

AN ALCOHOL MINDSET IN A DRUG-CRAZED WORLD: A REVIEW OF *BIRCHFIELD V. NORTH DAKOTA*

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INTRODUCTION

In *Birchfield v. North Dakota*,¹ the Supreme Court notes that on average, one person in the United States dies every 53 minutes from a drunk-driving related accident.² In response to this epidemic, the states and federal government have experimented with a variety of increasingly harsh mechanisms to remove intoxicated drivers from the roads and deter future offenders.³ Since 1906, states have attempted to prevent drunk-driving by criminalizing it.⁴ It was not until much later, however, that states would begin to use the blood-alcohol concentration (BAC) of an accused as evidence: first as presumption of guilt and then as per se guilt of driving while intoxicated when that blood-alcohol concentration exceeded a certain level.⁵ Most blood-alcohol tests require some cooperation from the accused in order to safely acquire an adequate sample,⁶ creating incentives for drivers to refuse to cooperate with testing procedures to avoid the harsh penalties legislatures have instituted in an attempt to deter drunk-driving.⁷ Thus, legislatures in all states have passed “implied consent” laws, sometimes

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1. 136 S. Ct. 2160 (2016).

2. *Id.* at 2178 (citing NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., ALCOHOL-IMPAIRED DRIVING 2 (2014)).

3. *See id.* at 2168–69 (outlining the evolution of blood-alcohol prohibitions from presumptions of intoxication at .15% to per se intoxication at .08% along with progressively harsher penalties and additional mechanisms to ensure compliance with search requirements).

4. *Id.* at 2167.

5. *Id.*

6. *See id.* at 2168 (noting that a driver's cooperation is necessary in order to acquire an adequate breath sample, and highly encouraged when drawing blood to ensure the safety of the officer and the suspected drunk driver).

7. *Id.* at 2169.

also called “refusal” statutes that condition driving privileges on cooperation with BAC testing if requested by an officer with sufficient reason to suspect the individual is driving while intoxicated.⁸

In most states, if a driver refuses to submit to a chemical test the driver’s license may be suspended or revoked and the very act of refusal can be used as evidence of guilt in a drunk-driving prosecution.⁹ However, when even these penalties proved ineffective at securing cooperation, several states and the federal government began to criminalize the refusal to submit to testing, frequently with penalties mirroring the jurisdiction’s Driving Under the Influence (DUI) statute.¹⁰ During the 2015-2016 term, in *Birchfield v. North Dakota*, the Supreme Court consolidated three cases in order to determine “whether such laws violate the Fourth Amendment’s prohibition against unreasonable searches.”¹¹ This paper will review the factual and procedural background of all three cases, address the legal landscape before the decision, outline the Court’s holding in this case, and finally, analyze and discuss that holding and its consequences for this area of law.

I. FACTUAL AND PROCEDURAL BACKGROUND

In the first of the three cases, *State v. Bernard*,¹² police in Minnesota received a report that three intoxicated men were attempting to remove a boat from a boat-dock and in the process had gotten their truck stuck.¹³ Upon arriving at the scene, additional witnesses indicated that of the three men, the driver of the vehicle had only been wearing underwear.¹⁴ William Robert Bernard fit this description and was in possession of the truck’s keys when the police approached him.¹⁵ He smelled of alcohol and admitted to having been drinking recently, although he denied driving the truck.¹⁶ He also refused to perform field sobriety tests.¹⁷ The police placed him under arrest and read him

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 2167; consolidated with *State v. Bernard*, 859 N.W.2d 762 (Minn. 2015) and *Beylund v. North Dakota*, 859 N.W.2d 403 (N.D. 2015).

12. *Bernard*, 859 N.W.2d 762.

