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Constitutional Law--Judicial Power--Harmless Error [*Chapman v. California*, 386 U.S. 18 (1967)]

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CONSTITUTIONAL LAW — JUDICIAL POWER — HARMLESS ERROR

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

The application of the various state harmless error rules in state criminal cases in which federal constitutional rights are violated has been a difficult and confusing task. In the past, courts, when faced with the question of harmless error, have been unable to resolve such difficult issues as whether state or federal standards are to govern and whether harmless error is in fact possible when a federal constitutional right has been violated.

In *Chapman v. California*[1] the Supreme Court has settled these issues by creating a new harmless error rule to be applied whenever a right protected by the United States Constitution has been denied in a state criminal proceeding. Petitioners were convicted in a California court of murdering a bartender. At trial, the district attorney commented upon their failure to testify, punctuating his argument to the jury with numerous references to their silence. The trial judge then charged the jury that it could draw inferences of guilt from petitioners' failure to testify.[2]

Shortly after trial, but before the case had been considered on appeal, the United States Supreme Court decided *Griffin v. California*[3] and held that comment upon a defendant's failure to testify penalized the exercise of his fifth amendment right against self-incrimination.[4] On the subsequent appeal of petitioners' case, the California Supreme Court admitted that the petitioners were denied their fifth amendment right in view of the holding in *Griffin.* Nevertheless, it affirmed the conviction by applying the California constitution's harmless error provision which forbids reversal unless "the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."[5] In *Chapman*, the United States Supreme Court rejected this test, reversed the conviction, and formulated its own test — before the violation of a federal right can be ruled harmless, the *state* must sustain the burden of proving

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[1] 386 U.S. 18 (1967).

[2] *Id.* at 19.

[3] 380 U.S. 609 (1965).

[4] *Id.* at 613. The fifth amendment right against self-incrimination was made binding upon the states by its being incorporated into the fourteenth amendment in Malloy v. Hogan, 378 U.S. 1 (1964).

[5] 386 U.S. at 20.

beyond a reasonable doubt that the error *did not contribute to the conviction.*[6]

Before the new test posited by the Supreme Court can be examined, it is essential to place the harmless error rule in historical context. As indicated by Professor Wigmore, the crux of the harmless error controversy has been whether rules of evidence are a mere means to the ascertainment of truth or are themselves an end, to be followed sometimes at the expense of the truth.[7] Although Wigmore preferred the former view,[8] courts in the majority of American jurisdictions ultimately chose the latter. The "Orthodox English Rule," that error was harmless "unless truth had thereby not been reached,"[9] gave way in the 1830's to the "Exchequer Rule,"[10] which considers error as a ground for automatic reversal even though the error does not cause the verdict to be inaccurate or untruthful. Though Wigmore termed the results of this rule "lamentable,"[11] it is the prevailing rule today, *provided the error contributed to the disposition* of the case. As the Supreme Court itself has stated, "[t]he question, is not were they [the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had . . . upon the jury's decision."[12] However, as to federal rights violated in state trials, the criteria for determining whether the error contributed to the result has remained a source of confusion until *Chapman.*

In *Chapman*, a majority of the Court cited *Fahy v. Connecticut*[13] to refute the suggestion that all trial errors which violate the Constitution necessitate reversal.[14] Although prior cases had held certain constitutional rights to be so basic to a fair trial that their violation can never be considered harmless,[15] the Court concluded that: "there may be some constitutional errors which in the setting of a

[6] *Id.* at 24. It should be noted that *Chapman* only applies after error has been established and does not affect state procedures which merely shift the burden of proof to the defendant as to a specific issue. *See, e.g.*, Leland v. Oregon, 343 U.S. 790 (1952).

[7] 1 J. WIGMORE, EVIDENCE § 21, at 365 (3d ed. 1940).

[8] *Id.* at 369, 370.

[9] *Id.* at 365.

[10] *Id.* at 367.

[11] *Id.* at 370.

[12] Kotteakos v. United States, 328 U.S. 750, 764 (1946).

[13] 375 U.S. 85 (1963).

[14] 386 U.S. at 24.

