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## What Were They Thinking? Fourth Amendment Unreasonableness in *Atwater v. City of Lago Vista*

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## WHAT WERE THEY THINKING? FOURTH AMENDMENT UNREASONABLENESS IN *ATWATER V. CITY OF LAGO VISTA*

Richard S. Frase\*

In *Atwater v. City of Lago Vista*, the Supreme Court upheld the arrest and jailing of a woman for a seat belt violation even though her offense was punishable with a small fine and the police officer could have simply issued a citation. *Atwater* thus permits, and indeed encourages, unnecessary and disproportionate arrests along with the various searches and other hardships that routinely accompany an arrest. The extremely broad arrest power recognized by the Court also creates a grave potential for abuse in light of the breadth of modern traffic laws (almost every driver violates some minor traffic rule), the broad search powers that accompany an arrest, the documented tendency for some officers to engage in pretextual investigations and/or racial profiling, and the absence of effective legal limits on pretexts and profiling.

The *Atwater* decision is puzzling as well as troubling. The majority opinion admits that Ms. Atwater's arrest was "pointless" and, as explained in this article, the Court's reasons for upholding her arrest are not persuasive. This decision can best be explained in the context of other recent Fourth Amendment cases that, like *Atwater*, reveal the Court's attempts to limit further applications of case-specific "reasonableness balancing." Even if the concerns underlying this latent trend are valid, however, they did not justify the decision in *Atwater*.

The proper resolution of a case like *Atwater* can benefit from, and contribute to, current theories of constitutional interpretation. *Atwater* shows the severe limitations of originalism and textualism, but it adds considerable support to, and helps to further refine, Professor Cass Sunstein's theory of "minimalism"—that the Court should generally decide cases narrowly both in terms of the scope of

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the ruling and its reasoning. The facts and case-specific policy arguments in Ms. Atwater's case were compelling, and the Court's broad grant of arrest power risks many adverse unintended consequences. The Court easily could and should have ruled narrowly, deciding only that the police must show a legitimate need to arrest rather than issue a citation for non-jailable traffic violations. These legitimate needs are well defined in statutes and rules found in a number of states. Given the broad scope of traffic laws, and the infrequent circumstances that justify arrest for these minor violations, strict limitations on arrest powers are both essential and administratively feasible. All states should enact similar limitations by statute or criminal rule; if such limitations are not forthcoming, courts should not hesitate to recognize them under state constitutions.

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### INTRODUCTION

In *Atwater v. City of Lago Vista*,<sup>1</sup> a five-to-four majority of the Supreme Court held that the Fourth Amendment places no limitations other than probable cause on police discretion to make a custodial arrest rather than issuing a citation for a minor traffic offense. Ms. Atwater was handcuffed and taken to jail even though she was charged with a seat belt violation punishable only with a small fine, and there was no legitimate law enforcement need to take her into custody (e.g., to confirm identification or prevent further dangerous driving). Seat belt violators are normally issued citations,<sup>2</sup> and it appears that the officer in this case made the arrest because he was angry at Ms. Atwater and wanted to teach her a lesson.<sup>3</sup>

The decision in *Atwater* has been widely criticized, even by conservatives,<sup>4</sup> and with good reason. Indeed, the closer one looks at

1. 532 U.S. 318 (2001).

2. See *Atwater v. City of Lago Vista*, 195 F.3d 242, 246 (5th Cir. 1999) (en banc) (Garza, J., dissenting) (“[I]n a regular traffic stop . . . the usual procedure . . . is to give the accused a citation . . .”); *Atwater v. City of Lago Vista*, 165 F.3d 380, 388 (5th Cir. 1999) (“Our research reveals that every case in Texas wherein an individual was custodially arrested after violating the seat belt law, the arrest ensued only after some additional conduct occurred or some additional factor justifying arrest was revealed.”).

3. See *infra* notes 23-26 and accompanying text.

4. Petitioner’s Request for Rehearing at 8 n.8, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408) (citing the following criticisms of the decision in the media: *A Decision Lacking Reason*, Investor’s Bus. Daily, Apr. 26, 2001, at 22; Sandy Banks, *Why A Mom’s Fate Should Worry Us All*, L.A. Times, Apr. 27, 2001, at 1E; Mark Cloud, *Extreme Searches*, Chi. Trib., May 4, 2001, at 25N; Steve Forbes, *Junk Judgment*, Forbes, May 28, 2001, at 40; James O. Goldsborough, *Belting Justice for a Seat-Belt Violation*, San Diego Union-Trib., Apr. 30, 2001, at B7; James J. Kilpatrick, *Punishing Logic in Soccer Mom’s Case*, News and Observer (Raleigh, NC), May 7, 2001, at A11; Peter Moskos, *U.S. Supreme Court Ruling Sowed Confusion, Injustice*, Balt. Sun, May 3, 2001, at 13A; Ed Quillen, *Tell Us Again, Which Side Won The Cold War?*, Denver Post, Apr. 29, 2001, at E6; Theotis Robinson, Jr., *Supreme Court Eroding Our Freedom*, Knoxville News-Sentinel (Knoxville, TN), Apr. 30, 2001, at A12; Bob Ray Sanders, *High Court Ruling Gives Bad Cops a New Weapon*, Fort Worth Star-Telegram, Apr. 27, 2001, at Metro 1; Rob Zaleski, *Supreme Court Ruling is Bogging*, Capital Times (Madison, WI), May 14, 2001, at 1B); The Honorable Dick Arney, *Disappointing Supreme Court Opinion*, Apr. 24, 2001, <http://www.freedom.gov/news/statements/seatbelt.asp>; *A Bad Decision By Supreme Court*, State Journal-Register (Springfield, Ill.), May 10, 2001, at 10. Academics have

Justice Souter's majority opinion and the issues involved, the less sense it makes. The decision is "a riddle wrapped in a mystery inside an enigma."<sup>5</sup> The enigma is apparent from even a superficial recitation of the facts:<sup>6</sup> jailing a driver for a fine-only seat belt violation, with no need for custody whatsoever, and apparently in bad faith, is clearly unreasonable. The mystery deepens when one examines Justice Souter's reasons for rejecting Ms. Atwater's claim. Justice Souter seems to admit that, on the facts alleged by the Petitioner (and which the Court assumed to be true), her arrest was unreasonable.<sup>7</sup>

Moreover, the *Atwater* decision carries with it substantial potential for abuse. The Court's ruling means that, as a practical matter, the police may arrest and search the person and the car of anyone who drives on public streets and highways. These broad powers flow from the combination of the Court's prior rulings and the nature of modern traffic laws. In earlier cases, the Court gave the police authority to conduct routine, suspicionless searches of drivers and their cars, incident to custodial arrests.<sup>8</sup> Additional suspicionless search powers apply to several police procedures that frequently accompany an arrest, such as the impounding of the arrestee's automobile<sup>9</sup> and the taking of his clothing and other effects when he is booked into jail or another detention facility.<sup>10</sup> Given these broad search powers, officers are tempted to arrest persons for very minor offenses in order to investigate more serious crimes for which they lack legal grounds to

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also been highly critical. *See, e.g.*, 3 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* 19-36 (3d ed. Supp. 2002) [hereinafter LaFare, *Search & Seizure Supplement*]; Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 Wake Forest L. Rev. 239 (2002); Irene Merker Rosenberg, *Buckle Up or Else. Or Else What? You're Under Arrest—Atwater v. Lago Vista*, 38 Crim. L. Bull. 160, 160-75 (2002); Akhil Reed Amar, *An Unreasonable View of the 4th Amendment*, L.A. Times, Apr. 29, 2001, at M1; Craig M. Bradley, *Minor-Offense Arrests Get Green Light in Seat Belt Case*, Trial, Aug. 2001, at 66.

5. Bartlett's Familiar Quotations 620 (1992) (quoting an October 1939 speech by Winston Churchill, who was referring to the Soviet Union).

6. *Atwater*, 195 F.3d at 248 (Wiener, J., dissenting) ("[H]ere, the facts virtually speak for themselves . . ."). Similarly, Justice Stevens suggested at oral argument that any arrest for which no plausible reason can be given is arbitrary, and that anything that is arbitrary cannot be reasonable under the Fourth Amendment. Supreme Court Oral Argument at 37-38, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408). In contrast, Justice Kennedy opined that "[i]t's not a constitutional violation for a police officer to be a jerk." *Id.* at 21. Another unidentified Justice remarked, "[t]here are a lot of really stupid things that aren't unconstitutional." *Id.* at 32.

7. *See infra* note 38 and accompanying text.

8. *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Robinson*, 414 U.S. 218 (1973).

9. *Colorado v. Bertine*, 479 U.S. 367 (1987); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

10. *Illinois v. Lafayette*, 462 U.S. 640 (1983).

arrest and search. The Court has refused, however, to permit lower courts to examine such pretextual motives, in cases where the police have probable cause to believe that some minor violation has occurred.<sup>11</sup> But *almost every driver* violates some minor traffic law *every time he drives*. Some examples of common violations include failing to come to a complete stop at intersections, inadequate signaling of turns and lane changes, and modestly exceeding the posted speed limit. If the police do not immediately observe a violation, they need only follow the driver for a few blocks until they do.<sup>12</sup>

Of course, the police will not follow, arrest, and search every driver they see, given the potentially staggering costs that such a program of “full enforcement” would involve. Instead, the extremely broad arrest and search powers now enjoyed by the police will be applied in a highly selective manner, thus virtually ensuring even more frequent complaints of racial profiling and other forms of disparity.<sup>13</sup> But the Court has made it very difficult for citizens to successfully raise claims of unconstitutional discriminatory enforcement in the exercise of law enforcement discretion.<sup>14</sup>

The *Atwater* decision also substantially undercuts the Court’s

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11. *Arkansas v. Sullivan*, 532 U.S. 769 (2001); *Whren v. United States*, 517 U.S. 806 (1996). For further discussion of these cases, see *infra* notes 192-94, 250-53 and accompanying text.

12. Wayne R. LaFave, “Case-By-Case Adjudication” Versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 152 [hereinafter LaFave, *Robinson Dilemma*] (“[V]ery few drivers can traverse any appreciable distance without violating some traffic regulation.” (quoting *Robinson*, 414 U.S. at 248 (Marshall, J., dissenting))); David A. Harris, “Driving While Black” and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. Crim. L. & Criminology 544, 582 (1997) (“Any time we use our cars, we can be stopped by the police virtually at their whim because full compliance with traffic laws is impossible.”).

Modern public-order statutes prohibiting littering, loitering with intent to commit any crime, general disorderly conduct, etc., also make criminals of a large number of persons who are not driving. The remainder of this article will focus, however, on the traffic law context because prohibitions and police powers are greater in that area. *Atwater* was a traffic case, and there were good reasons for the Court to limit its decision to such cases. See *infra* Part IV.

13. Harris, *supra* note 12; David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 Minn. L. Rev. 265 (1999); Tracey Maclin, “Black and Blue Encounters”—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 Val. U. L. Rev. 243, 250-57 (1991); Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 377-78 (1998).

14. *United States v. Armstrong*, 517 U.S. 456 (1996) (discovery); *Wayte v. United States*, 470 U.S. 598 (1985) (selective enforcement); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity); *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997) (rejecting claim of racial bias in airport stops because defendant’s statistics showing unequal treatment did not establish intent to discriminate or that police actions were based solely on race); *United States v. Bullock*, 94 F.3d 896, 899 (4th Cir. 1996) (affirming trial court’s refusal of defense efforts to show racially biased traffic stops); *United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996) (finding that defendant failed to show that whites also violated the bicycle headlamp law and were not arrested).

unanimous decision in *Knowles v. Iowa*,<sup>15</sup> decided only a little more than two years earlier. *Knowles* held that the suspicionless search-incident-to-arrest power only applies if the officer makes a custodial arrest. That search power is not available if the officer releases the offender on citation or summons to appear, even if a custodial arrest would have been permitted.<sup>16</sup> The Court declined to extend the search-incident doctrine to citation and summons cases because these brief citizen-police encounters do not pose the substantial (but unknowable) risks to the officer which arise when an officer transports an arrested suspect to jail or the police station.<sup>17</sup> Of course, the problem with *Knowles* is that it encourages officers to make custodial arrests for the sole purpose of conducting a suspicionless search of the offender, his carried belongings, and his car. But until *Atwater*, such arrests were discouraged by the possibility that a court might invalidate the arrest—particularly an arrest for a very minor violation, with no demonstrated need for custody. *Atwater* removes this uncertainty and explicitly holds that all such arrests are valid, provided the officer has probable cause that the suspect has committed *some* violation.<sup>18</sup>

Naturally, many officers will still be reluctant to make a time-consuming custodial arrest just to be able to search the suspect, in cases where citation release would adequately serve to charge the suspect and bring him to court. But *Knowles* does not actually require an arrest. All the officer has to do is announce his intention to arrest and proceed to conduct a full search of the person and his belongings and vehicle; if no evidence, contraband, or other seizable items are found, the officer can then “change his mind” and issue a citation.<sup>19</sup> Thus, the expanded arrest power granted in *Atwater* greatly increases the likelihood that officers will conduct searches “incident to citation,” which is precisely what the Court sought to prohibit in *Knowles*.

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15. 525 U.S. 113 (1998).

16. *Id.*

17. *Id.* at 117. See *infra* notes 111-23 and accompanying text for a further discussion of the rationale of the search-incident doctrine and the majority's use of cases within this doctrine to support its decision in *Atwater*.

18. The probable cause standard is not a particularly high standard. See *Illinois v. Gates*, 462 U.S. 213, 238, 246 (1983) (defining probable cause as a “fair probability” under the totality of the circumstances); see also Davies, *supra* note 4, at 381-85 (remarking that *Gates* “drastically weakened” the probable cause standard).

19. James B. White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 Sup. Ct. Rev. 165, 208; see also LaFave, *Search & Seizure Supplement*, *supra* note 4, at 28 (noting that police can validly search just before formally arresting). In other words, the officer in *Knowles* made the “mistake” of writing out the citation before he conducted the search. Another search-without-arrest option for the police, after *Atwater*, is to “encourage” the suspect to give consent to the search of his person, belongings, car, or other property or area over which he has control, by advising him that he will be arrested if he refuses. *Id.* at 26.

So we are left with a riddle: how can a clearly unreasonable arrest and an unfettered arrest power with grave potential for abuse be considered “reasonable” under the Fourth Amendment? And why did Justice Souter, who in recent years voted to uphold Fourth Amendment rights,<sup>20</sup> side with the police in *Atwater*? This article explains how the majority in *Atwater* reached its unfortunate decision and argues that the Court’s reasons—both those stated in the majority opinion, and those that can be inferred from trends in the Court’s recent Fourth Amendment decisions—did not justify or require the holding in *Atwater*. On the contrary, the constitutional arguments for invalidating Ms. Atwater’s arrest were compelling. Those arguments, and the potential for abuse from unlimited arrest power in minor cases, should lead state courts to limit such arrests under state constitutional provisions corresponding to the Fourth Amendment.<sup>21</sup>

Part I of this article presents a short summary of the facts and procedural history of the *Atwater* case and the major arguments advanced in the majority and dissenting opinions. Part II critiques the majority’s reasoning, while also pointing out the limitations of the arguments presented to the Court on the Petitioner’s behalf. This case turned out to be deceptively complex, and the Petitioner and her supporting amici failed to anticipate and address some of the issues that were of greatest concern to the justices in the majority. Part III.A examines a latent trend in Fourth Amendment cases that helps to explain Justice Souter’s opinion. Beginning in the late 1970s, and with increasing frequency in recent years, the Court has sought to limit further expansion of the application of “reasonableness balancing” analysis, so as to maintain traditional citizens’ rights and police powers. Part III.B. argues that, even if the concerns underlying this trend are legitimate, the Court should still have invalidated the arrest in *Atwater*. Part IV considers how the proper resolution of a case like *Atwater* can both benefit from, and contribute to, theories of constitutional interpretation—in particular, Professor Cass Sunstein’s theory favoring “minimalist” decisions (narrow in scope, shallow in reasoning). Part V proposes a workable (and narrow) arrest limitation rule that could easily have been adopted by the Court in *Atwater*, and that should now be adopted by state courts interpreting their own constitutions: arrest for a fine-only traffic violation should

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20. Justice Kennedy, another centrist who joined the majority in *Atwater*, has also often voted against the police in recent Fourth Amendment cases. See *infra* Part III.A.

21. Wayne R. LaFave, et al., *Criminal Procedure* § 1.5(d) (3d ed. 2000) [hereinafter LaFave]; Joshua Dressler, *Understanding Criminal Procedure* § 1.02[A] (3d ed. 2002); Charles H. Whitebread & Christopher Slobogin, *Criminal Procedure: An Analysis of Cases and Concepts* § 34.02(c) (4th ed. 2000). At least two courts have already reached different results under state law. See *infra* note 402 and accompanying text. But post-*Atwater* legislative attempts in Texas to enact stricter arrest standards for minor cases failed. See *infra* note 414 and accompanying text.



only be permitted if the officer has a reasonable, articulable basis to believe that custodial arrest is needed to verify identity, ensure payment of the fine, prevent imminent bodily harm, or prevent immediate repetition of the violation. State legislators and criminal rule drafters have a broader range of options, and these are also briefly considered. The article's concluding section considers the likely course of future constitutional developments in this area, and the lessons that civil rights litigators and constitutional scholars should draw from the surprising and disappointing outcome in *Atwater*.

## I. THE *ATWATER* DECISION

### A. *The Facts and Procedural History*

The *Atwater* case was a federal civil rights suit for damages that the trial court dismissed on summary judgment, so the legally relevant facts are those alleged in Ms. Atwater's complaint and supporting documents.<sup>22</sup> As summarized in Justice Souter's majority opinion, the essential facts and procedural history of the case were as follows:

In March 1997, Petitioner Gail Atwater was driving her pickup truck in Lago Vista, Texas, with her 3-year-old son and 5-year-old daughter in the front seat. None of them was wearing a seatbelt.<sup>23</sup> Respondent Bart Turek, a Lago Vista police officer at the time, observed the seatbelt violations and pulled Atwater over. . . . Turek approached the truck and "yell[ed]" something to the effect of "[w]e've met before" and "[y]ou're going to jail." [Turek had previously stopped Atwater for what he had thought was a seatbelt violation, but had realized that Atwater's son, although seated on the vehicle's armrest, was in fact belted in. Atwater [had] acknowledged that her son's seating position was unsafe, and Turek issued a verbal warning.]<sup>24</sup> He then called for backup and asked to see Atwater's driver's license and insurance documentation, which state law required her to carry. When Atwater told Turek that she did not have the papers because her purse had been stolen the day before, Turek said that he had "heard that story two-hundred times."

Atwater asked to take her "frightened, upset, and crying" children to a friend's house nearby, but Turek told her, "[y]ou're not going

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22. See *infra* notes 425-29 and accompanying text for a further discussion as to whether the procedural context, although seemingly advantageous to Ms. Atwater, actually hurt her case.

23. Ms. Atwater claimed that she was driving slowly (15 m.p.h.) on a residential street near their home, with the children unbelted so they could look out the windows for a favorite toy that had been lost while driving. Brief of Petitioners at 2-3, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408).

24. The bracketed material is from a footnote to the opinion. *Atwater*, 532 U.S. at 324 n.1. The prior encounter between Officer Turek and Ms. Atwater had occurred approximately three months earlier. *Id.* at 369-70. (O'Connor, J., dissenting).

anywhere.” As it turned out, Atwater’s friend learned what was going on and soon arrived to take charge of the children. Turek then handcuffed Atwater, placed her in his squad car, and drove her to the local police station, where booking officers had her remove her shoes, jewelry, and eyeglasses, and empty her pockets. Officers took Atwater’s “mug shot” and placed her, alone, in a jail cell for about one hour, after which she was taken before a magistrate and released on \$310 bond.<sup>25</sup>

Ms. Atwater was charged with driving without her seatbelt fastened, failing to secure her children in seatbelts, driving without a license, and failing to provide proof of insurance. She ultimately pleaded no contest to the misdemeanor seatbelt offenses and paid a \$50 fine; the other charges were dismissed.<sup>26</sup>

Ms. Atwater and her husband, representing the children, filed suit in state court under 42 U.S.C. § 1983 against Officer Turek, the City of Lago Vista, and the city police chief Frank Miller, seeking compensatory and punitive damages. The case was removed to a federal court, which found the Fourth Amendment claim meritless and granted the city’s motion for summary judgment. A panel of the Fifth Circuit Court of Appeals reversed,<sup>27</sup> holding that Ms. Atwater’s arrest violated the Fourth Amendment, and that Officer Turek was not entitled to qualified immunity.<sup>28</sup> The Fifth Circuit sitting en banc, by an eleven-to-six vote, vacated the panel’s decision and affirmed the District Court’s grant of summary judgment.<sup>29</sup> The en banc court held that, although determinations of Fourth Amendment reasonableness

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25. *Id.* at 323-24 (citations omitted). Ms. Atwater further alleged that her hands were cuffed behind her back, and that she was not secured by a seat belt during the drive to the police station. *Id.* at 369 (O’Connor, J., dissenting). In addition, her truck was towed. *Id.* She had to pay \$110 to get it back. Brief of Petitioners at 29, *Atwater* (No. 99-1408). Thus, her total out-of-pocket cost for bail and towing, \$420, was far higher than the maximum \$50 fine authorized for her offense. *Cf.* Malcolm M. Feeley, *The Process Is the Punishment* (Russell Sage Found. 1979) (discussing the dominance of informal penalties for minor crimes).

26. *Atwater*, 532 U.S. at 323-24. The dismissed driver’s license and insurance charges were not mentioned further in Justice Souter’s opinion. Presumably this was because these charges were likewise punishable only by a fine. *Atwater v. City of Lago Vista*, 195 F.3d 242, 252 (5th Cir. 1999) (en banc) (Dennis, J., dissenting); Petition for Writ of Certiorari at 4 n.1, *Atwater*, 523 U.S. 318 (No. 99-1408). Moreover, it appears that the arrest was motivated by the seat belt violations, not the other charges. Petitioner alleged that Officer Turek stated his intention to take Ms. Atwater to jail before he asked to see her license and proof of insurance, and that he had seen both her license and insurance documents during the previous encounter. Brief of Petitioners at 4 n.1, *Atwater*, 523 U.S. 318 (No. 99-1408). Moreover, prior to her arrest Ms. Atwater gave the officer her driver’s license number, which allowed him to verify that she still had a valid license. Reply Brief of Petitioners at 14, *Atwater*, 523 U.S. 318 (No. 99-1408).

27. *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999).

28. For further discussion of the validity and latent importance of the qualified immunity ruling, see *infra* notes 154-66 and accompanying text.

29. *Atwater v. City of Lago Vista*, 195 F.3d 242.

generally require a balancing of individual and governmental interests, where “an arrest is based on probable cause then ‘with rare exceptions . . . the result of that balancing is not in doubt.’”<sup>30</sup> Case-specific balancing would only be required if an arrest were “conducted in an extraordinary manner, unusually harmful to an individual’s privacy or even physical interests.”<sup>31</sup> Because the Petitioner conceded that Officer Turek had probable cause to arrest her, and the en banc court found nothing in the record to suggest that Turek conducted the arrest in an “extraordinary” or “unusually harmful” manner, the court concluded that her arrest was constitutional.

The Supreme Court granted certiorari<sup>32</sup> to consider “whether the Fourth Amendment, either by incorporating common-law restrictions on misdemeanor arrests or otherwise, limits police officers’ authority to arrest without warrant for minor criminal offenses.”<sup>33</sup>

### B. Justice Souter’s Majority Opinion

Justice Souter, joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, began by examining arguments based on historical sources. Justice Souter did not discuss, or even mention, the Petitioner’s first history-based argument—that the lower court’s ruling, combined with the breadth of modern traffic laws, gives the police virtually unlimited arrest power, equivalent to common-law general warrants and writs of assistance—the very abuses that the Fourth Amendment was designed to prevent.<sup>34</sup> Instead, Justice Souter focused on Ms. Atwater’s claim that her arrest violated a common-law rule prohibiting warrantless arrests for misdemeanors not involving any breach of the peace. Based on an examination of pre-Founding era English legal materials, Justice Souter concluded that the commentators and “sparse” case law reached “divergent conclusions” as to the validity of such arrests, while Parliament continued to expand warrantless misdemeanor arrest powers for various non-breach-of-the-peace-crimes. An examination of American sources, including the probable intent of the Framers, post-framing era developments, and late-twentieth-century statutes and model codes, similarly led Justice Souter to conclude that “[t]his . . .

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30. *Id.* at 244 (quoting *Whren v. United States*, 517 U.S. 806, 817 (1996)).

31. *Id.* at 244-45 (quoting *Whren*, 517 U.S. at 818).

32. *Atwater v. City of Lago Vista*, 530 U.S. 1260 (2000).

33. *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001).

34. Brief of Petitioners at 8-12, 20-23, *Atwater* (No. 99-1408). For further discussion of these broad powers, see *supra* notes 8-19 and accompanying text. The argument based on analogy to general warrants and writs of assistance is more fully examined in Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221 (1989). See also Davies, *supra* note 4, at 401 (noting that the framers intended the Fourth Amendment to reinforce common-law principle that peace officers should not be given discretionary power to arrest or search).

simply is not a case in which the claimant can point to ‘a clear answer [that] existed in 1791 and has been generally adhered to by the traditions of our society ever since.’”<sup>35</sup> Instead, he wrote, “history, if not unequivocal, has expressed a decided, majority view that the police need not obtain an arrest warrant merely because a misdemeanor stopped short of violence or a threat of it.”<sup>36</sup>

Justice Souter next turned to modern Fourth Amendment doctrine, noting that the Petitioner:

[D]oes not wager all on history. Instead, she asks us to mint a new rule of constitutional law on the understanding that when historical practice fails to speak conclusively to a claim grounded on the Fourth Amendment, courts are left to strike a current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness. Atwater accordingly argues for a modern arrest rule, one not necessarily requiring violent breach of the peace, but nonetheless forbidding custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time and when the government shows no compelling need for immediate detention.<sup>37</sup>

Justice Souter then made a startling concession:

If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail. She was a known and established resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she would almost certainly have buckled up as a condition of driving off with a citation. In her case, the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment. Atwater’s claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.<sup>38</sup>

Justice Souter, however, advanced a number of reasons why Ms. Atwater’s arrest should not be declared unreasonable, despite the case-specific balance strongly in her favor.

First, Justice Souter cited several search-incident-to-arrest cases adopting “bright-line” rules granting overbroad police search powers.

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35. *Atwater*, 532 U.S. at 345 (quoting Justice Scalia’s dissent in *County of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991)).

36. *Id.* at 345.

37. *Id.* at 345-46 (citations omitted). Actually, Petitioner and her supporting amici did not call for a standard of “compelling need.” For discussion of the standards that were proposed, see *infra* notes 137-38 and accompanying text.

38. *Atwater*, 532 U.S. at 346-47. A similar concession was made in one of the amicus briefs opposing Ms. Atwater’s claim. See Brief for the United States as Amicus Curiae Supporting Respondents at 7, *Atwater* (No. 99-1408) (arguing that if the allegations in complaint were true, “there would be little question that respondent Turek behaved in an inappropriate and unprofessional manner”).

In Justice Souter's view, these cases stand for the proposition that "a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review."<sup>39</sup> Justice Souter then examined whether it might be feasible to devise a clear and simple constitutional rule limiting warrantless arrests in minor cases, but he concluded that any such rule would be unworkable. He also feared that constitutional limits on custodial arrest would lead to problems of excluded evidence, personal liability of officers, increased litigation, and "a systematic disincentive" to make custodial arrests even when they were needed, thus resulting in underenforcement of the law.<sup>40</sup>

Next, Justice Souter questioned, as he had at oral argument, "how bad the problem [of unnecessary, minor crime arrests] is out there."<sup>41</sup> He noted that statutes in some jurisdictions already limit such arrests, that political accountability and good sense can prevent abuses, and that, as a result, there is "a dearth of horrors demanding redress."<sup>42</sup> Finally, Justice Souter announced the Court's new bright line arrest powers rule, similar to the rule adopted in the en banc Fifth Circuit opinion, and derived from language in *Whren v. United States*—that probable cause is generally a sufficient basis for custodial arrest and that case-specific balancing of government and private interests will not be conducted unless the arrest is made in an "extraordinary manner, unusually harmful to [the citizen's] privacy or even physical interests."<sup>43</sup> Justice Souter concluded that Ms. Atwater's arrest was not sufficiently "extraordinary" to fit within this exception.

### C. Justice O'Connor's Dissent

In her dissent, Justice O'Connor, joined by Justices Stevens, Ginsburg, and Breyer began by stressing the majority's concession that Ms. Atwater's arrest was a "pointless indignity" that served no discernible state interest.<sup>44</sup> She then cited several prior cases for the proposition that "[i]t is beyond cavil that '[t]he touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'"<sup>45</sup> She briefly referred to the majority's reliance on common-law rules, but argued that "history is just one of

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39. *Atwater*, 532 U.S. at 347.

40. *Id.* at 351.

41. Supreme Court Oral Argument at 20, *Atwater* (No. 99-1408).

42. *Atwater*, 532 U.S. at 353.

43. *Id.* (referring to *Whren v. United States*, 517 U.S. 806, 818 (1996)). For a further discussion of *Whren*, see *infra* notes 192-94, 250-53 and accompanying text.

44. *Atwater*, 532 U.S. at 360 (O'Connor, J., dissenting).

45. *Id.* (O'Connor, J., dissenting).

the tools we use in conducting the reasonableness inquiry.”<sup>46</sup> She concluded that “when history is inconclusive, as the majority amply demonstrates it is in this case,” courts must balance the intrusion against the governmental interest in that intrusion based on the particular facts and circumstances of each case.<sup>47</sup> She again emphasized the majority’s admission that such a case-specific balancing would lead to a ruling in Ms. Atwater’s favor. Justice O’Connor underscored this point by noting the serious invasion of liberty and privacy involved, particularly in light of the searches and jailing permitted incident to arrest, but also including the trauma that Ms. Atwater’s children experienced, the creation of an arrest record, the minimal state interest in prosecuting a fine-only offense and the absence of any case-specific need for custody to abate criminal conduct, verify identity, or assure appearance at trial.<sup>48</sup> She also pointed out that, while the Court had never precisely considered the validity of warrantless misdemeanor arrests,<sup>49</sup> several justices had seriously questioned the constitutionality of custodial arrests in minor cases.<sup>50</sup>

Justice O’Connor then addressed several of Justice Souter’s reasons for refusing to apply case-specific balancing to invalidate Ms. Atwater’s arrest. She argued that the Court’s language in *Whren*, refusing to engage in case-specific balancing when police act with probable cause, should not be taken beyond the context there: a brief traffic stop. She recognized the need for clear and simple rules, but saw no problem in devising a workable rule limiting arrests for fine-only offenses. In her view, a citation should always be used “unless the officer is ‘able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion’ of a full custodial arrest.”<sup>51</sup> Justice O’Connor further argued that the doctrine of qualified immunity will take care of problems of personal liability and disincentives to arrest.<sup>52</sup> Finally, she noted that the majority’s per se rule granting broad discretion to police has “grave potential for abuse” given the many minor offenses punishable only with a fine, the variety of search powers that come into play once a valid arrest is made, the risk of

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46. *Id.* at 361 (O’Connor, J., dissenting).

