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ARTICLES

HARMLESS ERRORS AND SUBSTANTIAL RIGHTS

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CONTENTS

INTRODUCTION2119

I. THE RISE OF HARMLESS CONSTITUTIONAL ERROR.....2126

 A. *Origins*2126

 1. *Harmless Error Generally*2126

 2. *The Possibility of Harmless Constitutional Error*2129

 B. *Growth and Development*.....2135

II. THE ENDURING RIDDLES OF HARMLESS ERROR2142

 A. *What Source of Law?*2142

 1. *Part and Parcel of Constitutional Rights*2143

 2. *Statutory Text*.....2144

 3. *Due Process*2146

 4. *Constitutional Common Law and the Law of Remedies*2149

 B. *Can Constitutional Errors Be Harmless, and If So Which Ones?*.....2151

 1. *The Legitimacy of Harmless Constitutional Error*.....2151

 2. *The Chapman Step Zero Question*.....2153

 C. *How Should Courts Conduct Harmless Error Analysis?*2155

III. RIGHTS, NOT REMEDIES2158

 A. *The Theory*.....2159

 B. *Benefits of the Rights-Based Approach*.....2164

 1. *Answering the Source-of-Law Question*2164

 2. *Making Sense of the Statutory Text*2165

 3. *Helping to Answer the Step Zero Question*.....2166

 4. *Guiding (and Constraining) Harmless Error Analysis*2168

 C. *Objection and Response*2170

 D. *Applications*2174

 1. *The Right to an Impartial Judge*2175

 2. *Coerced Confessions*2176

 3. *Jury Instructional Errors*2177

 4. *Illegally Obtained Evidence*2179

 5. *Batson and the Right to a Public Trial*2181

| | |
|--|------|
| IV. IMPLICATIONS..... | 2183 |
| <i>A. Congress's Power to Regulate Harmless Constitutional Error</i> | 2183 |
| <i>B. Postconviction Review</i> | 2184 |
| CONCLUSION | 2186 |

HARMLESS ERRORS AND SUBSTANTIAL RIGHTS

Daniel Epps*

The harmless constitutional error doctrine is as baffling as it is ubiquitous. Although appellate courts rely on it to deny relief for claimed constitutional violations every day, virtually every aspect of the doctrine is subject to fundamental disagreement and confusion. Judges and commentators sharply disagree about which (and even whether) constitutional errors can be harmless, how to conduct harmless error analysis when it applies, and, most fundamentally, what harmless constitutional error even is — what source of law generates it and enables the Supreme Court to require its use by state courts. This Article offers a new theory of harmless constitutional error, one that promises to solve many of the doctrine's longstanding mysteries. There is widespread consensus that harmless constitutional error is a remedial doctrine, in which the relevant question is the appropriate remedy for an acknowledged violation of rights. But harmless error is in fact better understood as an inquiry into the substance of constitutional rights: a purported error can be harmless only if the defendant's conviction was not actually obtained in violation of the defendant's rights. That approach can help solve the doctrine's longstanding riddles. It explains why harmless error is binding on state courts; it clears up confusion about the relationship between the doctrine and statutory harmless error requirements; it shows which errors can never be treated as harmless without effectively being eliminated; and it provides useful guidance for how courts should conduct harmless error analysis where it applies. Most importantly, it reflects a more realistic understanding of the right-remedy relationship that makes it harder for courts to surreptitiously undermine constitutional values.

INTRODUCTION

Harmless error is almost certainly the most frequently invoked doctrine in all criminal appeals.¹ When a defendant asks an appellate court to overturn a conviction, the government will often argue that, even if a violation of the defendant's rights transpired below, the remedy

* Associate Professor of Law, Washington University in St. Louis. For useful conversations and comments, I thank Jon Abel, Scott Baker, Danielle D'Onfro, Garrett Epps, Peter Joy, Ron Krotoszynski, Ron Levin, Leah Litman, Greg Magarian, Sandy Mayson, Justin Murray, Matt Owen, Wilson Parker, Neil Richards, Ian Samuel, Liz Sepper, and Peter Wiedenbeck, workshop participants at Washington University School of Law and the 2017 Southeast Junior-Senior Workshop, as well as the editors of the *Harvard Law Review*. I owe particular debts of thanks to Brandon Garrett, who did his best to show me the error of my ways, and to Richard Re, whose own insights into these questions helped crystalize my thinking. I am also grateful to Alison Siegler, Erica Zunkel, and their students at the Federal Criminal Justice Clinic at the University of Chicago Law School, who helped me first think through these issues several years ago when we collaborated as co-counsel on an amicus brief involving some difficult harmless error issues. See Brief for 57 Criminal Law and Procedure Professors as *Amici Curiae* in Support of Respondent, *United States v. Davila*, 133 S. Ct. 2139 (2013) (No. 12-167).

¹ See, e.g., William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. LEGAL STUD. 161, 161 (2001) (noting that harmless error is “probably the most cited rule in modern criminal appeals”); see also Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1181 n.52 (1995) (noting that between 1.38% and 2.15% of all reported federal appellate decisions in each year between 1979 and 1994 mentioned “harmless error”).

of reversal is not required because the purported error did not actually undermine the verdict. Courts often agree, either explicitly finding that a constitutional or statutory violation occurred below while still denying relief because the error was harmless,² or simply affirming on harmlessness grounds without deciding conclusively whether an error occurred at all.³

Yet for all its practical importance, and for all courts' familiarity with it, harmless error, and particularly harmless *constitutional* error, remains surprisingly mysterious. The case law reflects deep uncertainty and disagreement about fundamental questions, such as which constitutional errors should even be subject to harmless error analysis⁴ and how to conduct that analysis when it applies.⁵ As a rich scholarly literature has grown,⁶ the confusion has only deepened. Some scholars challenge the

² For a few very recent examples, chosen among thousands of possibilities, see *United States v. Roy*, 855 F.3d 1133, 1178–88 (11th Cir. 2017) (en banc) (holding that counsel's absence during portion of trial was harmless error); *United States v. Escamilla*, 852 F.3d 474, 486–87 (5th Cir. 2017) (holding that admission of fruits of unconstitutional search was harmless error); and *Miles v. State*, 204 S.W.3d 822, 827–28 (Tex. Crim. App. 2006) (holding that error in statement to jury about presumption of innocence was harmless error). See also Landes & Posner, *supra* note 1, at 184 (finding, in a study of cases involving harmless error, that in “87 percent of the cases, the errors were held to be harmless”). For an interesting and telling study of harmless error practices in one jurisdiction, see Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 7 (2002). Sam Kamin studies California death penalty appeals and concludes that “during a ten year period, over ninety percent of death sentences imposed by trial courts were upheld on appeal even though nearly every case was found to have been tainted by constitutional error.” *Id.*; see also, e.g., Charles S. Chapel, *The Irony of Harmless Error*, 51 OKLA. L. REV. 501, 504 n.26 (1998) (concluding, in a single-jurisdiction survey, that in 72% of published death-penalty cases over a two-year period, “at least one claimed error was resolved by applying the harmless error rule”).

³ Again, there are innumerable recent examples. See, e.g., *United States v. Blankenship*, 846 F.3d 663, 670 (4th Cir. 2017) (assuming arguendo that trial court violated Confrontation Clause by denying opportunity for recross-examination but finding any error harmless); *Commonwealth v. Montrond*, 75 N.E.3d 9, 20 (Mass. 2017) (assuming that trial court violated Confrontation Clause but finding any error harmless); *State v. Nelson*, 849 N.W.2d 317, 323–29 (Wis. 2014) (assuming without deciding that trial court erred by not permitting defendant to testify but finding the error harmless); see also Landes & Posner, *supra* note 1, at 184 (concluding that of the 87% of cases in their sample upholding convictions based on harmless error, in “45 percent the appellate court found errors but held that they were harmless” whereas in “42 percent the court concluded that even if there was an error (which the court did not decide) it was harmless”).

⁴ See *infra* section II.B.2, pp. 2153–55.

⁵ See *infra* section II.C, pp. 2155–58.

⁶ The literature concerning the harmless error doctrine is vast. For a sampling, see Helen A. Anderson, *Revising Harmless Error: Making Innocence Relevant to Direct Appeals*, 17 TEX. WESLEYAN L. REV. 391 (2011); Brent M. Craig, “What Were They Thinking?” — A Proposed Approach to Harmless Error Analysis, 8 FLA. COASTAL L. REV. 1 (2006); Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027 (2008); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35; John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 HOUS. L. REV. 59 (2016); Stuart P. Green, *The Challenge of Harmless Error*, 59 LA. L. REV. 1101 (1999); Kamin, *supra* note 2; Landes & Posner, *supra* note 1; Henry P. Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 SUP. CT. REV. 195; Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 NW. U. L. REV. 1053 (2005); D. Alex Winkelman et al., *An Empirical Method for Harmless Error*, 46 ARIZ. ST. L.J. 1405 (2014).

very idea that a constitutional error can *ever* be harmless.⁷ Others accept the premise of harmless error review but contend that courts apply it too generously.⁸ And while a number of commentators have tried to clear up the doctrine,⁹ the replacements offered provide no clearer path forward and would likely make the law of harmless error even less determinate than it is now.¹⁰

Perhaps most troubling, it remains unclear at a basic level what constitutional harmless error review really *is* — what source of law justifies its use and enables the Supreme Court to insist that state courts apply it to federal constitutional claims.¹¹ The most compelling explanation to date was offered by the late Daniel Meltzer, who (building on his work with Richard Fallon on constitutional remedies) argued that the doctrine was best understood as a form of “constitutional common law,”¹² a nebulous and controversial category of judge-made rules that are subject to statutory override.¹³ And while that approach seems to make the most sense of the Court’s cases, it leaves unsolved a number of mysteries while also providing little guidance about when and how to conduct harmless error analysis,¹⁴ relegating most hard questions to an indeterminate remedial balancing.¹⁵

This Article proposes a different way of thinking about harmless constitutional error, one with the potential to clear up most of its enduring puzzles. Essentially all prior attempts to understand harmless error have proceeded from the premise that it involves a remedies question: what should a court do about a violation of the defendant’s constitutional rights?¹⁶ I argue that, instead, harmless error is inexorably tied up in the process of defining and enforcing constitutional *rights*. When asking whether an error is harmless, an appellate court should not think of itself

⁷ See, e.g., David R. Dow & James Rytting, *Can Constitutional Error Be Harmless?*, 2000 UTAH L. REV. 483; Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421 (1980).

⁸ See, e.g., Edwards, *supra* note 1; Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error — A Process in Need of a Rationale*, 125 U. PA. L. REV. 15 (1976).

⁹ See, e.g., Chapel, *supra* note 2; Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 HARV. L. REV. 1791 (2017); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79 (1988).

¹⁰ See *infra* section II.A, pp. 2142–51.

¹¹ See *infra* section II.A, pp. 2142–51.

¹² See Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 26 (1994).

¹³ See *infra* section II.A.4, pp. 2149–51.

¹⁴ To avoid unnecessary verbosity, I will often refer merely to “harmless error” rather than “harmless constitutional error.” My intent, however, will be to refer to the harmless *constitutional* error doctrine in particular, unless I am explicitly discussing nonconstitutional errors.

¹⁵ See *infra* section II.A.4, pp. 2149–51.

¹⁶ The most significant exception is Richard Re, whose approach to harmless error is discussed *infra* section II.A.3, pp. 2146–49.

as asking whether a particular violation of the defendant's rights is serious enough to demand the remedy of reversal. Instead, it is really asking whether a defendant's constitutional rights have been violated at all.

This theory will seem counterintuitive at first. Whenever an appellate court engages in harmless error analysis, the court has, by definition, found that an *error* has occurred. And that means, one might think, that the defendant's rights have been violated. That, in turn, should mean that the question before the court is whether it should do anything about that violation of rights — a classic remedies question. Yet there are good reasons to resist this conclusion, as natural as it might seem.

Let me make clear, though, what exactly I mean when I say that harmless error analysis is best understood as an inquiry about constitutional rights, not remedies. This claim breaks down into two parts. First, the initial question of whether a particular error is *susceptible* to harmless error analysis at all — “Step Zero”¹⁷ of the harmless error inquiry — can be answered by specifying with clarity the nature of the constitutional right in question. If, for example, the right is best understood as one protecting against conviction *based on* a particular form of disfavored evidence, then harmless error analysis applies, since one cannot determine whether the defendant's rights were actually violated without determining whether his conviction was actually based on the improperly admitted evidence. If, by contrast, the right is best understood as safeguarding a value unconnected to a criminal trial's truth-seeking function, or as guaranteeing a particular form of *process*, then harmless error analysis is categorically inapplicable — meaning that once a violation is established, reversal is necessarily required.

Second, the actual practice of harmless error is itself part of constitutional law. That is, when courts ask whether a constitutional error was harmless they are resolving a truly constitutional question, not applying constitutional common law or dealing with equitable remedies. Does this mean that I think that the particular form that harmless error analysis takes (say, demanding certainty beyond a reasonable doubt that the error wasn't harmless before affirming) can be directly derived from the Constitution? Yes and no. Yes, in the sense that when the Supreme Court articulates the appropriate test for harmlessness, it really is making constitutional law; it is not creating some kind of prophylactic rule subject to congressional override. At the same time, I don't claim that the precise test used to determine harmlessness — the beyond a reasonable doubt standard of *Chapman v. California*¹⁸ as opposed to the substantial-and-injurious-influence test from *Kotteakos v. United*

¹⁷ See *infra* section II.B.2, pp. 2153–55.

¹⁸ 386 U.S. 18, 24 (1967).

States,¹⁹ say — follows inevitably from constitutional text and structure. Such a claim would be difficult, perhaps impossible, to defend persuasively (though some have tried²⁰).

Does that mean that a court is doing something other than “pure” constitutional interpretation when it announces the appropriate harmless error standard? No more so than when a court relies on a doctrinal test like “strict scrutiny” when interpreting the First Amendment. As Fallon has explained, tests like strict scrutiny are judicially created doctrines that *implement* constitutional values even if they cannot be directly found in the Constitution.²¹ In my view, we should think of *Chapman*’s requirement that harmless error be proved beyond a reasonable doubt in the same way. That rule is best understood as a doctrinal test that helps implement the constitutional criminal procedure rights to which it applies. When a court engages in harmless error analysis, then, it is applying a doctrinal rule that is designed to get at whether a conviction violated the defendant’s constitutional rights. Once that rights question is answered, the actual remedies question is easy: if the defendant’s conviction is unconstitutional, the appellate court must reverse; if the conviction isn’t, the court need not.

This way of thinking about harmless error has immediate, and significant, implications. First, it resolves the most vexing puzzles about the doctrine: its legal basis and the source of the Supreme Court’s authority to require its use by state courts. The Court’s insistence that state courts follow the *Chapman* standard is hard to square with the settled rule that defendants have no federal constitutional right to an appeal at all. As Meltzer asked, “[w]hy would affirmance of a conviction” under a standard less demanding than *Chapman* “raise a federal question if the state might have provided no appeal whatsoever?”²² The problem disappears, though, once one stops thinking about harmless error as a remedies issue. State courts that adjudicate federal claims always must apply the proper federal rule of decision.²³ In the same way, though a state need not permit criminal appeals, if a state chooses to do so, its appellate courts must apply the proper federal constitutional test — of which the harmless error doctrine is a component — for any federal constitutional claims that defendants are permitted to raise in those appeals.

¹⁹ 328 U.S. 750, 765, 776 (1946).

²⁰ See *infra* section II.A.1, pp. 2143–44.

²¹ See Richard H. Fallon, Jr., *The Supreme Court, 1996 Term — Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 56–57 (1997) (“[T]he [Supreme] Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution’s meaning precisely.” *Id.* at 57.).

²² Meltzer, *supra* note 12, at 3.

²³ See *infra* section III.B.1, pp. 2164–65.

Second, the part-and-parcel theory makes sense of the relationship between harmless error doctrine and the federal harmless error statute, a longstanding mystery that can be described as nothing less than an embarrassment to the Court.²⁴ That provision, 28 U.S.C. § 2111, states that appellate courts “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.”²⁵ Although this statute has been on the books for nearly seven decades,²⁶ the Court has never clearly explained its relationship to the harmless constitutional error doctrine. But properly understood, § 2111 serves as a command to courts against *overenforcing* rights. That is, any particular constitutional or statutory provision may be enforced only insofar as the error actually violated the defendant’s rights under the provision in question. If a constitutional guarantee, properly defined, is a right against conviction based on certain forms of evidence, a prima facie violation of that requirement only “affect[s] . . . substantial rights” if it wasn’t harmless. If, by contrast, the constitutional provision guarantees a particular form of process, full stop — think of a jury trial — a deprivation of that guarantee by definition affects substantial rights without requiring any further harmless inquiry.²⁷

Third, the theory helps delineate the proper bounds of harmless error doctrine in multiple ways. On the one hand, it provides a response to those who contend that there should be no such thing as a harmless constitutional error. That is, for some constitutional rights, treating them as if they could never be harmless would actually *overenforce* the right in question. If, say, the Confrontation Clause is best understood as guarding against convictions *based on* certain kinds of testimonial hearsay, a rule of mandatory reversal would overprotect Sixth Amendment rights: it would provide a benefit to some defendants whose convictions weren’t actually based on the improperly excluded evidence.

At the same time, understanding how potential harmless defines a constitutional right helps make clear why a number of constitutional rights, by their very nature, cannot be treated as harmless without being judicially redefined or eliminated. If, for example, the Sixth Amendment guarantees defendants the right to counsel of their choice, subjecting denials of that right to harmless error analysis, and finding

²⁴ See *infra* section II.A.2, pp. 2144–46.

²⁵ Act of May 24, 1949, ch. 139, § 110, 63 Stat. 89, 105 (codified at 28 U.S.C. § 2111 (2012)). Similar language appears in the Federal Rules of Criminal Procedure, which provide: “Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.” FED. R. CRIM. P. 52(a).

²⁶ Section 2111 is a newer version of an older statute that was first enacted in 1919. See *infra* note 195.

²⁷ See *infra* section III.B.2, pp. 2165–66.

violations not harmless only when defendants received *ineffective* assistance, transforms the right in question into a guarantee of effective assistance of counsel — not a guarantee of counsel *of choice*.²⁸ The harmless issue is inextricably bound up with the definition of the constitutional right at issue.

Fourth, this approach provides guidance for how harmless error should be conducted where it applies. If the harmless error inquiry is really about whether the defendant's rights were in fact violated — instead of being about whether the violation was bad enough to justify reversal — the precise question the appellate court must ask becomes clearer. The relevant question is not, and can't be, whether, if the error had not occurred, some other jury in an alternate universe might have still reached the same verdict. It is instead, as Justice Scalia understood better than any other Justice, “whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.”²⁹

Finally, and perhaps most importantly, treating the harmless error inquiry as firmly part of constitutional law reflects a more realistic understanding of the practical value of constitutional rights. Harmless error doctrine has been called a “[c]onstitutional [s]neak [t]hief” for the way it enables courts to take away with one hand what they have given with the other.³⁰ By declaring broad rights, but then eagerly finding violations of those rights to be harmless, courts can undermine constitutional rights without taking heat for doing so.³¹ Recognizing that harmless error is inexorably tied up with the way constitutional rights are defined makes visible how judges can deploy harmless error doctrine to expand, contract, or even eliminate constitutional rights. And thus it avoids sweeping difficult normative questions under the rug.

To be sure, the Supreme Court has never explained the harmless error doctrine the way I do here, and some of its pronouncements seem flatly inconsistent with this way of thinking. The Court has, for example, refused to explicitly incorporate a prejudice requirement into the formal definition of a Confrontation Clause violation.³² Yet there are compelling reasons to accept this theory even if it at first seems hard to reconcile with the way the Court has described constitutional rights. One possibility is that the Court has simply been disingenuous in how it explains constitutional rights, for fear that trial courts would too eagerly admit evidence that ultimately would be found to undermine the validity of a conviction. Alternatively, those more inclined to a “rights

²⁸ See *infra* section III.A, pp. 2159–64.

²⁹ *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

³⁰ Goldberg, *supra* note 7, at 421.

³¹ See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2537–38 (1996) (noting how harmless error and similar doctrines “require too much knowledge of arcane jargon and a too sophisticated understanding of the legal process,” *id.* at 2538, for the public to realize their significance).

³² See *infra* section III.D, pp. 2174–82.

essentialist” perspective could take the view that a trial court does, in some sense, violate the Constitution the instant it admits uncontroverted testimonial hearsay, regardless of any impact on the verdict — but that a *conviction* only itself becomes unconstitutional when it is actually based on, or results from, that constitutional violation at trial. Whichever approach one prefers, both make clear that courts assessing harmlessness are actually inquiring into rights, not making a remedial judgment.