13. *Id.* at 764.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

Minnesota's implied consent law.¹⁸ They also offered to allow him to call an attorney, though he declined to do so.¹⁹ After a call to his mother, Bernard refused to take the breath BAC test the officers requested.²⁰ He was charged with first-degree violation of Minnesota's test refusal statute.²¹

Arguing that Minnesota's implied consent statute "violated due process because it criminalized the refusal of an unreasonable, warrantless search," Bernard filed a motion to dismiss.²² The district court rejected this argument, but dismissed the charges on other grounds.²³ The court of appeals reversed, finding that there were sufficient facts to support a warrant application to search Bernard's breath.²⁴ The Minnesota Supreme Court rejected the appeals court's decision that the mere existence of probable cause sufficient to support a warrant caused the statute to be constitutional.²⁵ Instead, they reiterated the basic principle of Fourth Amendment that "[a] warrantless search is generally unreasonable unless it falls into one of the recognized exceptions to the warrant requirement."²⁶ They went on to note that a BAC breath test as outlined in the refusal statute falls within the "well-recognized" search incident to a lawful arrest exception.²⁷ Therefore, while the court of appeals' reasoning was wrong, the Minnesota Supreme Court came to the same ultimate conclusion that Bernard's refusal to take the BAC breath test could be constitutionally criminalized because the search was a reasonable exercise of the search incident to arrest exception.

In the next case, *State v. Birchfield*,²⁸ the North Dakota Supreme Court addressed Danny Birchfield's appeal from his conviction for refusing to submit to a chemical test.²⁹ The record shows that Birchfield

18. *See id.* (quoting Minn. Stat. § 169A.20, subd. 2) ("It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication) or 169A.52 (test refusal or failure; revocation of license).").

19. *Id.* at 765.

20. *Id.*

21. *See id.* at 765 n.1 (citing Minn. Stat. §169A.24, subd. 1(1)) ("A person is guilty of first-degree driving while impaired or criminal test refusal if that person 'commits the violation within ten years of the first of three or more qualified prior impaired driving incidents.'").

22. *Id.* at 765.

23. *Id.*

24. *Id.*

25. *Id.* at 766.

26. *Id.*

27. *Id.*

28. 858 N.W.2d 302 (N.D. 2015).

29. *Id.* at 303.

drove into a North Dakota ditch on October 10, 2013.³⁰ When an officer arrived on the scene he determined that Birchfield was likely intoxicated and asked him to perform field sobriety tests that Birchfield failed.³¹ The officer then asked Birchfield to take a preliminary breath test, which showed that Birchfield had a blood alcohol concentration of .254 percent, over three times the legal limit.³² This preliminary test, however, would not have any evidentiary weight, so the officer read Birchfield North Dakota's implied consent advisory outlining the potential penalties for refusal.³³ Birchfield refused to consent to a blood draw and was charged under the state's refusal statute.³⁴ Like Bernard, Birchfield moved to dismiss the charge arguing that criminalizing his refusal was unconstitutional under the Fourth Amendment.³⁵ The trial court rejected his arguments, leaving Birchfield to enter a conditional guilty plea while reserving his right to appeal.³⁶

On appeal, the Supreme Court of North Dakota determined that the refusal statute was constitutional because it did not force drivers to submit to the search, as was clear in the case at hand where Birchfield exercised his option to refuse.³⁷ Similarly, the court cited Supreme Court precedent supporting the idea that the criminal process could sometimes discourage defendants from exercising certain constitutional rights without offending the constitution so long as the rights still existed.³⁸ However, unlike the Minnesota Supreme Court, the North Dakota Supreme Court did not tie its decision to any specific warrant exception.³⁹

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* The roadside test is not considered reliable enough to be evidentiary, but officers are allowed to use them as a screening device. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2170 (2016) ("Because the reliability of these preliminary or screening breath tests varies, many jurisdictions do not permit their numerical results to be admitted in a drunk-driving trial as evidence of a driver's BAC.").

34. *Id.* at 2170.

35. *Birchfield*, 858 N.W.2d at 303.

36. *Id.*

37. *See id.* at 308 (arguing that the statute does not authorize a warrantless search, it merely seeks to incentivize consent).

38. *Id.* (quoting *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980)).