47. *Id.* (O’Connor, J., dissenting).

48. *Id.* at 368, 370-71 (O’Connor, J., dissenting).

49. Justice O’Connor also noted that the Court’s decision in *United States v. Watson*, 423 U.S. 411 (1976), upholding warrantless felony arrests, was based on a “clear and consistently applied common law rule.” *Atwater*, 532 U.S. at 362 (O’Connor, J., dissenting).

50. *Atwater*, 532 U.S. at 362 (O’Connor, J., dissenting) (citing *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring); *United States v. Robinson*, 414 U.S. 218, 238 n.2 (1973) (Powell, J., concurring)).

51. *Atwater*, 532 U.S. at 366 (O’Connor, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

52. *Id.* at 366-67 (O’Connor, J., dissenting).

racial profiling and harassment, and the absence of limits on pretext arrests.<sup>53</sup>

A further significant feature of Justice O'Connor's opinion is her explicit adoption of the concept of proportionality. At three different points in her opinion, Justice O'Connor complained that Ms. Atwater's arrest was disproportionate relative to the nature and seriousness of her offense<sup>54</sup> and to any legitimate case-specific need to take her into custody.<sup>55</sup> As discussed more fully in Part III.B, the first of these proportionality concepts suggests a limiting principle that is distinct from, and easier to apply than, the general Fourth Amendment reasonableness balancing test.

Although Justice O'Connor wrote a powerful and persuasive dissent, she did not fully respond to all of the arguments in Justice Souter's majority opinion. The following section provides such a critique.

## II. CRITIQUE OF THE MAJORITY OPINION'S STATED RATIONALES

One of the most striking things about Justice Souter's opinion is the relative emphasis given to the various arguments bearing on the validity of Ms. Atwater's arrest. Justice Souter began by addressing historical arguments and devoted two-thirds of his opinion to them before turning to a consideration of modern Fourth Amendment law. His limited discussion of contemporary issues paid very little attention to the Court's prior decisions defining police powers associated with arrests, and he almost completely disregarded the practical consequences of the Court's ruling in light of the nature of modern policing and traffic laws.<sup>56</sup>

### A. Common Law and Other Historical Sources

Justice Souter began his opinion by noting that the understanding of arrest powers under common law during the Founding-era "sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the [Fourth] Amendment might have thought to be reasonable."<sup>57</sup> Justice Souter then addressed, and rejected, the Petitioner's specific contention that the common law prohibited warrantless misdemeanor arrests except in cases of breach of the peace. However, as noted previously, Justice Souter did not mention or address the Petitioner's other historical argument: that the lower court's ruling effectively gives the police discretion

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53. *Id.* at 372 (O'Connor, J., dissenting).

54. *Id.* at 364, 372 (O'Connor, J., dissenting).

55. *Id.* at 371 (O'Connor, J., dissenting).

56. See *supra* notes 8-19 and accompanying text.

57. *Atwater*, 532 U.S. at 326 (quoting *Payton v. New York*, 445 U.S. 573, 591 (1980) (footnote omitted)).

equivalent to that exercised under common-law general warrants and writs of assistance.<sup>58</sup> Perhaps Justice Souter felt that such broad arguments by analogy are too imprecise to serve the purposes of “originalism” in constitutional adjudication—limiting judicial discretion and making the law more predictable.<sup>59</sup> But Justice Souter’s preferred historical argument, based on specific features of common-law and early American misdemeanor arrest rules, does not avoid all problems of judicial discretion and unpredictability. Moreover, for the reasons suggested below, eighteenth-century rules provide an unsatisfactory basis for determining, in a case like *Atwater*, what constitutes an unreasonable search or seizure at the start of the twenty-first century. Although the Court has relied on common-law rules in a number of its prior Fourth Amendment decisions,<sup>60</sup> *Atwater* represents one of the most extreme examples of the use, and misuse, of original-meaning arguments.<sup>61</sup>

Justice Souter and the other justices in the majority are not entirely to blame for their focus on historical sources, since the Petitioner strongly emphasized such sources. Petitioner’s brief on the merits began with the two common-law arguments noted above, which took up over one-third of the argument section.<sup>62</sup> Moreover, the petition

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58. See *supra* note 34 and accompanying text. Petitioner had conceded that a somewhat similar argument—that everybody violates traffic laws, so probable cause cannot be the only limitation—had already been rejected by the court in *Whren v. United States*, 517 U.S. 806 (1996). But Petitioner sought to distinguish custodial arrests from the traffic stop at issue in *Whren*. Brief of Petitioners at 22, *Atwater* (No. 99-1408).

59. See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 210-11 (1999); Daniel A. Farber, *Disarmed by Time: The Second Amendment and the Failure of Originalism*, 76 Chi.-Kent L. Rev. 167, 180 (2000); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 Colum. L. Rev. 1739, 1793 (2000).

60. See, e.g., *Florida v. White*, 526 U.S. 559 (1999); *Wyoming v. Houghton*, 526 U.S. 295 (1999); *Wilson v. Arkansas*, 514 U.S. 927 (1995); *California v. Hodari D.*, 499 U.S. 621 (1991); *United States v. Watson*, 423 U.S. 411 (1976); *Carroll v. United States*, 267 U.S. 132 (1925). On the other hand, the Court has sometimes declined to incorporate common-law rules. See, e.g., *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *Tennessee v. Garner*, 471 U.S. 1 (1985). See *infra* notes 315-16 and accompanying text for a further discussion of *Garner*.

61. For a thorough and very critical review of the accuracy and value of Justice Souter’s historical analysis in *Atwater*, see Davies, *supra* note 4. The Court’s recent emphasis on originalism in Fourth Amendment cases is reviewed and critiqued in Sklansky, *supra* note 59. See also Tracey Maclin, *Let Sleeping Dogs Lie: Why The Supreme Court Should Leave Fourth Amendment History Unabridged* (2002) (unpublished manuscript, on file with the Fordham Law Review). For a succinct critique of the feasibility and desirability of constitutional originalism in general, see Farber, *supra* note 59.

62. Brief of Petitioners at 7-19, *Atwater* (No. 99-1408). Petitioner’s counsel also strongly emphasized the common law at oral argument, even though the Court’s first question asked why the common law was relevant at all. Supreme Court Oral Argument at 3, *Atwater* (No. 99-1408). Later in the argument, counsel suggested that “perhaps the correct approach would be to rely exclusively on the common law.” *Id.* at 11.



for certiorari had strongly emphasized the similarity between the issues in *Atwater* and those in a case heard by the Court two years earlier, *Ricci v. Village of Arlington Heights*.<sup>63</sup> In both cases, the Petitioners argued that the Fourth Amendment incorporates a common-law, breach-of-the-peace requirement for misdemeanor arrests, even when the offense is committed in the presence of the arresting officer or citizen. After reading the briefs and listening to the oral arguments in *Ricci*, the Court dismissed the writ as improvidently granted,<sup>64</sup> apparently because the actual case facts did not fit within the supposed common-law rule. Linking these two cases in the *Atwater* certiorari petition was presumably done in order to persuade the Court that the issue of constitutional limitations on misdemeanor arrest powers was important enough to grant review again. But this linkage, along with the order of arguments in Petitioner's brief on the merits, may have led some members of the Court to think that the common-law misdemeanor arrest rule was the primary issue in *Atwater*.

In retrospect, it may have been a mistake for Petitioner to give so much emphasis to the common-law breach-of-the-peace-argument. Justice Souter may have been right to conclude that this common-law rule was not so well established that one could find that it must have been intended to be carried over in the Fourth Amendment.<sup>65</sup> Moreover, the supposed common-law rule bore little relationship to the facts in *Atwater*. That rule limited arrests for jailable as well as non-jailable offenses and did not recognize any legitimate grounds for warrantless misdemeanor arrest other than immediate public safety (breach of the peace). The common-law rule thus swept much more broadly than would any rule based on the actual facts of *Atwater* and bore no relationship to the two most compelling facts in Ms. Atwater's case: that her offense was punishable only with a fine, and that there

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63. Petition for Writ of Certiorari at 3, 6-9, *Atwater* (No. 99-1408) (citing *Ricci v. City of Arlington Heights*, 116 F.3d 288 (7th Cir. 1997), cert. granted, 522 U.S. 1038 (1998), writ dismissed as improvidently granted, 523 U.S. 613 (1998)).

64. *Ricci*, 523 U.S. at 613; see Wayne Logan, *Policing in an Intolerant Society*, 35 *Crim. L. Bull.* 334, 353 n.92 (1999) (discussing the concern raised by several Justices during oral argument in *Ricci* that the violation in question was considered a "civil" rather than a "criminal" provision).

65. See LaFave, *Search & Seizure Supplement*, supra note 4, at 19 (remarking that Justice Souter's conclusions about the common-law breach-of-the-peace requirement are "well documented," and that all of the justices agreed there was no "clear and consistently applied" common-law rule); see also William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 *Mo. L. Rev.* 771, 848 (1993) (stating that the common-law breach-of-the-peace rule has been abandoned in almost all American jurisdictions, and should not be deemed constitutionally required, but the common-law "in-the-presence" rule should be). *But see* Davies, supra note 4 (arguing that Founding-era exceptions to the breach-of-the-peace requirement were narrowly tailored, and that the Framers would not have approved of the broad misdemeanor arrest power endorsed by the *Atwater* majority).

was absolutely no need to take her into custody.<sup>66</sup> Indeed, the overbreadth of the common-law misdemeanor arrest limitation was implicitly conceded by the much narrower terms of Petitioner's proposed "modern" rule based on reasonableness balancing analysis. Petitioner's rule would have only applied to non-jailable traffic offenses; moreover, even in those cases her rule would allow arrest not just for reasons of public safety, but also when "necessary for enforcement of the traffic laws."<sup>67</sup>

It is possible that Justice Souter would have emphasized historical sources even if Petitioner had not. But such sources also provide weak support for Justice Souter's own (pro-police) arrest rule. His review concluded that "history, if not unequivocal, has expressed a decided, majority view" that a warrant is not needed to arrest for a non-violent misdemeanor.<sup>68</sup> The four dissenters viewed the same history as "inconclusive."<sup>69</sup>

Even if the common-law and early American rules had been much more clear, and had unambiguously permitted warrantless arrest for non-violent misdemeanors, it would have been (and was) a mistake to give these ancient rules controlling weight in a case like *Atwater*. As the Court recognized in *Tennessee v. Garner*,<sup>70</sup> much has changed in American society, law, and criminal justice since the Founding era. In *Garner*, the changes had to do with the common-law's authorization of the death penalty for almost all felonies, the dramatically different mix of offenses defined as a felony under modern criminal laws, and major changes in police weaponry that made it much easier for modern police to kill fleeing suspects who pose no imminent danger to the officer. The Court therefore concluded that incorporating the common-law deadly force rule "would be a mistaken literalism that ignores the purposes of a historical inquiry."<sup>71</sup>

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66. Furthermore, if the Court had held that the Fourth Amendment incorporates the common-law breach-of-the-peace requirement, the result would have been to constitutionalize the distinction between felonies and misdemeanors. But as Petitioner conceded, such offense classifications vary considerably from state to state, and have also changed dramatically since the Founding era. Brief of Petitioners at 46, *Atwater* (No. 99-1408) (citing *United States v. Watson*, 423 U.S. 411, 440 n.9 (1976) (Marshall, J., dissenting) (noting that many modern felonies were misdemeanors at common law)).

67. Brief of Petitioners at 46, *Atwater* (No. 99-1408). For a further discussion of Petitioner's proposed rule and its exceptions, see *infra* notes 137, 386-87 and accompanying text.

68. *Atwater v. City of Lago Vista*, 532 U.S. 318, 345 (2001).

69. *Id.* at 361 (O'Connor, J., dissenting); see generally, Davies, *supra* note 4.

70. 471 U.S. 1 (1985) (holding that the Fourth Amendment does not incorporate the common-law rule permitting use of deadly force to effect a felony arrest).

71. *Id.* at 13; see also Davies, *supra* note 4, at 422-37 (opining that framing-era criminal procedure was so different from our own that it cannot provide answers for contemporary issues); Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-But-Shallow*, 43 Wm. & Mary L. Rev. 1, 47-48 (2001) [hereinafter, Dripps, *Constitutional Theory*]

In Ms. Atwater's case, the relevant changes since 1791 are different, but equally compelling: in the Founding era there were no cars and traffic regulations, no driver and vehicle licensing laws, and no instantly-accessible computerized driver, vehicle and outstanding-warrant records. Nor were there large professional police departments with officers constantly on patrol looking for minor violations and rounding up absconders.<sup>72</sup> Moreover, some of the broad police powers that now apply whenever a valid arrest is made may not have existed in the late eighteenth century. Could the few police officers back then routinely conduct suspicionless searches of the "passenger compartment" of the horse-drawn carriage in which the suspect was riding when arrested, or impound the carriage and conduct a detailed inventory search of its contents?<sup>73</sup> Could such officers stop and frisk suspects on standards less demanding than probable cause?<sup>74</sup> The Court did not even bother to look for common-law roots when it gave approval to many of these expanded, modern-day police powers, so it should not insist on finding a common-law basis for any rule which limits police powers. Clearly, the Court has not consistently imposed any such requirement in the past.<sup>75</sup>

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("The institutional framework of modern criminal justice differs so greatly from that known to the authors of the Bill of Rights that, as Lawrence Lessig has argued, something akin to translation is required before the constitutional text is even relevant to modern practice." (citing Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993)); Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 Law & Soc. Inquiry 533, 541 (1999) (stating that in matters of criminal justice, "the present legal and social landscape is . . . completely foreign to that of the Framers' time"); see generally, Sklansky, *supra* note 59.

72. The first modern police force was created in London, in 1829. Robin Shepard Engel, *Police: History*, in 3 Encyclopedia of Crime & Justice 1051-60 (2d ed. 2002). Full time public prosecutors were also rare in common-law England, and a mix of public and private prosecution was used in colonial America. Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor*, in 3 Encyclopedia of Crime & Justice 1242-46 (2d ed. 2002). In part due to the greater reliance on private policing and prosecution, custodial arrest for minor crimes was relatively rare in the Founding era: "Prior to the mid 1800s . . . the summons was the rule." Salken, *supra* note 34, at 258. It can also be argued that the original meaning of the Bill of Rights provisions was fundamentally changed by the post-Civil War amendments, with their strong emphasis on equal protection values. For further discussion of the problems of discriminatory enforcement created by the *Atwater* decision, see *infra* notes 123-29, 183, 325-27, 360-62 and accompanying text.

73. Cf. *Colorado v. Bertine*, 479 U.S. 367 (1987) (holding that inventory search of impounded vehicles includes any closed containers therein); *New York v. Belton*, 453 U.S. 454 (1981) (ruling that scope of search incident to arrest includes passenger compartment).

74. Cf. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 629 n.216 (1999) (finding no framing-era equivalent of broadly-applicable detention power approved in *Terry v. Ohio*).

75. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966), *reaffirmed in Dickerson v. United States*, 530 U.S. 428 (2000); see also Davies, *supra* note 4, at 260-64 (noting that the Court's use of framing-era doctrine is very selective, and was not even mentioned in *Dickerson* and in most recent Fourth Amendment decisions).

Finally, even if one believes that adherence to the original meaning of the Fourth Amendment serves the important goals of limiting judicial discretion and making the law more predictable,<sup>76</sup> can these benefits be achieved with any regularity, given the difficulty of accurately determining common-law rules and applying them in a modern context? The results of Justice Souter's extensive historical survey—deemed “inconclusive” by four members of the Court—suggest that originalism often will not provide the benefits its proponents seek.<sup>77</sup>

In fairness, it should be noted that Justice Souter's historical analysis was not limited to the Founding era. He also examined cases, statutes, and commentary from that era up to the present and concluded that these materials also failed to support Petitioner's proposed breach-of-the-peace limitation. This broader historical approach, which involves a search for what might be called the Constitution's “traditional meaning,” also had been used by the Court in earlier arrest cases.<sup>78</sup> “Traditionalism” is less problematic than “originalism” because the former relies upon more recent legal theory and practice, which are more relevant to our era, and easier for us to discover and interpret. Like originalism, the traditional meaning approach also tends to discourage novel interpretations, making the law more predictable and stable. As discussed more fully in Part III, the Court's recent Fourth Amendment decisions reveal a strong preference for maintaining traditional rules governing both police powers and citizens' rights.

However, the value of the traditional meaning approach depends on how it is used and what questions are asked. Justice Souter only used it to look for evidence supporting the common-law breach-of-the-peace requirement. If he had applied this approach to Petitioner's alternative arrest-limitation rule (applicable to non-jailable traffic offenses), he would have found considerable and growing support in modern laws and model codes.<sup>79</sup> Moreover, adoption of a traditional meaning approach does not free the Court from the obligation to seriously consider whether a long-standing constitutional rule has become undesirable in light of current social and legal conditions. As noted at the outset of this article, these conditions strongly suggest the need for additional constitutional limitations on minor-crime arrests, yet these current conditions were almost completely ignored by the majority in *Atwater*. As discussed more fully below, the Court's stated reasons for rejecting the Petitioner's strong “modern law” argument, based on reasonableness balancing, were shallow and unpersuasive.

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76. See *supra* note 59 and accompanying text.

77. See Farber, *supra* note 59, at 170-83.

78. See, e.g., *Payton v. New York*, 445 U.S. 573, 583-85 (1980); *United States v. Watson*, 423 U.S. 411, 416-21 (1976).

79. See *infra* Part V.

B. *Reasonableness Balancing—Why Ms. Atwater Wins on the Facts, but Still Loses*

Justice Souter devoted approximately the last third of his opinion to the Petitioner's alternative argument—that her arrest was unreasonable because the degree of intrusion into her personal liberty, privacy, and dignity outweighed the minimal or non-existent law enforcement interest served by taking her into custody. The Court first formally recognized this balancing approach in *Camara v. Municipal Court of San Francisco*,<sup>80</sup> where it upheld housing and other regulatory inspections pursuant to warrants based on administrative criteria<sup>81</sup> rather than an individualized suspicion of violation. The Court stated that “there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.”<sup>82</sup> In the Court's view, three factors supported the reasonableness of these inspections, despite the absence of traditional probable cause to search:

First, such programs have a long history of judicial and public acceptance. Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other [inspection] technique would achieve acceptable results. Many such conditions—faulty wiring is an obvious example—are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself. Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.<sup>83</sup>

One year later, the Court again used a reasonableness balancing approach in *Terry v. Ohio*<sup>84</sup> to uphold warrantless investigatory stops and frisks based on a degree of suspicion less than probable cause (a standard usually referred to as “reasonable” and/or “articulable” suspicion).<sup>85</sup> Citing *Camara* and its balancing test, the Court concluded that important government interests are served by such stops and frisks, and that such interests, supported by reasonable suspicion, justify the relatively minor intrusions authorized by the Court, because a stop is less intrusive than an arrest, and a frisk is less thorough than a search incident to arrest.<sup>86</sup>

In recent years, the Court often has used this balancing approach to

80. 387 U.S. 523 (1967).

81. Such criteria might include “the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area.” *Id.* at 538.

82. *Id.* at 536-37.

83. *Id.* at 537 (citation omitted).

84. 392 U.S. 1 (1968).

85. *Richards v. Wisconsin*, 520 U.S. 385, 394-95 (1997) (noting that a *Terry* pat-down requires reasonable and articulable suspicion of danger); Dressler, *supra* note 21, § 18.03[A].

86. *Terry*, 392 U.S. at 20-22, 26-27.

uphold warrantless (and usually suspicionless) searches and seizures: searches of regulated industries;<sup>87</sup> automobile and jail inventories;<sup>88</sup> immigration and drunk driving roadblocks;<sup>89</sup> drug testing<sup>90</sup> and other searches<sup>91</sup> of high school students, public employees, and convicts; and miscellaneous other limited intrusions.<sup>92</sup> Over the years, some observers have expressed concerns that such balancing would only be used to water down Fourth Amendment rights;<sup>93</sup> reasonableness balancing has, however, occasionally been used to grant additional protections to citizens.<sup>94</sup>

Application of the balancing approach strongly favored Ms. Atwater's claim that her arrest was unreasonable.<sup>95</sup> Her custodial arrest and its various incidents, which included handcuffing and removal to the police station, separation from and trauma to her children, the searches of her person and vehicle, and her confinement in a cell, were significant intrusions on her liberty and privacy, and were not justified by either the seriousness of her offense or any case-specific need to take her into custody. Indeed, as noted above, Justice Souter agreed with this assessment, characterizing her arrest as a "gratuitous humiliation[]" that imposed "pointless indignity and confinement."<sup>96</sup> Nevertheless, Justice Souter concluded that, when

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87. See, e.g., *New York v. Burger*, 482 U.S. 691 (1987).

88. *Illinois v. Lafayette*, 462 U.S. 640 (1983); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

89. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

90. *Bd. of Educ. v. Earls*, 122 S. Ct. 2559 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989).

91. *United States v. Knights*, 534 U.S. 112 (2001); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

92. See *infra* notes 280, 294 and accompanying text.

93. See, e.g., *Gooding v. United States*, 416 U.S. 430, 465 (1974) (Marshall, J., dissenting) (arguing that balancing should not be viewed "as a one-way street, to be used only to water down" citizens' rights); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 393-94 (1974); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 Minn. L. Rev. 383, 384-85 (1988); Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 Am. Crim. L. Rev. 119, 130 (1989) (claiming that balancing has led to "a steady weakening of fourth amendment protections").

94. *Wilson v. Arkansas*, 514 U.S. 927 (1995); *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Winston v. Lee*, 470 U.S. 753 (1985); *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

95. Brief of Petitioners at 23-36, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408); Brief Amicus Curiae of the American Civil Liberties Union, et al., in Support of Petitioners ("ACLU Amicus Brief") at 11-18, *Atwater* (No. 99-1408); Brief of the Institute on Criminal Justice at the University of Minnesota Law School and Eleven Leading Experts on Law Enforcement and Corrections Administration and Policy as Amici Curiae in Support of Petitioners ("Institute Amicus Brief") at 3-17, *Atwater* (No. 99-1408).

96. *Atwater*, 532 U.S. at 346-47.

viewed in a perspective broader than the facts of Ms. Atwater's case, her arrest should not be deemed unreasonable.

Justice Souter's specific reasons for this conclusion are examined below. On closer inspection, each of these reasons is unpersuasive.<sup>97</sup> But once again, the fault is not entirely Justice Souter's. None of the broader policy considerations cited by Justice Souter was fully addressed in the briefs of Petitioner and her supporting amici. Indeed, several were not addressed at all, nor have most of these points been adequately discussed in scholarly literature.

### 1. Balancing Must Reflect the Value of Readily-Administrable (Bright-Line) Rules

Justice Souter began his attack on Ms. Atwater's case-specific balancing argument by citing *United States v. Robinson*<sup>98</sup> and *New York v. Belton*,<sup>99</sup> search-incident-to-arrest cases that rejected case-specific evaluation in favor of simple, "bright-line" rules granting overbroad police powers. As Justice Souter explained,

Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules . . . [which] "ought to be expressed in terms that are readily applicable by the police in the context of the

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97. An alternative argument, which was not mentioned by Justice Souter or in any of the briefs opposing Ms. Atwater, is that a strategy of "zero tolerance policing" requires and justifies arrests for minor crimes (or at least, that the Court should not adopt federal constitutional rules which would "tie the hands" of police administrators who believe in this approach). See Logan, *supra* note 64, at 353 n.92 (citing brief of respondent in *Ricci v. City of Arlington Heights*, 522 U.S. 1038 (1998)). This police strategy is based on the theory of "broken windows"—that a failure to vigorously suppress minor forms of deviance and disorder encourages more serious crimes and general neighborhood decay. James Q. Wilson & George Kelling, *Broken Windows: The Police and Neighborhood Safety*, Atlantic Monthly, March 1982, at 29-38. Some observers have questioned the validity of this theory, as well as the effectiveness of zero tolerance policing. See, e.g., Bernard Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing* (Harvard Univ. Press 2001). In any case, it appears that such policing strategies have more often focused on "nuisance" or "quality of life" crimes (graffiti, public drinking or urination, low-level drug sales and use, prostitution, subway fare-beating, and panhandling), rather than on minor traffic offenders like Ms. Atwater. See Logan, *supra* note 64, at 335, 337, 339. And when the latter are targeted, they are usually subjected only to brief detention (questioning and observing the vehicle's occupants, inspecting the vehicle itself, and checking for outstanding warrants), not routine custodial arrest. See *id.* at 341 n.29, 342 n.33, 343 n.39.

98. 414 U.S. 218 (1973).

99. 453 U.S. 454 (1981).

law enforcement activities in which they are necessarily engaged”<sup>99</sup> and not ““qualified by all sorts of ifs, ands, and buts.””<sup>100</sup>

There is certainly much truth in what Justice Souter says about the value of simple, readily-administered rules.<sup>101</sup> But Justice Souter’s arguments ultimately fail, and the fault lies partly with counsel and Fourth Amendment scholars. Although the pro-police bright-line rule cases cited by Justice Souter are well known, and provided a predictable counter to Ms. Atwater’s strong case-specific balancing arguments, these cases were almost completely ignored in the briefs of Petitioner and her supporting amici,<sup>102</sup> and were not addressed in Justice O’Connor’s dissent. Scholars, too, are well aware of these cases, but do not seem to have explored their application to a case like *Atwater*.

As a preliminary matter, it should be noted that the Court has not been very clear about its criteria for deciding when to adopt a bright-line rule. Such rules have been rejected (in favor of case-specific standards or factors evaluated under “the totality of the circumstances”) in numerous Fourth Amendment cases.<sup>103</sup> Wayne

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100. *Atwater*, 532 U.S. at 347. This theory is taken from *New York v. Belton*, 453 U.S. 454, 458 (1981), which in turn was quoting from LaFave, *Robinson Dilemma*, *supra* note 12, at 141. However, in the same article, Professor LaFave went on to argue that the police should *not* have unregulated discretion to make custodial arrests; instead, he proposed that regulations should specify the general situations in which arrest is either required or prohibited. *Id.* at 158-61. In later writings, Professor LaFave proposed strict criteria for adopting bright-line police-powers rules, and concluded that some of the Court’s decisions—including *Atwater*—have not met these criteria. *See infra* notes 104, 114, 130 and accompanying text.

101. *See generally* LaFave, *Robinson Dilemma*, *supra* note 12; Dripps, *Constitutional Theory*, *supra* note 71; *see also infra* Part V. *But see* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. Pitt. L. Rev. 227, 231 (1984) (“[bright-line rules] often lead to substantial injustice [and] their artificiality commonly makes them difficult, not easy, to apply.”). *See also* Craig Bradley, *Two Models of the Fourth Amendment*, 83 Mich. L. Rev. 1468, 1471 (1985) (suggesting that in lieu of unworkable bright-lines, courts should adopt either a general reasonableness standard, or strictly enforce the warrant requirement).

102. Only one brief supporting Petitioner even mentioned these cases. *See* Institute Amicus Brief at 9 n.7.

103. *See, e.g.*, *United States v. Drayton*, 122 S. Ct. 2105 (2002) (discussing consent by and seizure of bus passengers); *Illinois v. Wardlow*, 528 U.S. 119, 126-27 (2000) (Stevens, J., concurring and dissenting) (noting with approval the majority’s rejection of bright-line rules proposed by each side in that case, as to whether the suspect’s flight was a sufficient basis for a *Terry* stop); *Richards v. Wisconsin*, 520 U.S. 385 (1997) (requiring case-specific justification for no-knock entry); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (citing earlier cases rejecting bright-line rules); *United States v. Sharpe*, 470 U.S. 675, 684-87 (1985) (discussing duration of allowable stop under *Terry v. Ohio*); *Rakas v. Illinois*, 439 U.S. 128 (1978) (determining “standing” to suppress illegally-seized evidence); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (requiring that voluntariness of consent be assessed under the totality of the circumstances).

Numerous cases outside of the Fourth Amendment context have also rejected proposed bright-line rules. *See, e.g.*, *United States v. Cronin*, 466 U.S. 648 (1984) (involving ineffective assistance of counsel); *Bordenkircher v. Hayes*, 434 U.S. 357



LaFave has suggested the following criteria for evaluating whether a proposed bright-line rule should be adopted in a particular context:

- 1) Does [the proposed rule] have clear and certain boundaries, so that it in fact makes unnecessary case-by-case evaluation and adjudication?
- 2) Does it produce results approximating those which would be obtained *if* accurate case-by-case application of the underlying principle were possible?
- 3) Is it responsive to a genuine need to forego case-by-case application of a principle because that approach has proved unworkable?
- 4) Is it not readily subject to manipulation and abuse?<sup>104</sup>

It is far from clear that the Court's adoptions and rejections of bright-line rules have been consistent with LaFave's criteria, or with any other set of neutral principles.

Cynics might argue that one of the principles guiding the Court, or at least some of the justices, is that bright-line rules will ordinarily only be adopted when they favor the police, granting them overbroad powers that would often not be justified by application of any underlying principle to the particular case facts. Unfortunately, the language of the majority opinion in *Atwater* lends some support to this theory.

Justice Souter began his analysis of reasonableness balancing by asserting that such balancing must "credit the government's side with an essential interest in readily administrable rules."<sup>105</sup> Thus, even before stating exactly what "readily-administrable rule" he was proposing, Justice Souter implied that such rules always help "the government's side" of the balance. But overbroad pro-defendant (or pro-civil-rights) bright-line rules, although less common (especially in recent years), do exist.<sup>106</sup> An example of an overbroad pro-defendant

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(1978) (filing of mandatory life-sentence charge after defendant refused to plead to much lower initial charge); *Brady v. United States*, 397 U.S. 742 (1970) (allowing death-motivated guilty plea).

104. Wayne R. LaFave, 3 *Search and Seizure: A Treatise on the Fourth Amendment* § 7.1(c) at 446 (3d ed. 1996) [hereinafter LaFave, *Search & Seizure*].

105. *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). At this point in his opinion, Justice Souter cited *New York v. Belton*, 453 U.S. 454, 458 (1981). That portion of the *Belton* opinion deals with the value of clear rules for police decisions, but it did not suggest that such rules must or should be overbroad in favor of the police.

106. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966), *reaffirmed in Dickerson v. United States*, 530 U.S. 428 (2000). *Miranda* is (or at least, once was) an overbroad, pro-defendant bright-line rule because it renders inadmissible some statements that would be admissible by application of underlying principles of voluntariness or compelled self-incrimination. See *infra* note 348. Cases granting automatic rights to appointed counsel also announced overbroad, pro-defendant rules. See *Alabama v.*

rule in the Fourth Amendment context might be found in the Court's recent decision in *Kyllo v. United States*,<sup>107</sup> invalidating the use of a heat-detecting "thermal imaging" device to obtain *any* information—even non-intimate information—regarding the interior of a home that police could not otherwise obtain without entering the home. And although most bright-line rules seem to be overbroad in favor of either the police or the citizen, some rules are relatively neutral. Perhaps *Chimel v. California*<sup>108</sup> was such a rule. *Chimel* favored the police by permitting suspicionless searches of an arrestee's person and the area of his immediate control, however, it favored the citizen by ruling that such routine searches could not extend to a wider area.<sup>109</sup>

Putting aside the Court's lack of clarity in adopting bright-line rules, and its possible tendency to favor pro-police rules, what can be said about the "readily-administrable" rule Justice Souter actually adopted in *Atwater*? What exactly is this rule, and how did Justice Souter justify its "polarity" (pro-police) and its precise language? A statement of the majority's rule can be pieced together from several paragraphs near the end of Justice Souter's opinion: except for arrests made in an "extraordinary manner, unusually harmful to [the citizen's] privacy . . . or physical interests," probable cause suffices to justify any arrest, regardless of the seriousness of the offense or the actual need to take the suspect into custody.<sup>110</sup>

In support of adopting this overbroad pro-police rule governing arrest powers in minor cases, Justice Souter cited two of the Court's most famous decisions of this type: *Robinson v. United States*<sup>111</sup> and *New York v. Belton*.<sup>112</sup> However, a pro-police, bright-line rule is much more appropriate in the search-incident context at issue in *Robinson*

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Shelton, 122 S. Ct. 1764 (2002); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); see also Tracey Maclin, *The Fourth Amendment on the Freeway*, 3 Rutgers Race & L. Rev. 117, 155-57 (2001) (citing other examples of pro-citizen bright-line rules, but concluding that the Court has not articulated neutral principles for deciding when to adopt such a rule).

107. 533 U.S. 27 (2001). Other recent examples of pro-defendant bright-line rules can be found in a series of cases rejecting prosecution arguments based on case-specific "reasonableness balancing" arguments. See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). These cases, as well as *Kyllo*, are further discussed in Part III.A.

108. 395 U.S. 752 (1969).

109. See Myron Moskowitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 Wisc. L. Rev. 657, 659 (characterizing these two aspects of *Chimel* as its "positive" and "negative" rules).

110. *Atwater*, 532 U.S. at 354 (quoting *Whren v. United States*, 517 U.S. 806, 818 (1996)). Although not mentioned in Justice Souter's opinion, the police presumably still need at least an arrest warrant to make a non-consensual, non-exigent entry of the suspect's home for the purpose of effecting an arrest. See *Payton v. New York*, 445 U.S. 573 (1980). They may also need a search warrant to enter the home of a non-suspect third party. See *Steagald v. United States*, 451 U.S. 204 (1981).

111. 414 U.S. 218 (1973).

112. 453 U.S. 454 (1981).

and *Belton*, and poses far fewer risks of manipulation and abuse. Moreover, Justice Souter's failure to seriously consider these risks renders his broader conception of reasonableness balancing, which factors in the value of readily-administrable rules, very unsatisfactory and, in effect, very pro-police.

The *Robinson* and *Belton* rules permit suspicionless searches of the suspect, his "area of immediate control," and the passenger compartment of any car he was riding in when arrested, as a routine "incident" to (and "contemporaneous" with) custodial arrest for any offense, even a traffic offense.<sup>113</sup> These rules are not free from controversy; they have been questioned by many scholars,<sup>114</sup> and several states have rejected or limited them as a matter of state constitutional law.<sup>115</sup> But whatever their faults, such bright-line, strongly pro-police rules make much more sense in the *Robinson/Belton* context<sup>116</sup> than in a case like *Atwater*.

First, it should be noted that *Robinson* and *Belton* only assumed, but did not decide, that the custodial arrests in those cases were valid. Indeed, Justices Stewart and Powell, two relatively conservative members of the *Robinson* Court, each questioned the constitutional validity of arrests in minor traffic cases.<sup>117</sup> When this issue was finally squarely presented in *Atwater*, the Court should have given serious consideration to the concerns raised by these two justices—concerns which have only grown more serious in light of numerous subsequent decisions expanding police powers. In particular, the Court should have been very hesitant to adopt another bright-line, overbroad police-powers rule, given the cumulative effect—and potential for abuse—of these rules. But instead, the Court proceeded to pile yet another overbroad, pro-police rule on top of the old ones—that is, on top of the *Robinson* and *Belton* search-incident rules; the automobile

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113. See *Belton*, 453 U.S. 454; *Robinson*, 414 U.S. 218.

114. See, e.g., Dressler, *supra* note 21, §§ 13.04-.05; LaFave, Search & Seizure, *supra* note 104, §§ 5.2(e), 7.1(c); Moskowitz, *supra* note 109; Whitebread & Slobogin, *supra* note 21, at 82, 191.

115. See, e.g., *Zehring v. State*, 569 P.2d 189 (Alaska 1977); *State v. Perham*, 814 P.2d 914 (Haw. 1991); *State v. Hardaway*, 36 P.3d 900 (Mont. 2001); *State v. Chrisman*, 676 P.2d 419 (Wash. 1984).

116. Automobile impound and jail-booking inventory searches are another context in which the Court has permitted routine, suspicionless searches. *Illinois v. Lafayette*, 462 U.S. 640 (1983); *South Dakota v. Opperman*, 428 U.S. 364 (1976). For many of the reasons suggested in the text, such overbroad but highly "standardized" search powers pose fewer problems than the overbroad and highly discretionary arrest power recognized in *Atwater*.

117. In *Robinson*, Justice Powell, concurring, stated that the validity of a custodial arrest for a minor traffic offense was "not . . . self-evident." 414 U.S. at 238 n.2. In the companion case of *Gustafson v. Florida*, Justice Stewart, concurring, stated that "a persuasive claim might have been made . . . that the custodial arrest of the Petitioner for a minor traffic offense violated [the Fourth Amendment]. But no such claim has been made." 414 U.S. 260, 266-67 (1973).

and jail inventory rules;<sup>118</sup> and the cases refusing to allow courts to examine pretextual motives for the arrest.<sup>119</sup>

Another reason why the *Robinson* and *Belton* decisions provide weak support for the Court's pro-police ruling in *Atwater* has to do with differences in the nature of arrest and search-incident decisions. Searches incident to custodial arrest, even for minor crimes, are justified primarily by the need to ensure the officer's safety during the drive from the arrest scene to the police station.<sup>120</sup> A routine, suspicionless search power is needed because anyone may be carrying a weapon, and because there is no reliable way to identify which arrested persons are armed. The consequences of failing to disarm the suspect can be fatal to the officer or to the suspect.<sup>121</sup> For these reasons, even the dissenters in *Robinson* agreed that at least a suspicionless weapons frisk would be permissible.<sup>122</sup> Moreover, given the unpredictable nature of weapons-carrying, and the potentially fatal consequences of placing an armed suspect in the back seat of the police car, police officers are likely to invoke their search-incident powers in most custodial arrest cases, even if departmental regulations do not mandate the search. Thus, the search-incident power gives rise to a more or less "standardized" procedure<sup>123</sup> that the police can easily apply and which produces limited potential for disparate treatment of suspects.

The *Atwater* context is much different in terms of police needs, the potential for disparity, and the suitability of an overbroad, pro-police rule.<sup>124</sup> The overwhelming majority of suspects in minor traffic-stops do not need to be taken into custody, and the few who do can be

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118. See *supra* notes 9, 116; cf. *Minnick v. Mississippi*, 498 U.S. 146, 166 (1990) (Scalia, J., dissenting) (complaining about the piling of overbroad (pro-defendant) bright-line rules on top of each other—"prophylaxis built upon prophylaxis"—in the *Miranda* context).

119. *Arkansas v. Sullivan*, 532 U.S. 769 (2001) (per curiam); *Whren v. United States*, 517 U.S. 806 (1996); see also *supra* note 14 and accompanying text (citing cases that render it practically impossible for suspects or defendants to raise a successful claim of racially discriminatory enforcement).

120. *Knowles v. Iowa*, 525 U.S. 113, 116-18 (1998).

121. Some years ago a case was reported in the Minneapolis paper of a suspect who was shot dead by the police (before they had a chance to frisk him) because they thought his cigarette lighter was a pistol.

122. *United States v. Robinson*, 414 U.S. 218, 250-51 (1973) (Marshall, J., dissenting).

123. See generally, LaFave, *Robinson Dilemma*, *supra* note 12. The similarly overbroad automobile and jail-inventory search powers are even more standardized. *Supra* notes 9-10. The Court has invalidated inventory searches that were not sufficiently controlled by police department regulations. See *Florida v. Wells*, 495 U.S. 1 (1990).

124. Another distinction is that custodial arrest represents a substantial additional intrusion, beyond that already imposed on the offender; in *Robinson*, the Court may have viewed the search-incident of the arrestee as a relatively minor addition to the substantial intrusion already inherent in custodial arrest. See LaFave, *supra* note 21, § 3.5(b).

identified by simple, objective criteria that can already be found in the existing laws of several states.<sup>125</sup> The identity of the offender can almost always be established from driver and vehicle licensing records. Minor traffic suspects are unlikely to flee to avoid paying a modest fine. And if a suspect fails to appear in court, or even flees the jurisdiction, he may be subject to driver's license suspension.<sup>126</sup> Nor do most minor traffic offenders pose any imminent risk of harm to themselves or others. Finally, as Justice Rehnquist (speaking for a unanimous court) noted in *Knowles v. Iowa*,<sup>127</sup> there is rarely any need to search the person or vehicle of a traffic offender for evidence of their current offense—the officer already has all the evidence needed to prove the violation.

For all of these reasons, and because the sheer volume of traffic cases precludes arresting more than a small fraction of them, the great majority of traffic offenders will, even after the *Atwater* ruling, continue to be issued citations and then released at the scene, although more of them will probably be searched first, and arrested only if evidence or contraband are found.<sup>128</sup> But it is likely that more suspects will now be arrested. Because the Court has declined to require any scrutiny of these decisions, there is no reason to assume that the police will only make arrests when there is a valid need for this measure, and every reason to assume that many offenders will be arrested for invalid reasons, such as to harass a particular individual or group, to impose informal “punishment” (as seems to have been the motive in *Atwater*), or to use the traffic violation as a pretext to investigate other suspected violations. Because virtually anyone who drives can be charged with a traffic violation, the potential for abuse is great.<sup>129</sup>

Nor does Justice Souter's rule that probable cause is sufficient grounds for any in-public arrest, except in “extraordinary” cases, hold up well when judged according to Professor LaFave's criteria for assessing bright-line rules, summarized above:<sup>130</sup>

1) the boundaries of this rule are not necessarily “clear and certain”—what is an “extraordinary” arrest? Moreover, Ms. *Atwater*'s arrest was “extraordinary” in a number of respects.<sup>131</sup>

2) as noted above, the rule authorizes arrest in far more cases than

125. For further discussion, see *infra* section II.B.2 and Part V.

126. See, e.g., Minn. Stat. Ann. § 171.01(13) (2000) (discussed further *infra* note 386).

127. 525 U.S. 113, 118 (1998).

128. See *supra* note 19 and accompanying text.

129. See *supra* notes 6-14 and accompanying text; see also *infra* section II.B.4 (discussing the past and likely future frequency of arrests for minor violations).

130. See LaFave, Search & Seizure Supplement, *supra* note 4 at 21-24 (applying his four criteria to the *Atwater* majority's bright-line arrest rule, and concluding that the rule fails to meet most of these criteria).

131. See *infra* section II.B.5.

would be justified based on the actual need for custody;

3) requiring individualized assessments of the need for custody is a workable option (for the reasons suggested above, and in the following section);<sup>132</sup> and

4) Justice Souter's rule is, indeed, "readily subject to manipulation and abuse." Pretextual arrests and searches are almost certain to become more common, and police will be tempted to invoke the arrest power in bad faith—that is, solely to justify the search, with a view toward issuing a citation if nothing is found in the search.<sup>133</sup>

These problems of manipulation and abuse point to another problem with Justice Souter's approach. Once the Court decided to look beyond the facts of Ms. Atwater's case, assessing "reasonableness" in a broader context that considers the systemic need for "readily-administrable" decision rules, then the Court should also have carefully considered and "balanced" the broader public and private interests that weigh against unfettered arrest powers—in particular, the serious potential for abuse that this ruling creates. Yet Justice Souter never seriously considers these problems; he simply asserts that reported cases like Ms. Atwater's seem to have been fairly rare in the past.<sup>134</sup> As for the future, Justice Souter dismissed as "speculative" the "grave potential for abuse" noted by the dissent.<sup>135</sup> Nor did Justice Souter seriously consider the ways in which unnecessary minor-crime arrests negatively affect several important *governmental* interests to which the police themselves may not pay sufficient attention.<sup>136</sup> Such casual concern for the "downside" of the Court's decision, while giving strong weight to the need for bright-line rules and seeming to assume that consideration of this practical need will naturally support the government's side, produces a truncated and unduly pro-police balance.

In addition to citing *Robinson* and *Belton*, Justice Souter presented several other arguments for rejecting Petitioner's proposed arrest-limitation rule and adopting an overbroad, pro-police rule. These arguments are examined in sections B.2 through B.5 below.

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132. See *infra* Part V.

133. See *infra* section II.B.4.

134. See *infra* section II.B.4.

135. *Atwater v. City of Lago Vista*, 532 U.S. 318, 353 n.25 (2001).

136. See Institute Amicus Brief at 11-17, *Atwater* (No. 99-1408) (arguing that unnecessary minor-crime arrests present serious management problems for jail officials that are costly and dangerous, burden courts, and pretrial release programs, remove officers from duty while they transport the arrestee, and negatively affect the public's perception of the police). Justice Souter's only reference to these problems was his argument that cases like Ms. Atwater's will be rare, because "it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason." *Atwater*, 532 U.S. at 352. However, only some of these problems directly affect the police, and cases like Ms. Atwater's do not seem to be as rare as Justice Souter assumed. See *infra* notes 167-75 and accompanying text.

## 2. Petitioner's Proposed Arrest Limits Are Unworkable

Justice Souter next examined the rules proposed by Petitioner and her supporting amici, and concluded that none of these rules provided a "readily administrable" constitutional limitation on the warrantless arrest power in minor cases. The Petitioner herself proposed the following rule: "The Fourth Amendment prohibits custodial arrests for fine-only traffic offenses except when the arrest is necessary for enforcement of the traffic laws or when the offense would otherwise continue and pose a danger to others on the road."<sup>137</sup> Most of Petitioner's supporting amici proposed rules applicable (with various exceptions) to at least some non-traffic offenses.<sup>138</sup>

Justice Souter rejected a rule limiting arrests for offenses not punishable with incarceration, arguing that arresting officers may not be able to tell how serious the crime is. He maintained that "we cannot expect every police officer to know the details of frequently complex penalty schemes,"<sup>139</sup> and he further argued that unknown facts, such as the offender's prior record or the precise amount of drugs involved, may make an offense more serious than it appears to the arresting officer. Justice Souter also objected to the exceptions that the Petitioner and her amici proposed, which would allow arrest even for very minor crimes. Would speeding, Justice Souter asked, qualify as a sufficient "danger to others on the road"?<sup>140</sup> Why, as a constitutional matter, should only reckless driving qualify, as Ms. Atwater's counsel had suggested at oral argument? Moreover, Justice Souter argued, "is it not fair to expect that the chronic speeder will speed again despite a citation in his pocket, and should that not qualify as showing that the 'offense would . . . continue' . . . ?"<sup>141</sup>

As noted in the previous section, there is certainly a need to give the police a workable set of decision rules that will apply to all but the most exceptional circumstances. But in the case of the decision to arrest for a minor traffic offense, such rules already exist, and pose

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137. Brief of Petitioners at 46, *Atwater* (No. 99-1408).

138. See ACLU Amicus Brief at 26-29, *Atwater* (No. 99-1408) (all fine-only offenses); Brief Amici Curiae of the National Association of Criminal Defense Lawyers and the Association of Federal Defenders in Support of the Petitioners at 21-22, *Atwater* (No. 99-1408) (all fine-only misdemeanors); Institute Amicus Brief at 27-30, *Atwater* (No. 99-1408) (same); Brief Amicus Curiae of Americans for Effective Law Enforcement, Inc., in Support of Neither Party at 4-13, *Atwater* (No. 99-1408) ("minor" offenses); Motion for Leave to File Brief Amicus Curiae and Brief of the CATO Institute as Amicus Curiae in Support of Petitioners at 2-5, *Atwater* (No. 99-1408) ("minor" offenses not involving a breach of the peace); Brief of Amicus Curiae Texas Criminal Defense Lawyers Association in Support of Petitioners ("Texas Defense Lawyers Amicus Brief") at 28-29, *Atwater* (99-1408) (all fine-only offenses). For further discussion of these rules, see *infra* Part V.

139. *Atwater*, 532 U.S. at 348.

140. *Id.* at 349.

141. *Id.*

none of the problems Justice Souter suggested. Laws in a number of states place strict limits on such arrests, with no apparent problems for either the police or the courts. These state rules are further discussed in Part V. Here again, however, the manner in which the *Atwater* case was briefed and argued may have led the Court to think that these issues were more difficult than they are—the briefs suggested at least seven sets of decision rules, which differed in crimes covered and/or exceptions allowed, and many variations on these rules can be found in the state laws and model rules cited to the Court. Did this rich menu of options, many of which went beyond the specific facts of Ms. Atwater's case, and none of which were tied closely to prior court rulings or well-established constitutional principles, make the Court think that setting minor-crime arrest limits is a task for legislatures or criminal rules-drafters, not federal constitutional adjudication?<sup>142</sup>

In any case, the rule-drafting problems cited by Justice Souter are not serious enough to justify the unnecessary arrests and potential for abuse created by his pro-police rule. It is certainly true that an arresting officer will sometimes not know facts that make the offender eligible for a jail penalty. This problem did not concern the Court in *Welsh v. Wisconsin*,<sup>143</sup> however, where the Court held that police may not make a warrantless entry on exigent circumstances for a non-jailable offense. One of the most common bases for enhanced punishment is the offender's prior conviction record. But in traffic cases, the arresting officer can usually determine the offender's driving record by radio or computer. If the officer lacks this information, he should assume that there are no prior violations that would invoke a jail term (which will usually be the case for minor traffic offenders; the fact that officers almost always issue citations for minor violations like Ms. Atwater's strongly suggests that such aggravating factors are rarely present).

On the other hand, if the officer reasonably believes (or, under Justice O'Connor's standard, if the officer has articulable suspicion) that the offender's prior violations make him eligible for a jail sentence, then the Petitioner's proposed rule would permit a custodial arrest. Similar exceptions take care of Justice Souter's other two uncertain-charge examples. In terms of drug amounts, which will rarely be an issue in traffic cases,<sup>144</sup> the officer only needs reasonable

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142. At oral argument, Justice Kennedy objected to Petitioner's proposed rule, and pointed out that her supporting amici had also proposed "four or five different tests . . . and they're all different." Supreme Court Oral Argument at 21, *Atwater* (No. 99-1408); see also Respondents' Brief at 22-23, *Atwater* (No. 99-1408) (arguing that differences between proposed standards "reveal the futility" of devising a constitutional rule); Brief Amicus Curiae of the National League of Cities, et al., Supporting Respondents at 25, *Atwater* (No. 99-1408) (noting "inability of petitioners and their amici to agree on a single, workable rule").

143. 466 U.S. 740 (1984).

144. *But see* Minn. Stat. Ann. § 152.027(3) (2001) (prohibiting more than 1.4 grams



belief (or articulable suspicion) to believe the offender's drug amount is enough to permit a jail term.<sup>145</sup> As for the possibility that the prosecutor might later decide to charge a different,ailable offense, the traditional standard of probable cause seems appropriate—if the officer has probable cause to believe aailable offense has been committed, he can arrest for that charge. Again, these circumstances will rarely arise in traffic cases.

In critiquing Petitioner's willingness to permit custodial arrest for some non-ailable traffic violations, Justice Souter questioned why arrest should generally be prohibited for speeding, even by a "chronic speeder," but permitted for reckless driving. In most states, the simple answer is that the legislature has determined that reckless driving is a more serious offense.<sup>146</sup> Moreover, the police may charge that offense and execute a custodial arrest if they have probable cause to believe that recklessness has been shown. Similarly, a "chronic" speeder can be charged with aailable offense—if the legislature has authorized such a charge<sup>147</sup> and has given police officers ready access to traffic-conviction records. If such a law and/or the supporting traffic records are not available, speeders normally will—and should—be issued citations; officers should not be given *carte blanche* to speculate about whether a particular offender will "speed again despite a citation in his pocket."<sup>148</sup> The reality is that a case-specific need for custodial arrest is rarely present in minor traffic cases, and such need can easily be assessed on a case-by-case basis, as is already done under many existing state laws.<sup>149</sup>

Of course, none of these decisions is free of fact-specific line-drawing issues. But that is true of many everyday police decisions involving standards such as "probable cause" and "voluntary"

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of marijuana).

145. Courts tend to uphold arrests unless it should have been very clear to the police that the offender's drug amount was insufficient to support a higher charge. Compare *State v. Hanson*, 488 N.W.2d 511 (Minn. Ct. App. 1992) (holding arrest valid because officer could not reasonably know drug amount too small to permit arrest), with *State v. Evans*, 373 N.W.2d 836 (Minn. Ct. App. 1985) (holding arrest invalid based on single marijuana cigarette).

146. See, e.g., Minn. Stat. Ann. § 169.13 (2001) (categorizing reckless or careless driving as a misdemeanor); *id.* § 169.14 (describing speed limit regulations); *id.* § 169.89(1) (stating that speeding is ordinarily a petty misdemeanor); *id.* § 609.02(3) (punishing misdemeanor with up to 90 days in jail and/or a maximum fine of \$1,000); *id.*, § 609.02(4a) (punishing petty misdemeanor by fine of up to \$300); see also Nat'l Comm. on Unif. Traffic Laws and Ordinances, Uniform Vehicle Code and Model Traffic Ordinance §§ 11-801, 11-901, 17-101 (1998) [hereinafter Uniform Vehicle Code] (drawing similar distinction between speeding and reckless driving penalties).

147. See, e.g., Minn. Stat. Ann. § 169.89(1) (stating that third petty misdemeanor within one year is punishable as a non-petty (ailable) misdemeanor); see also Uniform Vehicle Code, *supra* note 146, § 17-101(b) (stating that third violation within one year isailable).

148. *Atwater v. City of Lago Vista*, 532 U.S. 318, 349 (2001).

149. See *infra* Part V.

consent.<sup>150</sup> The minimal additional requirements for arrest proposed by the dissent and in this article—articulable suspicion to believe that custody is necessary—are designed to prohibit arrest only when, as in *Atwater*, the officer can point to *no* plausible need for custody. And this rule would only apply to non-jailable traffic crimes, where the need for custody rarely arises. As with any legal limitation, there will be borderline cases and some uncertainty. But that is also true under Justice Souter’s ruling, which characterized the manner of Ms. Atwater’s arrest as “normal,” and purported to distinguish such arrests from “extraordinary” intrusions that require greater scrutiny.<sup>151</sup>

Justice Souter’s critique of Petitioner’s proposed arrest rule is unconvincing, and thus provides weak support for the rule Justice Souter eventually adopted. Part of the problem with Justice Souter’s critique is that he did not confine himself to the traffic law context raised by the facts of this case, and by Petitioner’s proposed rule. He seemed to believe (without saying why) that the Court ought to craft a rule extending to all non-jailable violations. This topic is examined further in Part IV, which discusses the pros and cons of “minimalist” decisions focusing on the facts of the case at hand. Perhaps another reason for Justice Souter’s unsatisfactory critique is that Petitioner’s proposal was vague on several key points. These issues are further discussed in Part V, which seeks to combine elements of the rules proposed by Petitioner, Justice O’Connor’s dissent, and Petitioner’s supporting amici into a workable, relatively bright-line arrest rule for minor traffic cases.

### 3. Broad Arrest Authority Is Needed to Avoid Problems of Excluded Evidence, Civil Liability, Increased Litigation, and a Systematic Disincentive to Arrest

Justice Souter conceded that police routinely make the kinds of distinctions proposed by Petitioner regarding the need for custody in a particular case. Nevertheless, he hesitated to subject determinations of such need to constitutional scrutiny for fear that this would result in excluded evidence, personal liability of officers, increased litigation, and a systematic disincentive to make custodial arrests even when they were needed—all arising out of decisions that a police officer must make “on a moment’s notice.”<sup>152</sup> He also rejected a simple presumption—“if in doubt, do not arrest”—arguing that such a rule

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150. *Atwater*, 532 U.S. at 366 (O’Connor, J., dissenting) (noting that probable cause is not a “model of precision”); Marcy Strauss, *Reconstructing Consent*, 92 J. Crim. L. & Criminology 211, 221-35 (2001-2002). Another highly fact-specific determination is whether the defendant had a constitutionally-protected “reasonable expectation of privacy” under case law following *Katz v. United States*, 389 U.S. 347 (1967).

151. *Atwater*, 532 U.S. at 354; see *infra* Part II.B.5.

152. *Atwater*, 532 U.S. at 350.

would be akin to a “least-restrictive-alternative” standard that he believed the Court had previously rejected.

Once again, none of these problems is as serious as Justice Souter claims, although one of them raises issues that the Court may need to address. The risk of lost evidence, if the officer wrongly decides to arrest, is the least important problem here. The evidence in question will usually be items seized in a search incident to arrest or while inventorying the car’s contents. Absent consent to search (which the police may request whether or not they are entitled to arrest), such evidence could not be legally obtained if a citation were issued, so we are not talking about excluding evidence that the police might have lawfully obtained but for confusingly complex arrest rules. Nor, given the minimal “articulable facts” standard for arrest proposed by the dissent and in this article, will there be very many illegal arrests to sanction with exclusion. Finally, there have been no problems of unfair exclusion, increased litigation, or arrest disincentive in Minnesota, which adopted strict limitations on minor-crime arrests in 1975, and has enforced these limitations with exclusionary remedies since 1977.<sup>153</sup> Despite these strict rules and the exclusionary rule remedy, there have been very few reported cases applying these rules. This is probably because the need for custodial arrest rarely arises in cases subject to these rules.

The risk of civil liability is a greater concern, because it may impose unfair burdens on arresting officers and/or disincentives to arrest, but such problems can be handled by properly-defined qualified immunity rules. Justice Souter worried that,

[E]ven where personal liability does not ultimately materialize, the mere “specter of liability” may inhibit public officials in the discharge of their duties for even those officers with airtight qualified immunity defenses are forced to incur “the expenses of litigation” and to endure the “diversion of [their] official energy from pressing public issues.”<sup>154</sup>

However, in *Saucier v. Katz*,<sup>155</sup> decided six weeks after *Atwater*, the Court solved many of these problems by broadening the criteria establishing qualified immunity and encouraging trial courts to rule on immunity claims at an early stage of litigation. The Court confirmed that qualified immunity is an entitlement not to stand trial that requires trial courts to address two questions early in the proceedings: (1) Would a constitutional right have been violated, if the facts alleged by the plaintiff are true? and (2) Was such a right—in its application to the particular official conduct alleged to violate it—already clearly

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153. Minn. R. Crim. P. 6.01; *State v. Martin*, 253 N.W.2d 404 (Minn. 1977); Institute Amicus Brief at 28-29, *Atwater* (No. 99-1408); see *infra* Part V.

154. *Atwater*, 532 U.S. at 351 n.22 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)) (citations omitted).

155. 533 U.S. 194 (2001).

grounds.<sup>160</sup> Of course, Petitioner's counsel in the Supreme Court was not free to argue that the lower court was wrong and that qualified immunity is and should be frequently available.<sup>161</sup> In any case, the Court's subsequent decision in *Saucier* should take care of many of these problems. If not, the remedy is to give further attention to qualified immunity standards and procedures, rather than grant unnecessarily broad arrest powers to the police.

With reasonable qualified immunity standards, combined with a minimal requirement of "articulable facts" justifying arrest in lieu of citation, there should be little disincentive to arrest. But even if there were some disincentive, that would be entirely appropriate in such minor cases. We are not talking about disincentives to charge and to prosecute such violators—only to custodially arrest them. When an offense cannot result in incarceration after conviction, and when case-specific needs for custody prior to conviction are very rare, elemental notions of reasonableness and proportionality call for rules that strongly discourage pretrial custody.<sup>162</sup> Moreover, any "systematic disincentive" to arrest in minor traffic cases would provide a valuable counterweight to the strong police incentives to make unnecessary arrests in these cases. Such incentives include the desire to search the suspect and his car for evidence and contraband, or to use a minor-crime arrest as a pretext to investigate more serious crimes; the tendency to engage in formal or informal racial profiling; and (as appears to have been the case in *Atwater*) the temptation to impose a little "street justice," contrary to legislative judgments about appropriate levels of punishment.

Justice Souter also objected to Petitioner's proposed rule because he viewed it as "something akin to a least-restrictive-alternative limitation."<sup>163</sup> However, that is not a fair characterization: Petitioner was simply arguing that, when enforcing non-jailable traffic offenses, the police should have *some reason* for thinking that custodial arrest is needed.<sup>164</sup> In any event, the cases cited by Justice Souter, rejecting

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160. See, e.g., *Patzner v. Burkett*, 779 F.2d 1363, 1369-71 (8th Cir. 1985). In *Patzner*, officers lacked qualified immunity in making warrantless entry to arrest for a jailable drunk driving violation. The court seemed to assume that loss of blood alcohol evidence may constitute exigent circumstances (or that the officers could reasonably so believe), but relied on *Welsh v. Wisconsin*, 466 U.S. 740 (1984), refusing to permit warrantless entry on these grounds. *Welsh*, however, involved a non-jailable drunk driving violation, and the entry in *Patzner* took place before *Welsh* was decided.

161. Cf. Supreme Court Oral Argument at 18, *Atwater* (99-1408). In oral argument, Justice Ginsburg suggested it was "almost certain" that Officer Turek would have qualified immunity. Petitioner's counsel responded that the Fifth Circuit's en banc decision did not address the issue, that it was a "tough hurdle to overcome," but that a defendant without immunity (the city) was still in the lawsuit.

162. For further discussion of proportionality, see *infra* Part III.B.

163. *Atwater*, 532 U.S. at 350.

164. Cf. *Richards v. Wisconsin*, 520 U.S. 385, 394-95 (1997) (ruling that police

established, so that the officer was on notice that his conduct would be clearly unlawful? If the answer to either question is no, trial is unnecessary and the claim should be dismissed.

As applied to the facts of *Atwater*, it appears that Petitioner's claim against Officer Turek should have been dismissed under either the first or the second prong of the *Saucier* standard. Although the Fifth Circuit panel decision in *Atwater* held that the individual defendants lacked qualified immunity, it conceded that no prior case had held that such arrests are unconstitutional.<sup>156</sup> Moreover, even if the holdings and dicta in a number of prior cases had suggested that arrest for a minor crime might raise constitutional problems, these cases hardly seem sufficient support for a "clearly established right." The panel, in rejecting qualified immunity, appears to have made the same two mistakes as the lower court in *Saucier*. First, the panel decision identified the applicable "clearly established" rights at too high a level of generality. The decision focused on the rights to be free from "unreasonable seizures," and from seizures "conducted in an extraordinary manner" or constituting "an extreme practice,"<sup>157</sup> rather than examining established law applicable to Officer Turek's particular conduct. Second, the panel viewed the "objective reasonableness" of the officer's conduct as an element of the qualified immunity standard.<sup>158</sup> *Saucier* emphasizes that an officer's conduct, even if later deemed unreasonable by a court, would not subject the officer to a civil damages trial unless a reasonably well-trained officer would have known that his conduct violated clearly established rights.<sup>159</sup>

One wonders whether Justice Souter and the other justices in the *Atwater* majority were influenced by the lower court's rejection of qualified immunity. Even if they knew or suspected that the immunity ruling was incorrect, perhaps they thought that it reflected a widespread tendency for lower courts to give officers insufficient protection from civil suits. Indeed, it is not difficult to find cases in which qualified immunity has been rejected on questionable

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156. *Atwater v. City of Lago Vista*, 165 F.3d 380, 384 (5th Cir. 1999); see also *Atwater*, 532 U.S. at 362 (O'Connor, J., dissenting) (observing that the United States Supreme Court had never precisely considered the issue in this case).

