 (1990); D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 39 (1988) (arguing that *Celotex* "has introduced a procedure which is asymmetrical, grossly favoring defendants over plaintiffs no matter which party is the movant"); R. Bruce Beckner, *Advance Sheet*, 24 LITIGATION, 63, 64–65 (Spring 1998).

107 Risinger, *supra* note 106, at 38–39 ("Although current Rule 56 is hardly clear in unbundling the two steps, it appears to contemplate a process in which the moving party, whether plaintiff or defendant, bears the burden of drawing from the various materials available to the parties but not yet available to the judge, and of presenting them in such a way as to make a convincing showing that the record can be confidently predicted in its relevant dimensions at that time. This is the movant's 'price of admission,' and only if the movant is willing to pay that price, with all the drudgery it entails in any fairly complex file, should the opponent be put to the burden of formulating a response. The Supreme Court seems to have been numb to these 'price of admission' functions, particularly in *Celotex*, and as a result has introduced a procedure which is asymmetrical, grossly favoring defendants over plaintiffs no matter which party is the movant." (footnote omitted)).

108 *Id*. at 41–42.

109 Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986).

110 *Id*. at 327.

111 *Id*. ("Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.").

further the purposes of the summary judgment process and the Federal Rules in general.

With its decision to adopt an asymmetrical approach with respect to summary judgment, the Court demonstrated that symmetry may yield to greater fundamental interests. By justifying its holding in *Celotex* on the ground that the summary judgment process should further one of the "primary purposes" of summary judgment in "isolat[ing] and dispos[ing] of factually unsupported claims or defenses,"[112] the Court displayed a willingness to raise the procedural and practical burdens of one party as compared to another in an effort to promote the interest in the orderly administration of justice and protection for parties challenging claims or defenses lacking a factual basis.

The Court's attitude in *Celotex* can be seen to display a preference for over-enforcement of minimum requirements to get to a jury as compared to under-enforcement, which would make summary judgment more difficult for a defendant and permit more claims to be heard by a jury.[113] This attitude and apparent preference for over-protection of defendants, as opposed to under-protection, is similar to the attitude displayed in *Bose* of preferring over-protection of First Amendment rights at the expense of the most legally correct outcomes.[114] To be sure that challenged speech "actually falls within the unprotected category" and in an effort "to confine the perimeters of any unprotected category within acceptably narrow limits . . . to ensure that protected expression will not be inhibited,"[115] *Bose* crafted a rule which expressed a clear preference for over-protection of First Amendment rights rather than under-protection. The driving purpose behind the independent review rule in *Bose* was "to preserve the precious liberties established and ordained by the Constitution."[116] Just like the Court in *Celotex* advanced an asymmetrical procedural approach to further the purposes behind summary judgment, the Court in *Bose* can be seen to have adopted an asymmetrical rule—*Bose* as a one-way street—to further the constitutional interests in over-protection of First Amendment rights. Therefore, symmetry need not exist solely for its own sake but may yield to other pressing fundamental interests.

The interests protected by the *Celotex* rule arguably extend beyond

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112 *Id*. at 323–24.

113 Risinger, *supra* note 106, at 42 ("Over time, defendants can be expected to become better at making thinner and thinner 'put the plaintiff to his proof about his proof' motions. This, coupled with the perceived exhortation for more summary judgments, is bound to lead to many summary judgments improvidently granted in favor of defendants, not because judges do not understand directed verdict sufficiency law (as well as it can be understood), but because they have mispredicted what the record would have been at trial.").

114 *See infra* notes 161–164 and accompanying text.

115 Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 505 (1984).

116 *Id*. at 511.

the procedural realm and implicate *substantive* interests. Similarly, *Bose* can be seen as setting forth more than abstract procedural requirements. *Bose* is not just about standard of review, but about vigorous enforcement of First Amendment rights, and a tendency to prefer over-enforcement to under-enforcement. Seen in this context, *Bose* can then be seen as a one-way street—despite the asymmetry of such an application—just like the asymmetries created in other areas of the law where substantive fundamental rights are at stake.

B. Asymmetry and Double Jeopardy

Often in criminal law, courts struggle with the balance between protecting individual rights and maintaining an orderly and symmetrical system of justice. While *Bose* and much of First Amendment law differs drastically from the criminal law, the ways in which courts have struggled to incorporate both symmetry and protection of liberty in criminal cases provides a clear understanding of the way these two interests have been balanced. While the issues that arise in the criminal law context are quite different from those involved in most First Amendment cases, an examination of symmetry's role in criminal cases where constitutional values are at stake—just like in *Bose*—provides insight into how symmetry and constitutional rights have been balanced.

