More Like Blood: State v. Thompson

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Joshua L. Weichsel†

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I. INTRODUCTION

Impaired driving accidents are responsible for thousands of deaths each year—on average one every fifty-three minutes.¹ In

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addition to the toll on human life, impaired driving arrests place an enormous burden on our criminal justice system: law enforcement carried out more than 1.1 million arrests for driving-while-impaired (DWI) in 2014. To help enforce DWI laws, every state in the country has “implied consent” laws that require drivers to undergo testing when there is sufficient reason to believe that they are impaired. These laws have been the subject of significant litigation in recent years, up to and including the United States Supreme Court.

The United States Supreme Court recently released its decision in Birchfield v. North Dakota. The Birchfield Court held that criminalizing the refusal to take a warrantless breath test incident to arrest for DWI is constitutional but criminalizing the refusal to take a blood test under the same circumstances is not. The Court left a significant question unanswered by not ruling on the constitutionality of criminalizing the refusal to take a warrantless urine test incident to arrest for DWI, the other common method of testing allowed by the DWI statutes. Only months after the Birchfield decision was released, the Minnesota Supreme Court ruled on this
issue in State v. Thompson.\(^8\) The Thompson court held that a warrantless test of an arrestee’s urine incident to arrest for DWI constitutes an unconstitutional search and refusing to take such a test cannot be criminalized.\(^9\)

To help explain the Minnesota Supreme Court’s decision in Thompson, this Note begins with a brief historical overview of the exclusionary rule as applied to the Fourth Amendment of the United States Constitution.\(^10\) Next, this Note examines some of the significant cases that provided the framework for the Thompson court’s analysis.\(^11\) This Note then focuses on Thompson and lays out the facts and procedural history of the case. Finally, this Note analyzes the Thompson court’s decision and argues that the court erred due to incorrectly weighing the interests involved and failing to give adequate consideration to the purpose of the warrant requirement. Therefore, this Note encourages the Minnesota Supreme Court to reconsider its decision in a future case or, alternatively, encourages the United States Supreme Court to grant certiorari to address this issue.\(^12\)

II. BACKGROUND: IMPORTANT CONCEPTS IN DWI JURISPRUDENCE

“No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”\(^13\)

The Fourth Amendment to the United States Constitution guarantees the right of people to be free from “unreasonable searches and seizures.”\(^14\) This generally requires law enforcement officers to obtain a warrant from a judge or magistrate before searching or seizing an individual, but there are many exceptions to this rule.\(^15\) This Note first explains what the exclusionary rule is and

\(^8\) 886 N.W.2d 224 (2016).
\(^9\) Id.
\(^10\) See infra Part II.
\(^11\) See infra Part III.
\(^12\) See infra Part IV.
\(^14\) U.S. CONST. amend. IV.
\(^15\) See State v. Hummel, 483 N.W.2d 68, 72 (Minn. 1992) (citing Katz v. United States, 389 U.S. 347, 357 (1967)) (“[W]arrantless searches and seizures are *per se* unreasonable unless they fall under an established exception.”).
provides a brief history of its development before moving on to describe a number of judicially created exceptions to the rule.

While it is impossible to define exactly what constitutes a search in every scenario,\textsuperscript{16} the Supreme Court laid out an important test for what is protected under the Fourth Amendment in \textit{Katz v. United States}.\textsuperscript{17} For the purposes of this Note, the relevant point is that government collection of samples of a suspect’s blood, breath, or urine for the purpose of testing for the presence of alcohol or drugs constitutes a search for Fourth Amendment purposes.\textsuperscript{18}

\section*{A. Brief Overview of the Exclusionary Rule}

Because the judiciary is charged with interpreting and applying the law, courts safeguard the right to be free from unreasonable searches and seizures through a mechanism called the "exclusionary rule."\textsuperscript{19} Under this rule, if police obtain a piece of evidence through an unconstitutional search, then the evidence may be inadmissible at trial.\textsuperscript{20} This rule was created by the Supreme Court to deter the executive branch—including police and other law enforcement agencies—from future Fourth Amendment violations.\textsuperscript{21} This is a vital enforcement mechanism because law enforcement officers’ jobs would be unquestionably simpler if they did not have to comply with

\begin{enumerate}[16.]
\item See, e.g., Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013) (holding that not only does a person have a reasonable expectation of privacy in his home but also in the "curtilage," or area immediately around his home); Payton v. New York, 445 U.S. 573, 586 (1980) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 473 (1971)) ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable."); Rakas v. Illinois, 439 U.S. 128 (1978) (holding that there is no legitimate expectation of privacy for the contents of the glove box of a vehicle that a person does not possess or own).
\item 389 U.S. 347 (1967). The starting point for constitutional protection from unreasonable searches is a “reasonable” or “legitimate” expectation of privacy on the part of the person being searched. \textit{Id.} at 354–56.
\item See, e.g., Skinner v. Ry. Labor Execs.’ Ass’n, 489 U.S. 602, 616 (1989) (rejecting the government’s claim that searches of blood, breath, and urine did not implicate the Fourth Amendment).
\item See State v. Smith, 814 N.W.2d 346, 350 (Minn. 2012) (“Evidence resulting from an unreasonable seizure must be excluded.”).
\item Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016); see also State v. Ture, 632 N.W.2d 621, 627 (Minn. 2001) (“The state bears the burden of establishing an exception to the warrant requirement.”).
\item See Elkins v. United States, 364 U.S. 206, 217 (1960) (noting that the exclusionary rule was created by the Court in order to “compel respect for the constitutional guaranty”); see also Davis v. United States, 564 U.S. 229, 236 (2011).
\end{enumerate}
the Fourth Amendment prohibition against unreasonable searches.\textsuperscript{22} Further, because law enforcement officers are not directly under the control of the judicial branch, the judiciary has no power to sanction them directly for Fourth Amendment violations.\textsuperscript{23} Thus, if courts are to protect Fourth Amendment rights, they can only do so indirectly after a violation has occurred.

Interestingly, prior to the creation of the exclusionary rule, the Fourth Amendment right to be free from unreasonable searches and seizures was defended through tort suits or self-help.\textsuperscript{24} In the late eighteenth century, it was not illegal for a person to forcibly resist a police officer’s unjustifiable search.\textsuperscript{25} An officer’s intrusion on a person’s Fourth Amendment rights constituted trespass, and the officer could theoretically be held personally liable in tort or could even face criminal charges.\textsuperscript{26} Though it seems doubtful that such actions were common, they did arise from time to time.\textsuperscript{27}

\begin{thebibliography}{9}
\bibitem{22} Mincey v. Arizona, 437 U.S. 385, 393 (1978) (“The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view . . . that the privacy of a person’s home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.”).
\bibitem{23} See Ruth W. Grant, The Exclusionary Rule and the Meaning of Separation of Powers, 14 Harv. J.L. & Pub. Pol’y 173, 175 (1991) (“The separation of executive from judicial power . . . is a means to enforce constitutional limits on government action. . . . Executive abuses can be checked by an independent judiciary, because the action of both branches is required to bring about an individual’s punishment. If the courts treat the fruits of an unconstitutional search as valid, they allow the government as a whole to proceed against the individual in violation of the constitutional limits established by the Fourth Amendment.”); see also Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) (stating that when police officers violate the Fourth Amendment but find nothing incriminating, “this invasion of the personal liberty of the innocent too often finds no practical redress”). While in many cases application of the exclusionary rule will allow guilty persons to go free, it is arguably the only practical method of enforcing Fourth Amendment rights because “freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way the innocent citizen can invoke advance protection.” Brinegar, 338 U.S. at 182 (Jackson, J., dissenting).
\bibitem{24} Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 625 (1999).
\bibitem{25} Id. at 624–25.
\bibitem{26} Id.
\bibitem{27} See, e.g., Stacey v. Emery, 97 U.S. 642, 643 (1878) (analyzing a trespass claim against an individual tax collector for “causing the seizure of a quantity of whiskey belonging to” the plaintiff).
\end{thebibliography}
B. Relevant Exceptions to the Exclusionary Rule

Fourth Amendment jurisprudence can be very complicated, especially when facing exceptions to the warrant requirement and exceptions to those exceptions. The text of the Fourth Amendment is useful to anchor the analysis of the judicial doctrine. The Fourth Amendment reads as follows:

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.

While the warrant requirement for searches and seizures is implicit in the language of the Fourth Amendment, long standing judicial interpretation helps to clarify the analytical structure of the Fourth Amendment. The “ultimate touchstone” of Fourth Amendment analysis is reasonableness. The reasonableness of a search requires balancing the individual’s right to personal security and autonomy against the state’s interest of protecting public safety. Warrantless searches “are per se unreasonable under the

28. See, e.g., Birchfield v. North Dakota, 136 S. Ct. 2160, 2187 (2016) (holding that the search-incident-to-arrest exception to the warrant requirement does not permit warrantless blood tests); Missouri v. McNeely, 133 S. Ct. 1552, 1570 (2013) (reviewing “several sets of exigent circumstances excusing the need for a warrant”); Terry v. Ohio, 392 U.S. 1, 27 (1968) (establishing a limited exception to the Fourth Amendment’s warrant requirement to allow police officers to pat down a suspect for weapons when they believe the individual is armed and dangerous); see also Davis v. United States, 564 U.S. 229, 248 (2011) (holding that there can be a good-faith exception to the exclusionary rule in some cases). In cases in which a search is rendered unconstitutional after the fact through a ruling in a different case, the court may still allow the unconstitutionally obtained evidence to be used at trial if the offending officer was relying on binding appellate precedent at the time of the search. Davis, 564 U.S. at 239–40.

29. See, e.g., People v. Levan, 62 N.Y.2d 139, 146 (1984) (holding that since “the police themselves cannot by their own conduct create an appearance of exigency,” the state cannot have evidence gathered in a subsequent warrantless search admitted at trial under the exigent circumstances exception).

30. U.S. Const. amend. IV.


32. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (stating that analysis of the reasonableness of a seizure requires “a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers”).
Fourth Amendment.” Still, the right to be free from warrantless searches and seizures has a number of judicially created exceptions and limitations. Three of the most important are searches incident to arrest, exigent circumstances, and administrative (also known as inventory) exceptions.

