Harmless Error and Constitutional Remedies

Daniel J. Meltzer[†]

Twenty-five years ago, in *Chapman v California*, the Supreme Court ruled that a federal constitutional error at a state criminal trial requires a conviction's reversal unless the government can establish that the error was harmless beyond a reasonable doubt.¹ *Chapman* can be seen as having two holdings: first, that federal constitutional error can be deemed harmless; and second, that federal law governs the harmlessness of such an error in a state trial.² My concern is with the second of these holdings: that federal law often demands that state courts find errors prejudicial.

At first glance this holding hardly seems startling. For harmless error rules measure not only the likelihood that an error affected the outcome, but also how great a likelihood the law should deem acceptable. This normative judgment depends heavily upon the nature of the violation itself, and thus is "inseparable from the

[†] Professor of Law, Harvard Law School. A.B. 1972, J.D. 1975, Harvard. I am grateful to Dick Fallon and David Shapiro for very helpful comments, and to Arthur Long for superb research assistance. Also, I am grateful to the Harvard Law School Summer Research Program for providing financial support for this Article.

¹ 386 US 18, 23-24 (1967).

² See *id.* at 21-22.

task of defining the scope of th[e] constitutional right"—and clearly a matter of federal law.³

The *Chapman* opinion was cryptic, however, about the source of the rule it announced. The Court did state that "[w]hether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied."⁴ But the "federal question" was not said to be a *constitutional* question. Indeed, the Court suggested that Congress might modify the standard that *Chapman* set forth,⁵ leading Justice Harlan, in lone dissent, to object that the Court had no authority to prescribe subconstitutional rules of procedure for the states.⁶

Justice Harlan's dissent did not generate much debate in subsequent years about the legal basis for the *Chapman* rule. Perhaps, one might think, the Court should simply have rested the ruling squarely on the Constitution itself.⁷ Under that approach, asserts one commentator (who has written the most thorough analysis of the basis for a federal rule of harmless error), "there would, of course, have been little conceptual difficulty. The Supreme Court has the power to force state courts to follow the Federal Constitution under the supremacy clause."⁸

Yet even if *Chapman* had rested squarely on the Constitution, profound conceptual difficulty would remain. Since its 1894 decision in *McKane v. Durston*,⁹ the Court has repeatedly insisted, albeit in dicta, that the Constitution grants criminal defendants no right to appeal.¹⁰ At present, no state has eliminated all appellate

³ Paul M. Bator, et al, *Hart & Wechsler's The Federal Courts and the Federal System* 637 n 6 (Foundation, 3d ed 1988) ("Hart & Wechsler"). Accord, Roger J. Traynor, *The Riddle of Harmless Error* 40-41 (Ohio State, 1970).

⁴ 386 US at 21.

⁵ See *id.*

⁶ See *id.* at 47-48 (Harlan dissenting).

⁷ At least one commentator reads *Chapman* as a "constitutional judgment." See Stephen H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J Crim L & Criminology 421, 424 n 31 (1980).

⁸ Philip J. Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 Minn L Rev 519, 528 (1969).

⁹ 153 US 684 (1894).

¹⁰ See, for example, *Pennsylvania v. Finley*, 481 US 551, 555-56 (1987), quoting *Ross v. Moffitt*, 417 US 600, 610-11 (1974) (so stating in holding that indigent prisoners have no federal constitutional right to appointed counsel in collateral attacks on their convictions); *Jones v. Barnes*, 463 US 745, 751 (1983) (so stating in finding no constitutional violation when a convict's appointed counsel on appeal refused to press a non-frivolous issue that the

review of serious criminal convictions,¹¹ and perhaps these dicta no longer command respect. But suppose a state conferred on its appellate courts jurisdiction to reverse a criminal conviction only if the error probably affected the outcome¹²—a standard far less protective of defendants than that of *Chapman*. Why would affirmance of a conviction under that standard raise a federal question if the state might have provided no appeal whatsoever?

For the most part, the Court and commentators have passed by this question entirely, focusing instead on the content of the harmless error standard.¹³ Thus, commentators have discussed, often critically, the Supreme Court's extension of the range of is-

client wished to press); *Ross*, 417 US at 606, 611 (so stating in holding that indigent convicts have no right to appointed counsel in connection with a second, discretionary appeal to the state supreme court, or with a petition for a writ of certiorari to the United States Supreme Court); *McKane*, 153 US at 687 (so stating in holding that a convict has no absolute right to bail pending appeal).

A recent student note has argued that the Court essentially overruled *McKane* by stating in *Bryant v Akron Metropolitan Park District* that "the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance." 281 US 74, 80 (1930). Proof of constitutional error at trial, the note argues, demonstrates that due process was not provided and hence triggers a right to appeal. Note, *The Right to Appeal and Appellate Procedural Reform*, 91 Colum L Rev 373, 377-78 (1991).

This argument conflates two different meanings of due process. The first is whether the trial court's procedural rulings were correct as a matter of federal constitutional law—for example, whether the court properly interpreted the Confrontation Clause. The second is whether the trial court provided a fair opportunity to litigate the defendant's constitutional claims; whether or not in deciding, for example, a Confrontation Clause issue, the trial court in the end "got it right." See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv L Rev 441, 483-93 (1963); see particularly *id* at 485, citing *Frank v Mangum*, 237 US 309, 334 (1915) ("[D]ue process of law . . . does not mean that the operations of the state government shall be conducted without error. . . ."). One could find that there is no due process right to an appeal so long as the trial process was fair, even if another tribunal reviewing the record would conclude that the trial court had erred.

There may be some constitutional issues—for example, the bias of a trial judge, or the ineffectiveness of counsel—that can be adequately raised only in a post-conviction setting, and that therefore may entail a limited right to an appeal or some other form of post-conviction relief. See Note, 91 Colum L Rev at 378-79. But that is a far narrower argument.

¹¹ See *Bundy v Wilson*, 815 F2d 125, 136-42 (1st Cir 1987); Marc M. Arkin, *Rethinking the Constitutional Right to A Criminal Appeal*, 39 UCLA L Rev 503, 513-14 (1992).

¹² Compare Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 Va L Rev 988, 1019 (1973) (criticizing a standard requiring reversal only where a conviction was "clearly wrong").

¹³ See, for example, Traynor, *Harmless Error* (cited in note 3); Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of A Rationale*, 125 U Pa L Rev 15, 21-58 (1976); Tom Stacy and Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 Colum L Rev 79, 82-88 (1988). Articles that do take note of the problem include Saltzburg, 59 Va L Rev at 1028, and Mause, 53 Minn L Rev at 531 (cited in note 8).

sues that can be subjected to harmless error analysis,¹⁴ as when the Court recently rejected its long-stated position that introduction of a coerced confession requires automatic reversal.¹⁵ Also controversial was the Court's decision last Term in *Brecht v Abrahamson* that when federal courts determine, under their habeas corpus jurisdiction, whether a federal constitutional error infected a state criminal conviction, an error should be deemed harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict."¹⁶ That formulation is less protective of criminal defendants than the "harmless beyond a reasonable doubt" standard that, under *Chapman*, governs on direct review. More generally, there is a widespread perception that in the Supreme Court, as well as in state and lower federal courts, errors of some substance are nonetheless found harmless so as to permit the affirmation of convictions.¹⁷ But why should a decision holding an error harmless on appeal be controversial if the state could dispense with appeals altogether?

The Court's decisions fail to give much attention at all to this question. Thus, last Term in *Sullivan v Louisiana*, the Court ruled unanimously that a constitutionally deficient instruction on the reasonable doubt standard can never be harmless error.¹⁸ But the Court's opinion—written by Justice Scalia, who is not shy in questioning the underpinnings of established doctrines—simply accepted *Chapman* without question.¹⁹ The Court's opinion in *Brecht* earlier in the Term was equally silent; Justice White's dis-

¹⁴ See, for example, Henry P. Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 S Ct Rev 195, 207-08.

¹⁵ *Arizona v Fulminante*, 111 S Ct 1246, 1257 (1991). The Court's holding has been widely criticized. See, for example, Charles J. Ogletree, Jr., *The Supreme Court, 1990 Term—Comment: Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 Harv L Rev 152, 161-75 (1991); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 Colum L Rev 1369, 1382-83 (1991); John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U Chi L Rev 13, 16 & n 9 (1992). I confess to seeing no reason why a coerced confession might not be deemed harmless, while recognizing that it will be a rare case in which harmlessness beyond a reasonable doubt can be established.

¹⁶ 113 S Ct 1710, 1714 (1993), quoting *Kotteakos v United States*, 328 US 750, 776 (1946).

¹⁷ See, for example, Francis A. Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 Iowa L Rev 311, 329-35 (1985); Stacy and Dayton, 88 Colum L Rev at 127-31 (cited in note 13).

¹⁸ 113 S Ct 2078, 2081-82 (1993).

¹⁹ See id at 2081. The same is true of Justice Rehnquist's concurring opinion. See id at 2083 (Rehnquist concurring).

senting opinion in *Brecht* was unusual in its willingness even to acknowledge that there is some question about the doctrine's roots:

Chapman, it is true, never expressly identified the source of [its] harmless error standard. But, whether the standard be characterized as a "necessary rule" of federal law, or criticized as a quasi-constitutional doctrine, the Court clearly viewed it as essential to the safeguard of federal constitutional rights. Otherwise, there would have been no justification for imposing the rule on the state courts. As far as I can tell, the majority does not question *Chapman's* vitality on direct review and, therefore, the federal and constitutional underpinnings on which it rests.²⁰

I do not claim that investigation of the conceptual uncertainties that underlie the federal harmless error rule will yield clear and certain answers to all of the controversial aspects of the doctrine that have been debated in recent years. Still, one cannot begin to think about those questions without some background understanding of the basis for the doctrine in general. I hope to develop such an understanding in this Article.

My conclusion, in brief, is that it is not possible to reconcile the lack of any right to a criminal appeal with a view of *Chapman* as a simple constitutional decision, irreversible by Congress. Indeed, *Chapman* is hard to rationalize as a decision of "pure" constitutional law even if one does not take seriously the oft-repeated dicta that there is no constitutional right to a criminal appeal. Rather, *Chapman* is best viewed as a rule of constitutional common law, born of concern that state courts, if left free to apply their own harmless error standards, would dilute federal constitutional norms by too easily finding that constitutional errors were not prejudicial. I will defend that understanding of *Chapman* and proceed to explore its implications.

I. A CONSTITUTIONAL RIGHT TO APPEAL?

One response to the apparent tension between *Chapman* and the lack of any established right to appeal is to disparage the declarations—never set forth in a case in which the right to appeal

²⁰ 113 S Ct at 1726 (White dissenting) (citations omitted). Justice O'Connor's separate dissent noted that "as Justice White observes . . . , one searches the majority opinion in vain for a discussion of the basis for *Chapman's* harmless-error standard. We are left to speculate whether *Chapman* is the product of constitutional command or a judicial construct that may overprotect constitutional rights." Id at 1729 (O'Connor dissenting).

had been eliminated altogether²¹—that no such right exists.²² On this view, one notes that in practice states uniformly provide some mechanism for appellate review²³ and argues that today a state could not constitutionally repeal or seriously restrict a right to appeal, at least in a criminal case.²⁴ I would like to explore both the plausibility of this view and its implications for the *Chapman* rule.

A. The Basis for the Conventional View

The conventional view that there is no constitutional right to appellate process rests initially and perhaps primarily on textual and historical arguments. The Bill of Rights, though it grants many procedural rights to criminal defendants, says nothing of a right to an appeal.²⁵ No general right to an appeal existed in colonial or English practice²⁶ or in the states at the time of the Founding.²⁷ Congress provided no such right in the federal courts when it enacted the Judiciary Act of 1789,²⁸ and did not confer a general right of appeal to all federal criminal defendants until 1891.²⁹

B. Challenges to the Received Wisdom

Several writers not concerned specifically with the issue of harmless error have argued in favor of a federal constitutional

²¹ See the cases cited in note 10.

²² See Note, 91 Colum L Rev at 377-78 (cited in note 10).

²³ See text accompanying note 11.

²⁴ Compare *Bundy v Wilson*, 815 F2d 125, 132-35 (1st Cir 1987) (holding unconstitutional New Hampshire's policy of not guaranteeing a felony criminal defendant access to a trial transcript and an opportunity for argument before their petition for appellate review could be dismissed—a disposition that did not reach the merits); Arkin, 39 UCLA L Rev at 576-80 (cited in note 11) (arguing that the Supreme Court should re-examine its holding in *McKane*); Note, 91 Colum L Rev at 375-86 (cited in note 10) (arguing that it would be unconstitutional for a state to withdraw the right to appeal).

