AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice: Search and Seizure

**Mitchell v. Wisconsin**, \_\_\_ U.S. \_\_\_ (2019).

*Wisconsin police officers found Gerald Mitchell wandering by a lake and close to coherent. A preliminary breath test found that Mitchell had a BAC (blood alcohol concentration) of three times the legal limit for driving in Wisconsin. Mitchell was arrested for drunk driving and driven to the police station to be administered a more reliable breath test. Because Mitchell lost consciousness during the ride, police officers drove him to the local hospital where staff drew a blood sample which confirmed his high BAC. At his trial for drunk-driving, Mitchell moved to suppress the blood draw. He claimed that blood draw violated his Fourth Amendment rights as incorporated by the due process clause of the Fourteenth Amendment because he did not consent to the test and police did not have a warrant. The trial court rejected that claim and that rejection was affirmed by the Wisconsin Supreme Court. Mitchell appealed to the Supreme Court of the United States.*

 *The Supreme Court by a 5-4 vote sustained the Wisconsin Supreme Court. Justice Samuel Alito’s plurality opinion held that police ordinarily do not need a warrant to conduct a BAC test when a suspected drunk driver is unconscious. Why does Alito conclude that “the exigent-circumstances rule almost always permits a blood test without a warrant”? What exceptions would he make to this general rule? Why does Justice Clarence Thomas reject these exceptions? Why does Justice Sonia Sotomayor’s dissent reject Alito’s general rule? Who has the better of the argument? Justice Stephen Breyer case the decisive vote in* Mitchell. *Breyer, on occasion, defects from the liberal bloc in certain criminal process cases. What explains this and those defections? Is Breyer just opposed to drunk driving (and, in other cases, drugs), or is there something in his liberal jurisprudence that warrants a more narrow reding of the Fourth Amendment than other liberal justices?*

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I841bc48b98b711e9b8aeecdeb6661cf4) announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I841bc48b98b711e9b8aeecdeb6661cf4), and Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I841bc48b98b711e9b8aeecdeb6661cf4) join.

In this case, we return to a topic that we have addressed twice in recent years: the circumstances under which a police officer may administer a warrantless blood alcohol concentration (BAC) test to a motorist who appears to have been driving under the influence of alcohol. We have previously addressed what officers may do in two broad categories of cases. First, an officer may conduct a BAC test if the facts of a particular case bring it within the exigent-circumstances exception to the Fourth Amendment's general requirement of a warrant. Second, if an officer has probable cause to arrest a motorist for drunk driving, the officer may conduct a breath test (but not a blood test) under the rule allowing warrantless searches of a person incident to arrest.

Today, we consider what police officers may do in a narrow but important category of cases: those in which the driver is unconscious and therefore cannot be given a breath test. In such cases, we hold, the exigent-circumstances rule almost always permits a blood test without a warrant. When a breath test is impossible, enforcement of the drunk-driving laws depends upon the administration of a blood test. And when a police officer encounters an unconscious driver, it is very likely that the driver would be taken to an emergency room and that his blood would be drawn for diagnostic purposes even if the police were not seeking BAC information. In addition, police officers most frequently come upon unconscious drivers when they report to the scene of an accident, and under those circumstances, the officers' many responsibilities—such as attending to other injured drivers or passengers and preventing further accidents—may be incompatible with the procedures that would be required to obtain a warrant. Thus, when a driver is unconscious, the general rule is that a warrant is not needed.

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In considering Wisconsin's implied-consent law, we do not write on a blank slate. “Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.” . . . We have held that forcing drunk-driving suspects to undergo a blood test does not violate their constitutional right against self-incrimination. Nor does using their refusal against them in court. And punishing that refusal with automatic license revocation does not violate drivers' due process rights if they have been arrested upon probable cause. . . .

These cases generally concerned the Fifth and Fourteenth Amendments, but motorists charged with drunk driving have also invoked the Fourth Amendment's ban on “unreasonable searches” since BAC tests are “searches.” Though our precedent normally requires a warrant for a lawful search, there are well-defined exceptions to this rule. In [*Birchfield*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039223797&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) *v. North Dakota* (2016), we applied precedent on the “search-incident-to-arrest” exception to BAC testing of conscious drunk-driving suspects. We held that their drunk-driving arrests, taken alone, justify warrantless breath tests but not blood tests, since breath tests are less intrusive, just as informative, and (in the case of conscious suspects) readily available.