One striking example of the interplay between symmetry and the protection of fundamental rights occurs in the context of double jeopardy and whether the prosecution may appeal and retry a defendant after a criminal trial. The Fourteenth Amendment's Due Process Clause[117] and the Double Jeopardy Clause of the Fifth Amendment[118] have been interpreted to prohibit the prosecution in a state criminal case from appealing legal error after trial and retrying a defendant.[119] In initially refusing to apply the Double Jeopardy Clause of the Fifth Amendment to the States via the Fourteenth Amendment, the Supreme Court reasoned in *Palko v. Connecticut* that, since a *defendant* may appeal from his conviction, it would not be absurd to permit the *prosecution* to similarly appeal errors of law and retry a defendant based upon such errors.[120] The Court justified such an outcome by stating that, with such a result, "[t]he edifice of justice stands, its *symmetry*, to

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117 U.S. CONST. amend. XIV § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law").

118 U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb").

119 *See* Benton v. Maryland, 395 U.S. 784 (1969) (applying the Double Jeopardy Clause to the States).

120 302 U.S. 319, 328 (1937), *overruled by Benton*, 395 U.S. at 794 ("If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge, has now been granted to the state." (internal citation omitted)).

many, greater than before."[121] The *Palko* Court based its conclusion that the Double Jeopardy Clause does not apply to the States, thus allowing the prosecution to appeal errors of law and retry a defendant in a state criminal prosecution, in part, on notions of maintaining symmetrical procedures for both parties to an adversarial contest.

This symmetrical application of the law was rejected, however, thirty-two years later in favor of applying the Double Jeopardy Clause of the Fifth Amendment to the States, on the reasoning that the Double Jeopardy Clause of the Fifth Amendment represents a "fundamental ideal in our constitutional heritage."[122] In its decision overruling *Palko*, the *Benton* Court did not once address *Palko's* reliance on symmetrical procedures for a defendant and the prosecution alike. Instead, the Court found that, once a particular provision in the Bill of Rights is deemed to be fundamental, it must be applied against the States.[123] Thus, the *Benton* Court implicitly observed that any interest in symmetry is outweighed where a "fundamental ideal in our constitutional heritage"[124] is in play.

It must, however, be acknowledged that the *Benton*-*Palko* interplay provides limited support for the notion that symmetry need not control where a constitutional right is at issue. *Benton* was not focused on the ability of a State to appeal but on a State's power to retry a defendant.[125] *Benton* was about whether to incorporate the Double Jeopardy Clause into the Due Process Clause of the Fourteenth Amendment.[126] Yet, *Benton* expressly overruled *Palko*,[127] and *Palko* made clear that it was not deciding whether the State may be "permitted after a trial *free from error* to try the accused over again or to bring another case against him."[128] Therefore, *Benton* must at least be seen as standing for the proposition that, even if errors of law were made at trial

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121 *Id*. (emphasis added).

122 *Benton*, 395 U.S. at 794.

123 *Id*. at 795 ("Our recent cases have thoroughly rejected the Palko notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of fundamental fairness. Once it is decided that a particular Bill of Rights guarantee is fundamental to the American scheme of justice, the same constitutional standards apply against both the State and Federal Governments." (internal quotation marks and citation omitted)).

124 *Id*. at 794.

125 *See* 392 U.S. 925, 925–26 (1968) (granting certiorari to determine whether "the double jeopardy clause of the Fifth Amendment [is] applicable to the States through the Fourteenth Amendment" and whether "the petitioner [was] twice put in jeopardy in this case" (internal quotation marks omitted)).

126 *See* 395 U.S. at 793–96. Arguably, *Benton* can be seen as nothing more than a decision applying the Double Jeopardy Clause *symmetrically*—as against both the federal government and the States. Since freedom from double jeopardy is an explicit constitutional requirement—thus mandating asymmetry—*Benton* arguably did nothing more than apply this constitutionally required asymmetry in a symmetrical manner.

127 *Id*. at 794.

128 302 U.S. 319, 328 (1937) (emphasis added).

which tended to favor the defendant, the State is not permitted to retry that defendant even if an appellate court agrees that such errors were committed. While Benton is certainly about incorporating the right to be free from retrial, it is effectively a bar on appeals conducted by the State.