39. *See id.*

The last consolidated, *Beylund v. Levi*,⁴⁰ case also arose in North Dakota, and was decided by the North Dakota Supreme Court a month after *Birchfield*.⁴¹ On August 10, 2013 a police officer approached Steve Michael Beylund's car after seeing his car almost collide with a stop sign while making a right-hand turn and then come to a stop partially in the roadway.⁴² Upon approaching the car, the officer observed an empty wine glass in the center console and smelled alcohol.⁴³ The officer requested Beylund exit the car, but Beylund refused until the officer opened the car door and again commanded him to leave the car.⁴⁴ Beylund was unsteady and uncooperative, refusing to engage in any field sobriety test because he had a "bad leg."⁴⁵ He then agreed to a preliminary breath test but was either unable or unwilling to provide an adequate breath sample.⁴⁶ The police officer then arrested Beylund and took him to the hospital where Beylund was read North Dakota's implied consent advisory.⁴⁷ The police officer requested that Beylund submit to a blood test, to which Beylund eventually agreed.⁴⁸ The results showed a BAC of .250 percent, again over three times the legal limit.⁴⁹ Unlike the other cases, Beylund appealed from a Department of Transportation order to suspend Beylund's driving privileges for two years.⁵⁰ At the hearing, Beylund objected that the implied consent statute was unconstitutional.⁵¹ Both the hearing officer and the district court rejected his arguments.⁵²

In the North Dakota Supreme Court Beylund focused his objection on the "doctrine of unconstitutional conditions."⁵³ As that court noted, "the government ordinarily may not grant a benefit conditioned on the surrender of a constitutional right."⁵⁴ However, "the government may lawfully impose conditions, including the surrender of a constitutional

40. *Beylund v. Levi*, 859 N.W.2d 403 (N.D. 2015).

41. *Id.* at 403.

42. *Id.* at 406.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 406–07.

53. *Id.* at 410.

54. *Id.*

right, provided the conditions are reasonable.”⁵⁵ In this case Beylund argued that, while driving is a privilege and a license is a benefit granted by the government, it cannot make relinquishing Fourth Amendment rights a condition of that privilege.⁵⁶ However, the North Dakota Supreme Court noted that it was unclear whether the unconstitutional conditions doctrine applied to Fourth Amendment rights, and even if it did, the conditions of the search were reasonable given the state’s interest in preventing drunk-driving.⁵⁷ Therefore, the court affirmed the district court’s ruling and Beylund’s suspension.⁵⁸

The Supreme Court consolidated all three cases and granted certiorari on the following question: “whether, in the absence of a warrant, a State may make it a crime for a driver to refuse to take a chemical test to detect the presence of alcohol in the driver’s blood.”⁵⁹

II. LEGAL BACKGROUND

The Fourth Amendment prohibits unreasonable searches.⁶⁰ It is undisputed that both the blood and breath BAC tests at issue in these cases are searches under the terms of the Fourth Amendment.⁶¹ In general, the Supreme Court has held that a warrant must be issued before a search will be reasonable.⁶² There are several established exceptions; the exigent circumstances and the search incident to arrest could apply to implied consent statutes.⁶³

However, based on the categorical nature of these statutes that apply anytime a suspected drunk driver is arrested, the case-by-case approach of the exigent circumstances exception cannot serve to justify them.⁶⁴ In *Missouri v. McNeely*,⁶⁵ the Supreme Court ruled that the exigent circumstance exception to the warrant requirement may make a BAC test a reasonable search in some drunk-driving cases.⁶⁶ The

55. *Id.*

56. *Id.* at 411.

57. *Id.* at 411, 413.

58. *Id.* at 414.

59. Brief for Petitioners at i, *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) (No. 14-1468).

60. U.S. CONST. amend. IV.

61. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

62. *Birchfield*, 136 S. Ct. at 2173.

63. *Id.*

64. *See id.* at 2174 (discussing the inadequate justification of the case-specific exigent circumstances exception).

65. 133 S. Ct. 1552 (2013).

66. *Id.* at 1560.

Court specifically rejected Missouri's attempt to create a per se rule that would find such tests reasonable in all drunk-driving cases.⁶⁷ Instead, the Court emphasized that the exigent circumstance exception was by definition a case-by-case question such that the reasonableness of a search could only be determined by analyzing the total circumstances of the unique facts at issue.⁶⁸ The *McNeely* Court did note that other warrant requirement exceptions can apply categorically, and specifically named the search incident to arrest doctrine.⁶⁹ Thus the question before the Court in *Birchfield* is properly whether BAC blood and breath tests are categorically reasonable under the search incident to arrest doctrine.