We have also reviewed BAC tests under the “exigent circumstances” exception—which, as noted, allows warrantless searches “to prevent the imminent destruction of evidence.” In M*issouri v. McNeely* (2013), we were asked if this exception covers BAC testing of drunk-driving suspects in light of the fact that blood-alcohol evidence is always dissipating due to “natural metabolic processes. We answered that the fleeting quality of BAC evidence alone is not enough. But in *Schmerber v. California* (1966) it did justify a blood test of a drunk driver who had gotten into a car accident that gave police other pressing duties, for then the “further delay” caused by a warrant application really “would have threatened the destruction of evidence

Like *Schmerber*, this case sits much higher than [*McNeely*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030367985&pubNum=0000780&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) on the exigency spectrum. [*McNeely*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030367985&pubNum=0000780&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was about the minimum degree of urgency common to all drunk-driving cases. In [*Schmerber*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131595&pubNum=0000780&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), a car accident heightened that urgency. And here Mitchell's medical condition did just the same. Mitchell's stupor and eventual unconsciousness also deprived officials of a reasonable opportunity to administer a breath test. . . .

The Fourth Amendment guards the “right of the people to be secure in their persons ... against unreasonable searches” and provides that “no Warrants shall issue, but upon probable cause.” A blood draw is a search of the person, so we must determine if its administration here without a warrant was reasonable. Though we have held that a warrant is normally required, we have also “made it clear that there are exceptions to the warrant requirement.” And under the exception for exigent circumstances, a warrantless search is allowed when “‘there is compelling need for official action and no time to secure a warrant.’”

The bottom line is that BAC tests are needed for enforcing laws that save lives. . . .

First, highway safety is a vital public interest. . . . Second, when it comes to fighting these harms and promoting highway safety, federal and state lawmakers have long been convinced that specified BAC limits make a big difference. . . . Third, enforcing BAC limits obviously requires a test that is accurate enough to stand up in court. And we have recognized that “[e]xtraction of blood samples for testing is a highly effective means of” measuring “the influence of alcohol.” Enforcement of BAC limits also requires prompt testing because it is “a biological certainty” that “[a]lcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour.... Evidence is literally disappearing by the minute.” Finally, when a breath test is unavailable to promote those interests, “a blood draw becomes necessary. Thus, in the case of unconscious drivers, who cannot blow into a breathalyzer, blood tests are essential for achieving the compelling interests described above.

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We held that there was no time to secure a warrant before a blood test of a drunk-driving suspect in [*Schmerber*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131595&pubNum=0000780&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) because the officer there could “reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence. So even if the constant dissipation of BAC evidence alone does not create an exigency, [*Schmerber*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131595&pubNum=0000780&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) shows that it does so when combined with other pressing needs. . . . [E]xigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious, so [*Schmerber*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131595&pubNum=0000780&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) controls: With such suspects, too, a warrantless blood draw is lawful.

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Mitchell objects that a warrantless search is unnecessary in cases involving unconscious drivers because warrants these days can be obtained faster and more easily. . . . [W]ith better technology, the time required has shrunk, but it has not disappeared. In the emergency scenarios created by unconscious drivers, forcing police to put off other tasks for even a relatively short period of time may have terrible collateral costs. That is just what it means for these situations to be emergencies.

When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment. We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. Because Mitchell did not have a chance to attempt to make that showing, a remand for that purpose is necessary.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I841bc48b98b711e9b8aeecdeb6661cf4), concurring in the judgment.

Today, the plurality adopts a difficult-to-administer rule: Exigent circumstances are generally present when police encounter a person suspected of drunk driving—except when they aren't. The plurality's presumption will rarely be rebutted, but it will nevertheless burden both officers and courts who must attempt to apply it. “The better (and far simpler) way to resolve” this case is to apply “the per se rule” I proposed. . . .Under that rule, the natural metabolization of alcohol in the blood stream “ ‘creates an exigency once police have probable cause to believe the driver is drunk,’ ” regardless of whether the driver is conscious. . . .