In summary, understanding constitutional harmless error doctrine as a part of constitutional law, rather than as part of the law of constitutional remedies, provides the best way to rationalize the doctrine and to clear up harmless error’s many riddles. The Article explains and elaborates on that thesis in four parts. Part I explains the doctrine of harmless constitutional error, including the history leading up to the Court’s revolutionary decision in *Chapman* as well as more recent case law. Part II describes the many unresolved puzzles created by *Chapman* and its progeny, including the significant mystery as to the source of law grounding the Court’s ability to impose the *Chapman* rule on state courts. In reviewing harmless error’s puzzles, Part II canvasses the scholarly literature, reviewing prior theories of the doctrine, with special attention to Meltzer’s account of harmless error as a form of constitutional common law arising from the law of remedies. Part III lays out my alternative, rights-based theory of harmless constitutional error. I explain the theory, show why it is able to solve (or at least clarify) the puzzles described in the previous Part, defend the theory against objections, and show how it applies in particular contexts. Part IV then explores the implications of the rights-based theory for related and collateral issues.

I. THE RISE OF HARMLESS CONSTITUTIONAL ERROR

This Part charts the origins and development of harmless constitutional error doctrine in the Supreme Court’s criminal procedure case law. Section A traces the doctrine from its earliest foundations through its first official recognition by the Supreme Court in *Chapman v. California*. Section B surveys doctrinal developments in the immediate wake of *Chapman* through to the present day.

A. Origins

The aim of this section is to trace the origins of the harmless constitutional error doctrine. In order to explain that history, however, it is necessary to set the stage by explaining the origins of the harmless error doctrine more generally — that is, as applied to ordinary evidentiary and other nonconstitutional errors.

1. *Harmless Error Generally.* — Though it seems like a fixed feature of appellate review in American law today, the very idea of harmless error is of relatively recent vintage. The story — or at least its pro-

logue — begins in the nineteenth century. English appellate courts initially used a form of harmless error review, which “required an appellate court to affirm a conviction,” notwithstanding the admission of some inadmissible evidence, “so long as ‘there [was] enough to warrant the finding of the jury independently of the evidence objected to.’”³³ Sometime beginning in the 1830s, though, a much stricter rule took its place.³⁴ Courts started to follow the “Exchequer Rule,” under which “a trial error as to the admission of evidence was presumed to have caused prejudice and therefore required a new trial.”³⁵

This change arose out of judges’ sense that the application of harmless error review “provided inadequate remedies — thereby allowing the underlying rights to be violated with impunity.”³⁶ Yet the cure was almost certainly worse than the disease. English courts started to apply the Exchequer Rule’s presumption of prejudice so strictly as to transform it into a “rule . . . approximating automatic reversal” for the introduction of any bit of inadmissible evidence.³⁷ Parliament responded with statutory reforms designed to get the appellate courts to be more stingy with reversals — although, at least as Justice Traynor tells the story, those reform efforts had only partial success.³⁸

Our interest lies across the Atlantic, however. In American courts, the Exchequer Rule took hold as well.³⁹ As one might expect, the results were unpopular. “[A]n effective coalition of highly respected individual members of the legal profession, as well as a collection of powerful law

³³ Craig Goldblatt, Comment, *Harmless Error as Constitutional Common Law: Congress’s Power to Reverse Arizona v Fulminante*, 60 U. CHI. L. REV. 985, 993 (1993) (alteration in original) (quoting *Doe v. Tyler* (1830) 130 Eng. Rep. 1397, 1398 (C.P.)).

³⁴ See Note, *Harmless Constitutional Error*, 20 STAN. L. REV. 83, 83 (1967); see also ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 8 (1970) (noting that a rule “approximating automatic reversal” arose “[d]uring the period 1835–73”).

³⁵ 7 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 27.6(a) (4th ed.), Westlaw (database updated Dec. 2017).

³⁶ Goldblatt, *supra* note 33, at 994.

³⁷ TRAYNOR, *supra* note 34, at 8. The origins of the strict Exchequer Rule are disputed. Though many have attributed the rule to the 1835 case *Crease v. Barrett*, (1835) 149 Eng. Rep. 1353 (Ex.), Justice Traynor “argues persuasively that the Exchequer Rule was not invented by Baron Parke in *Crease*, but rather by the judges who misread the precedent in applying *Crease* to the case of the moment.” Goldberg, *supra* note 7, at 422 n.9 (citing TRAYNOR, *supra* note 34, at 4).

³⁸ See TRAYNOR, *supra* note 34, at 8–11 (describing English courts’ unwillingness to follow parliamentary efforts to rein in reversals).

³⁹ See John H. Wigmore, *New Trials for Erroneous Rulings upon Evidence; a Practical Problem for American Justice*, 3 COLUM. L. REV. 433, 435 (1903) (“The Exchequer rule duly obtained recognition in the United States in a majority of jurisdictions.”); see also LESTER BERNHARDT ORFIELD, *CRIMINAL APPEALS IN AMERICA* 190 (1939) (noting that in America, England’s strict rule of reversal for any evidentiary error “remained the prevalent doctrine of the state and federal courts right up until recent times”).

reform institutions” led a campaign urging reform.⁴⁰ The critics highlighted the eagerness with which appellate courts overturned judgments — criminal convictions in particular.⁴¹ One famous critique argued that American appellate courts “tower[ed] above the trials of criminal cases as impregnable citadels of technicality.”⁴² As the Court later told the story in *Kotteakos v. United States*, “[s]o great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained.”⁴³

Legislatures listened to the complaints and enacted reforms to address the problem. The first federal harmless error statute, enacted in 1919, amended the Judicial Code to state that:

On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.⁴⁴

A number of states enacted similar reforms as well. By 1927, eighteen or so had passed harmless error statutes of their own, with as many as ten additional states abolishing the Exchequer Rule by judicial decree.⁴⁵ Eventually, every state in the union had its own harmless error statute.⁴⁶

The Supreme Court provided guidance on the meaning of the federal harmless error statute, § 269 of the Judicial Code, within a few decades of its enactment. After touching on the statute in several cases,⁴⁷ the

⁴⁰ Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433, 437 (2009).

⁴¹ See, e.g., Herbert S. Hadley, *Criminal Justice in America*, 11 A.B.A. J. 674, 678 (1925) (urging reform based on a 33% average reversal rate in criminal cases in a study of ten states); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 AM. LAW. 445, 448 (1906) (“If any material infraction is discovered . . . our sporting theory of justice awards new trials, or reverses judgments, or sustains demurrers in the interest of regular play.”); Wigmore, *supra* note 39, at 439 (arguing that the Exchequer Rule “has done more than any other one rule of law to increase the delay and expense of litigation, to encourage defiant criminality and oppression, and to foster the spirit of litigious gambling”).

⁴² Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 VA. L. REG. 65, 82 (1925). Kavanagh’s critique was later quoted in *Kotteakos v. United States*, 328 U.S. 750, 759 (1946).

⁴³ 328 U.S. at 759.

⁴⁴ Act of Feb. 26, 1919, Pub. L. No. 65-281, 40 Stat. 1181, 1181.

⁴⁵ Edson R. Sunderland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126, 147 (1927) (describing the status of current reform efforts).

⁴⁶ *Chapman v. California*, 386 U.S. 18, 22 (1967) (“All 50 States have harmless-error statutes or rules . . .”).

⁴⁷ See *Williams v. Great S. Lumber Co.*, 277 U.S. 19, 26 (1928); *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 421 (1926); *Liberty Oil Co. v. Condon Nat’l Bank*, 260 U.S. 235, 245 (1922); *Camp v. Gress*, 250 U.S. 308, 318 (1919).

Court in *Berger v. United States*⁴⁸ explained what it saw as the purpose of the enactment:

Evidently Congress intended by the amendment to § 269 to put an end to the too rigid application, sometimes made, of the rule that error being shown, prejudice must be presumed; and to establish the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless.⁴⁹

A decade later, in *Kotteakos*, a case where the trial court had erred by joining multiple prosecutions involving unrelated conspiracies,⁵⁰ the Court engaged in a more detailed discussion of the statute. There, the Court provided the still-controlling test for whether a *nonconstitutional* error requires reversal:

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, *except perhaps where the departure is from a constitutional norm* or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.⁵¹

Yet as the emphasized words make clear, *Kotteakos* did not address whether the harmless error test there recognized should apply to constitutional errors. Indeed, the Court had never made clear whether constitutional errors could *ever* be harmless at all. And it did not resolve that question until *Chapman* in 1967, two decades after *Kotteakos* and nearly a half century after the federal harmless error statute was first enacted.

2. *The Possibility of Harmless Constitutional Error.* — Even as harmless error marched on during the first half of the twentieth century, it remained an open question whether a harmless constitutional error was even possible. The Court touched on the issue at various points over the decades, but never offered a clear answer.

The earliest case to which commentators point as addressing the possibility of harmless constitutional error is the 1897 decision *Bram v. United States*.⁵² The defendant in *Bram* was a seaman accused of murdering his captain, the captain's wife, and the second mate while on the

⁴⁸ 295 U.S. 78 (1935).

⁴⁹ *Id.* at 82.

⁵⁰ *Kotteakos v. United States*, 328 U.S. 750, 755 (1946).

⁵¹ *Id.* at 764–65 (emphasis added) (footnote omitted) (citation omitted).

⁵² 168 U.S. 532 (1897).

high seas.⁵³ At trial, a police detective was permitted to testify about statements Bram made about the murder during an interrogation upon reaching port.⁵⁴ The Court found that Bram's statements were not voluntary and that their admission at trial therefore violated his Fifth Amendment rights.⁵⁵ As relevant here, the Court also made clear that such an error would require a new trial:

If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt.⁵⁶

In light of this language, some scholars treat *Bram* as rejecting a harmless error rule, either for confessions or for a broader category of errors.⁵⁷ Yet as *Stein v. New York*⁵⁸ suggested, this may be an overreading of the case.⁵⁹ In *Bram*, the government argued on appeal not merely that the statements in question were harmless, but that they were actually *exculpatory*; the Court explained why, having sought to admit the purported confession below as evidence of guilt, the state would not now be allowed to assert the opposite on appeal.⁶⁰ It is thus easy to read *Bram* as a case addressing fairly unusual circumstances, instead of a case creating a rule against the possibility of harmless constitutional error more generally.

And indeed, if *Bram* really laid down such a rule, the Court appeared unaware of it only three years later in *Motes v. United States*,⁶¹ a case that some commentators point to as the first example of a constitutional error being held harmless.⁶² In *Motes*, a number of defendants were

⁵³ *Id.* at 537.

⁵⁴ *Id.* at 537–39.

⁵⁵ *See id.* at 562–65.

⁵⁶ *Id.* at 541.

⁵⁷ *See, e.g.*, Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1000 (1973) (“*Bram* was interpreted as introducing a rule of automatic reversal where there were constitutional errors in a criminal trial.”); Note, *supra* note 34, at 84–85 (noting that *Bram*'s language was “broad enough to require automatic reversal for all improperly introduced evidence”).

⁵⁸ 346 U.S. 156 (1953), *overruled by* Jackson v. Denno, 378 U.S. 368, 391 (1964).

⁵⁹ *Id.* at 190 n.35.

⁶⁰ As Justice Jackson explained in *Stein*:

The Government took the position in the *Bram* case that this statement, even if not voluntary, was not a confession, since its author purported to deny, not admit, guilt. The quoted language of the Court is the answer to this position. As the Court points out, the evidence was introduced on the theory that it tended to admit guilt, and only on that theory would it have been admissible. It therefore must be treated as a confession.

Id.

⁶¹ 178 U.S. 458 (1900).

⁶² *See, e.g.*, Field, *supra* note 8, at 15 n.2 (calling *Motes* “[t]he only case in which the Court had found constitutional error harmless”); Philip J. Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 521 (1969) (“In only one case, *Motes v.*

charged with participating in a conspiracy to murder a man who had reported the defendants' illegal distilling operations to federal authorities.⁶³ At trial, the government introduced as evidence the transcript of testimony by a cooperating witness who had absconded before trial and was thus unavailable to testify.⁶⁴ The Court held that the admission of the testimony violated the defendants' rights under the Confrontation Clause,⁶⁵ and ordered that their convictions be reversed.⁶⁶

Yet the Court withheld reversal for one of the defendants, Columbus W. Motes, finding that "[t]he case as to him rest[ed] upon peculiar grounds."⁶⁷ Those "peculiar grounds" were that at trial, Motes had testified in detail about the alleged murder, confessing to his participation in the killing.⁶⁸ Because this confession gave the jury "conclusive proof of [Motes's] guilt,"⁶⁹ the Court reasoned that the admission of the other statement "was not so materially to the prejudice of Columbus W. Motes as to justify a reversal of the judgment as to him."⁷⁰ Again, as in *Bram*, the Court likely didn't intend to establish any kind of categorical rule about harmless error for constitutional errors. Instead, the opinion is best read as creating an exception to the normal rules governing reversal when the defendant has admitted in court to the truth of the charges against him.⁷¹ The case is perhaps best understood as a waiver or forfeiture case rather than as one addressing the conceptually distinct question of harmlessness.⁷²

Over the next few decades, even as harmless error statutes proliferated, the Court offered few hints about whether constitutional errors could be treated as harmless. Commentators sometimes point to *Tumey v. Ohio*⁷³ as an example of the Court following a strict no-harmlessness rule.⁷⁴ In *Tumey*, the Court held that the Fourteenth Amendment's Due Process Clause forbade a mayor from serving as judge in a criminal case

United States, has the Supreme Court actually held constitutional error to be harmless." (footnote omitted).

⁶³ See *Motes*, 178 U.S. at 460–61.

⁶⁴ See *id.* at 467–70.

⁶⁵ See *id.* at 471.

⁶⁶ *Id.* at 474 ("For the error referred to the judgment of the Circuit Court must be reversed as to all the plaintiffs in error and a new trial awarded . . .").

⁶⁷ *Id.*

⁶⁸ *Id.* at 474–75.

⁶⁹ *Id.* at 475.

⁷⁰ *Id.* at 476.

⁷¹ Supporting this reading is the Court's admonition that "[i]t would be trifling with the administration of the criminal law to award [Motes] a new trial because of a particular error committed by the trial court, when in effect he has stated under oath that he was guilty of the charge preferred against him." *Id.*

⁷² See Saltzburg, *supra* note 57, at 1001 ("The Court may well have viewed the defendant's admission of guilt under oath as tantamount to a plea of guilty waiving his constitutional rights.")

⁷³ 273 U.S. 510 (1927).

⁷⁴ See, e.g., Saltzburg, *supra* note 57, at 1001–02.

where statutes and ordinances gave the mayor a personal financial interest in ensuring that the defendant was convicted.⁷⁵ After so holding, the Court briskly swatted aside the objection “that the evidence shows clearly that the defendant was guilty . . . and therefore that he can not complain of a lack of due process.”⁷⁶ “No matter what the evidence was against him,” the Court concluded, the defendant “had the right to have an impartial judge.”⁷⁷

In the years after *Tumey*, “the Court required reversal without discussing the harmlessness of the error in a line of cases involving violations of constitutional provisions.”⁷⁸ As noted above,⁷⁹ *Kotteakos* adverted to the possibility that constitutional errors couldn’t be treated as harmless.⁸⁰ In so doing, the Court cited in a footnote *Bram* and several other cases dealing with coerced confessions.⁸¹ At no point, though, did the Court ever conclusively say whether constitutional error could be harmless.

Answering that question became more pressing in the 1960s. Early in that decade, the Court held in *Mapp v. Ohio*⁸² that state courts had to exclude evidence obtained by searches in violation of the Fourth Amendment.⁸³ The exclusionary rule had applied in federal cases since 1914, meaning that federal courts had confronted the question for half a century. *Mapp*, however, made the problem more urgent, since state courts too now had to ask whether particular convictions should stand despite the introduction of the fruits of unconstitutional searches. “[A]ppellate courts in at least 13 states faced the issue and held that their harmless-error rules applied.”⁸⁴

And indeed, the Supreme Court came close to finally resolving whether constitutional errors could be harmless in an exclusionary-rule case. In *Fahy v. Connecticut*,⁸⁵ the defendant was convicted on the basis of evidence that was subsequently found to have been the product of an illegal search.⁸⁶ The state court had upheld the conviction nonetheless on grounds of harmlessness.⁸⁷ The Supreme Court reversed.⁸⁸ The

⁷⁵ See *Tumey*, 273 U.S. at 532.

⁷⁶ *Id.* at 535.

⁷⁷ *Id.* (emphasis added).

⁷⁸ Note, *supra* note 34, at 85 (citing cases).

⁷⁹ See *supra* section I.A.1, pp. 2126–29.

⁸⁰ See *Kotteakos v. United States*, 328 U.S. 750, 764–65 (1946).

⁸¹ See *id.* at 765 n.19 (citing *Malinski v. New York*, 324 U.S. 401, 404 (1945); *Lyons v. Oklahoma*, 322 U.S. 596, 597 n.1 (1944); *Bram v. United States*, 168 U.S. 532, 540–42 (1897); *United States v. Mitchell*, 137 F.2d 1006, 1012 (2d Cir. 1943) (Frank, J., dissenting)).

⁸² 367 U.S. 643 (1961).

⁸³ *Id.* at 655.

⁸⁴ See Note, *supra* note 34, at 86.

⁸⁵ 375 U.S. 85 (1963).

⁸⁶ *Id.* at 86.

⁸⁷ *Id.*

⁸⁸ *Id.*

Court was careful not to say, however, that a constitutional error could never be harmless.⁸⁹ Instead, the Court found that, regardless of whether some constitutional errors could be harmless, “the erroneous admission of this unconstitutionally obtained evidence at this petitioner’s trial was prejudicial; therefore, the error was not harmless, and the conviction must be reversed.”⁹⁰

Justice Harlan, joined by three other Justices, dissented.⁹¹ He argued that the majority had inappropriately dodged “[t]he only question in this case which merits consideration by this Court . . . Does the Fourteenth Amendment prevent a State from applying its harmless-error rule in a criminal trial with respect to the erroneous admission of evidence obtained through an unconstitutional search and seizure?”⁹² Justice Harlan could “see no reason” why it should be impermissible “for Connecticut to apply its harmless-error rule to save this conviction from the otherwise vitiating effect of the admission of the unconstitutionally seized evidence.”⁹³ He also saw “no need to consider whether a state or federal standard of harmless error governs, since the state standard applied here is as strict as any possible federal standard.”⁹⁴

The Court answered the question it danced around in *Fahy* four years later in *Chapman v. California*.⁹⁵ The defendants in *Chapman* had chosen not to testify at their trial, and both the prosecutor and the trial court told the jury that it could draw a negative inference from this failure.⁹⁶ The California Supreme Court acknowledged that this violated *Griffin v. California*,⁹⁷ but held that the error was harmless under the state’s harmless error provision, which forbade reversal unless “the

⁸⁹ See *id.* (“[I]t is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of ‘harmless error’ under the federal standard of what constitutes harmless error.”).

⁹⁰ *Id.* Oddly, though the Court did not hold that harmless error analysis was permissible, it suggested what the appropriate test was when it asked “whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.” *Id.* at 86–87.

⁹¹ *Id.* at 92 (Harlan, J., dissenting).

⁹² *Id.* Justice Harlan’s dissent is unsurprising, in light of his consistently held view that the Fourteenth Amendment’s Due Process Clause gives states significantly more leeway in criminal procedure than the Bill of Rights gives to the federal government. See, e.g., *Ker v. California*, 374 U.S. 23, 45 (1963) (Harlan, J., concurring in the result) (arguing against imposing the Fourth Amendment’s requirements onto the states “because the States, with their differing law enforcement problems, should not be put in a constitutional strait jacket”).

⁹³ *Fahy*, 375 U.S. at 94 (Harlan, J., dissenting).

⁹⁴ *Id.* at 95 n.2.

⁹⁵ 386 U.S. 18 (1967). The Court granted certiorari in *Cooper v. California*, 386 U.S. 58 (1967), alongside *Chapman* in order to resolve the harmless error question, but ultimately resolved *Cooper* on different grounds. *Id.* at 59.

⁹⁶ *Chapman*, 386 U.S. at 18–19.

⁹⁷ 380 U.S. 609 (1965).

court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.”⁹⁸

Chapman held decisively that constitutional error could in fact be harmless. But before reaching that holding, the Court issued a different, and no less important, holding: that *federal* law governed state-court harmless error analysis for federal constitutional violations.⁹⁹ It stated:

With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent — expressly created by the Federal Constitution itself — is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule.¹⁰⁰

While explaining that federal law governed, the Court “was cryptic . . . about the source of the rule it announced.”¹⁰¹ The Court’s suggestion that it had to craft the rule “in the absence of appropriate congressional action”¹⁰² was mysterious, and it has led some commentators to conclude that the Court was creating “constitutional common law” in *Chapman* — a matter discussed at greater length below.¹⁰³

Whatever *Chapman*’s grounding, the rule it created was fairly straightforward. First, federal constitutional violations could be harmless.¹⁰⁴ Second, upon finding a constitutional error, an appellate court should reverse unless it can “declare a belief that [the error] was harmless beyond a reasonable doubt.”¹⁰⁵ Applying that standard to the case at hand, the majority found the error in question not harmless and accordingly reversed.¹⁰⁶

Justice Stewart concurred in the judgment, arguing in favor of a strict rule of automatic reversal for *Griffin* violations.¹⁰⁷ Justice Harlan

⁹⁸ *Chapman*, 386 U.S. at 20 (quoting CAL. CONST. art. VI, § 4 1/2 (repealed 1966)).