157. *Atwater*, 165 F.3d. at 384, 387.

158. *Id.* at 385-86.

159. *Saucier*, 533 U.S. at 204-05. It might be argued that the arresting officer in *Atwater* was acting in bad faith, intending to punish or harass Petitioner, rather than for any legitimate law enforcement purpose. Such actions would arguably be a violation of "clearly established" constitutional rights. But this reasoning does not appear in the Fifth Circuit panel decision. It also seems inconsistent with the Supreme Court's preference for objective standards, avoiding scrutiny of the hidden motives of police officers. See *Arkansas v. Sullivan*, 532 U.S. 769 (2001); *Whren v. United States*, 517 U.S. 806 (1996); *Horton v. California*, 496 U.S. 128 (1990); *Scott v. United States*, 436 U.S. 128 (1978).

such a limitation, all involved highly routinized procedures with limited potential for disparity,<sup>165</sup> not the totally discretionary arrest power conferred by the Court in *Atwater*. And although the Court has also rejected the least restrictive alternative concept in several stop-and-frisk cases,<sup>166</sup> the police actions in those cases were considerably less intrusive than Ms. Atwater's custodial arrest.

#### 4. Arrests Such as Ms. Atwater's Are Not a Widespread Problem

The administrative problems discussed above led Justice Souter to conclude that the costs of enforcing a constitutional limitation on unnecessary minor-offense arrests would outweigh the benefits, particularly since, in Justice Souter's view, such arrests are not very common.<sup>167</sup> Justice Souter noted that suspects arrested without a warrant are entitled to a judicial review of probable cause within forty-eight hours, and he further assumed that, as in Ms. Atwater's case, most suspects will have a "prompt opportunity to request release."<sup>168</sup> Justice Souter further noted that laws in some states already limit minor-offense arrests, and he asserted that regulation by statute is preferable because it can reflect "any sort of practical consideration without having to subsume it under a broader principle," or develop "a new and distinct body of constitutional law."<sup>169</sup> He also argued that it is in the interest of police departments and other local authorities to limit these kinds of arrests.<sup>170</sup> He concluded that these limitations, as well as "the good sense (and, failing that, the political accountability) of most local lawmakers and

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executing search warrant need reasonable and articulable suspicion that knocking and announcing their presence would be dangerous or futile); *Maryland v. Buie*, 494 U.S. 325, 334 (1990) (holding that police who have arrested a suspect in his home need articulable suspicion that another dangerous suspect may be present in order to justify a security "sweep" of the entire house).

165. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989); *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). Other cases rejecting a least-restrictive-alternative standard, and also involving highly routinized procedures, include *Illinois v. Lafayette*, 462 U.S. 640 (1983), and *Colorado v. Bertine*, 479 U.S. 367 (1987).

166. *United States v. Sokolow*, 490 U.S. 1 (1989); *United States v. Sharpe*, 470 U.S. 675, 687 (1985). Earlier cases had seemingly adopted a least-intrusive-means test or factor in *Terry* cases. See *United States v. Place*, 462 U.S. 696, 709 (1983); *Florida v. Royer*, 460 U.S. 491, 500 (1983).

167. Justice Souter implied a variety of standards for assessing when a police abuse would be frequent enough to merit intervention by the Court. He first stated that there is "a dearth of horrors demanding redress." *Atwater*, 532 U.S. at 353. Later he concluded that "surely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests." *Id.* Finally, he stated that "there simply is no evidence of widespread abuse of minor-offense arrest authority." *Id.* at 325 n.25.

168. *Id.* at 352.

169. *Id.* at 352-54.

170. *Id.* at 352.

law-enforcement officials” will minimize abuse of broad arrest powers.

Petitioner and her supporting amici were completely blind-sided by this argument. The Court has never before required a citizen to show that any one else’s rights have been similarly violated, let alone that the challenged government practice is “widespread” or of “epidemic” proportions. When Justice Souter raised this point at the oral argument, Petitioner’s counsel did his best to provide anecdotal evidence of similar minor-offense arrests,<sup>171</sup> and the petition for rehearing presented statistics suggesting that large numbers of such arrests do occur.<sup>172</sup> Such arrests seldom appear in reported cases because there is rarely any evidence to suppress in minor traffic stops, and where evidence is found, the case will not be charged and reported as a “traffic” offense.<sup>173</sup> Nor do many arrested traffic offenders have the time, resources, and stamina to pursue a civil damages action. But some reported cases can nevertheless be found,<sup>174</sup> and other evidence (in particular, data in recent studies of police-citizen contacts)<sup>175</sup> strongly suggests that arrests like Ms. Atwater’s have occurred with some frequency in recent years.

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171. See *id.* at 353 (“[C]ounsel . . . could offer only one [such case].”).

172. Petition for Rehearing at 1, 3-4, *Atwater* (No. 99-1408) (estimating over 250,000 annual arrests nationwide for “minor traffic” violations, based on data from California and Oregon).

173. Petition for Rehearing at 5, *Atwater* (No. 99-1408).

174. See ACLU Amicus Brief at 7-8, *Atwater* (No. 99-1408) (citing five pre-*Atwater* cases); see also Logan, *supra* note 64, at nn.80, 104, 106, 110, 125 & 129-32 (citing dozens of cases involving arrests for very minor violations). Minor-offense arrest cases reported after the *Atwater* decision (but involving arrests that took place before) include the following cases: *Arkansas v. Sullivan*, 532 U.S. 769 (2001) (discussing an arrest for speeding; defendant’s claim rejected, citing *Atwater*); *Lee v. Ferraro*, 284 F.3d 1188, 1196 (11th Cir. 2002) (holding that “[u]nder both *Atwater* and Florida law . . . a full custodial arrest is allowed when a misdemeanor has been committed”); *Williams v. Jaglowski*, 269 F.3d 778, 784 (7th Cir. 2001) (citing *Atwater* in support of an arrest of a police officer for violating a municipal code that prohibited members of the police department from failing to “perform any duty required of him by . . . the rules and regulations of the department”); *Price v. Roark*, 256 F.3d 364 (5th Cir. 2001) (discussing an arrest for lack of vehicle license tags; § 1983 claim dismissed, citing *Atwater*); *Irvine v. City of San Francisco*, No. C-00-01293 EDL, 2001 WL 967524 (N.D. Cal. July 12, 2001) (discussing an arrest on outstanding traffic warrant, resulting in overnight jail detention; § 1983 claim dismissed, citing *Atwater*); *Davenport v. Rodriguez*, 147 F. Supp. 2d 630 (S.D. Tex. 2001) (discussing a non-in-presence arrest for alleged shoplifting resulting in strip search at police station; § 1983 claim dismissed, citing *Atwater*); *People v. McKay*, 41 P.3d 59, 63-64 (Cal. 2002) (citing *Atwater* to support arrest for Defendant who was stopped by deputy sheriff for riding a bicycle the wrong way down a residential street); *Nicholson v. Texas*, No. 05-00-01401-CR, 2001 WL 515919 (Tex. App. May 16, 2001) (discussing an arrest for lack of valid registration sticker; defendant’s motion to suppress denied, citing *Atwater*).

175. See, e.g., Erica L. Schmitt et al., *Characteristics of Drivers Stopped By Police*, 1999 1, 12-13 (U.S. Dep’t of Justice 2002) (estimating that traffic stops in 1999 involved an estimated 19.3 million drivers; 1.3 million drivers had their person and/or vehicle searched, and 578,000 were arrested; no criminal evidence had been found on over four-fifths of arrested drivers). In addition, recent pretext cases and racial

Of course, the more important question is not how common these arrests have been in the past, but how common they will be in the future.<sup>176</sup> Prior to *Atwater*, the police had some reason to fear that arrests for very minor crimes, with no plausible need for custody, might be held invalid. But now that the Court has explicitly granted the police almost unlimited discretion in choosing between arrest and citation, there is every reason to believe that unnecessary, minor-offense arrests will become more common and that “search incident to citation” will become *much* more common.<sup>177</sup> Unless police supervisors strongly discourage such practices,<sup>178</sup> why wouldn’t officers employ them? As noted in the previous section, there are many personal and professional incentives to make unnecessary arrests and searches.

Because the Court in *Atwater* had no reliable statistical or qualitative evidence on the frequency of such arrests even in the past, let alone the probable frequency in the future, the Court should have issued a narrow ruling focused on the compelling facts of Ms. Atwater’s case, rather than seeking to craft a broader arrest rule with a correspondingly greater potential for unintended consequences.<sup>179</sup> At the very least, these problems of unknown and unknowable frequency of abuse should have entered into Justice Souter’s broad conception of “balancing” along with the value of bright-line rules. Finally, even if Justice Souter was correct in assuming that minor-crime arrests are rare, this means that the “cost” to law enforcement and the courts of regulating such arrests is likewise not very high. Yet for those unlucky citizens who are arrested, the intrusion will be great, and the perceived unfairness even greater.

None of Justice Souter’s specific reasons for assuming that arrests like Ms. Atwater’s have been or will be rare holds up under close scrutiny. The right to obtain prompt review of probable cause after a warrantless arrest will not benefit many suspects—such a review does

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profiling studies show that some officers are quite willing in minor-violation cases to use broad police powers for reasons other than those which justify the power. *See, e.g.,* *Arkansas v. Sullivan*, 532 U.S. 769 (2001); *Whren v. United States*, 517 U.S. 806 (1996); *see supra* note 13.

176. Supreme Court Oral Argument at 46, *Atwater* (No. 99-1408) (arguing for Petitioner that “perhaps more on point, if the conduct in this case is condoned, it will be much more likely to be a recurring problem”).

177. *See supra* note 19.

178. Actually, some law enforcement officials seem to want to actively encourage such arrests, at least in the context of anti-terrorism efforts. In a speech given on February 2, 2002, a U.S. Justice Department official stated that persons suspected of terrorist involvement should be arrested for even the most minor crimes (for example, spitting on the sidewalk). Anne Gearan, *U.S. Terror Tactics Detailed*, Associated Press, Feb. 1, 2002 (on file with the Fordham Law Review).

179. Sunstein, *supra* note 59, at 4-6, 46-48, 262. Sunstein argues that lack of information about a topic, and the risk of unintended consequences, are some of the strongest arguments for a narrow, “minimalist” decision. *See infra* Part IV for further discussion of Sunstein’s theory.



not prevent arrest, nor address the prior or continuing need for custody; moreover, since almost everyone violates some traffic rule, probable cause is virtually assured. And although arrested persons are often promptly brought before a magistrate, where they may request release, many are not; indeed, in most jurisdictions, indigent defendants remain in custody long *after* their first court appearance, without even seeing an attorney.<sup>180</sup> Some jurisdictions limit minor-offense arrests by statute or criminal rules, but many others do not. It is true that statutory regulation can go further than the federal constitution and need not be tied to any existing or proposed constitutional principle, but the minimal, articulable-need standard proposed by the dissent and in this article is easily justified by application of the Court's reasonableness balancing cases and draws on a suspicion standard that is well established not only in the stop and frisk cases, but also in several other contexts where it has been applied.<sup>181</sup> Finally, the Court's reliance on "good sense" and political accountability proves too much. If police self-regulation were an adequate safeguard, much of the protections recognized under the Fourth Amendment would not be necessary, nor would problems such as overcrowded jails and congested court dockets ever arise.<sup>182</sup>

In the end, the police respondents and their supporting amici in *Atwater* were saying: "Trust us; we'll use our broad arrest powers wisely and very selectively." This is not very reassuring to citizens who fear they or their friends and family will be subjected to racial profiling, or who simply happen to be among the unlucky few who get arrested. Indeed, the exceptional nature of these custody decisions, and the likelihood that they will most often involve young, poor, non-white suspects, virtually ensures lack of any effective political or administrative check.<sup>183</sup>

As a further safeguard, Justice Souter argued that, under his rule, arrests "conducted in an extraordinary manner, unusually harmful" to the citizen's privacy or physical interests, will remain subject to case-specific, constitutional scrutiny.<sup>184</sup> However, this novel distinction among arrests raises new line-drawing problems, which are discussed in the next section.

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180. See Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. Ill. L. Rev. 1, 4 (1998) ("In a majority of localities, the incarcerated indigent defendant will not see an attorney for days, weeks, or months following the bail decision.").

181. For further discussion, see *infra* note 400 and accompanying text.

182. Cf. Institute Amicus Brief at 3-17, *Atwater* (No. 99-1408) (describing jail crowding and other problems caused by unnecessary minor-offense arrests).

183. See *infra* Part IV.

184. *Atwater v. City of Lago Vista*, 532 U.S. 318, 352-53 (2001) (quoting *Whren v. United States*, 517 U.S. 806, 818 (1996)).

### 5. Balancing Is Generally Inapplicable When the Police Act with Probable Cause

In light of the arguments discussed above, Justice Souter adopted the following rule, applicable to all in-public arrests, for any offense, regardless of the circumstances:

[W]e confirm today what our prior cases have intimated: the standard of probable cause “applie[s] to all arrests, without the need to ‘balance’ the interests and circumstances involved in particular situations . . . [Officers acting with probable cause are] authorized . . . to make a custodial arrest without balancing costs and benefits or determining whether or not [the] arrest was in some sense necessary.”<sup>185</sup>

He added, however, that such case-specific reasonableness balancing is required where an arrest is made “in an extraordinary manner, unusually harmful to [the citizen’s] privacy or . . . physical interests.”<sup>186</sup> Turning to the *Atwater* facts, Justice Souter concluded that the Petitioner’s arrest, although “surely ‘humiliating’ . . . was no more ‘harmful to . . . privacy or . . . physical interests’ than the normal custodial arrest.”<sup>187</sup> It was therefore not sufficiently “extraordinary” when compared to the intrusions that the Court had previously found sufficient to justify case-specific reasonableness balancing, such as surgery to remove a bullet for evidence, police use of deadly force, and warrantless or no-knock entry into the home.<sup>188</sup>

Justice Souter relied on two prior cases to support his proposed limitation on balancing analysis. Both cases, however, are easily distinguishable from the facts and issues in *Atwater*. Moreover, the sweeping language that Justice Souter quoted from these two cases went far beyond the facts and issues presented in those cases.

In the first case, *Dunaway v. New York*,<sup>189</sup> the Court was actually *engaging* in balancing when it rejected the government’s argument that reasonable suspicion (the *Terry* standard) should suffice to justify

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185. *Id.* at 354 (quoting *Dunaway v. New York*, 442 U.S. 200, 208 (1979)).

186. *Id.* at 352-53 (quoting *Whren*, 517 U.S. at 818). Justice Souter also cited *Whren* with approval earlier in his opinion. *Id.* at 347 n.16. The Fifth Circuit en banc decision relied heavily on this language from *Whren*. See *supra* notes 29-30 and accompanying text.

187. *Atwater*, 532 U.S. at 354.

188. Justice Souter referred to *Wilson v. Arkansas*, 514 U.S. 927 (1995) (unannounced entry into the home); *Tennessee v. Garner*, 471 U.S. 1 (1985) (police use of deadly force to arrest); *Winston v. Lee*, 470 U.S. 753 (1985) (surgery under general anesthetic to remove a bullet for use as evidence); and *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (warrantless home entry in exigent circumstances). These were the same four cases cited by Justice Scalia in *Whren* and quoted by the Fifth Circuit en banc decision below. *Whren*, 517 U.S. at 818; see *Atwater v. City of Lago Vista*, 195 F.3d 242, 244-45, 253-54 (5th Cir. 1999) (en banc).

189. 442 U.S. 200 (1979).

transportation to the police station for questioning.<sup>190</sup> All the Court needed to say in *Dunaway*—and what it did say after the passage quoted by Justice Souter—is that the reasonable suspicion standard approved in the stop and frisk cases is a narrowly-tailored exception justified by the minimal intrusions involved, whereas the police actions in *Dunaway* were far more intrusive—functionally equivalent, in the Court’s view, to an arrest.<sup>191</sup> The Court thus had no need to broadly limit the scope of balancing analysis in order to reject the prosecution’s argument in *Dunaway*. Indeed, the Court was applying balancing when it concluded that the police action at issue was too intrusive to be justified on less than probable cause.

The second case relied on by Justice Souter was *Whren v. United States*.<sup>192</sup> As in *Dunaway*, the Court was presented with a rather weak reasonableness balancing argument (this time proposed by the defense)—that a pretextual investigative stop for a minor traffic violation, conducted by plain-clothed officers in unmarked cars, involves “a possibly unsettling show of authority” and “substantial anxiety,” yet only minimally advances public safety.<sup>193</sup> In *Whren*, the balancing analysis did not favor the citizen nearly as much as it did in *Atwater*, where the nature of the intrusion was far greater than a traffic stop, and the police lacked *any* legitimate law enforcement reason for the intrusion. As Justice O’Connor noted in her *Atwater* dissent, *Whren* did not even consider, let alone uphold, custodial arrests for fine-only offenses, and the court’s language should not be taken beyond the context there.<sup>194</sup> Moreover, the defendants in *Whren* were proposing a rule that would invalidate the initial stop, and hence the entire enforcement effort, based on actual or presumed pretextual motives. Ms. Atwater was not attacking decisions to enforce minor traffic laws, only the use of arrest in lieu of charging by citation, and her proposed rule was based on objective facts, not hidden police motives.

Another problem with Justice Souter’s reliance on the broad language of *Whren* lies in the proposed distinction between a “normal custodial arrest” and one that is made “in an extraordinary manner, unusually harmful” to privacy or physical interests.<sup>195</sup> These new, undefined boundaries undercut Justice Souter’s search for a simple, “readily administrable” arrest rule.<sup>196</sup> How intrusive must an arrest be in order to be deemed extraordinary? What if Ms. Atwater had been subjected to a much more thorough search at the scene and/or at the

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190. *Id.* at 211-12.

191. *Id.* at 212.

192. 517 U.S. 806 (1996).

193. *Id.* at 817 (quoting *Delaware v. Prouse*, 440 U.S. 648, 657 (1979)).

194. *Atwater v. City of Lago Vista*, 532 U.S. 318, 363 (2001) (O’Connor, J., dissenting).

195. *Id.* at 354.

196. *Id.* at 347.

station? Or if she was held in detention for much longer, or held in a crowded, dirty, and dangerous jail cell? Or suffered some combination of these additional hardships? A further problem lies in the Court's authority for this rule—it seems very doubtful that either the text of the Fourth Amendment or Founding-era history justifies the “extraordinary arrest” criterion. Indeed, no such textual or historical support was offered in either *Whren* or *Atwater*.

Furthermore, it is quite plausible to argue that Ms. Atwater's custodial arrest was, in a number of respects, an “extraordinary” intrusion.<sup>197</sup> It was highly disproportionate to the offense, and lacking in any law enforcement justification. It was also very unusual, as such offenders are almost always ticketed and released. Moreover, the Court's recognition of this broad arrest power and its correlated search powers, combined with the potential to apply these powers to virtually any driver on the road for pretextual or racially discriminatory reasons, creates an “extraordinary” potential for abuse.

Justice Souter and the other Justices in the majority might reply that Ms. Atwater's arrest, even with its various intrusive “incidents” and potential for abuse, was less “extraordinary” and “unusually harmful” than the intrusions at issue in the four prior cases, cited in *Whren* and *Atwater*, in which the Court permitted case-specific balancing despite the presence of probable cause.<sup>198</sup> Her arrest was clearly less onerous than the physical intrusions in these prior cases, which involved general-anesthetic surgery to remove a bullet, and deadly force to arrest.<sup>199</sup> And given the Court's long tradition of granting maximum Fourth Amendment protection to the home, a “normal” custodial arrest is arguably less “harmful” than a warrantless or no-knock home entry.<sup>200</sup>

But the Court's prior applications of balancing analysis despite the existence of probable cause are not limited to the four cases cited in *Whren*. In a number of cases, the Court has used balancing to *expand* the powers of the police when they are acting on probable cause.<sup>201</sup> Even more to the point, the Court's prior *limitations* of police powers, despite the presence of probable cause, have not always involved extraordinarily harmful physical or residential intrusions. In *Knowles*

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197. See *Atwater v. City of Lago Vista*, 165 F.3d 380, 388 (5th Cir. 1999) (stating that in all prior reported cases of custodial arrests for violation of Texas seat belt law, some additional conduct or factor justified arrest); *Atwater v. City of Lago Vista*, 195 F.3d 242, 251 n.3 (5th Cir. 1999) (en banc) (Wiener, J., dissenting) (finding that custodial arrest of Petitioner met dictionary definition of “extraordinary,” which includes “going beyond what is usual, regular, or customary”).

198. See *supra* note 188.

199. *Tennessee v. Garner*, 471 U.S. 1 (1985) (deadly force); *Winston v. Lee*, 470 U.S. 753 (1985) (bullet removal).

200. *Wilson v. Arkansas*, 514 U.S. 927 (1995) (no-knock entry); *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (warrantless entry).

201. See *infra* note 294 and accompanying text.

*v. Iowa*,<sup>202</sup> the Court unanimously refused to extend the “search-incident” doctrine to cases where the officer issued a citation in lieu of arrest, even though the officer in that case had probable cause, and was authorized under state law to make a custodial arrest. The Court was implicitly engaging in balancing analysis when it concluded that neither of the government interests supporting the search-incident doctrine, which included protecting officers from hidden weapons and seizing destructible evidence, provided a sufficient basis to justify the additional intrusion involved in such searches.<sup>203</sup>

Another example of the use of balancing analysis to limit police powers, despite probable cause, is *Graham v. Connor*,<sup>204</sup> a case not mentioned in *Whren* and only briefly noted in *Atwater*, but which was cited with approval in a post-*Atwater* case.<sup>205</sup> In *Graham*, the Court held that claims of excessive police force in the course of an arrest, investigative stop, or other seizure of a person<sup>206</sup> should be analyzed under the totality of the circumstances, “balancing . . . ‘the nature and quality of the intrusion’ . . . against the countervailing governmental interests at stake.”<sup>207</sup> Three factors were relevant to an assessment of such claims: “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”<sup>208</sup>

*Graham* is important not only because it shows a more flexible approach to the limits of balancing than the Court suggested in either *Whren* or *Atwater*, but also because, in a very real sense, Ms. Atwater was making an “excessive force” claim. Moreover, the three *Graham* factors, summarized above, all weighed heavily in her favor—the “force” involved in her custodial arrest, search, and jailing was excessive and unreasonable in light of the very low severity of her crime and the total lack of any evidence that she posed an immediate safety threat or was likely to attempt to flee.

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202. 525 U.S. 113 (1998); see *supra* notes 15-18 and accompanying text.

203. 525 U.S. at 117. The Court also engaged in balancing, despite an initial police determination of probable cause to arrest, in *County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 54-55 (1991) (holding that judicial review of probable cause must normally occur within 48 hours of warrantless arrest). For a further discussion of the Court’s presumptive 48-hour rule, see *infra* notes 214, 372-73 and accompanying text.

204. 490 U.S. 386 (1989); see also *Schmerber v. California*, 384 U.S. 757 (1966) (upholding warrantless seizure of defendant’s blood but seeming to require not only probable cause and exigent circumstances, but also proper, medically-supervised taking of the sample); Salken, *supra* note 34, at 260-61.

205. *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001).

206. Although the Court in *Graham* stated that the standard it announced would apply to all excessive-force claims, deadly or non-deadly, the more specific standards laid down in *Tennessee v. Garner*, 471 U.S. 1, 3, 11-12 (1985), presumably still also apply in deadly force cases. See *Graham*, 490 U.S. at 394-95.

207. *Graham*, 490 U.S. at 396 (quoting *Garner*, 471 U.S. at 8).

208. *Id.*

In neither *Atwater* nor *Whren* did the Court explain why it was necessary to strictly limit the application of reasonableness balancing analysis when the police act with probable cause. Such a general limitation finds very little support in the text of the Fourth Amendment.<sup>209</sup> In a warrantless arrest case like *Atwater*, the police action, even though supported by probable cause, is not justified by the Warrant Clause; such action is justified, if at all, by the Reasonableness Clause.

Nor is such an arbitrary limitation on the scope of balancing analysis necessary in order to provide the police and lower courts with a “readily-administrable” arrest rule. As several of the cases cited in *Whren* and *Atwater* illustrate, balancing can be used by the Court to decide that further limits are needed on certain intrusive police measures, but the Court can then provide simpler, “rule-like” standards to govern the use of such measures. Thus, in *Tennessee v. Garner*, the Court held that police may not use deadly force to arrest, unless “the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury” if not promptly arrested.<sup>210</sup> In *Wilson v. Arkansas* and *Richards v. Wisconsin*, the Court held that police may not make “no knock” entries of premises unless there is reasonable suspicion that knocking and announcing their presence would be dangerous or futile, or would result in destruction of evidence.<sup>211</sup> And in *Welsh v. Wisconsin*, the Court held that police may not make warrantless entries on exigent circumstances, such as the risk of losing crucial evidence, to arrest for a non-jailable offense.<sup>212</sup> Similarly, some of the Court’s most prominent applications of the reasonableness balancing approach to expand police powers in the absence of probable cause resulted in relatively simple, easily-applied procedures or standards: for example, the area “warrant procedure” upheld in *Camara v. Municipal Court of San Francisco*,<sup>213</sup> and the “articulable suspicion” standard adopted in *Terry v. Ohio*.<sup>214</sup> As these cases demonstrate, the use of

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209. See U.S. Const. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

210. *Garner*, 471 U.S. at 3.

211. *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995); *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997).

212. *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984).

213. 387 U.S. 523 (1967).

214. 392 U.S. 1 (1968). Other examples of cases using balancing analysis to justify additional police powers, but specifying fairly “rule-like” criteria for the exercise of those powers, include *Maryland v. Wilson*, 519 U.S. 408 (1997) (allowing police to order passengers to exit stopped vehicle); *Michigan v. Summers*, 452 U.S. 692 (1981) (allowing police to detain persons at scene without showing particular need for detention while search warrant is executed); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (allowing police power to routinely order driver of stopped car to exit the

reasonableness balancing to identify a police activity that merits further limitation or expansion does not mean that police and lower courts must be left with no guidance, or forced to perform complex interest-balancing in every case they confront. In *Atwater*, the Court could have used reasonableness balancing to invalidate the arrest, but then could—and should—have proposed a set of simpler rules to govern arrest decisions in minor traffic cases. These rules are discussed more fully in Part V.

Despite all of these criticisms, however, one cannot solely blame Justice Souter and the other Justices in the majority for their poorly-considered reliance on the *Whren* opinion and its proposed limits on further applications of reasonableness balancing. This was, after all, the principal basis for the Fifth Circuit en banc opinion below, yet Petitioner and her supporting amici devoted relatively little attention to these arguments.<sup>215</sup> This failure is all the more surprising given the signs, evident in numerous other recent opinions, that the Court was seeking to limit the further expansion of reasonableness balancing analysis. These broader trends are discussed in Part III.A.

### C. Summary

Justice Souter's reasons for refusing to place any constitutional limitations other than probable cause on in-public arrests are unconvincing. To some extent, this is because Petitioner and her supporting amici failed to address many of these issues adequately, and gave too much emphasis to inconclusive historical arguments. But the Court is surely familiar with the limitations of the briefs and arguments presented in its cases, and such limitations therefore seem an insufficient explanation for the majority's ruling.

So, what else were the Justices in the majority thinking? As discussed more fully in the next section, it appears that several of the Justices may have had other, broader concerns about the approach the Court should take in interpreting the Fourth Amendment. In particular, these Justices were concerned that further applications of the reasonableness balancing approach would, even if combined with

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vehicle). See also *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (adopting presumptive rule that warrantless probable cause to arrest must be judicially reviewed within forty-eight hours).

215. See Brief of Petitioners at 36-40, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408); Brief Amicus Curiae of the American Civil Liberties Union et al. at 13-14; Brief Amici Curiae of the National Association of Criminal Defense Lawyers et al. at 22; Brief of Amicus Curiae Texas Criminal Defense Lawyers Association at 2-3, 5-6; Supreme Court Oral Argument at 47 (final comments of Petitioner's counsel). The briefs on the other side gave more emphasis to the *Whren* dictum. See Brief of Respondents at 8-11; Brief for the United States as Amicus Curiae at 21-22; Brief Amici Curiae of State of Texas et al. at 5-9; Brief Amicus Curiae of the National League of Cities et al. at 8-9, 14-16; Supreme Court Oral Argument at 37, 44-45 (argument of counsel for State of Texas et al.).

adoption of relatively simple rules and standards to guide everyday police decisions, lead the Court and lower courts down a doctrinal “slippery slope,” threatening instability and undesirable change in well-settled areas of Fourth Amendment law.

### III. UNDERSTANDING *ATWATER* IN THE CONTEXT OF OTHER RECENT FOURTH AMENDMENT DECISIONS

The *Atwater* decision is not the only recent case in which the Court has rejected a persuasive argument based on reasonableness balancing. In several other cases the Court seems to have been looking for bright-line rules for *itself* (not just for the police) that would clearly limit further expansion of the balancing approach and maintain traditional citizens’ rights and police powers. Indeed, this tendency has been evident in the Court’s decisions since at least 1978.

The Court has stated many times that “reasonableness in all the circumstances” is the “touchstone” of Fourth Amendment analysis.<sup>216</sup> But if that is true, then reasonableness balancing becomes a possibility in every search and seizure case. The Court does not want to allow this broad principle, both for practical reasons and as a matter of substantive policy. The practical problems go beyond the desire to give the police rules that are easy to apply. As was pointed out above, simple decision rules and standards can be devised even if the Court has used balancing to decide that additional limitations (or expansions) of police power are appropriate in a given context.<sup>217</sup> Beyond the need for workable police-decision rules, the Court wants to maintain defensible doctrinal boundaries that tell lower courts, and the Supreme Court itself, which categories of cases are eligible for balancing analysis. From a substantive policy perspective, the Court wants to protect innocent citizens from further erosion of their rights, while also making sure that traditional police powers are not placed in doubt.