This Note primarily focuses on the search-incident-to-arrest exception. Under this exception, once an officer has probable cause to believe a suspect has committed a crime and has placed the suspect under arrest, the officer may conduct a search of the suspect and the “area within his immediate control.” This exception exists for the dual purpose of officer safety and evidence preservation. Searches incident to arrest are categorically permitted and do not require a case-by-case analysis of the reasonableness of the search. Because these searches are not subject to a reasonableness analysis based on the totality of the circumstances, litigation surrounding searches incident to arrest typically revolve around the permissible scope of the search.

Exigent circumstances is another important exception to the warrant requirement of the Fourth Amendment. Under this exception, “the exigencies of the situation” make the needs of law enforceable the paramount consideration. An arrest or search is permissible where there is a substantial basis to conclude that exigent circumstances exist that are likely to dissipate or be destroyed before a warrant can be obtained.

34. See supra notes 28–29 and accompanying text.
35. Probable cause cannot be defined with specificity, but it “exists where ‘the facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.” Brinegar v. United States, 338 U.S. 160, 175–76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).
37. See id. at 339.
38. See United States v. Robinson, 414 U.S. 218, 225 (1973) (citing Agnello v. United States, 269 U.S. 20 (1925)) (stating that there is a long held “categorical recognition of the validity of a search incident to lawful arrest”).
39. See, e.g., Birchfield v. North Dakota, 136 S. Ct. 2160, 2184 (2016) (holding that a warrantless breath test is constitutional as a search incident to arrest, but a warrantless blood test is not); Riley v. California, 134 S. Ct. 2473, 2485 (2014) (holding that when a cell phone is discovered as part of a warrantless search incident to arrest, the data on that cell phone may not be searched without a warrant); Gant, 556 U.S. at 343 (holding that police officers may search a car as a search incident to arrest when the arrestee is unsecured and within reaching distance of the passenger compartment, regardless of whether the officers have reason to believe that evidence of the crime that was the reason for arrest may be found within the car).
enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.” \(^{41}\) However, if an officer believes (even in good faith) that the exigencies of a situation require him or her to take action without the specific approval of a magistrate and a court later determines that the officer was not justified in this belief, the court would have to exclude any evidence seized during the search. \(^{42}\) Unlike the search-incident-to-arrest exception, the exigency exception cannot be applied categorically and requires an analysis of the totality of the circumstances to determine whether the search was objectively reasonable. \(^{43}\)

The administrative, or inventory, exception is another categorical exception to the warrant requirement that is similar to, but distinct from, the search-incident-to-arrest exception. \(^{44}\) Under this exception, when a suspect is taken back to a jail for processing, officers may perform a full search of the suspect. \(^{45}\)

The rationale behind inventory searches is not always clear. In one case, the Supreme Court ruled that “an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence.” \(^{46}\) In other words, such a search exists for administrative purposes and not for the purpose of discovering evidence that may be used against a suspect at a later date. \(^{47}\)

In a recent case, the Supreme Court appeared to take a slightly more expansive approach to these administrative purposes, stating

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43. See McNeely, 133 S. Ct. at 1563 (holding that the natural dissipation of alcohol from the bloodstream cannot constitute a per se exigency and that the exigent circumstances exception always requires an analysis of the totality of the circumstances).
44. See, e.g., Maryland v. King, 133 S. Ct. 1958, 1974 (2013) (upholding a warrantless collection of DNA to identify suspects after arrest); Florida v. Wells, 495 U.S. 1, 4–5 (1990) (holding that an inventory search of an arrestee’s impounded vehicle is generally appropriate, but evidence produced by an officer acting on an individualized suspicion rather than standard practice violated the Fourth Amendment).
45. See King, 133 S. Ct. at 1974 (“[T]he Court has been reluctant to circumscribe the authority of the police to conduct reasonable booking searches.”).
46. Wells, 495 U.S. at 4.
47. See Colorado v. Bertine, 479 U.S. 367, 372 (1987) (“[I]ntventory procedures serve to protect an owner’s property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger.”).
that the DNA tests which served to identify arrestees were permissible.\footnote{See King, 133 S. Ct. at 1973. Regardless, because such searches are constitutional when they are carried out under proper procedures and without the motive of investigating possible criminal activity, any evidence found during such a search is admissible at a later trial. See South Dakota v. Opperman, 428 U.S. 364, 370 n.5 (1976) (“The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations.”).} Part of the Court’s reasoning was that the government has a strong public safety interest in determining if the suspects whom it has under arrest are connected to any other crimes.\footnote{See King, 133 S. Ct. at 1973 (noting the strong government interest in accurately identifying arrestees, because “past conduct is essential to an assessment of the danger [an arrestee] poses to the public”).}

III. HISTORY: KEY CASES THAT INFLUENCE DWI LITIGATION

Because the stakes are frequently so high in criminal cases, lower courts are often fortunate to have an abundance of guidance to analyze difficult issues. In defining the scope of the permissible bounds of government searches of persons, there are too many truly important cases for this Note to do justice.\footnote{See Wayne R. LaFave, Search And Seizure: A Treatise On The Fourth Amendment (5th ed. 2012) (noting that between 1978 and 2012 the United States Supreme Court ruled on 205 cases involving issues related to government searches or seizures).} Instead of trying to cover every important case, this Part first examines the most significant cases in which the Court focused on defining the scope of permissible searches incident to arrest. This Part then examines two cases dealing with warrantless government testing of persons in a non-DWI context, before finally examining the two recent DWI cases that were litigated at the Supreme Court.

A. Defining the Scope of Searches Incident to Arrest

An early decision that is still very influential in Fourth Amendment DWI jurisprudence is \textit{Schmerber v. California}.\footnote{384 U.S. 757 (1966).} After Schmerber and a friend drank at a bowling alley, Schmerber got behind the wheel of his car and crashed into a tree.\footnote{Id. at 758 n.2.} Because of their injuries, Schmerber and his friend were both taken to a hospital. Upon arrival, in accordance with a local procedure, a hospital employee drew blood from Schmerber and his friend to test for alcohol.

\textit{Schmerber v. California} is the case that first recognized the principle that blood samples are not subject to Fourth Amendment scrutiny. The Court held that the taking of blood samples for an administrative screening test is not a search within the meaning of the Fourth Amendment. The Court noted that such a search is “presumably so minimal in the degree of intrusion on personal security as not to constitute a violation of the protections of the Fourth Amendment.”

\textit{Schmerber} is a landmark case in Fourth Amendment law because it established the principles that govern the admissibility of evidence obtained through searches and seizures. The case is particularly important in the context of DWI cases because it established the principle that evidence obtained through searches and seizures is admissible at trial, even if the search or seizure was not conducted in accordance with proper procedures.

\textit{Schmerber} has been the subject of extensive litigation and commentary. The case has been applied to a wide range of situations, including searches of persons for drugs, searches of vehicles, and searches of homes. The case has also been applied to searches for non-criminal purposes, such as searches for evidence of disease.

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hospital for treatment. Once at the hospital, a police officer requested that Schmerber submit to a chemical test of his breath so that officers could test for the presence of alcohol. Schmerber refused to comply with the test. After being directed to do so by a police officer, a physician took a blood sample from Schmerber—over Schmerber’s continued objections. The analysis of his blood showed that Schmerber was intoxicated beyond the legal limit at the time of the accident.

Schmerber was charged with driving while intoxicated. The report from the blood analysis was entered into evidence at a trial. Schmerber objected to the introduction of this evidence at trial, specifically arguing that the report that revealed his intoxication was the product of a search that violated the Fourth, Fifth, Sixth, and Fourteenth Amendments. Despite these objections, Schmerber was convicted of driving while intoxicated by the State of California, and both the state court of appeals and supreme court affirmed his conviction. The United States Supreme Court granted certiorari to address his constitutional claims.

The Court dispatched with Schmerber’s Sixth and Fourteenth Amendment claims quickly but examined his Fifth and Fourth Amendment claims much more closely. Schmerber’s argument that his right to self-incrimination was violated hinged on the idea that by taking a sample of his blood against his will, Schmerber was being compelled to provide evidence against himself in a criminal case in direct violation of the Fifth Amendment. While the Court had previously heard at least one case where a plaintiff claimed that his Fifth Amendment rights had been violated by state action, because any such cases occurred prior to the incorporation of the

53. Id.
54. Id. at 765 n.9.
55. Id.
56. Id. at 758–59.
57. Id. at 759.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
63. See id. at 759–72.
64. See id. at 760.
65. See, e.g., Twining v. New Jersey, 211 U.S. 78, 79 (1908) (declining to apply the Fifth Amendment right against self-incrimination to the states).
Fifth Amendment to the states, this was effectively a matter of first impression for the Court. The Court ruled broadly on this issue:

We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.