⁹⁹ The Court made clear in *Cooper*, however, that when the error at issue is solely a state law question, “the State is free, without review by [the Supreme Court], to apply its own state harmless-error rule.” 386 U.S. at 62.

¹⁰⁰ *Chapman*, 386 U.S. at 21.

¹⁰¹ Meltzer, *supra* note 12, at 2.

¹⁰² *Chapman*, 386 U.S. at 21.

¹⁰³ See *infra* section II.A.4, pp. 2149–51.

¹⁰⁴ *Chapman*, 386 U.S. at 22 (“We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.”).

¹⁰⁵ *Id.* at 24.

¹⁰⁶ *Id.* at 24–26.

¹⁰⁷ *Id.* at 45 (Stewart, J., concurring in the result). Justice Stewart did not necessarily favor automatic reversal for all constitutional violations; he took issue with the majority’s “implicit assumption that the same harmless-error rule should apply indiscriminately to all constitutional violations.” *Id.*

dissented, taking issue with the premise of the majority opinion that a federal standard must govern harmless error analysis in state courts.¹⁰⁸ In his view, “a state appellate court’s reasonable application of a constitutionally proper state harmless-error rule to sustain a state conviction constitutes an independent and adequate state ground of judgment.”¹⁰⁹

B. Growth and Development

While *Chapman* conclusively answered one set of questions — whether constitutional errors can be harmless, and if so what standard governs — it raised many new ones, the answers to which would need to be worked out over the coming decades. Perhaps most pressing was how, exactly, harmless error analysis would work. The Court had announced a standard in *Chapman* (the beyond a reasonable doubt test), but it remained to be seen how rigorously the Court would demand that lower courts apply it.

On its face, the *Chapman* standard was quite demanding; requiring confidence beyond a reasonable doubt that an error was harmless “comes close to automatic reversal.”¹¹⁰ Writing in the immediate aftermath of *Chapman*, Justice Traynor thought that the test was sufficiently stringent as to invite courts “to give the test lip service while tacitly discounting it.”¹¹¹ And indeed, in the years to come critics would accuse the Court of significantly watering down the *Chapman* standard.¹¹²

It did not take long. The first major dispute over harmless error after *Chapman* came only two years later in *Harrington v. California*.¹¹³ There, the defendant was tried alongside three codefendants for attempted robbery and murder.¹¹⁴ The government introduced into evidence confessions by the codefendants, two of whom did not testify at trial — a violation of *Bruton v. United States*.¹¹⁵ The Court upheld the conviction, holding that the error was harmless under *Chapman*.¹¹⁶ In the Court’s eyes, the evidence against the defendant “was so overwhelming” that the error was harmless “unless we adopt the minority view in *Chapman* that a departure from constitutional procedures should result in an automatic reversal, regardless of the weight of the evidence.”¹¹⁷

¹⁰⁸ *Id.* at 46 (Harlan, J., dissenting).

¹⁰⁹ *Id.*

¹¹⁰ TRAYNOR, *supra* note 34, at 43.

¹¹¹ *Id.* at 44.

¹¹² See, e.g., Goldberg, *supra* note 7, at 426 (“Cases decided after *Chapman* relaxed the rigor of the test and applied it to circumstances which could not have been contemplated, and indeed, would have been disavowed by the *Chapman* majority.”).

¹¹³ 395 U.S. 250 (1969).

¹¹⁴ *Id.* at 252.

¹¹⁵ 391 U.S. 123 (1968); *Harrington*, 395 U.S. at 252.

¹¹⁶ *Harrington*, 395 U.S. at 254.

¹¹⁷ *Id.* (citation omitted).

Justice Brennan angrily dissented, accusing the majority of overruling *Chapman* sub silentio “by shifting the inquiry from whether the constitutional error contributed to the conviction to whether the untainted evidence provided ‘overwhelming’ support for the conviction.”¹¹⁸ The majority insisted that it had not “depart[ed] from *Chapman*; nor . . . dilute[d] it by inference.”¹¹⁹

Whichever side was right about how best to read *Chapman*, the majority’s approach unquestionably won out in the years to come.¹²⁰ In *Schneble v. Florida*,¹²¹ the Court relied on *Harrington* to again find a *Bruton* error harmless in light of “overwhelming” evidence of guilt.¹²² And again, a dissent accused the majority of trying to overrule *Chapman*.¹²³ One commentator argues that by the mid-1970s, the *Harrington* approach “was firmly entrenched in the Supreme Court’s jurisprudence as *the* test of harmless error. The Court continued to pay lip service to *Chapman*, but the focus of the test centered on the singular question of guilt.”¹²⁴

The next landmark ruling came a little more than a decade later in *Delaware v. Van Arsdall*.¹²⁵ Again, the Court encouraged the use of harmless error to uphold convictions.¹²⁶ The defendant had been denied the ability to cross-examine a prosecution witness about a deal he had made with the prosecution in exchange for his testimony, which violated the Confrontation Clause.¹²⁷ The state supreme court ordered a new trial without asking whether the error was harmless.¹²⁸ The Supreme Court vacated the judgment,¹²⁹ insisting that the error in question was one for which harmless error analysis was necessary and stressing that “the central purpose of a criminal trial is to decide the factual question

¹¹⁸ *Id.* at 255 (Brennan, J., dissenting) (“The Court today overrules *Chapman* . . . the very case it purports to apply.”).

¹¹⁹ *Id.* at 254 (majority opinion).

¹²⁰ That a narrower reading of *Chapman* would prevail is unsurprising, given the Court’s rightward shift as the Warren Court became the Burger Court and, later, the Rehnquist Court.

¹²¹ 405 U.S. 427 (1972).

¹²² *Id.* at 431.

¹²³ *Id.* at 437 (Marshall, J., dissenting) (“Unless the Court intends to emasculate *Bruton* . . . or to overrule *Chapman* . . . sub silentio, then I submit that its decision is clearly wrong.” (citations omitted)).

¹²⁴ Chapel, *supra* note 2, at 526; see also Martha S. Davis, *Harmless Error in Federal Criminal and Habeas Jurisprudence: The Beast that Swallowed the Constitution*, 25 T. MARSHALL L. REV. 45, 63 (1999–2000) (arguing that “in practice, after *Harrington*, the courts scrutinize the whole record for other overwhelming evidence of guilt; if it exists, then the admitted error is deemed harmless”).

¹²⁵ 475 U.S. 673 (1986).

¹²⁶ See *id.* at 680.

¹²⁷ *Id.* at 676–77.

¹²⁸ *Id.* at 677–78.

¹²⁹ *Id.* at 678.

of the defendant's guilt or innocence."¹³⁰ Echoing *Harrington's* emphasis on overwhelming evidence of guilt, the Court explained that whether the error was in fact harmless would turn on "a host of factors" including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case."¹³¹

One important source of disagreement as the doctrine developed was over which constitutional rules would be subject to harmless error analysis at all. *Chapman* had suggested that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,"¹³² citing in a footnote as examples coerced confessions, the right to counsel, and the right to an impartial judge.¹³³ *Van Arsdall* had rejected the argument that Confrontation Clause violations fell into "the limited category of constitutional errors that are deemed prejudicial in every case."¹³⁴

That category proved limited indeed. Although the Court recognized a few violations for which automatic reversal was appropriate — such as the right to conflict-free counsel, in *Holloway v. Arkansas*¹³⁵ — for the most part the Court concluded that errors were subject to *Chapman*. Mere months after *Van Arsdall*, the Court held in *Rose v. Clark*¹³⁶ that *Chapman* applied to erroneous jury instructions.¹³⁷ Earlier, in *United States v. Hasting*,¹³⁸ the Court forbade lower courts from relying on their supervisory authority to reverse convictions without conducting harmless error analysis where it would otherwise apply.¹³⁹ And in *Satterwhite v. Texas*,¹⁴⁰ the Court held that harmless error analysis applied to the admission, at capital sentencing, of psychiatric testimony obtained in violation of *Estelle v. Smith*.¹⁴¹

¹³⁰ *Id.* at 681; see also *id.* at 682 ("Harrington, which we have expressly reaffirmed on more than one occasion, demonstrates that the denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case." (citations omitted)).

¹³¹ *Id.* at 684.

¹³² *Chapman v. California*, 386 U.S. 18, 23 (1967).

¹³³ *Id.* at n.8 (first citing *Payne v. Arkansas*, 356 U.S. 560 (1958); then citing *Gideon v. Wainwright*, 372 U.S. 335 (1963); and then citing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

¹³⁴ 475 U.S. at 682.

¹³⁵ 435 U.S. 475, 490–91 (1978).

¹³⁶ 478 U.S. 570 (1986).

¹³⁷ *Id.* at 582.

¹³⁸ 461 U.S. 499 (1983).

¹³⁹ *Id.* at 505. The Court further limited the use of the supervisory power to reverse absent a showing of prejudice in *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263–64 (1988), although that case did not involve constitutional error. *Id.* at 256.

¹⁴⁰ 486 U.S. 249 (1988).

¹⁴¹ 451 U.S. 454 (1981); *Satterwhite*, 486 U.S. at 258.

Most controversially, *Arizona v. Fulminante*¹⁴² held that *Chapman* governed an error in admitting a coerced confession at trial.¹⁴³ The Court was sharply divided. Four Justices thought that the confession at issue was coerced and that harmless error analysis was categorically inapplicable.¹⁴⁴ Four other Justices thought that the confession was voluntarily made and that harmless error analysis applied.¹⁴⁵ Justice Scalia agreed with the first four that the confession was involuntary but joined the latter four to create a majority to hold that harmless error analysis applied.¹⁴⁶ Further confusing matters, Justice Kennedy thought that the confession was voluntary and agreed that harmless error analysis applied — but concluded that the confession wasn't harmless (accepting the premise that it was involuntary, though he disagreed with it).¹⁴⁷ He thus voted to reverse even though he saw no error in the judgment.¹⁴⁸

Trying to understand the disposition of the case is challenging, but *Fulminante*'s bottom line is simple: even an error as serious as the admission of an involuntary confession is subject to *Chapman*. This was so despite the dissenters' lament that "a coerced confession is fundamentally different from other types of erroneously admitted evidence to which [*Chapman*] has been applied."¹⁴⁹ And it was so even though *Chapman* itself had suggested that its rule would not apply to coerced confessions.¹⁵⁰ Indeed, the *Chapman* Court appeared to think it so obvious that a coerced confession could not be harmless that, in explaining why reversal was necessary, it compared the constitutional violation suffered by Chapman that required reversal to "the introduction against a defendant of a coerced confession."¹⁵¹ *Fulminante* engendered extensive criticism from commentators.¹⁵²

Perhaps more significant than the specific holding in *Fulminante* was the general approach to harmless error it endorsed. Chief Justice Rehnquist's opinion for the Court distinguished between "trial error," which occurs "during the presentation of the case to the jury, and which

¹⁴² 499 U.S. 279 (1991).

¹⁴³ See *id.* at 310 (Rehnquist, C.J.).

¹⁴⁴ See *id.* at 287–88 (White, J.).

¹⁴⁵ See *id.* at 303 (Rehnquist, C.J., dissenting).

¹⁴⁶ See *id.* at 282 n.7, 302–03 (Rehnquist, C.J.) (majority opinion).

¹⁴⁷ *Id.* at 313–14 (Kennedy, J., concurring in the judgment).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 289 (White, J., dissenting).

¹⁵⁰ See *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967) (citing *Payne v. Arkansas*, 356 U.S. 560 (1958)).

¹⁵¹ See *id.* at 26 ("Such a machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession.")

¹⁵² See, e.g., 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, 154 (1991); see also Goldblatt, *supra* note 33, at 985 (recounting criticism).

may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless,¹⁵³ on the one hand, and “structural defects in the constitution of the trial mechanism, which defy analysis by ‘harmless-error’ standards,” on the other.¹⁵⁴ The Court made clear that the latter category was narrow; the “general rule” is that harmless error applies.¹⁵⁵ Justice White argued that the majority’s dichotomy was inconsistent with precedent, which suggested that determining whether an error could be harmless required “considering the nature of the right at issue and the effect of an error upon the trial.”¹⁵⁶ Despite those protests, *Fulminante*’s trial/structural error dichotomy proved highly influential in later cases.¹⁵⁷

Another tricky question arising from *Chapman* was how harmless error analysis should apply in the postconviction context. The Court finally resolved this question in *Brecht v. Abrahamson*.¹⁵⁸ In an opinion by Chief Justice Rehnquist, the Court concluded that when a constitutional violation is raised on habeas, as opposed to direct appeal, the *Kotteakos* “substantial and injurious effect or influence” standard, and not *Chapman*’s beyond a reasonable doubt standard, governs.¹⁵⁹ Like many other harmless error landmark cases, the Court was sharply divided, with four Justices dissenting.¹⁶⁰

One notable event in the history of harmless constitutional error doctrine was Justice Scalia’s ascension to the Supreme Court. In a number of opinions, he offered a perspective on harmless error that was thoughtful and conceptually systematic.¹⁶¹ Most important, perhaps, was his opinion for the Court in *Sullivan v. Louisiana*.¹⁶² There, the trial court

¹⁵³ *Fulminante*, 499 U.S. at 307–08 (Rehnquist, C.J.).

¹⁵⁴ *Id.* at 309.

¹⁵⁵ *Id.* at 306–07; see also *id.* at 306 (“[M]ost constitutional errors can be harmless.”).

¹⁵⁶ *Id.* at 291 (White, J., dissenting).

¹⁵⁷ See, e.g., *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907–12 (2017); *Rivera v. Illinois*, 556 U.S. 148, 160–61 (2009); *Neder v. United States*, 527 U.S. 1, 8 (1999).

¹⁵⁸ 507 U.S. 619 (1993).

¹⁵⁹ *Id.* at 622–23 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

¹⁶⁰ See *id.* at 644 (White, J., dissenting); *id.* at 650 (O’Connor, J., dissenting).

¹⁶¹ Justice Scalia’s first major contribution to harmless error came in *Carella v. California*, 491 U.S. 263 (1989) (per curiam). There, he explained when a jury instruction that erroneously instructed a jury to presume an ultimate fact could be susceptible to harmless error analysis. In his view, only when “facts necessarily found by the jury” are “so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact” should a court find an error harmless. *Id.* at 271 (Scalia, J., concurring in the judgment). If that relationship were absent, “the problem would not be cured by an appellate court’s determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not by a jury.” *Id.* at 269.

¹⁶² 508 U.S. 275 (1993).

had given the jury an incorrect reasonable doubt instruction at the defendant's murder trial.¹⁶³ The Court had previously held that an essentially identical instruction was unconstitutional;¹⁶⁴ the question in *Sullivan* was whether such an error could ever be treated as harmless.¹⁶⁵ Justice Scalia's opinion for a unanimous Court began with the premise that the defendant had, due to the erroneous jury instruction, been denied his Sixth Amendment right to a jury trial because the jury had never been asked to find him guilty beyond a reasonable doubt.¹⁶⁶ Justice Scalia combined that premise with a conceptually elegant theory of harmless error analysis in order to produce the answer to the case at hand:

[T]he question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. . . . That must be so, because to hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be — would violate the jury-trial guarantee.

Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since . . . there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt — not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough.¹⁶⁷

Justice Scalia's approach seemed to hold the promise of helping explain when harmless error analysis should apply in future cases. Yet not all of Justice Scalia's colleagues were fully on board. Though joining in the majority opinion in *Sullivan*, Chief Justice Rehnquist wrote separately to express some reservations.¹⁶⁸

And six years later, in *Neder v. United States*,¹⁶⁹ the Court squarely rejected Justice Scalia's views. In *Neder*, the defendant was charged with fraud, and the trial court had erred by refusing to permit the jury

¹⁶³ *Id.* at 277.

¹⁶⁴ See *Cage v. Louisiana*, 498 U.S. 39, 39 (1990) (per curiam).

¹⁶⁵ *Sullivan*, 508 U.S. at 276.

¹⁶⁶ *Id.* at 277–78.

¹⁶⁷ *Id.* at 279–80 (citations omitted).

¹⁶⁸ *Id.* at 283–85 (Rehnquist, C.J., concurring).

¹⁶⁹ 527 U.S. 1 (1999).

to decide the issue of materiality, an element of the crime.¹⁷⁰ *Sullivan* seemed to suggest — and the defendant argued — that the error could not be harmless: the Sixth Amendment entitles a defendant to a jury finding of guilt on all the elements of the offense; that finding being entirely absent as to one element, there would seem to be, as in *Sullivan*, no “object . . . upon which harmless-error scrutiny can operate.”¹⁷¹ But the majority, per Chief Justice Rehnquist, did not see things that way. Acknowledging that a “strand of the reasoning in *Sullivan*” supported the defendant’s view, the Court concluded that *Sullivan*’s reasoning had been too broad in light of earlier precedent and held that harmless error analysis applied.¹⁷² Justice Scalia dissented furiously, accusing the majority of ignoring constitutional logic for the sake of expediency.¹⁷³

Justice Scalia was more persuasive in *United States v. Gonzalez-Lopez*.¹⁷⁴ There, a trial court had refused to permit a defendant to be represented by his counsel of choice in violation of the Sixth Amendment right to counsel.¹⁷⁵ Writing for a 5–4 majority, Justice Scalia concluded that such an error must be treated as structural (and thus not subject to review for harmlessness) because of the difficulty in assessing how alternate counsel might have performed.¹⁷⁶ “Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.”¹⁷⁷

Cases involving harmless error questions have continued to divide the Court in recent years.¹⁷⁸ Just last term, in *Weaver v. Massachusetts*,¹⁷⁹ a divided court held that where trial counsel fails to object to an error that would be deemed structural on direct appeal, the defendant must still show prejudice to obtain relief on an ineffective assistance of counsel claim based on that failing.¹⁸⁰

II. THE ENDURING RIDDLES OF HARMLESS ERROR

Harmless error has been a fixed feature of constitutional criminal procedure for more than half a century. Yet in that time, courts, and the Supreme Court in particular, have made little progress in solving

¹⁷⁰ *Id.* at 4.

¹⁷¹ *See id.* at 11 (emphasis omitted) (quoting *Sullivan*, 508 U.S. at 280).

¹⁷² *Id.* at 11–12.

¹⁷³ *See id.* at 34, 40 (Scalia, J., dissenting).

¹⁷⁴ 548 U.S. 140 (2006).

¹⁷⁵ *Id.* at 142.

¹⁷⁶ *Id.* at 150.

¹⁷⁷ *Id.*

¹⁷⁸ *See, e.g.,* *Davis v. Ayala*, 135 S. Ct. 2187 (2015) (Court divided 5–4 over whether *Batson* violation was harmless); *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (Court divided 6–3 over whether vacatur was necessary due to lower court mistakenly treating error as structural).

¹⁷⁹ 137 S. Ct. 1899 (2017).

¹⁸⁰ *Id.* at 1912–13.

“the riddle of harmless error,” which California Supreme Court Justice Traynor called the “most pervasive and elusive of all problems in an appellate court.”¹⁸¹

This Part considers a number of unresolved puzzles. Section A evaluates the mystery about harmless constitutional error doctrine’s legal grounding and the source of the Supreme Court’s power to impose its use on state courts. Section B considers and addresses the threshold objection that violations of constitutional rights should never be harmless, as well as the uncertainty about which errors should be subject to harmless error analysis. And section C explores the confusion over what, exactly, appellate courts should be asking when determining whether a particular error was harmless.

My goal in this Part is twofold: First, I canvas the case law and literature in order to give a comprehensive account of present understandings of, and disagreements over, the harmless constitutional error doctrine. At the same time, I offer my thoughts on the shortcomings of prior efforts in order to lay the groundwork for my theory, which is presented in Part III.

A. *What Source of Law?*

A critical unanswered question about the harmless error doctrine is the source of law from which it arises. In *Chapman*, the Supreme Court reversed the judgment of the California Supreme Court, which had recognized a violation of *Griffin* but had upheld the conviction under a state law harmless error statute. The Court’s new harmless error doctrine was clearly *federal* law that state courts were now required to follow in their own appellate proceedings.

Yet the Court did not adequately explain where this new federal harmless error rule came from. The most explicit statement on the matter was *Chapman*’s elliptical observation that “the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent . . . is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule.”¹⁸² *Chapman* left it to scholars to figure out what exactly this meant, but a clear answer has yet to emerge. Yet answering this question is critically important, since the source of authority for the *Chapman* rule bears directly on whether the Court actually had the power to require state courts to use it.

1. *Part and Parcel of Constitutional Rights.* — The simplest grounding for the harmless error doctrine would be to treat it as “part and parcel’ of the federal constitutional rights it protects,” as Philip Mause put it.¹⁸³ “Thus, the right against compelled self-incrimination could be

¹⁸¹ TRAYNOR, *supra* note 34, at 4.

¹⁸² *Chapman v. California*, 386 U.S. 18, 21 (1967).