²⁵ See *Medina v California*, 112 S Ct 2572, 2576 (1992) (stating that the explicitness of Bill of Rights provisions with respect to criminal procedure counsels against implying additional protections under the Due Process Clause). See also David Rossman, "Were There No Appeal": The History of Review in American Criminal Courts, 81 J Crim L & Criminology 518, 555 (1990) ("[N]othing in the Congressional debates over the Bill of Rights directly addressed . . . review of criminal convictions.").

²⁶ See Arkin, 39 UCLA L Rev at 522 (cited in note 11); Rossman, 81 J Crim L & Criminology at 541.

²⁷ See Arkin, 39 UCLA L Rev at 521 n 79.

²⁸ See, for example, Rossman, 81 J Crim L & Criminology at 522, 556-59.

²⁹ Act of March 3, 1891, ch 517 § 5, 26 Stat 826. See also Arkin, 39 UCLA L Rev at 522-23; *Griffin v Illinois*, 351 US 12, 20-21 (1956) (Frankfurter concurring in the judgment) (noting that appeals from federal convictions were not granted for "nearly a hundred years").

right to an appeal.³⁰ Here I will simply try to summarize the arguments they present.

1. The complexities of the history.

While not disputing the points just noted, some of these writers have insisted that a more nuanced look at historical practice reveals difficulties with the broad claim that at common law there was no right to an appeal. For in the eighteenth and nineteenth centuries many jurisdictions followed procedures that served some of the functions of a modern appeal, including: (a) circuit-riding or other mechanisms whereby the views of judges of the state's highest court could inform a trial court decision,³¹ (b) post-conviction motions,³² (c) trials before a panel of several judges,³³ (d) executive and legislative review of criminal convictions,³⁴ (e) trial de novo in a higher court,³⁵ and (f) in some cases, review via a writ of error.³⁶

It is obviously not easy to reason from these practices—none of which was uniformly followed—to a right to an appeal as presently understood. Indeed, a thoughtful study of these features concluded that “[t]he major justification for review of criminal convictions in the eighteenth century rested on institutional rather than individual concerns”—primarily the concern for promoting uniformity.³⁷ Moreover, the various arrangements mentioned plainly serve quite various purposes, and thus require one to consider whether the critical feature of any claimed right to appeal is (a) a chance to re-argue that an error was made, even before the same judge who allegedly erred, (b) a chance to argue before different judges that an error was made, (c) a decision informed by the views of the jurisdiction's highest court, or (d) a decision made by

³⁰ See, for example, Arkin, 39 UCLA L Rev at 571-80; Note, 91 Colum L Rev at 375-86 (cited in note 10); Rossman, 81 J Crim L & Criminology at 518-20; Harry G. Fins, *Is the Right of Appeal Protected By the Fourteenth Amendment?*, 54 Judicature 296, 297 (1971).

³¹ See Rossman, 81 J Crim L & Criminology at 529-31.

³² See Arkin, 39 UCLA L Rev at 531-32; Rossman, 81 J Crim L & Criminology at 532-34.

³³ See Rossman, 81 J Crim L & Criminology at 534-37.

³⁴ See id at 537-39 (noting, however, that executive review (appeal to the Crown) was “too inconvenient and costly to be of much practical significance,” and was used extensively only in Rhode Island); Arkin, 39 UCLA L Rev at 526-27.

³⁵ See Rossman, 81 J Crim L & Criminology at 539-40.

³⁶ See Arkin, 39 UCLA L Rev at 533; Rossman, 81 J Crim L & Criminology at 541-42. The federal practice included circuit riding (though not, of course, to hear appeals from district court convictions), post-trial motions, opportunity in some circumstances for certification to the Supreme Court, and limited review via habeas corpus. See Arkin, 39 UCLA L Rev at 537-42; Rossman, 81 J Crim L & Criminology at 560-64.

³⁷ Rossman, 81 J Crim L & Criminology at 549.

more than one judge.³⁸ To be sure, early American criminal practice, because it does not present a stark picture of decisions made by a single trial judge subject to no further review, is not inconsistent with the claim that some kind of review is constitutionally required. But the historical picture hardly provides fertile soil for such a claim.

2. Policy and contemporary practice.

A distinct strand of argument contends that whatever the historical record reveals, appeals have come to have central importance in American practice. Expanded rights of defendants and greater legal complexity increase the likelihood that errors may be committed.³⁹ Fragmentary evidence suggesting that reversal rates in criminal appeals range from just under 5% to close to 14% in various state systems or federal circuits, and that rates of "modification" of judgment short of reversal are higher still, highlights the practical importance to defendants of appellate review.⁴⁰ The provision of some form of appellate review, at least in serious cases, by the federal government and all 50 states today reflects a social consensus that such review is necessary. These arguments of policy and contemporary practice provide important support for the claim that criminal appeals are constitutionally required.

3. The due process calculus.

Finally, some proponents of a constitutional right to a criminal appeal rely on the open-ended balancing formulation of *Mathews v Eldridge*.⁴¹ They argue that in criminal cases, the private liberty interest is of paramount importance; the risk of erroneous conviction, as just noted, is not insignificant; and the burden on the government cannot be deemed too heavy when considered in light of

³⁸ See, for example, 4 *ABA Standards for Criminal Justice*, Criminal Appeals, Standard 21-1.2, Commentary at 21.9-21.10 (Little, Brown, 2d ed 1980) (suggesting that the last three features listed comprise the "threefold purpose" of the right to an appeal).

³⁹ See Arkin, 39 *UCLA L Rev* at 574-75 (cited in note 11).

⁴⁰ *Id.* at 515-16. Of course, even a reversal may not in the end change the outcome; the defendant might, for example, be convicted after retrial, or the case might be reversed and remanded for a hearing that results in no relief. Compare Robert T. Roper and Albert P. Melone, *Does Procedural Due Process Make a Difference? A Study of Second Trials*, 65 *Judicature* 136, 139 (1981) (noting that of 1159 federal criminal cases remanded after an appeal between fiscal 1975 and 1979, the second proceeding reached a different outcome in 51.1%).

⁴¹ 424 US 319 (1976).

existing state practice uniformly providing such appeals.⁴² The First Circuit relied on just such an approach in holding unconstitutional a 1979 New Hampshire rule that authorized its Supreme Court, which was the state's only appellate court, to deny a criminal defendant's petition for review (not a decision on the merits) without providing the defendant with either a trial transcript or an opportunity to argue the merits.⁴³

C. Implications of the Revisionist View

Even this brief sketch should make clear that the argument for constitutionalizing a right to a criminal appeal, like so many constitutional arguments, has both considerable force and obvious difficulties. I have some sympathy for the revisionist approach,⁴⁴ although there are important countervailing concerns⁴⁵ and reasons to doubt that the current Court will follow this path.⁴⁶ But even if

⁴² See, for example, Note, 91 Colum L Rev at 382-86 (cited in note 10) (applying the *Mathews* balancing test to the right of appeal in criminal cases).

⁴³ See *Bundy v Wilson*, 815 F2d 125, 131-35 (1st Cir 1987). Under the rule, the New Hampshire Supreme Court could "in its discretion, decline to accept an appeal from a lower court after a decision on the merits" after having reviewed only the notice of appeal. *Id.* at 126. As summarized by the First Circuit, the notice of appeal set forth "(1) A 'brief description' of the nature of the case and the result. (2) The statute on which the case was based. (3) The 'specific questions to be raised on appeal, expressed in terms and circumstances of the case but without unnecessary detail.' (4) A list of cases supporting the movant's position." *Id.* at 128-29. To the notice of appeal, an appellant could append pleadings, trial court rulings, and other material, but not an argument why an appeal should be accepted. See *id.* at 129.

⁴⁴ I confess to having accepted somewhat uncritically the conventional view that there is no constitutional right to an appeal. See Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv L Rev 1731, 1770-71 (1991); Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 Ind L J 291, 298 (1990).

⁴⁵ The massive increase in appellate dockets in recent years suggests that the institutional burden imposed by a constitutional right to appeal would be, in fact, considerable. See Arkin, 39 UCLA L Rev at 547 (cited in note 11). Thus, notwithstanding the provision of appeals in all 50 states, constitutionalizing a right to appeal might be thought to give insufficient weight to the third *Mathews* factor, the burden imposed on the government.

⁴⁶ Five of the sitting Justices are on record (though generally in dicta) that there is no right to an appeal. See *Pennsylvania v Finley*, 481 US 551, 555-56 (1987) (opinion of Rehnquist, joined by White, Powell, O'Connor, and Scalia), quoting *Ross v Moffitt*, 417 US 600, 610-11 (1974); *Jones v Barnes*, 463 US 745, 751 (1983) (opinion of Burger, joined by White, Powell, Rehnquist, Stevens, and O'Connor); *Murray v Giarratano*, 492 US 1, 22-23 (1989) (Stevens dissenting, joined by Brennan, Marshall, and Blackmun) (dictum) (conceding that there is generally no right to an appeal in a non-capital case).

In *Jones*, Justice Blackmun refused to join the opinion of the Court because he found it unnecessary to decide "whether there is or is not a constitutional right to a first appeal of a criminal conviction. . . ." 463 US at 754 (Blackmun concurring in judgment). More recently, however, he joined in Justice Stevens's dissent in *Murray*, 492 US at 22-23 (Stevens dissenting), conceding, albeit in dictum, that there is generally no right to an appeal.

the argument for a constitutional right to an appeal (at least in serious criminal cases) were accepted, what implications would that right have for harmless error doctrine?

Presumably, chief among the purposes of recognizing such a right would be to reduce the likelihood that a defendant has been convicted at a trial that violated his rights, constitutional or otherwise. To promote that purpose, an appeal must promise reversal of the conviction in appropriate cases. But what are "appropriate cases?" Surely not every error demands reversal. Limits upon appellate relief when a defendant violates state procedural rules (as by failing to file a timely notice of appeal)⁴⁷ or limits on reversal when an error is unquestionably harmless would be permissible. Still, an unduly broad conception of harmlessness (for example, one requiring the defendant to prove that the error probably affected the outcome) could threaten the right to reversal that would be encompassed by such a right to appeal. Hence, a federal right to appeal would have to include some limits on what errors a state can deem harmless.

But even this approach would remain hard-pressed to explain *Chapman's* doctrine. For under *Chapman*, federal law governs the

There are strong reasons to believe that Justice Souter will also subscribe to the no-right-to-appeal position. While on the New Hampshire Supreme Court, he joined a decision upholding the constitutionality of the New Hampshire Supreme Court rule and stressing the lack of any right to a criminal appeal. See *State v. Cooper*, 498 A2d 1209, 1211-12, 1216 (NH 1985). In a subsequent habeas corpus proceeding, the First Circuit held the rule unconstitutional. See *Bundy*, 815 F2d at 131-35 (discussed in note 43).

Justices Kennedy and Thomas also appear likely to adopt the conventional position. Justice Kennedy wrote the opinion for the Court in *Medina v. California*, 112 S Ct 2572, 2576-77 (1992), which, in upholding the constitutionality of placing on a criminal defendant the burden of proof as to his competency to stand trial, suggested that the *Mathews* balancing test had little if any relevance in criminal cases. Justice Kennedy declared that because "[t]he Bill of Rights speaks in explicit terms to many aspects of criminal procedure," the Court, rather than expanding "those constitutional guarantees under the open-ended rubric of the Due Process Clause," should ask only whether the challenged provision "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Id at 2576-77, quoting *Patterson v. New York*, 432 US 197, 202 (1977) (internal quotations omitted). Justice Thomas, who generally finds originalist arguments attractive and takes a narrow view of constitutional rights, also joined Justice Kennedy's opinion in *Medina*.

Compare *Whitmore v. Arkansas*, 495 US 149, 167 (1990) (Marshall dissenting) ("This Court has held that the Constitution does not require States to provide appellate review of noncapital criminal cases."), and *Pennzoil v. Texaco*, 481 US 1, 31 & n 4 (1987) (Stevens concurring in the judgment) (same view of precedent), with *Jones*, 463 US at 756 n 1 (Brennan, joined by Marshall, dissenting) (arguing that the majority's statement that no right exists was unnecessary and "quite arguably wrong").

⁴⁷ See, for example, Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv L Rev 1128, 1133-35, 1145 (1986).

harmlessness only of federal constitutional errors; whether errors of state law are to be treated as harmless is left to the states. But if the goal of a right to an appeal is to avoid erroneous convictions, the correction of a state trial court's errors in applying local evidence rules or in instructing the jury on the elements of a criminal offense can be just as important as the correction of constitutional errors.⁴⁸ Thus, federal limits on harmless error drawn from a right to appeal would seem to encompass all errors, not just those of federal constitutional law.