[15] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession); Tumey v. Ohio, 273 U.S. 510 (1927) (impartial judge).

particular case are so unimportant and insignificant that they may . . . be deemed harmless, not requiring the automatic reversal of the conviction."[16] Thus, the Court rejected the argument that the violation of all or certain constitutional rights constitutes automatic reversible error. The majority did hold, however, that the state must prove beyond a reasonable doubt that the error did not contribute to the conviction.[17]

In so ruling, the *Chapman* Court asserted that it was doing nothing new,[18] but only adhering to its ruling in *Fahy v. Connecticut*, in which it stated that: "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[19] In *Chapman*, the Court believed that the newly adopted test "will provide a more workable standard, although achieving the same result as that aimed at in our *Fahy* case."[20] Actually, the Court went far beyond its holding in *Fahy*, which neither explicitly put the burden upon the state to prove its contentions *beyond a reasonable doubt* nor explicitly displaced the various state harmless error rules with a uniform federal rule with respect to violations of federally protected rights.[21] In any event the Court's ruling in *Fahy* and its broad extension in *Chapman* has significantly changed the law in this area. Before these cases the federal courts were divided as to whether they were bound to follow the decisions of the highest state courts in the *absence of a state statute* regulating trial error.[22] A fortiori, it is less likely that federal courts would ignore a state supreme court's decision in the face of a directly applicable state statute as was present in *Chapman*.[23] In practical effect *Chapman* completely destroys

[16] 386 U.S. at 22. In its opinion the Court offered no examples of this possibility. In a concurring opinion, Mr. Justice Stewart argued that constitutional rights are not fungible goods subject to a uniform rule and that, though some constitutional violations might be subject to the Court's harmless error rule, violations of *Griffin* could never be found harmless under any test. *Id.* at 44. He concluded that "a rule of automatic reversal would seem best calculated to prevent clear violations of Griffin . . . ." *Id.* at 45.

[17] *Id.* at 24.

[18] *Id.*

[19] 375 U.S. at 86-87.

[20] 386 U.S. at 24.

[21] 375 U.S. at 86-87.

[22] 1 J. WIGMORE, *supra* note 7, § 6b.

[23] CAL. CONST. art. VI, 4 ½:

No judgment shall be set aside, or new trial granted, in any case, on the

the applicability of state harmless error rules to state convictions tainted by the violation of rights.[24]

The troubling aspect of *Chapman*, however, is the Court's justification for applying the new rule to the states. In the past the Court has carefully distinguished its broad supervisory power over the federal courts from its more limited power over state courts.[25] As the United States Constitution dictates, the latter power is confined to issues involving constitutional provisions binding upon the states. In *Ker v. California*,[26] the Court stated in reply to the defendant's argument that the federal standard adopted in *Miller v. United States*[27] applied to the states:

> And, although the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution.[28]

More recently the Court *explicitly* acknowledged the use of its federal supervisory power in holding that no sentence exceeding 6

> ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

See 28 U.S.C. § 2111 (1964) which provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." FED. R. CRIM. P. 52 (a) provides that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

[24] Mr. Justice Stewart, concurring, recognized this fact and stated that the new rule "commits this court to a case-by-case examination to determine the extent to which we think unconstitutional comment . . . influenced the outcome of a particular trial. This burdensome obligation is one that we here are hardly qualified to discharge." 386 U.S. at 44. Mr. Justice Harlan, dissenting, was even more specific: "This decision . . . imposes on this Court, in cases coming here directly from state courts, and . . . in cases arising on habeas corpus, the duty of determining for themselves whether a constitutional error was harmless. In all but insubstantial instances, this will entail a *de novo* assessment of the entire state trial record." *Id.* at 56.

[25] *Compare* Benanti v. United States, 355 U.S. 96 (1957), *with* Schwartz v. Texas, 344 U.S. 199 (1952) *and* Nardone v. United States, 302 U.S. 379 (1937). *Compare* Ker v. California, 374 U.S. 23 (1963), *with* Miller v. United States, 357 U.S. 301 (1958). *See also* Mallory v. United States, 354 U.S. 449 (1957); Rea v. United States, 350 U.S. 214 (1950); McNabb v. United States, 318 U.S. 332 (1943).

[26] 374 U.S. 23 (1963).

[27] 357 U.S. 301 (1958).

[28] 374 U.S. at 33. Mr. Justice Harlan disagreed, contending that the standard of reasonableness under the fourth and 14th amendments were not the same; he considered the underlying test of the fourth amendment to be that of "fundamental fairness." *Id.* at 44.

months may be imposed in a *federal* criminal contempt case unless the sentencing court observes the defendant's right to trial by jury.[29] The supervisory power has traditionally been used to formulate rules of evidence for federal courts.[30] But in all *these* instances the Court made it abundantly clear that on constitutional issues it was using its supervisory power as opposed to its power over the states through the 14th amendment.

