what to expect . . . : th'ol' 'totality of the circumstances' test."[87] Applications of this test — turning, in *Fields*, on such minutiae as the size and lighting of the interrogation room — are of little use to bench and bar. These miniscule elaborations of the law hardly justify departure from ordinary avoidance norms.

These limits aside, however, criminal procedure is special. In this field, the Court does not treat the dictates of *Ashwander* as "strict and venerable rule[s]" (as Justice Scalia once described the last-resort rule),[88] or even as "sound general principle[s]" (as he described the instruction to formulate constitutional holdings narrowly).[89] That is just as it should be.

2. Suggestive Eyewitness Identifications. — Since the Supreme Court first acknowledged the peculiar "vagaries of eyewitness identification" four decades ago,[1] eyewitness identifications have drawn fire as a uniquely unreliable form of courtroom evidence.[2] Susceptible to numerous psychological biases[3] and notoriously difficult to rebut at trial,[4] eyewitness testimony is a leading cause of wrongful convictions in the United States.[5] This past Term, in *Perry v. New Hampshire*,[6] the Supreme Court denied that the inherent unreliability of eyewitness testimony merits heightened due process scrutiny, holding that suggestive identifications require preliminary judicial review only if procured through circumstances arranged by the police.[7] While *Perry*'s holding conforms with an established state-action requirement in due process

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87 United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

88 Webster v. Reprod. Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment).

89 *Id.* at 533.

1 United States v. Wade, 388 U.S. 218, 228 (1967).

2 *See, e.g.*, Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 454 (2012) (noting "a nationwide movement to reform criminal procedure" involving eyewitnesses).

3 *See* Brief for Amicus Curiae American Psychological Association in Support of Petitioner at 8–13, Perry v. New Hampshire, 132 S. Ct. 716 (2012) (No. 10-8974) [hereinafter APA Amicus Brief] (noting the influence of such factors as passage of time, witness stress, duration of exposure, distance, possession of a weapon, and cross-racial bias on the accuracy of such evidence); Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite *Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 118–22 (2006) (surveying psychological research into eyewitness identifications since *Brathwaite*).

4 APA Amicus Brief, *supra* note 3, at 3–4 (noting unique jury reliance on eyewitness evidence and the limits of jury instructions, expert testimony, and cross-examination in rebutting it).

5 *See* Steven E. Clark, *Blackstone and the Balance of Eyewitness Identification Evidence*, 74 ALB. L. REV. 1105, 1106 (2011) (suggesting that eyewitness identifications figure in roughly seventy-five percent of wrongful convictions subsequently overturned due to DNA testing); Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595, 596–99 (2009) (reviewing statistics identifying mistaken eyewitness identifications as a leading cause of wrongful convictions); O'Toole & Shay, *supra* note 3, at 110 (noting the high exoneration rates for defendants convicted using eyewitness identifications).

6 132 S. Ct. 716 (2012).

7 *Id.* at 730.

cases, the Court's unnecessary and misleading renunciation of reliability as an animating due process concern provides a precarious precedent for judicial involvement in preliminary evidentiary review and a troubling example of the Court's reliance on precedent in place of substantive constitutional analysis.

On August 15, 2008, the Nashua, New Hampshire, police department received a phone call reporting that an African American male was trying to break into cars in the parking lot of an apartment building.[8] Arriving on the scene, Officer Nicole Clay saw Barion Perry, an African American male, standing between two cars holding two car-stereo amplifiers.[9] Perry claimed to have found the amplifiers on the ground of the lot.[10] As police reinforcements arrived, a resident of the building inspected his car and found his two speakers and amplifiers missing.[11] Officer Clay left Perry with a fellow officer and accompanied the resident upstairs to the original caller's apartment.[12] When Officer Clay asked the caller's wife to describe the man she and her husband had seen, the witness moved to the window and pointed at Perry.[13] A month later, however, she was unable to identify Perry in a photographic array provided by the police.[14]