¹⁸³ Mause, *supra* note 62, at 532.

defined as a right not to be convicted on the basis of compelled self-incrimination or, more precisely, a right not to be convicted when it cannot be proved ‘beyond a reasonable doubt’ that compelled self-incrimination ‘did not contribute to the verdict.’¹⁸⁴ Or, as the Seventh Circuit suggested, “[o]n this theory, a defendant’s right not to have a coerced confession introduced against her is to be understood as the right not to be convicted if an appeals court cannot determine — beyond a reasonable doubt — that a coerced confession did not affect the jury’s decision.”¹⁸⁵

This approach might best accord with the actual practice of harmless error. As Craig Goldblatt notes, “the Court appears to treat the federal harmless error standard like any other constitutional rule.”¹⁸⁶ Yet recognizing harmless error as part and parcel of constitutional rights seems hard to square with the Court’s observation in *Chapman* that it needed to develop a rule “in the absence of appropriate congressional action.”¹⁸⁷ If harmless error is really a constitutional rule, it is far from clear why congressional action would be relevant.¹⁸⁸

It is also hard to see *how* to ground harmless error in constitutional rights. As Mause recognized, “[d]efining constitutional rights so that they include or simply limit harmless error standards may appear to be little more than a semantic exercise.”¹⁸⁹ Putting more meat on the bones of this theory is difficult, as Richard Re explains:

[O]ne might argue that harmless error analysis is somehow derivable from the text of the Self-Incrimination or Confrontation Clauses themselves — but how? . . . [T]hose Clauses by their terms require exclusion of certain evidence in the first instance, but they do not speak to the appropriate remedy . . . in the event that a violation has *already* transpired.¹⁹⁰

Finally, as Meltzer noted, “even if *Chapman* had rested squarely on the Constitution, profound conceptual difficulty would remain.”¹⁹¹ The problem that he emphasized is that the Supreme Court has repeatedly stated that criminal defendants have no constitutional right to an appeal¹⁹²:

[S]uppose a state conferred on its appellate courts jurisdiction to reverse a criminal conviction only if the error probably affected the outcome — a

¹⁸⁴ *Id.* (quoting *Chapman*, 386 U.S. at 24).

¹⁸⁵ *United States v. Cappas*, 29 F.3d 1187, 1192 (7th Cir. 1994).

¹⁸⁶ Goldblatt, *supra* note 33, at 1004.

¹⁸⁷ *Chapman*, 386 U.S. at 21.

¹⁸⁸ See *infra* section IV.A, pp. 2183–84.

¹⁸⁹ Mause, *supra* note 62, at 533.

¹⁹⁰ Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1915 (2014) (footnote omitted).

¹⁹¹ Meltzer, *supra* note 12, at 2.

¹⁹² *Id.* at 2–3; see also, e.g., *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (“There is, of course, no constitutional right to an appeal . . .”); *Abney v. United States*, 431 U.S. 651, 656 (1977) (“[I]t is well settled that there is no constitutional right to an appeal.” (citing *McKane v. Durston*, 153 U.S. 684 (1894))).

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?¹⁹³

In light of these difficulties, and in the absence of a more fleshed-out theory of how harmless error doctrine can be grounded directly in constitutional rights and why that grounding would require state courts to follow the doctrine, the part-and-parcel theory seems to be a dead end. (As I will show, however, this approach proves more fruitful than others have realized.)

2. *Statutory Text.* — Another seemingly obvious starting point for a theory of harmless constitutional error is statutory law. Congress first enacted a harmless error statute in 1919, providing:

On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.¹⁹⁴

A nearly identical command (though one omitting the word “technical”) has been codified at 28 U.S.C. § 2111 since 1949.¹⁹⁵ And similar language appears in the Federal Rules of Criminal Procedure, which command that “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”¹⁹⁶ As Justice Traynor noted, this language appears to apply to constitutional violations.¹⁹⁷ He argued that the *Chapman* Court “lost sight of” these provisions and should have relied on them to ground its harmless error rule.¹⁹⁸

But in the years since *Chapman*, the Court has never given any indication that these statutes and rules are doing any of the work in cases involving constitutional errors. “Whatever one might say about the Court’s complicated harmless constitutional error jurisprudence, these cases are not about figuring out what Congress meant, in 1919, by ‘affect the substantial rights of the parties.’”¹⁹⁹

Indeed, the Justices’ few pronouncements since *Chapman* about the relationship between the statute and the doctrine have only magnified

¹⁹³ Meltzer, *supra* note 12, at 3 (footnote omitted).

¹⁹⁴ Act of Feb. 26, 1919, Pub. L. No. 65-281, 40 Stat. 1181 (codified at 28 U.S.C. § 391 (1925)) (repealed 1948).

¹⁹⁵ See Act of May 24, 1949, Pub. L. No. 81-72, § 110, 63 Stat. 89, 105 (codified at 28 U.S.C. § 2111 (2012)). In 1948, Congress “repealed the 1919 statute on the view that the Federal Rules of Civil and Criminal Procedure contained all the necessary provisions,” but the next year it “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.” Meltzer, *supra* note 12, at 21 n.86.

¹⁹⁶ FED. R. CRIM. P. 52(a).

¹⁹⁷ See TRAYNOR, *supra* note 34, at 57 (“Since Section 2111 does not distinguish constitutional violations from other errors, it apparently governs them also . . .”).

¹⁹⁸ See *id.* at 42 (arguing that “the Court lost sight of the controlling federal statute”).

¹⁹⁹ Goldblatt, *supra* note 33, at 1004.

the confusion. Consider one puzzling question: How do so-called “structural” errors coexist with the congressional command to ignore violations that do not “affect substantial rights”? If only errors that aren’t harmless “affect substantial rights,” the puzzle is why it would be permissible to disregard § 2111 and Rule 52(a) when it comes to structural errors, which require automatic reversal without any harmless error analysis.

The Court’s only meaningful discussion of this question, in *Neder*, was equivocal. What the Court said can be read as implying either that structural errors automatically affect substantial rights or that such errors fall within an implicit exception to the statutory command.²⁰⁰ Justice Brennan, in a separate opinion in *United States v. Lane*,²⁰¹ endorsed the latter approach. He concluded that “§ 2111 and Rule 52(a) . . . require harmless-error inquiry for all procedural errors”²⁰² but that these provisions do not apply (despite their broad language) to constitutional errors.²⁰³ But others disagree. Justice Alito, for his part, seemed to suggest in dissent in *Gonzalez-Lopez* that Rule 52(a) requires the use of harmless error analysis for *all* constitutional errors.²⁰⁴

This confusion on the Justices’ part doesn’t settle the matter. It is certainly possible that statutory text could provide the best grounding for the harmless constitutional error doctrine even if the Justices themselves have not realized that fact. But there are other problems with relying on the statute, as Meltzer notes. First, there’s reason to think that § 2111 was intended to make it *harder* to reverse convictions, not to require courts to impose a *more* demanding standard, as *Chapman* did.²⁰⁵ Nor is it clear that the statute “regulate[s] the standards of harmlessness applied by the states in their own courts, rather than by the Supreme Court on review of state court decisions.”²⁰⁶ While the relationship between § 2111 and harmless constitutional error is mysterious, it does not seem to provide a firm grounding for the doctrine.

²⁰⁰ The Court stated:

Although [Rule 52(a)] by its terms applies to *all* errors where a proper objection is made at trial, we have recognized a limited class of fundamental constitutional errors that defy analysis by harmless error standards. Errors of this type are so intrinsically harmful as to require automatic reversal (*i.e.*, “affect substantial rights”) without regard to their effect on the outcome. For all other constitutional errors, reviewing courts must apply Rule 52(a)’s harmless-error analysis

Neder v. United States, 527 U.S. 1, 7 (1999) (citations omitted) (internal quotation marks omitted).

²⁰¹ 474 U.S. 438 (1986).

²⁰² *Id.* at 455 (Brennan, J., concurring in part and dissenting in part).

²⁰³ *Id.* at 460.

²⁰⁴ See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 157 (2006) (Alito, J., dissenting) (“The Constitution, by its terms, does not mandate any particular remedy for violations of its own provisions. Instead, we are bound in this case by Federal Rule of Criminal Procedure 52(a) . . .”).

²⁰⁵ Meltzer, *supra* note 12, at 20.

²⁰⁶ *Id.* at 21.

3. *Due Process*. — In *Lane*, Justice Brennan offered an idiosyncratic theory of harmless constitutional error, one grounded in constitutional due process guarantees. Looking to § 2111 and Rule 52(a), he concluded that the phrase “affects substantial rights” in those provisions necessarily requires some form of harmless error analysis.²⁰⁷ As some constitutional errors require automatic reversal without any inquiry into harmlessness, Justice Brennan posited that “constitutional errors are governed by the Due Process Clauses of the Fifth and Fourteenth Amendments rather than by § 2111 and Rule 52(a).”²⁰⁸

Justice Brennan did not, however, elaborate on his due process theory, so it is difficult to evaluate its merits. *Re*, however, has expounded on a due process approach at more length — though it is unclear whether *Re*’s approach is precisely what Justice Brennan had in mind. Here is how *Re* explains things:

[D]ue process principles can explain why trial violations of the Self-Incrimination and Confrontation Clauses *presumptively* trigger reversal on appeal. The key here is the separate due process requirement that convictions must be authorized by constitutionally sufficient evidence — namely, proof beyond a reasonable doubt. . . . Imagine for example that the government moves to admit a sworn affidavit accusing the defendant of the crime, and the defendant moves to exclude based on the Confrontation Clause. If it succeeds in getting the affidavit admitted, the government will next rely on that evidence to request the jury’s authorization to convict. And, after that, the government will rely on the conviction to authorize continued detention during appeal. This chain of authorizations is only as strong as its weakest link. If the affidavit were admitted in error, then there would be insufficient lawful evidence to authorize conviction. And that, in turn, would deprive the government of authority to defend the defendant’s continued detention on appeal. Thus, the in-court violation in itself supplies a reason to reverse, thereby justifying the adoption of a presumption of harmful error.

. . . [F]ocusing on the Due Process Clauses makes sense of why violations of constitutional trial rights do not *necessarily* trigger reversal on appeal. To modify the foregoing example, imagine that an unfronted and therefore illegally admitted affidavit formed part of the government’s case in chief, but that the government also introduced compelling in-trial testimony incriminating the defendant. In that event, the illegally submitted affidavit might be superfluous to the conviction’s legality. For example, any reasonable jury might have reached the very same result — conviction — *even without* the illegally submitted affidavit. Thus, the erroneous introduction of the affidavit would not have deprived the jury of authority to enter a conviction, nor would it have deprived the government of authority to defend the conviction on appeal. A defendant deprived of liberty on the basis of both an unfronted affidavit and compelling in-trial testimony would have enjoyed the full benefit of the “process” he was “due,” even though he suffered a violation of right at trial. So while the presence of a

²⁰⁷ *Lane*, 474 U.S. at 455 (Brennan, J., concurring in part and dissenting in part).

²⁰⁸ *Id.* at 460.

constitutional violation at trial may signal the possibility of a defective conviction, the trial error alone would not in itself require reversal of the ultimate conviction. In this way, harmless error analysis — like the presumption in favor of reversal — can be viewed as a product of the Due Process Clauses.²⁰⁹

Re’s approach is insightful and creative, and as will become clear I think he is definitely onto something. But as described here, the due process approach seems to just create a new set of puzzles. As Re notes, one difficulty with grounding the harmless error doctrine directly in constitutional provisions like the Confrontation Clause is that such clauses “are silent when it comes to the appropriate remedy in the event that a violation has *already* transpired.”²¹⁰ That observation, though, is equally true of the Due Process Clause. Often, a defendant will have been denied some form of process he was “due” at trial; the harder question is what to do about it. If a defendant was denied the chance to confront a trial witness, the defendant may well have been denied the process he was “due” — but the question is still whether to invalidate the conviction as a result, and it is unclear how placing the problem under a Fifth or Fourteenth Amendment heading rather than under a Sixth Amendment heading really clarifies matters.

Re seems to sidestep this difficulty by recasting harmless error analysis as an inquiry into a *present*, not past, violation of rights. But even if this is the right way to think about things,²¹¹ it doesn’t solve the problem, either. How do we know which violations actually render a conviction defective for due process purposes? Re suggests that reversal is appropriate where, absent the unlawfully admitted evidence, the jury would have lacked constitutionally sufficient evidence to convict. Yet this approach, if followed to its logical conclusion, seems to imply a fairly radical retrenchment of the doctrine. If reversal is appropriate only where, but for the error, the government would have failed to introduce constitutionally sufficient evidence, few appeals would deserve

²⁰⁹ Re, *supra* note 190, at 1915–17 (footnotes omitted).

²¹⁰ *Id.* at 1915.

²¹¹ There are some reasons to challenge this perspective. In many criminal appeals, the defendant was not sentenced to incarceration and instead is merely challenging the fact of her conviction. Or, even where a defendant received a prison sentence, her appeal may be resolved after the time has been served. But one could nonetheless characterize even those criminal appeals as arising from continuing violations. An appeal from a fine might be said to be a challenge to the government’s refusal to refund the money. *Cf.* *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017) (holding that the government’s refusal to refund fees and fines paid pursuant to an overturned conviction was a “continuing deprivation of property”). And an appeal of a conviction after the defendant has served the sentence could be seen as a challenge to the government’s continued insistence on the legal validity of the conviction.

that remedy. Indeed, even the defendants in *Chapman* itself almost certainly couldn't have cleared that hurdle.²¹²

Moreover, Re's due process approach seems to focus on the wrong problem. In situations where a defendant is complaining about the improper admission of evidence, the heart of the objection is not really that, but for the error, *no jury could have* convicted; it's that the error caused *this* jury to convict when it otherwise wouldn't have. It's also not entirely clear how Re's due process theory would handle claims of error that don't relate to the admission of evidence. Would the total denial of a jury, say, need to be evaluated through a due process lens? Or can the Sixth Amendment do all the relevant work? In the final analysis, it's not obvious why it's necessary to bring a different constitutional provision into the mix. But all that said, as will be seen later, Re's key insight — that harmless error questions make the most sense when understood under the rubric of rights, not remedies — is both profound and important — and despite my quarrels with some of the details of his approach, there is a larger sense in which we are both on the same page.

4. *Constitutional Common Law and the Law of Remedies.* — Having rejected other potential explanations of harmless constitutional error as inadequate, we now come to what is unquestionably the leading explanation today: that harmless error is a form of “constitutional common law.” The first to argue that harmless constitutional error doctrine falls within this category were Goldblatt²¹³ and Meltzer.²¹⁴

A starting premise of the argument is that harmless error doctrine is a subset of the law of constitutional *remedies*: that is, when a court asks whether a particular constitutional error was harmless, it is not asking whether the Constitution was violated (it was), but whether that past

²¹² In *Chapman*, the Court noted that the government had presented “a reasonably strong ‘circumstantial web of evidence’ against” the defendants beyond the impermissible comments on the defendants’ silence. *Chapman v. California*, 386 U.S. 18, 25 (1967) (quoting *People v. Teale*, 404 P.2d 209, 220 (Cal. 1965), *rev’d sub nom. Chapman*, 386 U.S. 18). It seems extremely unlikely, then, that absent the error there wouldn't have been sufficient evidence to convict — at least under current law, which requires courts to ask “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Re at least hints that this is indeed how his test would work. See Re, *supra* note 190, at 1917 (concluding the “erroneous introduction of [evidence] would not . . . deprive[] the jury of authority to enter a conviction” where “any reasonable jury might have reached the very same result . . . without th[at evidence]” (emphasis omitted)).

²¹³ See Goldblatt, *supra* note 33, at 986.

²¹⁴ See Meltzer, *supra* note 12, at 26. Meltzer and Goldblatt appear to have reached the same conclusion, at roughly the same time — in the same law journal no less — without either realizing it at the time (as neither cites the other). Cf. CARL B. BOYER, *THE HISTORY OF THE CALCULUS AND ITS CONCEPTUAL DEVELOPMENT* 188 (1949) (describing how “Newton and Leibniz, apparently independently, invented algorithmic procedures” that form the basis of modern calculus).

violation of the Constitution (the error) was significant enough to require the remedy of reversal in the present.

Here is how Fallon and Meltzer explain things:

A trial court would err if it admitted hearsay evidence, in knowing violation of the confrontation clause But on appeal, if the trial court is found to have erred substantively, an additional question arises: does the law of remedies require reversal of the conviction? The modern view that constitutional errors can be harmless does not rest upon a sure denial of prejudice, but emerges instead from a balancing calculus familiar to the law of remedies: if the risk of prejudice, though not nonexistent, is small, the burdens of retrial are not warranted.²¹⁵

This premise is not (at present) controversial; essentially every scholarly account of harmless error (save *Re's*²¹⁶) proceeds from the assumption that it is a remedial doctrine.²¹⁷ The wrinkle, Meltzer argued, is that once one recognizes *Chapman* as a remedial doctrine, it is hard to see how following it could be constitutionally required: “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*.”²¹⁸ The *Chapman* rule must be something else, Meltzer concluded, and the “only plausible alternative” is to understand *Chapman* as constitutional common law.²¹⁹

The phrase “constitutional common law” was coined by Henry Monaghan to describe “a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions” that is “subject to amendment, modification, or even reversal by Congress.”²²⁰ Understanding

²¹⁵ Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1771–72 (1991) (footnotes omitted); see also Meltzer, *supra* note 12, at 24 (“Thus, post-conviction relief (whether on appeal or otherwise) is most easily characterized as one kind of remedy for a constitutional violation.”); Goldblatt, *supra* note 33, at 1008 (arguing that in *Chapman* “the Court apparently thought that its duty to protect the underlying right was sufficient authority to announce a remedial rule”); *United States v. Cappas*, 29 F.3d 1187, 1193 (7th Cir. 1994) (“[T]he standard does not define the scope of underlying substantive constitutional rights . . . but is rather about what *remedy* is required where it is agreed that constitutional rights have been violated.”).

²¹⁶ See *supra* section II.A.3, pp. 2146–49.

²¹⁷ See, e.g., Greabe, *supra* note 6, at 61 (describing *Chapman* as requiring courts to “provide remedies for errors not shown to have been harmless beyond a reasonable doubt”); Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1026 (2010) (describing harmless error as a “significant example” of a “[r]emedial rule[]”); Murray, *supra* note 9, at 1793 (calling harmless error review “a set of closely related remedial rules”); Stacy & Dayton, *supra* note 9, at 91 (describing harmless error as a “remedial rule”); Goldblatt, *supra* note 33, at 1008 (describing *Chapman* as “a remedial rule”).

²¹⁸ Meltzer, *supra* note 12, at 26.

²¹⁹ *Id.*

²²⁰ See Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975).

harmless constitutional error as a form of constitutional common law means thinking of it as akin to the implied cause of action recognized in *Bivens v. Six Unknown Named Agents*.²²¹ That is, in both contexts Congress has allowed the Court to fill a void and to fashion a judicially created remedy in order to protect constitutional rights.²²² And “in both cases, the remedy should not be seen as a necessary imperative of the Constitution, but as a matter of constitutional common law.”²²³

Although the Court has never clearly embraced this theory — or, indeed, ever acknowledged that there is a legitimate legal category known as “constitutional common law” — it is the easiest theory of harmless error to reconcile with what the Court has said. Most significantly, the Court’s observation in *Chapman* that its need to “fashion[] the necessary rule” arose “in the absence of appropriate congressional action”²²⁴ provides a strong clue that the Court thought it was doing something more legislative than straightforward constitutional interpretation. At present, this theory is the most compelling on offer.

This conception of harmless error has a number of implications. One is what it says about the role of Congress. If the *Chapman* rule is really just constitutional common law, Congress might have the power to abrogate *Chapman* and order the Court to impose a different harmless standard — or perhaps even no standard — on state courts.²²⁵ This view also seems to mean that the Court has significant leeway in how and when it applies harmless error — given that at some level the Court is really just making it all up.

More troublingly, this theory of harmless error might suggest to some that *Chapman* is illegitimate. The legitimacy of “constitutional common law” is sharply disputed,²²⁶ and if the critics are right *Chapman* appears to stand on shaky ground.²²⁷ Another problem with the conventional

²²¹ 403 U.S. 388 (1971).

²²² Meltzer, *supra* note 12, at 31 (“*Chapman*, like *Bivens*, asks courts to exercise their jurisdiction in a fashion thought appropriate for the vindication of federal constitutional rights.”).

²²³ Goldblatt, *supra* note 33, at 1008.

²²⁴ *Chapman v. California*, 386 U.S. 18, 21 (1967).

²²⁵ Goldblatt argues that *Chapman*’s status as constitutional common law means that Congress could effectively overrule *Fulminante* and require the Supreme Court to treat the introduction of a coerced confession as per se reversible error. See Goldblatt, *supra* note 33, at 992–93.

²²⁶ For a sampling of the literature criticizing this kind of lawmaking by federal courts, see Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 54–59 (1985); Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978).

²²⁷ One critic of “prophylactic” rulemaking by federal courts has suggested the possibility that *Chapman* might be put on surer footing if understood as constitutionally required. See Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 162–63 (1985).

view is that it doesn't (as the next two sections show) provide particularly good answers to how, exactly, harmless error should work — which errors should be treated as harmless, and what question, exactly, courts should be asking in the harmlessness inquiry.