In some cases involving the recently developed theory of penumbral rights, however, the Court has not explicitly indicated the source and nature of its power. At times the distinction between the Court's supervisory power over the federal courts as opposed to its more limited constitutional power over the states appears to have vanished. No doubt this is partly due to the nature of the penumbral theory itself, which is somewhat nebulous in that implicit constitutional policy is being utilized to give explicit constitutional rights more life, meaning, and substance.[31] Yet, Mr. Justice Holmes recognized the importance of the penumbral approach when he stated: "I fully agree [with Mr. Justice Brandeis] that Courts are apt to err in sticking too closely to the words of a law where those words import a policy that goes beyond them."[32]

It is therefore understandable that some commentators have been more critical of the rationale than of the result in cases which have employed the penumbral theory in order to make constitutional rights meaningful.[33] The "mystical" status of the exclusionary doctrine of *Weeks v. United States*[34] clearly illustrates this point. Although the Court held the fourth amendment binding upon the states via the due process clause of the 14th amendment in *Wolf v. Colorado*,[35] it nevertheless held that the *Weeks* exclusionary rule did not bind the states,[36] and it was assumed by scholars that the rule was based upon the Court's supervisory power only.

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29 Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966).

30 Ker v. California, 374 U.S. 23, 31 (1963); *see, e.g.*, Wolfle v. United States, 291 U.S. 7 (1934); Funk v. United States, 290 U.S. 371 (1933); Weeks v. United States, 232 U.S. 383 (1914).

31 *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

32 Olmstead v. United States, 277 U.S. 438, 469 (1928) (dissenting opinion).

33 Blackshield, *Constitutionalism and Comstockery*, 14 KAN. L. REV. 403 (1966). In criticizing the Court's opinion in Griswold v. Connecticut, 381 U.S. 479 (1965), the author states: "The somewhat skimpy reasoning by which these hints and echoes were made to yield up a generalized constitutional privacy right is the main ground for dissatisfaction with *Griswold* . . . ." Blackshield, *supra* at 432.

34 232 U.S. 383 (1914).

35 338 U.S. 25 (1949), *overruled*, Mapp v. Ohio, 367 U.S. 643 (1961).

36 338 U.S. at 25.

As the Court in *Wolf* stated, the *Weeks* rule "was not derived from the explicit requirements of the Fourth Amendment .... The decision was a matter of judicial implication."[37] The Court went on to say that "problems ... would be presented should Congress under § 5 of the Fourteenth Amendment undertake to . . . make the *Weeks* doctrine binding upon the states."[38] Mr. Justice Black concurred in the opinion: "But I agree with what appears to be the plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate."[39] Justices Rutledge and Murphy dissented because they felt that the *Weeks* rule *was* a fourth amendment requirement.[40]

Twelve years later, in *Mapp v. Ohio*,[41] the Court overruled *Wolf* and bound the states to apply the exclusionary rule in order to make the fourth amendment a more meaningful right. In so holding, the Court stated not only that the rule was a constitutional mandate, but also that the Court had always considered it to be such. "There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks* — and its later paraphrase in *Wolf* — to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed."[42] It appears inconceivable that the *Weeks* rule was considered to be of constitutional origin *before Mapp.* As already noted,[43] the Court in *Wolf* clearly seemed to have construed the rule as being anything but a constitutional mandate. Thus, the source of the Court's power in the *Mapp* decision is not at all clear.

The recent case of *Parker v. Gladden*[44] is another illustration of the Court's failure to define clearly the source of its power. In this

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[37] *Id.* at 28.

[38] *Id.* at 33.

[39] *Id.* at 39-40. Mr. Justice Black's limitation of the sweep of the fourth amendment, as expressed in *Wolf*, caused him to rely on the *fourth and fifth* amendments *together* when he changed his position in Mapp v. Ohio, 367 U.S. 643, 661-62 (1961).

[40] Wolf v. Colorado, 338 U.S. 25, 48 (1949) (dissenting opinion).

[41] 367 U.S. 643 (1961).

[42] *Id.* at 649.

[43] Text accompanying notes 35-41 *supra. See also* Linkletter v. Walker, 381 U.S. 618 (1965), where the Court held that its decision in *Mapp* to incorporate the *Weeks* rule into the fourth amendment was not to apply retroactively. Since this was the first criminal case in which a constitutional ruling was given prospective effect only, it lends support to the contention that the Court had not always considered the *Weeks* rule to be of constitutional origin.