Moreover, acceptance of a constitutional right to appeal cannot explain why all courts reviewing a criminal conviction must apply federal harmless error rules. It seems implausible that the Constitution could require more than one appeal. Thus, if a state intermediate appellate court affirmed a trial court judgment, the convicted defendant would have no constitutional right to a further appeal to the state supreme court, or indeed to the United States Supreme Court.⁴⁹ Therefore, the state supreme court would be free to apply whatever harmless error rule it wished. Yet all state courts have been assumed to be obliged to apply *Chapman* when reviewing criminal convictions.

These and other difficulties⁵⁰ suggest that even if a constitutional right to an appeal were recognized, at least the current ver-

⁴⁸ This point is implicit in *Griffin v Illinois*, 351 US 12, 18-19 (1956), which held that where trial transcripts are necessary for a state court defendant effectively to appeal, they must be made available to indigent appellants. That a convict could obtain a transcript in state post-conviction processes did not cure the problem, the plurality noted, as those processes were limited to constitutional issues. See *id.* at 15 (opinion of Black).

Professor Fallon has argued that when Article III courts review decisions by non-Article III tribunals, constitutional issues—at least issues of law—deserve special treatment. See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv L Rev 915, 975-76 (1988). But see Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum L Rev 229, 267-71 (1985), criticizing the view that the Constitution requires “appellate courts to exercise independent judgment on adjudicative facts decisive of constitutional law application.” Professor Fallon later appears to argue that all questions of law require review. See Fallon, 101 Harv L Rev at 976-82. His argument rests upon special concerns about the separation of powers, as well as about fairness to litigants.

Neither concern is particularly apposite in the context of harmless error. Separation of powers requirements are generally inapplicable to state governments. See *Crowell v Benson*, 285 US 22, 57 (1932); *Dreyer v Illinois*, 187 US 71, 83-84 (1902); Meltzer, 65 Ind L J at 296 (cited in note 44). Moreover, unlike non-Article III tribunals and Article III courts, state trial and appellate courts are both part of the judicial branch. And as a practical matter, fairness to litigants may depend as much on the correct application of state as of federal law.

⁴⁹ The latter point raises additional complexities. See note 88.

⁵⁰ To premise the *Chapman* rule on a right to appeal, one would also need to determine whether the right extends to all criminal cases (even traffic offenses?), and exactly what

sion of harmless error doctrine does not follow easily. It remains to explore other possible sources for existing doctrine.

II. OTHER POSSIBLE CONSTITUTIONAL LIMITS ON STATE POWER TO TREAT ERRORS AS HARMLESS

Are there other possible constitutional provisions that might provide the basis for *Chapman*—and that might explain why, though a state may constitutionally dispense with appeals altogether, it lacks the freedom to follow whatever harmless error standard it deems appropriate? A short answer is that the greater power does not always include the lesser: sometimes it does, sometimes it does not, and often it is exceedingly difficult to tell which cases are which.⁵¹ Is there, however, a persuasive argument for holding that the greater power to dispense with an appeal does not carry with it the lesser power to remedy only those constitutional errors that an appellate court finds, for example, have probably affected the outcome?

A. Prohibitions Against Discrimination

Although states need not provide appeals, once they do so the means they adopt are subject to other constitutional requirements, including the dictates of the Equal Protection Clause.⁵² A state may not restrict appeal rights to persons who are white or Protestant or whose last names begin with Q. The Supreme Court's holdings that states may not constitutionally deny indigent appellants free transcripts,⁵³ or appointed counsel,⁵⁴ or the effective assistance of counsel on appeal⁵⁵ can be similarly explained: at least as to aspects of the appellate process that are "integral" to the state's

form of appellate process is constitutionally required. See Saltzburg, 59 Va L Rev at 1028 n 148 (cited in note 12). See also text accompanying notes 30-38.

⁵¹ See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv L Rev 1413, 1421-42, 1456-68 (1989); Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv L Rev 4 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problems of Negative Rights in a Positive State*, 132 U Pa L Rev 1293, 1304-14, 1326-51 (1984).

⁵² See *Griffin v Illinois*, 351 US 12, 34-38 (1956) (Harlan dissenting); Scott H. Bice, *The Limited Grant of Certiorari and the Justification of Judicial Review*, 1975 Wis L Rev 343, 374.

⁵³ *Griffin*, 351 US at 18-19.

⁵⁴ *Douglas v California*, 372 US 353, 356-58 (1963).

⁵⁵ *Evitts v Lucey*, 469 US 387, 396 (1985).

criminal justice system, discrimination on the basis of wealth is constitutionally invidious.⁵⁶

A more difficult case would be presented by a state statute authorizing appeals but barring consideration of free speech claims (even, for example, in criminal convictions for obscenity). Such a limitation on appellate review would not discriminate invidiously against indigents or against any suspect class, but it might nonetheless be constitutionally vulnerable. First, well-established law bars states, in conferring jurisdiction on their courts, from discriminating against federal rights—although a state that precluded review of free speech claims based on the state as well as the federal constitution would less obviously be engaged in such discrimination.⁵⁷ Second, some have argued (although I am not convinced) that a government denies equal protection when it distinguishes among constitutional rights and grants litigants fewer opportunities to litigate some rights than others.⁵⁸

⁵⁶ The *Griffin* decision referred to the Due Process and Equal Protection Clauses together, see 351 US at 18, and *Douglas* referred generally to the Fourteenth Amendment, see 372 US at 356-58, although the key concern in both was invidious discrimination against the poor. See *Griffin*, 351 US at 16-19, 28-29 (Burton and Minton dissenting), 34 (Harlan dissenting); *Douglas*, 372 US at 354-58. In *Ross v Moffitt*, the Court accurately remarked that "[t]he precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment. Neither Clause by itself provides an entirely satisfactory basis for the result reached . . ." 417 US 600, 608-09 (1974). On the due process argument, see note 59.

The equal protection argument finds echoes in discussions of congressional control of the jurisdiction of the federal courts, which conventionally distinguish between "internal restraints"—possible limits, drawn from Article III itself, on congressional power to legislate with respect to the jurisdiction of Article III courts—and "external restraints"—limits imposed by other constitutional provisions (such as the Equal Protection Clause or the First Amendment) on such congressional power. See, for example, *Hart & Wechsler* at 383-84 (cited in note 3).

⁵⁷ See, for example, *Howlett v Rose*, 496 US 356, 370-75, 379-81 (1990). I would have thought the state would not be engaged in discrimination when analogous state and federal claims are treated identically. But *Felder v Casey*, 487 US 131, 134 (1988), suggests otherwise. There, the Court refused to permit a state court to apply a state notice-of-claim statute in an action under 42 USC § 1983. *Id.* at 153. The statute conditioned the right to sue a governmental body or one of its officers in state court on the plaintiff's having provided notice to the putative defendant within 120 days of the alleged injury. See *id.* at 136; Wis Stat § 893.80(1)(a) (1983 & Supp 1987). Although the statute treated federal law and state law claims no differently, the Court found that the statute discriminated against federal civil rights actions. See *Felder*, 487 US at 138-41, 145. I believe that this is a doubtful basis for a result that could have been justified on other grounds. See Paul M. Bator et al, *Hart & Wechsler's The Federal Courts and the Federal System*, 1993 Supplement 68, 79-82 (Foundation) ("Hart & Wechsler Supplement").

⁵⁸ Compare Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv CR-CL L Rev 129, 135-56 (1982) (Congress may not constitutionally restrict the federal courts from exercising jurisdiction to enforce "disfa-

But even were one to accept either of these difficult arguments, a state rule that treats as harmless any error that probably did not affect the outcome seems easily distinguished. It discriminates neither against federal rights in general (federal and state errors are treated no differently in determining their harmlessness) nor against particular federal rights. Nor does it seem irrational to distinguish errors that probably did not affect the outcome from those that probably did. The *Chapman* rule similarly distinguishes between harmless and prejudicial errors, albeit with a narrower view of when errors are harmless. Whatever the merits of a broader or narrower view, the narrower view hardly lacks a rational basis.⁵⁹ Thus, harmless error rules do not run afoul of the Equal Protection Clause.

B. Unconstitutional Conditions

One situation in which the greater power does not include the lesser is when a law creates an "unconstitutional condition." For example, that a state need not establish public libraries at all does not give it the lesser power to set up libraries restricted to Democratic users.⁶⁰ If states need not provide criminal appeals, does a similar principle require states, if they do provide such appeals, to observe a federal standard of harmless error?

Here, too, the constitutional argument falls short. For to object that a state cannot condition its appeals on enforcement of a

vored" rights while exercising jurisdiction over other constitutional claims), with *Hart & Wechsler* at 383-84 (cited in note 3), and Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 *Stan L Rev* 895, 916-22 (1984) (questioning that argument).

⁵⁹ The Court's decisions voiding rules that disadvantage indigent appellants might be traced to the Due Process Clause. In *Douglas*, Justice Harlan's dissent argued that the Equal Protection Clause was inapposite, as the state is not obliged to redress economic imbalances. See 372 US at 362 (Harlan dissenting). His position has generally been accepted in subsequent cases. See, for example, *San Antonio Independent School District v Rodriguez*, 411 US 1, 27-29 (1973). Although Justice Harlan had dissented in *Griffin*, 351 US at 27-37 (Harlan dissenting) (arguing against requiring the state to provide free transcripts to indigent criminal appellants), his dissent in *Douglas* accepted *Griffin* as a due process holding. See *Douglas*, 372 US at 361 n 1 (Harlan dissenting). Justice Harlan then framed the question posed in *Douglas* as "whether the State's rules with respect to the appointment of counsel are so arbitrary or unreasonable, in the context of the particular appellate procedure that it has established, as to require their invalidation." *Id* at 365 (emphasis in original). See also *Lucey*, 469 US at 401 ("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."); Bice, 1975 *Wis L Rev* at 374-75 (cited in note 52). A test of reasonableness or non-arbitrariness is much the same whether framed under the Due Process or the Equal Protection Clause.

⁶⁰ See, for example, Sullivan, 102 *Harv L Rev* at 1421-28 (cited in note 51).

harmless error standard less favorable to defendants than *Chapman* requires some independent explanation of why the Constitution requires the *Chapman* standard—an analogue to the First Amendment right of library patrons not to belong to the Democratic party. Thus, the argument is incomplete and returns us to the problem of establishing the right to application of the *Chapman* standard absent any established right to an appeal in a criminal case.

Moreover, “[n]ot all constitutional rights are implicated in unconstitutional conditions cases. By its very nature, the doctrine serves to protect only those rights that depend on some sort of exercise of autonomous choice by the rightholder, such as individual rights to speech, exercise of religion[,] or privacy”⁶¹ Conditioning library access (or criminal appeals) on membership in the Democratic party interferes with an individual’s freedom to exercise constitutional rights. But a state law providing that one’s conviction may be reversed only by proving that the error probably affected the outcome does not create pressure to change one’s primary behavior so as to forgo the exercise of constitutional rights. For these reasons, a state harmless error rule does not fall within the doctrine that proscribes unconstitutional conditions.

C. *Marbury v Madison*, The Rule of Law, and the Justification for Judicial Review

Can we make sense of the *Chapman* rule as a matter of judicial integrity required by due process or by fundamental presuppositions about judicial review? The argument would begin with the basic premise that, like other courts, appellate courts with jurisdiction over a case are obliged to apply the Constitution. After all, the primary justification for judicial review in *Marbury v Madison* was that the Court was obliged to apply all the relevant law, including the Constitution, to a case at bar.⁶² The argument would then conclude that application of the Constitution demands reversal of convictions tainted by constitutional error, unless the *Chapman* standard can be satisfied.

The basic premise, though correct as applied in certain circumstances, fails to sustain the argument as applied here. *Marbury* was, after all, a case brought in the Supreme Court’s *original* juris-

⁶¹ Id at 1426.

⁶² 5 US (1 Cranch) 137, 177-78 (1803); Herbert Wechsler, *The Courts and the Constitution*, 65 Colum L Rev 1001, 1005-06 (1965); Fallon and Meltzer, 104 Harv L Rev at 1771 (cited in note 44).

diction.⁶³ It is easy enough to find that a trial court, particularly in an enforcement action, is obliged to apply all of the law; a defendant may not constitutionally be sanctioned by a court without having had an opportunity that comports with due process to make his defenses.⁶⁴ It is quite a different question whether an appellate court is obliged to decide all the issues that had been before the trial court, particularly if we assume that criminal appeals, unlike criminal trials, are constitutionally gratuitous.