B. Can Constitutional Errors Be Harmless, and If So Which Ones?

i. The Legitimacy of Harmless Constitutional Error. — Some commentators have attacked the harmless error doctrine, arguing that a constitutional error should never be considered harmless. For example, Steven Goldberg has called constitutional harmless error “among the most insidious of legal doctrines.”²²⁸ As Goldberg sees it, the doctrine subverts the Sixth Amendment: by reviewing the trial record to determine whether a constitutional error is harmless, an appellate court “sits as a jury and makes a guilt determination based upon an amount of evidence upon which no jury has passed.”²²⁹ Goldberg also criticizes the doctrine's potential to serve as “a tool for the secret theft of constitutional rights.”²³⁰ The danger, Goldberg contends, is that a court that wishes to dilute constitutional guarantees can do so surreptitiously by finding an error yet declaring it harmless. Because such findings are based on lengthy trial records, they will be “almost beyond question or review” by observers.²³¹

Others have leveled similar critiques. David Dow and James Rytting argue that harmless error doctrine is fundamentally inconsistent with basic rule-of-law values:

When a court applies harmless error analysis in the constitutional context, that court is concluding that a constitutional right — a fundamental legal principle — was violated by the state. Yet it disregards the violation of that principle, at least sometimes. . . . [A] court applying harmless error doctrine is thereby acting particularistically [I]t is saying that notwithstanding the violation of a principle, the right result was attained.²³²

These critiques, and others like them,²³³ are understandable. At least from the perspective of the defense bar, appellate courts can seem all too willing to declare serious errors harmless. And there is something unquestionably troubling about providing no remedy whatsoever for a recognized violation of a right important enough to be enumerated in our nation's founding charter, which the harmless error doctrine seems to ask courts to do on a daily basis.

²²⁸ Goldberg, *supra* note 7, at 421.

²²⁹ *Id.* at 431.

²³⁰ *Id.* at 436.

²³¹ *Id.*

²³² Dow & Rytting, *supra* note 7, at 533.

²³³ See, e.g., James Edward Wicht III, *There Is No Such Thing as a Harmless Constitutional Error: Returning to a Rule of Automatic Reversal*, 12 *BYU J. PUB. L.* 73 (1997).

At the same time, though, it's hard to see what the plausible alternative is. Goldberg may be right that harmless error enables the dilution of constitutional rights. But in a world with no such rule, one would expect courts determined to undermine constitutional rights to simply define those rights more narrowly.²³⁴ As Daryl Levinson has argued, constitutional rights and constitutional remedies have a dynamic relationship; as the remedy for a constitutional violation becomes more severe, we should expect courts to “pare back the constitutional right” in question.²³⁵ Indeed, Steven Shepard has argued that the automatic reversal rule for so-called “structural errors” has had exactly this effect on the definition of constitutional rights.²³⁶ Effectively treating *all* constitutional violations as structural errors — which a mandatory rule would require — could only exacerbate this problem.

Moreover, is it true that *every* violation of a constitutional right is sufficiently important to demand reversal, simply because the right in question is in the Constitution? As Michael Coenen has argued, constitutional rights are not all equally important; some, though enumerated in the Constitution, might not actually deserve to be treated as preeminent.²³⁷ Those who insist that all violations of constitutional rights must be subject to automatic reversal simply because those rights are *in the Constitution* must offer a compelling theory of why that is so.

But Dow and Rytting have a deeper challenge to harmless error doctrine. In their telling, the very concept of harmless error analysis is conceptually incoherent. Relying on epistemology, they emphasize that “determining the truth conditions of counterfactuals has proven to be a problem of significant logical complexity. . . . [I]n a strictly logical sense, all counterfactuals are true, because their antecedents are false.”²³⁸ Because a “counterfactual is not subject to empirical verification,” they argue that there is no principled way for courts to determine whether a harmless error counterfactual (had this error not occurred, the same result would have obtained) is true.²³⁹

²³⁴ See Edwards, *supra* note 1, at 1182 (“My own experience suggests that appellate panels confronted with allegations of error in criminal cases sometimes simply narrow the application of the [constitutional] rule the defendant seeks to invoke. This is a kind of backhanded use of the harmless-error rule, which allows a court to preserve a conviction without seeming to erode an important right by declaring a breach of it to be harmless.”).

²³⁵ Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889 (1999).

²³⁶ See Steven M. Shepard, Note, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180, 1186–89 (2008). Pamela Karlan has argued that this phenomenon has caused courts to narrow the scope of rights under *Batson v. Kentucky*, 476 U.S. 79 (1986). See Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2017–22 (1998).

²³⁷ See generally Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683 (2013).

²³⁸ Dow & Rytting, *supra* note 7, at 503.

²³⁹ *Id.* at 504.

Dow and Rytting may be right about the epistemic difficulties involved in answering the counterfactual involved in harmless error analysis. But it's hard to know what to do with the objection. Is the harmless error counterfactual really any harder to answer, as a logical matter, than many other questions courts are called upon to answer every day? To determine whether the defendant caused a death, a factfinder might have to ask whether, but for the defendant's actions, the decedent would still have died. To decide whether to grant a preliminary injunction, a judge may ask whether, if the injunction does not issue, some great harm will come to pass. And so on.

Perhaps epistemologists will tell us that reaching "true" answers to these questions is impossible. But that does not obviate the practical need for courts to continue asking them. What the law asks for when it comes to questions like "was this error harmless" is not logical certainty but sufficient confidence to justify action. Even if we can't *know* that any particular error was harmless, there may be some errors that seem so unlikely to have caused an erroneous result that it doesn't make sense to overturn a criminal conviction on that basis.

2. *The Chapman Step Zero Question.* — Even assuming that some constitutional errors can properly be held harmless, there is significant uncertainty about which errors should be treated as harmless, or, in other words, which errors should be "susceptible" to harmless error review at all. Call this question "*Chapman Step Zero*."²⁴⁰ There is consensus that some errors, by their very nature, can't be harmless. The Court has repeatedly said, for example, that a directed verdict for the prosecution in a criminal jury trial could never be treated as harmless.²⁴¹ That much seems obvious; if the right to a jury means anything, it should mean that the jury, and not a judge, must find the defendant guilty to justify a conviction.

But there is little common ground beyond this point. *Fulminante* closely divided the Court about whether coerced confessions could be harmless.²⁴² In *Neder*, the Court split 6-3 over whether the omission of an element from the instructions given to the jury was structural error.²⁴³ And in *Gonzalez-Lopez*, the Court divided 5-4 over whether denial of counsel of choice was an error susceptible to review for harmlessness.²⁴⁴

²⁴⁰ Cf. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) (defining *Chevron* "Step Zero" as "the initial inquiry into whether the *Chevron* framework applies at all").

²⁴¹ See, e.g., *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) ("The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal . . ."); *Rose v. Clark*, 478 U.S. 570, 578 (1986) ("[H]armless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury.").

²⁴² See *supra* text accompanying notes 142–157.

²⁴³ See *supra* text accompanying notes 169–173.

²⁴⁴ See *supra* text accompanying notes 174–177.

The disagreement concerns not just which errors can be harmless, but also *how to determine* which errors can be harmless. Chief Justice Rehnquist's opinion in *Fulminante* suggested that the key question is epistemic. He distinguished between isolated "trial errors" whose isolated impact on the record is easy to assess by an appellate court, on the one hand, and "structural" errors that defy harmless error review because they affect the "entire conduct of the trial from beginning to end," on the other.²⁴⁵

Justice Scalia, though sometimes embracing this line of thinking,²⁴⁶ made clear that he thought the Step Zero question was not merely about the epistemic challenge involved in assessing the effects of an error; the nature of the constitutional right at issue mattered, too. In *Sullivan*, he stressed that the error there — a failure to give the jury a proper reasonable doubt instruction — could never be harmless. This was not because it would never be possible for an appellate court to assess whether the record evidence supported a guilty verdict; surely in some cases the evidence would be sufficiently overwhelming. Instead, as he saw things, the problem was that because there was "no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent."²⁴⁷

Justice Scalia's colleagues did not all embrace his way of thinking about this question, however. In *Neder*, he angrily dissented when the Court held that the omission of an element of a crime in jury instructions could be treated as harmless error. Review for harmless error is appropriate, he argued, "only when the jury *actually renders* a verdict — that is, when it has found the defendant guilty of all the elements of the crime."²⁴⁸ In response to Justice Scalia, the majority was able to offer no principled line between the error in *Neder* (a judge's refusal to let the jury decide one element) and a directed verdict for the prosecution (that is, a trial judge's refusal to let the jury decide *any* of the elements of the offense).²⁴⁹

For present purposes, the interesting point is that the conventional view of harmless error as a remedial doctrine rooted in constitutional common law provides essentially no purchase on this question. Indeed, that way of thinking gives us no real way to explain why *any* errors should be categorically immune from harmless error review. If harmless error really boils down to nothing more than a remedial balancing, why

²⁴⁵ *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991).

²⁴⁶ See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) ("[W]e rest our conclusion of structural error upon the difficulty of assessing the effect of the error.").

²⁴⁷ *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

²⁴⁸ *Neder v. United States*, 527 U.S. 1, 38 (1999) (Scalia, J., concurring in part and dissenting in part).

²⁴⁹ The majority's only real response was that "our course of constitutional adjudication has not been characterized by this 'in for a penny, in for a pound' approach." *Id.* at 17 n.2 (majority opinion).

couldn't a directed verdict for the prosecution be harmless in a case where the evidence of guilt is absolutely overwhelming? A defendant in such a case would be the victim of a serious constitutional violation, no doubt. But the whole premise of the conventional view is that harmless error analysis presupposes a constitutional violation and the question before the court is whether remedying that violation is appropriate. Something about upholding a directed verdict feels deeply troubling and inconsistent with the idea of a right to a jury trial. But the conventional view offers us no good tools for explaining why that error is categorically worse than, say, the erroneous introduction of evidence. If the harmless error doctrine tells us it's fine to ignore some violations of the Constitution because we are confident the same result would have obtained absent the error, how can we say some errors are in principle worse than others and thus ineligible for harmless error analysis?

C. How Should Courts Conduct Harmless Error Analysis?

Another source of disagreement is precisely how courts should go about conducting harmless error analysis. *Chapman* instructed appellate courts to uphold convictions in the face of constitutional error only if they were confident the error was harmless beyond a reasonable doubt.²⁵⁰ What exactly this means, and whether it is even the right question to ask, has been the subject of controversy.

First of all, what should courts consider when evaluating whether an error was harmless? Martha Field argues that in the years immediately after *Chapman*, the Court vacillated between different approaches:

1. The first approach focuses upon the erroneously admitted evidence (or other constitutional error) to ask whether it might have contributed to a guilty verdict.
2. The second approach asks whether, once erroneously admitted evidence is excluded, there remains overwhelming evidence to support the jury's verdict.
3. The third approach asks whether the tainted evidence is merely cumulative — that is, merely duplicative of some remaining admissible evidence.²⁵¹

Field criticizes the second approach, arguing that it “usurps the jury’s function far more significantly than an appellate court limiting its inquiry to an examination of the error.”²⁵² Many commentators share Field’s intuition; although there is variation in how they describe the problem, the general consensus is that the harmless inquiry should be about determining the effect of the error on *this* jury, rather than

²⁵⁰ *Chapman v. California*, 386 U.S. 18, 24 (1967).

²⁵¹ Field, *supra* note 8, at 16 (footnote omitted).

²⁵² *Id.* at 33.

determining whether a *different jury* would convict the defendant absent the error.²⁵³ In Justice Traynor's words, "[t]he crucial question is not what might happen tomorrow on an edited rerun, but what did happen yesterday on the actual run."²⁵⁴

This view has not prevailed in the judiciary. While *Chapman* appeared to envision that courts would inquire whether a constitutional error contributed to a verdict,²⁵⁵ the Court quickly seemed to lose sight of that approach, asking instead whether "overwhelming" evidence of guilt apart from the error justified the guilty verdict.²⁵⁶ Today, "[r]ather than properly follow the *Chapman* standard and looking to whether an error actually 'contributed' to the jury's actual verdict, the courts broadly search the record by asking whether independent evidence of guilt taken alone *could* support the conviction."²⁵⁷

Something about this method seems troubling. Yet prevailing thinking about harmless error provides little help in identifying the problem. If harmless error boils down to nothing more than a remedial calculus, why, exactly, should it be off limits to ask whether the defendant would almost certainly be convicted anyways at a new trial devoid of error? Why must it be true that the right question is what effect the error had on the verdict, rather than whether a jury would reach the same bottom line had the error never occurred? Once again, the conventional view of harmless error gives us no answers.

Other critics go further than Field and argue that whether an error contributed to the verdict is the wrong question. Judge Chapel argues that all such tests boil down to asking whether the defendant is guilty, an inquiry that "den[ies] the accused his constitutional right to trial by jury."²⁵⁸ He argues that courts should instead ask whether the error had "a significant adverse effect upon a right of the accused."²⁵⁹ Judge

²⁵³ See, e.g., Edwards, *supra* note 1, at 1170 ("The problem with harmless error arises when we as appellate judges conflate the harmlessness inquiry with our own assessment of a defendant's guilt."); Stacy & Dayton, *supra* note 9, at 92-93 (arguing that the focus of the inquiry should be whether a claimed error may have affected the verdict); Gregory Mitchell, Comment, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CALIF. L. REV. 1335, 1340 (1994) ("[T]he overwhelming-evidence test . . . substantially intrudes on the province of the trial court because it allows the appellate court . . . to come to its own, independent conclusion of guilt.").

²⁵⁴ TRAYNOR, *supra* note 34, at 22.

²⁵⁵ See *Chapman*, 386 U.S. at 24 (holding that "the beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained").

²⁵⁶ See, e.g., *Harrington v. California*, 395 U.S. 250, 254 (1969) (finding constitutional error harmless where remaining evidence of guilt was "overwhelming").

²⁵⁷ Garrett, *supra* note 6, at 59.

²⁵⁸ Chapel, *supra* note 2, at 531.

²⁵⁹ *Id.* at 534. Building on Judge Chapel's work, Martha Davis argues that "[a] more rational harmless error test would focus, as the statute and rules would indicate, not on the impossible-to-know effect of the error on the verdict, but on the importance of the right violated to achieving a fair trial." Davis, *supra* note 124, at 59.

Chapel has the right instinct in focusing on the issue of the defendant's rights, as we will see.²⁶⁰ Still, his approach ultimately offers even less clarity than those he would seek to displace: he rejects the idea that some errors can require automatic reversal and instead says that all errors should be subject to case-by-case review, with a multifactor test designed to help a court discern whether an error really affected the defendant's rights.²⁶¹

Along similar lines is a more recent proposal by Justin Murray, who argues for shifting from a "results-based" approach to a "contextual" approach. Under his method, a court should "begin by identifying the interest (or range of interests) protected by whichever procedural rule was infringed"; then, the court should "balance the redressable harm caused by the error against the social cost of reversal and reverse if the former outweighs the latter."²⁶² Murray is surely right to draw attention to the fact that many constitutional rights protect values independent from the truth-seeking function at trial. Yet his test, like Judge Chapel's, seems deeply, perhaps hopelessly, indeterminate. There is without doubt significant disagreement — both within the judiciary and without — about the social costs of reversal and the value of particular constitutional rights; a test that asks judges to weigh these competing goods in every case seems unlikely to generate consistent results across cases decided by a large judiciary with diverse views on criminal procedure issues.²⁶³

One final source of uncertainty is where, exactly, the particulars of *Chapman's* beyond a reasonable doubt standard come from. The conventional view of *Chapman* as a remedial doctrine suggests that the test is just made up, like *Bivens* — the product of a judicial cost-benefit balancing.²⁶⁴ But at least one commentator has tried to put *Chapman's* beyond a reasonable doubt standard on more solid footing. Stephen Saltzburg contends that *Chapman's* "reasonable possibility" standard is a necessary corollary of the beyond a reasonable doubt burden of proof applied in criminal trials and argues that the former should apply to both constitutional and nonconstitutional error alike.²⁶⁵

²⁶⁰ Judge Chapel's attention to § 2111's text is also admirable, given how few scholars and judges even acknowledge it. See Chapel, *supra* note 2, at 530 ("The face of the harmless error statute clearly dictates that any harmless error test should focus on the right affected by the error.").

²⁶¹ See *id.* at 534 (suggesting that courts should consider "the right affected" and "its purpose," "the totality of the circumstances surrounding the error," and "[t]he deterrence factor, if any, against the government").

²⁶² Murray, *supra* note 9, at 1795.

²⁶³ Cf. Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 551–53 (2005) (arguing that legal theorists need to account for the fact that the judiciary is a collective of individuals).

²⁶⁴ See *supra* section II.A.4, pp. 2149–51.

²⁶⁵ See Saltzburg, *supra* note 57, at 1021–22.

Saltzburg has a point when he observes that the relevant harmless error standard should probably bear some relationship to the adjudicative system's attitude towards the costs of error.²⁶⁶ Still, what the appropriate burden of proof for the finder of fact should be is a different question from the appropriate level of confidence an appellate court must have before passing over a legal error. The latter question turns on many matters — such as the perceived social costs of a new trial and the value of finality — that are not implicated by the burden of proof for a trial factfinder. Drawing a close link between these two questions seems like a bit of a stretch.

III. RIGHTS, NOT REMEDIES

As the previous Part made clear, the harmless constitutional error doctrine is a confusing mess. A better theory of harmless error is needed — one that provides a clearer grounding for the doctrine and one with the potential to provide better answers for the questions considered above. This Part provides such a theory. It lays out and defends a rights-based approach to harmless constitutional error. Section A provides the framework of the theory. Section B explains how the theory resolves most of the longstanding puzzles considered in the previous Part. Section C addresses the most pressing counterargument to the theory — its seeming inconsistency with some of the Court's description of harmless error in the case law. Section D applies the theory to particular criminal procedure rights.

A. *The Theory*

The basic theory of harmless error is simple. Essentially everyone understands harmless error as a remedies question: What relief should a court grant when a defendant's constitutional rights were violated? But I argue this is the wrong frame; harmless error makes much more sense if we understand it as a *rights* question: Was the defendant's conviction obtained in violation of the defendant's constitutional rights? This approach will seem inconsistent with how the Court has talked about harmless error in its cases. I ask readers to withhold those objections for the time being; I will explain the theory in more depth and show why it holds the promise for solving harmless constitutional error's mysteries before I respond to the most serious objections.

It's helpful to start by recognizing what exactly an appellate court is: it's just a court, like any other, where a litigant can ask for relief. In constitutional litigation, the typical model is a plaintiff who goes to court to seek redress from a constitutional violation by a government actor. What makes appellate courts different from ordinary trial courts is that

²⁶⁶ For a discussion of the criminal justice system's attitude towards the costs of errors, see Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065 (2015).

they specialize in providing relief to those whose rights were violated by *other courts*. As Fallon and Meltzer recognize, “[a] convict appealing to overturn a conviction can be viewed as similar to a plaintiff suing for redress of a constitutional tort: both have initiated an adjudicatory process seeking relief from an alleged harm that the government has already inflicted.”²⁶⁷

This understanding of appellate courts *as courts* is useful, I think, because it provides a platform for some analogies that can help make sense of harmless error. When evaluating claims of constitutional violations, courts rely on an array of tests and doctrines that have been developed by the Supreme Court. For example, when addressing a plaintiff’s claim that a law violates the First Amendment’s Free Speech Clause, a court might apply “strict scrutiny,” requiring the government to prove that the restriction is “narrowly tailored to serve compelling state interests.”²⁶⁸ Or, depending on the details of the government action at issue, a court might apply a less demanding form of scrutiny, asking only whether the restriction “serve[s] a substantial interest” and is “narrowly drawn.”²⁶⁹

Where do these tests, and others like them,²⁷⁰ come from? They certainly aren’t explicit in the text of the First Amendment. Nor would one find references to “tiers of scrutiny” in Madison’s notes or other Founding-era sources.²⁷¹ Instead, these doctrinal tests, created as part of the Court’s mission “to *implement* the Constitution successfully,” are “driven by the Constitution, but do[] not reflect the Constitution’s meaning precisely.”²⁷² Nonetheless, such tests are not remedial doctrines; they are designed to help courts determine whether a particular government action actually violated constitutional *rights*.

As I see it, the best way to think about harmless error is that it is part of a judicially created doctrinal test designed to help a court figure out whether a conviction was obtained in violation of the defendant’s rights. Sometimes, the Court explicitly defines constitutional rights this way,²⁷³ such as with the right to disclosure of exculpatory evidence, where the evidence must be “material” to trigger the Due Process

²⁶⁷ Fallon & Meltzer, *supra* note 215, at 1771.

²⁶⁸ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

²⁶⁹ *E.g.*, *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion) (internal quotation marks omitted) (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980)).

²⁷⁰ For a thorough typology of these kinds of doctrinal tests, see Fallon, *supra* note 21, at 67–73.

²⁷¹ *Cf.* Kermit Roosevelt III, *Interpretation and Construction: Originalism and Its Discontents*, 34 HARV. J.L. & PUB. POL’Y 99, 104 (2011) (“It is wildly unrealistic to suppose that the drafters or ratifiers of the Equal Protection Clause understood that they were creating the complex and multi-tiered system that the Supreme Court continues to refine almost a hundred and fifty years later.”).

²⁷² Fallon, *supra* note 21, at 57.