Perry was convicted in New Hampshire state court of theft by unauthorized taking.[15] Before the trial, Perry moved to suppress testimony regarding his identification in the parking lot on the grounds that the circumstances had created a one-man "showup" in violation of his state and Fourteenth Amendment due process rights.[16] The New Hampshire Superior Court denied the motion despite acknowledging multiple deficiencies in the identification, including poor lighting, Perry's position next to a police officer, and the fact that Perry was the only African American male in the vicinity.[17] The Superior Court noted that the Supreme Court had established a two-part test for evaluating due process challenges to out-of-court identifications: first, whether the police had used an unnecessarily suggestive procedure, and second, whether the suggestiveness of the procedure rendered the

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[8] *Id.* at 721.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 722.
[14] *Id.*
[15] *Id.* Perry was also charged with but acquitted of one count of criminal mischief. *Id.* at 723.
[16] *See id.* at 722; New Hampshire v. Perry, No. 2009-0590, slip op. at 1 (N.H. Nov. 18, 2010). A showup is a procedure in which a single suspect is presented to the witness for identification. *See* Manson v. Brathwaite, 432 U.S. 98, 111 (1977) (noting widespread criticism of showups).
[17] *Perry*, 132 S. Ct. at 722.

identification unreliable.[18] Because Perry's identification did not arise from a police-orchestrated confrontation but rather from a witness's spontaneous gesture, the Superior Court refused to exclude the resulting testimony.[19] The New Hampshire Supreme Court affirmed without hearing oral argument.[20] Declining to follow the First Circuit's example of extending due process scrutiny to all suggestive identifications,[21] the court agreed that improper state action is necessary to trigger due process analysis under both state and federal law.[22]

The Supreme Court affirmed.[23] Writing for the Court, Justice Ginsburg[24] held that "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of [eyewitness identifications that are] not procured under unnecessarily suggestive circumstances arranged by law enforcement."[25] Justice Ginsburg confirmed that the Court's holdings in *Neil v. Biggers*[26] and *Manson v. Brathwaite*[27] had established a two-part inquiry for evaluating due process claims involving eyewitness identifications: first, whether "law enforcement officers use[d] an identification procedure that is both suggestive and unnecessary," and second, whether the "improper police conduct created a 'substantial likelihood of misidentification'" as determined on a case-by-case basis.[28] Surveying the Court's cases from preceding decades,[29] Justice Ginsburg noted that the Court had consistently "linked the due process check, not to suspicion of eyewitness testimony generally, but only to improper police arrangement of the circumstances surrounding an identification."[30] She denied Perry's claim, drawn from the Court's own opinion in *Brathwaite*, that "reliability is the linchpin in determining the admissibility of identification testimony."[31] Rather, Justice Ginsburg insisted that a "primary aim" and "key premise" animating the Court's past holdings was the deterrence of future police manipulation — a rationale "inapposite in cases . . . in

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[18] *Id.*; *see also* Neil v. Biggers, 409 U.S. 188, 198–99 (1972) (establishing the two-part test).

[19] *Perry*, 132 S. Ct. at 722.

[20] *See Perry*, No. 2009-0590, slip op. at 1.

[21] *Id.* at 1–2. The Second, Sixth, and Ninth Circuits adopted the same rule as did the First Circuit. *See Perry*, 132 S. Ct. at 737–38 (Sotomayor, J., dissenting).

[22] *Perry*, No. 2009-0590, slip op. at 2.

[23] *Perry*, 132 S. Ct. at 730.

[24] Justice Ginsburg was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan.

[25] *Perry*, 132 S. Ct. at 730.

[26] 409 U.S. 188 (1972).

[27] 432 U.S. 98 (1977).

[28] *Perry*, 132 S. Ct. at 724 (quoting *Biggers*, 409 U.S. at 201).

[29] *Id.* at 724–27.

[30] *Id.* at 726.