The Court also heard Schmerber’s Fourth Amendment claim and rejected it based on the same grounds. The Court again treated the claim as an issue of first impression. The Court first held that, although the Fifth Amendment is not implicated by a forced blood draw, the Fourth Amendment “plainly” is. The Court first discussed the analytical structure behind Fourth Amendment claims and declared that its ruling must rest on whether the search in this case “respected relevant Fourth Amendment standards of reasonableness.” The Court next quickly examined the general rationales behind warrantless searches incident to arrest and found them wanting in Schmerber’s case. The Court then discussed the general rule allowing officers to perform searches without a warrant under emergency situations and found that the facts in Schmerber’s particular case justified the warrantless search of his blood. Unlike its holding on the Fifth Amendment issue, the Court ruled narrowly

66. *Schmerber*, 384 U.S. at 761 ("We therefore must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner's [Fifth Amendment] privilege.").
67. *Id.*
68. See *Briehaupt v. Abram*, 352 U.S. 432, 434 (1957) (holding "that the generative principles of the Bill of Rights" do not extend the protections of the Fourth and Fifth amendments to petitioner’s case through the Due Process Clause of the Fourteenth Amendment).
69. *Schmerber*, 384 U.S. at 768 ("[W]e write on a clean slate.").
70. *Id.* at 767.
71. *Id.* at 768.
72. *Id.* at 769–70. The Court first pointed out that because there was plainly sufficient probable cause, if the policy rationale behind a search incident to arrest was implicated, it could simply apply that exception to the general prohibition against warrantless searches. *Id.* at 769. However, the general rationale supporting such searches is to allow police to take reasonable steps to confiscate weapons which could be used against them and to preserve evidence that would be discovered during such a search, and neither of those rationales applied to the facts in *Schmerber*. See *id.*
73. *Id.* at 770–71.
in regard to Schmerber’s Fourth Amendment argument, holding that only the “special facts” of the case warranted the officer’s actions.\textsuperscript{74}

The Court’s holding contained language that confused two very different exceptions to the Fourth Amendment prohibition on warrantless searches. The Court held that because of the “special facts . . . the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner’s arrest.”\textsuperscript{75} Under current jurisprudence, the language about “special facts” would be construed as a reference to the exigent circumstances exception to the Fourth Amendment—which resists categorical rules—and instead focuses on the need for the intrusion and the availability of a warrant.\textsuperscript{76} However, the language also justifies the search as “incident to petitioner’s arrest,” which could indicate that the test was upheld as a search incident to arrest.\textsuperscript{77} Searches incident to arrest are categorical exceptions to the warrant requirement and where applicable do not require any case-by-case balancing.\textsuperscript{78}

In \textit{Chimel v. California},\textsuperscript{79} the Court continued to grapple with warrantless searches.\textsuperscript{80} In that case, police arrested the burglary

\textsuperscript{74} Id. at 771.
\textsuperscript{75} Id.
\textsuperscript{76} See, e.g., Missouri v. McNeely, 133 S. Ct. 1552, 1564 (2013) (holding that the exigent circumstances exception to the Fourth Amendment requires a fact-intensive case-by-case determination as to whether or not a particular search is justified).
\textsuperscript{77} Schmerber, 384 U.S. at 771.
\textsuperscript{78} See, e.g., Birchfield v. North Dakota, 136 S. Ct. 2160, 2174 (2016) (holding that searches incident to arrest are either categorically allowed or prohibited, and that if they are appropriate, then an officer does not need to make a decision based on the totality of the circumstances).
\textsuperscript{79} 395 U.S. 752 (1969).
\textsuperscript{80} The Court grappled with many landmark constitutional criminal procedure cases during the 1960s and into the 1970s. See, e.g., Miranda v. Arizona, 384 U.S. 436, 478–79 (1966) (holding that evidence obtained from a criminal defendant through police interrogation without advisement of the suspect’s rights is inadmissible under the Fifth and Sixth Amendments); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (incorporating the Fifth Amendment protection against the right to self-incrimination to state courts); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (establishing the requirement under the Sixth Amendment that the states must provide legal counsel for certain criminal defendants who lacked the resources to acquire counsel themselves); Wong Sun v. United States, 371 U.S. 471, 484–85, 488 (1963) (holding that both direct and indirect evidence discovered because of an unconstitutional search must be excluded). See generally Eric J. Miller, \textit{The Warren Court’s Regulatory Revolution in Criminal Procedure}, 43 CONN. L. REV. 1 (2010). Because
suspect in his house. They had a warrant for Chimel’s arrest but not a warrant to search the house. Over Chimel’s objections, police searched the entire house as a search incident to arrest and discovered evidence that was later admitted at his trial. The Court granted certiorari to answer the question of whether that search was within the scope of a search incident to arrest.

The State argued that an older case, United States v. Rabinowitz, should control the outcome in Chimel. In Rabinowitz, federal officers searched the one-room office that a suspect was arrested in, as well as the desk, safe, and file cabinets in the office. The Court held that police had “[t]he right ‘to search the place where the arrest is made in order to find and seize things connected with the crime.’” The Court in Chimel explained that “Rabinowitz ha[d] come to stand for the proposition . . . that a warrantless search ‘incident to a lawful arrest’ may generally extend to the area that is considered to be in the ‘possession’ or under the ‘control’ of the person arrested.”

The Court pushed back on this expansion of police power and held that officer safety was the prime justification for the search-incident-to-arrest principle and that the preservation of evidence was a secondary concern. The Court held that it is reasonable for an officer to search the person of the arrestee to “remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape.” The Court also held that it is categorically reasonable to search the area into which “an arrestee might reach in order to

of the vast amount of material specifically addressing implied-consent laws and searches incident to arrest, Terry stops and other important but not directly related cases are beyond the scope of this Note. See Terry v. Ohio, 392 U.S. 1 (1968).

82. Id. at 754. The district court held that the arrest warrant was invalid due to a lack of sufficient probable cause but did not exclude the evidence that police discovered in Chimel’s house, as the officers were acting in good faith. Id. at 754–55. The Supreme Court declined to address the validity of the arrest. Id. at 755.
83. Id.
86. Chimel, 395 U.S. at 759.
87. Rabinowitz, 399 U.S. at 59.
88. Id. at 61.
89. Chimel, 395 U.S. at 760.
90. Id. at 763.
91. Id. (alteration in original).
grab a weapon.” Because such a search is reasonable, the officer could also seize any potential evidence discovered during this search in order to prevent its “concealment or destruction.” Because Chimel’s entire home could not be defined as such an area, the evidence obtained in the search had to be suppressed, and Chimel’s conviction reversed.

The Court again addressed the proper scope of a search incident to arrest four years later in United States v. Robinson. In that case, the petitioner was stopped based on uncontested probable cause for a minor traffic offence. The arresting officer searched Robinson and pulled a “crumpled up cigarette package” out of the left breast pocket of his coat. Upon further inspection, the arresting officer discovered fourteen capsules of heroin in the cigarette package. This heroin was admitted as evidence at trial and subsequently used to convict Robinson of possession of heroin and facilitation of concealment of heroin. At issue was the fact that at no point did the arresting officer have any fear or apprehension that Robinson was armed or dangerous; the search was entirely motivated by the potential for the preservation of evidence.

Lacking this justification, the court of appeals excluded the heroin and held that the search was unreasonable. The Supreme Court reversed and, contrary to the language in Chimel, held that the preservation of evidence was just as important a justification for the search-incident-to-arrest exception as officer safety. For the first

92. Id.
93. Id.
94. Id. at 768.
96. Id. at 220.
97. Id. at 222–23.
98. Id.
99. Id. at 219–20.
100. See id. at 236.
101. See United States v. Robinson, 471 F.2d 1082, 1089 (D.C. Cir. 1972) (reasoning that the search went beyond the scope of a valid search incident to arrest because “there was no suggestion that [the arresting officer] believed it to be a weapon or believed himself to be in danger”), rev’d, 414 U.S. 218.
102. Compare Robinson, 414 U.S. at 234 (“The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial.”), with Chimel, 395 U.S. at 762 (holding that the scope of a search incident to arrest is the area from which an arrestee might procure a weapon).
time, the Court also held that a search incident to arrest is categorically reasonable and requires no justification beyond the probable cause that is required for a legal arrest.  

Jumping forward forty years, the Court recently granted certiorari on a case that applied Fourth Amendment principles to a situation that the founding fathers could never have anticipated. In Riley v. California, the Court addressed two cases in which police searched an arrestee incident to arrest and discovered information stored on the arrestee’s cell phone, which was accessed without a warrant and later used as evidence at trial. The Court noted that, absent historical guidance, it is the Court’s duty to balance “the degree to which [a search] intrudes upon an individual’s privacy [against] the degree to which it is needed for the promotion of legitimate governmental interests.” The Court based its holding on the historical basis for searches incident to arrest generally. It held that data stored in cell phones cannot possibly be used as a weapon to attack the arresting officer. The Court rejected the argument that accessing the data could allow officers to avoid collateral danger, because that justification could apply to any potential warrantless search.

The Court further held that the preservation of evidence, though a more compelling interest, was also insufficient justification to allow these searches incident to arrest. The Court held that the main danger asserted by the State, that a third party could either wipe the data on the phone or encrypt it remotely, was “distinct” from reasoning in earlier cases, and the danger was thus unpersuasive.

On the other side of the balancing test, the Court concluded that even though an arrestee had a reduced expectation of privacy

103. See Robinson, 414 U.S. at 235 (“We do not think the long line of authorities . . . requires such a case-by-case adjudication.”).
105. Id.
106. Id. at 2484 (alteration in original) (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).
107. See id. at 2485.
108. Id.
109. See id.
110. See id. at 2486.
111. See id. (“We have also been given little reason to believe that either problem is prevalent. The briefing reveals only a couple of anecdotal examples of remote wiping triggered by an arrest.”).
simply due to being arrested, the intrusion into the privacy interests of the arrestee in the case at hand was still unreasonable.\textsuperscript{112} The Court referenced the fact that smart phones are essentially “minicomputers” that are materially different from the crumpled up pack of cigarettes in \textit{Robinson}.\textsuperscript{115}

The State presented an alternative argument that searches of an arrestee’s cell phone should be permissible when the arresting officer has probable cause to believe that the phone contains evidence of the crime for which the suspect was arrested.\textsuperscript{114} The State based the argument on the reasoning of an earlier case, \textit{Arizona v. Gant},\textsuperscript{115} which created an addition to the search-incident-to-arrest exception regarding vehicles.\textsuperscript{116} The \textit{Gant} Court held that when a suspect is arrested in a motor vehicle, a search of that vehicle is constitutional as a search incident to arrest when “it is ’reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’”\textsuperscript{117}