In other words, the Court has been concerned that further extensions of the balancing approach were leading it down a doctrinal slippery slope. Some hints of this concern may be found in Justice Souter’s opinion in *Atwater*. Justice Souter characterized the Petitioner’s argument as requiring the “development of a new and distinct body of constitutional law.”<sup>218</sup> He also alluded to broader doctrinal problems when he expressed his preference for non-constitutional solutions to the issues in *Atwater*: “It is of course easier

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216. See, e.g., *United States v. Knights*, 534 U.S. 112 (2001); *United States v. Ramirez*, 523 U.S. 65, 71 (1998); *Maryland v. Wilson*, 519 U.S. 408, 411 (1997); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Florida v. Jimeno*, 500 U.S. 248, 250 (1991); *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09, (1977) (per curiam); *United States v. Chadwick*, 433 U.S. 1, 9 (1977); *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

217. See *supra* notes 210-14 and accompanying text.

218. *Atwater v. City of Lago Vista*, 532 U.S. 318, 353-54 (2001).



to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle."<sup>219</sup>

Thus, the majority in *Atwater* may have feared that a ruling in the Petitioner's favor would encourage future defendants to challenge other very intrusive, unnecessary, and/or disproportionate searches and seizures where the police act on probable cause, for example, very thorough and/or destructive searches of cars, boats, and other vehicles (especially those with substantial living quarters),<sup>220</sup> exigent circumstances entries and searches to enforce offenses more serious than the fine-only violation at issue in *Welsh v. Wisconsin*,<sup>221</sup> public arrests for more serious crimes than were at issue in *Atwater*; and perhaps even some warrant-based arrests and searches in minor-crime cases.<sup>222</sup>

Section A below traces the Court's efforts over the past twenty-five years to avoid such slippery slope problems by adhering to traditional Fourth Amendment rules and limiting the application of reasonableness balancing. Section B then argues that this concern, even if valid, did not require the majority's ruling in *Atwater*.

#### *A. The Court's Search for "Bright-Line" Limits on Reasonableness Balancing*

Besides *Atwater*, two other cases decided in the October 2000 term rejected application of case-specific reasonableness balancing analysis and reached results that, like those in *Atwater*, were contrary to the outcome suggested by such balancing. In both cases, it appears that the Court was at least as concerned with avoiding a doctrinal slippery slope as it was with giving the police clear decision rules; indeed, the latter consideration was not mentioned in either case.<sup>223</sup>

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219. *Id.* at 352.

220. *Cf. California v. Carney*, 471 U.S. 386, 394 n.3 (1985) (permitting warrantless search of motor home found in a public parking lot, but leaving open the possibility that a warrant might be required if such a vehicle were "situated in a way or place that objectively indicates that it is being used as a residence."). *See infra* notes 330-31 and accompanying text.

221. 466 U.S. 740 (1984).

222. *See also* William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 Harv. L. Rev. 842, 869-76 (2001) (arguing that reasonableness balancing based on crime seriousness might provide a basis to invalidate racially-discriminatory traffic stops and racially-disparate drug law enforcement policies).

223. As was suggested above, the absence of discussion in these two cases of the need for bright-line decision rules might be explained by the Court's unstated (and unfounded) assumption that such rules are only appropriate when they grant over-broad police powers. *See supra* note 117 and accompanying text. An equally valid explanation, however, would be that the police activity at issue in these two cases (drug-interdiction roadblocks and drug-testing of pregnant women) was part of a

In *City of Indianapolis v. Edmond*,<sup>224</sup> decided one week before the oral arguments in *Atwater*, the Court struck down a suspicionless drug interdiction roadblock program, even though application of balancing analysis seemed to favor the state at least as strongly as it had in earlier balancing cases. The Court's 1990 ruling in *Michigan Dep't of State Police v. Sitz*,<sup>225</sup> upholding drunk-driver roadblocks, seemed particularly apposite: in *Sitz*, the "hit-rate" (arrests per stop) was less than two percent,<sup>226</sup> whereas it was nine percent in *Edmond*.<sup>227</sup> Moreover, drug trafficking would seem to be a more serious crime than drunk driving, at least if judged by the authorized penalties.<sup>228</sup> Indeed, Justice O'Connor expressed "no doubt that traffic in illegal narcotics creates social harms of the first magnitude," but she concluded that "[t]he same could be said of various other illegal activities, if only to a lesser degree. . . . [T]he gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose."<sup>229</sup> The majority in *Edmond*, which included two of the "swing" Justices in the *Atwater* majority, Justices Souter and Kennedy,<sup>230</sup> distinguished the roadblocks and other measures upheld in prior cases on the grounds that these measures were based on "special needs" other than criminal law enforcement (e.g., immediate public safety, in the case of drunk driver roadblocks),<sup>231</sup> whereas the "primary purpose" of the drug-interdiction roadblock in *Edmond* was "to detect evidence of ordinary criminal wrongdoing."<sup>232</sup> As discussed more fully below, this

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carefully-planned program, designed and supervised by high-level law enforcement officials. These cases did not involve "quick, ad hoc judgments" by low-level officers in the field. Cf. *United States v. Robinson*, 414 U.S. 218, 220-23 (1973).

224. 531 U.S. 32 (2000).

225. 496 U.S. 444 (1990).

226. *Id.* at 454-55 (resulting in two arrests out of 126 stops).

227. *Edmond*, 531 U.S. at 35.

228. See, e.g., Minn. Stat. Ann. § 152.021(3a) (2001) (listing maximum prison term for first offense of first degree controlled substance crimes as thirty years); *id.* § 169A.24(2) (listing maximum term for first degree drunk driving (fourth alcohol-related driving incident within ten years) as seven years); *id.* § 169.27(2) (punishing third-degree drunk driving as a misdemeanor); *id.* § 609.02(3) (listing maximum sentence for a misdemeanor as ninety days).

229. *Edmond*, 531 U.S. at 42.

230. Besides Justices O'Connor, Kennedy, and Souter, the other justices in the majority were Stevens, Ginsburg, and Breyer. Justices Rehnquist, Scalia, and Thomas dissented.

231. *Edmond*, 531 U.S. at 37-38. Besides *Sitz*, other prior "special needs" cases discussed and distinguished by the Court in *Edmond* included, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989); *New York v. Burger*, 482 U.S. 691 (1987); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Michigan v. Tyler*, 436 U.S. 499 (1978); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); and *Camara v. Mun. Court of San Francisco*, 387 U.S. 523 (1967).

232. *Edmond*, 531 U.S. at 38. The Court used a variety of other verbal formulations of the category of "primary" goals which do not permit balancing analysis, including the "general interest in crime control," "general crime control"

distinction may be somewhat arbitrary, but it does limit further erosion of citizens' rights and uncertainty about when the Court will engage in reasonableness balancing. As Justice O'Connor explained, "[w]ithout drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life."<sup>233</sup>

Later in the 2000-2001 term, and one month before *Atwater* was decided, the Court handed down another case in which it refused to apply a reasonableness balancing approach. In *Ferguson v. City of Charleston*,<sup>234</sup> the Court, citing *Edmond*, struck down the non-consensual, suspicionless drug testing of pregnant women by a public hospital.<sup>235</sup> As in *Edmond*, the Court held that balancing could not be used because the "primary purpose" of the testing program was to obtain and turn over to the police evidence of criminal conduct.<sup>236</sup> The lineup of justices in *Ferguson* was almost identical to that in *Edmond*,<sup>237</sup> and once again reasonableness balancing seemed to favor

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purposes, and the "ordinary enterprise of investigating crimes." *Id.* at 40, 41, 43-44, 47.

233. *Id.* at 42. Similarly, Justice O'Connor rejected the government's argument that drug-interdiction roadblocks, like the drunk-driver roadblocks upheld in *Sitz*, promote highway safety:

The detection and punishment of almost any criminal offense serves broadly the safety of the community, and our streets would no doubt be safer but for the scourge of illegal drugs. Only with respect to a smaller class of offenses, however, is society confronted with the type of immediate, vehicle-bound threat to life and limb that the sobriety checkpoint in *Sitz* was designed to eliminate.

*Id.* at 43. Justice O'Connor also rejected the government's argument that these drug interdiction roadblocks could be upheld based on the secondary purposes of detecting impaired drivers and checking licenses and registration, since the latter goals constitute recognized "special needs." *Id.* at 37. Justice O'Connor feared that acceptance of this argument would permit the police "to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check." *Id.* at 46; see also Laurence A. Benner et al., *Criminal Justice in the Supreme Court: An Analysis of United States Supreme Court Criminal and Habeas Corpus Decisions (October 2, 2000 - September 30, 2001)*, 38 Cal. W. L. Rev. 87, 95 (2001) (stating that the Court in *Edmond* (and in *Ferguson*, discussed *infra* notes 238-45 and accompanying text) "was confronted with the logical consequences of its own prior decisions that had departed from the individualized suspicion standard." Police had sought to maximize their powers under these decisions, and "the Court attempted to halt the hemorrhaging" of Fourth Amendment rights).

234. 532 U.S. 67 (2001).

235. Although the testing program was said to be designed for patients "suspected of drug abuse," the criteria for selection were broad and the Court assumed that probable cause, and even reasonable suspicion of drug use, were lacking. *Id.* at 71, 76.

236. *Id.* at 84.

237. Justice Souter was in the majority, and Justice Kennedy's concurring opinion, while not accepting all of the majority's reasoning, agreed that the fatal defect was the "substantial law enforcement involvement in the [drug testing] policy from its inception." *Id.* at 88.

the government.<sup>238</sup> The harm to the fetus caused by the maternal use of cocaine, as well as the substantial public and private costs of treating such harm, would seem to be very important government interests,<sup>239</sup> and the intrusion on privacy, although greater than in previous drug testing programs upheld by the Court,<sup>240</sup> was not substantial. The testing in *Ferguson* was based on urine samples taken from hospital patients<sup>241</sup> who presumably were accustomed to having such samples taken and analyzed.

Nevertheless, the Court refused to engage in balancing, citing the narrow definition of the “special needs” doctrine adopted in *Edmond*.<sup>242</sup> Once again, the Court appeared to be concerned with avoiding a doctrinal slippery slope. The government had argued that its ultimate purposes were to get the women into treatment and off drugs, and thus to protect the health of the mother and child.<sup>243</sup> But the Court rejected this characterization of the program, focusing instead on the immediate objective of obtaining evidence for law enforcement purposes:

Because law enforcement involvement always serves some broader social purpose or objective, under respondents’ view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate purpose . . . [T]his case simply does not fit within the closely guarded category of “special needs.”<sup>244</sup>

The doctrinal-bright-line, slippery-slope-avoiding nature of the Court’s ruling in *Ferguson* was underscored by the minimal degree to which arrest and prosecution were actually used in the program invalidated by the Court—of the 253 women who tested positive for drug use, only 30 were arrested, and only two were prosecuted.<sup>245</sup>

Thus, *Edmond* and *Ferguson* rejected balancing in support of expanded police power, while *Atwater* and *Whren* rejected balancing

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238. This was the basis for the lower court’s ruling, upholding the testing program. *Ferguson v. City of Charleston*, 186 F.3d 469, 479 (4th Cir. 1999).

239. Justice Stevens, writing for the majority, agreed that drug abuse is “a serious problem.” *Ferguson*, 532 U.S. at 86. On the other hand, he also argued that such testing programs are counterproductive because they discourage drug users from seeking prenatal care. *Id.* at 84 n.23.

240. Under the program at issue in *Ferguson*, the test results were disseminated to third parties (the police). In prior drug testing cases, the test results were designed to be used primarily or exclusively for internal (school or employer) purposes. *Id.* at 78.

241. *Id.* at 70.

242. *Id.* at 81 n.15.

243. *Id.* at 82-83.

244. *Id.* at 84. In contrast, the student drug-testing program subsequently upheld in *Bd. of Educ. v. Earls*, 122 S. Ct. 2559 (2002), involved a classic “special needs” situation (allowing the search of students by school authorities for school purposes only).

245. *Ferguson*, 532 U.S. at 103 (Scalia, J., dissenting).

in support of reduced police power and expanded rights of suspects.<sup>246</sup> In all of these cases, the Court seemed intent on ruling out further application of balancing analysis—even in cases like *Atwater*, *Edmond*, and arguably *Ferguson*, where the balance seemed to clearly favor one side over the other. The Court sought to draw a line in the sand—this far with balancing, and no farther. The slippery slope problem was explicitly recognized in *Edmond* and *Ferguson*,<sup>247</sup> and was implicit in the Court’s rejection of balancing in *Whren* and *Atwater*. This broader doctrinal concern makes more sense than the other reasons cited by the Court in *Atwater*,<sup>248</sup> and helps to explain the otherwise puzzling distinction, in *Edmond* and *Ferguson*, between criminal law enforcement and other government purposes. Why should the police have less power to investigate serious crimes than to enforce administrative regulations?<sup>249</sup>

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246. Based on *Atwater*, *Edmond*, *Ferguson*, and *Kyllo v. United States* (discussed *infra*), Professor Craig Bradley has proposed the following theory to explain the Court’s Fourth Amendment decisions since Justice Breyer’s appointment in 1994: the Court rules in favor of the police when they have probable cause, while resisting interferences with “(legally) innocent civilians.” Craig M. Bradley, *The Court’s New Approach to the Fourth Amendment*, Trial, Feb. 2002, at 82. The theory I am proposing is consistent with Bradley’s, but goes further. My theory identifies the rejection of reasonableness balancing as a common theme in the cases Bradley discusses, and also in cases decided as early as 1978 (discussed *infra*). I also point out language in the Court’s opinions, suggesting its slippery slope concerns. My theory helps to explain the pattern of case outcomes identified by Bradley. If balancing cannot be invoked, then courts must fall back on traditional doctrinal categories: no individualized suspicion means no search or seizure (absent “special needs,” narrowly defined); probable cause means that the police retain substantial, unregulated search and seizure powers.

247. See *supra* notes 233, 244-45 and accompanying text.

248. See *supra* Part II.

249. Although the “non-criminal-law purpose” rationale was foreshadowed in prior cases it was not consistently applied and was never even clearly stated prior to *Edmond*. In the original balancing case, *Camara v. Mun. Court of San Francisco*, 387 U.S. 523 (1967), the Court indicated that one of the factors supporting the reasonableness of housing code inspections is the fact that they are not “aimed at the discovery of evidence of crime.” *Id.* at 537; *supra* text accompanying note 80. One year later, in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court extended the application of balancing analysis to government actions that were aimed more at prevention than evidence-gathering. However, the activity sought to be prevented by the stop and frisk in *Terry* (“casing” a store for an armed robbery) seemingly involved “ordinary criminal wrongdoing.” *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000), and there was also very “substantial” (indeed, exclusive) “law enforcement involvement” *Ferguson*, 532 U.S. at 99-102 (Scalia, J., dissenting). Several subsequent cases also upheld the application of balancing analysis despite heavy involvement of law enforcement personnel acting with a major, if not primary, goal of obtaining evidence for criminal prosecution. In *New York v. Burger*, 482 U.S. 691 (1987), the Court upheld the warrantless search of an automobile junkyard by plainclothes police officers whose sole apparent motive at the time of the search was to uncover evidence of criminal acts. *Id.* at 724-28 (Brennan, J., dissenting). In *Michigan Dep’t of Police v. Sitz*, 496 U.S. 444 (1990), the drunk-driving roadblocks at issue involved substantial “criminal law” goals and attributes—they were set up and operated by the police and were expected to result in arrest and criminal prosecution. Moreover, the Court in

Two other cases decided in the October 2000 term also reflected the Court's desire to reinforce traditional doctrinal boundaries and limit the application of reasonableness balancing analysis. In *Arkansas v. Sullivan*,<sup>250</sup> the Court reaffirmed and extended its decision in *Whren* (and thus, *Whren's* rejection of reasonableness balancing) by upholding a custodial arrest and a search of the defendant's car incident to that arrest, arising out of speeding and minor equipment violations. The state court in *Sullivan* specifically found that the arrest was pretextual (based on suspicion of narcotics dealing).<sup>251</sup> According to the Supreme Court's short, unsigned opinion, "[t]hat *Whren* involved a traffic stop, rather than a custodial arrest, is of no particular moment."<sup>252</sup> Nor did it seem to matter that the pretextual police motives in *Whren* were only assumed, not proven.<sup>253</sup> The Court seemed to be saying that probable cause is all that matters and that it will consider neither the degree of the intrusion nor the blatantness of the pretext, because such a fine-grained approach would give neither the police nor the courts any clear and defensible boundaries for police powers or the application of reasonableness balancing.

Later the same term, in *Kyllo v. United States*,<sup>254</sup> the Court invalidated the warrantless use of a thermal imaging device used to detect degrees of heat escaping from different rooms in an apartment. This case involved the question of whether any "search" had occurred, rather than the reasonableness of the search, but the Court was likely implicitly rejecting balancing as a way of upholding the search. Although the latter issue was not addressed, it would not make much sense for the Court to invalidate the use of thermal imaging in *Kyllo* and then, in a later case, hold that the very same warrantless intrusion could be upheld under a balancing approach.<sup>255</sup>

In any case, the Court's actual holding in *Kyllo*, that a "search" did occur, resembles the *Atwater* decision. In both cases, the Court refused to take into account the triviality of the case-specific interests at stake. Justice Scalia, writing for the majority in *Kyllo* (which included Justice Souter, but not Justice Kennedy), argued that the Fourth Amendment "draws 'a firm line at the entrance of the

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*Sitz* specifically rejected Respondents' argument that the reasonableness balancing approach is limited to contexts presenting a "special need" beyond criminal law enforcement. *See id.* at 450.

250. 532 U.S. 769 (2001) (per curiam).

251. *Id.* at 770.

252. *Id.* at 772.

253. The defendants in *Whren* argued not that the officers' motivations were actually pretextual, but that they *probably* were. They claimed that a "reasonable officer in the same circumstances would not have made the stop for the reasons given." 517 U.S. 806, 814 (1996).

254. 533 U.S. 27 (2001).

255. Such a balancing rationale would also seem to be precluded by the Court's decisions in *Arizona v. Hicks*, 480 U.S. 321 (1987), and *Minnesota v. Dickerson*, 508 U.S. 366 (1993), discussed *infra* notes 277-78, 282-84 and accompanying text.

house,' . . . [which] must be not only firm but also bright."<sup>256</sup> Accordingly, the Court held that the warrant requirement applies to any sense-enhancing surveillance technology not in general public use that reveals any information—even non-intimate information like the heat escaping from Mr. *Kyllo's* apartment—regarding the interior of a home that police could not otherwise obtain without entering the home.<sup>257</sup> As in *Atwater*, the Court acknowledged that the actual facts in *Kyllo* might call for a different result: "[I]t is certainly possible to conclude . . . in this case that no 'significant' compromise of the homeowner's privacy has occurred."<sup>258</sup> But the majority concluded that in the home, "all details are intimate details"<sup>259</sup> and that any standard requiring assessment of degrees of intimacy would be impractical in application by failing to provide police with a clear and workable decision rule, and requiring the Court to "develop a jurisprudence specifying which home activities are 'intimate' and which are not."<sup>260</sup> Moreover, a ruling in favor of the government would

[P]ermit police technology to erode the privacy guaranteed by the Fourth Amendment . . . [and] would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development.<sup>261</sup>

Thus, the Court was trying to provide a bright line not only for the police but also for the courts, governing both current and future technologies, and without the need to define the exact point at which information about conditions or activities inside the home raises sufficient privacy concerns to require Fourth Amendment protection.<sup>262</sup>

The Court's five decisions in the 2000-2001 term, curtailing reasonableness balancing and reaffirming traditional doctrinal boundaries, were actually a continuation of a tendency which began many years before. In some of these earlier cases the Court expressly stated its concern to avoid a doctrinal slippery slope; in other cases, this concern was strongly implied. The first category (expressing

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256. 533 U.S. at 40 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

257. *Id.* at 35.

258. *Id.* at 40.

259. *Id.* at 37 (emphasis in original).

260. *Id.* at 38-39.

261. *Id.* at 34, 36.

262. See also *Bond v. United States*, 529 U.S. 334 (2000) (adopting, like *Kyllo*, a bright-line, "a search is a search" rule, notwithstanding the very minor nature of the intrusion, which involved a law enforcement officer who had physically manipulated the soft-sided bag that the defendant carried onto a cross-country bus and placed in the luggage rack above his seat).

concern) includes *Florida v. J.L.*,<sup>263</sup> decided one year before *Atwater*; *Richards v. Wisconsin*, a 1997 case,<sup>264</sup> and *Mincey v. Arizona*,<sup>265</sup> decided in 1978.

In *Florida v. J.L.*, the Court held that the special danger of gun violence did not permit a stop and frisk based on an anonymous tip that failed to meet normal suspicion standards. The case involved a tip that a “young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun.”<sup>266</sup> The police found a person of that description at that location, frisked him, and found a gun.<sup>267</sup> The Court acknowledged the “serious threat that armed criminals pose to public safety,”<sup>268</sup> but feared that it would be difficult to limit such a rule to firearms, given the strong public interest in stopping and searching other suspects: for example, those carrying large amounts of drugs (many of whom are also carrying guns).<sup>269</sup> The Court pointed to its decision in *Richards v. Wisconsin*,<sup>270</sup> declining to approve a state court rule permitting “no-knock” entries in all felony drug cases: “[T]he reasons for creating an exception in one category [of Fourth Amendment cases] can, relatively easily, be applied to others.”<sup>271</sup> Although the Court in *J.L.* did not rule out the possibility of allowing stops and frisks based on minimal tips in cases of imminent public danger (e.g., a report that a person is carrying a bomb) and/or in contexts where privacy expectations are diminished (e.g., in airports or schools),<sup>272</sup> the Court was clearly unwilling to give broad approval to such a balancing approach in *Terry* cases.

The Court expressed similar slippery slope concerns in *Mincey v. Arizona*,<sup>273</sup> in which it declined to approve a “murder scene” exception to the warrant requirement. The Court acknowledged the very serious nature of this offense, but noted that

[T]he public interest in the investigation of other serious crimes is comparable. If the warrantless search of a homicide scene is reasonable, why not the warrantless search of the scene of a rape, a

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263. 529 U.S. 266 (2000).

264. 520 U.S. 385 (1997).

265. 437 U.S. 385 (1978).

266. *J.L.*, 529 U.S. at 268.

267. *Id.* at 272. The Court distinguished *Alabama v. White*, 496 U.S. 325 (1990), which permitted a stop based on an anonymous tip that accurately predicted the suspect’s future movements, and noted that the Court regarded even that case as “borderline” and “close.” *J.L.*, 529 U.S. at 270-71.

268. *J.L.*, 529 U.S. at 272.

269. *Id.* at 273.

270. 520 U.S. 385 (1997).

271. *J.L.*, 529 U.S. at 273. Besides the doctrinal slippery slope problem, the Court in *J.L.* was also concerned that any “automatic firearm exception to our established reliability analysis . . . would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call.” *Id.* at 272.

272. *Id.* at 273-74.

273. 437 U.S. 385 (1978).



robbery, or a burglary? “No consideration relevant to the Fourth Amendment suggests any point of rational limitation” of such a doctrine.<sup>274</sup>

The Court therefore “decline[d] to hold that the seriousness of the offense under investigation itself creates exigent circumstances” justifying a warrantless search.<sup>275</sup>

In all three of these cases, the Court expressed slippery slope concerns, and also implicitly rejected the application of the reasonableness balancing approach by refusing to accord great weight to the seriousness of the crime and/or inherent exigencies of enforcement. In none of these cases did the Court base its decision on the need to provide the police with clear decision rules; indeed, in two of these cases, *Richards* and *Mincey*, the Court rejected proposed bright-line rules that would have made police decisions much simpler in the category of cases covered by the rule.<sup>276</sup> The uncertainties that concerned the Court in these three cases related to the implications of any such rule for *other* types of cases not yet before the Court. These uncertainties would be a problem for the courts, as well as the police. If the Court recognized expanded police power based on crime seriousness or inherent exigencies, consideration of these factors would present difficult line-drawing problems in future cases, and would threaten steady erosion of citizens’ rights.

Other cases in recent decades have also reflected slippery slope concerns, albeit implicitly. In two cases decided in 1987 and 1993, the Court refused to permit minor intrusions for evidence-gathering purposes, based on reasonable suspicion, even though such police measures could easily have been justified by the logic of the reasonableness balancing test applied in *Camara* and *Terry*—measures that are much less intrusive than ordinary searches and seizures require a lower degree of suspicion.

In *Arizona v. Hicks*, the police lawfully entered the defendant’s apartment, observed an expensive stereo turntable that seemed out of place in the “ill-appointed” four-room flat, and turned it over to record the serial number and see if it had been reported stolen.<sup>277</sup> The Court held that this relatively minor intrusion was not permitted unless the police already had probable cause to believe the turntable was stolen. As Justice Scalia, writing for the majority, put it,

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274. *Id.* at 393.

275. *Id.* at 394. *Mincey* was re-affirmed in *Thompson v. Louisiana*, 469 U.S. 17 (1984) and again in *Flippo v. West Virginia*, 528 U.S. 11 (1999).

276. In *Richards v. Wisconsin*, 520 U.S. 385, 395 (1997), the Court rejected a lower court ruling that a no-knock entry is *per se* reasonable in all felony drug cases. In *Mincey*, 437 U.S. at 395, the Court declined to approve a “murder scene exception” under which exigent circumstances, permitting warrantless entry and re-entry of homicide premises, would be presumed to exist.

277. *Arizona v. Hicks*, 480 U.S. 321, 323 (1987).

[A] search is a search, even if it happens to disclose nothing but the bottom of a turntable. . . . We are unwilling to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a “plain-view” inspection nor yet a “full-blown” search. Nothing in the prior opinions of this Court supports such a distinction.<sup>278</sup>

As noted above, however, *Terry v. Ohio* supported precisely this distinction.<sup>279</sup> Moreover, in another line of cases, the Court upheld temporary detentions of mail or luggage, on reasonable suspicion, to permit further investigation and/or application for a search warrant.<sup>280</sup> In the latter cases, as in *Terry*, the courts justified expanded police powers under a reasonableness balancing analysis—a minor intrusion can be justified by a degree of suspicion less than probable cause. Thus, it seems that in *Hicks* the Court was concerned that further extension of the scope of reasonableness balancing would cause uncertainty and litigation. The Court therefore drew a questionable distinction between minimal detentions (in all of the prior cases mentioned above) and the minimal search in *Hicks*, with a further distinction between searches for weapons (*Terry*) and searches for evidence (*Hicks*).<sup>281</sup>

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278. *Id.* at 325, 328-29.

279. *See supra*, notes 84-86 and accompanying text. Subsequent cases, expanding the application and scope of police powers under *Terry*, were based on a similar “minor intrusion” rationale. *See, e.g.*, *United States v. Hensley*, 469 U.S. 221 (1985) (involving a stop to investigate completed felony offense); *Michigan v. Long*, 463 U.S. 1032 (1983) (involving a weapons “frisk” of vehicle after suspect gets out); *Michigan v. Summers*, 452 U.S. 692 (1981) (involving a suspicionless detention of persons during search warrant execution); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (involving a suspicionless order to exit stopped vehicle); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (involving a stop to investigate non-violent immigration violations).

280. *See United States v. Place*, 462 U.S. 696, 703-10 (1983) (stating in dicta that detention of luggage to permit further investigation would be permissible in some cases; actual detention was invalidated because unreasonably conducted); *United States v. van Leeuwen*, 397 U.S. 249 (1970) (upholding detention while police gathered enough evidence to obtain a search warrant).

281. However, the Court’s decision in *New York v. Class*, 475 U.S. 106 (1986), is more difficult to reconcile with *Hicks*. In *Class*, the Court upheld a brief entry and search of defendant’s car in order to uncover the vehicle identification number (“VIN”) which had been covered by papers lying on the dashboard. Thus *Class*, like *Hicks*, involved a limited search for evidence, not a detention or a search for weapons. Justice O’Connor’s opinion for the majority viewed the VIN as “a significant thread in the web of regulation of the automobile,” and argued that “[a] motorist must surely expect that such regulation will on occasion require the State to determine the VIN. . . . [T]he individual’s reasonable expectation of privacy in the VIN is thereby diminished.” *Id.* at 111, 113. The Court did not, however, hold that no “search” had occurred; instead, it held that the search was reasonable. Therefore, the inconsistency between *Class* and *Hicks* remains. Perhaps the ruling in *Class* could have been justified by the theory that the defendant was *legally obligated* to keep the VIN uncovered, and that by obscuring the VIN the defendant forfeited any objection to the officer’s actions (or gave implied consent to them).

Six years later, in *Minnesota v. Dickerson*,<sup>282</sup> the Court again refused to broaden the scope of reasonableness balancing and held that frisks under *Terry v. Ohio* are strictly limited to finding weapons and cannot be extended to a general search for evidence or drugs based solely on reasonable suspicion. The frisking officer in that case felt a small, hard object that he knew was not a weapon, but that he thought might be (and was) crack cocaine.<sup>283</sup> The Court held that further squeezing and prodding of the object to ascertain its nature was a full “search” requiring probable cause.<sup>284</sup>

Although most of these earlier cases involved attempts to expand police powers based on balancing analysis, several cases implicitly rejected balancing arguments designed to limit police powers. In the 1978 case of *Zurcher v. Stanford Daily*,<sup>285</sup> the Court upheld the search of the offices of a student newspaper for evidence of the identity of persons who took part in a violent protest that the paper had reported. The paper and its employees were not suspected of any wrongdoing, but the Court rejected the argument that First Amendment concerns and/or the greater rights of innocent third parties justified special limits on such searches beyond normal probable cause and warrant requirements.<sup>286</sup> As in *Richards* and *Mincey*, the Court did not seem concerned that the consideration of such case-specific factors would make the law too uncertain for the police to follow; indeed, the Court in *Zurcher* actually rejected a relatively “bright-line” rule that the lower court had adopted.<sup>287</sup> Another case in which the Court refused to adopt special rules based on First Amendment concerns was *New York v. P.J. Video*,<sup>288</sup> where the Court held that a warrant to seize allegedly pornographic videotapes was supported by probable cause. The Court noted that the First Amendment imposes certain limits on content-based seizures,<sup>289</sup> but declined to hold that the Fourth Amendment requires a higher-than-normal standard of probable cause in this context.<sup>290</sup>

In all of these cases, the Court seemed to fear that the application of the reasonableness balancing approach would inevitably lead to requests for balancing in a host of other cases, thus threatening the rights of citizens or traditional police powers, while also raising

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282. 508 U.S. 366 (1993).

283. *Id.* at 377.

284. *Id.* at 378.

285. 436 U.S. 547 (1978).

286. *Id.* at 553-54.

287. *Id.* at 552 (rejecting lower court's holding that a warrant to search premises of a non-suspect required probable cause to believe that the materials could not be obtained by subpoena, and also rejecting that court's holding that search of a newspaper required a clear showing that important materials would be destroyed or moved unless seized with a warrant).

288. 475 U.S. 868 (1986).

289. *Id.* at 873-74 (citing cases).

290. *Id.* at 874-75.

difficult line-drawing problems for the courts. Examples of pro-citizen rulings of this type, invalidating searches of persons or property that might have easily been upheld on a balancing approach, include *Edmond*, *Ferguson*, *J.L.*, *Richards*, *Mincey*, *Hicks*, and *Dickerson*. Examples of pro-police rulings upholding law enforcement actions that would or might be invalidated under a balancing approach include *Atwater*, *Sullivan*, *Whren*, *Zurcher*, and *P.J. Video*. Although these decisions reflect shifting majorities and changes in the court's personnel, Justices Souter and Kennedy have been quite consistent. Justice Souter was in the majority on all of the cases decided after he joined the Court; Justice Kennedy was in the majority (or strongly concurred with the majority) in all of the cases he sat on except *Kyllo*. Neither Justice was on the Court when it decided *Zurcher*, *Mincey*, *P.J. Video*, and *Hicks*.