Furthermore, if the Court were to find that the searches were unreasonable, and therefore unconstitutional, the question of whether the states and federal government could condition driving privileges on the waiver of those rights would still remain.⁷⁰ As the North Dakota Supreme Court pointed out, the U.S. Supreme Court has yet to address whether the unconstitutional conditions doctrine, which originally arose out of Fifth Amendment law, would apply to Fourth Amendment rights, making it an issue of first impression for the Court.⁷¹

III. HOLDING

Justice Alito wrote the opinion in *Birchfield v. North Dakota* for a six-judge majority.⁷² Justice Sotomayor and Justice Ginsberg concurred in part and dissented in part in one opinion, while Justice Thomas wrote for himself, also concurring in part and dissenting in part.⁷³

As previewed above, Justice Alito's analysis relied heavily on the search incident to arrest exception to the warrant requirement.⁷⁴ To determine whether these searches, which are a product of modern invention, and whose circumstances were unfathomable at the time the Fourth Amendment was ratified, fell within the search incident to arrest exception, he used a balancing test recently outlined in *Riley v.*

67. *Id.*

68. *Id.*

69. *Id.* at 1559 n.3.

70. *See* *Beylund v. Levi*, 859 N.W.2d 403, 411 (N.D. 2015).

71. *Id.*; *see also* *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016) (admitting that the specific issue had not been addressed before this case).

72. *Birchfield*, 136 S. Ct. at 2166.

73. *Id.*

74. *Id.* at 2174–75.

California.⁷⁵ There, the Court decided that “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.’”⁷⁶ Justice Alito then analyzed the privacy impact and governmental interests behind both breath and blood tests separately.⁷⁷

The Court found that “a breath test does not ‘implicate significant privacy concerns.’”⁷⁸ They are not physically intrusive or painful.⁷⁹ Similarly, humans breathe constantly and have no property interest or any claim to property-related privacy interests towards air that must be expelled from their lungs in order for life to continue.⁸⁰ Additionally, with a breath test, no sample is left in government hands and the test does not provide any information about the driver other than his or her BAC,⁸¹ further limiting any intrusion into a suspect’s privacy interests.⁸²

In contrast, a BAC blood test is significantly more intrusive.⁸³ It involves a painful intrusion into the skin and an extraction of blood, which unlike air from the lungs is not something humans shed lightly or inevitably.⁸⁴ Additionally, a blood draw results in a sample of blood being left with the police from which a great deal of information can be extracted.⁸⁵ As the Court notes, this might produce anxiety in certain people regardless of the protections the state may institute to ensure that use is limited to authorized purposes.⁸⁶ Thus in terms of the *Riley* balancing test, blood and breath tests are very differently situated in the amount they infringe on the privacy interests of drivers.

The Court also found that the two tests were slightly differently situated in the government interests they protect.⁸⁷ The Court concedes that “the States and the Federal Government have a ‘paramount

75. *Id.* at 2176 (citing *Riley v. California*, 134 S. Ct. 2473 (2014)).

76. *Id.* (quoting *Riley*, 134 S. Ct. at 2484).

77. *Id.* at 2176–78.

78. *Id.* at 2178 (quoting *Skinner v. Railway Labor Execs. Ass’n.*, 489 U.S. 602, 626 (1989)).

79. *Id.* at 2177.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 2178.

84. *Id.*

85. *Id.*

86. *Id.*

87. *See id.* at 2184 (noting that breath tests cannot detect non-alcohol intoxicants like blood tests can).

interest . . . in preserving the safety of . . . public highways.”⁸⁸ Included in that interest is the need to deter drunk-driving.⁸⁹ In that light, BAC breath tests seem to easily pass the *Riley* balancing test. The government interest being promoted is not merely legitimate, it is compelling, and the privacy interest is negligible.⁹⁰