The government argued that there should be a similar addition for cell phones when there is probable cause to believe that there is evidence on a seized phone that is relevant to the crime for which the suspect was arrested.\textsuperscript{118} The Court rejected this argument, holding that motor vehicles present “heightened law enforcement needs” that cell phones do not and that in virtually any situation where a cell phone was seized incident to arrest an officer could come up with sufficient probable cause to justify a full search of the data on the phone.\textsuperscript{119}

\begin{itemize}
\item \textsuperscript{112} See id. at 2488.
\item \textsuperscript{113} Id. at 2488–89, 2492 (noting the “immense storage capacity” of smartphones and the “virtually unlimited” potential for collection of private data).
\item \textsuperscript{114} Id. at 2492 (citing \textit{Arizona v. Gant}, 556 U.S. 332, 343 (2009)).
\item \textsuperscript{115} 556 U.S. 332.
\item \textsuperscript{116} Id. at 343.
\item \textsuperscript{117} Id. (quoting \textit{Thornton v. United States}, 541 U.S. 615, 632 (2004)).
\item \textsuperscript{118} \textit{Riley}, 134 S. Ct. at 2492.
\item \textsuperscript{119} See id. (“It would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone.”). The Court also summarily rejected alternate justifications, holding that restricting the scope of the search within the data of the cell phone would not provide a meaningful constraint on officers; that even viewing the call logs would reveal personal information, such as the identities of the persons that the owner of the cell phone was calling; and that allowing a search of any data on a cell phone that police would have had the possibility of finding through a search of an address book or other pre-digital counterpart would be an unworkable and unjustifiable diminution of privacy. See \textit{id}.
\end{itemize}
B. The Skinner and King Decisions: Providing a Framework for Analysis of Warrantless Testing

Unlike most of the cases discussed in this Note, the next important case to the development of DWI implied-consent law, *Skinner v. Railway Labor Executives’ Ass’n*, was not a criminal case but a civil one. In that case, the Railway Labor Executives’ Association challenged certain regulations promulgated by the Federal Railroad Administration. The challenged regulations required railroad companies to take blood and urine tests from employees after major accidents and authorized railroads to administer breath or urine tests to employees who violated safety rules.

The Supreme Court emphasized the importance of the reasonableness requirement of the Fourth Amendment. The railroad employees argued that the potential searches were unconstitutional because they made certain employees subject to a mandatory search after a major crash without a warrant or any individualized suspicion. The Court found the privacy interests involved to be slight, as compared to the “compelling” government interest in safely regulating the industry. The Court therefore upheld the regulations involving warrantless testing of blood, breath, and urine as categorically constitutional. *Skinner* is especially important because, unlike any other Supreme Court case, the *Skinner* Court had to balance the reasonableness and intrusion involved in breath, blood, and urine tests, all in the same case.

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120. 489 U.S. 602 (1989).
121. Id. at 612.
122. Id. at 609–12. The Court determined, as a threshold matter, that the collection of such samples constituted a search that implicated the Fourth Amendment. Id. at 614–16. The Court reasoned that even though the search was performed by private railroad companies, because of the compelled nature of the testing required and the government interest and involvement in the testing, the searches implicated the Fourth Amendment. Id.
123. Id. at 619 (“For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable.”).
124. Id. at 621–22 (noting that warrants supported by individualized suspicion served to protect citizens from “the random or arbitrary acts of government agents,” and concluding that such arbitrariness was not a concern in this case).
125. Id. at 628.
126. Id. at 603.
127. See id. at 625–28.
In 2013, the Court granted certiorari on two cases that wrestled with significant Fourth Amendment issues. In *Maryland v. King*, an arrestee challenged a Maryland law incorporating DNA tests into standard booking procedures. Police arrested King on assault charges and, as part of routine procedure, took a warrantless DNA sample via cotton swab from his inner cheek. When the sample was analyzed, King’s DNA was matched to semen that had been recovered from an unsolved rape that occurred six years prior. After King’s conviction for that rape, the Maryland Court of Appeals ruled that the DNA swab was an unconstitutional search and reversed. The United States Supreme Court granted certiorari to decide the question of the statute’s constitutionality.

The Supreme Court first held that the DNA testing clearly constituted a search of the person and thus implicated the Fourth Amendment. The Court reasoned that, as an administrative search, requiring a warrant for the test in this case would be a near pointless exercise, noting that “in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate.” The Court then engaged in a rigorous balancing test to evaluate the reasonableness of the search. The Court held that the government interest in correctly identifying the persons whom it held in custody was compelling for four reasons.

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128. See *Maryland v. King*, 133 S. Ct. 1958 (2013) (holding that a warrantless DNA swab incident to arrest was constitutional as an inventory search); *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) (holding that the natural dissipation of alcohol from a suspect’s bloodstream did not constitute a per se exigency for purposes of Fourth Amendment analysis).

129. 133 S. Ct. 1958.

130. Id. at 1965 (“As part of a routine booking procedure for serious offenses, [King’s] DNA sample was taken by [buccal swab].”).

131. Id.

132. Id.


134. *King*, 133 S. Ct. at 1965. While every state has a statute authorizing DNA collection from convicted felons, Maryland was one of twenty-eight states, in addition to the federal government, that collected DNA from some or all arrestees prior to a conviction. Id. at 1968.

135. Id. at 1968–69.


137. Id. at 1969.

138. Id.
The Court held that identification by way of DNA analysis was crucial for the purposes of thwarting attempts by the arrestee to conceal his identity,\textsuperscript{139} protecting the safety of officers and existing detainees,\textsuperscript{140} ensuring that the government can produce individuals for trial,\textsuperscript{141} and assessing the potential danger that the individual would present if allowed to be released on bail.\textsuperscript{142} The Court concluded that these interests outweighed the privacy interests of the individuals involved.\textsuperscript{143} The Court held that arrestees have a diminished expectation of privacy in all cases\textsuperscript{144} and further held that the search was minimal because “[a] gentle rub along the inside of the cheek does not break the skin, and it ‘involves virtually no risk, trauma, or pain.’”\textsuperscript{145}

The Court declared that DNA testing had the “unmatched potential” to serve the government’s interest in identifying the persons whom it had arrested, which deserved “great weight.”\textsuperscript{146} It also specifically noted that the methodology used to identify individuals using their DNA does not reveal any genetic traits of the individual.\textsuperscript{147} The Court further noted that the DNA collection statute itself limits any further use of the DNA sample obtained from

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\textsuperscript{139} Id. at 1971 (quoting \textit{Florence v. Bd. of Chosen Freeholders}, 566 U.S. 318, 336 (2012)) (“An ‘arrestee may be carrying a false ID or lie about his identity,’ and ‘criminal history records . . . can be inaccurate or incomplete.’”).

\textsuperscript{140} Id. at 1972 (analogizing to a visual inspection of new arrestees for gang tattoos or other markings that would indicate that an individual is particularly violent).

\textsuperscript{141} Id. at 1973. The argument appears to be that if an individual knew that he had committed a previous crime and was arrested for a minor offense, then he would flee the jurisdiction the moment that he was released on that minor charge.

\textsuperscript{142} Id. at 1978 (quoting Bell v. Wolfish, 441 U.S. 520, 557 (1979)) (“The expectations of privacy of an individual taken into police custody ‘necessarily [are] of a diminished scope.’”).

\textsuperscript{143} Id. at 1980.

\textsuperscript{144} Id. at 1979 (quoting Schmerber v. California, 384 U.S. 757, 771 (1966)).

\textsuperscript{145} Id. at 1977.

\textsuperscript{146} Id. at 1979 (noting that the CODIS loci tested currently cannot reveal such information).
\end{flushleft}
the arrestees.\textsuperscript{148} Interestingly, the Court accepted at face value the contention that the DNA samples that the State obtained would not be used for any purpose other than identification of the arrestee.\textsuperscript{149} Instead, the Court merely noted that “[i]f in the future police analyze samples to determine, for instance, an arrestee’s predisposition for a particular disease or other hereditary factors not relevant to identity, that case would present additional privacy concerns not present here.”\textsuperscript{150} The Court also reasoned that DNA testing in this context was analogous to the current practice of fingerprinting suspects upon arrest.\textsuperscript{151} Justice Scalia wrote a scathing dissent,\textsuperscript{152} concluding with a hope that a future Court would reverse the opinion.\textsuperscript{153}

C. DWI Litigation Is Back at the Supreme Court

The same year the Court decided \textit{Maryland v. King}, the Court took on a case that sparked a flurry of DWI litigation. In \textit{Missouri v. McNeely},\textsuperscript{154} McNeely was pulled over on suspicion of driving while impaired after the officer witnessed him driving erratically.\textsuperscript{155} McNeely failed other field sobriety tests and refused to provide a breath sample for a preliminary breath test.\textsuperscript{156} The officer placed McNeely under arrest and began to transport him back to the station.\textsuperscript{157} Once McNeely informed the officer that he would again refuse to provide a breath sample at the station, the officer diverted

\textsuperscript{148} Id. at 1980 (quoting NASA v. Nelson, 562 U.S. 134, 136 (2011)) (noting that “a statutory or regulatory duty to avoid unwarranted disclosures generally [assuages] privacy concerns” (internal quotations omitted)). Interestingly, the Court appears to have taken a step back from this position. \textit{Cf.} Birchfield v. North Dakota, 36 S. Ct. 2160, 2178 (2016) (“Even if the law enforcement agency is precluded from testing the [retained blood sample] for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.”).

\textsuperscript{149} King, 133 S. Ct. at 1979.

\textsuperscript{150} Id.

\textsuperscript{151} Id. at 1971–72.

\textsuperscript{152} Id. at 1989 (Scalia, J., dissenting) (“I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.”).

\textsuperscript{153} Id. at 1989–90.

\textsuperscript{154} 133 S. Ct. 1552 (2013).

\textsuperscript{155} Id. at 1556.

\textsuperscript{156} Id. at 1556–57.

\textsuperscript{157} Id.
McNeely to a hospital to obtain a sample of McNeely’s blood. At the hospital, the officer read the informed-consent advisory to McNeely and informed him that test-refusal would result in license revocation and be used as evidence in a subsequent prosecution. McNeely still refused to consent to testing. The officer directed a hospital technician to take a blood sample anyway, which revealed that McNeely’s blood alcohol concentration was almost twice the legal limit.

McNeely was subsequently charged with driving while intoxicated. He moved to suppress the results of the blood test on the grounds that the blood draw constituted a warrantless search that was prohibited by the Fourth Amendment. He argued that the search could not be justified by the exigent circumstances exception to the warrant requirement. The district court agreed that the search violated the Fourth Amendment, and the Missouri Supreme Court affirmed. The Supreme Court granted certiorari on the issue of whether the natural dissipation of alcohol from the body constituted a per se exigency so as to justify states in either conducting warrantless tests or in criminalizing refusal of warrantless tests.