Indeed, well-entrenched practice calls into question whether an appeal must extend to every issue in a case. The Supreme Court has long granted certiorari limited to particular issues.⁶⁵ If Congress may authorize the Court to exercise jurisdiction without deciding every issue raised by the litigants, why may not a state give its appellate courts jurisdiction to reverse only on the basis of certain kinds of errors—those most likely to have been prejudicial?⁶⁶ Indeed, a distinction between more or less prejudicial errors may be easier to justify than one distinguishing between more or less “important” issues.⁶⁷

⁶³ See Bice, 1975 Wis L Rev at 390-400 (cited in note 52).

⁶⁴ See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv L Rev 1362, 1374-83 (1953); Alfred Hill, *Constitutional Remedies*, 69 Colum L Rev 1109, 1111-12 (1969).

⁶⁵ See generally Bice, 1975 Wis L Rev at 346-62.

⁶⁶ Similarly, when states establish post-conviction review mechanisms, the courts' jurisdiction is sometimes limited to errors deemed “fundamental.” See, for example, *Reeves v State*, 726 SW2d 366, 367 (Mo App 1987); *Maxfield v State*, 700 P2d 115, 121 (Idaho App 1985); *Woodard v State*, 617 SW2d 861, 864 (Ark 1981). See also *Cutbirth v State*, 751 P2d 1257, 1261 (Wyo 1988) (holding that post-conviction relief is limited to questions “of constitutional magnitude which manifest a miscarriage of justice”). I know of no cases that have required states to hear every issue simply because they have agreed to hear others. If appeals are just as much a constitutional gratuity as state collateral remedies, it is not apparent why states should not have equal latitude in deciding which issues merit reversal on appeal.

⁶⁷ See note 58. Perhaps one can argue that the practice of limited grants of certiorari preserves a considerable measure of judicial integrity, for the decision not to review a particular issue is made by a court, not a legislature. Thus, in the context of a petition for certiorari, every litigant has the opportunity to have all issues heard by the Court. Compare Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 BU L Rev 205, 267-69 (1985) (arguing that discretionary Supreme Court review on certiorari is consistent with the letter of Article III, but may violate its spirit). By contrast, insofar as a state harmless error rule is legislatively prescribed, a court could be precluded from granting relief that it deemed necessary or appropriate.

Yet given current certiorari practice, a particular litigant's opportunity to obtain Supreme Court review is only theoretical. In a state criminal case, for example, the likelihood that the Supreme Court, when it grants review on some cert-worthy issue, would also review a garden-variety challenge to the sufficiency of the evidence under *Jackson v Virginia*, 443 US 307, 324 (1979), or a claim that the police lacked probable cause in making an arrest, is very small indeed—not simply in practice but by design. See generally H.W. Perry, Jr.,

There is a second difficulty with the view that application of state law harmless error rules would preclude a court from applying "all the law." As Richard Fallon and I have argued, the question whether to reverse a judgment on appeal (or more generally after conviction) is best viewed as a question of the law of remedies.⁶⁸ Harmless error doctrine addresses "whether a particular form of relief—the reversal of a conviction or the vacation of a judgment—should be available to redress the past wrong."⁶⁹ Thus, a court that denies relief in the face of a meritorious claim that there was constitutional error at trial does not necessarily ignore its obligation to apply all of the law. It may well apply the Constitution in finding that the conduct at trial was illegal, but that finding alone does not dictate reversal, for the appropriate remedy for any such violation is a separate question.⁷⁰ Though always unsettling, it is hardly exceptional for appellate courts, or indeed courts more generally, to withhold remedies for violations of constitutional wrongs.⁷¹

A regime whose broad conception of harmlessness often called for withholding the remedy of reversal might prompt the objection that a state should not be able to confer legitimacy upon a criminal conviction by authorizing a toothless form of appellate review. A similar argument has been made in the context of limitations on the power of Article III courts to review decisions of non-Article

Deciding to Decide: Agenda Setting in the United States Supreme Court (Harvard, 1991); Bice, 1975 Wis L Rev at 353 (cited in note 52). Thus, the practice of certiorari review would at the very least be in tension with the "spirit" of any principle requiring appellate courts to hear all issues in a case. See Amar, 65 BU L Rev at 267-69. See also Daniel J. Meltzer, *The History and Structure of Article III*, 138 U Pa L Rev 1569, 1616-17 n 176 (1990) (arguing that under Amar's view, the Court's certiorari policy may also violate the *letter* of Article III).

Of course, the economy rationale that underlies a limited grant of certiorari has greater force in a jurisdiction's highest court than in intermediate appellate courts that hear a first appeal as of right. See Bice, 1975 Wis L Rev at 377-78 (cited in note 52). But that difference in the force of policy concerns does not translate easily into a difference between the constitutionality of the practice in a state's highest courts and in its intermediate courts. Indeed, there remain some states in which the right to any appellate review in criminal cases is discretionary. See *Bundy v Wilson*, 815 F2d 125, 128-29, 141 (1st Cir 1987); NH S Ct Rule 7(1), in 1 NH Court Rules Ann (Equity 1992); Va Code Ann § 17-116.07 (Michie 1988 & 1993 Cum Supp); Va S Ct Rule 5A:12(e), 5:17, in Va Rules Ann (Michie 1992); W Va Rule App P 7, in W Va Rules Ann (Michie 1992).

⁶⁸ See Fallon and Meltzer, 104 Harv L Rev at 1770-73 (cited in note 44).

⁶⁹ Id at 1770.

⁷⁰ See id at 1771-73. Of course, a court might decide that an alleged constitutional violation was harmless without determining whether in fact a violation had occurred.

⁷¹ See id at 1779-86.

III federal tribunals.⁷² But there are a number of difficulties with this argument. First, such claims about legitimacy and judicial integrity always have a somewhat evanescent quality. Second, insofar as the argument rests upon Article III, it has no application to state courts.⁷³ Third, the argument has not been accepted even for Article III courts. For when the Supreme Court grants certiorari limited to a single issue and then affirms a conviction, it too can be seen as lending legitimacy to a conviction that might in some sense be unconstitutional, if the unredressed constitutional violation fell outside the scope of the grant of certiorari.⁷⁴

Finally, insofar as it is known that an appellate court lacks authority to reverse, it is uncertain how great the imprimatur of legitimacy would be. Indeed, to take the polar case, suppose that a state appellate court were given broad jurisdiction in criminal appeals to declare that the appellant had suffered an egregious violation of his constitutional rights at trial, but no power to reverse the conviction.⁷⁵ An "affirmance" by such a court would not obviously legitimate the conviction.

The polar case points the way, however, to a different objection to broad state harmless error rules. Surely, the argument goes, an appellate finding of a constitutional violation must entail some corresponding entitlement on the part of the defendant to obtain a remedy, unless the error is truly harmless as defined by an appropriate standard (such as that in *Chapman*). But even in the polar case, if there is no constitutionally guaranteed right to an appeal, there cannot be any entailed right to the remedy of reversal.

I thus conclude that if one accepts the traditional view that appeals are constitutional gratuities, it is difficult to develop a constitutional argument that would justify the Supreme Court's requiring the state courts to follow the *Chapman* rule.⁷⁶

⁷² See Fallon, 101 Harv L Rev at 942 (cited in note 48), arguing that in reviewing administrative action, Article III courts perform, in part, a legitimatizing function.

⁷³ See note 48.

⁷⁴ See Bice, 1975 Wis L Rev at 346-56 (cited in note 52) (discussing the Court's use of the limited grant of certiorari to decide some, but not all, of the constitutional issues presented in a case).

⁷⁵ Such a practice would raise no federal constitutional problems under Article III, as state courts are not bound by that provision's case or controversy requirement. See generally William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 Cal L Rev 263, 265-294 (1990).

⁷⁶ Some have suggested that the harmless error rule might be viewed as an implication of the right to jury trial. See Mause, 53 Minn L Rev at 531 (cited in note 8); see also Saltzburg, 59 Va L Rev at 1028-29 (cited in note 12) (stating that harmless error implicates the right to jury trial but noting that the Court has never held that appeals are constitutionally required). The argument holds that appellate affirmance is analogous to a retrial of a

III. FEDERAL STATUTES

If the *Chapman* doctrine does not follow easily from any constitutional doctrine, are there federal statutes or court rules that could be interpreted as prescribing the *Chapman* standard? Arguments that would root *Chapman* in these enactments also strike me as unconvincing.

A. Federal Enactments Relating to Harmless Error

In his book *The Riddle of Harmless Error*, Justice Traynor thought it odd that the *Chapman* Court "chose not to proceed on the basis of Section 2111 [of Title 28] and [FRCrP] 52(a) though the question of harmless error involved the interpretation and application of those provisions."⁷⁷

As to Rule 52(a), the difficulty is easily seen. That rule, like the Federal Rules of Criminal Procedure more generally, is not designed to regulate state court cases.⁷⁸ Just as the federal rules

defendant's case, and that such a retrial by judges rather than juries would violate the Sixth Amendment unless the appellate court were convinced beyond a reasonable doubt that any error would not have affected the jury's decision. See Mause, 53 Minn L Rev at 531.

The analogy of appellate review to retrial, however, is obviously strained. Indeed, if one accepts the premise, one might conclude that only a jury could decide whether an error might have affected the outcome—thus requiring automatic reversal in every case. Moreover, an appeal, even if accompanied by a broad harmless error rule, can make defendants better off only if it undercuts the jury trial right no more (indeed, far less) than providing no appeal at all. (A similar problem besets any theory that seeks to ground the harmless error rule in the requirement of proof beyond a reasonable doubt. See *In re Winship*, 397 US 358, 364 (1970); Saltzburg, 59 Va L Rev at 1028-29.) A distinct problem for the right to jury trial theory is that it would not comprehend appeals when the defendant had waived his right to jury trial, or was convicted only of a petty crime—to which the jury right does not extend. See *Baldwin v New York*, 399 US 66, 69 (1970); Saltzburg, 59 Va L Rev at 1028 n 146.

In the end, neither the right to proof beyond a reasonable doubt nor the jury trial right could easily have been the unstated basis for *Chapman* itself, for neither right was incorporated against the states until after *Chapman* was decided in 1967. See *Winship*, 397 US at 364; *Duncan v Louisiana*, 391 US 145, 149 (1968).

⁷⁷ Traynor, *Harmless Error* at 42 (cited in note 3). Harmless error provisions are also found in FRCP 61 and FRE 103(a).

A nearby section in the judicial code, 28 USC § 2106 (1988), states:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

From this general procedural language authorizing courts to do their jobs, it is hard to infer a specific substantive standard regulating harmless error.

⁷⁸ The language of FRCrP 1 ("These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a) . . .") is somewhat less clear on this point than the counterpart provision in FRCP 1 ("These rules govern the pro-

governing grand juries⁷⁹ or the manner of taking guilty pleas⁸⁰ govern neither state courts nor Supreme Court review of state court proceedings, neither does Rule 52(a).

Section 2111 presents a somewhat more complicated question. Its language appears to encompass Supreme Court review of state court cases: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."⁸¹ Yet the statute enjoins the Court to ignore errors that do not affect substantial rights; it does not mandate reversal where substantial rights are affected.⁸²

That observation gains force when one recalls the impulse for the statute's enactment. In the nineteenth century, "[a]ppellate courts in this country were wont to hold that an error raised a presumption of prejudice or called for automatic reversal, and they reversed judgments for the most trivial errors," becoming "impregnable citadels of technicality."⁸³ The 1919 Act that was the predecessor to § 2111 was one fruit of a long reform campaign seeking to relieve appellate courts from the perceived obligation to reverse whenever error was detected.⁸⁴ Thus, the thrust of the Act—to permit appellate courts to affirm convictions they might otherwise have reversed—was just the opposite of the aspect of *Chapman* at issue here. In light of this history, the Court's failure in *Chapman* to find that § 2111 imposed on the states an obliga-

cedure in the United States district courts . . ."). See also Charles A. Wright, 1 *Federal Practice and Procedure, Criminal* § 21 at 22-23 (West, 2d ed 1982); James W. Moore, 8 *Moore's Federal Practice* § 1.02 at 1-6 (Matthew Bender, 2d ed 1992 and Aug 1993 Cum Supp); Charles A. Wright and Arthur R. Miller, 4 *Federal Practice and Procedure, Civil* § 1012 at 56 (West, 2d ed 1987); James W. Moore and Jo Desha Lucas, 2 *Moore's Federal Practice* § 1.03[I] at 1-23 (Matthew Bender, 2d ed 1993).

⁷⁹ See FRCP 6.

⁸⁰ See FRCP 11.

⁸¹ 28 USC § 2111 (1992).

⁸² Justice Traynor's focus on the statute does, however, highlight one oddity: Was the statute designed to reject the view that some or all constitutional errors could never be harmless? Traynor, *Harmless Error* at 42 (cited in note 3). Insofar as cases before or after *Chapman* took that view, one would have thought that they would have had to find the statute either inapplicable or unconstitutional. But there appears to be no discussion of this question in the case law.