To bolster this decision, the Court notes that in the drunk-driving context a warrant requirement would be of negligible benefit to protect privacy interests and would frequently impose substantial costs on the government.⁹¹ This argument is based on the fact that the test is conducted during a search incident to arrest, thus the officer already needed probable cause to believe the individual was driving while intoxicated.⁹² Additionally, because the facts that make up probable cause are very similar in most drunk-driving cases, a magistrate is left to rely on the officer’s characterization of the individual, and would be “in a poor position to challenge such characterizations.”⁹³ One of the other benefits of a search warrant is to limit the scope of a search, but in the case of BAC tests, particularly breath tests, that scope is already limited.⁹⁴ The implied consent statutes only allow the BAC blood or breath test; they do not authorize any other tests or searches.⁹⁵

Thus the Court determined that BAC breath tests after the arrest of a drunk driver are reasonable searches under the Fourth Amendment.⁹⁶ The states and federal government may require drivers to submit to them as a condition of driving on state or federal highways.⁹⁷ Blood tests, however, are more intrusive and the Court was not convinced they were necessary in light of the government’s ability to use the less invasive breath test instead.⁹⁸ The Court did note in passing that blood tests are the only way to determine other forms of impairment, such as marijuana or prescription drugs, but it dismissed this as a reason sufficient to overcome the weight of privacy interests because warrants and the exigent circumstance exception would still be

88. *Id.* at 2178 (quoting *Mackey v. Montrym*, 443 U.S. 1, 17 (1979)).

89. *Id.* at 2179.

90. *Id.* at 2178, 2184.

91. *Id.* at 2181–82.

92. *Id.* at 2181.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 2185.

97. *Id.*

98. *Id.* at 2184.

available to law enforcement in such a situation.⁹⁹ Thus a blood test does not categorically met the search incident to arrest exception.¹⁰⁰

The Court notes that implied consent statutes that fall short of criminalization for refusal are still applicable to blood draws.¹⁰¹ A driver can lose his license for refusing to submit to a blood draw, but he can only be criminally penalized for refusing a breath test.¹⁰² Thus the Court does extend the Fifth Amendment unconstitutional condition doctrine to Fourth Amendment warrantless blood tests, but draws the line of “unreasonable” conditions at criminalization, not administrative penalties.¹⁰³

With respect to the three defendants, this means that Birchfield, who was prosecuted for refusal to submit to a BAC blood test, had his conviction reversed.¹⁰⁴ Bernard was prosecuted for refusal to submit to a BAC breath test.¹⁰⁵ His conviction was upheld because the search being requested was not unconstitutional, and thus could be required of him.¹⁰⁶ Finally, Beylund submitted to a BAC blood test after being informed of the potential for criminal prosecution if he refused.¹⁰⁷ Therefore, the question is whether his consent could be considered voluntary because it only occurred after he was threatened with an unconstitutional prosecution.¹⁰⁸ Because the voluntariness of consent is a factual question that turns on the totality of the circumstances, the Court remanded Beylund’s case to determine whether the blood draw was voluntary.¹⁰⁹

IV. ANALYSIS

The *Birchfield v. North Dakota* decision is interesting first in the dispute between the justices, and second, is perhaps flawed in its emphasis on alcohol related intoxicated driving incidents to the exclusion of other more complicated scenarios.

99. *Id.*

100. *Id.* at 2185.

101. *Id.*

102. *Id.*

103. *Id.* at 2186.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

A. *Disagreement Within the Court*

The Court's analysis is driven by the balancing test laid out in *Riley v. California*, which requires the Court to carefully analyze the varying importance of privacy protections versus legitimate government interests.¹¹⁰ What is interesting in this analysis is the way different members of the court treat the potential consequences of different constitutional rules when making their decision.

Justice Alito, writing for the majority, focuses a lot on the limits of a warrant requirement to actually provide increased privacy and procedural protection given the nature of the arrest and probable cause evidence at issue.¹¹¹ Far from championing warrants as a safeguard of constitutional liberty as one might expect in a Fourth Amendment case, he notes that magistrate judges will be in a "poor position to challenge . . . characterizations [made by officers about the driver's apparent intoxication]."¹¹² On the one hand, this makes a lot of sense when considering, as Justice Sotomayor does, that the warrant application and affidavit may be presented to the judge by email or telephone, giving the magistrate only a limited ability to question the officer or evaluate his statements.¹¹³ On the other hand, the Fourth Amendment itself seems to assume that judges will be able to overcome any such difficulties, and Fourth Amendment jurisprudence assumes that "warrants provide the 'detached scrutiny of a neutral magistrate and thus ensur[e] an objective determination whether an intrusion is justified.'"¹¹⁴ Justice Alito's willingness to assume the contrary is an intriguing departure from the norm, and while not directly addressed by Justice Sotomayor, may explain some of her concern that the warrant requirement of the Fourth Amendment is being needlessly undercut.

