AMERICAN CONSTITUTIONALISM

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Supplementary Material

The Contemporary Era—Criminal Justice/Search and Seizure

**Birchfield v. North Dakota, \_\_ U.S. \_\_** (2016)

*Danny Birchfield was arrested for drunk driving and informed that North Dakota law required to him to take a blood test that would determine his blood alcohol content. When Birchfield refused, he was tried and sentenced to thirty days in jail. That sentence was affirmed by the Supreme Court of North Dakota. Steven Beylund was similarly arrested for drunk driving and informed that North Dakota law required him to take a blood test that would determine his blood alcohol content. Unlike Birchfield, Beylund consented to the test, fearing the criminal penalties for refusal. When the test showed his blood alcohol concentration was three times over the legal limit, Beylund’s driver’s license was suspended for two years. William Bernard was arrested for drunk driving and informed that Minnesota law required him to take a breath test to determine his breath alcohol content. When Bernard refused, he was charged with test refusal in the first degree. A lower state court dismissed those charges as inconsistent with the Fourth and Fourteenth Amendment, but that decision was reversed by an intermediate state court and, subsequently, by the Supreme Court of Minnesota. Birchfield, Beylund and Bernard all appealed to the Supreme Court of the United States. They claimed that state laws that imposed criminal penalties for drivers who refused to take blood or breath tests after being arrested for drunk driving violated the warrant requirement of the Fourth Amendment as incorporated by the due process clause of the Fourteenth Amendment.*

*The Supreme Court by a 6-2 vote ruled that state criminal laws could require drunk drivers to take breath tests, but by a 7-1 vote ruled that state criminal laws could not require drunk drivers to take blood tests unless the arresting officers secured a warrant. Justice Samuel Alito’s majority opinion insisted that police officers did not need warrants when conducting searches incident to arrests when doing so served legitimate government interests and do not trench on significant privacy interests. To what extent to Justice Sonia Sotomayor and Justice Clarence Thomas disagree with Alito’s constitutional test for searches incident to an arrest and to what extent do they disagree with Alito’s application of those tests? What is the correct test and how would you apply that test to the facts of the case?*

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I319e186b395011e6a807ad48145ed9f1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court.

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. . . [O]ur cases establish that the taking of a blood sample or the administration of a breath test is a search. The question, then, is whether the warrantless searches at issue here were reasonable. “[T]he text of the Fourth Amendment does not specify when a search warrant must be obtained.”  But “this Court has inferred that a warrant must [usually] be secured.”  This usual requirement, however, is subject to a number of exceptions.

We have previously had occasion to examine whether one such exception—for “exigent circumstances”—applies in drunk-driving investigations. The exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant. . . . In *Schmerber v. California* (1966), we held that drunk driving may present such an exigency. There, an officer directed hospital personnel to take a blood sample from a driver who was receiving treatment for car crash injuries. [384 U.S., at 758](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131595&pubNum=0000780&originatingDoc=I319e186b395011e6a807ad48145ed9f1&refType=RP&fi=co_pp_sp_780_758&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_758). The Court concluded that the officer “might reasonably have believed that he was confronted with an emergency” that left no time to seek a warrant because “the percentage of alcohol in the blood begins to diminish shortly after drinking stops.”  . . . More recently, though, we have held that the natural dissipation of alcohol from the bloodstream does not always constitute an exigency justifying the warrantless taking of a blood sample. That was the holding of *Missouri v. McNeely* (2013). . . .  While emphasizing that the exigent-circumstances exception must be applied on a case-by-case basis, the *McNeely* Court noted that other exceptions to the warrant requirement “apply categorically” rather than in a “case-specific” fashion.  One of these is the long-established rule that a warrantless search may be conducted incident to a lawful arrest.

The search-incident-to-arrest doctrine has an ancient pedigree. Well before the Nation's founding, it was recognized that officers carrying out a lawful arrest had the authority to make a warrantless search of the arrestee's person. . . . One Fourth Amendment historian has observed that, prior to American independence, “[a]nyone arrested could expect that not only his surface clothing but his body, luggage, and saddlebags would be searched and, perhaps, his shoes, socks, and mouth as well.” No historical evidence suggests that the Fourth Amendment altered the permissible bounds of arrestee searches. . . .

When this Court first addressed the question, we too confirmed (albeit in dicta) “the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidence of crime.” *Weeks v. United States* (1914). The exception quickly became a fixture in our Fourth Amendment case law. But in the decades that followed, we grappled repeatedly with the question of the authority of arresting officers to search the area surrounding the arrestee, and our decisions reached results that were not easy to reconcile.