In many of these cases, the Court explicitly stated its concerns about slippery slope problems; in other cases, such concerns seem implicit in the Court's decision. *Atwater* falls into the latter category. As was suggested at the outset of this section, the Court may have feared that a ruling in Petitioner's favor would make it difficult to rule against similar claims in related Fourth Amendment areas, including some warrantless vehicle and exigent circumstances searches, arrests for more serious crimes, and perhaps even some warrant-based arrests and searches in minor-crime cases.

However, as discussed more fully in the next section, the Court could have ruled in Ms. Atwater's favor by making a very limited extension of the applicability of balancing, or perhaps none at all. Moreover, there were very good reasons to apply balancing in *Atwater*, reasons that do not apply to the other police powers listed above.

#### B. *Atwater Required Little if Any Extension of the Application of Reasonableness Balancing*

Even if the Court's concerns about slippery slope problems were understandable, the decision in *Atwater* was unnecessary and unwise. Ruling in Ms. Atwater's favor would not have led the Court onto, or farther down, a doctrinal slippery slope requiring balancing in every Fourth Amendment case.

To begin with, it must be recognized that the Court has not been very consistent in its rejection of balancing. Balancing analysis has been used to justify expanded or contracted search and seizure powers in at least five contexts: 1) to uphold measures based on administrative or regulatory "special needs" unrelated to criminal law enforcement;<sup>291</sup> 2) to invalidate various "extraordinary" bodily or

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291. See *supra* notes 224-49 and accompanying text.

domicile intrusions;<sup>292</sup> 3) to uphold measures with very substantial police involvement and criminal law enforcement goals, such as stop and frisk;<sup>293</sup> 4) to grant the police additional powers when they execute a search warrant or carry out certain other searches and seizures based on probable cause;<sup>294</sup> and 5) to assess claims that excessive force was used in making an arrest.<sup>295</sup> Clearly, the Court makes exceptions and extends the application of reasonableness balancing when it feels it has a good reason to do so.

In *Atwater*, there were very good reasons to apply reasonableness balancing. The balance of private and public interests tilted very strongly in Ms. Atwater's favor—her custodial arrest, with its associated searches, processing, and detention, was a major intrusion with serious implications for liberty, personal safety, privacy, reputation, and property. Yet the governmental interests supporting this intrusion were minimal or non-existent, given the legislative classification of the offense as non-jailable and the absence of any need to take Ms. Atwater into custody. Furthermore, the Court's refusal to apply balancing to invalidate arrests such as Ms. Atwater's has created a serious potential for abuse, particularly in light of prior decisions recognizing overbroad police powers (e.g., in connection with inventories and searches incident to arrest), adopting purely objective standards (e.g., the plain view and pretext cases), and making it difficult to successfully raise claims of discriminatory enforcement.<sup>296</sup> In deciding whether to apply reasonableness

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292. See, e.g., *Wilson v. Arkansas*, 514 U.S. 927 (1995); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Winston v. Lee*, 470 U.S. 753 (1985); *Welsh v. Wisconsin*, 466 U.S. 740 (1984); see *supra* notes 177, 185-86 and accompanying text.

293. *Terry v. Ohio*, 392 U.S. 1 (1968). Other examples of the use of balancing despite the substantial involvement of police personnel seeking to enforce criminal penalties include *New York v. Burger*, 482 U.S. 691 (1987), *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), *United States v. Place*, 462 U.S. 696 (1983), *United States v. van Leeuwen*, 397 U.S. 249 (1970), and *United States v. Knights*, 534 U.S. 112 (2001).

294. *Illinois v. McArthur*, 531 U.S. 326 (2001) (granting police power to prevent resident from re-entering his home unaccompanied, pending arrival of search warrant); *Wyoming v. Houghton*, 526 U.S. 295 (1999) (extending scope of *Carroll* vehicle searches to purse belonging to non-suspect); *Maryland v. Wilson*, 519 U.S. 408 (1997) (extending *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), to passengers); *Maryland v. Buie*, 494 U.S. 325 (1990) (permitting limited "protective sweep" of premises where an arrest has been made to look for other persons who may pose a danger to officers); *Michigan v. Summers*, 452 U.S. 692 (1981) (permitting detention of occupants of premises, while search warrant is executed); *Mimms*, 434 U.S. 106 (allowing routine ordering of driver to exit stopped vehicle). Although the police in both *Mimms* and *Wilson* had probable cause to believe a traffic violation had occurred, the added police power recognized in these cases also apparently applies when a vehicle is stopped based on articulable suspicion. See Dressler, *supra* note 21, § 18.04[C][2]; LaFave, *supra* note 21, § 3.8(e).

295. *Graham v. Connor*, 490 U.S. 386 (1989); see *supra* notes 204-08 and accompanying text.

296. See *supra* notes 8-14 and accompanying text.

balancing to a new area of police activity, the Court should carefully consider the cumulative impact of its prior decisions governing related police powers, and not casually pile new overbroad pro-police rules on top of old ones.<sup>297</sup>

Moreover, Ms. Atwater's case could have been decided in her favor with little or no further extension of the reasonableness balancing approach. As was argued in Part II,<sup>298</sup> Ms. Atwater's arrest was "extraordinary" in a number of respects, including the disproportionality to her offense, the absence of government need, the highly unusual police response, and the high potential for abuse. Thus, her arrest fit within the exception recognized by the Court in *Whren* and permitted balancing despite the presence of probable cause. Indeed, in *Graham v. Connor*,<sup>299</sup> a case not cited by the Court in *Whren* and only briefly mentioned in *Atwater*, the Court applied reasonableness balancing to a broad category of cases involving claims of excessive police force in the course of an arrest, investigatory detention, or other seizure of the person, many of which involved intrusions no more "extraordinary" or "unusually harmful" than custodial arrest and its accompanying searches, jailing, and other detrimental effects. Finally, there were two additional grounds for relief in *Atwater*—proportionality and equality—that the Court could have relied on in lieu of or in combination with reasonableness balancing.

#### 1. Fourth Amendment Proportionality

Given the extremely minor nature of Ms. Atwater's offense—a nonjailable traffic violation—basic principles of proportionality dictate a finding of unreasonableness. Justice O'Connor, at several points in her dissenting opinion, lamented the disproportionality of Ms. Atwater's arrest relative to the very minor nature of her traffic violations.<sup>300</sup> Although a Fourth Amendment proportionality

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297. See *supra* note 118 and accompanying text.

298. See *supra* note 197 and accompanying text.

299. 490 U.S. 386 (1989); see *supra* text accompanying notes 206-08, 295.

300. *Atwater v. City of Lago Vista*, 532 U.S. 318, 364, 372 (2001). Justice O'Connor also complained that the lack of any good reason to take Ms. Atwater into custody likewise made her arrest disproportionate. *Id.* at 371. This alternative meaning of "proportionality"—focusing not on the seriousness of the offense, but rather on the government's specific needs and the availability of equally effective, less intrusive measures—is more akin to reasonableness balancing analysis than to proportionality *per se*. See *infra* note 304 and accompanying text. Such weighing of government needs and available measures finds counterparts in many areas of American law, including the requirements of narrowly-tailored regulation of speech, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of New York*, 447 U.S. 557, 564-66 (1980), "strict scrutiny" of certain classifications under the Equal Protection clauses, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280, 283-84 (1986), evaluation of state regulations burdening interstate commerce, *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 670-71 (1981), evaluation of federal legislation

principle has never been explicitly recognized by the Court, this principle has been articulated by a number of scholars,<sup>301</sup> and is reflected in common-law arrest rules and in several of the Court's search and seizure decisions. The principle also finds support in Eighth Amendment and due process case law,<sup>302</sup> and in well-established principles of sentencing jurisprudence and substantive criminal law.<sup>303</sup>

Since it has roots in the common law, the proportionality principle pre-dates the reasonableness balancing approach. Thus, for justices who are strongly committed to "originalism," it provides an

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enacted under Section 5 of the Fourteenth Amendment, *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."), assessments of government "takings" of private property, *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (zoning law "effects a taking if the ordinance does not substantially advance legitimate state interests" or "denies an owner economically viable use of his land"), and in applying the Eighth Amendment Bail Clause, *Stack v. Boyle*, 342 U.S. 1, 5 (1952) (bail set higher than "reasonably calculated" to assure appearance at trial is "excessive" within the meaning of the Amendment).

301. See Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 Colum. L. Rev. 1642, 1724-25 (1998); Christopher Slobogin, *Let's Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 St. John's L. Rev. 1053 (1998) [hereinafter Slobogin, *Proportionality Principle*]; Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. Rev. 1, 51-55 (1991). Other articles that make similar Fourth Amendment arguments without specifically using the "proportionality" concept are Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 785 (1994); Amsterdam, *supra* note 93, at 436-37; Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. Colo. L. Rev. 693, 719-24 (1998); William A. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations – Warrantless Entries into Premises: The Legacy of Welsh v. Wisconsin*, 38 U. Kan. L. Rev. 439, 530 (1990); Stuntz, *supra* note 222, at 869-76.

302. Substantive "proportional-to-the-offense" limitations are imposed on various measures governed by the Eighth Amendment Cruel and Unusual Punishment, Excessive Fines, and Excessive Bail clauses. See, e.g., *United States v. Bajakajian*, 524 U.S. 321 (1998) (in personam forfeiture under Excessive Fines Clause); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for rape of adult victim); *Stack v. Boyle*, 342 U.S. 1 (1952) (bail). Under the Due Process clauses, proportionality standards limit the size of punitive damages awards. See, e.g., *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996). Proportionality concepts are also reflected in "petty offense" limitations to constitutional criminal procedure rights. See, e.g., *Scott v. Illinois*, 440 U.S. 367 (1979) (right-to-counsel); *Baldwin v. New York*, 399 U.S. 66 (1970) (jury trial). Limits on statutory and rule-based criminal procedural rights also reflect proportionality considerations (what might be termed "making the procedure fit the crime"). See, e.g., Minn. R. Crim. P., 5.02, 9, 23, 26.01 (counsel, defense discovery, petty misdemeanor procedures, and jury trial rights). Administrative procedures are subject to a due process balancing test that considers the importance of the private and public interests at stake, and the risk of errors under the state's chosen procedure. *Matthews v. Eldridge*, 424 U.S. 319 (1976).

303. See Joshua Dressler, *Understanding Criminal Law* § 6.01-.05 (3d ed. 2001) (stating that proportionality principle limits all justification defenses including self defense, and defense of property, and is important in sentencing under both retributive and utilitarian philosophies).

independent historical basis for finding a search or seizure unreasonable. Proportionality analysis is similar but not identical to reasonableness balancing. Both approaches examine the nature and degree of the intrusion on liberty and privacy, but the two concepts differ on the “government need” side of the ledger. Whereas balancing examines a wide range of factors—seriousness and immediacy of the harm sought to be prevented; degree of individualized or target-group suspicion; presence of a warrant, warrant substitute, or other limits on police discretion; importance of the evidence or other expected fruits of the intrusion; availability of other means<sup>304</sup>—the proportionality principle focuses primarily on the seriousness of the crime suspected or charged. Given this narrower focus, the proportionality principle is easier to apply than reasonableness balancing, and lends itself to simpler rules. In extreme cases, the principle bars the use of intrusive measures even when the police have probable cause, and even if police inability to use such measures is very likely to prevent prosecution and conviction of the offender.

At common law, misdemeanor arrests were prohibited unless the offense was committed in the officer’s presence.<sup>305</sup> Although Justice Souter’s opinion in *Atwater* cast doubt on the common-law “breach-of-the-peace” requirement for misdemeanor arrests,<sup>306</sup> the common-law in-presence rule is well documented, and continues to be recognized in some form by most states.<sup>307</sup> The Supreme Court has never decided whether any aspect of the common-law in-presence rule is enforceable under the Fourth Amendment.<sup>308</sup> But even if it is not, this common-law limitation embodies an underlying proportionality concept that was well established in the Founding era, and helps to define what the founders viewed as “reasonable” police measures. Indeed, the custodial arrest in Ms. Atwater’s case was even more disproportionate than the misdemeanor arrests prohibited at common law, because many of the latter involved much more serious, jailable offenses.<sup>309</sup> The survival of the in-presence rule under state laws and the Court’s modern decisions incorporating proportionality concepts attest to the continuing importance of proportionality in Fourth

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304. See generally Dressler, *supra* note 21, §§ 18.01-19.02.

305. See *Carroll v. United States*, 267 U.S. 132, 156-57 (1925) (citing Halsbury’s *Laws of England*, vol. 9, part III, at 612).

306. See *supra* Part I.B.

307. See Dressler, *supra* note 21, § 10.02; Schroeder, *supra* note 65, at 777; see also Davies, *supra* note 4, at 322-26 (discussing other common-law distinctions between felony and misdemeanor arrest powers).

308. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 340 n.11 (2001) (declining to decide or speculate on constitutional status of in-presence rule).

309. See *United States v. Watson*, 423 U.S. 411, 440 n.9 (1976) (Marshall, J., dissenting) (commenting that many serious modern felonies, including assault, forgery, bribery, and kidnapping, were classified as misdemeanors at common law).



Amendment analysis. These cases, together with the common-law and state law in-presence rules, stand for a single proposition—that intrusive police measures cannot be used to enforce minor crimes.

In *Welsh v. Wisconsin*,<sup>310</sup> the Court held that the police could not make a warrantless entry of a person's house to effect an arrest for a non-jailable drunk driving offense, even though the officers had probable cause to arrest, and also had a very plausible claim that delaying the arrest until a warrant was obtained would have resulted in the loss of crucial evidence of intoxication. The Court noted that many lower courts have viewed the seriousness of the offense as an important factor in assessing the reasonableness of a warrantless entry on exigent circumstances.<sup>311</sup> The Court also cited Justice Jackson's view that warrantless entry to arrest for a minor offense would display "a shocking lack of all sense of proportion."<sup>312</sup> Although drunk driving poses major risks to persons and property, the Court considered the Wisconsin legislature's decision classifying first-time violations as non-jailable, civil offenses, to be the best indication of the state's interest in making an arrest and enforcing this law.<sup>313</sup>

Ms. Atwater's arrest presented just as strong a case as *Welsh* for applying the Fourth Amendment proportionality principle. Although the Court has granted the greatest degree of protection to the home, custodial arrest and its accompanying measures and effects are also highly intrusive; moreover, Ms. Atwater's seat belt violation carried less risk of public harm than the drunk driving charge in *Welsh*. And unlike the home entry invalidated in *Welsh*, a rule prohibiting Ms. Atwater's arrest, and the arrest of traffic violators like her, would rarely result in the loss of crucial evidence.<sup>314</sup>

In *Tennessee v. Garner*,<sup>315</sup> the Court held that police may not employ deadly force to arrest a fleeing, unarmed suspect who is not reasonably believed to pose a significant threat of death or serious physical injury to the officer or others. Recognizing that such a rule might permit some suspects to escape and perhaps even permanently evade capture and prosecution, the Court nevertheless concluded that the use of deadly force to arrest a suspect not believed to be

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310. 466 U.S. 740 (1984).

311. *Id.* at 751-52 (citing *Dorman v. United States*, 435 F.2d 385, 392 (D.C. Cir. 1970)).

312. *Id.* at 751 (quoting *McDonald v. United States*, 335 U.S. 451, 459 (1948) (Jackson, J., concurring)).

313. *Id.* at 754; *cf.* *Illinois v. McArthur*, 531 U.S. 326, 335-36 (2001) (distinguishing *Welsh* and rejecting a proportionality argument). The offense in *McArthur* was punishable with up to 30 days in jail, and the police intrusion, which included barring the suspect from entering his home unsupervised for two hours until a search warrant was obtained, was less serious than the warrantless home entry in *Welsh*. *Id.*

314. *Cf.* *Knowles v. Iowa*, 525 U.S. 113, 118 (1998) (stating that once defendant was stopped for speeding, officer already had all the evidence needed to convict; no further evidence was likely to be found on the defendant's person or in his vehicle).

315. 471 U.S. 1, 11 (1985).

dangerous or to have committed a serious violent crime would constitute an unreasonable seizure under the Fourth Amendment.<sup>316</sup> Thus, as in *Welsh*, the Court implicitly recognized that the Fourth Amendment reasonableness standard incorporates a requirement of proportionality between the intrusiveness of the arrest and the seriousness of the offense or offender.

Admittedly, Ms. Atwater's full-custody arrest was much less intrusive than the use of deadly force in *Garner*. Contrary to the situation in *Garner*, however, limiting police power to make full-custody arrests for non-jailable traffic violations would have little adverse effect on the enforcement of such crimes: almost all traffic offenders can be fully identified from driver's licenses and/or vehicle records, and thus are unlikely to permanently evade justice.

Several other decisions of the Court have also recognized the principle that police powers are more limited in minor cases. In *Graham v. Connor*,<sup>317</sup> the Court held that the severity of the crime is one of three factors to be considered in assessing a claim that excessive force was used to make an arrest or other seizure. And in *United States v. Hensley*,<sup>318</sup> the Court suggested (but did not decide) that completed crimes less serious than the felony at issue in that case might not permit the use of *Terry* stop and frisk powers.<sup>319</sup> Finally, numerous lower court decisions, in a variety of contexts, have considered the seriousness of the offense to be an important factor in determining issues of Fourth Amendment reasonableness, particularly with regard to the use of intrusive police powers.<sup>320</sup>

Taken together, the decisions summarized above demonstrate an important principle: even where the police have probable cause, a search or seizure may be found unreasonable when it involves intrusive police measures that are disproportionate to the seriousness

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316. *Id.*

317. 490 U.S. 386, 396 (1989); see *supra* notes 206-08 and accompanying text.

318. 469 U.S. 221, 229 (1985).

319. Some lower courts have applied this dictum to invalidate certain stops. See, e.g., *Blaisdell v. Comm'r of Pub. Safety*, 375 N.W.2d 880, 884 (Minn. Ct. App. 1985), *aff'd on other grounds*, 381 N.W.2d 849 (Minn. 1986) (finding *Hensley* inapplicable to misdemeanor committed two months earlier); cf. *State v. Stich*, 399 N.W.2d 198, 199 (Minn. Ct. App. 1987) (upholding stop to investigate misdemeanor committed "moments" before).

320. For example, many courts have invalidated suspicionless strip searches of jail inmates charged with traffic or other minor crimes. See, e.g., *Chapman v. Nichols*, 989 F.2d 393 (10th Cir. 1993); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983); *Wilson v. Shelby County*, 95 F. Supp. 2d 1258, 1262-63 (N.D. Ala. 2000) (noting that eight federal circuits have condemned blanket strip search policies applied to minor-offense detainees). Similarly, long before the Supreme Court's decision in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), most lower courts had considered the seriousness of the offense an important factor in assessing whether exigent circumstances permit warrantless entry of a home. See *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970). Offense severity has also been cited in numerous other Fourth Amendment cases. See *Schroeder*, *supra* note 301, at 444 n.26.

of the offense. When, as in *Atwater*, the state has declared that an offense is not punishable with incarceration, the use of custodial measures prior to trial is clearly disproportionate to the state's determination of the seriousness of the offense. In very minor cases, the proportionality principle can operate as a trump, as it did in *Welsh v. Wisconsin*.<sup>321</sup> In such cases, intrusive measures such as custodial arrest are banned, and the police and courts have no need to examine other case-specific reasonableness factors. At the extremes of offense seriousness (*Welsh*) or intrusiveness (*Garner*), the proportionality principle generates simple, bright-line decision rules applicable to a limited group of cases.

Of course, the Court may have been reluctant to recognize the proportionality principle for fear of entering onto yet another doctrinal slippery slope, as proportionality arguments could potentially be raised in a wide variety of Fourth Amendment contexts.<sup>322</sup> But except in extreme cases such as those noted above, recognition of a principle like proportionality does not commit the Court to any particular application or result; such a broad principle, like those applied in other areas of constitutional law (i.e., "equal protection"; "freedom of speech"), can be interpreted in many different ways, and does not tightly constrain future decisions.<sup>323</sup> Moreover, even if the Court was unwilling to base a ruling in *Ms. Atwater's* favor entirely on this principle, the strong proportionality considerations in her case would have justified a modest extension or redefinition of the scope of reasonableness balancing in probable cause cases. The combination of strong balancing and proportionality arguments distinguishes *Atwater* from cases that present only one of these factors, thus providing a small, secure ledge above the doctrinal slippery slopes that the Court sought to avoid.

## 2. Equal Justice

Fundamental principles of equal justice, and the need to avoid gross disparities in the administration of criminal justice, also supported a modest expansion of reasonableness balancing to cover cases like *Atwater*. Although the Court has not been sympathetic to these principles in its recent cases rejecting limits on pretext stops and

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321. See *supra* note 320 and accompanying text.

322. Such slippery slope concerns help to explain the Court's extremely limited recognition of proportionality limits on the length of prison sentences. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding sentence of life without parole for a major cocaine possession crime by a first offender). Yet the Court has shown a greater willingness to apply proportionality limits to fines, civil forfeitures, and punitive damages. See *supra* note 302.

323. Sunstein, *supra* note 59, at 11-13, 260-61. This and other aspects of Sunstein's theory of constitutional adjudication are further discussed in Part IV.

arrests,<sup>324</sup> the Court's special-needs cases have often recognized the importance of limiting the "unbridled discretion" of the police and other low-level officials.<sup>325</sup> Even if the Court is unwilling, for the reasons discussed in Part III.A, to broadly recognize equality concerns when the police act with probable cause, limited recognition of these concerns is essential under the extreme circumstances presented in *Atwater*, where a highly intrusive measure like custodial arrest is virtually certain to be applied in a highly discriminatory manner. Gross disparity in the use of arrest and search powers in such cases is guaranteed by the simple facts that 1) almost everyone violates minor traffic laws,<sup>326</sup> and 2) there is rarely any actual need for arrest or search in such cases.<sup>327</sup>

### 3. Other Fourth Amendment Contexts

None of the other Fourth Amendment contexts, identified previously as possible candidates for future pro-defendant reasonableness balancing arguments, is likely to raise anything close to the compelling proportionality and equal justice arguments present in Ms. Atwater's case. In all of these other contexts—warrantless searches of vehicles; exigent circumstances searches of private premises; warrantless arrests for more serious offenses; warranted arrests and searches—the factual and legal conditions for the intrusions occur less frequently than the conditions that permit a minor traffic stop. As a result, those other police activities carry much less potential for police abuse of overbroad powers, and thus present a less compelling need for limitations supported by balancing analysis.

Two of these other police activities are further distinguishable from the minor traffic offense context of *Atwater*. Arrests for more serious offenses can be distinguished by the simple criterion of the authorized punishment. Where the legislature has provided for jail or prison penalties, custodial arrest raises much weaker proportionality concerns.<sup>328</sup> Moreover, serious offenses are more likely to actually require custodial arrest and search, which tends to promote more uniform arrest practices. As for warranted searches and seizures, they

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324. See *Arkansas v. Sullivan*, 532 U.S. 769 (2001); *Whren v. United States*, 517 U.S. 806 (1996).

325. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 454 (1990); *Skinner v. Ry. Labor Executives' Ass'n.*, 489 U.S. 602, 634 (1989); *New York v. Burger*, 482 U.S. 691, 711-12 (1987); *Delaware v. Prouse*, 440 U.S. 648, 661-63 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976); *South Dakota v. Opperman*, 428 U.S. 364, 383-84 (1976).

326. See *supra* note 12 and accompanying text.

327. See *supra* notes 124-27 and accompanying text; see also *infra* notes 385-86 and accompanying text.

328. As for Justice Souter's concern that the police cannot always tell if the suspect's offense will permit a jail term, see *supra* notes 143-45 and accompanying text.

are supported by much stronger textual justification, based on the warrant clause.<sup>329</sup>

In the other two areas mentioned above, vehicle and exigent circumstances searches, the Court has already expressed a willingness to consider balancing in some cases. Thus, although the warrantless search of a recreational vehicle was upheld on the facts of *California v. Carney*,<sup>330</sup> the Court explicitly left open the possibility that searches of some less mobile and/or more “home-like” vehicles would still require a warrant.<sup>331</sup> As for exigent circumstances evaluations, the Court already approved the use of balancing in minor cases in *Welsh v. Wisconsin*, and most lower courts have used balancing even in cases involving serious offenses.<sup>332</sup>

Thus, the Court has already entered onto the slippery slopes of balancing and proportionality in assessing vehicle and exigent circumstances searches. And despite the available distinctions and doctrinal boundary lines that could be drawn, perhaps the Court should also consider further applications of balancing in the other two areas discussed above (other arrests, warranted intrusions). The Court could have ruled narrowly in Ms. Atwater’s favor, and waited

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329. Petitioner’s counsel in *Atwater* conceded that his client’s arrest would have been valid, if supported by a warrant. Supreme Court Oral Argument at 5, *Atwater* (No. 99-1408). In previous cases, the Court has been reluctant to read additional requirements into the Warrant Clause that are not based on Founding-era law and practice. *See, e.g.,* *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *New York v. P.J. Video*, 475 U.S. 868 (1986) (refusing to add specific additional requirements for searches involving premises of non-suspects and persons asserting First Amendment claims; such considerations are left to discretion of warrant-issuing magistrates); *cf. Wilson v. Arkansas*, 514 U.S. 927 (1995) (holding that common-law “knock and announce” rule is part of Fourth Amendment reasonableness inquiry for warranted as well as warrantless entries). *But see Winston v. Lee*, 470 U.S. 753 (1985) (holding that court-authorized surgery to remove a bullet for use as evidence violated Fourth Amendment).

330. 471 U.S. 386 (1985) (permitting warrantless search of a fully mobile motor home found in a city parking lot).

331. *Id.* at 394 n.3 (suggesting warrant might be required if motor home were “situated in a way or place that objectively indicates that it is being used as a residence”; factors which “might be relevant in determining whether a warrant would be required [include the vehicle’s] location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road”). Lower courts have invalidated the warrantless search of a vehicle being used as a residence and not readily mobile. *See State v. Kypreos*, 39 P.3d 371, 378-79 (Wash. Ct. App. 2002) (invalidating search of trailer not connected to any motor vehicle); *United States v. Adams*, 845 F. Supp. 1531, 1535-37 (1994) (invalidating search of motor home parked in woods, with “no convenient or easy access to public road”).

332. *See, e.g., Dorman v. United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970) (armed robbery). The seven factors announced in *Dorman* have been widely adopted. *See LaFave, supra* note 21, § 3.6(a). Although some of these factors relate to particular types of exigency such as armed suspects or flight risks, others seem to reflect elements of reasonableness balancing, including whether the violation at issue is a “grave offense,” whether the police have strong probable cause as to suspect’s guilt and/or location in the place, or whether the entry is made peaceably.

until later cases to decide whether and when to use balancing and proportionality arguments to further limit arrests and other police actions based on probable cause.

Instead, the Court ruled in favor of the police, and refused to apply balancing and proportionality analyses. The Court ruled broadly not only in its rejection of such analyses, but also in choosing the scope of its ruling. As previously noted,<sup>333</sup> the Court rejected the Petitioner's request to issue a ruling limiting arrests for non-jailable traffic violations; instead, the court looked at all non-jailable offenses, and decided that no workable rule could accommodate all of them. Moreover, the Court's grant of broad arrest power, limited only by probable cause and the uncertain boundary between "normal" and "extraordinary" arrests, seems to validate practically all arrests, including some more onerous and abusive than Ms. Atwater's, such as those involving lengthier jailing or arrests based on apparent racial profiling.

Was such a broad ruling—implicitly deciding cases and factual contexts that have not yet been presented to the Court—an appropriate mode of adjudication? Recent scholarship on constitutional decision-making, discussed in the next section, suggests that it was not.

#### IV. WHAT *ATWATER* CAN DRAW FROM, AND ADD TO, THEORIES OF CONSTITUTIONAL INTERPRETATION

Resolving the policy issues in *Atwater* can both benefit from and contribute to contemporary theories of constitutional decision-making. For the reasons discussed in Part II.A, the Court's heavy reliance on uncertain historical sources, with little concern for the present day legal and social context of its decision, shows the severe limitations and dangers of "originalism" as a primary basis for interpreting the Fourth Amendment. Similarly, a case like *Atwater* reveals the limitations of "textualism." Whatever the Court decided in that case, its decision could not be based directly on the text of the Fourth Amendment. Although the Reasonableness Clause of the Amendment does specify that suspects have "the right . . . to be secure in their persons," it provides no particular guidance as to when a seizure of the person is reasonable. The Warrant Clause provides even less help, because the Court has held that warrants are not required for in-public arrests.<sup>334</sup>

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333. See *supra* note 150 and accompanying text.

334. *United States v. Watson*, 423 U.S. 411, 423-24 (1976) (requiring no warrant for in-public felony arrests, even if the police had grounds and plenty of time to seek a warrant). Contrary to the implications and effect of *Watson*, however, the text of the Reasonableness Clause implies that the people's "right to be secure" is *equally important* in "their persons, houses, papers and effects."

The facts and decision in *Atwater* also shed light on both the value and the limitations of the theory of adjudication recently proposed by Professor Cass Sunstein.<sup>335</sup> Under Sunstein's model, decisions have two fundamental dimensions. In terms of the scope of the ruling, a decision can be "narrow" (limited to the case facts; highly contextualized) or "wide" (purporting to govern factual circumstances and policy issues not presented by the case at hand).<sup>336</sup> In terms of the Court's reasoning, the justification for a decision can be "shallow" or "deep."<sup>337</sup> Shallow rulings avoid abstract theories or principles, except for those broadly-shared ideals (e.g., equal protection; freedom of speech) that can be interpreted in many different ways, thus yielding "incompletely theorized agreement" among the justices voting in favor of a particular outcome.<sup>338</sup> Deep rulings involve "ambitious theoretical justifications" or overarching interpretative models, including originalism, textualism, deference to majority rule, "democracy-reinforcement," and independent judicial interpretation.<sup>339</sup> Both of Sunstein's dimensions are matters of degree; decision *X* can be "narrow" (and/or "shallow") when compared to decision *Y*, but "wide" (and/or "deep") when compared to decision *Z*.<sup>340</sup>

Using this model, Sunstein makes both descriptive and prescriptive claims; he asserts that the current Court usually prefers to rule narrowly and shallowly, and that this "minimalist" approach is generally preferable, reflecting the style and wisdom of our common-law tradition.<sup>341</sup> Narrow and shallow rulings focus on the concrete facts of the current case, lessen the risk of unintended consequences, and preserve flexibility, for the Court and the other branches of government, to rule differently in future cases presenting different facts.<sup>342</sup> Minimalism is especially valuable, Sunstein argues, when the Court is dealing with a constitutional issue of high complexity and lack of consensus, and when judges lack information about the topic they are addressing, or the probable consequences of their decision.<sup>343</sup> On the other hand, "maximalist" (wide and/or deep) rulings are appropriate, he argues, if one or more of the following criteria are met:

- (1) when judges have considerable confidence in the merits of that [wide and/or deep] solution,

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335. Sunstein, *supra* note 59.

336. *Id.* at 10-11.

337. *Id.* at 11-14.

338. *Id.*

339. *Id.* at 6-10.

340. *Id.* at 10-11, 16.

341. *Id.* at xi-xiv, 5-6, 49.

342. *Id.* at 3-6, 9, 46-54, 259.