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. . . “[T]he imminent destruction of evidence” is a risk in every drunk-driving arrest and thus “implicates the exigent-circumstances doctrine.” “Once police arrest a suspect for drunk driving, each passing minute eliminates probative evidence of the crime” as alcohol dissipates from the bloodstream. . . . Because the provisions of Wisconsin law at issue here allow blood draws only when the driver is suspected of impaired driving, they fit easily within the exigency exception to the warrant requirement.

Instead of adopting this straightforward rule, the plurality makes a flawed distinction between ordinary drunk-driving cases in which blood alcohol concentration evidence “is dissipating” and those that also include “some other [pressing] factor.” But whether “some other factor creates pressing health, safety, or law-enforcement needs that would take priority over a warrant application” is irrelevant. When police have probable cause to conclude that an individual was driving drunk, probative evidence is dissipating by the minute. And that evidence dissipates regardless of whether police had another reason to draw the driver's blood or whether “a warrant application would interfere with other pressing needs or duties.”

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Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I841bc48b98b711e9b8aeecdeb6661cf4), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I841bc48b98b711e9b8aeecdeb6661cf4) and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I841bc48b98b711e9b8aeecdeb6661cf4) join, dissenting.

The plurality's decision rests on the false premise that today's holding is necessary to spare law enforcement from a choice between attending to emergency situations and securing evidence used to enforce state drunk-driving laws. Not so. To be sure, drunk driving poses significant dangers that Wisconsin and other States must be able to curb. But the question here is narrow: What must police do before ordering a blood draw of a person suspected of drunk driving who has become unconscious? Under the Fourth Amendment, the answer is clear: If there is time, get a warrant.

The State of Wisconsin conceded in the state courts that it had time to get a warrant to draw Gerald Mitchell's blood, and that should be the end of the matter. Because the plurality needlessly casts aside the established protections of the warrant requirement in favor of a brand new presumption of exigent circumstances that Wisconsin does not urge, that the state courts did not consider, and that contravenes this Court's precedent, I respectfully dissent.

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The warrant requirement is not a mere formality; it ensures that necessary judgment calls are made “ ‘by a neutral and detached magistrate,’ ” not “ ‘by the officer engaged in the often competitive enterprise of ferreting out crime.’ A warrant thus serves as a check against searches that violate the Fourth Amendment by ensuring that a police officer is not made the sole interpreter of the Constitution's protections. Accordingly, a search conducted without a warrant is “per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”

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Blood draws are “searches” under the Fourth Amendment. The act of drawing a person's blood, whether or not he is unconscious, “involve[s] a compelled physical intrusion beneath [the] skin and into [a person's] veins,” all for the purpose of extracting evidence for a criminal investigation. . . . That “invasion of bodily integrity” disturbs “an individual's ‘most personal and deep-rooted expectations of privacy.’ ” [McNeely, 569 U.S., at 148, 133 S.Ct. 1552](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030367985&pubNum=0000780&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RP&fi=co_pp_sp_780_148&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_148).

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[*Schmerber*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131595&pubNum=0000780&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and [*McNeely*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030367985&pubNum=0000780&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) establish that there is no categorical exigency exception for blood draws, although exigent circumstances might justify a warrantless blood draw on the facts of a particular case. . . . Against this precedential backdrop, Wisconsin's primary argument has always been that Mitchell consented to the blood draw through the State's “implied-consent law.” Under that statute, a motorist who drives on the State's roads is “deemed” to have consented to a blood draw, breath test, and urine test, and that supposed consent allows a warrantless blood draw from an unconscious motorist as long as the police have probable cause to believe that the motorist has violated one of the State's impaired driving statutes. The plurality does not rely on the consent exception here. With that sliver of the plurality's reasoning I agree. I would go further and hold that the state statute, however phrased, cannot itself create the actual and informed consent that the Fourth Amendment requires. That should be the end of this case.