In part because of the symmetry afforded by a system which permits effective appeals (and retrial) by both the defendant and the prosecution, *Palko* found that the right to be free from double jeopardy was not one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[129] In overruling *Palko*, the *Benton* Court therefore rejected this reasoning as a ground for failing to apply the Double Jeopardy Clause against the States. To put it another way, *Benton* found that the Double Jeopardy Clause does represent "a fundamental ideal in our constitutional heritage"[130] *despite* the virtues of a more symmetrical approach. While the Fifth Amendment itself mandates this asymmetry, the Court decided that this asymmetry was required even in State prosecutions and implicitly rejected *Palko*'s symmetry rationale for why this federally required asymmetry should not extend to the States. Thus, the important point here is not that the Fifth Amendment itself mandates this asymmetrical procedure, but that the *Benton* Court itself made the decision that symmetry could not justify a failure to incorporate a "fundamental ideal"[131] against the States.

C. Why Benton Demonstrates that Bose Need Not Be Applied Symmetrically

Bose's constitutional command that appellate courts conduct independent review in First Amendment cases is not dissimilar from the notion that the Due Process Clause of the Fourteenth Amendment prohibits the prosecution from appealing errors of law and retrying a defendant in a criminal trial. After all, the First Amendment's prohibition on the abridgement of free speech has also been found to be a personal right protected by the Due Process Clause from State infringement.[132] Therefore, since *Benton* rejected any symmetry justification for refusing to apply the Double Jeopardy Clause to the States, it follows that a mere interest in symmetrical procedures based on which party prevailed below should not be enough to outweigh the

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129 *Id*.

130 395 U.S. at 794.

131 *Id*.

132 Gitlow v. People of State of New York, 268 U.S. 652, 666 (1925) (incorporating the First Amendment's guarantee of freedom of speech and of the press through the Due Process Clause of the Fourteenth Amendment so as to apply to the States and holding that the Free Speech Clause is "among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States").

interest in properly applying "fundamental personal rights," such as freedom of speech.[133] *Benton* stands for the notion that symmetry alone is not enough to justify refusing to extend a fundamental right to the States, thus providing for greater enforcement of constitutional concerns. Viewing *Bose* as a means of vigorously protecting First Amendment rights, any interest in symmetry should similarly not trump forceful enforcement of these rights.

The question of whether *Bose* is a two-way street is not a matter of whether independent review itself should be applied against the States, but a question of whether an interest in symmetry is sufficient to outweigh an interest in more stringent protection of First Amendment rights. The governing principle, however, remains the same: where the protection of a fundamental right will be hindered by imposing symmetrical procedures in the law, any interest in symmetry need not control for symmetry's sake alone.[134] *Benton* implicitly provides support for this principle, and none of the purposes behind requiring symmetry in the first place demand that it be applied in the *Bose* context.[135] Only if a greater reason for symmetry exists in the independent review context than in the context of appeals from criminal trials should symmetry and evenhandedness counsel in favor of lessening protection for free speech. Double jeopardy applies to criminal prosecutions, and lessening double jeopardy protections for criminal defendants may result in loss of life, liberty, or property. On the other hand, *Bose* involved a libel suit in which the defendant stood to lose only money, and it is possible that the consequences of weakening First Amendment protection may be less severe than the consequences of weakening double jeopardy protection. However, courts interpreting *Bose* to require symmetrical application regardless of which party prevails below have not limited such application to civil suits,[136] and First Amendment freedoms have been vigorously protected even where an adverse First Amendment finding would not result in

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133 *See id*.

134 *Benton* and *Palko* involved competing interpretations of the Due Process Clause of the Fourteenth Amendment and did not directly address the issue of whether symmetry at the expense of a fundamental right could ever be appropriate. In *Palko*, however, the Court concluded that the right to be free from multiple prosecutions when the first prosecution contained errors of law is not one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." 302 U.S. at 328 (internal quotation marks omitted). Thus, *Palko* did not address any competition between fundamental rights and symmetrical procedures, because the Court concluded that no fundamental right was at stake. In *Benton*, however, the Court held that double jeopardy protection was a "fundamental ideal," 395 U.S. at 794, and the Court went on to implicitly reject any contention that an interest in symmetrical procedures could outweigh an individual defendant's constitutional right to be free from multiple prosecutions.

135 *See infra* Part II.D.

136 *See* U.S. v. Friday, 525 F.3d 938, 950 (10th Cir. 2008) (conducting independent review of trial court's factual findings where trial court dismissed information charging defendant with violating Bald and Golden Eagle Protection Act on First Amendment grounds).

imprisonment.[137] Thus, utilizing less protective measures in First Amendment independent review cases would not necessarily yield consequences so much less severe than the consequences of failing to protect criminal defendants from being subjected to multiple prosecutions for the same offense.