²⁷³ See *Edwards*, *supra* note 1, at 1178 (“[T]he Court in certain cases has gone so far as to *incorporate the harmless inquiry into the determination of whether an error has even occurred.*”).

Clause,²⁷⁴ or the right to effective assistance of counsel, which only violates the Sixth Amendment if counsel's ineffectiveness caused the defendant "prejudice."²⁷⁵ My claim is that essentially *all* criminal procedure rights are best understood this way, even if the Supreme Court has not so explained things (though I think that failure has a good explanation, as I discuss later²⁷⁶).

This is not how we usually think about harmless constitutional error. Instead, the conventional understanding is that harmless error comes into play only when constitutional rights have been violated. If a trial court admits testimonial hearsay without giving the defendant an opportunity to confront the bearer of testimony, the court has violated the Constitution, whether or not the error turns out to be harmless — or at least so the conventional wisdom goes. As Fallon and Meltzer observe, "[a] trial court would err if it admitted hearsay evidence, in knowing violation of the confrontation clause, based on the conclusion that the hearsay would be harmless in light of the overwhelming case against the defendant."²⁷⁷ This conventional view accords best with constitutional text, to be sure. The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."²⁷⁸

But return to the First Amendment analogy I introduced above. The First Amendment speaks in unequivocal terms, commanding that "Congress shall make no law . . . abridging the freedom of speech."²⁷⁹ Yet the Court has not interpreted it quite so literally; instead, it has interpreted the amendment to permit speech restrictions that survive the appropriate level of scrutiny.²⁸⁰ Likewise, though the Equal Protection Clause forbids any state from "deny[ing] to any person within its jurisdiction the equal protection of the laws,"²⁸¹ the Court has not interpreted it as a blanket prohibition on all forms of unequal treatment. Instead, different forms of unequal treatment receive different levels of scrutiny, ranging from strict scrutiny for discrimination based on certain "sus-

²⁷⁴ See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process *where the evidence is material either to guilt or to punishment*" (emphasis added)).

²⁷⁵ See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that to establish a violation, "the defendant must show that the deficient performance prejudiced the defense").

²⁷⁶ See *infra* section III.C, pp. 2170–74.

²⁷⁷ Fallon & Meltzer, *supra* note 215, at 1771.

²⁷⁸ U.S. CONST. amend. VI.

²⁷⁹ *Id.* amend. I.

²⁸⁰ See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–39 (2010) (upholding a content-based speech restriction under strict scrutiny, although without clearly explaining what level of scrutiny applied).

²⁸¹ U.S. CONST. amend. XIV, § 1.

pect” classifications to rational basis review for more benign classifications.²⁸² The point these examples are offered to illustrate is that judicially created doctrinal tests can refine and narrow the scope of constitutional rights even in ways that might seem inconsistent with their plain text.²⁸³

My claim is that whether an error is susceptible to harmless error review is a question that is fundamentally inseparable from the very definition of the right in question. To help understand that claim, *United States v. Gonzalez-Lopez* is instructive. As discussed above,²⁸⁴ the majority in that case concluded that the Sixth Amendment guarantees a right to counsel of choice, not merely effective assistance of counsel, and then held that violations of that right are structural error. For present purposes, though, it is Justice Alito’s dissent that holds our interest. There, he made two arguments. First, he hotly contested the way the majority interpreted the substance of the Sixth Amendment right at issue. “Because the Sixth Amendment focuses on the quality of the assistance that counsel of choice would have provided,” he would have held “that the erroneous disqualification of counsel does not violate the Sixth Amendment unless the ruling diminishes the quality of assistance that the defendant would have otherwise received.”²⁸⁵

I have no quarrel with Justice Alito’s analysis on that first point and indeed no real instinct as to whether he or the majority is right on that threshold question. My focus is instead Justice Alito’s second claim: he went on to argue that, even if the majority were right about the scope of the Sixth Amendment right, the Court should nonetheless subject violations of the right to counsel of choice to harmless error review, reversing only if the violation harmed the quality of representation that the defendant received.²⁸⁶ What’s interesting is how Justice Alito seemed not to recognize — or, at least, acknowledge — the way in which his alternative rationale (accepting the broad construction of the right, but subjecting violations to review for harmlessness) was functionally indistinguishable from his primary rationale (defining the Sixth Amendment right more narrowly). That is, treating violations of the right to

²⁸² See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (noting that “all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny” (internal quotation marks omitted) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995))); *Heller v. Doe*, 509 U.S. 312, 319–20 (1993) (explaining that “a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose”).

²⁸³ For an interesting argument that the strict scrutiny test under the First Amendment might be better conceptualized as a form of “proportionality review,” see Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3136–41 (2015).

²⁸⁴ See *supra* text accompanying notes 174–177.

²⁸⁵ *United States v. Gonzalez-Lopez*, 548 U.S. 140, 155 (2006) (Alito, J., dissenting).

²⁸⁶ See *id.* at 157–59.

counsel of choice as grounds for reversal only when the defendant received less effective assistance would, for all intents and purposes, *redefine the right* so as to guarantee only some level of effectiveness of counsel, not counsel of choice.

The purest formalists may resist this conclusion. The mode of thinking that Levinson has called “rights essentialism” runs deep in constitutional theory.²⁸⁷ “Constitutional adjudication, in this view, begins with the identification or definition of the constitutional right and only then proceeds to application of the right in a real world context, where thoughts of remedy first come into play.”²⁸⁸ Yet this way of thinking conceals how rights and remedies can easily substitute for one another; the practical difference between Justice Alito’s two alternative rationales is essentially zero. Those who insist on a rigid right-remedy relationship seem unable to recognize this fact.²⁸⁹

For the skeptics, though, consider this limiting case. Imagine that a trial court directed entry of judgment in a criminal case for the prosecution — an unquestionable violation of the Sixth Amendment’s jury-trial right. What if such violations could be disregarded if the evidence was sufficiently overwhelming that an appellate court was persuaded beyond a reasonable doubt that the error was harmless? The Supreme Court has told us repeatedly that this would be impermissible.²⁹⁰ And that seems obvious; the alternative feels absurd. Yet the conventional remedial perspective provides no real explanation of why this is so. Why can’t we deny a remedy in cases where it seems certain that the result would be the same?

In my view, the best answer to this question is that when the judge, and not the jury, is the entity that finds the defendant guilty, the defendant’s *right to a jury has unquestionably been violated*. And when a court decides that an error is subject to review for harmlessness, that conclusion implies a judgment about the scope of the right. By deciding that violations of the Confrontation Clause fall within *Chapman*’s ambit, the Court is, necessarily, deciding that the Confrontation Clause guarantees a right not to be convicted *on the basis of* unconflicted testimonial hearsay. A rule of mandatory reversal, by contrast, would re-

²⁸⁷ See Levinson, *supra* note 235, at 858 (observing that “rights essentialism is deeply embedded in the conventional understanding of constitutional law”).

²⁸⁸ *Id.* at 861. For perhaps the archetypal example of this form of thinking, see Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

²⁸⁹ For a fascinating discussion of how the Supreme Court has recently limited various remedies and thus has undermined constitutional values, see Leah M. Litman, *Remedial Spillovers, Convergence, and Displacement*, 106 CALIF. L. REV. (forthcoming 2018).

²⁹⁰ See cases cited *supra* note 241.

flect an implicit understanding that the Confrontation Clause guarantees a right not to be convicted at a trial where any unfronted testimonial hearsay is offered.²⁹¹

On this theory, then, a court must specify what exactly the right protects in order to determine whether the right is subject to review for harmlessness. Where harmless error review applies, we should think of *Chapman* as part of the doctrinal test for determining whether the defendant's rights really were violated, much in the same way that strict scrutiny helps courts figure out if the First Amendment or the Equal Protection Clause was violated. That question being answered, the real remedies question — reverse or not? — is easy in most cases. If the defendant's conviction was obtained in violation of the defendant's rights — understood the way I have explained here — reversal is necessary. If it wasn't, reversal usually won't be required, absent the court's use of its "supervisory power" to reverse despite the lack of a rights violation.

This way of thinking about harmless error reflects a much more realistic conception of the right-remedy relationship. It makes it harder for courts to sweep constitutional rights under the rug, declaring a broad conception of the right while undercutting the right with a lax remedial standard — exactly what Justice Alito sought to do to the right to counsel of choice by subjecting violations to review for harmlessness. Just as importantly, though, this conception also can solve essentially all the outstanding riddles of harmless error, as the next section shows.

B. Benefits of the Rights-Based Approach

Understanding harmless error as fundamentally an inquiry into rights rather than remedies has a number of important benefits, each corresponding to some of the difficulties discussed in Part II.

1. *Answering the Source-of-Law Question.* — As noted, it is hard to explain why the Supreme Court has the authority to impose the *Chapman* rule on state courts; the best explanation thus far — that *Chapman* is a form of constitutional common law — is an uneasy one, especially given the contested status of constitutional common law.²⁹² But if one understands harmless error as part and parcel of constitutional rights, and not as part of the law of remedies, the mystery vanishes.

²⁹¹ Which conception of the Sixth Amendment Confrontation Clause right is correct is beyond my scope here. I note, however, that the right implied by the use of harmlessness review makes a certain deal of sense. It's at least arguable that the primary purpose of the Confrontation Clause was to prohibit the risk that the government would obtain wrongful convictions using ex parte examinations — such as in Sir Walter Raleigh's infamous treason trial, *see Crawford v. Washington*, 541 U.S. 36, 43–45 (2004). If that's right, then it would seem appropriate for the right to extend only as far as needed to prevent that bad result — that is, the right would only need to guard against convictions based on unfronted testimony.

²⁹² *See supra* section II.A.4, pp. 2149–51.

It may be a hard question when the Supreme Court can insist that a state provide a particular remedy. It's also a tricky question when state courts are required to permit litigants to raise federal claims.²⁹³ It isn't a hard question, though, whether a state, having chosen to permit litigants to raise federal claims in state court, is required to follow federal law in adjudicating the substance of those federal claims. Missouri couldn't open its courts to claims arising under the First Amendment but then insist that its courts apply rational basis review for all First Amendment claims.²⁹⁴

The puzzle raised by Meltzer thus disappears. It doesn't matter whether there's a constitutional right to an appeal or not. The state need not permit appeals, but if it does, and if it permits defendants to raise federal constitutional claims in those appeals, then it has to follow federal rules of decision in adjudicating the substance of those claims. Because, under my theory, harmless error review (where it applies) is part of the substantive test for adjudicating criminal procedure rights, state courts must apply it whenever it permits defendants to claim that their federal constitutional rights were violated. And once an error is found to be not harmless, my theory suggests that the defendant's *conviction* is necessarily unconstitutional — meaning that a state that chose to open its appellate courts to federal constitutional claims would have no basis for denying the remedy of reversal.

2. *Making Sense of the Statutory Text.* — A rights-based approach also solves the mystery of the relationship between harmless error doctrine and the federal harmless error statute and Rule. Recall the conundrum: § 2111 and Rule 52(a) both command appellate courts to ignore errors that do not affect “substantial rights.”²⁹⁵ The difficulty is in reconciling this unequivocal command with the existence of structural errors, which require reversal with no inquiry into harmlessness at all. Do

²⁹³ The Supreme Court has held that state courts may not discriminate against federal causes of action. See *Haywood v. Drown*, 556 U.S. 729, 740–42 (2009) (holding that New York could not preclude state-court jurisdiction over claims for money damages against corrections officers under 42 U.S.C. § 1983 by divesting its courts of jurisdiction over all suits, state and federal, seeking money damages against corrections officers); *Testa v. Katt*, 330 U.S. 386, 394 (1947) (forbidding Rhode Island from refusing to allow plaintiffs to raise claims under federal penal statutes, when similar claims under Rhode Island law would be permitted). Meltzer discussed the application of this principle (though before *Haywood v. Drown*, 556 U.S. 729, which arguably pushed the principle further), concluding that it did not justify requiring states to follow federal harmless error rules. See Meltzer, *supra* note 12, at 13–14.

²⁹⁴ This proposition — that federal law governs federal claims — seems sufficiently elementary that no citation should be needed. But for a particularly good, and recent, recapitulation of the principle, see *James v. City of Boise*, 136 S. Ct. 685 (2016) (per curiam), where the Court explained why state courts may not “disregard [its] rulings on federal law,” *id.* at 686.

²⁹⁵ 28 U.S.C. § 2111 (2012); FED. R. CRIM. P. 52(a).

such errors represent an exception to, or an application of, this statutory language? The Court has never provided a satisfactory explanation.²⁹⁶

A rights-based approach to harmless error provides a simple answer. In my view, § 2111 and Rule 52(a) are best understood as commands against *overenforcing* rights. That is, they instruct courts to reverse only if the conviction actually violated some meaningful right — constitutional or statutory — rather than merely some technical rule that doesn't actually affect the defendant's rights.²⁹⁷ And, if my conception of constitutional rights is correct, that reading of the statutory language provides a simple explanation for why certain errors require reversal without any analysis of harmlessness: such errors by definition violate the defendant's rights (for example, a directed verdict in favor of the prosecution).²⁹⁸ By contrast, other kinds of purported errors (for example, the introduction of uncontroverted testimony) don't actually violate the defendant's rights if they didn't actually cause the defendant's conviction. This understanding seems more faithful to the statutory language than the prevailing approach.²⁹⁹

This way of reading the statute also avoids a serious anomaly. One understanding of what it means to “affect substantial rights” is that an error wasn't harmless. This is how Justice Brennan interpreted the language, for example.³⁰⁰ If that's right, though, then one must conclude either (1) that there's an unstated exception for constitutional errors (which was what Justice Brennan concluded³⁰¹) or (2) that some constitutional violations always “affect substantial rights” and others don't. The problem with (1) is that it's hard to square with the statutory language. The problem with (2), when combined with the conventional remedial perspective on harmless error, is that it implies that some *constitutional* rights aren't “substantial.” That is, the conventional view holds that a trial court that admits uncontroverted testimony violates the Confrontation Clause, but that an appellate court can deny a remedy if

²⁹⁶ See *supra* section II.A.2, pp. 2144–46.

²⁹⁷ This language is best read to limit federal courts' ability to reverse in the absence of prejudice under their “supervisory power.” The Court already reached this conclusion in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), which held that “a federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a).” *Id.* at 254.

²⁹⁸ Indeed, one early commentator, discussing a similarly worded harmless error provision, recognized that it would be bizarre to read such a statute as precluding reversal absent proof of prejudice for at least some constitutional violations: “Very likely no court would regard such a statute as doing away with the constitutional rights of the defendant, such as his right to jury trial where he did not waive it, even though no injury to the defendant was shown.” ORFIELD, *supra* note 39, at 196 (discussing the American Law Institute Code of Criminal Procedure's harmless error provision).

²⁹⁹ As Judge Chapel notes, “[t]he face of the harmless error statute clearly dictates that any harmless error test should focus on the right affected by the error.” Chapel, *supra* note 2, at 530.

³⁰⁰ See *United States v. Lane*, 474 U.S. 438, 455 (1986) (Brennan, J., concurring in part and dissenting in part).

³⁰¹ See *id.* at 460.

the violation ultimately didn't affect the bottom line. On this view, then, a defendant who has had his rights violated under the Confrontation Clause hasn't had his "substantial rights" affected. But if a provision of the Bill of Rights isn't a "substantial right," what is?

A rights-based approach to harmless error avoids these problems. If courts are really asking whether a conviction violated a defendant's rights when asking whether an error is harmless, they are being faithful to the statutory language (so no exception is needed). Nor are they implying, by finding an error harmless, that some constitutional violations aren't "substantial rights"; instead, a harmless finding suggests that the *right* wasn't violated at all.

3. *Helping to Answer the Step Zero Question.* — A rights-based approach to harmless error also helps inform the "Step Zero" inquiry — which errors should be susceptible to harmless error analysis? This approach does not always instantly provide an answer, but it makes the question clearer. In the Step Zero inquiry, courts need to specify the right at issue to figure out whether such errors can be harmless. Specifically, the question is what the right guarantees vis-à-vis criminal conviction. If, properly understood, the right protects against conviction using a particular form of process, a conviction obtained via that disfavored method can never be harmless. If, by contrast, the right is best understood as guarding against conviction based on a particular form of disfavored evidence, or as a result of a particular procedure, then a prima facie violation can be harmless. That is, such a right is not really violated if the defendant's conviction wasn't based on, or caused by, the introduction of the disfavored evidence or other procedural violation.

To return to a recurring example: by determining that violations of the Confrontation Clause can be harmless,³⁰² the Supreme Court has effectively, if not explicitly, declared that the Confrontation Clause protects against conviction attributable to unfronted testimonial hearsay. If, instead, the Court had held that Confrontation Clause violations require automatic reversal, that would imply something different about the scope of the right: the Confrontation Clause would instead guard against conviction at a trial where testimonial hearsay was introduced without an opportunity for confrontation — even if that testimony is not responsible for the conviction. (And indeed, at least to my eyes, that latter framing explains why a rule of automatic reversal would make little sense.)

³⁰² See, e.g., *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (remanding for harmless error analysis based on Confrontation Clause violation); *Schneble v. Florida*, 405 U.S. 427, 428, 432 (1972) (finding Confrontation Clause violation harmless); *Harrington v. California*, 395 U.S. 250, 252, 254 (1969) (same).

This perspective also answers the challenge of those who argue that a constitutional error can never be harmless.³⁰³ In one sense, those critics are correct: a conviction that actually renders a violation unconstitutional *can't* ever be harmless. But those critics understand constitutional rights too broadly; a rule of automatic reversal any time uncontroverted testimonial hearsay is introduced would actually overenforce the right guaranteed by the Confrontation Clause, providing a benefit to defendants whose convictions weren't actually tainted by the putative error. What is necessary, then, is a careful construction of the constitutional right in question and what it guarantees with respect to conviction.

I don't claim that the category into which a particular constitutional rule fits will always be obvious. Courts will need to consider history, precedent, the purposes of the particular rule, and functional concerns in identifying the proper scope of the right. Some scholars taking the remedial perspective have urged courts to look to such considerations in deciding whether to treat errors as structural.³⁰⁴ But the rights-based perspective makes the relevant choices starker and clearer. Insisting on a description of the right that incorporates the possibility of harmless error analysis brings to the forefront a question that the remedial perspective enables courts to sweep under the rug. If there is no way to describe the right that makes sense while still showing why harmless error analysis is appropriate, that is a strong clue that the error is one that should require automatic reversal.

And sometimes, at least, the analysis should be fairly easy. Consider the Sixth Amendment guarantee of a criminal jury. There is simply no way to describe the right that permits harmless error analysis that doesn't sound like nonsense. If violations of the Sixth Amendment right to a jury were subject to harmless error analysis (such as where a trial judge directs a verdict for the prosecution), what exactly would the right be? "The right to have a jury, and not a judge, determine whether you are guilty, unless a judge determines you are, in fact, guilty?" So framed, the answer should be obvious.³⁰⁵

³⁰³ See *supra* section II.B, pp. 2151–55.

³⁰⁴ For example, Stacy and Dayton argue that, in determining what the appropriate remedy for a constitutional violation should be, courts should ask first, "whether the violation has impaired the purposes of the constitutional right in question," Stacy & Dayton, *supra* note 9, at 91; second, "whether redoing the adjudicative process can effectively cure the harm caused by the violation," *id.*; and third, whether reversal is "necessary to deter future violations," *id.* at 92. Along somewhat similar lines, Murray argues for a "contextual" approach to harmless error in which courts "begin by identifying the interest (or range of interests) protected by whichever procedural rule was infringed." Murray, *supra* note 9, at 1795.

³⁰⁵ Field, though still working within the more traditional remedial framework, addressed a related problem when she discussed "generically harmless" errors, which cannot be treated as harmless without "effectively overturn[ing] the constitutional rules." Field, *supra* note 8, at 21.

4. *Guiding (and Constraining) Harmless Error Analysis.* — A rights-based approach to harmless error also helps guide harmless error analysis in cases where it is applicable. As noted, a number of commentators have criticized the Court for letting the *Chapman* test devolve over the years from an inquiry into whether a constitutional error contributed to a conviction into appellate speculation about whether the defendant is truly guilty.³⁰⁶ The remedial perspective, though, offers no real basis for criticizing that approach. If the question of harmless error just comes down to whether it makes sense to award a judicial remedy for a violation that happened in the past, why is it off limits for a court to refuse to prescribe the strong medicine of reversal if a new trial is highly unlikely to make a difference because the evidence is so strong? Adherents of the remedial approach have no easy answers.

A rights-based approach solves the mystery. Once the constitutional right at issue is properly specified, it should be clear how a court should — and should not — conduct harmless error analysis. If the Confrontation Clause is best understood as protecting against convictions based on unconflicted testimonial hearsay, the relevant question should be — as *Chapman*, but not necessarily some of the later cases, implies — what role the inadmissible testimony had in causing or contributing to the conviction.

