

## ***Board of Education v. Earls* – The Fourth Amendment and Judicial Process**

### **Overview**

In this lesson, students will explore the Supreme Court case *Board of Education v. Earls*, in which high school sophomore Lindsay Earls challenged her school’s drug testing policy. Students will watch a documentary on the case, apply the Fourth Amendment to the case, and further their understanding by participation in activities such as creating an anti-drug campaign and a moot court or mock trial.

### **Grades**

10-11

### **NC Essential Standards for American History: The Founding Principles, Civics and Economics**

- FP.C&G.1.4: Analyze the principles and ideals underlying American democracy in terms of how they promote freedom
- FP.C&G.2.3: Evaluate the U.S. Constitution as a “living Constitution” in terms of how the words in the Constitution and Bill of Rights have been interpreted and applied throughout their existence
- FP.C&G.2.7: Analyze contemporary issues and governmental responses at the local, state, and national levels in terms of how they promote the public interest and/or general welfare
- FP.C&G.3.4: Explain how individual rights are protected by varieties of law
- FP.C&G.3.8: Evaluate the rights of individuals in terms of how well those rights have been upheld by democratic government in the United States.
- FP.C&G.5.2: Analyze state and federal courts by outlining their jurisdictions and the adversarial nature of the judicial process.

### **NC Essential Standards for American History II**

- AH2.H.2.1: Analyze key political, economic, and social turning points since the end of Reconstruction in terms of causes and effects (e.g., conflicts, legislation, elections, innovations, leadership, movements, Supreme Court decisions, etc.).
- AH2.H.2.2: Evaluate key turning points since the end of Reconstruction in terms of their lasting impact (e.g., conflicts, legislation, elections, innovations, leadership, movements, Supreme Court decisions, etc.).

### **Essential Questions**

- What is the role of the Supreme Court?
- What is the basic structure of the Federal Court System?
- What is the Bill of Rights?
- What purpose does the Fourth Amendment serve?
- Why is protection of one’s privacy important?
- Should drug testing without suspicion be allowed in schools? If so, under what circumstances?
- How are the constitutional rights of students different than the constitutional rights of adults?

### **Materials**

- Documentary of *Board of Education v. Earls* Voices of American Law DVD available at [www.voicesofamericanlaw.org](http://www.voicesofamericanlaw.org)
- Television and DVD player
- *Board of Education v. Earls* Viewer Guide and Answers, attached
- *Vernonia School District v. Acton*, attached
- Board of Education, Lindsay Earls and Judge Pro Se Court Tips, attached

- Teacher’s Guide to Moot Court Arguments
- Glossary (student reference document, if needed)
- *Board of Education v. Earls* Opinion, edited, attached

**Duration**

2 block periods

**Procedure**

**Day One**

**Warm-Up: New Rules in School**

1. As a warm-up, tell students that you have some news for them and you’d like to glean their opinions. (Try to make the announcement you share as believable as possible). Explain to students that starting next semester new school board policies will go into effect. The new policies include that students must dump out the belongings of their book bags, purses, pockets, etc. at least once a day during random classroom raids by the administration. Also, locker doors will be replaced with clear plexiglass doors so that the principal can tell if there are any weapons or drugs being kept inside. Most importantly, there will be random drug tests for all students participating in extracurricular activities. Allow students to express their opinions openly on these new policies. Use the following questions to gage their feelings:
  - How do you feel about the new school board policies? Why do you think these policies are being implemented?
  - If you feel it isn’t fair to force everyone to give up their privacy because some students break the rules, what alternatives do you recommend to ensure we are all safe?
  - How much privacy do you expect to have at school?
  - Do you now have more privacy at school or home? Do you expect more privacy at school or at home? Why?

**Documentary: *Education v. Earls***

2. Let students know that there have been no such changes in school board policy, but they are going to be watching a documentary about a Supreme Court case involving school drug testing that elicited feelings such as those they just felt in the people involved. Teachers should determine which of the viewing options below they will use. While a synopsis of the case is provided for teacher reference, students need no further introduction to the film.

- **Teacher Reference - Synopsis of the Case**

In order to combat increasing drug use among Tecumseh students, the school board decided to adopt a new drug testing policy. The policy required that all students participating in extracurricular activities be drug tested at the beginning of the year and randomly throughout the year. Lindsay Earls, a sophomore who participated in choir and academic team, believed the policy was unconstitutional and refused to sign the consent forms. With the help of her parents and the ACLU, Lindsay brought suit against the school board. The District Court held that the policy was constitutional, so Lindsay appealed. The 10<sup>th</sup> Circuit Court of Appeals reversed the District Court’s decision, holding that the policy was unconstitutional. Ultimately, the case went to the Supreme Court, which held that the policy was constitutional.