If anything, the interest in symmetry in both the double jeopardy and the independent review contexts is quite similar. *Palko* reasoned that "[a] reciprocal privilege" to appeal errors of law is not unreasonable, since the State has an interest in "a trial free from the corrosion of substantial legal error."[138] Likewise, conducting independent review of a trial court's factual findings even when the trial court upheld a First Amendment claim would likely benefit the accuracy and reliability of the proceedings as a whole, since factual determinations would be independently examined twice, as opposed to just once. *Benton*, however, stands for the proposition that the accuracy and reliability of judicial proceedings may, in certain circumstances, yield to the protection of fundamental rights.[139] Similarly, while conducting symmetrical independent review in First Amendment cases may lead to more accurate and reliable results, such accuracy and reliability need not come at the price of lessening First Amendment protection.[140] For example, in *Bartimo v. Horsemen's Benevolent and Protective Association*, where the Fifth Circuit conducted independent review of the trial court's factual determination that actual malice had not been proved, the court concluded that the operation of independent review does not necessarily work only to further free speech rights.[141] This determination of the driving purpose behind *Bose's* independent review rule is inconsistent with specific language in *Bose*. The *Bose* Court noted that it previously conducted an independent examination of

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[137] *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[138] 302 U.S. at 328.

[139] 395 U.S. 784 (1969).

[140] The adversarial nature of the American judicial system supports the notion that trials are not proceedings aimed solely at the ascertainment of truth. For example, evidence obtained in violation of the Fourth and Fourteenth Amendments may not be admitted against a state criminal defendant at trial, even where that evidence clearly establishes a defendant's guilt. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (applying the exclusionary rule in Fourth Amendment cases to the States). If the sole objective of a trial was to discover the truth, then excluding concededly relevant yet illegally obtained evidence would seem to hinder that goal. Thus, an interest in *accurate* results—while a very strong interest indeed—does not necessarily trump an interest in protecting fundamental rights.

[141] Bartimo v. Horsemen's Benev. & Protective Ass'n, 771 F.2d 894, 897 (5th Cir. 1985) ("First, it is not clear to us that the rationale of *Bose* is inapplicable here, for definition of First Amendment protections requires inclusion as well as exclusion and the former is no less a judicial function merely because it does not pose a direct threat to First Amendment values. Including speech within the protected category requires no less careful an evaluation of constitutionally significant facts than excluding such speech.").

the record to make sure that protected speech will not be infringed upon.[142] The Court further stated that the independent review rule is one of federal constitutional law and thus "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."[143]

Furthermore, Justice Rehnquist acknowledged in his *Bose* dissent that the majority's goal was to protect free speech. He wrote that "the primary result of the Court's holding today will not be *greater protection for First Amendment values*, but rather only lessened confidence in the judgments of lower courts and more entirely fact-bound appeals."[144] The *Bose* Court gave every indication that the rule of independent review was meant to protect First Amendment rights, and there is no suggestion that independent review was designed solely to come to more accurate or reliable results at the expense of First Amendment freedoms.[145] Because *Bose's* independent review rule protects First Amendment values and not merely the accuracy of results in First Amendment cases, the furtherance and vigorous protection of First Amendment values is a greater constitutional interest than symmetry for symmetry's sake.

D. The Purpose Behind the Independent Review Rule is to Further Enhance—Not Diminish—First Amendment Protections

An examination of the purposes behind the *Bose* rule itself reveals that treating *Bose* as a two-way street inhibits the purpose and spirit behind the independent review rule in First Amendment cases. Any justification of *Bose* as a two-way street relies on a desire to have symmetrical procedures and appellate review standards regardless of which party wins below. This interest in symmetry, however, like in the criminal context, is overcome by reference to *Bose's* origin, purpose, and spirit.

Some courts that have found *Bose* to be a two-way street have been unable to justify their decisions with reference to any goal or

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142 Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 505 (1984).

143 *Id*. at 510–11 (emphasis added).

144 *Id*. at 520 (Rehnquist, J., dissenting) (emphasis added).

145 *See also* Daily Herald Co. v. Munro, 838 F.2d 380, 383 (9th Cir. 1988) ("This rule 'reflects a special solicitude for claims that the protections afforded by the First Amendment have been unduly abridged,' while not affording special protection 'for the government's claim that it has been wrongly prevented from restricting speech.'" (quoting Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth., 767 F.2d 1225, 1229 (7th Cir. 1985))); Planned Parenthood Ass'n/Chicago Area, 767 F.2d at 1229) ("The rule's purpose is to assure 'that the judgment does not constitute a forbidden intrusion into the field of free expression.'" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964))); Childress, *supra* note 20, at 1322 ("[I]t should be recognized that the free review rule is about appealing censorship, not enabling appellate censorship.").

purpose other than mere symmetry.[146] Other courts have summarily stated that independent review applies.[147] Still, some courts and commentators have provided alternate justifications apart from symmetry for the application of *Bose* as a two-way street, and these alternate justifications require some attention.