Thus, this conception finally provides a firm foundation for Justice Scalia's approach in *Sullivan*. Because we are asking whether a trial error violated the defendant's rights, the relevant question is "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error," and "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered."³⁰⁷ That is, a court inquiring into whether a conviction violated the defendant's rights must focus on the purported error and the relationship to the verdict actually rendered, not to the mere question of how much evidence in the record might nonetheless support a guilty verdict. To quote Justice Traynor once more, "[t]he crucial question is not what might happen tomorrow on an edited rerun, but what did happen yesterday on the actual run."³⁰⁸

To be clear, I don't claim that one can derive all the details about the relevant harmless error test from a careful specification of the constitutional right. Certainly, one could define a constitutional right in terms of, say, the *Chapman* test; one could speak of "a right not to be convicted when it cannot be proved 'beyond a reasonable doubt' that compelled self-incrimination 'did not contribute to the verdict.'"³⁰⁹ So framed, the whole rights-based enterprise seems like an absurd word game.

³⁰⁶ See *supra* section II.C, pp. 2155–58.

³⁰⁷ *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

³⁰⁸ TRAYNOR, *supra* note 34, at 22.

³⁰⁹ Mause, *supra* note 62, at 532 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

But I don't think that's the right way to think about things. We talk about the right to free speech; we don't talk about the "right to free speech when it can't be shown that a speech restriction is narrowly tailored to serve a compelling government interest." That's because we recognize that tests like strict scrutiny (though still fully binding on state courts as "real" constitutional law, rather than constitutional common law subject to congressional override) are merely part of the doctrinal superstructure necessary to adjudicate claims about the right at issue. In my view, the details of the *Chapman* test are no different. The right is best defined as, say, a right against conviction based on certain forms of forbidden evidence; beyond that, *Chapman*'s beyond a reasonable doubt standard is a doctrinal test that serves to help the Court figure out whether the defendant's conviction was actually based on the error.

C. Objection and Response

There is, concededly, one major objection to the rights-based theory that I've bracketed up until now: the Supreme Court has never explained the doctrine the way that I do here. And while I'm confident almost all of the *results* of the case law can be shown to be consistent with a rights-based approach, the way the Court has described the harmless error inquiry is hard to square with the theory — and in some cases, flatly inconsistent with it.

The Court, for example, describes trial courts violating a defendant's *rights* when they run afoul of one or another constitutional provision, even when that error is ultimately declared harmless. That way of talking about rights is hard to square with my theory that a defendant's constitutional rights are not actually violated unless he is convicted as a result of the error. And indeed, the critique can be sharpened further: under my theory, it's hard even to make sense of the very notion that the trial court *erred* if the purported error is later declared harmless, since in my view such "errors" don't actually violate the defendant's rights at all.

Making matters worse, the Court has in some instances explicitly rejected an understanding of constitutional rights like the one I'm urging. Although the Court has directly incorporated a prejudice or harmlessness prong into some constitutional rights, like *Brady* and *Strickland*,³¹⁰ it has declined to do so for others. Perhaps most notably, in *Van Arsdall*, the Court rejected the argument that a defendant's Confrontation Clause rights are violated only upon conviction:

[T]he focus of the Confrontation Clause is on individual witnesses. Accordingly, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial. It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses

³¹⁰ See *supra* notes 274–275 and accompanying text.

against him nonetheless had been afforded his right to “confront[ation]” because use of that right would not have affected the jury’s verdict. We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness³¹¹

At first glance this creates significant problems for my theory. But I don’t think it’s fatal at all. There are two potential responses.

First, and this is the response that best tracks my instincts, one could conclude that the Court is simply being disingenuous, or is simply mistaken, about the scope of constitutional rights. And indeed, the Court’s failure to be forthcoming about a rights-based approach has a good explanation.

Start from the premise that, when it comes to criminal procedure rules governing trials, we can think of appellate courts as the law enforcers and trial courts as the governed. In my theory, the relevant decision rule³¹² suggests that the introduction of testimonial hearsay without opportunity for confrontation violates the defendant’s constitutional rights only if it actually causes his conviction. But it doesn’t follow that we want trial courts themselves to apply that test during the trial. In the midst of a trial, a trial court might make a mistake about the likely impact that a particular piece of evidence or testimony might have on the jury. (Moreover, what purpose is there for admitting the testimony if it isn’t going to be used to support a conviction?) Far better for a trial court to simply refuse to admit evidence that might trigger the constitutional rule in question, even if we can’t know for certain whether that admission will actually violate the Constitution until the jury renders a verdict. In other words, the conduct rule we want trial courts to follow is a blanket prohibition on the admission of testimony that might create a potential Confrontation Clause problem.

The problem is that, as regulated actors, trial courts experience an extremely low level of “acoustic separation”³¹³ from the decision rules applied by appellate courts. A huge part of the job of the trial judge is to read and understand the rules laid down by appellate opinions. And so, even if appellate courts might want trial courts to follow a strict conduct rule (for example, don’t admit testimonial hearsay without an opportunity for confrontation), it’s hard to enforce such a rule if trial courts all are intimately familiar with the relevant decision rule, which

³¹¹ *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (alteration in original).

³¹² Drawing on the work of Jeremy Bentham, Meir Dan-Cohen identified the distinction between “decision rules,” which are “the laws addressed to officials,” and “conduct rules,” which are “the laws addressed to the general public.” Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 627 (1984).

³¹³ See *id.* at 630–34 (explaining concept of acoustic separation as a condition in which regulated actors are aware of conduct rules but unaware of the decision rules followed by government officials adjudicating disputes involving conduct rules).

says that no error occurs unless the evidence in question contributes to conviction. The partial solution the doctrine reaches, I argue, is to be somewhat disingenuous about when the real constitutional violation occurs. This solution is a partial one only; trial courts still know they will face no meaningful repercussions for violations of constitutional rights that will later be declared harmless.

But being told they are violating the Constitution may have some exhortatory force, even if that exhortation has no real sanction standing behind it. Justice White certainly thought so. Concurring in the judgment in *Van Arsdall*, he argued that a showing of prejudice should be required to state a violation of the Confrontation Clause based on a refusal to permit cross-examination in order to avoid unnecessarily deterring trial court judges.³¹⁴ “No judge welcomes or can ignore being told that he committed a constitutional violation, even if the conviction is saved by a harmless-error finding. . . . [T]he judge will surely tend to permit the examination rather than risk being guilty of misunderstanding the constitutional requirements of a fair trial.”³¹⁵ In my view, what Justice White saw as a bug is actually a feature of the doctrine.³¹⁶

One suggestive piece of evidence for this theory is that the criminal procedure doctrines for which the Court has explicitly incorporated harmless tests into the formal definition of the constitutional right — *Brady* and ineffective assistance of counsel — are unusual, because they are trial errors committed by actors *other than the trial court*. That is, the Court has been willing to acknowledge that harmless or prejudice is part of the definition of a right in precisely those contexts where honesty creates no danger of spillover onto the conduct of trial court judges.³¹⁷

A rights-based theory is also particularly attractive because it avoids a major drawback of the remedial framework. Under the conventional understanding of harmless error, many or most violations of criminal

³¹⁴ *Van Arsdall*, 475 U.S. at 686 (White, J., concurring in the judgment).

³¹⁵ *Id.*

³¹⁶ For a fascinating discussion of issues related to the definition of rights and the interaction between trial and appellate courts, see Michael Coenen, *Spillover Across Remedies*, 98 MINN. L. REV. 1211, 1235–39 (2014). Coenen discusses the problem of how a rule of automatic reversal might encourage appellate courts to narrow the scope of constitutional rights, thereby creating “spillover” that affects the behavior of trial courts as well. In my account, appellate courts have declared rights that are *broader* than necessary precisely to harness the benefits of shaping trial court behavior.

³¹⁷ That said, at least when it comes to *Brady*, there is a good argument that the Court should have defined the relevant conduct rule more broadly. Prosecutors, like trial courts, experience very low levels of acoustic separation, and there is a significant danger that they will decline to turn over exculpatory information if, in their view, the information does not actually rise to the level of being “material” to guilt and innocence. For this reason, the District of Columbia Court of Appeals recently concluded that professional ethics require prosecutors to disclose *all* exculpatory information, not merely that information which rises to the level of being material. See *In re Kline*, 113 A.3d 202, 211–13 (D.C. 2015).

procedure rights receive no remedy whatsoever. Trial courts, the conventional thinking goes, violate the Constitution whenever they err in admitting certain kinds of evidence or testimony at trial. But the victims of those constitutional violations, the defendants, receive no remedy at all except in the smaller subset of cases where that violation of rights actually contributes to a conviction.³¹⁸ Where the violation is harmless, there is no other remedy available; a victim of a harmless error cannot bring a suit for damages against the trial court or the prosecution.

Although it would be naïve to argue that the slogan “for every right, a remedy” accurately describes the American constitutional system,³¹⁹ it is at least a principle that resonates with basic constitutional values.³²⁰ And so it seems regrettable that the conventional thinking on harmless error asks us to simply accept the fact that many or most criminal procedure violations have no remedy. But a rights-based framework avoids that problem entirely: so-called harmless errors are not really constitutional violations at all, whatever the Supreme Court might say about them.

To be sure, this response avoids the problem identified by simply narrowing the content of constitutional rights: under my approach, many things that we currently think of as constitutional violations (such as the introduction of uncontroverted testimonial hearsay) may not actually violate the Constitution at all. Some might worry that this cure is worse than the disease.³²¹

Yet there are two reasons why we should be willing to accept this consequence. First of all, while this approach does effectively narrow the scope of constitutional rights, it does so in name only; for practical purposes, those rights have *already been narrowed* by the widespread

³¹⁸ To be sure, trial courts are sometimes able to correct their errors in real time with curative instructions to the jury. But at least in cases where the trial court overrules an objection that is later determined to be correct, no remedy is available short of reversal of the conviction.

³¹⁹ See Fallon & Meltzer, *supra* note 215, at 1778 & n.243 (arguing that this slogan “reflects a principle, not an ironclad rule, and its ideal is not always attained,” *id.* at 1778).

³²⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) (“It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”). Of course, *Marbury* itself arguably put the lie to this claim by denying a remedy for the injury the Court identified. See *id.* at 173, 177–80.

³²¹ Observers have criticized doctrines like *Brady* and *Strickland* for incorporating prejudice standards directly into the definition of the right. This criticism, however, largely revolves around the argument that the Court has replaced the defendant-friendly *Chapman* standard with a much more prosecution-friendly standard. See, e.g., David McCord, *Is Death “Different” for Purposes of Harmless Error Analysis? Should It Be?: An Assessment of United States and Louisiana Supreme Court Case Law*, 59 LA. L. REV. 1105, 1160 (1999) (“[T]he *Strickland* test does indeed contain a camouflaged harmless error test that is very much less favorable to defendants than would be traditional harmless error analysis.”). Recognizing that harmlessness analysis is part of the underlying definition of a constitutional right does not, however, require adopting a standard less defendant-friendly than *Chapman*.

use of harmless error doctrine. Second, and relatedly, this approach actually *prevents* the further narrowing of rights. By insisting that harmless error analysis is only possible where a constitutional right can plausibly be described in a way that reflects the possibility of a harmless error, this approach precludes courts from deploying harmless error analysis in ways that effectively render constitutional rights meaningless. This approach thus trades off a *nominal* narrowing of constitutional rights in exchange for safeguards against the *practical* narrowing of rights. That is a tradeoff those who care about meaningful protections for defendants, and not merely formal labels, should happily live with.

There is, however, an alternative response to the larger objection I'm addressing here — one that could appeal better to those more steeped in a “rights essentialist” framework.³²² One could embrace the view that the Court was right about the scope of constitutional rights in *Van Arsdall* without rejecting a rights-based approach to harmless error. That is, one could say that admission of testimonial hearsay without confrontation *does* violate the Confrontation Clause at the moment it occurs (and this is surely easier to square with the plain text of the Sixth Amendment).³²³ But one could also conclude that *conviction based on* that constitutional violation is a separate, further violation of the Constitution. And, given that an appeal is a specialized form of court proceeding aimed at trial court judgments, one could conclude that appellate courts can only provide relief for constitutional violations that undermine the validity of convictions, even if other constitutional violations happened to befall the defendant along the way to his valid conviction.

That insight, I think, motivates Re's approach to harmless error, discussed above.³²⁴ Re grounds harmless error in due process, arguing that the key question for an appellate court is whether a violation of, say, the Confrontation Clause is responsible for the conviction, thereby depriving the jury of authority to convict, and thus violating the Due Process Clause.³²⁵ But it's not clear to me that the additional apparatus of the Due Process Clause is necessary. Even in a world where the Fifth Amendment was never ratified, one could conclude that a conviction based on the very kind of testimony forbidden by the Confrontation Clause is an *additional* constitutional violation, separate from the violation of introducing that testimony in the first place — and that this additional violation requires the remedy of reversal. Grounding harmless error in due process is not, however, fatal to my theory at all, so readers drawn to Re's approach can largely reconcile our views.

³²² See generally Levinson, *supra* note 235.

³²³ See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

³²⁴ See *supra* section II.A.3, pp. 2146–49.

³²⁵ See Re, *supra* note 190, at 1916–17.

Much more could be said about these potential responses to the overarching objection. What I have said here no doubt raises difficult metaphysical questions about the right-remedy relationship that I have not fully resolved. But I think I have shown that there are at least plausible ways to rationalize this theory with the current practice of constitutional law, as counterintuitive as the theory might seem to be at first.

D. Applications

Having explained and defended my theory, it remains to show how it works in practice. Thus far, I've considered only a very small number of constitutional violations in order to illustrate the bounds of the theory. Though my goal is mainly to lay out the theory, rather than exhaustively document its applications, this section will apply the rights-based approach to several different constitutional provisions so as to demonstrate its workings and to address objections. As I'll show, my approach can explain most of the existing precedent, though in at least one instance it suggests that the Court erred. With respect to each context, the rights-based approach demands a careful construction of the right in light of its history and purposes.

I do not claim that this approach will always lead to easy answers. Sometimes it will — some rights simply cannot be plausibly explained in a way that incorporates the possibility of harmless error analysis. But other times there will be genuine uncertainty about the proper scope of a right. This approach, then, may seem like no real improvement on some of the remedial approaches, which I have already criticized for their indeterminacy.³²⁶ I think my approach is better, though, because in those hard cases it makes clear what the stakes truly are. In arguing about whether an error can be treated as harmless, judges and justices aren't merely debating the costs and benefits of a particular remedy. They are actually arguing about what the constitutional right at stake really is. Recognizing that fact makes it much more difficult for courts to sweep rights under the rug, declaring broad rights while making those rights less valuable through the overly generous application of harmless error rules.

i. The Right to an Impartial Judge. — The Court has frequently suggested that the right to an impartial judge in a criminal trial requires automatic reversal even if the challenger cannot point to any erroneous or biased *ruling* by the judge.³²⁷ The Court reaffirmed this principle

³²⁶ See *supra* section II.C, pp. 2155–58.

³²⁷ See *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991); *Chapman v. California*, 386 U.S. 18, 23 & n.8 (1967); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

most recently in *Williams v. Pennsylvania*,³²⁸ holding that it was structural error for a state supreme court justice to participate in a capital case where he had formerly been the prosecutor who had approved a request to seek the death sentence.³²⁹

The Court in *Williams* rested its conclusion that the error was structural partly on the difficulty of assessing prejudice, given the confidentiality of judicial deliberations.³³⁰ But the Court also emphasized that what mattered was not the mere possibility of actual bias, but the *appearance* of bias, as the appearance of judicial impartiality is “necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.”³³¹ So understood, the right at issue seems best understood as a right to an impartial adjudicator, full stop. Treating the right as potentially harmless, by contrast, would recognize a right against biased rulings, which would guard against *actual* bias but would not sufficiently protect the interest in avoiding the appearance of bias.

Here is also a good place to make clear that, in my theory, there is a significant difference between concluding that (1) a rule of automatic reversal is necessarily implied by the scope of the right; and (2) a rule of automatic reversal is necessary because assessing prejudice is too practically difficult in any given case. My approach is most useful for determining which constitutional rights fit into the first category; less so the second. For ease of reference, I’ll borrow and modify existing terminology and call only errors in the first category “structural.” Errors in the second category I’ll call “presumptively harmful.”

2. *Coerced Confessions*. — The Court’s conclusion in *Fulminante* that the introduction of a coerced confession could be harmless error was roundly criticized by commentators.³³² Yet one could try to defend the result under my theory. The argument would go as follows: the main reason to be concerned about the use of coerced confessions at trial centers around their potential to sway the jury, not the mere fact of their introduction. If that’s right, then perhaps it isn’t wrong to specify the relevant right as “the right not to be convicted on the basis of a coerced confession” as opposed to “the right not to be convicted at a trial in which a coerced confession is introduced.”

But saying that *Fulminante* is not clearly wrong is not to say it is clearly right. Justice White forcefully argued that “permitting a coerced

³²⁸ 136 S. Ct. 1899 (2016); cf. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (holding that due process required judicial recusal in a civil case where one party’s corporate officer had made extraordinary campaign contributions to the judge’s election efforts).

³²⁹ *Williams*, 136 S. Ct. at 1910.

³³⁰ See *id.* at 1909 (“The deliberations of an appellate panel, as a general rule, are confidential. As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process.”).

³³¹ *Id.*

³³² See sources cited *supra* note 152.

confession to be part of the evidence on which a jury is free to base its verdict of guilty” is fundamentally inconsistent with the adversarial (as opposed to inquisitorial) nature of the criminal justice system.³³³ One could sensibly conclude that coerced confessions are sufficiently abhorrent to our system of justice that no trial at which they are introduced can support a conviction — much in the same way that a biased judge always requires a new trial, regardless of the evidence. I can’t resolve this question here; my goal now is only to make clear that it is on this front — the proper definition of the right — that the battle must be waged.³³⁴

3. *Jury Instructional Errors.* — The Sixth Amendment guarantees a right to trial by jury.³³⁵ I have previously explained why, under my theory, directed verdicts in favor of the prosecution can never be harmless.³³⁶ Similarly, *Sullivan* made clear that a failure to properly instruct the jury on reasonable doubt is structural error always vitiating a conviction. This result fits neatly under my theory, proceeding logically from the premise that the Sixth Amendment requires that a jury find all the elements of a crime beyond a reasonable doubt. Absent a proper instruction on harmless error, there simply is no jury finding of guilt beyond a reasonable doubt whatsoever to which a reviewing court can apply harmless error analysis.

Does it follow from the definition of this right, though, that every error in the instructions given to a jury demands automatic reversal? That would be an unappealing result, because erroneous jury instructions are a fairly common form of error and are often relatively trivial. *Sullivan* notwithstanding, the Court’s case law has certainly not taken the position that all such errors are structural. In a series of cases starting with *Rose v. Clark*, the Court found that instructional errors can be harmless error.³³⁷ Yet the Court did not make entirely clear how harm-

³³³ *Arizona v. Fulminante*, 499 U.S. 279, 293–94 (1991) (White, J., dissenting).

³³⁴ And even if the *Fulminante* majority’s implicit conception of the right was correct, it still could be true that such errors should be presumptively harmful because “it is impossible to know what credit and weight the jury gave to the confession.” *Id.* at 292. Yet Justice White did not offer a particularly compelling explanation of why this would be uniquely true of *coerced* confessions, as the Court had previously held that the erroneous introduction of other kinds of confessions could be harmless error. *See, e.g., Milton v. Wainwright*, 407 U.S. 371, 372 (1972) (holding that confession obtained in violation of Sixth Amendment right to counsel can be harmless).

³³⁵ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”).

³³⁶ *See supra* text accompanying note 298.

³³⁷ *See* 478 U.S. 570, 579–80 (1986); *see also* *California v. Roy*, 519 U.S. 2, 5 (1996) (per curiam); *Carella v. California*, 491 U.S. 263, 266–67 (1989) (per curiam); *Pope v. Illinois*, 481 U.S. 497, 503 (1987).

less error analysis should work in that context. As Justice Scalia explained later in *Carella v. California*,³³⁸ *Rose* was ambiguous.³³⁹ It suggested, on the one hand, that the key question was whether the predicate facts the jury *did* find established the element the jury was told to presume such that “no rational jury” could have found one but not the other.³⁴⁰ But on the other hand, *Rose* stated elsewhere that all that mattered was whether the record evidence established guilt (in the appellate court’s eyes).³⁴¹

Justice Scalia forcefully argued that only the first test could be reconciled with the jury trial guarantee:

If the judge in the present case had instructed the jury, “You are to apply a conclusive presumption that Carella embezzled the rental car if you find that he has blue eyes and lives in the United States,” it would not matter, for purposes of assuring Carella his jury-trial right, whether the record contained overwhelming evidence that he in fact embezzled the car. For nothing in the instruction would have directed the jury, or even permitted it, to consider and apply that evidence in reaching its verdict. And the problem would not be cured by an appellate court’s determination that the record evidence unmistakably established guilt, for that would represent a finding of fact by judges, not by a jury. As with a directed verdict, the error in such a case is that the wrong entity judged the defendant guilty.³⁴²

Applying harmless error is permissible under the first test, by contrast, because when it is satisfied it is clear beyond a reasonable doubt “that the jury found the facts necessary to support the conviction.”³⁴³

Justice Scalia’s take on *Rose* has to be correct under a rights-based approach. As explained, that approach doesn’t support a free-ranging inquiry into whether the defendant is guilty; instead, the relevant question is always what effect that purported error had on the verdict actually rendered. Where the right at issue is the one to have a jury make the relevant factual findings, a purported violation can only be harmless where the jury did, in fact, make the required factual findings.³⁴⁴

³³⁸ 491 U.S. 263.