[31] *Id.* at 725 (quoting *Brathwaite*, 432 U.S. at 114) (internal quotation marks omitted).

which the police engaged in no improper conduct."[32] *Brathwaite*'s inquiry into "reliability" entered the analysis only after a defendant established police manipulation, as a more flexible alternative "to a *per se* rule requiring exclusion" and as a way to salvage "identification evidence that is reliable, *notwithstanding* improper police conduct."[33]

Justice Ginsburg cautioned that expanding due process scrutiny to unreliable identifications absent police misconduct would risk overextending the scope of judicial involvement in evidentiary review. Citing Perry's own amicus brief for the numerous factors that might render eyewitness identifications unreliable, she warned that Perry's emphasis on reliability regardless of police action "would open the door to judicial preview . . . of most, if not all, eyewitness identifications."[34]

Finally, Justice Ginsburg rebutted Perry's claim that eyewitness identifications deserve special scrutiny as a "uniquely unreliable form of evidence."[35] Emphasizing the traditional role of the jury in evaluating evidence, she insisted that judicial accuracy was sufficiently protected by "other safeguards built into [the] adversary system,"[36] including the right to confront witnesses, the right to effective assistance of counsel, jury instructions, and the potential use of expert testimony on eyewitness fallibility.[37] Given that Perry's counsel repeatedly highlighted the dubious circumstances of Perry's identification to the jury,[38] Justice Ginsburg concluded that the introduction of eyewitness evidence "did not render Perry's trial fundamentally unfair."[39]

Justice Thomas concurred. Insisting that "the Fourteenth Amendment's Due Process Clause is not a 'secret repository of substantive guarantees against unfairness,'" he wrote separately to disavow the existence of any "substantive due process" right against the presentation of unreliable eyewitness testimony at trial.[40]

Justice Sotomayor dissented, arguing that the majority opinion contravened both the Court's precedent on suggestive identifications and the true due process interests at stake.[41] The Court's past cases, Justice Sotomayor contended, condemned the "corrosive effects of suggestion on the reliability" of eyewitness identifications and established a "clear rule" against the admission of suggestive identifications "that

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[32] *Id.* at 726.
[33] *Id.*
[34] *Id.* at 727 (citing APA Amicus Brief, *supra* note 3, at 9–12).
[35] *Id.* at 728.
[36] *Id.*
[37] *Id.* at 728–29.
[38] *Id.* at 729–30.
[39] *Id.* at 730.
[40] *Id.* at 730 (Thomas, J., concurring) (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 598–99 (1996) (Scalia, J., dissenting)).
[41] *Id.* at 739–40 (Sotomayor, J., dissenting).

pose a very substantial likelihood of misidentification."[42] In context, the majority's insistence that a due process violation requires police action added a "step zero" to a two-step test,[43] grafting "a *mens rea* requirement onto [the] existing rule"[44] that created an unclear standard for future courts.[45] Justice Sotomayor dismissed the fact that prior cases had consistently involved police action, suggesting that this pattern "reflect[ed] [the] practical reality" that eyewitness identifications usually arise through state-orchestrated procedures.[46] Insisting that the "driving force" behind the Court's past cases was the reliability of evidence,[47] she reminded the Court that *Brathwaite* had considered deterrence only as a subsidiary factor — one that, if anything, supported a per se exclusionary rule and militated *against* the totality-of-the-circumstances test that the Court adopted in that case.[48]

Justice Sotomayor denied that expanding due process rights to non-police-arranged identifications would create excessive judicial involvement in evidentiary review. Circuit courts that had extended due process scrutiny to all suggestive identifications, she noted, had not been overwhelmed by evidentiary screenings, and courts already evaluated a similar volume of objections based on the rules of evidence at trial.[49] Acknowledging that the judicial system generally relies on juries to assess the credibility of rival witnesses, Justice Sotomayor insisted that eyewitness identifications "upend th[at] ordinary expectation"[50] due to their unreliability, "powerful impact" on a jury, and "resistance to the ordinary tests of the adversarial process."[51]

Perry presents a rare judicial phenomenon: a case where the majority's judgment but the dissent's reasoning reads the precedent best. The Court's holding that only police-orchestrated eyewitness identifications require heightened judicial review aligns with a healthy line of precedent, clarified since *Biggers* and *Brathwaite*, that due process violations require some element of official misconduct. Yet the majority's reasoning — recasting reliability from an animating doctrinal concern into a safety net for salvaging police-manipulated evidence — unnecessarily mischaracterizes the Court's case law. By disowning reliability as an independent due process concern in past eyewitness

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[42] *Id.* at 731.

[43] *Id.* at 735.