First, some courts have argued in favor of *Bose* as a two-way street on the ground that *Bose* itself did not expressly limit its independent review rule to cases in which the First Amendment claimant lost below.[148] Even Justice O'Connor, during oral argument for *Hustler Magazine, Inc. v. Falwell*,[149] implied that limiting *Bose's* application only to adverse First Amendment factual findings would be an extension of *Bose* and not derived from *Bose's* explicit enunciation of the independent review rule.[150] Specifically, in response to the defense attorney's assertion that *Bose* was a one-way street, Justice O'Connor replied, "I don't think *Bose* spelled it out that way. I don't read that necessarily into *Bose*. So you may be asking us to move on to another step beyond that case."[151]

Looking at the Court's opinion in *Bose* as a whole, however, demonstrates the rule's purpose so clearly that the Court likely felt it unnecessary to expressly note such a limitation. The *Bose* Court stated that, in First Amendment cases, the Court has routinely conducted an independent examination of the record both to ensure that "the speech in question actually falls within the unprotected category" and to confine the limits of that unprotected category "in an effort to ensure that protected expression will not be inhibited."[152] The former presupposes a lower court judgment that certain speech is not protected, and the latter demonstrates the Court's concern with ensuring that speech will not be unduly abridged by overly broad categories of unprotected speech. Thus, both justifications for independent review, as set forth by the *Bose* majority, indicate that the rule is aimed at protecting—not restricting—free speech.

The *Bose* Court goes on to comment that the rule of independent

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146 *See* U.S. v. Friday, 525 F.3d 938, 950 (10th Cir. 2008) (noting the circuit split but stating that, "[a]lthough we have never explained why, this Circuit has applied *Bose* even when First Amendment claims prevailed below, and thus taken the side of symmetry.").

147 *See* Lindsay v. City of San Antonio, 821 F.2d 1103, 1108 (5th Cir. 1987) ("[I]n deciding whether restrictions on speech are justified, appellate courts do not rely heavily on findings of fact made by trial courts.").

148 *See* Bartimo v. Horsemen's Benev. & Protective Ass'n, 771 F.2d 894, 897 (5th Cir. 1985) ("As regards the review of actual malice determinations, the Court stated the rule of independent review in terms broad, clear and without exception. . . . We think if the Court had intended to make such a distinction it would have so limited its holding.").

149 485 U.S. 46 (1988).

150 Childress, *supra* note 20, at 1319-20 (1996) (quoting RODNEY A. SMOLLA, LAW OF DEFAMATION § 12.09[3] n.365 (1991)).

151 *Id*. (quoting RODNEY A. SMOLLA, LAW OF DEFAMATION § 12.09[3] n.365 (1991)).

152 Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 505 (1984).

review—a rule which the Court says is one of federal constitutional law—reflects the belief of judges and Supreme Court justices that independent review must be exercised to protect the freedoms established by the Constitution.[153] Any application of *Bose* to reverse First Amendment-favorable judgments would not work to "preserve the precious liberties"[154] of the First Amendment and would make it more—not less—difficult for First Amendment claimants to prevail on appellate review.

Even Justice Rehnquist's *Bose* dissent acknowledged that the purpose of the Court's rule was to protect the First Amendment.[155] While he disagreed with the majority over whether independent review would in fact result in greater First Amendment protection, he did not take issue with such as being the central premise of the majority's holding.[156]

As for Justice O'Connor's[157] remarks during oral argument of

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[153] *Id*. at 510–11 ("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 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." (internal quotation marks omitted)).

[154] *Id*. at 511.

[155] *Id*. at 520 (Rehnquist, J., dissenting).

[156] *Id*. Other lower courts interpreting *Bose* have agreed that the purpose behind the rule is to promote the interest in First Amendment protections, thus requiring independent review only when such would further—and not infringe upon—First Amendment interests. *See, e.g*., Daily Herald Co. v. Munro, 838 F.2d 380, 383 (9th Cir. 1988); Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth., 767 F.2d 1225, 1229 (7th Cir. 1985) ("[T]he presence of a First Amendment issue in a case does not, in and of itself, trigger the rule of independent review of the factual findings of the lower court. The rule's purpose is to assure 'that the judgment does not constitute a forbidden intrusion into the field of free expression.' . . . The rule thus reflects a special solicitude for claims that the protections afforded by the First Amendment have been unduly abridged. . . . The doctrine of independent review has never been thought to afford special protection for the government's claim that it has been wrongly prevented from restricting speech." (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964))); *see also* Childress, *supra* note 20, at 1322 (1996) ("[I]t should be recognized that the free review rule is about appealing censorship, not enabling appellate censorship."); Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U. L. REV. 3, 76–77 (1985) ("So viewed, the procedural balance that effectuates the actual malice concept provides that neither judge nor jury shall possess absolute discretion to punish expression in the defamation context.").