³³⁹ *Id.* at 267 (Scalia, J., concurring in the judgment).

³⁴⁰ *See Rose*, 478 U.S. at 580–81 (“In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury.”).

³⁴¹ *See id.* at 579 (“Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.”).

³⁴² *Carella*, 491 U.S. at 269 (Scalia, J., concurring in the judgment) (internal quotation marks omitted) (quoting *Rose*, 478 U.S. at 578).

³⁴³ *Id.* at 271.

³⁴⁴ Indeed, perhaps the only question about Justice Scalia’s approach concerns whether it is strict enough: he would permit courts to find an error harmless if the jury found fact *A* and, in the court’s view, no rational jury could have found *A* without also finding required element *B*. *See id.* Perhaps one could argue, though, that this is not the same thing as *actually finding* element *B*, which is what the jury trial right guarantees.

The Court, however, rejected Justice Scalia's approach in its decision in *Neder*. There, the trial court did not submit one of the required elements (materiality) to the jury and there was no plausible argument that any of the facts necessarily found by the jury included an implicit materiality finding.³⁴⁵ The Court held the error harmless based on its apparent conclusion that the defendant was obviously guilty and the jury would have found the materiality element satisfied had it been asked to.³⁴⁶ Justice Scalia forcefully argued that the error was functionally indistinguishable from a directed verdict,³⁴⁷ and the majority's response was — to say the least — underwhelming.³⁴⁸

Neder is clearly wrong under my theory; there simply is no way to reconcile a right to have the jury make all the relevant factual findings³⁴⁹ — a right that the majority in *Neder* did not dispute — with a harmless error rule that permits appellate courts to ignore flagrant violations of that right simply because the defendant appears clearly guilty.³⁵⁰ I am comfortable with that conclusion, and I believe *Neder* is the only harmless error case that my theory *requires* me to say is wrongly decided — though there are others that are at least questionable.³⁵¹

4. *Illegally Obtained Evidence*. — One potential land mine for my theory is posed by the exclusionary rule for evidence obtained in violation of the Fourth Amendment. That rule enforces constitutional rights against various kinds of police investigative abuses. An objection is that it suggests that the Fourth Amendment isn't violated when a police officer conducts an illegal search, but that instead the relevant constitutional violation occurs only when the defendant is convicted on the basis

³⁴⁵ *Neder v. United States*, 527 U.S. 1, 6 (1999).

³⁴⁶ *Id.* at 17.

³⁴⁷ *See id.* at 32–33 (Scalia, J., concurring in part and dissenting in part).

³⁴⁸ *See supra* note 249.

³⁴⁹ The Court has consistently recognized such a right. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (explaining that the Fifth and Sixth Amendments “indisputably entitle a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt!” (alteration in original) (internal quotation marks omitted) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995))).

³⁵⁰ Indeed, Justice Scalia protested that the majority's decision “is the only instance I know of (or could conceive of) in which the remedy for a constitutional violation by a trial judge (making the determination of criminal guilt reserved to the jury) is a repetition of the same constitutional violation by the appellate court (making the determination of criminal guilt reserved to the jury).” *Neder*, 527 U.S. at 32 (Scalia, J., concurring in part and dissenting in part).

³⁵¹ The debatable cases include those where the Court looked to the presence of “overwhelming” evidence of guilt, such as *Harrington* and *Schneble*. *See supra* text accompanying notes 113–118, 121–124. The Court's *analysis* in such cases is certainly problematic, given that, on my view, the appropriate inquiry concerns the effect the putative error had on the actual jury verdict rendered. *See supra* section III.B.4, pp. 2168–69. But it's possible that approach might still have justified the *results* in those cases; one reason why overwhelming evidence of guilt might matter is that it would imply that any particular piece of erroneously admitted evidence was unlikely to have been the deciding factor for the jury.

of evidence obtained in that search that should have been excluded. That result will strike many lawyers as patently ridiculous.

I don't think my theory requires that result, however, as the Fourth Amendment is fundamentally different from other criminal procedure rights. Unlike, say, the Confrontation Clause, the Fourth Amendment is not primarily concerned with criminal trials — or, in fact, with the criminal process at all.³⁵² Given that difference, it is easy to conclude that a Fourth Amendment violation is complete at the moment a search occurs, even if one believes that *other* criminal procedure rights aren't violated until conviction.

Supporting this view is the unique status of the exclusionary rule. The Supreme Court has explained that the Fourth Amendment exclusionary rule is not “a personal constitutional right of the party aggrieved.”³⁵³ Instead, the Court has framed the rule as merely “a deterrent remedy afforded to the defendant as a private attorney general.”³⁵⁴ As Fallon and Meltzer explain, the Fourth Amendment “prohibits unconstitutional searches, not the admission of unconstitutionally seized evidence at trial. Because any violation of the Constitution occurred in the past, outside of court, admission of the evidence is not an independent violation.”³⁵⁵

They conclude that this means that the exclusionary rule is a remedial doctrine. I think this is not quite right — or, at the very least, it is incomplete. While the Fourth Amendment exclusionary rule is motivated by remedial considerations, it is best understood as achieving those remedial goals through a prophylactic *right* — the Court achieves deterrence by granting defendants a judicially created, subconstitutional right not to be convicted on the basis of illegally seized evidence (since only that conception of the right makes sense of the notion that improperly admitted evidence can be harmless).³⁵⁶ Under my theory, by finding that an exclusionary-rule violation was harmless, an appellate court is necessarily finding that *this* right was not violated. But it does not conclude that there was no underlying Fourth Amendment violation at all.³⁵⁷

³⁵² See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994) (“For unlike the Fifth, Sixth, and Eighth Amendments, which specially apply in criminal contexts, the Fourth Amendment applies equally to civil and criminal law enforcement.” (footnote omitted)).

³⁵³ *United States v. Calandra*, 414 U.S. 338, 348 (1974).

³⁵⁴ Fallon & Meltzer, *supra* note 215, at 1774.

³⁵⁵ *Id.* (footnote omitted).

³⁵⁶ Here, my approach somewhat lines up with that of Re, who grounds the right to exclusion in a different *constitutional* right — the Due Process Clause. See generally Re, *supra* note 190. I have explained that, while Re and I share similar instincts in trying to ground harmless error in rights rather than remedies, I find the due process framework an unnecessary complication. See *supra* section III.C, pp. 2170–74.

³⁵⁷ A more complicated question is posed by the exclusionary rules for violations of the Fifth Amendment. For example, *Miranda* requires exclusion where its protections are ignored. *Miranda*

And indeed, the way constitutional doctrine handles civil damages actions for Fourth Amendment violations reinforces the point. The Court made clear in *Heck v. Humphrey*³⁵⁸ that defendants may not normally seek civil damages under 42 U.S.C. § 1983 for claims of constitutional violations contributing to their convictions unless the underlying convictions are no longer valid.³⁵⁹ Yet the Court explained in a footnote that “a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff’s still-outstanding conviction.”³⁶⁰

5. *Batson and the Right to a Public Trial.* — Consider two quite different constitutional guarantees: Under *Batson v. Kentucky*,³⁶¹ the Equal Protection Clause prohibits racial discrimination in jury selection.³⁶² And under the Sixth Amendment, defendants have a right to a public trial.³⁶³ What makes these constitutional guarantees similar is that both protect values of the highest importance, yet both would be rendered effectively unenforceable if they were treated as subject to harmless error analysis. Field observes that racial discrimination in jury selection is “generically harmless,” and thus the right would be reduced to an “empty exhortation” if susceptible to harmless error review; “discriminatory elimination of one group does not influence the result of a trial, absent a showing of bias on the part of those who served.”³⁶⁴ Likewise, “showing prejudice from the absence of the intangible benefits of the public trial right would be difficult, if not impossible, in most cases.”³⁶⁵

v. Arizona, 384 U.S. 436, 476 (1966). The *Miranda* warnings protect the Fifth Amendment guarantee that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. There is a reasonable argument that a *Miranda* violation by a police officer does not actually violate the Constitution until the person is actually made a “witness” in a criminal trial. Making matters even more complicated, however, is the Court’s internal inconsistency on whether *Miranda* itself is compelled by the Constitution or is instead a prophylactic rule. Though the Court had suggested the latter at many points, *see, e.g., Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (“The *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself.”), it seemed to reject that conception of *Miranda* in *Dickerson v. United States*, 530 U.S. 428, 441 (2000) (“Our decision in [*Oregon v. Elstad*] . . . simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment.”). Clarifying precisely what right is actually at stake in *Miranda* appeals would require a more developed working theory of the *Miranda* doctrine and its relationship to constitutional rights than is possible here.

³⁵⁸ 512 U.S. 477 (1994).

³⁵⁹ *Id.* at 486–87.

³⁶⁰ *Id.* at 487 n.7.

³⁶¹ 476 U.S. 79 (1986).

³⁶² *Id.* at 86.

³⁶³ U.S. CONST. amend. VI; *see also, e.g., Waller v. Georgia*, 467 U.S. 39, 46 (1984).

³⁶⁴ Field, *supra* note 8, at 20.

³⁶⁵ Kristin Saetveit, Note, *Close Calls: Defining Courtroom Closures Under the Sixth Amendment*, 68 STAN. L. REV. 897, 922 (2016).

For these reasons, violations of both rights are normally treated as if they cannot be harmless.³⁶⁶ My theory need not contradict this result. Consider public trials first. If the right at issue is conceptualized as a right to a public trial, full stop, then it should follow that denials of that right require reversal. The right guarantees a particular form of process — a public trial — and a conviction obtained in violation of that process is invalid. And indeed, the unique way in which the Court has treated violations of this right seems to line up perfectly with a clear understanding of the scope of the right. *Waller* made clear that a new trial is not always needed for a violation of the public trial right.³⁶⁷ In that case, the proceeding that had been closed to the public was a suppression hearing; the Court ordered a do-over of that specific hearing, making clear that a new trial would be needed only if the result of that hearing were different.³⁶⁸ Although this looks like harmless error analysis, it isn't. Instead, what the Court did was give the defendant the exact process of which he was deprived, fully redressing the violation of his right. Only if that violation led to a more serious deprivation of the defendant's right would a new trial be justified. Where an entire trial was closed to the public, however, this logic would suggest that a new trial would be necessarily required.

Batson presents more complicated issues. "The *Batson* 'right' is actually a package of equal protection rights: rights of the defendant to a fair trial free of the stigma of racial prejudice, and rights of prospective jurors both to be free of that stigma and to participate fully in the criminal justice system."³⁶⁹ To the extent that *Batson* is really protecting jurors' rights rather than those of the defendant, it's hard to ground a rule of automatic reversal in the defendant's constitutional rights; instead, the rule looks like a prophylactic somewhat akin to the exclusionary rule. But the relevant right could be identified as belonging to the defendant. Eric Muller argues that "it takes a fairly creative gloss on equal protection to conscript it as a fair trial guarantee," leading him to contend that the Court should (contrary to precedent) ground the right against discrimination in jury selection in the defendant's Sixth Amendment rights instead.³⁷⁰ Given these complexities, I won't tarry

³⁶⁶ See *Waller*, 467 U.S. at 49 & n.9. As for *Batson* violations, the Court has never squarely held whether such errors are structural, though it has implied that they are. See Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 117 (1996) ("[W]here the Court has found a violation of the *Batson* norm, it has reversed the conviction or judgment outright without pausing to assess the harmlessness of the violation."). The Court has held, however, that a trial court's erroneous denial, on *Batson* grounds, of a peremptory challenge by the defendant is subject to harmless error review. See *Rivera v. Illinois*, 556 U.S. 148, 157 (2009).

³⁶⁷ *Waller*, 467 U.S. at 49–50.

³⁶⁸ *Id.* at 50.

³⁶⁹ Muller, *supra* note 366, at 95.

³⁷⁰ *Id.* at 132–33.

longer here beyond noting that more careful explanation of the rights at issue by the Court could clear things up a bit.

* * *

One could apply this approach to additional rights, but the preceding examples hopefully are sufficient to give a sense of how the rights-based approach might work. It may require some reconceptualization here and there, and it may suggest that the Court has occasionally veered off course in a few domains. But the rights-based approach can work in many contexts, and it can provide better answers than the conventional approach.

IV. IMPLICATIONS

This Part considers two additional implications of the rights-based theory offered in the previous Part. Section A explains how, contrary to the suggestions of earlier commentators, Congress likely lacks the power to revise the harmless error standard, at least when it comes to Supreme Court review of state convictions. Section B considers how the rights-based theory complicates the Court's approach to harmless error in federal habeas cases.

A. Congress's Power to Regulate Harmless Constitutional Error

Chapman implied that Congress might have the power to set harmless error standards that would be binding on state courts.³⁷¹ The constitutional common law theory supports this view. And while Congress has never put this power to the test, it once considered a bill to reverse the result in *Fulminante* and reinstate a rule of automatic reversal for the introduction of coerced confessions.³⁷²

Under the rights-based theory, though, it is dubious whether Congress could successfully pass such a law that would be binding on state courts. If the harmless error doctrine is actually part of the constitutional test defining the scope of constitutional rights, Congress would be on shaky ground in demanding that courts use a different test. Consider the fate of the Religious Freedom Restoration Act³⁷³ (RFRA), which sought to reassert a demanding free exercise test that the Court had abandoned in *Employment Division v. Smith*.³⁷⁴ In *City of Boerne v. Flores*,³⁷⁵ the Court held that Congress had exceeded its powers under the Fourteenth

³⁷¹ See *supra* text accompanying note 225.

³⁷² See Goldblatt, *supra* note 33, at 987–88 (discussing Title IX of the Omnibus Crime Control Act of 1991).

³⁷³ Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (1994)), *invalidated in part* by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

³⁷⁴ 494 U.S. 872 (1990); *id.* at 883–85; see also 42 U.S.C. § 2000bb(a)(4).

³⁷⁵ 521 U.S. 507.

Amendment in trying to impose RFRA on the states.³⁷⁶ In the Court's eyes, given that RFRA went beyond merely enforcing the free exercise guarantee (as understood by the Court), it could not stand because it lacked "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."³⁷⁷

A rights-based theory thus implies that, at the very least, Congress would need to make a showing that reinstating a rule of automatic reversal that the Court had rejected was a congruent and proportional response to an unsolved problem of constitutional violations in state courts. Absent such a showing, such a law would be unconstitutional with respect to state-court convictions.³⁷⁸ But as Joseph Grano notes, the idea that Congress cannot regulate harmless error "is hardly a radical proposition. Indeed, it may be more radical to assert that Congress can dictate to federal courts the standard for determining when a constitutional violation warrants reversal of a defendant's conviction."³⁷⁹ And while this conclusion implies that *Chapman's* suggestion that the Court needed to fashion harmless error rules "in the absence of appropriate congressional action"³⁸⁰ was ill advised and incorrect, that implication is easy enough to swallow. That one line was throwaway dicta — certainly not a sufficient basis for rejecting the rights-based approach, given its many advantages.

My theory also implies that Congress could not *water down* harmless error standards for constitutional violations in appeals from either state or federal courts. If harmless error is simply part of the test for assessing whether a violation of a constitutional right occurred, Congress could not — having given federal courts jurisdiction over constitutional claims — replace it with a less demanding standard any more than it could insist that federal or state courts assess all First Amendment claims under rational basis review. Given my reading of the relevant statutes and rules, however, Congress has made no attempt to supplant constitutional standards in this manner, but has instead only sought to prevent federal courts from overenforcing rights.³⁸¹

B. Postconviction Review

A rights-based approach also has implications for the operation of harmless error doctrine in the postconviction context. In *Brecht*, the

³⁷⁶ *Id.* at 536.

³⁷⁷ *See id.* at 520.

³⁷⁸ Though of course, Congress could insist that the Court rely on a more demanding standard in *federal* criminal cases. *See* *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006).

³⁷⁹ Grano, *supra* note 227, at 162.

³⁸⁰ *Chapman v. California*, 386 U.S. 18, 21 (1967).

³⁸¹ *See supra* section III.B.2, pp. 2165–66.

Court held that on habeas review, the less demanding *Kotteakos* standard, rather than the *Chapman* rule, governed claims of constitutional error.³⁸² Some have concluded that this put the lie to the view of *Chapman* as directly grounded in constitutional rights rather than remedies. As the Seventh Circuit put it, “[a]fter *Brecht*, it is no longer plausible to argue that the harmless error doctrine provides a gloss on the underlying constitutional rights, or is even itself a rule derived from the constitution.”³⁸³ By requiring harmless analysis to vary across procedural contexts, the argument goes, *Brecht* suggests that it must be a remedial consideration, since the substantive definition of *rights* does not usually vary from court to court.

But this is not necessarily so. One option (though one perhaps not available to the Seventh Circuit) is simply to conclude that *Brecht* — a hotly contested 5–4 decision — was wrong on the merits and that the Court erred by requiring federal habeas courts to rely on a different definition of constitutional rights (as my theory necessarily implies) than that which ordinary appellate courts must apply.

Another option is to conclude that in the unique context of habeas, there is more leeway to limit the substantive scope of rights than there is in the context of direct appeals. *Brecht* might thus be seen as somewhat akin to the statutory limits on habeas corpus found in the Antiterrorism and Effective Death Penalty Act³⁸⁴ (AEDPA), which precludes relief for claims adjudicated in state court unless the state-court decision “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”³⁸⁵ As the Court has interpreted this language, “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”³⁸⁶

AEDPA limits the availability of the habeas remedy by requiring habeas courts to apply a more deferential standard to the adjudication of claims of constitutional violations that were previously adjudicated in state court. In the same way, under my theory, *Brecht* requires federal habeas courts to resolve constitutional claims using a more deferential substantive test than would otherwise apply on direct appeal. If there is no constitutional problem with AEDPA’s imposition of a more defer-

³⁸² *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

³⁸³ *United States v. Cappas*, 29 F.3d 1187, 1193 (7th Cir. 1994).

³⁸⁴ Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S. Code).

³⁸⁵ 28 U.S.C. § 2254(d)(1) (2012).

³⁸⁶ *Williams v. Taylor*, 529 U.S. 362, 411 (2000).

ential test for constitutional claims, then it is not obvious there is anything illegitimate about the Court in *Brecht* watering down substantive rights by replacing the *Chapman* standard with that of *Kotteakos*.

Perhaps *Brecht* seems objectionable because there the Court, rather than Congress, was the one watering down constitutional rights. But there is precedent, at least, for significant judicial flexibility in limiting the availability of habeas. In *Stone v. Powell*,³⁸⁷ the Court took Fourth Amendment claims entirely off the table for habeas petitioners.³⁸⁸ While *Powell* rested in part on considerations unique to the Fourth Amendment exclusionary rule,³⁸⁹ it at least suggests that the Court has significant latitude in shaping and limiting entitlements to habeas relief.

Brecht doesn't necessarily undercut the rights-based theory, then. What my theory does suggest, though, is that the *Brecht* Court could have been more honest about what it was up to. Rather than merely restricting remedies in the habeas context, the Court was effectively changing the substantive law in the habeas context, replacing a more defendant-friendly substantive test with a more deferential standard. But helping us see *Brecht* from this perspective seems like a good thing. More generally, a real benefit of the rights-based approach is how it requires courts to be honest about how they are actually shaping (and sometimes negating) constitutional rights when they purport to be merely resolving questions of remedies.

CONCLUSION

The harmless constitutional error doctrine has long been a source of profound confusions. Yet perhaps the solution to the doctrine's riddles has long been staring us in the face. This Article's title is inspired by § 2111 and Rule 52(a), which suggest that the key question in harmless error cases is whether a defendant's "substantial rights" have been affected. As I have shown, taking this hint to focus on rights, instead of remedies, can help us finally answer some of the most vexing problems of the harmless constitutional error doctrine.

Should we care, though, about achieving a deeper understanding of harmless error? Recently, Brandon Garrett wondered whether the harmless error doctrine matters anymore; numerous other restrictions on judicial relief for constitutional violations have made "harmless error a far less relevant tool."³⁹⁰ Garrett undoubtedly has a point, and I make no claim that the theory offered here would radically change the outcomes our criminal process generates — let alone that it holds any promise of solving some of the larger problems with our criminal justice system.

³⁸⁷ 428 U.S. 465 (1976).

³⁸⁸ *Id.* at 494.

³⁸⁹ *See id.* at 489–95.

³⁹⁰ Brandon L. Garrett, *Patterns of Error*, 130 HARV. L. REV. F. 287, 289 (2017).

But there is value to a system's internal coherence, and for too long our doctrine of harmless constitutional error has rested on fundamental riddles and contradictions. A rights-based theory can, this Article has shown, clear things up. More importantly, the rights-based approach has at least one significant practical payoff: it would require courts to be clearer about the values at stake when adjudicating claims of harmless error. No longer could a court declare a broad scope of a constitutional right while in the same breath undercutting that right's effective value through the use of harmless error analysis. That would be a step forward, even if only a small one.