By contrast, Justice Sotomayor focuses much of her analysis on the technological advancements that make obtaining a warrant quick and easy.¹¹⁵ She discredits the Governments' arguments that they need implied consent laws in order to obtain evidence of drunk-driving and that a reduced number of magistrates in rural areas would make

110. *Id.* at 2176.

111. *Id.* at 2181.

112. *Id.*

113. *See id.* at 2192 (Sotomayor, J., concurring in part and dissenting in part) (noting several expedited warrant application methods).

114. *Id.* at 2187–88 (quoting *Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602, 622 (1989)).

115. *Id.* at 2192.

obtaining warrants in such areas a substantial burden.¹¹⁶ Based on the total number of judges in the two states and the average rate of refusal to consent to a search, she determines that each magistrate would only have to handle one extra warrant application a week.¹¹⁷ However, it seems likely that this does not fully account for the reality in these rural states. As Justice Alito makes clearer in his opinion, the judges are not uniformly distributed across the state, leaving some rural districts with very few judges capable of issuing warrants.¹¹⁸ Similarly, common sense would perhaps encourage the assumption that many, if not most, drunk-driving cases, and drunk-driving warrant applications will arise in the dead of night when perhaps only one judge is on call to handle all the warrant needs of a district.¹¹⁹ Thus while Justice Alito is dismissing the practical efficacy of judges in such situations perhaps too cavalierly, Justice Sotomayor is dismissing the burdens on judges in a similar fashion. This dismissal leads her to decide that both breath and blood BAC tests should require warrants.¹²⁰

Finally, Justice Thomas ignores much of the practical privacy concerns to argue from a more abstract position that a search incident to arrest should incorporate any search of the arrestee's person.¹²¹ He argues this rule would be preferable because its simplicity would prevent confusion among lower courts or law enforcement officers.¹²² However, his lack of faith in the ability of law enforcement and lower courts to distinguish between two so plainly different BAC tests (blood versus breath) is a disservice to both groups.¹²³

116. *Id.* at 2193–94.

117. *Id.*

118. *Id.* at 2181 (majority opinion).

119. From personal experience, governments in certain rural portions of the west do face significant burdens if forced to acquire a warrant, even with the technological innovations envisioned by Justice Sotomayor. For example, while working for the Assistant U.S. Attorney in Yellowstone National Park during the summer of 2016, the author observed that it was common to only have one magistrate judge on call to take afterhours warrant applications. Similarly, depending on cell reception or other technological difficulties, law enforcement officers may have to travel for long periods of time in order to gain access to a computer or to gain cell reception necessary to submit a warrant application to the court. It should also be noted that while the officers are jumping through the hoops necessary to obtain a warrant, the arrestee is sobering up and the evidence of the crime is leaving his or her blood.

120. *Id.* at 2196 (Sotomayor, J., concurring in part and dissenting in part).

121. *Id.* at 2197 (Thomas, J., concurring in part and dissenting in part).

122. *Id.* at 2198.