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. . . [I]n *United States v. Robinson* (1973), . . . [w]noted that the search-incident-to-arrest rule actually comprises “two distinct propositions”: “The first is that a search may be made of the person of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee.” After a thorough review of the relevant common law history, we repudiated “case-by-case adjudication” of the question whether an arresting officer had the authority to carry out a search of the arrestee's person.  The permissibility of such searches, we held, does not depend on whether a search of a particular arrestee is likely to protect officer safety or evidence. . . .

Our decision two Terms ago in *Riley v. California* (2014) . . . explained how the rule should be applied in situations that could not have been envisioned when the Fourth Amendment was adopted. . . . “Absent more precise guidance from the founding era,” the Court wrote, “we generally determine whether to exempt a given type of search from the warrant requirement ‘by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’ ”  Blood and breath tests to measure blood alcohol concentration are not as new as searches of cell phones, but here, as in *Riley*, the founding era does not provide any definitive guidance as to whether they should be allowed incident to arrest. Lacking such guidance, we engage in the same mode of analysis as in *Riley* : we examine “the degree to which [they] intrud[e] upon an individual's privacy and ... the degree to which [they are] needed for the promotion of legitimate governmental interests.' ”

Years ago we said that breath tests do not “implicat[e] significant privacy concerns.”   That remains so today.

First, the physical intrusion is almost negligible. Breath tests “do not require piercing the skin” and entail “a minimum of inconvenience.” . . . Humans have never been known to assert a possessory interest in or any emotional attachment to any of the air in their lungs. The air that humans exhale is not part of their bodies. Exhalation is a natural process—indeed, one that is necessary for life. . . . In prior cases, we have upheld warrantless searches involving physical intrusions that were at least as significant as that entailed in the administration of a breath test. Just recently we described the process of collecting a DNA sample by rubbing a swab on the inside of a person's cheek as a “negligible” intrusion. *Maryland v. King* (2013)

Second, breath tests are capable of revealing only one bit of information, the amount of alcohol in the subject's breath.

Finally, participation in a breath test is not an experience that is likely to cause any great enhancement in the embarrassment that is inherent in any arrest. The act of blowing into a straw is not inherently embarrassing, nor are evidentiary breath tests administered in a manner that causes embarrassment. . . .

Blood tests are a different matter. They “require piercing the skin” and extract a part of the subject's body. And while humans exhale air from their lungs many times per minute, humans do not continually shed blood. . . . .In addition, a blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.

The States and the Federal Government have a “paramount interest ... in preserving the safety of ... public highways.” . . . Alcohol consumption is a leading cause of traffic fatalities and injuries. . . . Justice SOTOMAYOR's partial dissent suggests that States' interests in fighting drunk driving are satisfied once suspected drunk drivers are arrested, since such arrests take intoxicated drivers off the roads where they might do harm. But of course States are not solely concerned with neutralizing the threat posed by a drunk driver who has already gotten behind the wheel. They also have a compelling interest in creating effective “deterrent[s] to drunken driving” so such individuals make responsible decisions and do not become a threat to others in the first place.

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Petitioners and Justice SOTOMAYOR contend that the States and the Federal Government could combat drunk driving in other ways that do not have the same impact on personal privacy. Their arguments are unconvincing. The chief argument on this score is that an officer making an arrest for drunk driving should not be allowed to administer a BAC test unless the officer procures a search warrant or could not do so in time to obtain usable test results. . . . This argument contravenes our decisions holding that the legality of a search incident to arrest must be judged on the basis of categorical rules. . . . . *McNeely* concerned an exception to the warrant requirement—for exigent circumstances—that always requires case-by-case determinations. That was the basis for our decision in that case.  Although Justice SOTOMAYOR contends that the categorical search-incident-to-arrest doctrine and case-by-case exigent circumstances doctrine are actually parts of a single framework,  in McNeely the Court was careful to note that the decision did not address any other exceptions to the warrant requirement,