[157] Justice Rehnquist had initially raised the issue at oral argument, directly asking *Hustler Magazine's* lawyer whether he believed *Bose* was a "one-way street." Childress, *supra* note 20, at 1319 (1996) (quoting RODNEY A. SMOLLA, LAW OF DEFAMATION § 12.09[3] n.365 (1991)). It would be difficult to see how Justice Rehnquist could—consistent with his dissent in *Bose*—advocate for a system in which independent review would occur in more, rather than less, instances. Justice Rehnquist's *Bose* dissent took issue with the reliability of factual determinations made by appellate judges. *See* 466 U.S. at 520 (("[I]t is not clear to me that the *de*

Hustler Magazine, it cannot be said that her views, even if we assume that she firmly believed *Bose* to be a two-way street, were representative of a majority of the Court. During oral argument of *Hustler Magazine*, Hustler's lawyer firmly insisted that independent review applies only to factual findings which are adverse to a First Amendment claimant. He also argued that the purpose of the independent review rule was to "protect the speaker," thus triggering *Bose* only in instances where the speaker actually needs protection.[158] Yet, the majority opinion did not address the question of *Bose's* reach proposed by *Hustler's* attorney; instead, the majority simply accepted the jury's factual findings of whether the ad at issue in the case would be interpreted as factual.[159] At least one commentator has argued that this acceptance of the jury's factual findings—after the dialogue at oral argument on the issue of *Bose's* reach—might provide implicit support for the notion that *Bose* really is just a one-way street.[160]

Another justification for applying *Bose* symmetrically is that independent review can serve the function of protecting the First Amendment even when it works to exclude certain speech from protected categories.[161] The argument goes that properly defining the parameters of protected speech is an important judicial function under *Bose*, even when First Amendment values are not directly at stake.[162] This rationale, however, presupposes that *Bose* stands for the

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novo findings of appellate courts, with only bare records before them, are likely to be any more reliable than the findings reached by trial judges."). For him to be in favor of expanded independent review would seem inconsistent with his casual assumption in *Bose* that such review is not necessarily more reliable than the factual determinations made by trial court judges. Unless Justice Rehnquist was implying that he would find *Bose* to be a two-way street to ensure a system of symmetry in unreliable factual findings, then this single offhand question should not be viewed as dispositive of his views on the issue.

158 Childress, *supra* note 20, at 1319 (1996) (quoting RODNEY A. SMOLLA, LAW OF DEFAMATION § 12.09[3] n.365 (1991)).

159 Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988) ("The Court of Appeals interpreted the jury's finding to be that the ad parody 'was not reasonably believable,' and in accordance with our custom we accept this finding." (internal citation omitted)). It should be noted that Justice Rehnquist wrote the majority opinion in *Hustler Magazine*.

160 Childress, *supra* note 20, at 1320 (1996) ("The result [in *Hustler Magazine*] may give some support to arguing that the Court implicitly found in favor of a one-way street.").

161 *See* Bartimo v. Horsemen's Benev. & Protective Ass'n, 771 F.2d 894, 897 (5th Cir. 1985).

162 *See id*. ("[I]t is not clear to us that the rationale of Bose is inapplicable here, for definition of First Amendment protections requires inclusion as well as exclusion and the former is no less a judicial function merely because it does not pose a direct threat to First Amendment values. Including speech within the protected category requires no less careful an evaluation of constitutionally significant facts than excluding such speech."); Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009, 1027 (1996) (arguing that, for purposes of the "hostile environment" question in workplace harassment suits, "independent judgment review . . . is generally both valuable and permissible under Rule 52(a) and the Seventh Amendment, whether or not the free speech claimant lost at trial," because "[i]n either situation, appellate independent judgment should generally produce more refinement of the hostile environment standard").