123. *Id.*

B. *Alcohol versus Drugs*

Birchfield is also an interesting decision because of the almost complete focus on alcohol to the exclusion of all other forms of intoxicants.¹²⁴ Only one paragraph of Justice Alito's approximately nineteen-page opinion addresses the fact that some substances can only be located through a blood test, thus the government's ability to use a breath test in no way helps them prove impairment in such cases.¹²⁵ This is perhaps understandable given that all of the petitioners were accused of being under the influence of alcohol. However, as the only amicus brief to directly address the difference between drug DUIs and alcohol DUIs noted, many legislatures clearly had drug DUIs in mind when they crafted their implied consent laws.¹²⁶ As the amicus brief for eighteen states notes, the National Highway Traffic Safety Administration "reported an increase in the number of drivers using marijuana or other illegal drugs from its 2007 study. Nearly one in four drivers tested positive for at least one drug that could impair safe driving."¹²⁷ As certain states continue to legalize marijuana, this problem will likely only continue to increase. Given these facts, it is odd that of fifteen briefs filed for this case, only two explicitly mentioned the fact that breath tests would not measure the presence of drugs, and thus argued that breath tests could not serve as a less invasive alternative in all cases.¹²⁸ Similarly, since combating marijuana and other drug DUIs seems poised to be an increasingly compelling and complicated interest for the states, the fact that Justice Alito dismisses the argument out of hand is troubling.

The lack of briefing and argument on these issues in the decision

124. See generally *id.* at 2166–87 (majority opinion).

125. *Id.* at 2184.

126. See Brief of New Jersey et al. as Amici Curiae Supporting Respondents at 9, *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) (No. 14-1468) (citing *Skinner v. Railway Labor Excs. Ass'n.*, 489 U.S. 602, 625 (1989)) ("Although breath testing has been recognized as less invasive, it will not reveal the presence of drugs in the body.").

127. *Id.* at 8 (citing NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS, RESULTS OF THE 2013–2014 NATIONAL ROADSIDE SURVEY OF ALCOHOL AND DRUG USE BY DRIVERS (2015), http://www.nhtsa.gov/staticfiles/nti/pdf/812118-Roadside_Survey_2014.pdf; NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., PRESS RELEASE: NHTSA RELEASES TWO NEW STUDIES ON IMPAIRED DRIVING ON U.S. ROADS (2015), <http://www.nhtsa.gov/About+NHTSA/Press+Releases/2015/nhtsa-releases-2-impaired-driving-studies-02-2015>).

128. See *id.* at 9; see also Brief for The United States as Amicus Curiae Supporting Respondents at 6, *Birchfield*, 136 S. Ct. 2160 ("Most States also provide for blood testing under their implied-consent statutes. That method can detect drugs in addition to alcohol, and it is sometimes favored because it measures blood-alcohol concentration directly, rather than relying on conversion of breath-alcohol levels.").

may allow later courts to argue that it was an oversight, perhaps making room to allow officers to draw blood if, and only if, they have probable cause to believe the driver is under the influence of a substance other than alcohol. This would mesh well with the bulk of Justice Alito's opinion which found the state's interest in preventing intoxicated driving to be exceedingly weighty, and thus if the question was squarely presented a future court might find that those interests in highway safety outweigh even the privacy and bodily integrity interests at risk with a warrantless blood draw. Regardless of how future courts come out on this issue it seems almost inevitable that blood tests for drug DUIs will come before the Court in the future, either as here under the search incident to arrest doctrine, or perhaps as Justice Alito forecasts as an exigent circumstances case. To that extent, it seems likely that *Birchfield* did not help to settle the law in this field, but merely provided background for future litigation.

CONCLUSION

The Court came to a practical and moderate decision in this case. As Justice Thomas characterizes it in his opinion, it is a "compromise."¹²⁹ For the most part, this compromise struck a good balance between the needs of the states to prevent drunk driving and the needs of the people to be protected from unreasonable searches. That being said, various portions of the opinion seemed to only imperfectly reflect the likely or potential real-world consequences that the opinion attempted to address. With respect to drug DUIs, the disconnect seemed starkest, but the justices also appeared to have radically different understandings of the abilities of judges on the ground to assess warrants, and the number of judges available to handle an influx of warrant applications in any given area. To the extent that the legal conclusions were based on these flawed factual frameworks, one must question whether the legal conclusions were truly the most appropriate solution to these admittedly complicated and nuanced constitutional questions. Perhaps in future cases the factual realities will be better briefed, leading to a fuller understanding of the practical implications of these decisions, especially because the *Riley* balancing test seems to place the practical burdens on both government and the public in the forefront of the analysis.

129. *Birchfield*, 136 S. Ct. at 2198 (2016) (Thomas, J., concurring in part and dissenting in part).