Petitioners and Justice SOTOMAYOR next suggest that requiring a warrant for BAC testing in every case in which a motorist is arrested for drunk driving would not impose any great burden on the police or the courts. But of course the same argument could be made about searching through objects found on the arrestee's possession, which our cases permit even in the absence of a warrant. . . . If a search warrant were required for every search incident to arrest that does not involve exigent circumstances, the courts would be swamped. And even if we arbitrarily singled out BAC tests incident to arrest for this special treatment, as it appears the dissent would do, the impact on the courts would be considerable. The number of arrests every year for driving under the influence is enormous—more than 1.1 million in 2014. . . . North Dakota . . . has only 51 state district judges spread across eight judicial districts. Those judges are assisted by 31 magistrates, and there are no magistrates in 20 of the State's 53 counties. At any given location in the State, then, relatively few state officials have authority to issue search warrants. Yet the State, with a population of roughly 740,000, sees nearly 7,000 drunk-driving arrests each year. With a small number of judicial officers authorized to issue warrants in some parts of the State, the burden of fielding BAC warrant applications 24 hours per day, 365 days of the year would not be the light burden that petitioners and Justice SOTOMAYOR suggest.

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The distinction . . . between an arrestee's active destruction of evidence and the loss of evidence due to a natural process makes little sense. In both situations the State is justifiably concerned that evidence may be lost. . . .

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Having assessed the effect of BAC tests on privacy interests and the need for such tests, we conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great.

We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.

Neither respondents nor their amici dispute the effectiveness of breath tests in measuring BAC. Breath tests have been in common use for many years. Their results are admissible in court and are widely credited by juries, and respondents do not dispute their accuracy or utility. What, then, is the justification for warrantless blood tests?

One advantage of blood tests is their ability to detect not just alcohol but also other substances that can impair a driver's ability to operate a car safely. A breath test cannot do this, but police have other measures at their disposal when they have reason to believe that a motorist may be under the influence of some other substance (for example, if a breath test indicates that a clearly impaired motorist has little if any alcohol in his blood). Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not.

. . . It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.

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. . . . 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. . . . It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.

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Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I319e186b395011e6a807ad48145ed9f1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I319e186b395011e6a807ad48145ed9f1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, concurring in part and dissenting in part.

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. . . . A citizen's Fourth Amendment right to be free from “unreasonable searches” does not disappear upon arrest. . . . Both before and after a person has been arrested, warrants are the usual safeguard against unreasonable searches because they guarantee that the search is not a “random or arbitrary ac[t] of government agents,” but is instead “narrowly limited in its objectives and scope.”  Warrants provide the “detached scrutiny of a neutral magistrate, and thus ensur [e] an objective determination whether an intrusion is justified.”

Because securing a warrant before a search is the rule of reasonableness, the warrant requirement is “subject only to a few specifically established and well-delineated exceptions.”  To determine whether to “exempt a given type of search from the warrant requirement,” this Court traditionally “assess[es], on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”  In weighing “whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question,” but, more specifically, “whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.”

Applying these principles in past cases, this Court has recognized two kinds of exceptions to the warrant requirement that are implicated here: (1) case-by-case exceptions, where the particularities of an individual case justify a warrantless search in that instance, but not others; and (2) categorical exceptions, where the commonalities among a class of cases justify dispensing with the warrant requirement for all of those cases, regardless of their individual circumstances.

Relevant here, the Court allows warrantless searches on a case-by-case basis where the “exigencies” of the particular case “make the needs of law enforcement so compelling that a warrantless search is objectively reasonable” in that instance.  The defining feature of the exigent circumstances exception is that the need for the search becomes clear only after “all of the facts and circumstances of the particular case” have been considered in light of the “totality of the circumstances.”  Exigencies can include officers' “need to provide emergency assistance to an occupant of a home, engage in ‘hot pursuit’ of a fleeing suspect, or enter a burning building to put out a fire and investigate its cause.” Exigencies can also arise in efforts to measure a driver's blood alcohol level. . . .

This Court also recognizes some forms of searches in which the governmental interest will “categorically” outweigh the person's privacy interest in virtually any circumstance in which the search is conducted. Relevant here is the search-incident-to-arrest exception. That exception allows officers to conduct a limited postarrest search without a warrant to combat risks that could arise in any arrest situation before a warrant could be obtained: “ ‘to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape’ ” and to “ ‘seize any evidence on the arrestee's person in order to prevent its concealment or destruction.’ ” . . . .

Given these different kinds of exceptions to the warrant requirement, if some form of exception is necessary for a particular kind of postarrest search, the next step is to ask whether the governmental need to conduct a warrantless search arises from “threats” that “ ‘lurk in all custodial arrests' ” and therefore “justif[ies] dispensing with the warrant requirement across the board,” or, instead, whether the threats “may be implicated in a particular way in a particular case” and are therefore “better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances.” . . .