[44] *Id.* at 734.

[45] *See id.* Justice Sotomayor questioned whether the rule required police to act in bad faith and whether the confrontation, the suggestiveness, or both had to be police-arranged. *Id.*

[46] *Id.* at 735.

[47] *Id.* at 736 (quoting Manson v. Brathwaite, 432 U.S. 98, 111 (1977)).

[48] *Id.*

[49] *Id.* at 737–38.

[50] *Id.* at 737.

[51] *Id.* at 731.

identification cases, *Perry* ironically risks extending due process review to ever more categories of contested evidence. Furthermore, in resolving Perry's due process claim through an arguable mischaracterization of precedent, the Court's opinion refuses to consider the very possibility of expanding a due process right on its constitutional merits while risking injecting aconstitutional changes into constitutional doctrine.

In itself, the Court's holding that suggestive identifications raise due process concerns only when arranged by the police conforms to a robust line of precedent stating that a due process violation requires some element of official misconduct. In the decades since *Biggers* and *Brathwaite*, the Court has repeatedly affirmed that, with "few exceptions, . . . constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities."[52] The Fourteenth Amendment is especially unequivocal: prohibiting "any State" from "depriv[ing] any person of life, liberty, or property, without due process of law,"[53] the Amendment "can be violated only by conduct that may be fairly characterized as 'state action.'"[54] On a set of facts quite similar to those in *Perry*, indeed, the Supreme Court has already held that the use of admittedly "unreliable" evidence received passively by the police does not support a Fourteenth Amendment due process claim.[55] In *Colorado v. Connelly*,[56] a defendant who spontaneously confessed to murder while suffering from schizophrenia challenged his conviction on due process grounds, arguing that his impaired mental state had precluded him from making a voluntary confession.[57] The Court denied his claim, explaining that, "[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."[58] Faced with an analogous challenge to the state-action requirement in *Perry*, the Court could thus easily have rested its holding on a rich body of intervening precedent affirming the significance of state action in due process cases.[59]

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[52] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991); *see also* Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978) (noting that most constitutional rights "are protected only against infringement by governments"). *See generally* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985) ("It is firmly established that the Constitution applies only to governmental conduct, usually referred to as 'state action.'" *Id.* at 507.).

[53] U.S. CONST. amend. XIV, § 1.

[54] Lugar v. Edmondson Oil Co., 457 U.S. 922, 924 (1982).

[55] *See* Colorado v. Connelly, 479 U.S. 157, 167 (1986).

[56] 479 U.S. 157 (1986).

[57] *Id.* at 160–62.

[58] *Id.* at 164. The Court rejected the argument that the very admission of unreliable evidence into trial proceedings constituted "sufficient state action" to support a violation. *Id.* at 165.

[59] While commentators have critiqued the state-action requirement as an arbitrary limitation on "vital liberties," *see, e.g.*, Chemerinsky, *supra* note 52, at 557, the Court has defended the rule for its respect for state evidentiary procedures, protection of constitutional rights, promotion of

Yet the Court did not discuss its intervening state-action cases in dismissing Perry's due process claim.[60] Instead, it justified its holding through a misleading devaluation of reliability as a core policy interest behind its prior suggestive identification cases. When the Court first developed its two-step inquiry in *Biggers*, it identified the unreliability of eyewitness evidence — the "likelihood of misidentification" — as the sole source of due process concerns and "the basis of . . . exclusion" under the first prong.[61] Despite the *Perry* majority's insistence that deterrence was a "primary" concern in *Brathwaite*, Justice Sotomayor correctly noted that *Brathwaite* had addressed deterrence purely defensively, in order to justify its adoption of the two-step inquiry against the petitioner's charge that only a rigid exclusionary rule could discourage police misconduct.[62] Prior to *Perry*, the Court had consistently linked the deterrence rationale to the per se exclusionary rule that it refused to adopt in *Brathwaite*.[63] In that case, the Court explicitly explained its preference for the two-step inquiry as a matter of privileging accuracy *over* deterrence: an attempt to salvage "reliable and relevant" evidence and ensure the proper "administration of justice" that the per se rule's focus on deterrence would undermine.[64]