⁸³ *Id.* at 13, 14, quoting Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 ABA J 217, 222 (1925).

⁸⁴ See, for example, *Kotteakos v United States*, 328 US 750, 758-60 (1946); Edson R. Sunderland, *The Problem of Appellate Review*, 5 Tex L Rev 126, 146-47 (1927); Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, *Ninth Annual Report*, 2 ABA J 603, 604-07 (1916).

tion not to find too many errors harmless seems to me unsurprising and probably correct.⁸⁵

Two further difficulties stand in the way of resting *Chapman* on § 2111. First, the statutory text hardly makes clear that it means to regulate the standards of harmlessness applied by the states in their own courts, rather than by the Supreme Court on review of state court decisions.⁸⁶ Second, though *Chapman* prescribes a stricter test of harmlessness for constitutional than for non-constitutional errors, the history surrounding passage of the statute provides no reason to think that it was meant to treat different kinds of errors differently.⁸⁷

B. The Supreme Court's Appellate Jurisdiction

Can one premise the *Chapman* rule on the need to protect the Supreme Court's appellate jurisdiction?⁸⁸ If the Court had not im-

⁸⁵ In *Brecht v Abrahamson*, 113 S Ct 1710 (1993), the Court stated: "After examining existing harmless-error rules, including the federal rule (28 USC § 2111), we held [in *Chapman*] 'that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.'" Id at 1717, quoting *Chapman*, 386 US at 24. This somewhat ambiguous reference to § 2111 does not seem to me to suggest that the Court now views *Chapman* as having relied on § 2111. Indeed, the *Brecht* Court later notes that "to date we have limited [§ 2111's] application to claims of nonconstitutional error in federal criminal cases," and that "[i]n the absence of any express statutory guidance from Congress, it remains for this Court to determine what harmless-error standard applies on collateral review of petitioner's . . . claim." 113 S Ct at 1718-19.

⁸⁶ The textual doubt is reinforced by the treatment of the harmless error provision in the 1948 Revision of the Judicial Code. The Revision repealed the 1919 statute on the view that the Federal Rules of Civil and Criminal Procedure contained all the necessary provisions. See Act of Feb 26, 1919, ch 48, 40 Stat 1181, codified at Judicial Code of 1911 § 269, repealed by Act of June 25, 1948, ch 646 § 39, 62 Stat 992. See Charles A. Wright and Arthur R. Miller, 11 *Federal Practice and Procedure*, Civil § 2881 at 272 (West, 1973). In 1949, however, Congress enacted current § 2111 out of concern that the Federal Rules applied only to the district courts, not to the Supreme Court or to the courts of appeals. Act of May 24, 1949, ch 139 § 110, 63 Stat 105, codified at 28 USC § 2111; see also HR Rep No 352, 81st Cong, 1st Sess 18 (1949), in 1949 USCCAN 1248, 1272. There may have been little basis in fact for that concern. See, for example, Wright & Miller, 11 *Federal Practice* § 2881 at 272. Thus, the statute, like the federal rules, was designed with federal court litigation in mind. Indeed, it is difficult to interpret the statute as protecting the federal rights of state court litigants, given that (i) its enactment was thought necessary merely to fill a gap in the federal rules, and (ii) under 28 USC § 2072, the Supreme Court may not exercise its rulemaking power so as to "abridge, enlarge or modify any substantive right." See also note 85 (discussing *Brecht*).

⁸⁷ See Traynor, *Harmless Error* at 57 (cited in note 3).

⁸⁸ Arguments have been made that Article III confers upon state court litigants a constitutional right to Supreme Court review. See generally *Hart & Wechsler* at 379-87 (cited in note 3) (summarizing diverse arguments). Although I am skeptical about such arguments, see Meltzer, 138 U Pa L Rev at 1573-1613 (cited in note 67), one need not resolve that question here, for Congress has not created significant "exceptions" to the Court's appellate jurisdiction so as to interfere with any such right. Compare the arguments cited in note 58.

posed a federal standard of harmlessness upon the state courts, they could have followed a rule, for example, that treated all constitutional errors as harmless unless the defendant could prove that the error probably affected the verdict.⁸⁹ Under such a rule, state appellate courts would often find that the defendant had no right to reversal, whether or not constitutional error had occurred. If the defendant then sought Supreme Court review, under conventional doctrine the Court would lack jurisdiction because the state court judgment would rest on an adequate and independent state ground.⁹⁰ And so, the argument would go, leaving states free to apply their own harmless error rules could undercut the role of the Supreme Court in ensuring the uniformity and supremacy of federal law.⁹¹

Does it follow that in order to protect its role, the Supreme Court must displace the rules applied in the state courts with a federal standard of harmlessness? I think not. For the only displacement needed is for the Court to be free to treat the state law ground underlying the state court judgment as inadequate to block Supreme Court review.⁹² So long as its jurisdiction is not blocked, the Court does not have to impose upon the state courts any obligation to depart from their ordinary harmless error rules.⁹³

The question whether the *Chapman* rule is required to protect the appellate jurisdiction that the Court does possess is not dependent upon the scope of Congress's power to narrow that jurisdiction.

⁸⁹ In fact, most states had rules less strict than that prescribed in *Chapman*. See Charles L. Black, Jr., *The Supreme Court, 1966 Term*, 81 Harv L Rev 69, 206 n 12 (1967).

⁹⁰ See *Chapman*, 386 US at 46 (Harlan dissenting); Mause, 53 Minn L Rev at 529 (cited in note 8).

⁹¹ Richard Fallon and I have noted that the possibility that an error may be found harmless under *Chapman*—or, to put the point more generally, that no remedy for an alleged constitutional violation may be provided—does not preclude a court from deciding whether a violation occurred. See Fallon and Meltzer, 104 Harv L Rev at 1797-1807 (cited in note 44). But our premise was that the standard of harmlessness is governed by federal law, so that a court applying that standard is simply deciding which of two federal issues it will first decide. If the standard for harmlessness were governed by state law, then Supreme Court review would be barred under conventional doctrine. See generally Alfred Hill, *The Inadequate State Ground*, 65 Colum L Rev 943, 944-98 (1965).

⁹² Insofar as the argument is based upon the claim that there is a special need (constitutional or statutory) for Supreme Court review of *state* court judgments, it would not necessarily extend to Supreme Court review of federal judgments. Still, one could argue that Congress cannot have intended more intensive review of state court judgments than of federal judgments, and hence the Court's treatment of harmless error should not differ when reviewing state and federal judgments.

⁹³ A different route to the same result would be to treat application of the state's (less strict) harmless error rule, in cases in which the error is found to be harmless, as tantamount to a denial of appellate review. In such a situation, the Supreme Court may review the decision of a trial court. See, for example, *Thompson v City of Louisville*, 362 US 199,

In a related context—that of a state court judgment denying review on the ground that the criminal defendant failed to raise his federal constitutional claim in accordance with state procedures—I have argued that a Supreme Court decision finding that state ground inadequate should be viewed as creating a kind of federal common law, which does bind the state courts to treat the procedural rule as invalid when applied to similar cases.⁹⁴ But the premise for my argument was that the state procedural rule was held inadequate because it failed to give adequate protection to federal rights—a federal concern as applicable in the state courts as in the small minority of cases that the Supreme Court actually reviews.⁹⁵ If the argument for displacing state harmless error rules is not that they fail to give adequate protection to federal rights, but rather that they threaten to block Supreme Court review, then the application of state rules in the state courts threatens no federal interest.⁹⁶ Preservation of the Supreme Court's jurisdiction would warrant only a refusal by the Court to treat a state court's finding of harmlessness as an adequate state ground; it would not warrant imposing any limitation upon what harmless error rule the states may apply in their own courts. So in the end, this theory, too, cannot account for *Chapman*.⁹⁷

IV. CONSTITUTIONAL REMEDIES AND CONSTITUTIONAL COMMON LAW

A. Does the *Chapman* Doctrine Confer a Constitutionally Required Remedy?

I suggested earlier that appellate review (and the accompanying disposition of reversal for prejudicial error) implicates a question of remedies for constitutional violations.⁹⁸ Constitutional

202-06 (1960). This approach would leave the Supreme Court free to review a judgment without requiring the state courts, in the exercise of any appellate or post-conviction jurisdiction, to follow the *Chapman* standard.

⁹⁴ See Meltzer, 99 Harv L Rev at 1176-85 (cited in note 47).

⁹⁵ See id at 1183-84, 1190-96.

⁹⁶ Compare Terrance Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 S Ct Rev 187, 233 (asserting that a finding that a state ground is inadequate determines whether the Supreme Court has jurisdiction to review the federal claim, "not whether the state may adhere to the rule in future cases").

⁹⁷ Moreover, an explanation of *Chapman* based upon the need to protect Supreme Court jurisdiction would not explain why the Court should ever treat a constitutional error as calling for automatic reversal. See, for example, *Sullivan v Louisiana*, 113 S Ct 2078, 2081 (1993) (stating that total deprivation of the right to counsel, trial by a biased judge, and denial of the right to self-representation are errors requiring automatic reversal).

⁹⁸ See text accompanying notes 68-71.

rights in criminal cases typically govern the behavior of trial courts;⁹⁹ for example, a trial court could not, consistently with the Constitution, comment on the defendant's failure to testify on the theory that, in light of the overwhelming proof of guilt, any error would be harmless.¹⁰⁰ The question of harmlessness arises after an error has been found on appeal, or following post-trial motions.¹⁰¹ Thus, post-conviction relief (whether on appeal or otherwise) is most easily characterized as one kind of remedy for a constitutional violation. Just as damages in a constitutional tort suit redress a prior violation by a government official, reversal on appeal, redresses a prior violation at trial. The doctrine of harmless error thus helps determine when that remedy must be provided.

The question then arises whether *Chapman* can be understood as a constitutionally required remedy. Richard Fallon and I have argued that there are constitutional imperatives as to the provision of constitutional remedies, and that the "doctrine" here, although lacking sharp edges, should be and to a considerable extent is or-

⁹⁹ Of course, many constitutional provisions regulate police behavior and protect individuals' privacy and dignity whether or not prosecution ensues. Yet even some of those constitutional protections—for example, those provided by *Miranda*, or those prohibiting unnecessarily suggestive identification procedures—come into being only with the trial court's admission of the evidence. See Fallon and Meltzer, 104 Harv L Rev at 1774-75 & n 231 (cited in note 44); Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 Mich L Rev 907, 917 (1989). Thus, for example, suits under 42 USC § 1983 seeking damages against police officers who conducted unnecessarily suggestive lineups, or interrogations in disregard of the *Miranda* rules, have almost universally been found wanting when the evidence thus obtained was never introduced at trial. See, for example, *Hensley v Carey*, 818 F2d 646, 648-50 (7th Cir 1987); *Warren v City of Lincoln*, 864 F2d 1436, 1442 (8th Cir 1989) (en banc). But see *Cooper v Dupnik*, 963 F2d 1220, 1251-52 (9th Cir 1992) (en banc) (police conduct during interrogation that violates not only *Miranda* rules but "core" 5th and 14th Amendment rights to be free from coercion gives rise to § 1983 damages action, even if the coerced statements were never introduced in a criminal trial). At least one court has gone further than the prevailing rule, finding that a constitutional tort action for damages does not lie even when the plaintiff alleges that statements obtained in violation of *Miranda* were introduced at trial. See *Bennett v Passic*, 545 F2d 1260, 1262-63 (10th Cir 1976).

In the case of the Fourth Amendment, I have elsewhere expressed my view that the violation has occurred when the illegal search occurs, and the exclusion of evidence does not prevent the violation so much as it provides a form of redress. See generally Daniel J. Meltzer, *Detering Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 Colum L Rev 247, 267-78 (1988).

¹⁰⁰ See Fallon and Meltzer, 104 Harv L Rev at 1771 (cited in note 44).

¹⁰¹ See *id.* Of course, an appellate court is free, where an alleged error would be harmless in any event, to affirm without determining whether a violation occurred. See, for example, *Milton v Wainwright*, 407 US 371, 372 (1972); *United States v Pravato*, 505 F2d 703, 704 (2d Cir 1974).

ganized around two basic remedial imperatives.¹⁰² The first imperative is "to redress individual violations"—as reflected in the slogan, "for every right, a remedy."¹⁰³ The second imperative is "to reinforce structural values, including those underlying the separation of powers and the rule of law."¹⁰⁴ Neither imperative, however, calls for remediation in every case; both can and do yield to countervailing governmental interests, albeit in different ways.¹⁰⁵ Thus, the constitutional imperatives are both qualified and necessarily somewhat imprecise when applied in particular cases.