The Supreme Court held that the exigent circumstances exception requires a case-by-case analysis that is dependent on the totality of the circumstances. The Court maintained that it would not “depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State.” While the Court cited to several exigent circumstance cases that clearly use such language, there are exceptions to the warrant requirement that

158. Id. at 1557.
159. Id.
160. Id.
161. Id.
162. Id.
163. Id.
164. Id.
165. Id. at 1558.
166. Id. at 1563.
167. Id. at 1561.
168. See id. at 1559 (first citing Illinois v. McArthur, 531 U.S. 326, 331 (2001) (“concluding that a warrantless seizure of a person to prevent him from returning to his trailer to destroy hidden contraband was reasonable ‘[i]n the circumstances of the case before us’”); then citing Cupp v. Murphy, 412 U.S. 291, 296 (1973) (“holding that a limited warrantless search of a suspect’s fingernails to preserve
appear to constitute per se exigencies. Further, it appears that for some cases, the language that the McNeely Court used to describe the Court’s past reasoning does not necessarily match with the language used in the actual cases. Importantly, the Court’s holding in McNeely abrogated Minnesota case law upholding the constitutionality of the State’s implied-consent laws as being justified by the “single-factor” exigent circumstance of the “rapid, natural dissipation of alcohol in the blood.”

In 2016, just three years after McNeely, the Supreme Court again grappled with the issue of DWI test refusal. In Birchfield v. North Dakota, the Court held that warrantless breath tests were categorically constitutional incident to a valid arrest for driving while impaired but warrantless blood tests were not. The case involved three defendants, each with a slightly different set of facts but all of whom challenged the constitutionality of their states’ implied-consent laws. The issue that the Court granted certiorari on was evidence that the suspect was trying to rub off was justified “[o]n the facts of this case”).

169. See, e.g., Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (“One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury.”); Michigan v. Tyler, 436 U.S. 499, 511 (1978) (“[E]ntry to fight a fire requires no warrant, and . . . once in the building, officials may remain there for a reasonable time to investigate . . . .”); United States v. Santana, 427 U.S. 38 (1976) (holding that a suspect fleeing from a public area into her private house did not require the police to halt their chase, as the flight constituted a “hot pursuit”). This seems to directly contradict the Court’s description of exigent circumstance jurisprudence in McNeely as always relying on a case-by-case analysis, as these cases appear to create categorical exigent circumstances that are exempt from the warrant requirement.

170. Compare McNeely, 133 S. Ct. at 1559 (“Our decision in Schmerber applied this totality of the circumstances approach.”), with Schmerber v. California, 384 U.S. 757 (1966) (analyzing the totality of the circumstances to justify the search and holding that given the special facts, the search “was an appropriate incident to petitioner’s arrest” (emphasis added)).

171. State v. Shriner, 751 N.W.2d 538, 549–50 (Minn. 2008), abrogated by McNeely, 133 S. Ct. 1552.


175. Id. at 2185.

174. Id. at 2170. Danny Birchfield was convicted of DWI test-refusal in North Dakota for refusing to consent to a blood test after driving his car off of a highway. Id. William Bernard was convicted of DWI test-refusal in Minnesota for refusing to consent to a breath test. Id. at 2171. Steve Beylund had his driver’s license revoked for DWI in North Dakota after a blood test revealed that he had been driving with a blood alcohol concentration more than three times the legal limit. Id. at 2171–72.
essentially the same for all three cases: was a warrantless test, of breath or blood, permissible as a search incident to arrest?\textsuperscript{175}

The Court began its analysis with a general discussion of the implied warrant requirement of the Fourth Amendment before moving on to the specific issue in the case, the search-incident-to-arrest exception.\textsuperscript{176} The Court went through the historical basis for the exception before deciding that there was no historical analogue to chemical tests for blood-alcohol-concentration.\textsuperscript{177} Therefore it concluded that, consistent with \textit{Riley}, the proper analysis for whether the exception applies in a certain situation should be determined “by assessing, on the one hand, the degree to which [a search] intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”\textsuperscript{178}

In regard to breath tests, the Court reaffirmed its declaration from \textit{Skinner} that they “do not ‘implicat[e] significant privacy concerns.’”\textsuperscript{179} Its analysis focused primarily on the degree of physical intrusion into the body that the testing required.\textsuperscript{180} The Court held that even though the test requires the suspect to insert the mouthpiece of the testing machine into his or her mouth, there was nothing “painful or strange” about the test.\textsuperscript{181} Importantly, the Court directly compared the breath search at issue in that case with the DNA swab in \textit{Maryland v. King}—despite the fact that the two searches were justified by different exceptions to the warrant requirement.\textsuperscript{182}

The Court went on to note that breath tests only reveal one piece of information and do not place a sample of any biological material in the hands of police.\textsuperscript{183} Again, it contrasted the testing in

\textsuperscript{175} \textit{Id.} at 2172.
\textsuperscript{176} \textit{Id.} at 2173 (citing Kentucky v. King, 563 U.S. 452, 459 (2011)).
\textsuperscript{177} \textit{Id.} at 2176.
\textsuperscript{178} \textit{Id.} (alteration in original) (quoting \textit{Riley v. California}, 134 S. Ct. 2473, 2484 (2014)).
\textsuperscript{179} \textit{Id.} (quoting \textit{Skinner v. Ry. Labor Execs.’ Ass’n}, 489 U.S. 602, 626 (1989)).
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textit{Id.} at 2177. The Court also held that people hold no “possessory interest” in the air in their lungs, regardless of the fact that the test requires “alveolar,” or “deep lung” air. \textit{Id.}
\textsuperscript{182} \textit{Id.} (quoting Maryland v. King, 133 S. Ct. 1958, 1969 (2013)) (describing “the process of collecting a DNA sample by rubbing a swab on the inside of a person’s cheek as a ‘negligible’ intrusion”).
\textsuperscript{183} \textit{Id.}
this case with the test in King.\footnote{Id. (citing King, 133 S. Ct. at 1967–68).} Finally, the Court noted that breath tests are not likely to cause an enhancement to the embarrassment that is already “inherent in any arrest” and that after an arrest, “the individual’s expectation of privacy is necessarily diminished.”\footnote{Id. at 2178 (quoting Skinner v. Ry. Labor Execs.’ Ass’n, 489 U.S. 602, 626 (1989)).}

To contrast, the Court noted that blood tests are different because they require “‘piercing the skin’ and extract[ing] a part of the subject’s body.”\footnote{Id.} The decision also included the dramatic point that “while humans exhale air from their lungs many times per minute, humans do not continually shed blood.”\footnote{Id. (quoting Mackey v. Montrym, 443 U.S. 1, 17 (1979)).} The Court finished its analysis of the intrusion of blood tests by noting that a blood test places a sample into the hands of law enforcement.\footnote{Id.}

On the other hand, the Court stated that the government has a “paramount interest . . . in preserving the safety of . . . public highways.”\footnote{Id. at 2178–79.} The Court described the damage that the country suffers from drunk driving every year:

Alcohol consumption is a leading cause of traffic fatalities and injuries. During the past decade, annual fatalities in drunk-driving accidents ranged from 13,582 deaths in 2005 to 9,865 deaths in 2011. The most recent data report a total of 9,967 such fatalities in 2014—on average, one death every 53 minutes. Our cases have long recognized the “carnage” and “slaughter” caused by drunk drivers.\footnote{Id. (internal citations omitted).}

The Court noted that, contrary to Justice Sotomayor’s assertion in her dissent, the State’s interests do not end once the drunk driver is arrested.\footnote{Id. at 2178–79.} Instead, the Court stated that the interest continues through the suspect’s conviction, because the State has an interest in deterring other potential drunk drivers from getting behind the wheel.\footnote{Id.}

The Court also noted that criminal consequences for DWI test refusal grew out of a desire to curb the “most dangerous offenders”\footnote{Id. at 2179.}—in other words, those who drive with a blood alcohol

\footnote{184. Id. (citing King, 133 S. Ct. at 1967–68).} \footnote{185. Id.} \footnote{186. Id. at 2178 (quoting Skinner v. Ry. Labor Execs.’ Ass’n, 489 U.S. 602, 626 (1989)).} \footnote{187. Id.} \footnote{188. Id.} \footnote{189. Id. (quoting Mackey v. Montrym, 443 U.S. 1, 17 (1979)).} \footnote{190. Id. (internal citations omitted).} \footnote{191. Id. at 2178–79.} \footnote{192. Id.} \footnote{193. Id. at 2179.}
content well above the legal limit and DWI recidivists who faced the harshest consequences for a conviction for driving while impaired. The problem with purely civil sanctions for test refusal, the Court noted, was that the most dangerous offenders had a strong incentive to refuse a test that would likely lead to harsh criminal penalties when they could simply refuse to comply with the test and only have to face a license revocation. The Court further reasoned that requiring a warrant for every driving while impaired arrest was a practical impossibility, as police effectuate more than 1.1 million such arrests every year.

The Court then noted that due to the interests involved and the categorical nature of the search-incident-to-arrest exception, the burden was on the petitioners, not the State, to show that there was a “special need” for warrants in these situations. This implies that the categorical nature of searches incident to arrest have a presumption of reasonableness. The Court then went through the possible benefits of requiring a warrant for every arrest on suspicion of driving while intoxicated, such as limiting intrusion on privacy. However, the Court concluded that due to the similarity of the facts in most DWI arrests and the categorically limited scope of the search, requiring the police to obtain a warrant for every arrest on suspicion of DWI “would impose a substantial burden but no commensurate benefit.” Additionally, the Court concluded that given the government interests involved and the “slight” impact of breath tests on privacy, warrantless breath tests are categorically constitutional incident to arrest for DWI.