Against this backdrop, the majority in *Perry* did not simply relegate reliability behind deterrence; it eliminated reliability as an independent due process concern altogether. By insisting that routine trial procedures like the presence of counsel, cross-examination, and jury instructions "suffice[d] to test [the] reliability" of most suggestive identifications,[65] the Court rejected the contention that the innate unreliability of eyewitness identifications required unique due process scrutiny. More fundamentally, by consigning reliability to the second prong of *Brathwaite*'s two-step inquiry, relevant only following a finding of police misconduct,[66] the Court recast reliability from an autonomous

judicial accuracy, and maintenance of an administrable framework for courts, *see Connelly*, 479 U.S. at 166–67. This comment does not take a normative position on the state-action requirement.

60 Notably, New Hampshire's brief discussed *Connelly* at length as a potentially dispositive precedent. *See* Brief for Respondent at 17–20, *Perry*, 132 S. Ct. 716 (2012) (No. 10-8974).

61 *See* Neil v. Biggers, 409 U.S. 188, 198 (1972).

62 *See* Manson v. Brathwaite, 432 U.S. 98, 111–12 (1977).

63 *See Biggers*, 409 U.S. at 199 ("The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available . . . ."); *Brathwaite*, 432 U.S. at 110 ("The justifications advanced [for a per se exclusionary rule] are the elimination of evidence of uncertain reliability, deterrence of the police and prosecutors, and the stated 'fair assurance against the awful risks of misidentification.'" (citation omitted)).

64 *Brathwaite*, 432 U.S. at 112.

65 *Perry*, 132 S. Ct. at 721.

66 *Id.* at 726 ("The due process check for reliability . . . comes into play only after the defendant establishes improper police conduct.").

policy interest underwriting both steps of the *Brathwaite* inquiry[67] into a method of rehabilitating otherwise inadmissible police-tainted evidence. At oral argument for the case, Justice Scalia led his colleagues in critiquing Perry's attempts to ground due process review solely on reliability as opening "a one-way door" in which "evidence that . . . causes the defendant to be convicted is excluded, but . . . evidence on the other side is not."[68] Beyond simply evading this concern, the Court's disposition in *Perry* ironically casts the asymmetry the other way. Coming out of *Perry*, any independent inquiry into reliability enters the Court's analysis as a single-edged sword that may only serve to salvage otherwise inadmissible evidence pointing to a defendant's guilt. In this sense, even as the Court's holding in *Perry* brings the Court's suggestive identification cases in line with its intervening precedent on state action, the Court's reasoning turns its back on the Court's earlier emphasis on the unique unreliability of eyewitness identifications as a "primary evil" justifying heightened due process scrutiny.[69]

More than just depriving defendants of an added layer of procedural protections, *Perry*'s repudiation of reliability as an animating due process interest has two potential repercussions for the Court's approach to due process and to constitutional analysis more broadly.

First, although one of the Court's concerns in *Perry* was containing the scope of judicial evidentiary review, *Perry*'s disavowal of suggestive identifications as a uniquely unreliable form of evidence ironically risks extending preliminary review to additional categories of contested evidence. If, as the Court suggested, eyewitness identifications are comparable to other forms of unreliable evidence,[70] and if it is merely the combination of eyewitness identifications and police misconduct that justifies preliminary review, then it is unclear why the same scrutiny should not apply to any number of other forms of evidence where police action is involved. In the last decades, the federal circuits and the Supreme Court have recognized numerous categories of inherently unreliable evidence that might further be tainted by police manipulation, including not only *Perry*'s example of jailhouse snitches[71] but also

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[67] As articulated in *Biggers*, the first step asked whether the challenged identification procedures were "unnecessarily suggestive" — an inquiry itself motivated by reliability. *Biggers*, 409 U.S. at 198; *see also Brathwaite*, 432 U.S. at 106–07.

[68] Transcript of Oral Argument at 9, *Perry*, 132 U.S. 716 (No. 10-8974). Since due process rights attach to individual defendants, the Justices objected that the state would have no comparative tool to challenge exculpatory eyewitness evidence introduced at trial. *Id.* at 8–10.