There are two additional difficulties involved in fleshing out these imperatives. First, the Constitution often requires some adequate remedy but not necessarily any particular one.¹⁰⁶ Redress for unconstitutional searches and seizures, for example, could be provided by an exclusionary rule, a vigorous system of tort damages remedies, or some system of administrative review and personnel regulation.¹⁰⁷ Second, a particular court's remedial authority is rarely understood as being limited to providing that redress which is absolutely *essential* under the governing substantive law. Courts ordinarily have authority to issue remedies that are appropriate even where not strictly necessary.¹⁰⁸ This principle is widely recognized in suits for structural injunctions, in which the entire idea of a remedy that would restore plaintiffs to their rightful positions had no violation occurred, though sometimes articulated in the cases,¹⁰⁹ is difficult to sustain.¹¹⁰ Indeed, the question whether a particular remedy that a court has chosen to afford for a constitu-

¹⁰² See Fallon and Meltzer, 104 Harv L Rev at 1777-91 (cited in note 44).

¹⁰³ The origins of this slogan in *Marbury v Madison*, 5 US (1 Cranch) 137, 163 (1803), are discussed in Fallon and Meltzer, 104 Harv L Rev at 1787.

¹⁰⁴ Fallon and Meltzer, 104 Harv L Rev at 1787.

¹⁰⁵ Thus, the first imperative is sometimes simply trumped by countervailing considerations—as when immunity doctrines leave the victim of a constitutional tort unable to collect damages, even if damages are the only conceivable remedy. The second imperative does not require that a remedy be provided in every case, but merely that the overall structure of remedies be sufficiently robust to keep government within the bounds of law. See generally *id.* at 1779-87.

¹⁰⁶ See Hart, 66 Harv L Rev at 1366 (cited in note 64) ("Congress necessarily has a wide choice in the selection of remedies, and [] a complaint about [the denial of one remedy while another is left open] can rarely be of constitutional dimension.").

¹⁰⁷ See Meltzer, 88 Colum L Rev at 294 n 260 (cited in note 99).

¹⁰⁸ See, for example, *Hutto v Finney*, 437 US 678, 687-88 (1978) (approving a wide-ranging equitable decree designed to eliminate cruel and unusual prison conditions over a dissent objecting that the decree enjoined practices not themselves unconstitutional). See also text accompanying notes 127-34, discussing the *Bivens* remedy.

¹⁰⁹ See, for example, *Milliken v Bradley*, 433 US 267, 280 (1977); *Dayton Board of Education v Brinkman*, 433 US 406, 420 (1977).

¹¹⁰ See, for example, Abram Chayes, *The Role of the Judge in Public Law Litigation*,

tional violation is constitutionally necessary, or instead is merely appropriate, rarely arises as such. The question is sharply put only when the legislature attempts to preclude provision of that remedy.¹¹¹

But quite apart from all of the qualifications of any constitutional right to particular remedies, *Chapman* is hard to understand as a rule of constitutionally mandated remediation. For if the Constitution does not mandate appeals at all, surely it does not mandate provision, when appeals are provided as a matter of grace, of the remedy of appellate reversal under the particular standard set forth in *Chapman*.

B. *Chapman* as Constitutional Common Law

What, then, is the best explanation for the *Chapman* rule? My own view is that the harmless error rule should be seen as constitutional common law. Professor Monaghan, who has set forth most generally the theory of constitutional common law, has so declared, though without much elaboration.¹¹² His conclusion relied primarily upon the Court's statement in *Chapman* that Congress might have the power to modify the standard the Court there announced. A rule that could be legitimately modified by the legislature did not appear to be a "real" constitutional holding.¹¹³ I have suggested that even had the Court made no such statement, there would be no firm basis for understanding the *Chapman* decision as a constitutional mandate. Thus, understanding *Chapman* instead as constitutional common law seems to me the only plausible alternative.

89 Harv L Rev 1281, 1304-07 (1976); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 Yale L J 635, 668-91 (1982).

¹¹¹ See, for example, Meltzer, 88 Colum L Rev at 293 (cited in note 99); Walter E. Dellinger, *Of Rights and Remedies: The Constitution As a Sword*, 85 Harv L Rev 1532, 1548 (1972).

¹¹² In 1989, Professor Monaghan stated in passing that *Chapman* is an example of constitutional common law. See Monaghan, 1989 S Ct Rev at 200 n 30 (cited in note 14). His original article on constitutional common law gave only a hint that the *Chapman* rule might be so regarded. See Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv L Rev 1, 20-21 & n 112 (1975).

¹¹³ See Monaghan, 89 Harv L Rev at 17 (stating that the Court's dormant Commerce Clause cases are "wholly subject to congressional revision"). See also text accompanying notes 4-6. In earlier writing, I followed him in this regard. See Meltzer, 88 Colum L Rev at 279 n 166 (cited in note 99) ("One possibility is that *Chapman* is a constitutional common-law decision A second possibility is that the Supreme Court was simply confused.").

Although the idea of constitutional common law has drawn critics,¹¹⁴ I remain persuaded by its basic validity and importance. I have explained my views in earlier writing¹¹⁵ and so shall not repeat them in full here. I would simply like to highlight several points about the appropriateness of formulating harmless error rules as constitutional common law.

First, as Professor Monaghan has noted, although Congress has power to prescribe remedies for constitutional violations, it tends to defer to the courts in the elaboration of civil liberties matters.¹¹⁶ Numerous obstacles stand in the way of legislative action, "the most important of which are the power of inertia, the lack of time, and the futility of all-encompassing statutory codes."¹¹⁷ Thus, willy-nilly, the courts are the primary actors in this area. And "ensuring adequate protection of constitutionally rooted interests and of achieving self-regulating official behavior may make it desirable for the Court itself to frame at least some part of the appropriate procedures. . . . The important point is that the Court need not assume that any particular rule is a *necessary* component of due process to justify its imposition."¹¹⁸

Second, courts may claim a distinctive expertise in the formulation of remedies. Remedies by their nature respond to the nature and scope of violations and a particular party's demand for relief,¹¹⁹ and courts have a particular expertise in fashioning the necessary connections.¹²⁰

Of course, when federal courts formulate rules for state courts, they are not simply acting where Congress has failed to act. The decision in *Chapman*, for example, requires state courts to act in contravention of state harmless error rules that would otherwise govern. But the imposition of a federal standard of harmless error is a far less intrusive matter than, for example, mandating a right to appeal in criminal cases. Indeed, the Court's refusal to recognize a right to a criminal appeal may have been influenced by doubts about the desirability of constitutionalizing an expensive procedure, and by concerns about imposing that burden upon a state

¹¹⁴ See, for example, Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U Chi L Rev 1, 54-59 (1985); Thomas S. Schrock and Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 Harv L Rev 1117, 1126-45 (1978).

¹¹⁵ See Meltzer, 99 Harv L Rev at 1172-76 (cited in note 47).

¹¹⁶ See Monaghan, 89 Harv L Rev at 18-19 (cited in note 112).

¹¹⁷ Meltzer, 88 Colum L Rev at 288 (cited in note 99).

¹¹⁸ Monaghan, 89 Harv L Rev at 26.

¹¹⁹ See Chayes, 89 Harv L Rev at 1308 (cited in note 110).

¹²⁰ See Meltzer, 88 Colum L Rev at 287-88.

that would not otherwise provide an appeal. But so long as a state has created a system of appeals, it is far less intrusive to mandate application therein of a particular harmless error rule. Indeed, the state courts would have a harmless error rule in any event; the Court is merely tinkering with the standard to be applied.

That tinkering must be justified by the fear that state courts, left to their own devices, would unduly dilute federal constitutional norms by too easily finding errors to be harmless. This concern is not one divined only by the *Chapman* Court. The existence of federal habeas corpus jurisdiction itself reflects doubts that state courts, left to their own devices, would adequately enforce federal constitutional norms.¹²¹ Many federal constitutional norms are neither intuitive nor already accepted as part of state systems of criminal justice. Those systems may resist recognition and enforcement of such norms. One form of resistance is to shield convictions by application of overly broad conceptions of harmless error. *Chapman* tends to counteract such resistance, both by imposing a strict standard for finding errors to be harmless and by subjecting state court applications of that standard to the possibility of federal review by the Supreme Court or by federal habeas corpus courts.¹²²

Harmless error standards are rather fact-specific, and so even adopting the *Chapman* rule is hardly a guarantee of vigorous enforcement of federal rights. As Justice Stevens noted recently in *Brecht v Abrahamson*, "the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied."¹²³ Determining whether an error is harmless under any standard is not likely to create clear rules that will be helpful in future cases, and so in any particular case a reviewing court's de-

¹²¹ See *Teague v Lane*, 489 US 288, 306-07 (1989) (plurality opinion); *Mackey v United States*, 401 US 667, 687 (1971) (Harlan, concurring in the judgment in part and dissenting in part); *Desist v United States*, 394 US 244, 262-63 (1969) (Harlan dissenting); Larry W. Yackle, *Explaining Habeas Corpus*, 60 NYU L Rev 991, 1031-40 (1985). Of course, in recent years the Court has been quite schizophrenic in its vision of the relation of federal habeas and state courts. With the cases just cited, compare *Brecht v Abrahamson*, 113 S Ct 1710, 1721 (1993), and *Stone v Powell*, 428 US 465, 493-94 & n 35 (1976) (both rejecting the premise that habeas review is necessary to ensure that state courts faithfully apply federal constitutional norms).

¹²² In theory, insofar as federal habeas courts stand ready to apply *Chapman* with greater vigor, that may create some greater incentive for state courts to do so in the first instance. In practice, the threat of habeas reversal may not be so potent. See Daniel Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S Cal L Rev 2507, 2523-31 (1993) (noting that only a very small percentage of state prisoners file habeas corpus petitions, and that relief is granted to a still smaller percentage).

¹²³ 113 S Ct at 1725 (Stevens concurring).

termination is rather open-textured. It is no doubt for that reason, in part, that a number of commentators think that in practice many courts (federal as well as state, but perhaps state courts particularly) have diluted the *Chapman* standard.¹²⁴ In turn, such dilution may affect the likelihood of violations in the first instance; a prosecutor will be less alert to avoid potential error if she is convinced that any error is likely to be found harmless.¹²⁵ So, in practice, *Chapman* may have created a less effective remedial scheme than many would have hoped. If so, one might view this result as counseling against the wisdom of *Chapman*. Alternatively, and I think more plausibly, one might take it as evidence that strict limits on the willingness to deem errors harmless are an important, if not entirely effective, counterweight to the pro-affirmance tendencies of state criminal courts.¹²⁶

C. *Chapman* and *Bivens*

I would like to draw particular attention to the link between *Chapman* and the *Bivens* line of cases. An appellant attacking an adverse judgment is seeking affirmative relief against a past wrong, not unlike a plaintiff suing the government for damages in a constitutional tort action.¹²⁷ Thus, it seems highly plausible to analo-

¹²⁴ See Allen, 70 Iowa L Rev at 331-32 (cited in note 17); Stacy and Dayton, 88 Colum L Rev at 127-31 (cited in note 13).

¹²⁵ For example, in *United States v Pallais*, 921 F2d 684, 691 (7th Cir 1991), the prosecutor, in closing argument, "made the standard misstep and commented on [the defendant's] failure to take the stand." Although noting that "[w]e rebuke prosecutors repeatedly for commenting on a defendant's failure to take the stand . . . , [and that] [t]en years ago we were commenting on a 'sense of futility from persistent disregard of prior admonitions,'" the court, per Judge Posner, remarked that "[t]hese rebukes seem to have little effect, no doubt because of the harmless error rule, which in this as in many other cases precludes an effective remedy for prosecutorial misconduct. The expansive code of constitutional criminal procedure that the Supreme Court has created in the name of the Constitution is like the grapes of Tantalus, since the equally expansive harmless error rule in most cases prevents a criminal defense from obtaining any benefit from the code." Id at 691-92 (citations omitted). See also, for example, *Dortch v O'Leary*, 863 F2d 1337, 1343-45 (7th Cir 1988).

¹²⁶ See, for example, Thomas Y. Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 Am Bar Found Res J 543, 591-95, 612.

¹²⁷ Indeed, the similarity may have been even clearer when trial court judgments were reviewed via a writ of error rather than a modern appeal. The writ of error was viewed as original action seeking relief against unlawful action, rather than as a continuation of the case after trial. See *Cohens v Virginia*, 19 US (6 Wheat) 264, 409-10 (1821); *Sunderland*, 5 Tex L Rev at 139-40 (cited in note 84). See also *Ross v Moffitt*, 417 US 600, 610-11 (1974), citing *McKane v Durston*, 153 US 684 (1894) ("[I]t is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being

gize rules regulating the provision of relief to the appellant to rules authorizing the provision of damages relief in *Bivens* actions.¹²⁸

One could imagine a system in which the remedy for any constitutional violation suffered by a criminal defendant was a suit for damages against the responsible actor (the judge or prosecutor). To be sure, damages might be inferior to reversal as a form of individual redress.¹²⁹ But whatever its hypothetical merits or demerits, a vigorous system of tort remedies does not exist.¹³⁰ The scope of governmental liability is quite limited,¹³¹ and judges and prosecu-

'hailed into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all.").