The Court reached the opposite conclusion on blood tests. The Court held that the reasonableness of the “more intrusive” test

194. Id.
195. Id.
196. See id. at 2180 (“The number of arrests every year for driving under the influence is enormous—more than 1.1 million in 2014.”).
197. Id. at 2181.
198. Id. (“First, [warrants] ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found. Second, if the magistrate finds probable cause, the warrant limits the intrusion on privacy by specifying the scope of the search—that is, the area that can be searched and the items that can be sought.” (internal citations omitted)).
199. Id. at 2181–82.
200. Id. at 2184.
201. Id.
“must be judged in light of the availability of the less invasive alternative of a breath test.” 202 Further, the Court noted, Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant. . . . [P]olice 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. . . . Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. 203

Thus, the Court relied exclusively on the greater intrusiveness of blood tests to hold that warrantless blood tests are unconstitutional as searches incident to arrest, absent a case-by-case analysis of the exigencies of the situation.

IV. STATE v. THOMPSON

A. Facts of the Case

On April 13, 2012, at around 1:00 a.m., Ryan Thompson drove away from a bar in Owatonna, MN. 204 An officer, who was watching the parking lot of this bar, saw Thompson’s car “jump the curb and then stop quickly before reversing and leaving the parking lot.” 205 As the vehicle left the parking lot, it “cut the corner short and crossed the center line.” 206 The officer watching the parking lot then initiated a traffic stop. 207 After Thompson stopped and the officer approached his car, Thompson informed the officer that he did not
have his driver’s license with him and produced the license of the passenger of the car instead.\textsuperscript{208} The officer was able to identify Thompson by his name and date of birth.\textsuperscript{209} The officer later testified that there was an “overwhelming odor” of alcohol coming from the vehicle and that Thompson had “watery and glassy eyes.”\textsuperscript{210} Thompson admitted to having a single beer.\textsuperscript{211}

The officer then asked Thompson to submit to several field sobriety tests, all of which he failed.\textsuperscript{212} Thompson also failed a preliminary breath test at the scene,\textsuperscript{213} after which the officer placed him under arrest for suspicion of driving while impaired.\textsuperscript{214} The officer then transported Thompson to the Steele County Detention Center and gave Thompson a phone, a telephone book, and a directory of attorneys.\textsuperscript{215} After leaving one voicemail, Thompson told the officers that he was done attempting to contact an attorney.\textsuperscript{216} The officer then read the implied consent advisory to Thompson and requested that he take a blood or urine test.\textsuperscript{217} Thompson

\begin{itemize}
\item \textsuperscript{208} Id.
\item \textsuperscript{209} Id.
\item \textsuperscript{210} Id. at 226–27.
\item \textsuperscript{211} Id. at 227.
\item \textsuperscript{212} State v. Thompson, 873 N.W.2d 873, 876 (Minn. Ct. App. 2015), aff’d, 886 N.W.2d 224.
\item \textsuperscript{213} Thompson, 886 N.W.2d at 227. Under Minnesota law, when a peace officer has reason to believe that a person has driven or operated a vehicle under the influence of alcohol, the officer may request that the person submit to a “preliminary screening test,” which tests a sample of the person’s breath at the scene. MINN. STAT. § 169A.41 (2016). This test will indicate an approximate level of intoxication, but the results are not considered reliable enough to be evidence of intoxication. See Windschitl v. Comm’r of Pub. Safety, 355 N.W.2d 146, 149 (Minn. 1984). This test may be used for a number of purposes (primarily to determine whether or not an arrest should be made), but it cannot be used to establish the blood alcohol content of the suspect in court during a prosecution for driving while intoxicated. MINN. STAT. § 169A.41, subdiv. 2.
\item \textsuperscript{214} Thompson, 886 N.W.2d at 227.
\item \textsuperscript{215} Id.
\item \textsuperscript{216} Id.
\item \textsuperscript{217} Id. Under Minnesota law, officers who arrest a person suspected of driving under the influence have two choices to offer the arrestee. MINN. STAT. § 169A.51, subdiv. 3. They can require the suspect to take a breath test, and if they do so, they are not required to offer, or accept, an alternate test. See Carlson v. Comm’r of Pub. Safety, 357 N.W.2d 391, 392 (Minn. Ct. App. 1984). The other choice is to request that the suspect take either a blood or urine test. MINN. STAT. § 169A.51, subdiv. 3. If police request either of these testing methods and the suspect refuses, then police must offer an alternate method of testing before the state can either bring criminal
refused both alternatives, stating, “I don’t think I’ve been prosecuted properly.”

The State subsequently charged Thompson with one count each of second-degree test refusal, third-degree driving while impaired, obstruction of legal process, and driving over the centerline.

**B. The Lower Courts’ Decisions and Reasoning**

At the district court, Thompson moved for dismissal of the test-refusal charge, arguing that the statute was unconstitutional as applied on the grounds that it violated his substantive due process rights and the doctrine of unconstitutional conditions. Regarding the due process claim, he claimed that a warrantless search of his blood or urine was an unconstitutional search under the Fourth Amendment that violated his substantive due process right to be free from unreasonable searches and seizures. He argued that because the search was be unconstitutional, refusing to submit to it could not be criminalized.

The unconstitutional conditions argument is more complex. Under the doctrine of unconstitutional conditions, the government cannot condition a privilege on the relinquishment of certain constitutional rights. In this case, Thompson argued that Minnesota’s implied-consent laws condition the privilege of driving on the relinquishment of the Fourth Amendment right to be free from unreasonable searches and seizures. Because both the Minnesota Court of Appeals and the Minnesota Supreme Court charges or revoke the license of the suspect for test refusal. See Johnson v. Comm’r of Pub. Safety, 887 N.W.2d 281, 290–95 (Minn. Ct. App. 2016).

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218. State v. Thompson, 873 N.W.2d 873, 876 (Minn. Ct. App. 2015), aff’d, 886 N.W.2d 224.
221. **Id.** § 609.50, subdivs. 1(2), 2(3).
222. **Id.** § 169.18, subdiv. 1; Thompson, 886 N.W.2d at 227.
223. **Thompson,** 886 N.W.2d at 227.
225. **Id.**
226. Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 HARV. L. REV. 1413, 1426 (1989) (“[T]he doctrine serves to protect only those rights that depend on some sort of exercise of autonomous choice by the rightholder, such as individual rights to speech, exercise of religion or privacy . . . .”).
ruled on this case on due process grounds, neither court addressed Thompson’s unconstitutional conditions argument.227

The district court denied Thompson’s motion for dismissal based on the Minnesota Supreme Court’s decision in State v. Bernard.228 Bernard involved a similar challenge to the DWI test-refusal statute on warrantless tests of a suspect’s breath.229 The Minnesota Supreme Court held in Bernard that when a suspect is placed under lawful arrest for suspicion of driving while impaired, a warrantless breath test is categorically permissible as a search incident to arrest.230 Thus, because a warrantless breath test under those circumstances is constitutional, it is also constitutional to criminalize refusal of the test.231 The Bernard court did not rule on either urine or blood tests and declined to express any opinion on the matter.232

The Minnesota Court of Appeals disagreed with the district court. The court of appeals found that Bernard was not dispositive on the issue of blood or urine tests and held that the test-refusal statute is unconstitutional as applied to both blood and urine.233 Instead of Bernard, the court of appeals leaned heavily on another opinion that it had released just two months prior, State v. Trahan.234 In Trahan, the Minnesota Court of Appeals ruled that warrantless blood tests incident to arrest for driving while intoxicated were unconstitutional, and therefore the DWI test-refusal statute was unconstitutional as well.235

Basing its reasoning on Trahan, the Minnesota Court of Appeals held that urine tests are more like blood than breath tests and therefore are not permissible as searches incident to arrest.236 The

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227. Thompson, 886 N.W.2d at n.9; Thompson, 873 N.W.2d at 880.
229. Bernard, 859 N.W.2d at 764.
230. Id.
231. Id.
232. Id. at 768 (“[T]he question of a blood or urine test incident to arrest is not before us . . . . The differences between a blood test and a breath test are material, and not the least of those differences is the less-invasive nature of breath testing.”).
234. Id. at 876 (citing State v. Trahan, 870 N.W.2d 396 (Minn. Ct. App. 2015), aff’d, 886 N.W.2d 216 (Minn. 2016)).
235. Trahan, 870 N.W.2d at 401.
236. Thompson, 873 N.W.2d at 879.
court reasoned that because warrantless urine tests could not be justified as searches incident to arrest, the test-refusal statute implicated Thompson’s substantive due process right to be free from unreasonable searches, and strict scrutiny was the appropriate framework for an analysis of the DWI test-refusal statute. The Minnesota Court of Appeals concluded that the State did have a compelling interest in keeping impaired drivers off of its roads, which satisfied the first prong of the strict scrutiny analysis. But it held that because there were alternatives available to the State, such as breath tests, the statute was not narrowly tailored to serve that interest.

Upon review, the Minnesota Supreme Court was critical of the analysis of the Minnesota Court of Appeals. The higher court determined that because a specifically enumerated fundamental right, the right to be free from unreasonable searches and seizures, was implicated, a substantive due process analysis was inappropriate and contrary to precedent. However, while it disagreed with the reasoning of the Minnesota Court of Appeals, the Minnesota Supreme Court affirmed the decision and held that a warrantless urine test was not constitutionally permissible as a search incident to arrest. The court reasoned that while the urine tests are more like breath tests than blood tests when examined for their level of intrusiveness, urine tests implicate more privacy interests than breath tests or blood tests and are thus overall more like blood tests. It also reasoned that because breath tests adequately serve the State’s interest in protecting the public from the danger of impaired drivers, the scales are further tipped against the reasonableness of warrantless urine tests.

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237. Id. at 879–80.
238. Id. at 880.
239. Id.
240. State v. Thompson, 886 N.W.2d 224, 230 n.4 (Minn. 2016) (quoting Cty. of Sacramento v. Lewis, 523 U.S. 835, 842 (1998)) (“[W]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.”).
241. Thompson, 886 N.W.2d at 233.
242. Id. at 231–32.
243. Id. at 233.
V. ANALYSIS: THE MINNESOTA SUPREME COURT GOT IT WRONG

To analyze the court’s decision in Thompson, this Part first begins with a discussion of the DWI test-refusal statute and what is required to convict someone under the law. Next, this Part critically examines the Minnesota Supreme Court’s balancing of privacy interests against public interests. Finally, this Part discusses the purposes of the warrant requirement as the United States Supreme Court laid out in Birchfield and concludes that the Thompson decision does not serve these purposes.