proposition that First Amendment *cases* are too important to get wrong—regardless of who wins—as opposed to the principle that First Amendment *rights* are too important to infringe. If the former were true, then reliability and accuracy would be controlling interests, even at the cost of under-protection of First Amendment rights. If, however, the latter is true, then it is the vigorous protection of First Amendment rights which drives independent review, and over-protection of speech is more highly valued than proper resolution of First Amendment cases. Given the complete absence of any language in *Bose* indicating that the driving principle behind its rule was to ensure more *accurate* First Amendment results and the heavy emphasis on "preserv[ing] the precious *liberties* established and ordained by the Constitution,"[163] this interpretation of *Bose* makes little sense.[164]

Finally, one court noted that treating *Bose* as a one-way street could lead to the same record being evaluated under different standards as it makes its way through the appellate review process.[165] This potential problem, however, is more theoretical than real. Assuming that *Bose* is a one-way street, a First Amendment claimant who loses at the trial level would be entitled to have an intermediate appellate court independently examine the relevant facts of his case. If this claimant were to prevail and the party arguing for a restriction of First Amendment rights, usually the government or a defamation plaintiff, also known as the "restricting party", were to appeal to a higher court, that court would *not* conduct independent review, since the First Amendment claimant prevailed below. This would not be any less fair to the restricting party than if it had lost at trial, since that party was never entitled to independent review, and the *Bose* rule served its purpose by over-protecting free speech. Neither should different standards of review at different levels in the appellate process create problems, since higher appellate courts are often not permitted to conduct factual reviews even though an intermediate appellate court may.[166]

If, still assuming *Bose* is a one-way street, the First Amendment claimant prevails at the trial level, but loses at the intermediate appellate level despite the absence of any independent review by the intermediate

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163 Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 (1984).

164 *See supra* notes 141–145 and accompanying text.

165 *See Bartimo*, 771 F.2d at 898 n.3 ("[Defendant's] argument would introduce the possibility of a particular record being reviewed by two different standards as it made its way through the appellate process. . . . We think judicial economy is best served by requiring the same standard of review at all levels, regardless of the outcome below.").

166 *Compare* N.Y. C.P.L. § 470.15(5) (1970) (granting New York intermediate appellate courts authority to reverse or modify a criminal judgment where the "judgment was, in whole or in part, against the weight of the evidence"), *with* N.Y. C.P.L. § 470.35 (1970) (granting the New York Court of Appeals no authority to weigh the evidence).

appellate court, the First Amendment claimant may be entitled to have the state high court or the Supreme Court conduct an independent review. In such circumstances, an instance may arise where the state high court is conducting a factual review even though the intermediate appellate court did not. However, where a First Amendment claimant prevails at the trial level but loses on his first appeal, there would probably not be many, if any, factual findings to be independently reviewed. This is so because the intermediate appellate court could have only reversed based upon a legal error apart from any factual determinations made by the trial court (assuming the intermediate appellate court did not find clear error). The First Amendment claimant would be appealing this *legal* error, and there would likely be few adverse factual findings made by the trial court—which ruled in favor of the First Amendment claimant—on which the higher appellate court would have to pass in order to resolve the *legal* question before it.

Even if the function of judicial economy would be better served if the same standard were automatically used throughout the appellate process, such an interest would have to yield in the face of a "rule of federal constitutional law."[167] It would likely also serve the interest of judicial economy to refuse to conduct independent review at all and merely defer to the trial court's factual findings. However, in the face of *Bose's* declaration that independent review is constitutionally required to protect First Amendment liberties,[168] no one could seriously contend that an interest in judicial economy could outweigh a concededly constitutional rule.

III. INDEPENDENT REVIEW SHOULD ONLY BE USED WHERE A FIRST AMENDMENT CLAIMANT LOSES BELOW

The purposes behind the independent review rule strongly counsel in favor of applying *Bose* only when a First Amendment claimant loses below.[169] The language in *Bose* indicates that *Bose's* purpose and goal of vigorously protecting First Amendment speech ought to prevail.[170] Yet because of broad language in the opinion, some

167 *Bose*, 466 U.S. at 510.

168 *Id*.

169 *See supra* notes 152–160 and accompanying text.