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Beginning with the governmental interests, there can be no dispute that States must have tools to combat drunk driving. But neither the States nor the Court has demonstrated that “obtaining a warrant” in cases not already covered by the exigent circumstances exception “is likely to frustrate the governmental purpose[s] behind [this] search.”

First, the Court cites the governmental interest in protecting the public from drunk drivers. But it is critical to note that once a person is stopped for drunk driving and arrested, he no longer poses an immediate threat to the public. Because the person is already in custody prior to the administration of the breath test, there can be no serious claim that the time it takes to obtain a warrant would increase the danger that drunk driver poses to fellow citizens.

Second, the Court cites the governmental interest in preventing the destruction or loss of evidence. But neither the Court nor the States identify any practical reasons why obtaining a warrant after making an arrest and before conducting a breath test compromises the quality of the evidence obtained. To the contrary, the delays inherent in administering reliable breath tests generally provide ample time to obtain a warrant. . . . [T]he standard breath test is conducted well after an arrest is effectuated. The Minnesota Court of Appeals has explained that nearly all breath tests “involve a time lag of 45 minutes to two hours.” . . . Both North Dakota and Minnesota give police a 2–hour period from the time the motorist was pulled over within which to administer a breath test. . . . During this built-in window, police can seek warrants. . . .

Where “an officer can ... secure a warrant while” the motorist is being transported and the test is being prepared, this Court has said that “there would be no plausible justification for an exception to the warrant requirement.”  Neither the Court nor the States provide any evidence to suggest that, in the normal course of affairs, obtaining a warrant and conducting a breath test will exceed the allotted 2–hour window.

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Assuming that North Dakota police officers do not obtain warrants for any drunk-driving arrests today, and assuming that they would need to obtain a warrant for every drunk-driving arrest tomorrow, each of the State's 82 judges and magistrate judges would need to issue fewer than two extra warrants per week. . . . But even these numbers overstate the burden by a significant degree. States only need to obtain warrants for drivers who refuse testing and a significant majority of drivers voluntarily consent to breath tests, even in States without criminal penalties for refusal. . . .

. . . . Finally, as a general matter, the States have ample tools to force compliance with lawfully obtained warrants. This Court has never cast doubt on the States' ability to impose criminal penalties for obstructing a search authorized by a lawfully obtained warrant. No resort to violent compliance would be necessary to compel a test. If a police officer obtains a warrant to conduct a breath test, citizens can be subjected to serious penalties for obstruction of justice if they decline to cooperate with the test.

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As shown, because there are so many circumstances in which obtaining a warrant will not delay the administration of a breath test or otherwise compromise any governmental interest cited by the States, it should be clear that allowing a categorical exception to the warrant requirement is a “considerable overgeneralization” here, As this Court concluded in *Riley* and *McNeely*, any unusual issues that do arise can “better [be] addressed through consideration of case-specific exceptions to the warrant requirement.”

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. . . . [T]he search-incident-to-arrest exception is particularly ill suited to breath tests. To the extent the Court discusses any fit between breath tests and the rationales underlying the search-incident-to-arrest exception, it says that evidence preservation is one of the core values served by the exception and worries that “evidence may be lost” if breath tests are not conducted.  But, of course, the search-incident-to-arrest exception is concerned with evidence destruction only insofar as that destruction would occur before a warrant could be sought. And breath tests are not, except in rare circumstances, conducted at the time of arrest, before a warrant can be obtained, but at a separate location 40 to 120 minutes after an arrest is effectuated. That alone should be reason to reject an exception forged to address the immediate needs of arrests.

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Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I319e186b395011e6a807ad48145ed9f1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), concurring in judgment in part and dissenting in part.

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Today's decision chips away at a well-established exception to the warrant requirement. Until recently, we have admonished that “[a] police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search.”  Under our precedents, a search incident to lawful arrest “require[d] no additional justification.” . . . .

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The Court justifies its result—an arbitrary line in the sand between blood and breath tests—by balancing the invasiveness of the particular type of search against the government's reasons for the search.  Such case-by-case balancing is bad for the People, who “through ratification, have already weighed the policy tradeoffs that constitutional rights entail.”  It is also bad for law enforcement officers, who depend on predictable rules to do their job, as Members of this Court have exhorted in the past.

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The better (and far simpler) way to resolve these cases is by applying the per se rule that I proposed in *McNeely*. Under that approach, both warrantless breath and blood tests are constitutional because “the natural metabolization of [BAC] creates an exigency once police have probable cause to believe the driver is drunk. It naturally follows that police may conduct a search in these circumstances.”

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