A. Understanding the Law

Minnesota’s implied-consent law states that any individual who “drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water” consents to a chemical test for the limited purpose of determining whether or not he or she is under the influence of intoxicating chemicals.244 A number of conditions need to be met before an individual is subject to a chemical test to determine intoxication.245 The officer requesting the test must have probable cause to place the suspect under arrest for “driving, operating, or [being] in physical control of a motor vehicle” while under the influence, and one of the following conditions must be present:

(1) the person has been lawfully placed under arrest for violation of section 169A.20 [driving while impaired] or an ordinance in conformity with it;
(2) the person has been involved in a motor vehicle accident or collision resulting in property damage, personal injury, or death;
(3) the person has refused to take the screening test provided for by section 169A.41 (preliminary screening test); or
(4) the [preliminary] screening test was administered and indicated an alcohol concentration of 0.08 or more.246

245. All of these conditions are necessary, but not sufficient, before an individual can be prosecuted for test refusal. See id.
246. Id. § 169A.51, subdiv. 1(b). Additionally, if the person is “driving, operating, or in physical control” of a commercial motor vehicle, there are no other requirements, and a chemical test is required simply based on an officer’s determination of probable cause that the person is under the influence. Id. § 169A.51, subdiv. 1(c).
Under the statute, once these conditions are met, suspects are obligated to take a chemical test of their breath, blood, or urine, depending on the officer’s request. Only then, if they refuse to take such a test, could a suspect be prosecuted for DWI test-refusal. Further, *Birchfield* bars the State of Minnesota from prosecuting individuals for refusing to consent to a blood test incident to arrest for driving while impaired.

A key issue in an analysis of the constitutionality of this statute is the behavior that the statute punishes. This is because the goal of the statute is one step removed from the behavior that it is attempting to regulate; that is, individuals driving while under the influence of alcohol or another intoxicating substance. A conviction for a DWI test refusal is not a conviction for the act of driving while impaired, but rather a conviction for refusing a search. As such, courts have correctly focused their inquiry on the constitutionality of the searches that states have chosen to criminalize refusal of; if the searches are not constitutional exercises of government authority, then individuals cannot be punished for refusing to comply with them.

**B. The Court Gave Too Much Weight to the Privacy Interests Involved**

In order to determine whether a warrantless urine test is a valid search incident to arrest for driving while intoxicated, the *Thompson* court engaged in a balancing of the government interests involved against the privacy interests implicated by the search. The court first laid out the privacy interests involved in the case: “the level of physical intrusion” required by the search, “the ability of the State to retain a sample containing other personal information,” and the

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247. See *id.* § 169A.20, subdiv. 2.
249. See *Birchfield* v. North Dakota, 136 S. Ct. 2160 (2016) (holding that warrantless blood tests are not constitutional as searches incident to arrest).
250. See *Minn. Stat.* § 169A.20, subdiv. 2 (“It is a crime for any person to refuse to submit to a chemical test of the person’s blood, breath, or urine.”).
251. See *Birchfield*, 136 S. Ct. at 2172 (“If such warrantless searches comport with the Fourth Amendment, it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing, just as a State may make it a crime for a person to obstruct the execution of a valid search warrant.”).
“enhanced embarrassment a urine test is likely to cause during an arrest.” 253

The Minnesota Supreme Court agreed with the State on the level of physical intrusiveness of the search; that is, a urine test is more like a breath test than a blood test in terms of the physical intrusion. 254 However, the court failed to give appropriate weight to this aspect of the analysis. In Thompson, the court’s entire analysis on the matter of the physical intrusiveness of the test consisted of two paragraphs, acknowledging that a urine test was not physically intrusive. 255 The holding of the case rested on the fact that the other two privacy interests involved—the embarrassment in the application of a urine test and the potential misuse of a sample—outweighed the low level of intrusiveness of the search, so that “[i]n sum, in terms of the impact on an individual’s privacy, a urine test is more like a blood test than a breath test.” 256

The Minnesota Supreme Court’s reasoning misstates the United States Supreme Court’s holding in Birchfield. 257 The Court held in Birchfield that “[b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests . . . a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving.” 258 The Court did not place significant weight on the possibility that the State could use a retained sample for nefarious ends or that obtaining the sample could be an uncomfortable experience for the arrestee. 259 When the case is considered in its entirety it is clear that the Birchfield decision rested on the intrusiveness of the test, and the Minnesota Supreme Court erred in failing to weigh this interest appropriately. 260

253. Id. at 229–30.
254. Id. (citing Birchfield, 136 S. Ct. at 2177).
255. Id.
256. Id. at 232. “[T]he fact that a urine 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 [alcohol concentration] reading’ makes urine tests comparable to blood tests.” Id. at 231 (quoting Birchfield, 136 S. Ct. at 2178).
257. Birchfield, 136 S. Ct. at 2160.
258. Id. at 2185.
259. Id. There are only two sentences mentioning of the potential misuse of any retained sample in the Birchfield decision, and they are not central to the holding of that case. See id. at 2178.
260. See id. at 2185 (“Because breath tests are significantly less intrusive than
The court in Thompson gave far too much weight to the potential for the abuse of a retained sample from a urine test. The court stated decisively that “the fact that a urine 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 [alcohol concentration] reading’ makes urine tests comparable to blood tests.”

Assuming the Thompson court had the freedom to evaluate this interest independently of United States Supreme Court guidance, it did so erroneously. The Thompson court considered this interest in its eventual decision to declare a statute unconstitutional—an action that Minnesota case law holds should only be done “with extreme caution and only when absolutely necessary.” Instead of declaring the statute unconstitutional, the court could have placed a limiting construction on the statute providing that any samples obtained for the purpose of testing for intoxicating chemicals would have to be destroyed immediately after testing. This would have allowed the court to uphold the statute as constitutional. Because Minnesota courts “should interpret a statute to preserve its constitutionality,” the court erred by failing to consider a limiting construction of the statute.

Though the language that the Thompson court used to describe the potential for embarrassment from the collection of a urine sample was more restrained, the court also erred in giving this interest great weight. Not long ago, the Minnesota Supreme Court made clear “that the warrantless inspection of an arrested man’s blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving.”

261. Thompson, 886 N.W.2d at 231 (quoting Birchfield, 136 S. Ct. at 2178).
262. State v. Ness, 834 N.W.2d 177, 182 (Minn. 2013) (quoting In re Haggerty, 448 N.W.2d 363, 364 (Minn. 1989)).
263. See United States v. Stevens, 559 U.S. 460, 480–81 (2010) (quoting Reno v. ACLU, 521 U.S. 844, 884 (1997)) (stating that the Court may impose a limiting construction on a statute to preserve its constitutionality if the statute is “readily susceptible” to such a construction).
264. Hutchinson Tech., Inc. v. Comm’r of Revenue, 698 N.W.2d 1, 18 (Minn. 2005); see also Minn. Stat. § 645.17 (2016) (“In ascertaining the intention of the legislature the courts may be guided by the following presumptions: . . . (3) the legislature does not intend to violate the Constitution of the United States or of this state . . . .”).
265. Thompson, 886 N.W.2d at 231 (“Urine tests for law enforcement purposes, regardless of how they are administered, implicate significant privacy interests.”).
penis was a valid search incident to arrest, noting that someone ‘lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person.’

While the Minnesota Supreme Court does have the power to overrule its own cases, the court lacked support for its reasoning. The court cited Skinner for the proposition that “urine tests for law enforcement purposes, regardless of how they are administered, implicate significant privacy interests.” But Skinner does not support this proposition. The passage that the Thompson court relies on was the section of the Skinner Court’s explanation of why urine tests implicated the Fourth Amendment at all—not why they implicated especially significant privacy interests.

Further, the Thompson court’s implication that the privacy interests are significant regardless of the method of collection is directly contradicted by Skinner. The analysis in that case focused on the minimally intrusive nature of the procedure used to collect urine samples. This implies that the procedure used to collect samples, rather than what may be revealed by testing samples, is what implicates privacy interests.

Finally, in Vernonia School District 47J v. Acton, the Supreme Court addressed a challenge to a school’s policy of subjecting its student athletes to random tests of their urine for the use of drugs. It concluded that these tests constituted Fourth Amendment searches, just as the tests at issue in Thompson. In weighing the intrusion of the tests involved, the Court reasoned that, like Skinner, “the degree of intrusion depends upon the manner in which

266. State v. Bernard, 859 N.W.2d 762, 767 (Minn. 2015) (quoting State v. Riley, 303 Minn. 251, 254, 226 N.W.2d 907, 909 (1975)).
267. See Zutz v. Nelson, 788 N.W.2d 58, 63 (Minn. 2010) (reasoning that although the Minnesota Supreme Court has the power to overrule its own decisions, the doctrine of stare decisis requires a compelling reason to do so).
268. Id. (citing Skinner v. Ry. Labor Execs.’ Ass’n, 489 U.S. 602, 617 (1989)).
269. See Skinner, 489 U.S. at 617 (“Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.”).
270. Id. at 626 (holding in part that because the regulations do not require the urine sample to be furnished under the direct observation of a monitor and the sample is to be collected in a medical environment, the test is reasonable).
272. Id. at 648.
273. Id. at 652.
production of the urine sample is monitored.” The Court concluded, “These conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily. Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible.” Again, this clearly demonstrates that the Thompson court disregarded precedent when it stated that “regardless of how [urine tests] are administered, [they] implicate significant privacy interests.”

In addition to the possibility of a limiting construction of the statute regarding preservation of a urine sample, the Thompson court could have placed a limiting construction on the method of collection. While it is true that the statute must be “readily susceptible” to such a construction, in this case the statute meets this criterion. In both Skinner and Vernonia, the Supreme Court described the method of collection of a urine sample and reasoned that it was minimally intrusive. Given this clear precedent, and because Minnesota courts “should interpret a statute to preserve its constitutionality,” the Minnesota Supreme Court should have limited the procedures by which police are allowed to request a urine sample to minimize any intrusion on legitimate privacy interests instead of declaring the statute unconstitutional.