¹²⁸ To be sure, *Bivens* cases are brought in federal court while most criminal cases are litigated in state court. However, if *Bivens* cases were brought in state court and not removed under 28 USC § 1442, as in fact they almost invariably are, see *Bivens v Six Unknown Federal Narcotics Agents*, 403 US 388, 391 & n 4 (1971) (noting the Justice Department's policy of removing state tort actions against federal agents to federal court), the state courts would have an obligation to hear them and to provide relief. See Hill, 69 Colum L Rev at 1160 (cited in note 64); Gene R. Nichol, *Bivens*, Chilicky, and *Constitutional Damages Claims*, 75 Va L Rev 1117, 1131 (1989).

¹²⁹ Plainly, damages are not an adequate remedy for someone unconstitutionally sentenced to prison. Moreover, some violations may not be the direct responsibility of the judge or prosecutor—for example, ineffective assistance of counsel, or misconduct in the jury room. Although in some sense the judge may have erred in permitting the sanction of conviction to be imposed in such circumstances, where the judge was unaware of the violation, she would surely not be personally liable in damages. See also note 10, suggesting that in cases like these there may be a right to some form of post-conviction relief.

¹³⁰ Like damages relief, injunctive relief against future violations fails to provide individual redress to a person who has been unconstitutionally deprived of liberty. Nor is injunctive relief generally available to redress constitutional violations by law enforcement officials. See generally Meltzer, 88 Colum L Rev at 297-98, 314-16 (cited in note 99).

¹³¹ Federal sovereign immunity bars unconsented suits against the United States in any court. See *Arnsberg v United States*, 757 F2d 971, 980 (9th Cir 1985) (citing cases). Though Congress has broadly consented to suit, see generally *Hart & Wechsler* at 1144-58 (cited in note 3) (outlining the major statutory schemes), its consent does not extend to liability for constitutional (as distinguished from common law) torts. See id at 1153.

The Eleventh Amendment immunizes state governments from unconsented suit in federal court, see, for example, *Atascadero State Hospital v Scanlon*, 473 US 234, 237-40 (1985), unless Congress has exercised a constitutional power to abrogate that immunity. See, for example, *Pennsylvania v Union Gas Co.*, 491 US 1, 9-13 (1989). In addition, the Court has interpreted 42 USC § 1983 as not creating a right of action for damages against state governments. See *Will v Michigan State Police*, 491 US 58, 62-71 (1989). That decision, together with *Jett v Dallas Independent School District*, 491 US 701, 731-36 (1989) (holding that the § 1983 cause of action for damages is the exclusive federal remedy against state governments for violations of the rights guaranteed in 42 USC § 1981), indicates rather clearly that there are neither express nor implied federal damages remedies against state governments for constitutional torts. See *Hart & Wechsler Supplement* at 185-86 (cited in note 57).

tors enjoy absolute immunity from damages liability.¹³² Indeed, one of the justifications for conferring absolute immunity on participants in the criminal process is that defendants have the alternative remedy of reversal on appeal.¹³³ Thus, at least under current law, for criminal defendants whose rights are violated at trial, it is "reversal or nothing."¹³⁴

The *Chapman* rule thus fortifies the remedy provided to persons who are victimized by unconstitutional conduct at their criminal trials. Like *Bivens*, it does not seek to force courts that lack jurisdiction to take it, for just as *Bivens* presupposes federal courts that have subject matter jurisdiction under 28 USC § 1331,¹³⁵ *Chapman* presupposes that state appellate courts have been given jurisdiction over criminal appeals. Instead, *Chapman*, like *Bivens*, asks courts to exercise their jurisdiction in a fashion thought appropriate for the vindication of federal constitutional rights. Thus, *Chapman* seems to me justified in much the same way that *Bivens* is.

The analogy, like most analogies, is hardly perfect. One might suggest, for example, that there is less need for remediation in the post-conviction context, where the violation occurred in the course of a judicial proceeding in which an impartial adjudicator found that no constitutional violation had occurred. Thus, even without the implication of additional constitutional remedies, the defendant will ordinarily already have had the opportunity for judicial review of his entire claim.¹³⁶

But this picture of adjudication in state trial courts is, in many instances, quite idealized. Some constitutional errors may arise from rapid rulings on evidentiary issues at trial, in which the opportunity for considered argument and judgment is very slim indeed—or in circumstances in which the judge is the subject of criticism, calling into question judicial disinterestedness. Moreover, the particular seriousness of an official condemnation for criminal conduct, and the sanctions that typically accompany a judgment of

¹³² See, for example, *Stump v Sparkman*, 435 US 349, 362-64 (1978) (judicial immunity); *Imbler v Pachtman*, 424 US 409, 424-31 (1976) (prosecutorial immunity).

¹³³ See *Pierson v Ray*, 386 US 547, 554 (1967); Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* 90 (Yale, 1983).

¹³⁴ Compare *Bivens*, 403 US at 410 (Harlan concurring in the judgment) ("For people in *Bivens*' shoes, it is damages or nothing.").

¹³⁵ In theory, *Bivens* actions can also be brought in state courts of general jurisdiction. See note 128.

¹³⁶ I say ordinarily because there may be some violations that occur outside of the judicial process, or for which the trial process is not an adequate remedy. See notes 10 and 129.

criminality, suggest that judicially-implied remedies are especially necessary in the criminal process.¹³⁷

A second question about the analogy is whether, if state legislatures could constitutionally repeal criminal appeals, Congress could constitutionally preclude all *Bivens* actions. Such an assertion would be very controversial. First, a key purpose of constitutional remedies is to create a system of redress adequate to ensure that government generally respects constitutional requirements.¹³⁸ Because constitutional tort remedies serve this purpose (albeit incompletely)¹³⁹ their elimination would be constitutionally suspect, at least absent the provision of some alternative form of redress. Second, *Bivens* remedies contribute importantly to the more familiar remedial goal of providing effective redress to individual victims of constitutional violations.¹⁴⁰ Finally, in many cases adequate alternatives do not exist, as Justice Harlan noted in *Bivens*: "For people in *Bivens*' shoes [an innocent victim of an isolated violation of the Fourth Amendment, not redressable by either injunction or exclusion of evidence at trial], it is damages or nothing."¹⁴¹

But though there are strong reasons of principle to doubt whether Congress could preclude *Bivens* actions altogether, there is very little in Supreme Court opinions that would give rise to such doubts—either in *Bivens* itself,¹⁴² in the subsequent cases recognizing significant limits upon *Bivens* remedies in the name of legislative policy,¹⁴³ or in the Court's broad immunity doctrines,

¹³⁷ See text accompanying note 41.

¹³⁸ See text accompanying notes 98-105.

¹³⁹ See Fallon and Meltzer, 104 Harv L Rev at 1788 (cited in note 44).

¹⁴⁰ See id at 1787.

¹⁴¹ *Bivens*, 403 US at 410 (Harlan concurring in the judgment).

¹⁴² See Meltzer, 99 Harv L Rev at 1172 (cited in note 47); Monaghan, 89 Harv L Rev at 23-24 (cited in note 112). For the contrary argument, see Dellinger, 85 Harv L Rev at 1557 (cited in note 111); Schrock and Welsh, 91 Harv L Rev at 1135-38 (cited in note 114).

¹⁴³ See, for example, *Schweiker v Chilicky*, 487 US 412, 424-29 (1988); *United States v Stanley*, 483 US 669, 678-84 (1987); *Chappell v Wallace*, 462 US 296, 298-305 (1983).

Some language in *Davis v Passman*, 442 US 228 (1979), could be viewed as looking the other way. The Court there stated that unless constitutional rights "are to become merely precatory," litigants who have no other "effective means" to enforce their rights "must be able to invoke the existing jurisdiction of the courts . . ." Id at 242. But even that language appeared in a part of the opinion finding that the plaintiff had a cause of action; the succeeding portion of the opinion proceeded to inquire whether a damages remedy should be provided, and the standard applied was one of appropriateness rather than necessity. See id at 245-48. A number of other influential opinions likewise treat the question of damages as one of remedial discretion. See, for example, *Bivens*, 403 US at 407 (Harlan concurring in the judgment); *Carlson v Green*, 446 US 14, 18-19 & n 5, 22 n 10 (1980); id at 26-29 (Powell concurring in the judgment); *Davis*, 442 US at 252 (Powell dissenting); *Bush v Lucas*, 462 US 367, 373 (1983) (rejecting both (1) the view that federal courts should "fashion an ade-

which severely restrict the reach of the *Bivens* remedy.¹⁴⁴ For example, the cases repeatedly state that a *Bivens* remedy should not be recognized where there are "special factors counselling hesitation in the absence of affirmative action by Congress"¹⁴⁵—without suggesting that such factors must be of sufficient power to outweigh a presumptive constitutional entitlement to the remedy.¹⁴⁶

quate remedy for every wrong" and (2) the view that federal courts lack power to grant relief not expressly authorized by Congress, in favor of the view that judicial power "is to be exercised in the light of relevant policy determinations made by the Congress").

See also George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the Bivens Dissenters Prevailed?*, 64 Ind L J 263, 269-74, 289, 291 n 206 (1989) (noting that *Bivens* did not rest originally on a clearly constitutional ground and noting that recent cases so suggest). Brown observes that some cases show "traces" of the Court's evaluating a legislatively provided scheme and finding it to be as good as a *Bivens* remedy, or at least "adequate" under some constitutional standard. *Id.* at 276-77. See, for example, *Bush*, 462 US at 378 n 14 (stating that existing civil service remedies were "clearly constitutionally adequate"); but see *Chilicky*, 487 US at 425 (holding that remedies provided by Congress are meaningful). But Brown stresses that for the most part, the Court, when refusing to recognize a *Bivens* action because of the subject matter or because of congressional action, has not determined the adequacy of alternative remedies. Brown, 64 Ind L J at 276-77. See, for example, *Stanley*, 483 US at 683-84.

¹⁴⁴ See, for example, *Harlow v Fitzgerald*, 457 US 800, 813-19 (1982); *Butz v Economou*, 438 US 478, 504-17 (1978); *Stump v Sparkman*, 435 US 349, 362-64 (1978); *Imbler v Pachtman*, 424 US 409, 424-31 (1976).

¹⁴⁵ *Bivens*, 403 US at 396; see also *Carlson*, 446 US at 18 (quoting *Bivens*); *Davis*, 442 US at 245 (same).

If the Court's decisions limiting the remedy do not seem to proceed on the assumption that the remedy is constitutionally required, neither do its decisions recognizing the remedy. For example, the Court in *Carlson v Green*, 446 US 14 (1980), recognized a *Bivens* remedy even though Congress had provided a remedy under the Federal Tort Claims Act. That statutory remedy was said to have many disadvantages as compared to the *Bivens* remedy, *id.* at 20-23, although the Court overlooked ways in which the FTCA remedy might provide superior redress to individual claimants (for example, it provides for governmental rather than individual liability). But *Bush v Lucas* deemed a legislatively provided remedy with almost all the same defects to be constitutionally adequate, and on that basis held that a *Bivens* remedy need not be provided. See 462 US 367, 385-90 (1983). The major distinction between the statutory remedies in *Bush* and *Carlson* is that it appears that the former defined liability for constitutional violations, see *Bush* at 386-89, while the latter provided redress for common law torts that overlapped with constitutional violations. See *Carlson*, 446 US at 19-23. Yet in *Carlson* there was no finding that on the facts of the case the redress for common law torts would not adequately redress the alleged constitutional violation.

¹⁴⁶ There is a way in which one might try to reconcile these limits of the *Bivens* remedy with a more general argument that the remedy is, at least to some extent, constitutionally required. The reconciliation would proceed as follows: a broad constitutional imperative underlies the *Bivens* damages remedy; the principle, however, is not absolute, see Fallon and Meltzer, 104 Harv L Rev at 1787-91 (cited in note 44); Congress has broad power to provide substitute remedies, see text accompanying notes 138-47; and the remedial imperative must yield to compelling state interests—such as very strong showings of legislative need to limit or displace the remedy (as in order to provide the protection secured by immunity doctrines).