[44] 385 U.S. 363 (1966).

case a bailiff, while watching over the jury in an Oregon state criminal case, made remarks prejudicial to the defendant. Ten of the jurors swore that they had not heard the remarks. Although Oregon law permits conviction by the affirmative vote of only 10 jurors, the Court reversed the conviction: "The State says that 10 of the jurors testified that they had not heard the statements of the bailiff . . . . In any event, petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors."[45] The Court appears to be saying that, although state law may constitutionally allow conviction by less than a 12-juror vote, *all* jurors must be impartial initially. Yet the language of the Court goes far beyond this point; the following part of its opinion suggests that it was applying the broad sixth amendment right to trial by jury to the states as well: "We believe that the statements . . . are controlled by the command of the sixth amendment. . . . It guarantees that 'the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and be confronted with the witnesses against him. . . .' "[46] In view of the Court's prior holding in *Maxwell v. Dow*,[47] that the totality of the sixth amendment is not binding upon the states, and the fact that *Maxwell* was not mentioned in *Parker*, it must be assumed that the Court did not really mean what it said but that only the more limited sixth amendment right to an impartial jury and the right of confrontation are applicable to the states. Also, if this result were constitutionally required, why was a *Louisiana state case* cited to bind Oregon courts? If, instead, this was not a constitutional mandate, but merely a discretionary exercise of supervisory power over *federal courts*, then the Court was powerless to bind the *state* of Oregon. This is another instance in which the Court, in purportedly adding meaning and life to the first 10 amendments, has neglected to define the source of its power and has introduced confusion as to the status of the sixth amendment.

In *Chapman* the source of the Court's power is as unclear as it was in *Mapp* and *Parker*. Here the court briefly justified its exercise of power over the states in creating the new harmless error rule:

> Whether a conviction . . . should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as

[45] *Id.* at 366, where the Court refers to State v. Murray, 164 La. 883, 887, 114 So. 721, 723 (1927).

[46] 385 U.S. at 366. This language suggests that the sixth amendment right to a jury trial be incorporated into the 14th amendment. *Cf.* Pointer v. Texas, 380 U.S. 400 (1965).

[47] 176 U.S. 581 (1900).

> much of a federal question as what particular federal constitutional provisions themselves mean. . . . [W]ith faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws . . . designed to protect . . . federally guaranteed rights . . . . [T]he 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.[48]

Again, the Court appears to be making an expressly created right more meaningful. Yet, in its own words, it does so "in the absence of appropriate congressional action,"[49] without clearly stating, as it had done in *Wolf v. Colorado,* that its reliance was being placed on the due process clause of the 14th amendment.[50] The Court's language thus appears to make its power more supervisory than constitutional.

Perhaps the Court is saying that the absence of appropriate congressional action necessitated the judicial formulation of the new rule through the exercise of constitutional rather than supervisory power, and that the vehicle for the decision was the penumbral rights theory.[51] Yet, this conclusion is reached, not in view of the Court's language, but in spite of it. Whatever the thinking of the Court may have been, it should have been set forth more clearly.

Recent cases like *Mapp, Parker,* and *Chapman,* which have blurred the once-clear distinction between the constitutional and supervisory powers of the Supreme Court, may have stemmed from the exercise of a new, third power of the Court — a result of the selective incorporation of the first 10 amendments into the 14th. It is important to note that the present determination of the Court to give the constitutional rights more life, meaning, and substance,[52]

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[48] 386 U.S. at 21 (emphasis added).

[49] *Id.*

[50] 338 U.S. at 33; *see* text accompanying note 38 *supra.*

Mr. Justice Harlan points to the troublesome language in *Chapman* in his dissenting opinion:

> The . . . rule . . . flows from what is seemingly regarded as a power inherent in the Court's constitutional responsibilities rather than from the Constitution itself. The Court appears to acknowledge that other harmless-error formulations would be constitutionally permissible. It certainly indicates that Congress . . . could impose a different formulation.
>
> I regard the Court's assumption of what amounts to a general supervisory power over the trial of federal constitutional issues in state courts as a startling constitutional development that is wholly out of keeping with our federal system and completely unsupported by the Fourteenth Amendment where the source of such a power must be found. 386 U.S. at 46-47.