C. The Court Gave Too Little Weight to the Public Interests Involved

In contrast, the government interest in protecting the public from the dangers of impaired driving is significant. The Thompson court cited Birchfield’s summation of the government interests in protecting society from the perils of drunk driving. The court
noted that the government has an interest both in getting impaired drivers off the road and in deterring impaired individuals from driving in the first place. The court also acknowledged the importance of criminal penalties for test refusal because administrative penalties are “unlikely to persuade the most dangerous offenders.”

After quickly summarizing the government interests, the court noted that the reasonableness of a particular type of test depends on the availability of alternatives. It noted that central to the Birchfield holding that warrantless blood tests are unconstitutional was the Court’s finding that, in most cases, a “less intrusive” breath test would serve the same government interests. It further noted that Birchfield held that the government “offered no satisfactory justification for demanding the more intrusive alternative [test].”

The Minnesota Supreme Court went one step too far. When interpreting Birchfield it held that “[t]he State here presents no justifications for warrantless urine tests other than those the Court considered and rejected in Birchfield in the context of blood draws.” This is why the court had to find that urine testing impacted the individual’s privacy significantly more than breath tests.

Significantly, the Supreme Court never stated that the justifications the State offered were per se unpersuasive and never actually “rejected” the interests asserted by the State. The Birchfield Court simply held that the interests were not “satisfactory” to support the “more intrusive” test. As the Thompson court admitted, “In terms of physical intrusion, therefore, a urine test is more similar to a breath test than a blood test.” Therefore, if the court had limited the method of collection, it would have been unable to analogize the results of Birchfield’s balancing test—in regard to blood tests—to urine tests, as it did.

281. Id.
282. Id. (quoting Birchfield, 156 S. Ct. at 2179).
283. Id.
284. Id.
285. Id. (internal citations omitted).
286. Id. at 233 (emphasis added).
287. See Birchfield, 136 S. Ct. at 2181.
288. Id. at 2184.
289. Thompson, 886 N.W.2d at 230.
290. See MINN. STAT. § 645.17 (2016) (“In ascertaining the intention of the legislature the courts may be guided by the following presumptions: . . . (3) the legislature does not intend to violate the Constitution of the United States or of this
Additionally, the Thompson court erred in its balancing of the interests involved in the case by entirely disregarding Maryland v. King. The court stated that “the warrantless search in King was not upheld as a search incident to a valid arrest, and as a result, King is inapposite to our analysis here.” While some constitutional issues are narrowly examined within different analytical frameworks, Fourth Amendment searches are not among them. Beyond this general argument, the Thompson court’s assertion is directly contradicted by Birchfield’s use of King in its analysis. The Birchfield Court compared the reasonableness of the DNA search in King to the reasonableness of blood searches and breath searches, even though the King decision relied on the inventory search exception and the reasonableness of blood and breath searches were being litigated based on the validity of the search-incident-to-arrest exception.

For the Thompson court to ascribe the same balance between breath and blood to breath and urine, it needed to find that the intrusiveness of a urine test is of the same level as a blood test. While Skinner did not concern criminal penalties or the search-incident-to-arrest exception to the warrant requirement, it is illustrative because it is the only case in which the Supreme Court compared and contrasted tests of breath, urine, and blood, all in the same case. In regard to urine tests, the Court stated,

Like breath tests, urine tests are not invasive of the body and, under the regulations, may not be used as an occasion for inquiring into private facts unrelated to alcohol or drug use. We recognize, however, that the procedures for collecting the necessary samples, which require employees to perform an excretory function traditionally shielded by great privacy, raise concerns not implicated by blood or breath tests. While we would not characterize these additional privacy concerns as minimal in most contexts,

state . . . “); see also id. § 645.16 (“The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.”).

292. Thompson, 886 N.W.2d at 231 n.6.
293. See, e.g., Brigham City v. Stuart, 547 U.S. 398, 398 (2006) (highlighting that the “ultimate touchstone” of the Fourth Amendment is reasonableness).
294. See Birchfield, 136 S. Ct. at 2177 (citing King, 133 S. Ct. at 1969).
295. Id.
we note that the regulations endeavor to reduce the intrusiveness of the collection process. 297

Thus, the Skinner Court implied that the privacy concerns implicated by urine tests could be rendered “minimal” by subjecting the collection of such samples to certain restrictions. 298

The Thompson court also did not give adequate weight to the interest that the government has in allowing warrantless urine tests as searches incident to arrest. While the Birchfield Court did not find that the government interest in combatting drivers under the influence of a substance other than alcohol is sufficient to allow warrantless blood searches, the issue of warrantless urine tests was not before the Court. Impaired driving is a compelling issue in the United States, and the statistics regarding drug-related car accidents and deaths are startling:

Drugs other than alcohol (legal and illegal) are involved in about 16% of motor vehicle crashes. Marijuana use is increasing and 15% of nighttime, weekend drivers have marijuana in their system. Marijuana users were about 25% more likely to be involved in a crash than drivers with no evidence of marijuana use . . . 299

While warrantless blood draws intrude too far into the constitutional right to privacy for the courts to allow them categorically, surely the less intrusive urine test, given the restrictions that the court could have placed on the collection and retention of samples, is justified by this compelling interest.

D. Requiring a Warrant for Urine Tests Incident to Arrest for DWI Does Not Serve the Purposes of the Warrant Requirement

In Birchfield, the Court emphasized the purpose of the warrant requirement of the Fourth Amendment in order to ensure that the outcome of its analysis served the intent behind the Amendment.300 It stated that the warrant requirement protects privacy in two ways:

First, [warrants] ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that

297. Id. (footnote omitted).
298. See id.
300. Birchfield, 136 S. Ct. at 2181.
evidence will be found. Second, if the magistrate finds probable cause, the warrant limits the intrusion on privacy by specifying the scope of the search—that is, the area that can be searched and the items that can be sought.301

The Court further reasoned that neither of these purposes would be served by requiring a warrant for breath tests after an arrest for driving while intoxicated.302 Regarding the first purpose, the Court stated that in requesting a warrant, an officer would likely give a somewhat standardized recitation of facts that “are largely the same from one drunk-driving stop to the next and consist largely of the officer’s own characterization of his or her observations . . . . A magistrate would be in a poor position to challenge such characterizations.”303 The second purpose of the warrant requirement would be even less served by judicial oversight at the time of the arrest.304 Because the permitted scope of a chemical test would necessarily be defined by the test itself, “the warrants in question here would not serve that function at all.”305

A warrant requirement for a urine test would not provide any protection from a neutral magistrate because the facts requiring a urine test would likely be the same in nearly every case. First, a police officer would have probable cause to believe that someone was driving while intoxicated, and either (1) the suspect would not exhibit a significant amount of alcohol in his system, perhaps due to an inability to take a breath test for a medical reason like asthma, or (2) police might find drugs or paraphernalia on a person who appeared to have been driving while impaired. Either way, as with the breath test at issue in Birchfield, “the officer would typically recite the same facts that led the officer to find that there was probable cause for arrest, [which would] consist largely of the officer’s characterization of his or her observations.”306 The second purpose of the warrant requirement, that the neutral magistrate can define the scope of the search,307 would also not be served by requiring the

301. Id. (citations omitted).
302. Id.
303. Id.
304. Id.
305. Id.; cf. Skinner v. Ry. Labor Execs.’ Ass’n, 489 U.S. 602, 622 (1989) (“[I]n light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate.”).
307. Id.
officer to get a warrant. The scope of the search would be the same in every case; that is to say, officers would be permitted to request that the suspect consent to a urine test.

Requiring a warrant before a request for a chemical test would serve to validate an officer’s determination that probable cause exists. However, this oversight already exists because, in order to convict an individual for DWI test-refusal, the state must prove that the officer had probable cause to arrest the defendant, thus validating the constitutionality of the search as a search incident to arrest. Therefore, instead of validating the search before it happens, the court would simply require police officers to validate their findings after the fact. Ideally, oversight by a neutral magistrate protects individuals from unreasonable searches and seizures while still allowing police to get impaired drivers off of the streets. But even if warrantless urine tests were allowed as searches incident to arrest and a police officer unreasonably required that someone perform a urine test after an erroneous arrest, a judge would review the officer’s judgment and have the power to throw out the case for a lack of probable cause.\textsuperscript{308} Further, for arrests that are clearly erroneous, not only will the case be dismissed, but victims of erroneous searches may be able to recover in tort for the violation of their personal autonomy.\textsuperscript{309} Therefore, the main historical purpose of the Fourth Amendment of protecting individuals from general warrants that effectively had no judicial oversight is not implicated in DWI test-refusal cases because any search under this statute must by necessity occur after an arrest, which would later be reviewed by a judge.

\section*{VI. CONCLUSION}

Because the Minnesota Supreme Court’s reasoning overstated the privacy interests implicated by urine testing and understated the

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\textsuperscript{308} See State v. Rochefort, 631 N.W.2d 802, 805 (Minn. 2001) (citing In re Welfare of G.M., 560 N.W.2d 687, 690 (Minn. 1997)) (“[W]e do conduct a de novo review of probable cause determinations made in connection with warrantless searches.”).

\textsuperscript{309} See 42 U.S.C. § 1983 (2012) (recognizing a cause of action for constitutional violations); see also Freeman v. Gore, 483 F.3d 404, 411 (5th Cir. 2007) (holding that individuals have a right to be free from arrest absent either a valid warrant or probable cause, and that if police violate that right, they are not entitled to qualified immunity when their actions are objectively unreasonable in light of clearly established law).
public interests involved, the holding of the case was in error. Further, because requiring a warrant for urine searches incident to arrest for driving while impaired does not serve the purpose of the Fourth Amendment, the Minnesota Supreme Court erred by not considering that purpose in its analysis. For the reasons stated above, the Minnesota Supreme Court should reconsider its decision in a future case, or the United States Supreme Court should grant certiorari to address this issue.310

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