[69] *Biggers*, 409 U.S. at 198; *see also Perry*, 132 S. Ct. at 735.

[70] *Perry*, 132 S. Ct. at 728 (comparing eyewitness identifications to jailhouse snitches).

[71] *See id.*

testimony by police informants,[72] polygraph evidence,[73] and confessions from accomplices.[74] These admittedly dubious forms of evidence are currently exempt from preliminary due process screening and are in many cases governed by widely varying local rules.[75] Yet *Perry*'s reasoning opens the door for courts concerned with the admissibility of unreliable evidence to extend due process scrutiny to any of these categories.[76] In this sense, reaffirming the unique unreliability of eyewitness identifications as an independent justification for heightened due process scrutiny would actually have helped the Court ensure judicial economy at the preliminary review stage.

Second, the Court's mischaracterization of its precedent on eyewitness identifications raises concerns about the judicial practice, exemplified in *Perry*, of adhering to the strict letter of precedent so as to avoid substantive constitutional analysis of constitutional claims. Although Justice Thomas wrote separately to denounce the existence of any "substantive due process" right to fairness,[77] the entirety of the majority's opinion in *Perry* reflects a retreat from substantive due process as a springboard for novel rights.[78] By dismissing Perry's constitutional claims based primarily on the factual distinctions between his identification and the Court's earlier, police-orchestrated identification cases,[79] the Court elided the core of Perry's substantive due process claim: not that the Court's prior holdings mandated extending judicial review to non-police-arranged identifications, but that the "rationale underlying [those] decisions" supported extending due process scrutiny to cases like Perry's.[80] In characterizing deterrence as the long-established rationale behind its eyewitness identification holdings and by minimizing reliability as a due process concern worth evaluating in its own right, the Court avoided having to reach that second claim on its constitu-

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[72] *See* United States v. Cook, 102 F.3d 249, 252 (7th Cir. 1996).

[73] *See* United States v. Scheffer, 523 U.S. 303, 310–11 (1998).

[74] *See* United States v. Owens, 460 F.2d 268, 269 (10th Cir. 1972); Tillery v. United States, 411 F.2d 644, 648 (5th Cir. 1969).

[75] *See, e.g.*, *Cook*, 102 F.3d at 254–55; *Scheffer*, 523 U.S. at 310–11.

[76] The four circuit courts that applied the *Brathwaite* inquiry to all suggestive eyewitness identifications exemplify lower courts' willingness to expand due process protections farther than has the Supreme Court.

[77] *Perry*, 132 S. Ct. at 730 (Thomas, J., concurring).

[78] *See* Colorado v. Connelly, 479 U.S. 157, 166 (1986) (refusing to "establish a brand new constitutional right — the right of a criminal defendant to confess to his crime only when totally rational and properly motivated"); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 833 (2003) (noting that, despite the rising prominence of substantive due process, "the Court continues sporadically to generate rules that seem to undermine its very legitimacy").

[79] *See Perry*, 132 S. Ct. at 726–27.

[80] *Id.* at 725. As the majority noted, Perry "concede[d]" the factual differences between his conviction and the Court's previous cases. *Id.*

tional merits — to evaluate the very possibility of "enlarg[ing] the domain of due process"[81] past its already-charted perimeter.

The Court's reasoning, in short, deferred to the scope of its existing precedent on eyewitness identifications as the exclusive source of constitutionality for Perry's claims, rather than treating that precedent as an evolving tool for vindicating the Constitution.[82] To be sure, where the Court has confronted and reasoned through substantially equivalent issues in past cases, precedent may provide a useful shorthand for constitutionality.[83] Yet the narrow letter of past holdings is an inappropriate tool for disposing of cases that confront the Court with new fact patterns and novel constitutional questions. Here, indeed, the Court's failure to rely on its established state-action requirement may be all the more glaring an omission. Absent that independent limit on Perry's due process claims, the accumulation of scientific research since *Brathwaite* on the peculiar risks of eyewitness testimony would appear to make *Perry* the precise type of case where a fresh substantive due process inquiry is most appropriate.