[51] Text accompanying note 32 *supra*; *cf.* Katzenbach v. Morgan, 384 U.S. 641 (1966). *See also* the quote from the majority opinion in Wolf v. Colorado, 338 U.S. 25 (1949), as in the text accompaning note 38 *supra.*

and to check offensive police practices that detract from such efforts,[53] had previously been expressed by the Court in the *explicit* exercise of its supervisory power before selective incorporation became the vogue.[54] The intent of the Court, as expressed in its 1943 opinion in *McNabb v. United States*,[55] sounds much like the intent expressed by the present Court:[56]

> For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice" . . . the scope of our reviewing power over . . . federal courts is not confined to the ascertainment of Constitutional validity. Judicial supervision . . . in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.[57]
>
> For this procedural requirement checks resort to those reprehensible practices known as the "third degree" which . . . still find their way into use. It aims to avoid all the evil implications of secret interrogations . . . . It reflects not a sentimental but a sturdy view of law enforcement.[58]

It is also important to note that the Court recently has enlarged the protection of the fourth, fifth, and sixth amendments specifically in order to combat offensive police practices. The Court, in addition, has applied many of these decisions prospectively only on the ground that the offensive practices struck down did not affect the process of guilt determination.[59] In *Stovall v. Denno*[60] the Court recently held that a constitutional rule of criminal procedure was to apply prospectively even though the guilt-determining process had been tainted by violation of constitutional rights:

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[52] *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965); text accompaning note 32 *supra.*

[53] *See, e.g.,* Miranda v. Arizona, 384 U.S. 436 (1966).

[54] *See, e.g.,* Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

[55] 318 U.S. 332 (1943).

[56] *See, e.g.,* Miranda v. Arizona, 384 U.S. 436 (1966).

[57] McNabb v. United States, 318 U.S. 332, 340 (1943).

[58] *Id.* at 344.

[59] *See, e.g.,* Linkletter v. Walker, 381 U.S. 618 (1965), giving prospective application to Mapp v. Ohio, 367 U.S. 643 (1961); Tehan v. Shott, 382 U.S. 406 (1966), giving prospective application to Griffin v. California, 380 U.S. 609 (1965); Johnson v. New Jersey, 384 U.S. 719 (1966), giving prospective application to Miranda v. Arizona, 384 U.S. 436 (1966) and Escobedo v. Illinois, 378 U.S. 478 (1964).

[60] 388 U.S. 293 (1967). Here the court prospectively applied the rule set forth in United States v. Wade, 388 U.S. 218 (1967), that a pretrial lineup at which an accused is exhibited to identifying witnesses without benefit of counsel was a critical stage of criminal prosecution and failure to provide counsel constituted a denial of the sixth amendment rights.

> The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a "question of probabilities." . . . Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice.[61]

This greater concern for the administration of justice than for the right of an individual to an untainted mode of guilt determination seems much more justifiable if it is assumed that the Court is relying on its supervisory power. If, on the other hand, the Court is relying in these decisions on its limited power to bind the states to observe constitutionally guaranteed rights, its subsequent prospective application of those rights is much less understandable. As Mr. Justice Black stated, "I do not believe . . . [the Court] has the power, by weighing 'countervailing interests,' to legislate a timetable by which the Constitution's provisions shall become effective."[62]

This writer suggests that although the values of the Court basically have remained the same, the selective incorporation of most of the first 10 amendments into the 14th has blunted the once-sharp distinction between supervisory and constitutional power.[63] The penumbral rights theory and the selective incorporation technique seem to have wedged a third source of power — a twilight zone — between the distinctly supervisory and distinctly constitutional power of the Court.

In summary, the *Chapman* case appears significant for various reasons. First, it creates a new federal harmless error rule and casts aside the various harmless error rules of the 50 states wherever a federal right has been violated.[64] In requiring the application of this new rule in state cases *initially*, the Court seems to have re-

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[61] 388 U.S. at 298.

[62] *Id.* at 304.

[63] *But see* Ker v. California, 374 U.S. 23 (1963), where the Court, *after* the fourth amendment had been incorporated into the 14th, explicitly recognized the supervisory-constitutional power distinction in reviewing a state case involving the fourth amendment. This writer feels that the effect of using the selective incorporation technique in binding both the states and the federal government to the same test with respect to most of the first 10 amendments, may have caused the Court to *unconsciously* overlook, on occasion, the importance of defining the exact source of its power. Since states are *now* bound by these amendments, their "stake" in the Court's strict observance of the nature of its power is much greater. Because of this, the Court should be more diligent in defining the source of its power and in respecting the constitutional-supervisory distinction.

[64] Note 24 *supra* & accompanying text. As California itself recognized in petitioning the Court to rehear the *Chapman* case, "this Court has cast aside the various harmless error rules hitherto adopted by some fifty states as well as the federal government." Respondent's Petition for Rehearing at 2, Chapman v. California, 386 U.S. 18 (1967).