170 Childress, *supra* note 20, at 1322 ("[I]t should be recognized that the free review rule is about appealing censorship, not enabling appellate censorship. Thus, the institutional worry about judicial censorial bodies also includes appellate courts. Their own risks to expression rights are only exacerbated by providing a review rule that authorizes them to ignore a pro-speech finding. The enigma is that the independent review rule was designed specifically to protect speaker-defendants in defamation actions, and now it is being used to allow an appellate court to doubt freely a lower court's determination protecting defendants. The effect is that defendants winning below have less protection on appeal than they would if no First Amendment interests were involved at all. Ultimately, the power can mean that a pro-speech case like *Bose* would protect the government in its efforts to stifle speech."). *See also* Daily Herald Co. v. Munro, 838 F.2d 380,

have improperly interpreted it to suggest that *Bose* should be applied as a two-way street.[171]

The purposes behind the *Bose* rule strongly counsel in favor of conducting independent review only when the First Amendment claimant loses below, because applying the rule otherwise would give the government the benefit of independent review and result in an *under*protection of speech, rather than an *over*protection. Thus, the only argument in favor of applying *Bose* as a two-way street is to maintain symmetry in the law.[172] This interest in symmetry, however, does not appear from the Court's opinion in *Bose* to be of any meaningful significance. As discussed above, symmetry is often disregarded where greater, fundamental constitutional interests, such as First Amendment rights, are at stake.[173]

Furthermore, any interest in symmetry here is based on the notion that symmetrical procedures should prevail regardless of differences between the parties. The law may generally treat like parties alike—and strong policy considerations favor such symmetrical and equal treatment—but parties acting in completely different positions and pursuing completely different interests need not be treated symmetrically for the same of symmetry.[174]

The great importance ascribed to First Amendment speech in

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383 (9th Cir. 1988) (holding that the *Bose* rule "reflects a special solicitude for claims that the protections afforded by the First Amendment have been unduly abridged, while not affording special protection for the government's claim that it has been wrongly prevented from restricting speech") (internal punctuation omitted).

171 *See supra* note 148.

172 *See* Volokh, *supra* note 162, at 1027 ("Moreover, a symmetric rule is fairer to plaintiffs. Harassment plaintiffs' claims aren't of constitutional magnitude, but they're certainly important. I see no policy reason to treat these plaintiffs worse than defendants, assuming *Bose's* requirements are satisfied."). Volokh, however, argues that in workplace harassment claims—aside from where a special verdict is utilized—a jury finding in favor of a defendant generally cannot be subject to independent review by an appellate court. Volokh explains that, since there are multiple ways in which a defendant can win, it would be almost impossible for an appellate court to determine on which ground the jury based its conclusion. *Id*. at 1028–29.

173 *See supra* Part II.

174 Childress, *supra* note 20, at 1322 ("The only justification for the two-way street is a wholly formal thinking that makes 'equal process' apply regardless of the speaker. Yet, if there is any constitutional principle [*Bose*] is based on, it is free expression, not equality-to the extent free speech is inconsistent with the most *superficial and formal notions of equality that would force the same rule on quite different parties*."(emphasis added)). *See also id*. at 1322–23 (arguing that courts have mistakenly characterized the issue of actual malice independently reviewed in *Bose* as being one of "law"). Childress goes on to argue that, if malice is a question of law, then symmetrical review should apply, but if it a question of fact, then *Bose's* rationale should govern and *Bose* should be read as a one-way street. *Id*. at 1323 ("At bottom, the dilemma mirrors the general question of *Bose's* basis: If malice is 'legal,' then *de novo* review may apply in any case, but if *de novo* review applies because of the First Amendment, the symmetrical scrutiny of pro-speech findings defies the basic point of the doctrine. All the nebulous talk of mixed-question analysis appears to have confused the issue to the point of actually empowering appellate courts to exercise censorial discretion themselves, rather than providing the protection against it that the Court's legacy of independent judgment requires.").

Bose and *Times v. Sullivan* by the *Bose* court demonstrates that *Bose's* fundamental purpose of protecting speech need not be inhibited by a "superficial and formal notion[] of equality"[175] which would require symmetry for no reason other than to provide symmetry. Reading a symmetry requirement into *Bose's* holding would distort the purpose of the independent review rule and inhibit free speech claims from succeeding—a result which would seem to be the antithesis of *Bose's* stated goal of "preserv[ing] the precious liberties established and ordained by the Constitution."[176] Additionally, *Bose* suggests a preference for over-protection of First Amendment freedoms, and where independent review is applied symmetrically, that preference for over-protection and vigorous defense of First Amendment rights is substantially frustrated.

Thus, *Bose's* rule of independent review should be applied *only* where the First Amendment claimant lost below. *Bose* should be interpreted as a one-way street in order to further the speaker's interest in free speech, provide vigorous protection of First Amendment rights, and to refuse to further protect the government or a defamation plaintiff in its claim that speech should be restricted.

IV. CONCLUSION

Because the driving purpose behind *Bose* is to further enhance First Amendment protections, independent review should only be applied where the First Amendment claimant *loses* below, and not where the First Amendment claimant prevails.

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175 *Id*. at 1322.

176 466 U.S. 485, 511 (1984).