343. *Id.* at ix, 4-6, 46-48, 59-60, 262.

(2) when [such a] solution can reduce costly uncertainty for future courts and litigants,

(3) when advance planning is important [e.g., in a commercial context], and

(4) when a maximalist approach will promote democratic goals [by giving elected officials good incentives, to which they are likely to be responsive, to address the subject matter in question].<sup>344</sup>

Although not stressed by Sunstein, another value of wide and deep rulings is that they reduce judicial discretion and promote uniformity in the law, albeit at the risk of failing to recognize important case-specific differences, and, in the case of wide rulings granting overbroad government powers, at the further risk of leaving officials with too much unregulated discretion.<sup>345</sup>

Sunstein does not discuss very many of the Court's constitutional criminal procedure cases, and it is not clear how he intends his theory to apply in that context. In any case, his descriptive claim is contradicted by the large number of wide, "bright-line-rule" decisions handed down, by both liberal- and conservative-leaning majorities, over the past half century.<sup>346</sup>

Sunstein's prescriptive claim is also problematic in the criminal justice context. Professor Donald Dripps has argued that "width is a virtue rather than a vice in constitutional criminal procedure," due to the high volume of criminal cases raising constitutional issues, "the need to supply police and lower courts with reliable guidance," and "the demonstrable failure of legislatures to deal constructively with criminal procedure problems."<sup>347</sup> However, Dripps seems to agree with Sunstein that "deep" justifications are generally undesirable, since they tend to be more controversial and unstable over time. Shallower justifications "would command normative respect from various ideological perspectives, which would reduce both collective decision problems in future cases and the risk of hostile political reaction."<sup>348</sup>

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344. *Id.* at 57; *see also id.* at 54-56, 59, 71, 263.

345. *See id.* at 71, 262 (mentioning uniformity goals).

346. Examples of wide, pro-defendant rulings include *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Examples of wide pro-police rules include *Robinson and Belton*, and *Opperman and Lafayette*.

347. Dripps, *Constitutional Theory*, *supra* note 71, at 4, 40.

348. *Id.* at 4. Dripps views the Court's recent decision in *Dickerson v. United States*, 530 U.S. 428 (2000), reaffirming the constitutional basis for the *Miranda* rules, as a narrow and shallow ruling. *Miranda* itself was a wide (but shallow) ruling. Sunstein, *supra* note 59, at 262. *Miranda* imposed bright-line rules which went far beyond the facts and demonstrated constitutional violations in the cases presented, with a questionable doctrinal basis in the Fifth Amendment privilege. *Dickerson* is narrow in that it reaffirms *Miranda* but refuses to explicitly repudiate post-*Miranda* cases which were seemingly premised on the assumption that *Miranda* rights are not constitutionally-based. To the extent that the latter cases have not been implicitly



Justice Souter's opinion in *Atwater* does not fully support either Sunstein's general theory or Dripps' proposed alternative. Instead, the opinion contradicts Sunstein's descriptive and prescriptive claims and partially contradicts Dripps' wide-shallow preference in that it appears to be both "wide" and "deep." According to Sunstein, Justice Souter is usually a "minimalist" justice,<sup>349</sup> but in *Atwater* he disregarded the compelling facts of Ms. Atwater's case,<sup>350</sup> which he admitted would support a decision in her favor, and adopted a relatively "wide" rule applicable to all arrests, including non-traffic cases, and permitting arrest and detention on probable cause under almost any circumstances.<sup>351</sup> Thus, except for the uncertain category of "extraordinary" and "unusually harmful" arrests, the Court has not given itself much flexibility to rule differently in future cases presenting different facts. At the same time, the opinion's reasoning is "deep" in several respects: in its heavy reliance on the theory of originalism; in its statement of a general preference for "bright-line" rules; and in its adoption of the *Whren* court's *a priori* limits on case-specific reasonableness balancing (seemingly due to broader, "slippery slope" concerns about the continued expansion of balancing analysis).<sup>352</sup>

Sunstein and Dripps both caution that the optimum choices as to narrow versus wide scope and shallow versus deep rationale are highly context-specific.<sup>353</sup> Thus, one case does not necessarily prove either of their theories wrong.<sup>354</sup> But at least on first inspection, it appears that

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overruled, *Dickerson*'s reasoning is shallow—it fails to provide any underlying theory that reconciles these cases with *Miranda* and *Dickerson*.

349. Sunstein, *supra* note 59, at xiii. Most of the other Justices' votes in *Atwater* are consistent with Sunstein's classification: Stevens, O'Connor, Ginsburg, and Breyer dissented, favoring a narrow, case-specific ruling, while Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas joined Justice Souter's "maximalist" ruling, preferring an ambitious, "clear, bright-line rule[], producing stability and clarity in the law." *Id.* at xii-xiii (identifying Chief Justice Rehnquist and Justices Scalia and Thomas as "maximalists"); *id.* at 58, 101 (discussing maximalist decisions joined by Justice Kennedy). *But see id.* at 9 (Justice Kennedy is a minimalist). See also, *Kyllo v. United States*, 533 U.S. 27 (2001), where Justices Ginsburg and Breyer ruled widely, "endeavor[ing] to craft an all-encompassing rule for the future." *Id.* at 51 (Stevens, J., dissenting). In contrast, Chief Justice Rehnquist and Justice Kennedy joined the dissent, and thus preferred to rule narrowly.

350. Justice Souter similarly disregarded the strong case facts (in favor of the government) in *Edmond*, *Ferguson*, and *Kyllo*. See *supra* notes 224-45, 254-62 and accompanying text.

351. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). Justice Souter declined the Petitioner's request for an arrest-limiting rule applicable only to non-ailable traffic violations. See *supra* note 150 and accompanying text.

352. See *supra* Part III.A.

353. Sunstein, *supra* note 59, at 262; Dripps, *Constitutional Theory*, *supra* note 71, at 4, 76.

354. Dripps believes *Atwater* is a bad decision. A few days after the decision was announced, he walked into my office and remarked that "the Fourth Amendment was born in Lexington, and died in Lago Vista." Sunstein's views on *Atwater* are unknown, but he presumably believes that the Court's decision demonstrates the

Sunstein's theory not only fails to predict the outcome in *Atwater*, but also provides limited guidance as to how that case *should* have been decided.

Sunstein's criteria for choosing between a minimalist and maximalist approach generate conflicting results in *Atwater*. On the one hand, several features of this case argue strongly for a narrow, case-specific ruling. Although the Court assumed that abusive arrests like Ms. Atwater's are rare, it lacked any reliable evidence to support this conclusion,<sup>355</sup> thus failing the first of Sunstein's four criteria for a wide rule. Moreover, the Court's grant of almost unlimited police discretion to arrest minor offenders, coupled with the reality that virtually anyone who drives is chargeable with some violation, carries serious potential for adverse, unintended consequences.<sup>356</sup> On the other hand, the *Atwater* context—high-volume decisions by low-level officers, on the street—is one which, according to Sunstein's second criterion, calls for relatively simple, bright-line, over-broad rules, applicable to all minor offenses (not just traffic violations), in order to “reduce costly uncertainty for future courts and litigants.”<sup>357</sup> Moreover, the Court's decision in *Atwater* might be seen as promoting democratic goals (Sunstein's fourth criterion) by leaving almost all arrest-limiting decisions to the legislative or executive branches. The “wider” the decision in favor of police power, the better. Minimal constitutional limits on such powers leave maximum scope for democratic policy-making, albeit with little incentive—via the threat of constitutional regulation—for democratic processes to actually address such policy issues.

One solution to the indeterminacy and high context-specificity of Sunstein's theory might be to weight or prioritize his four prudential factors. In fact, Sunstein seems to give greatest emphasis to the fourth factor, democracy-promotion.<sup>358</sup> As noted above, this factor seems to favor the Court's decision in *Atwater* (and perhaps *all* of the Court's over-broad, bright-line police-powers decisions in recent decades). Thus, if a given jurisdiction's citizens want more limitations on the

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danger of wide and broad rulings.

355. See *supra* notes 171-78 and accompanying text.

356. Sunstein, *supra* note 59, at ix, 47.

357. *Id.* at 57. As argued in Parts II and V, however, the need for overbroad police power is less compelling in the *Atwater* context than in many others, and a simple, workable rule limiting arrests for non-jailable traffic violations can easily be devised. Moreover, what the Court's wide, pro-police rule gains in reduction of legal uncertainty it loses by promoting unfettered police discretion and inconsistency in decisions about which offenders will actually be arrested and searched (or vice versa).

358. *Id.* at xiv, 24-45, 259-60. Sunstein distinguishes between rulings that are “democracy-promoting” (triggering democratic deliberative processes, or improving them, e.g., through greater accountability or a requirement of reasoned decisions); “democracy-foreclosing” (placing some practices or issues “off limits to politics”); or “democracy-permitting” (validating the results of democratic processes). See *id.* at 26-28.

arrest power, let them ask their legislators or police officials. The Court's pro-police decision in *Atwater* merely represents, in Sunstein's words, a "'remand' to the public."<sup>359</sup> Indeed, his strongly-emphasized democracy-promotion factor might even be cited in support of a *general preference* in favor of wide, pro-government decisions, in all criminal procedure and civil rights cases.

Such a government-preferring principle would be unwise. As Dripps and others have noted, legislatures and other officials have traditionally failed to deal constructively with most criminal procedure issues, and have rarely granted additional rights to criminal suspects.<sup>360</sup> Nevertheless, it might be argued that legislatures or police administrators will be much more responsive to abuses in the traffic enforcement context, since so many "ordinary" citizens are affected by these laws. Indeed, this may be precisely what Justice Souter was assuming when he relied so heavily upon "the good sense (and, failing that, the political accountability) of most local lawmakers and law-enforcement officials,"<sup>361</sup> to prevent abuse of broad arrest powers. But if one is to judge by studies of racial profiling and policing in general,<sup>362</sup> the greater likelihood is that "ordinary" citizens like Ms.

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359. *Id.* at 135.

360. See Dripps, *Constitutional Theory*, *supra* note 71, at 45-46. See generally Amsterdam, *supra* note 93, at 379 ("[T]here will remain more than enough crime and fear of it in American society to keep our legislatures from the politically suicidal undertaking of police control."); Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?* 44 *Syracuse L. Rev.* 1079 (1993); Logan, *supra* note 64, at 364 ("[T]he inevitable majoritarian impulse of legislatures, with their characteristic modern crime-control orientation, potentially undercuts the tenability of reliable legislative intervention [to limit minor-crime arrests]."). Indeed, even with a sympathetic figure like Ms. Atwater, civil rights proponents were not able to enact legislation in Texas limiting police powers in such cases. See *infra* note 414 and accompanying text.

361. *Atwater v. City of Lago Vista*, 532 U.S. 318, 353 (2001); see also Supreme Court Oral Argument at 41, *Atwater* (No. 99-1408) (Scalia, J.) (suggesting that the political process protects misdemeanants better than felons). Justice Souter also apparently assumed that police administrators will strongly discourage unnecessary arrests, because "it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason." *Atwater*, 532 U.S. at 352. But neither Justice Souter nor the *Atwater* respondents and their supporting amici cited any examples of such police regulations or policies. One reason for the absence of self-regulation is that arrest also permits various searches; moreover, as was noted previously, no actual arrest may be made if the "search incident" and vehicle-inventory search produce no evidence or contraband. See *supra* note 19.

362. See Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 *Cornell L. Rev.* 1258 (1990); Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 *St. John's L. Rev.* 1271, 1278 (1998); see also *supra* note 13. The high degree of attention that has been given to racial profiling issues in recent years would seem to contradict the pessimistic assessments above, see *supra* note 360 and accompanying text, about the prospects for addressing the *Atwater* problem through democratic processes. It remains to be seen, however, whether this increased attention will produce real change in racially discriminatory police practices. Additionally, without sustained

Atwater will rarely be affected by overbroad arrest powers in traffic cases, just as they are rarely affected by broad “stop and frisk” rules that apply to everyone in theory, but not in practice.

Dripps’ insight into the inherent race and class politics of criminal justice shows that this context requires important modifications to Sunstein’s general interpretive theory. Because the typical victim of police abuse is likely to be poor and non-white—and thus uninvolved in, and unprotected by, democratic processes—Sunstein’s “democracy-promotion” criterion cannot be considered as a general, “pro-police” factor. If anything, courts should adopt the opposite principle: “if in doubt, rule in favor of the citizen.”<sup>363</sup> Such an *a priori* preference is consistent with several bedrock principles of modern criminal justice: the presumption of innocence, the requirement of proof beyond reasonable doubt, the privileging of the rights of the defendant over those of the victim, and the rule of lenity in statutory construction. Moreover, this principle is consistent with the “democracy-reinforcement” theory noted favorably by both Sunstein and Dripps—that constitutional rules have an important role to play in “protecting groups that are at special risk because the democratic process is not democratic enough.”<sup>364</sup>

It is important to note that any such “pro-suspect” preference would not systematically favor *either* a wide or a narrow rule-scope. In some situations, Sunstein’s criteria would justify a wide, pro-suspect ruling, and I agree with Sunstein and Dripps that *Miranda* falls into this category.<sup>365</sup> In *Miranda*, the Court had extensive experience with interrogation issues and the application of the case-specific (voluntariness) approach, no narrower bright-line rule seemed to be workable, and the Court’s wide-but-shallow rule<sup>366</sup> still left open the option for the legislative or executive branches to devise suitable alternative safeguards meeting the Court’s criteria for constitutionally-adequate interrogation procedures.<sup>367</sup>

In other criminal justice contexts, however, a pro-suspect

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data collection, analysis, and advocacy, concerns about racial profiling may not lead state legislatures, rule drafters, or police chiefs to cut back on arrest discretion. Most profiling studies focus on disparity in traffic and other investigatory stops, not arrests. State and local policymakers will have to be convinced not only that there is racial disparity in stopping and searching of traffic offenders, but that part of the solution to these problems is to cut back on overbroad arrest powers that legally justify the searches.

363. Judge Posner has proposed an analogous, pro-government preference, to be applied in the military context. Sunstein, *supra* note 59, at 168.

364. *Id.* at 7; see also Dripps, *Constitutional Theory*, *supra* note 71, at 45-46.

365. Sunstein, *supra* note 59, at 55, 262; Dripps, *Constitutional Theory*, *supra* note 71, at 4, 42-46.

366. See *supra* note 348.

367. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (stating that *Miranda* standards apply “unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it”).

preference, in combination with Sunstein's criteria, would call for a narrow decision. As noted previously, such a ruling is particularly appropriate when the court faces a high degree of "factual or moral uncertainty" (Sunstein's first factor), thus posing a substantial risk of adverse unexpected consequences. This was the case in *Atwater*. Accordingly, the Court should have issued a narrow ruling in Ms. Atwater's favor, along the lines suggested in Part V—that is, a ruling limited to non-jailable traffic offenses of the type charged in *Atwater*. Because the Court did not know precisely what it was doing, it should have ruled narrowly. And that narrow ruling should have been in the citizen's favor—the democratic process cannot be relied on to prevent unnecessary and abusive traffic arrests, because the typical victim of such arrests will not be a suburban "soccer mom" like Ms. Atwater.

Apart from democracy-promotion goals and the politics of criminal justice, does a preference for minimalist decisions tend to favor a ruling for one side or the other? In particular, could the Court have issued a narrow-shallow ruling in favor of the government in *Atwater*? Although such a question does not appear to have been directly addressed by Sunstein, the logic of his model clearly dictates that a narrow-shallow ruling for either party is not always possible. In a case where the facts and case-specific policy arguments strongly favor one party—as even Justice Souter admitted that they did in *Atwater*—any decision *against* that party would have to be based on an abstract, "deep" rationale. Moreover, such a decision would, in effect, be a "wide" decision—even if the court were to explicitly state that its decision is limited to the current case facts and context. In *Atwater*, with its strong case facts and arguments supporting Ms. Atwater's claim, any decision upholding her arrest means that practically any arrest, for any offense under any circumstances, is also valid. Thus, if a minimalist decision is generally preferable, a case with strong facts and case-specific policy arguments for one side should generally be decided in that party's favor. Accordingly, the Court should have held that Ms. Atwater's arrest was unreasonable, while expressing only limited views on the validity of arrests under other circumstances.

Consistent with the general preference expressed by both Sunstein and Dripps, a narrow ruling in Ms. Atwater's favor could also have been based on a shallow, "incompletely theorized"<sup>368</sup> rationale, derived from principles of reasonableness balancing, proportionality, and equal justice that can attract broad support with limited agreement on particulars other than the result required on the facts presented. At the same time, the narrowness of the ruling, and its shallow reasoning, minimize the risk of moving the Court onto, or further down, any doctrinal "slippery slope."<sup>369</sup>

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368. Sunstein, *supra* note 59, at 11.

369. *See supra* Part III.

On the other hand, a relatively narrow and shallow ruling does not mean that the police and lower courts must be left with no guidance or “bright-lines.” Such bright-lines are highly desirable in the criminal procedure context, and should be employed whenever possible.<sup>370</sup> As discussed in Part V, a narrow ruling in Ms. Atwater’s favor could include a simple set of decision rules for the police. The category of cases governed by the rule (non-jailable traffic) could be clearly defined, and the appropriate exceptions to the general rule, barring arrest in such cases, are few and easily stated.

A workable decision rule need not consist entirely of bright-line elements. Indeed, some aspects of the rule may need to incorporate more flexible standards, factors, or principles.<sup>371</sup> In *Atwater*, the general rule suggested in Part V that no custodial arrest should be permitted for non-jailable traffic violations, necessitates case-specific assessments of the need for custody in exceptional cases. But such assessments will interfere only slightly with the goal of providing police and courts with a relatively simple, bright-line rule. The proposal creates a strong, rule-like presumption (no arrest), and exceptions to that general rule will rarely arise in the narrowly-defined category of cases governed by the rule. The Court adopted a similar rule-and-exceptions approach in *County of Riverside v. McLaughlin*.<sup>372</sup> The court ruled that warrantless probable cause to arrest must “as a general matter” be judicially reviewed within forty-eight hours; the government has the burden of demonstrating that “extraordinary circumstances” justify a longer delay, and the defendant has the burden of showing that a delay of forty-eight hours or less was unreasonable.<sup>373</sup>

Admittedly, a narrow-shallow ruling, limited to non-jailable traffic violations and based on “incompletely theorized”<sup>374</sup> principles, leaves the police and lower courts uncertain about the validity of arrests for other minor offenses (jailable traffic violations and all non-traffic crimes, both jailable and non-jailable). Such uncertainty is, of course, the price of minimalism. But such a ruling would not leave the police and lower courts in any worse position than they were in before the *Atwater* case arose, because the Court had never clearly spoken on

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370. Dripps, *Constitutional Theory*, *supra* note 71, at 4, 40; *see also supra* notes 100-01, 347 and accompanying text.

371. *Cf.* Sunstein, *supra* note 59, at 19 (stating that decisions can be minimalist in some ways or along some dimensions, and maximalist in other respects). As others have noted, some criminal procedure standards, such as probable cause and reasonable suspicion, are largely and unavoidably dependent on flexible, case-specific assessments. Slobogin, *supra* note 301, at 72; Dripps, *Constitutional Theory*, *supra* note 71, at 44.

372. 500 U.S. 44, 56-57 (1991).

373. *Id.* at 56, 70.

374. Sunstein, *supra* note 59, at 11-14.

any of these issues.<sup>375</sup> Invalidating Ms. Atwater's arrest would inevitably cast some doubt on the legality of arrests for other minor crimes, but so did the dicta and holdings in a number of the Court's prior decisions.<sup>376</sup> Moreover, the Court could stress the particularly strong facts of Ms. Atwater's case, as well as the special (citation-promoting) circumstances of the traffic law context, and could make it very clear that its decision invalidating her arrest does not necessarily cast doubt on the validity of arrests for other kinds of minor offenses.

Finally, as Sunstein points out, the limits of a minimal decision are also its strength. Such a decision allows the Court to take a wait-and-see approach to broader policy issues, addressing them only when presented by concrete case facts, and in light of experience gained from application of the Court's earlier, narrow rulings. And although a holding that Ms. Atwater's arrest was unconstitutional would remove that narrow class of cases from the scope of democratic policy-making, such a ruling could actually encourage legislators, police administrators, and other officials to become more actively involved in drafting and enforcing appropriate limitations on minor-crime arrests, thus achieving Sunstein's all-important "democracy-promoting" goal. Legislative and executive branch officials would want to address these issues not only to reduce uncertainty about the legality of arrests not governed by the Court's narrow ruling, but also to demonstrate to the courts that further constitutional limitations are unnecessary.

In sum, it appears that the optimum resolution of the issues presented in *Atwater* is both informed by, and has important implications for, the theories of constitutional adjudication proposed by Professors Sunstein and Dripps. Application of Sunstein's model to the *Atwater* problem shows the need to prioritize his criteria for choosing between minimalist and maximalist rulings and to further elaborate their application in the criminal procedure context. Both authors give strong emphasis to the goals of democracy-promotion and democracy-reinforcement, but these important goals do not systematically favor either a narrow ruling (Sunstein) or a wide ruling (Dripps). Instead, that choice is dependent on the application of Sunstein's other factors. Nor, for the reasons suggested by Dripps, does Sunstein's democracy-promotion goal justify a general preference for criminal justice rulings in the government's favor. Finally, "minimalism" does not necessarily leave officials without guidance, nor does such guidance require exclusively "bright-line"

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375. See *supra* note 156 and accompanying text. Also, Justice Souter's ruling is not free of uncertainty either. See *supra* note 194 and accompanying text.

376. Note, in particular, the concurring opinions of Justice Stewart, in *Gustafson*, and Justice Powell, in *Robinson*, and the implications of *Welsh*. See *supra* notes 117, 310-14 and accompanying text.

decision rules. Any ruling, whether narrow or wide, can incorporate both bright-line and case-specific elements.

Looking at *Atwater* in light of the Sunstein-Dripps model, as further elaborated in this article, suggests that the Court was *right* to look for simple, relatively bright-line rules, and to avoid the need for police officers and lower courts to engage in complex, fact-specific “reasonableness balancing” in every traffic case. But the Court was wrong to assume that such practical concerns call for a wide, pro-police ruling. For the reasons persuasively argued in Sunstein’s work, the Court should have ruled narrowly, on a shallow rationale. But for the equally persuasive reasons advanced by Dripps, the Court should have chosen to err on the side of citizen’s rights. The reality is that, in many jurisdictions, the political process will not—at least without some goading from the Court—produce appropriate limits on the arrest power in minor cases. Moreover, given the very strong case facts and policy arguments against Ms. Atwater’s arrest, any truly “minimalist” decision would have to be in her favor.

The precise nature of a suitable “minimalist” ruling in *Atwater* is further explored in the next section.

#### V. BETTER BRIGHT LINES: PROPOSED CONSTITUTIONAL AND NONCONSTITUTIONAL ARREST RULES

Whether it based its decision on reasonableness balancing alone, or balancing in combination with proportionality and equality principles, the Supreme Court should have concluded Ms. Atwater’s arrest to be an unreasonable seizure. Surely this police action was unreasonable in any ordinary sense of the word, and Justice Souter admitted as much.<sup>377</sup> His stated reasons for disregarding the facts of Ms. Atwater’s case (as well as common sense and common language) are understandable but ultimately unpersuasive.<sup>378</sup> Even accounting for Justice Souter’s desire to give police and lower courts a “readily administrable” rule, the Court’s broad ruling—that probable cause alone justifies a “normal custodial arrest” for any violation under any circumstances—is not the only workable rule option. Nor is the Court’s decision justified by broader concerns about entering onto a doctrinal slippery slope, with endless requests for more “balancing.”<sup>379</sup> The Court could, and should, have issued a “narrow-shallow” ruling of the type it has often preferred in recent years, which would have had few implications for other factual or legal contexts.<sup>380</sup> Given the strong facts in Ms. Atwater’s case, such a narrow, “minimalist” approach would clearly require a ruling in her favor.

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377. See *supra* note 38 and accompanying text.

378. See *supra* Part II.

379. See *supra* Part III.

380. See *supra* Part IV.



Although Ms. Atwater's arrest was clearly unreasonable, Justice Souter was correct in concluding that police and trial courts cannot be expected to engage in complex balancing or proportionality and equal justice assessments in every case—particularly in the context of minor, high-volume traffic violations. Thus, rather than simply striking down Ms. Atwater's arrest based on the particular facts of her case, the Court needed to provide some guidance for future cases. When *would* arrest be constitutional? What relatively simple, bright-line rules are possible for these kinds of cases? In her dissent, Justice O'Connor proposed barring arrest for any non-jailable offense, "unless the officer is 'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion' of a full custodial arrest."<sup>381</sup> Elsewhere in her opinion Justice O'Connor indicated that warrantless arrest would be permissible, even for a non-jailable violation, "to abate criminal conduct[,] . . . to verify the offender's identity and, if the offender poses a flight risk, to ensure her appearance at trial."<sup>382</sup> She also stated that arrest would be proper when the officer reasonably believes that the suspect "might be a danger to the community if released."<sup>383</sup>

Justice O'Connor's opinion provides a simple statement of the arrest power, but her proposed rule is not truly "minimalist" because it appears to govern non-traffic as well as traffic cases. Several of the Petitioner's supporting amici (including the author, *mea culpa*) also proposed arrest-limiting rules applicable to a broader class of minor crimes.<sup>384</sup> There were very good reasons, however, for the Court to limit its ruling to non-jailable traffic violations of the type charged against Ms. Atwater. Such a limitation avoids deciding issues not presented by the facts of the case, thus preserving the advantages of minimalism articulated by Professor Sunstein—in particular, the risk of poorly-informed decision-making and unintended consequences.<sup>385</sup>

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381. *Atwater v. City of Lago Vista*, 532 U.S. 318, 366 (2001) (O'Connor, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). A similar rule was proposed by Judge Wiener, dissenting from the en banc decision. *Atwater v. City of Lago Vista*, 195 F.3d 242, 249-50 (5th Cir. 1999).

382. *Atwater*, 532 U.S. at 365 (O'Connor, J., dissenting).

383. *Id.* at 367 (O'Connor, J., dissenting).

384. *See supra* note 138.

385. Of course, any rule limiting arrest powers for non-jailable offenses risks the unintended consequence that legislatures might be tempted to add jail penalties simply to evade the new constitutional limitations. This danger seems relatively small, however, in the context of minor traffic violations. Ordinary citizens would feel threatened by, and question the need for, any such increase in penalties. Moreover, limiting the maximum penalty to a fine allows these high-volume offenses to be processed quickly and cheaply, with a minimum of procedural formality. *See, e.g.*, Minn. R. Crim. P. 5.02(2), 23.01 (stating that there is no right to appointed counsel or jury trial for nonjailable misdemeanors); *id.* 23.03(1) (granting authority for local courts to establish violations bureaus for payment of fines); *id.* 23.03(2)(1) (stating that state judges shall adopt uniform schedule of fines payable at violations bureaus

Moreover, minor traffic offenses present by far the strongest case for placing strict limits on the arrest power. The universality and low visibility of such minor violations raise the greatest potential for discriminatory arrest decisions, and there is rarely any actual need to arrest in such cases. Most traffic offenders are easily identified by means of driver's license and/or vehicle records and their prior driving records are readily accessible to officers in the field. They are unlikely to flee to avoid the minor penalties authorized in these cases, and if they do fail to appear for trial they can be subjected to license suspension and other expedited administrative remedies.<sup>386</sup> For these reasons, the advantages of a narrow, context-specific ruling outweigh the disadvantages of failing to definitively resolve the limits of the arrest power for minor violations outside of the traffic-law context.

The Petitioner properly limited her proposed arrest rule to non-jailable traffic violations. But her rule was *too* minimalist in some respects—it failed to fully specify the kinds of factors that would justify arrest in such cases, and did not indicate whether articulable suspicion or some other evidentiary standard would be applied to these factors. The principal statement of Petitioner's rule simply provided that arrest is permitted “when . . . necessary for enforcement of the traffic laws or when the offense would otherwise continue and pose a danger to others on the road.”<sup>387</sup> Later, Petitioner added that arrest would be proper “when the officer cannot ascertain the driver's identity.”<sup>388</sup> This specific example (along with “danger to others”) is helpful, but the police, legislators, criminal rule drafters, and lower courts need even more detailed guidance. The Court could have offered such guidance by incorporating provisions that are well-established in existing state laws and model codes.<sup>389</sup> At the same

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for all statutory non-jailable offenses and any other statutory misdemeanors they may select).

386. In Minnesota, when a cited traffic violator fails to appear for trial, the alleged violation is treated as a conviction for driver's license administration purposes (but this is not a basis for imposing a fine). Minn. Stat. Ann. § 171.01(13); *State v. Haney*, 600 N.W.2d 469 (Minn. Ct. App. 1999). Under the Uniform Vehicle Code, the court shall report any violation of a written promise to appear to the state department of motor vehicles; department may suspend license of driver who violates promise to appear in a citation given to an officer in that or any other state. Uniform Vehicle Code, *supra* note 146, §§ 6-205(b), 6-211(a)(6).

387. Brief of Petitioners at 46, *Atwater* (No. 99-1408).

388. *Id.* at 46-47.

389. An alternative approach, similar to one suggested by Professor LaFave to deal with the pretext problem, would be for the Court to require states to develop legislative or administrative regulations specifying when arrest is permissible for non-jailable traffic violations. LaFave, *Search & Seizure*, *supra* note 104, §§ 1.4(e), 5.2(g). The Court would then review those regulations, with a substantial degree of deference. The Court appears to have used this approach to regulate inventory searches. *See Florida v. Wells*, 495 U.S. 1 (1990) (invalidating search because state had no regulations on opening of closed containers); *Colorado v. Bertine*, 479 U.S. 367 (1987) (upholding inventory search where regulations were adequate). Some have argued, however, that this experience shows that such police regulations do not

time, such guidance need not remove all discretion; as was noted in Part IV, it is possible, and sometimes necessary, to craft decision criteria that are "rule-like" in some respects, while also incorporating standards and principles that allow some room for case-specific assessments.

What particular grounds for arrest should the Court have recognized as exceptions to the general rule barring arrest for a non-jailable traffic violation? First, there seems to be widespread agreement that a citation will not suffice when there are doubts that the suspect's identity has been reliably established.<sup>390</sup> There is also considerable support in existing laws and model codes for the proposition that, even where the suspect's identity is well-known, arrest is permissible if there are reasonable grounds to believe that the violator will not appear in court or pay the fine<sup>391</sup>—for example, where the suspect refuses to sign the citation, or the officer knows that the offender has previously failed to appear in court, or the offender is not a state resident, and in each of these cases, where the offender provides no credit or bond card guaranteeing payment of the fine.<sup>392</sup>

Other common justifications for arrest found in state laws and model codes include the officer's belief that the offender: 1) presents a serious risk of causing imminent bodily harm,<sup>393</sup> or 2) will persist in

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sufficiently constrain police discretion. See Salken, *supra* note 34, at 248-49. It could also be argued that custodial arrest and its various incidents and potentials for abuse is too important an area to be delegated to administrative or legislative rule-makers. Furthermore, the well-developed standards for citation release, found in state rules and model codes, suggest that the Court has a firm basis to impose minimum constitutional requirements to govern the narrow category of nonjailable traffic violations.