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There are good reasons why Wisconsin never asked any court to consider applying \*2547 any version of the exigency exception here: This Court's precedents foreclose it. According to the plurality, when the police attempt to obtain a blood sample from a person suspected of drunk driving, there will “almost always” be exigent circumstances if the person falls unconscious. As this case demonstrates, however, the fact that a suspect fell unconscious at some point before the blood draw does not mean that there was insufficient time to get a warrant. And if the police have time to secure a warrant before the blood draw, “the Fourth Amendment mandates that they do so.”

The exigent-circumstances exception to the Fourth Amendment warrant requirement applies if the State can demonstrate a “compelling need for official action and no time to secure a warrantThe Court has identified exigencies when officers need to enter a home without a warrant to provide assistance to a “seriously injured” occupant or one facing an imminent threat of such injury, when officers are in “hot pursuit” of a fleeing suspect, and when officers need to enter a burning building to extinguish a fire. Blood draws implicate a different type of exigency. The Court has “recognized that in some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence.”

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. . . . [C]ases involving blood draws are “different in critical respects” from the typical destruction-of-evidence case that presents police officers with a “ ‘ “now or never” ’ ” situation. Unlike situations in which “police are just outside the door to a home” and “evidence is about to be destroyed, a person is about to be injured, or a fire has broken out,” some delay is inherent when officers seek a blood test regardless of whether officers are required to obtain a warrant first. In the typical situation, the police cannot test a person's blood as soon as the person is arrested; police officers do not draw blood roadside. Rather, they generally must transport the drunk-driving suspect to a hospital or other medical facility and wait for a medical professional to draw the blood. That built-in delay may give police officers time to seek a warrant, especially if the suspect is brought to the hospital by an officer or emergency-response professional other than the one who applies for the warrant.

. . . . Meanwhile, as the Court has observed, significant technological advances have allowed for “more expeditious processing of warrant applications. In the federal system, magistrate judges can issue warrants based on sworn testimony communicated over the phone or through “ ‘other reliable electronic means.’ . . . As a result, judges can often issue warrants in 5 to 15 minutes.

The reasons the Court gave for rejecting a categorical exigency exception in [*McNeely*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030367985&pubNum=0000780&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) apply with full force when the suspected drunk driver is (or becomes) unconscious. In these cases, there is still a period of delay during which a police officer might take steps to secure a warrant. Indeed, as the plurality observes, that delay is guaranteed because an unconscious person will need to be transported to the hospital for medical attention. . . . Likewise, an unconscious person's BAC dissipates just as gradually and predictably as a conscious person's does. Furthermore, because unconsciousness is more likely to occur at higher BACs, the BACs of suspected drunk drivers who are unconscious will presumably be higher above the legal limit—and thus remain above the legal limit for longer—than is true for suspects who are conscious and close to sobering up. And, of course, the process for getting a warrant remains the same.

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. . . . Of course, the police and other first responders must dutifully attend to any urgent medical needs of the driver and any others at the scene; no one suggests that the warrant process should interfere with medical care. The point is that, in many cases, the police will have enough time to address medical needs and still get a warrant before the putative evidence (i.e., any alcohol in the suspect's blood) dissipates. And if police officers “are truly confronted with a ‘now or never’ situation,” they will be able to rely on the exigent-circumstances exception to order the blood draw immediately. . . .

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There is no doubt that drunk drivers create grave danger on our roads. It is, however, “[p]recisely because the need for action ... is manifest” in such cases that “the need for vigilance against unconstitutional excess is great.” “Requiring a warrant whenever practicable helps ensure that when blood draws occur, they are indeed justified.”

The plurality today carries that burden for a State that never asked it to do so, not only here but also in a scattershot mass of future cases. Acting entirely on its own freewheeling instincts—with no briefing or decision below on the question—the plurality permits officers to order a blood draw of an unconscious person in all but the rarest cases, even when there is ample time to obtain a warrant. The plurality may believe it is helping to ameliorate the scourge of drunk driving, but what it really does is to strike another needless blow at the protections guaranteed by the Fourth Amendment.

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I841bc48b98b711e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I841bc48b98b711e9b8aeecdeb6661cf4), dissenting.

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