In context, it may be all the more troubling that the majority opinion mischaracterized the precedent that it claimed resolved Perry's claims. By disowning reliability as the policy interest underwriting both steps of the *Brathwaite* inquiry, the Court purportedly declined to alter the scope of its existing due process doctrine while actually introducing substantive changes to the meaning of that doctrine. And while, in this particular case, the Court's changes aligned with a legitimate (if unreferenced) constitutional limiting principle,[84] the Court's characterization of those changes as an already-decided component of its suggestive identifications case law is a roundabout approach to refining the scope of constitutional rights. Most crucially, it is an approach ill suited to ensuring that the Court's modifications of constitutional doctrine conform to the principles of the Constitution itself. If the Constitution is to be regarded as "a superior, paramount law, unchangeable by ordinary means,"[85] then we must ensure that any changes to constitutional doctrine are made only in light of a comprehensive and transparent assessment of the constitutional interests in-

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[81] *Id.* at 728.

[82] *See generally* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term — Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997) (analyzing how doctrine functions as an imperfect but practical tool to "implement" high-level constitutional decrees in the real world).

[83] *See, e.g.*, *supra* pp. 251–52 (noting how the Court's analysis in *Connelly*, 479 U.S. 157, already resolved the claims in *Perry*).

[84] *See supra* p. 251 (discussing the state-action requirement).

[85] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Fairbank v. United States, 181 U.S. 283, 285 (1901) (stating that "the duty of the court is plain to uphold the Constitution").

volved.[86] Whatever the merits of *Perry*'s ultimate due process holding, the Court's justification of its holding through a retroactive revision of its existing eyewitness identification cases exemplifies a form of analysis that risks introducing aconstitutional changes into constitutional doctrine.

In light of the Supreme Court's consistent defense of the state-action requirement, the Court in *Perry* reached the right outcome. Yet the majority's misleading renunciation of reliability as the animating due process concern behind its eyewitness identification cases provides an unsatisfying groundwork for that result. *Perry* has already drawn fire for its refusal to safeguard defendants from an increasingly renounced form of courtroom evidence.[87] The case may stand also as a reminder of the importance of using precedent judiciously — and exactingly — when venturing out on novel constitutional terrain.

D. Sixth Amendment

1. Sentencing — Factfinding in Sentencing for Criminal Fines. — At the dawn of the new millennium, the Supreme Court ushered in a new age of the constitutional law of sentencing with its decision in *Apprendi v. New Jersey*.[1] In that case, the Court established the principle that under the Fifth and Sixth Amendments, "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[2] The Court incrementally and consistently expanded the rule's scope over the next decade before refusing to extend it to a judge's determination of whether to impose consecutive or concurrent sentences of confinement in *Oregon v. Ice*.[3] However, the lull in *Apprendi*'s expansion was short lived. Last Term, in *Southern Union Co. v. United States*,[4] the Court extended the *Apprendi* rule to sentences of criminal fines.[5] Dicta in the majority's opinion suggest that *Apprendi*'s limits are coextensive with the Sixth Amendment right

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[86] *See, e.g.*, *Connelly*, 479 U.S. at 166–67 (discussing the several policy interests supporting a state-action requirement in due process claims).

[87] *See, e.g.*, Deborah Davis & Elizabeth F. Loftus, *The Dangers of Eyewitnesses for the Innocent: Learning from the Past and Projecting into the Age of Social Media*, 46 NEW ENG. L. REV. 769, 784 (2012) (terming *Perry* "a great disappointment" for failing to consider the dangers of unreliable eyewitness evidence); Garrett, *supra* note 2, at 454 (critiquing *Perry* for failing to reform criminal procedure "to promote greater accuracy and to prevent wrongful convictions").

[1] 530 U.S. 466 (2000). Justice O'Connor presciently noted that the case would "surely be remembered as a watershed change in constitutional law." *Id.* at 524 (O'Connor, J., dissenting).

[2] *Id.* at 476 (majority opinion) (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999)) (internal quotation marks omitted). *Jones* involved a federal statute, and *Apprendi* extended its rule to the states through the Fourteenth Amendment. *See id.*

[3] 129 S. Ct. 711 (2009).

[4] 132 S. Ct. 2344 (2012).

[5] *Id.* at 2348–49, 2357.