390. See, e.g., Am. Bar Ass'n, Standards for Criminal Justice (2d ed. 1980) [hereinafter ABA Standards] 10-2.2(c)(i); Nat'l Dist. Attorneys Ass'n, National Prosecution Standards 10.2(B) (1977); Nat'l Ass'n of Pretrial Servs. Agencies, Performance Standards And Goals For Pretrial Release And Diversion: Pretrial Release [hereinafter NAPSA Standards] II.A(1) (1978); see also Knowles v. Iowa, 525 U.S. 113, 118 (1998) (rejecting argument that search-incident to citation could be justified by risk that suspect will destroy evidence of his identity because "if a police officer is not satisfied with the identification furnished by the driver, this may be a basis for arresting him"); Brief of Petitioners at 46-47, *Atwater* (No. 99-1408) (arguing that officers could arrest when they cannot ascertain driver's identity); ACLU Amicus Brief, at 22-23, *Atwater* (No. 99-1408) (detailing state statutes that recognize lack of proof of identity as a basis to arrest for minor crimes).

391. See, e.g., ABA Standards, *supra* note 390, 10-2.2(c)(ii, iv, v); Nat'l Conference of Comm'rs on Unif. State Laws, Uniform Rules of Criminal Procedure 211(c)(iii) (1974) [hereinafter Uniform Rules]; NAPSA Standards, *supra* note 390, II.A(4), (5).

392. Arguably, the problem of out-of-state violators has been solved by adoption of the Nonresident Violator Compact of 1977, under which state *A* helps to enforce state *B*'s traffic laws by suspending the driver's license of a state *A* resident who fails to pay or appear in State *B*. Salken, *supra* note 34, at 267-68; see Supreme Court Oral Argument at 8, *Atwater* (No. 99-1408).

393. See, e.g., ABA Standards, *supra* note 390, 10-2.2(c)(iii); Uniform Rules, *supra* note 391, 211(c)(i).

committing the same violation for which he has just been charged,<sup>394</sup> or 3) is in need of medical care or other protection.<sup>395</sup> However, the third justification would seem to be rarely sufficient to justify custodial arrest for a non-jailable traffic violation; if the driver needs immediate medical care or protection, the officer can seize his keys and, if necessary, escort him home or to a hospital. The first two of these justifications are more substantial, and are probably covered by the first prong of Petitioner's proposed standard, because the arrest is "necessary for enforcement of the traffic laws." The Court simply needed to make these grounds for arrest more specific, and, for all of the proposed grounds, specify an officer-belief standard such as reasonable suspicion. It is worth mentioning, however, that these two additional grounds, while acceptable as a matter of setting federal constitutional minimum standards, are overbroad and problematic in the context of minor traffic violations. They should not automatically be adopted as a matter of state constitutional law, or in statutory or criminal-rule arrest provisions.

If the Court were unwilling to "legislate" all of these exceptions in *Atwater*, it could have taken a slightly more minimalist approach, validating the most compelling arrest grounds, for example, no identification, or out-of-state driver without a valid credit or bond card, while expressing doubts (or reserving judgment) about whether other exceptional cases might also justify arrest for a non-jailable traffic offense. A similar rule was proposed in one of the amicus briefs in *Atwater*—citation release should be mandatory for all non-jailable traffic offenses unless the defendant cannot be identified.<sup>396</sup> This strict rule produces the most proportional and uniform results, and provides the simplest decision rule. On the other hand, it is arguably too "overbroad" in the opposite (pro-suspect) direction, preventing some justifiable arrests (or at least casting doubt on their validity). Nevertheless, such a rule finds support in several of the Court's prior cases. The Court's rulings in *Tennessee v. Garner* and *Welsh v. Wisconsin*, discussed in Part III.B, prohibited certain intrusive police measures (the use of deadly force to arrest and warrantless entry of a home on exigent circumstances, respectively) even though the inability to use such measures would, in some cases, totally preclude effective prosecution of the suspect.<sup>397</sup>

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394. Uniform Rules, *supra* note 391, 211(c)(ii).

395. *Id.* 211(c)(iv).

396. Texas Defense Lawyers Amicus Brief, *supra* note 138, at 27 (proposing a second alternative rule). *But see id.* at 28-29 (arguing that "no reason" justifies not applying such a rule to non-jailable violations outside of the traffic law context).

397. *See supra* notes 310-16 and accompanying text. Neither of those cases, however, adopted a rule that would leave the police unable to prevent an immediate threat to public safety. In *Tennessee v. Garner* the Court approved the use of deadly force to deal with such a threat. 471 U.S. 1 (1985). In *Welsh v. Wisconsin*, the drunk driver the police were trying to arrest and subject to blood testing was in his home,

What evidentiary standard should apply to the circumstances justifying arrest? Should the Court have gone even further than the dissent's reasonable suspicion standard, and held that the police must have probable cause to believe that arrest is needed to protect one of the legitimate law enforcement interests noted above? Although the text and history of the Fourth Amendment provide no basis for this approach, some support for "reading in" a further probable cause requirement governing "custody need" can be found in the rule that police must have probable cause to believe "exigent circumstances" are present to permit a warrantless search or seizure.<sup>398</sup> If a probable cause standard were applied to need-for-custody assessments, it might also be appropriate to permit "standardized procedures"—regulations mandating arrest—to be applied in cases of serious crime, since the arrest power is often justified and widely invoked in such cases.<sup>399</sup> Even with this qualification, however, use of the probable cause standard is problematic in that it places stricter limits on police discretion. This higher standard would therefore be less likely to gain the support of a majority of the justices on the U.S. Supreme Court, or on state supreme courts, and it may be undesirable on policy grounds. Use of Justice O'Connor's articulable suspicion standard seems like a suitable compromise. Nor would this be a novel application of that standard. In several cases arising outside of the *Terry* stop and frisk context, the Court has granted additional police powers, but limited their use to cases meeting an articulable suspicion standard.<sup>400</sup>

Of course, state courts and rule-drafters have more freedom to craft arrest-limiting rules than does the Supreme Court. Courts may interpret state constitutional provisions more favorably than the Supreme Court has interpreted similar, or even identical, language in the federal constitution.<sup>401</sup> After *Atwater* was decided, lower courts in

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and was not expected to go out and resume driving. 466 U.S. 740 (1984).

398. See Dressler, *supra* note 21, § 12.04; Whitebread & Slobogin, *supra* note 21, § 9.04.

399. Such a mandatory arrest policy would be consistent with several of Professor LaFave's criteria for adopting an overbroad, "bright-line" rule. See *supra* note 100 and accompanying text.

400. See, e.g., *United States v. Knights*, 534 U.S. 112 (2001) (search of probationer's home); *Richards v. Wisconsin*, 520 U.S. 385 (1997) (need for "no-knock" home entry); *Maryland v. Buie*, 494 U.S. 325 (1990) ("sweep" of arrest premises for other dangerous persons); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (search of government employee's office); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (strip search at international border); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of high school student's purse).

401. LaFave, *supra* note 21. State and federal courts may also adopt rules under a "supervisory powers" theory, which provides more flexibility in the formulation of the rule and in its implementation, amendment, or repeal. The status of this power in federal courts is uncertain. See *id.* § 1.5(i). It has been frequently used, however, by some state supreme courts. See, e.g., *State v. Scales*, 518 N.W.2d 587 (Minn. 1994) (requiring electronic recording of custodial interrogations); *State v. Lefthand*, 488 N.W.2d 799 (Minn. 1992) (barring custodial interrogation of represented suspect

Montana and Ohio ruled that such an arrest violates the state constitution.<sup>402</sup> Even before *Atwater*, several states had adopted statutes or criminal rules limiting custodial arrests in minor cases, and experience has shown that such limitations are workable. In Minnesota, for example, the Rules of Criminal Procedure have, since their inception in 1975, required the police to issue citations in all misdemeanor cases with a maximum penalty of 90 days in jail (including non-traffic cases), “unless it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or further criminal conduct, or that there is a substantial likelihood that the accused will fail to respond to a citation.”<sup>403</sup> As for non-jailable violations (petty misdemeanors), the Rule’s text, commentary, and interpretive case law indicate that arrest is very rarely permitted.<sup>404</sup> Since 1977, these limits on the arrest power have been enforced through exclusionary rules.<sup>405</sup> For more serious offenses, however, the rules are different. Recognizing the fundamental proportionality principle discussed in Part III.B, as well as the more frequent need for arrest in serious cases, the Minnesota rules give police full discretion to arrest, or, in some cases, *require* arrest, if the most serious charged offense is a gross misdemeanor (punishable with up to one year in jail), or a felony.<sup>406</sup>

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without presence of or notice to counsel).

402. *State v. Bauer*, 36 P.3d 892 (Mont. 2001) (finding that arrest for being a minor in possession of an alcoholic substance, a non-jailable offense, is prohibited except in special circumstances); *State v. Brown*, 2001 WL 1657828 (Ohio App. 2d Dec. 28, 2001) (unpublished opinion) (finding that arrest of jaywalker violated Ohio statute R.C. 2935.26 and Ohio Constitution, and as a result, the cocaine seized in search incident must be suppressed). The prior Ohio Supreme Court decision in *State v. Jones*, 727 N.E.2d 886 (Ohio 2000), based on the same statute as well as the United States and Ohio constitutions, is still controlling notwithstanding *Atwater*. See also *United States v. Swanson*, 155 F. Supp. 2d 992, 1000 (C.D. Ill. 2001) (declining to extend *Atwater* to permit detention at police station beyond time reasonably necessary to write citation for traffic violations and apply court-ordered bail schedule).

403. Minn. R. Crim. P. 6.01(1).

404. *State v. Martin*, 253 N.W.2d 404 (Minn. 1977) (holding that arrest violated Rule 6.01); *State v. Richmond*, 602 N.W.2d 647 (Minn. Ct. App. 1999) (same); *State v. Evans*, 373 N.W.2d 836 (Minn. Ct. App. 1985) (same); Minn. R. Crim. P. 6.01(1), cmt. (“[W]here possible, a person should not be taken into custody for an offense for which the person could not be incarcerated even if found guilty.”); Minn. R. Crim. P. 3.01 (stating that upon filing of a complaint charging an offense punishable by fine only, a summons shall be issued in lieu of a warrant). Since Rule 6 went into effect in 1975, no reported case has ever upheld custodial arrest for a non-jailable misdemeanor. Cf. *State v. Brown*, 345 N.W.2d 233 (Minn. 1984) (finding that arrest for jailable misdemeanor was proper where suspect was known to have previously failed to appear after receiving citations).

405. See *Martin*, 253 N.W.2d 404 (excluding evidence obtained after arrest for a non-jailable misdemeanor); *State v. Varnado*, 582 N.W.2d 886 (Minn. 1998) (excluding evidence taken during arrest for jailable misdemeanor).

406. Minn. R. Crim. P. 6.01(2); *State v. Bauman*, 586 N.W.2d 416 (Minn. Ct. App. 1998) (upholding admissibility of evidence seized following custodial arrest on gross misdemeanor charge carrying maximum penalty of one year in jail).

Other states also significantly limit arrest powers in minor cases.<sup>407</sup> Indeed, some of these states require issuance of a citation for most misdemeanor traffic violations,<sup>408</sup> and a few even require citations for certain non-traffic offenses.<sup>409</sup> Such rules still permit arrest when the offender cannot be identified, or when the suspect appears unlikely to respond to the citation,<sup>410</sup> and a strong argument can be made that these are the only valid reasons to make a warrantless arrest for a non-jailable traffic offense.<sup>411</sup> Dangerous drivers—in particular, those who are drunk or chemically impaired—can usually be charged with and arrested for more serious offenses.<sup>412</sup> Short of that, officer predictions of “imminent harm” or “continuation” of the violation are arguably too subjective, unreliable, and inconsistent. Perhaps the most compelling additional basis for arrest beyond identification or non-appearance problems would be that the offender has already resumed the violation for which he has just been charged—for example, if Ms. Atwater had been cited and then drove off without

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407. One national survey found a large number of states with statutes requiring or strongly encouraging the use of citations for traffic and other minor offenses. See Salken, *supra* note 34, at 251 n.189. Additional limits are found in rules of criminal procedure (e.g., the Minnesota Rules). See also Davies, *supra* note 4, at 368 (noting that Justice Souter’s own summary of current state laws indicated that at least fifteen states would not permit warrantless arrest in a case like *Atwater*).

408. See, e.g., Ind. Code Ann. § 9-30-2-5 (1997); Neb. Rev. Stat. § 60-684 (1998); N.M. Stat. Ann. § 66-8-123(A) (1978); S.D. Codified Laws § 32-33-2 (2002).

409. See, e.g., Alaska Stat. § 12.25.180(b) (2000) (violations); Vt. R. Crim. P. 3(c) (misdemeanors).

410. Salken, *supra* note 34, at 266-67; see also *id.* at 251, n.189 (stating that, in the twenty-two states with statutes limiting discretion to arrest in traffic cases, by far the most common exceptions (i.e., permitting arrest) were for lack of satisfactory identification or risk of non-appearance in court).

411. See Uniform Vehicle Code, *supra* note 146, §§ 16-203, -204, -206 (stating that, for minor traffic violations, officers have discretion to arrest only where offender fails to furnish satisfactory proof of identity or where officer has reasonable and probable grounds to believe offender will disregard written promise to appear; offender who refuses to sign promise to appear must be promptly taken to court).

412. If a particular jurisdiction has removed jail penalties for certain potentially dangerous traffic violations (for example, the first-offense drunk driving offense at issue in *Welsh v. Wisconsin*, 466 U.S. 740 (1984)), such a violation could justify arrest for reasons of public safety. See LaFave, Search & Seizure Supplement, *supra* note 4, at 23. Arrest may also be needed to obtain scientific evidence of intoxication. If the legislature has authorized the gathering of such evidence, and if the law would be very difficult to enforce without such testing, then there is at least an implicit legislative intent to authorize (and indeed, to encourage) custodial arrest. Such offenses are, to that limited extent, “jailable.” Of course, it would be better if such laws were amended to explicitly provide that custodial arrest for chemical testing is permitted. See also Salken, *supra* note 34, at 274 (arguing that citation should be required for all adequately-identified violators in traffic cases, except for intoxicated drivers). Other than cases like *Welsh*, 466 U.S. 740, the need to arrest in order to conduct further investigation will be extremely rare in minor traffic cases. LaFave, Search & Seizure Supplement, *supra* note 4, at 24; Salken, *supra* note 34, at 269. The police will usually have witnessed the offense, already have all the evidence they need to convict, and expect to find no further evidence in the possession of the suspect. See also Knowles v. Iowa, 525 U.S. 113, 118 (1998).

buckling herself or her children. Of course, the officer can pursue the offender and issue another ticket. If such cases are deemed to be a problem, the legislature could specifically authorize arrest for a repeat violation on the same day, or could provide that such a repeat violation constitutes a jailable offense.<sup>413</sup> But unless and until the arrest rules or traffic laws are changed in this manner, the officer should assume that the legislature intends no more than a fine, even for repeated violations. Under such circumstances, the officer's sole duty and authority should be to ensure that the suspect has been identified and is likely to appear in court and pay the fine authorized by the legislature.

The experience of Minnesota and other states shows that strict limitations on police powers to arrest for minor offenses are workable in practice and pose no threat to law enforcement and public safety. Such limits should be enacted by legislatures in all states. But the political process in some states will not permit the adoption of even minimal limits on the arrest power. For example, in Texas, following the *Atwater* decision, a bill limiting arrests in minor cases passed the legislature despite great police opposition, but was then vetoed by the Governor in response to further police pressure.<sup>414</sup> If legislative solutions are not forthcoming, courts can and should impose arrest limits under the state constitution, supervisory powers, or state rules of criminal procedure, as proposed above.

#### CONCLUSION

The Supreme Court's decision in *Atwater* makes little sense based on the facts of the Petitioner's case, creates serious potential for abuse of the arrest power, and is not supported by the reasons stated in Justice Souter's majority opinion. The Court's apparent desire to limit further growth in the application of reasonableness balancing analysis may help to explain the result in *Atwater*, but does not justify it. The Court could easily have ruled in Ms. Atwater's favor without creating either unmanageably complex rules for the police and lower courts or a doctrinal slippery slope. A narrow ruling in her favor would have done justice in her case and prevented many similarly unjustified arrests in minor traffic cases. Such a "minimalist" ruling would also have been more consistent with the Court's usual approach to deciding novel constitutional issues, and is supported by the strong policy considerations articulated by Cass Sunstein. As Donald Dripps has shown, a wider, "maximalist" ruling is often appropriate in

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413. Cf. Minn. Stat. Ann. § 169.89(1) (2001) (stating that third non-jailable traffic violation within one year, excluding parking violations, is a jailable misdemeanor); Uniform Vehicle Code, *supra* note 146, § 17-101(b) (stating that third violation within one year is jailable).

414. Michele Deitch, *Veto Risks Texans' Civil Rights*, Dallas Morning News, July 1, 2001, at 5J, available at <http://www.dallasnews.com>.



criminal procedure cases, but *Atwater* was not such a case. The *Atwater* Court lacked sufficient information and experience with minor-violation arrest standards to issue a wide rule, and thus risked reaching the wrong result, with serious, unintended consequences.

Although the unfortunate results of *Atwater* will probably have to be remedied by statutes, rules, or state constitutional rulings, it is possible that the Supreme Court will be persuaded in the near future to revisit this issue and reverse itself, or at least define “extraordinary” intrusions broadly enough to include many custodial arrests.<sup>415</sup> In recent decades, there have been several instances in which the Court has overruled a prior decision, sometimes one it had issued only a few years earlier.<sup>416</sup> Alternatively, the Court might seek to limit *Atwater*’s potential for abuse by cutting back on other overbroad, pro-police rules, in particular those defining the invocation and scope of search incident to arrest.<sup>417</sup>

Several events could force the Court to revisit related Fourth Amendment doctrines, or *Atwater* itself. First, the Court may be presented with a custodial arrest involving even more troubling, but not clearly “extraordinary” or unusual facts, for instance: a non-white driver, arrested on much weaker probable cause (or based on a pretext, and/or racial profiling) for an even more trivial offense such as a parking or littering offense, searched more frequently or more thoroughly, and held for longer in a crowded, unsanitary, and dangerous jail.<sup>418</sup> Alternately (or in addition), the Court might conclude, based on new empirical data showing the significant or growing frequency of unnecessary custodial arrests in minor cases and/or searches “incident” to citation,<sup>419</sup> that abuses of the unfettered

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415. Reinterpretation of the “normal” versus “extraordinary” arrest distinction would be an example of a subsequent court taking a “minimalist” approach to a prior decision; for example, by characterizing much of the prior decision as dicta, even though the authors of that decision intended it to be “maximalist.” See Sunstein, *supra* note 59, at 19-21; see also Dripps, *Constitutional Theory*, *supra* note 71, at 63-72 (arguing that all justices should accept both the holding and the reasoning of prior decisions, even those with which they strongly disagree, but that the Court should also feel free to reconsider and openly overrule prior holdings, when appropriate).

416. See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (1991), *partially overruling* *Booth v. Maryland*, 482 U.S. 496 (1987) (regarding victim-impact statements in death penalty hearings); *United States v. Ross*, 456 U.S. 798 (1982), *overruling* *Robbins v. California*, 453 U.S. 420 (1981) (involving search of closed container found in a car); *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), *overruling* *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) (requiring flag salute in public schools in violation of child’s religious beliefs).

417. For a list of authorities criticizing this doctrine, see *supra* note 114.

418. See, e.g., *Davenport v. Rodriguez*, 147 F. Supp. 2d 630 (S.D. Tex. 2001) (involving non-in-presence arrest for alleged shoplifting). In *Davenport*, police officers strip-searched defendant at police station and while in public view, and forced her to change clothes. *Id.* at 634. Defendant was then placed in a cell for three hours before being released. *Id.* at 637. The trial court dismissed her § 1983 suit, citing *Atwater*. *Id.*

419. See *supra* note 19 and accompanying text.

arrest power granted in *Atwater* are more common than Justice Souter had assumed.<sup>420</sup> The collection of such data will be difficult,<sup>421</sup> but such research is clearly a high priority.

Finally, the Court may be forced, in light of further developments in Fourth Amendment law and practice, to reconsider its limits on the application of reasonableness balancing and the proportionality principle. It seems inevitable that the Court will be presented with one or more cases in which the police request additional investigative authority to deal with terrorism or other threats of catastrophic harm.<sup>422</sup> Indeed, the Court has already suggested in dicta that such additional authority will be granted.<sup>423</sup> But if the Supreme Court does grant such authority, it will face increased pressure to impose additional limitations on police powers in very minor cases. Reasonableness balancing and proportionality cannot be allowed to become a “one way street, to be used only to water down” Fourth Amendment rights.<sup>424</sup>

The *Atwater* decision was puzzling and disappointing, but it also provides some important lessons about the processes that shape the development of Fourth Amendment doctrine. With hindsight, scholars and civil rights litigators can better understand how the Court went astray in *Atwater*, and, in the future, avoid some of the problems that contributed to the Court’s unfortunate decision.

*Atwater* illustrates the variety of ways in which Fourth Amendment law depends on the accidents of Supreme Court litigation—which cases come to the Court, with what facts, which arguments, and in what procedural posture. At the oral argument, Justice O’Connor told Petitioner’s counsel: “[y]ou’ve got the perfect case.”<sup>425</sup> But in

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420. Cf. *Arkansas v. Sullivan*, 532 U.S. 769, 773 (2001) (Ginsburg, J., concurring) (hoping that Justice Souter’s assumed “dearth of horrors” was an accurate perception and prediction, “[b]ut . . . if experience demonstrates ‘anything like an epidemic of unnecessary minor-offense arrests’ . . . I hope the Court will reconsider [*Atwater*]”).

421. See *supra* notes 172-73 and accompanying text.

422. See William J. Stuntz, *Local Policing After the Terror*, 111 Yale L.J. 2137 (2002) (arguing that it is both natural and good that additional police powers be granted in the wake of the September 11th attacks, but that there should be compensating changes that increase regulation of certain police powers).

423. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (“[T]he Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.”); *Florida v. J.L.*, 529 U.S. 266, 273 (2000) (noting that “a report of a person carrying a bomb” might permit a *Terry* stop, where a similar report of a man with a gun would not). Some lower courts have already adopted what amounts to a “terrorism” exception to normal Fourth Amendment requirements. See, e.g., *People v. Sirhan*, 497 P.2d 1121, 1140 (Cal. 1972).

424. *Gooding v. United States*, 416 U.S. 430, 465 (1974) (Marshall, J., dissenting) (arguing that nighttime searches are much more intrusive and should require additional justification, beyond normal probable cause and warrant requirements, under the Court’s reasonableness balancing approach).

425. Supreme Court Oral argument at 14, *Atwater* (No. 99-1408).

fact, *Atwater* was a deceptively difficult case, due to the Court's broader concerns about bright-line rules and doctrinal slippery slopes. Moreover, even the facts were not as strongly in Ms. Atwater's favor as one might think. Her arrest, handling, and detention were actually fairly "mild," and carried no hint of racial profiling or pretext. As suggested above, much worse minor-offense arrest scenarios can and will arise.

The procedural posture of Ms. Atwater's case—a civil suit, dismissed on summary judgment—was also problematic. At first blush, she would seem to benefit, in two ways: unlike most Fourth Amendment claimants, she was not trying to exclude evidence clearly establishing her guilt; moreover, the trial court's summary judgment decision required it and subsequent reviewing courts to assume as true the relevant facts alleged in her complaint. But did all of the judges and justices strictly apply this assumption, or did some of them assume that the facts were probably *less* strong than she alleged, and that there may have actually been legitimate reasons for her arrest? Officer Turek later told a reporter that he arrested Ms. Atwater to protect her children,<sup>426</sup> and this was also the view of the lawyer for the city of Lago Vista.<sup>427</sup> Moreover, Justice Souter stated in a footnote that "allowing a small child to stand unrestrained in the front seat of a moving vehicle at least arguably constitutes [felony] child endangerment."<sup>428</sup> Although judges are believed to be capable of playing the legalistic mind game of assuming and then ruling upon hypothetical facts, one wonders if the *Atwater* majority would have approved of such outrageous police behavior, or would have been so willing to assume that such police abuses are rare, if the assumed facts had actually been proven at trial. Moreover, since the arresting officer never got a chance to give his reasons for taking Ms. Atwater into custody, the trial and reviewing courts had no concrete examples of such reasons, legitimate or illegitimate. Thus any approval or disapproval of such reasons would have been dicta.<sup>429</sup>

Furthermore, although Ms. Atwater was not trying to suppress evidence, she was trying to obtain compensatory and punitive damages from the arresting officer, as well as from the police chief and the city of Lago Vista. Justice Souter was very concerned about the unfairness of subjecting officers to future civil suits, and the

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426. Patty Mullins, *Turek tells his side of arrest*, North Lake Travis Log, May 16, 2001, at [http://www.zwire.com/site/news.cfm?newsid=1823054&BRD=1553&PAG=461&dept\\_id=181](http://www.zwire.com/site/news.cfm?newsid=1823054&BRD=1553&PAG=461&dept_id=181) (last accessed May 17, 2001).

427. Charles Lane, *Police Win Latitude on Minor Cases*, Washington Post, Apr. 25, 2001, at A1 (stating that attorney Bill Krueger said Ms. Atwater was "endangering the life of [her] child").

428. *Atwater v. City of Lago Vista*, 532 U.S. 318, 349 n.20 (2001).

429. Of course, when the Court issues a "wide" ruling, going beyond the specific facts of the case(s) adjudicated, much of its opinion is technically dicta. See *supra* Part IV.

deterrent effect that even the threat of liability would have on arrest decisions—problems that seemed quite real, given the lower court’s rejection of qualified immunity. As was suggested in Part II, qualified immunity would seem to be appropriate in most such cases, including this one. But of course, counsel representing Ms. Atwater in her civil suit was not free to argue for a generous doctrine of qualified immunity. Finally, Ms. Atwater was clearly guilty of the violation that led to her arrest; a truly perfect case would have to be brought by a citizen who was innocent of any violation (and not found, when searched incident to the arrest, to be carrying anything incriminating).

Supreme Court decisions are also strongly influenced by the arguments that the parties choose to make and emphasize. As has been noted at several points in this article, “20/20 hindsight” suggests that Ms. Atwater and her supporting amici made a number of mistakes in deciding how to frame and argue the issues in this case. In particular, they gave too much attention and priority to historical arguments, and failed to anticipate the issues which most concerned Justice Souter, namely, the value of simple, readily-administered rules (the *Robinson/Belton* argument); the threat of civil liability, despite qualified immunity protections; the frequency of arrests like Ms. Atwater’s; and the Court’s desire, expressed in *Whren* and earlier cases, to limit further applications of the reasonableness balancing analysis. It may also be the case that Petitioner and her supporting amici, by citing the many model and state rules limiting arrests in minor cases, gave the Court too many options; this diversity of possible rules might have made the Court’s task seem more complex than it was, or may have made these issues seem too “legislative.”<sup>430</sup> It probably would have been wiser, both as a matter of litigation strategy and in terms of general principles of constitutional adjudication (as articulated by Professor Sunstein), for Petitioner and her amici to give the Court only one constitutionally required rule, limited to the facts of the current case (i.e., non-jailable traffic offenses).

Counsel for Ms. Atwater and her supporting amici are not entirely to blame for their unsuccessful tactics; they didn’t get much help from Fourth Amendment scholars, who have devoted very limited attention to the specific and broader doctrinal issues in *Atwater*. This is rather surprising—a case like *Atwater* has been expected since 1973, when the Court decided *Robinson* and *Gustafson*. Justices Stewart and Powell, concurring in those cases, both suggested that some offenses are too minor to justify custodial arrest.<sup>431</sup> Moreover, the holdings of those cases—permitting routine, suspicionless searches incident to arrest—clearly put a premium on the underlying question of when such arrests are constitutionally allowed. That premium grew in value

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430. See *supra* note 142 and accompanying text.

431. See *supra* note 117.

as the Court: 1) added additional routine search powers to arrests and to related car-impound and jail-booking procedures;<sup>432</sup> 2) refused to limit pretextual traffic stops;<sup>433</sup> and 3) made it virtually impossible for most suspects to successfully challenge racially biased police decisions.<sup>434</sup> The *Atwater* premium went platinum in 1998 when the Court held, in *Knowles v. Iowa*,<sup>435</sup> that a routine “search incident” is not authorized if the officer has already decided to release the suspect on citation. *Knowles* sent a clear message to the police: if you want to search, be sure to arrest first (or at least, say you’re going to) rather than ticket the offender. That same year, the Court heard arguments but then dismissed the writ in a case challenging custodial arrest for a non-jailable business-licensing violation.<sup>436</sup>

Thus it was inevitable that the Court would eventually have to decide whether there are any constitutional limits beyond probable cause on in-public arrests for very minor offenses. Similarly, the Court’s recent preference for overbroad, pro-police bright-line rules is well known, as was the steadily expanding application of reasonableness balancing. Sooner or later, the Court would have to decide whether certain categories of search and seizure are excluded, *a priori*, from balancing analysis, and are governed instead by cruder categories tied to the degree of suspicion (no police power, if no individualized suspicion; very limited power, with reasonable suspicion; largely unfettered power, if the police act with probable cause).

Scholars were well aware of these developments, but did not link most of them to the looming question posed by *Atwater*. Some scholars disapproved of reasonableness balancing, apparently thinking that it would only be used to expand police powers.<sup>437</sup> Very few writers emphasized the importance of offense severity in reasonableness balancing analysis, and even fewer explicitly recognized the important concept of Fourth Amendment proportionality.<sup>438</sup>

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432. See *supra* notes 8-10 and accompanying text (discussing *Belton*, *Bertine*, and *Lafayette*).

433. See *supra* notes 11, 192-94, 250-53 and accompanying text (discussing *Whren*).

434. See *supra* note 14 and accompanying text.

435. 525 U.S. 113 (1998); see *supra* notes 15-18 and accompanying text.

436. See *supra* notes 63-64 and accompanying text.

437. See *supra* note 93 and accompanying text.

438. See *supra* note 301. Scholars who have recognized the proportionality concept have not always emphasized or even discussed offense severity. See, e.g., Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 *Fordham L. Rev.* 723, 727 (1999) (arguing that prosecutors should balance public and private costs of intrusive investigative measures against factors such as offense gravity, the likely benefit of the measure, and the availability of less intrusive means); Slobogin, *Proportionality Principle*, *supra* note 301, at 1053 (proposing that increasing degrees of suspicion—from reasonable suspicion, to probable cause, to clear and convincing evidence—justify increasing degrees of governmental intrusion).

Could counsel for Ms. Atwater and her supporting amici, or scholars writing on contemporary Fourth Amendment issues, have done better? Could they have changed the result in *Atwater*? Perhaps not. But the Court's disastrous decision at least suggests the need for a more strategic view of Supreme Court advocacy and policy-oriented scholarship. Advocates must do a better job of anticipating the issues that will concern the Court, or certain Justices, even if those concerns are not clearly reflected in the other side's briefs. Scholars must do a better job of identifying critical "open" questions of the sort presented in *Atwater*, and analyzing how the Court is likely to address those questions in light of its recent decisions, interpretative theories, and competing policies.

## *Notes & Observations*