I do not wish to go so far as to argue that the *Bivens* regime is entirely unconstitutional and therefore subject to complete preclusion by Congress. But at the very least, I think one can say that the current *Bivens* regime has been created on the assumption that the Court has considerable powers to fashion remedies, as federal common law, even where they are not clearly constitutionally required.¹⁴⁷ And if the Court is justified in establishing remedial imperatives in constitutional tort actions, why may it not establish remedial imperatives in criminal appeals? That, I suggest, is exactly what the Court has done.

V. IMPLICATIONS

What implications would acceptance of this analysis have for future doctrinal developments? Let me close by focusing on three points in particular.

A. The Future of *Chapman*

Earlier I noted that the present Court seems unlikely to announce that there is a constitutional right to an appeal in a criminal case.¹⁴⁸ If so, and if the Court agrees that the harmless error rule cannot be justified as constitutionally required, is the Court likely nonetheless to maintain that rule under the reasoning I have just sketched?

The Court has not spoken clearly about whether it accepts the existence or legitimacy of constitutional common law, but in several respects the Court could be viewed as inhospitable to it. At

I find that argument not unattractive, but still difficult to square with the decided cases. First, there remains the problem that the cases do not go far toward announcing that *Bivens* is constitutionally required, or that there are constitutional constraints applicable in cases in which the Court is asked not to recognize a *Bivens* remedy. Similarly, the cases recognizing immunities have not proceeded by treating the remedy as constitutionally required and then seeing how far compelling state interests require its limitation via immunity; rather, the Court has viewed itself as having authority to fashion policy as it sees fit. See, for example, *Nixon v Fitzgerald*, 457 US 731, 747-48 (1982).

¹⁴⁷ See Meltzer, 99 Harv L Rev at 1172-74 (cited in note 47); Monaghan, 89 Harv L Rev at 23-24 (cited in note 112); Note, *The Scope of Bush v. Lucas: An Examination of Congressional Remedies for Whistleblowers*, 88 Colum L Rev 587, 602 (1988); Brown, 64 Ind L J at 294 (cited in note 143). Then-Justice Rehnquist made this point long ago when he criticized *Bivens* in *Carlson*. See 446 US at 53 (Rehnquist dissenting).

Professor Nichol prefers to view *Bivens* as constitutionally required, so that Congress's power is limited to displacing the *Bivens* remedy with substitutes that satisfy some test of constitutional adequacy. See Nichol, 75 Va L Rev at 1142-43 (cited in note 128). He recognizes, however, that his preferred reading conflicts with the case law. See *id.*

¹⁴⁸ See note 46.

the most general level, the Court is increasingly moved by claims of federalism and related arguments for limits on the power of federal judges to tie the hands of the states or the political branches. In the narrower area of federal common law, its decisions, though not all of a piece,¹⁴⁹ reflect a restrictive conception of the appropriateness of federal judges fashioning rules of decision. And in the area of criminal process, it has recently imposed limits upon, and expressed doubts about the proper scope of, federal supervisory power (itself a kind of federal common law, but one limited to the federal courts).¹⁵⁰

But the alternatives to recognizing the common law basis for *Chapman* and the *Bivens* cases are not attractive for the Court. One alternative is to overrule these decisions—which would be uncomfortable, to say the least, in view of (a) the failure of any of the Justices to question *Chapman*'s continuing authority in two decisions last Term,¹⁵¹ and (b) more general concerns about stare decisis.¹⁵² A second alternative is to treat these decisions as constitutionally required. Such a holding would ultimately be far more dramatic, and would place limits upon the state and federal systems of criminal justice that Congress is not free to change.¹⁵³

I do not claim to have a crystal ball in these matters. But I do believe that *Chapman* and *Bivens*, unless jettisoned, will force the

¹⁴⁹ See, for example, *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 43-53 (1989); *Boyle v United Technologies Corp.*, 487 US 500, 504-13 (1988).

¹⁵⁰ In *United States v Williams*, 112 S Ct 1735 (1992), the Court declined (in a 5-4 decision) to exercise its "supervisory power" to prescribe standards of prosecutorial conduct before a grand jury. The grand jury, the Court said, was an institution separate from the courts and any judicial authority to fashion rules of grand jury procedure did not extend to the rule adopted by the court below, which would have required a prosecutor to present available exculpatory evidence if that evidence were "substantial." See id at 1742-44.

After rejecting the supervisory power argument, the Court proceeded, in a separate section of the opinion, to hold that the rule sought by the defendant could not be justified "as a sort of Fifth Amendment 'common law.'" Id at 1744. Yet it is possible to read the opinion as not foreclosing the possibility that such common law might be appropriate in other circumstances. For the court did not simply say that such common law was illegitimate. To the contrary, it analyzed the merits and demerits of the proposed rule, and determined that the rule was substantively unjustified, see id at 1744-46. It did, however, finish by stating that: "For the reasons set forth above, however, we conclude that courts have no authority to prescribe such a duty pursuant to their inherent supervisory authority over their own proceedings." Id at 1746. One might well think that reservations on making common law decisions that restrict the state courts would follow a fortiori.

¹⁵¹ See text accompanying notes 18-20.

¹⁵² Compare *Planned Parenthood v Casey*, 112 S Ct 2791, 2808-16 (1992) (opinion of O'Connor, Kennedy, and Souter), refusing to overrule *Roe v Wade*, 410 US 113 (1973), on the grounds of stare decisis.

¹⁵³ See Meltzer, 88 Colum L Rev at 293-94 (cited in note 99); Monaghan, 89 Harv L Rev at 29 (cited in note 112).

Court at some point to confront, and I hope recognize the legitimacy of, constitutional common law.

B. Federal Harmless Error Rules in Civil Cases

The foregoing analysis might be thought to present a puzzle: Why hasn't the Supreme Court federalized the harmless error rules applied by state courts *in civil cases* involving errors of federal constitutional law? Suppose, for example, that a state trial court misstated somewhat the governing law under *New York Times v Sullivan*,¹⁵⁴ but a state appellate court affirmed a judgment against the defendant, finding any error not to have been prejudicial within the meaning of state harmless error rules. The arguments just offered for understanding *Chapman* as a federal common law rule would seem, at least when taken at a high level of generality, to apply equally to civil cases. Yet I have been unable to find any Supreme Court decisions even raising the question whether a federal standard governs the determination of the harmlessness of a federal constitutional error in a state civil case.

My own explanation is not that the cases fundamentally differ in any analytical way, but rather that the Court's situation sense is that no such federal intervention is necessary to protect federal rights. Constitutional rules are much less pervasive in civil cases, so that fewer occasions would arise for such intervention in the first instance. Moreover, the constitutional rules in civil cases are more likely in some sense to go to the "merits" (as does *New York Times v Sullivan*, which relates to the question of the defendant's fault) than to issues less central to a determination of guilt or innocence (for example, exclusion of probative evidence). They may, therefore, not generate the same kind of resistance from state courts. Finally, we may have a higher tolerance for a slim possibility that constitutional error affected the outcome when the case is civil rather than criminal;¹⁵⁵ hence, concerns that state courts may be generous in forgiving constitutional error may be less problematic in civil cases. But if these kinds of explanations are correct, they surely would not, and should not, stand in the way of formulating more robust federal standards in civil cases in which the risks of dilution seem especially serious or troublesome.

¹⁵⁴ 376 US 254 (1964).

¹⁵⁵ Compare *In re Winship*, 397 US 358, 364 (1970) (holding that the Due Process Clause requires proof beyond a reasonable doubt of every fact necessary to support a criminal conviction).

C. Harmless Error Doctrines in Criminal Cases

Would recognition of *Chapman* as a rule of constitutional common law be likely to change the outcome of particular criminal cases involving application of harmless error doctrine? Justice Holmes famously reminded us that “[g]eneral propositions do not decide concrete cases.”¹⁵⁶ I doubt that acceptance of the analysis I have provided would necessarily have changed any Justice’s vote about whether, for example, automatic reversal is required when a coerced confession is erroneously introduced at trial,¹⁵⁷ or when the jury is not properly instructed on the requirement of proof beyond a reasonable doubt.¹⁵⁸

The decision in *Brecht v Abrahamson*¹⁵⁹ last Term, however, presented an issue that might have come out differently had the Court paid more careful attention to the underpinnings of *Chapman*. There the Court divided 5-4 in holding that when federal courts determine, under their habeas corpus jurisdiction, whether a federal constitutional error infected a state criminal conviction, an error should be deemed harmless unless it “had substantial and injurious effect or influence in determining the jury’s verdict”¹⁶⁰—a standard less protective of criminal defendants than the *Chapman* standard applied on direct review. Justice Stevens joined the majority and wrote a separate concurrence, which may reflect some discomfort with the Court’s opinion, or a desire that lower courts interpret that opinion in a fashion sympathetic to the claims of habeas petitioners. Justice Stevens’s opinion stressed that the standard fashioned by the Court “places the burden on prosecutors to explain why [] errors were harmless; requires a habeas court to review the entire record *de novo*; [] leaves considerable latitude for the exercise of judgment by federal courts”; and “is appropriately demanding.”¹⁶¹

I fully agree with Justice Stevens’s observation, in *Brecht*, that differences in doctrinal formulations of standards of review are elusive in application.¹⁶² But had the Court discussed the basis for *Chapman*, rather than simply treating it as an accepted rule seem-

¹⁵⁶ *Lochner v New York*, 198 US 45, 76 (1905) (Holmes dissenting).

¹⁵⁷ *Arizona v Fulminante*, 111 S Ct 1246, 1261 (1991), discussed in text accompanying note 15.

¹⁵⁸ *Sullivan v Louisiana*, 113 S Ct 2078 (1993), discussed in text accompanying notes 18-20.

¹⁵⁹ 113 S Ct 1710 (1993).

¹⁶⁰ *Id.* at 1714, quoting *Kotteakos v United States*, 328 US 750, 776 (1946).

¹⁶¹ 113 S Ct at 1723.

¹⁶² See text accompanying note 123.

ingly devoid of any purpose, perhaps one of the Justices in the bare majority of five would have had more difficulty in "discount[ing the defendant's] argument that [state] courts will respond to our ruling by violating their Article VI duty to uphold the Constitution," or in dismissing the contention that a contrary decision in *Brecht* might deter lower federal or state courts from failing fully to enforce constitutional rights.¹⁶³ For *Chapman* itself rested upon a specific and practical concern that protection of constitutional rights in criminal cases is subject to hydraulic pressures, which may incline courts to find, all too easily, that violations of constitutional rights were harmless. And as I noted earlier, the recognition that *Chapman* addressed that concern would have dovetailed nicely with what I view as a guiding premise for the existence of habeas corpus jurisdiction—that there is a particular reason to fear such hydraulic pressures in *state* criminal courts.¹⁶⁴

It may be too much to suggest that greater attention to the underpinnings of *Chapman* would have caused the author of the *Brecht* opinion, Chief Justice Rehnquist, to have come out the other way, notwithstanding his general desire to restrict the scope of habeas corpus jurisdiction. Much the same could be said of the Justices (other than Justice Stevens) who joined with him. For one should not forget that there is little to prevent five Justices from deciding a case in whatever way that they like. But at a minimum, an exploration of the underpinnings of *Chapman* would have highlighted the extent to which *Brecht* fails to carry forward the Court's past commitment to fashioning rules of constitutional com-

¹⁶³ *Brecht*, 113 S Ct at 1725 (Stevens concurring). In this regard, the Court, and some Justices, have been quite inconsistent. Compare *Teague v Lane*, 489 US 288, 306 (1989) (plurality opinion by O'Connor), citing *Desist v United States*, 394 US 244, 262-63 (1969) (Harlan dissenting) (purpose of habeas corpus is to give [state court] trial and appellate judges throughout the land a necessary incentive to follow established constitutional principles), and *Brown v Allen*, 344 US 443, 508-10 (1953) (opinion of Frankfurter) (Congress gave the federal habeas courts power to review federal constitutional claims that a state criminal court had rejected on the merits as a means of enforcing "higher" federal law); with *Brecht*, 113 S Ct at 1721 (refusing to presume that state court judges are ignoring their oath to uphold the Constitution and holding that the strict harmless error standard of *Chapman v California*, which governs in state courts on direct review of criminal convictions, need not be applied in habeas corpus cases), and *Stone v Powell*, 428 US 465, 493 n 35 (1976) (dismissing both the argument that federal habeas review of state court Fourth Amendment decisions is necessary to ensure adequate enforcement of the Constitution, and the related argument "that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States").

¹⁶⁴ See text accompanying note 122. See also *Brecht*, 113 S Ct at 1727 (White dissenting) (invoking this understanding of habeas corpus jurisdiction to criticize the majority). Compare the cases cited in note 163.

mon law that are designed to promote, in a world full of contrary pressures, the faithful enforcement of federal constitutional guarantees.