- **Viewing Options**

There are several ways you can choose to have the class view the documentary.

- You may choose to have the class watch the video with no pauses and have students work on the attached Viewer’s Guide while watching
- *Suggested Viewing:* You may choose to pause the video at the times outlined below and ask the class to discuss the questions listed. Students may complete the questions below in addition to or instead of the questions on the Viewer’s Guide.

- **Discussion Point #1/Activity:** (*Pause at 3: 27*). Tell the students that they will be participating in a mock school board meeting where they must create a school drug testing policy. Divide students into groups of five. Assign each member of a group one of the following roles: school board member, teacher, student athlete, parent, and soccer coach. Then, in their respective roles, have students discuss (write these questions on the board):
  - Who will be tested?
  - What drugs will students be tested for?
  - How will students be selected for drug testing?
  - How often will students be tested?
  - What will the consequences be for students who test positive for drugs?
  - Are there ways other than drug testing to combat a school's drug problem?

After students are done discussing in their character, the teacher should allow the class to debrief: Was that activity difficult and why? Were you surprised by the ideas shared at the meeting and why? What was your opinion (in character) of the policy created by your group? What is your personal opinion (not in character) of the policy?

- **Discussion Point #2:** (*Pause at 5:56*) Ask the students to discuss what they would do if they were required to sign a form consenting to drug testing. Would they sign it? Would they talk to their parents? Would they choose not to participate in the extracurricular activity? If they chose to go to their parents, how many students think their parents would do what David Earls did?
- **Discussion Point #3:** (*Pause at 14:51*) Ask students how invasive they feel the drug testing policy is. Are there ways that the procedures could be less invasive?

### **You're Hired: Create an Anti-Drug Campaign!**

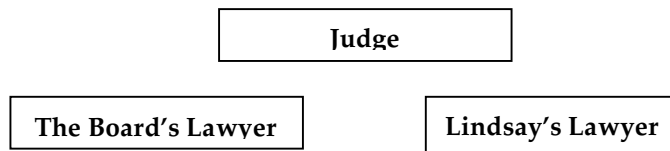
3. Once the documentary has ended, divide students into small groups (3-4 students, depending on the size of the class). Tell the class that their school board has decided that before implementing a drug testing policy, they want to try an anti-drug campaign. Tell the students that they are employees at various advertising companies and the school board has asked each group to come up with an anti-drug campaign. Hand out and go over the attached assignment sheet then give each group 15-20 minutes to complete their advertisement. Tell students that upon completion, they will "pitch" their advertising idea to the school board (the class) by presenting it and accepting any questions. The class will then vote on the most effective campaign.

## **Day 2**

### **Moot Court: *Vernonia v. Acton* and *Board of Education v. Earls***

4. Let students know that they will be participating in a pro se court. A pro se court allows students to role-play a court case with the smallest possible number of participants and basic rules of evidence. The court is organized as a group of three participants: **the judge**, who will hear the two sides and make the final decision; **the petitioner**, who brings the suit before the court; and **the respondent** in which the suit is being brought against. Pro se courts give students a simplified look at judicial decision making while presenting an opportunity for all students in a class to be actively engaged in the process.
5. First, distribute copies of the attached student handout reviewing the facts of the case and the opinion for *Vernonia v. Acton*, a similar landmark Supreme Court case. Students will read the opinion individually and answer the Guided Reading Questions.
6. Next, assign roles for the Pro Se Court. Have students count off from 1-6 to divide the class into six equal groups. Individuals who are 1's & 4's will be judges, 2's & 5's will be the petitioner (which in this case is the Board of Education), 3's & 6's will be the respondent (the lawyers for Lindsay Earls). Instruct students to meet in their respective groups to prepare for the simulation. Each student will be actively involved in the role play, so preparation at this stage is critical to successful participation in the simulation.

7. Give students the attached tip sheets to assist them in preparing for court. The two sets of petitioner and the respondent groups will prepare an opening statement and arguments supporting their positions on the issues raised in the case. Meanwhile, the two groups of judges will review the case and prepare questions that they would like to ask of the petitioner and respondent during the presentation phase of the activity. These questions should be designed to clarify positions on the issues which the judges will be called upon to decide. Teachers should take some time during the preparation phase to meet with the judges and review some simple rules of procedure, such as:
  - The petitioner should present first, without interruptions from the defense. The respondent presents his or her case second.
  - Allow for brief rebuttals from each side in the case.
  - The judge may interrupt the presentations at any time to pose questions designed to clarify the arguments being made. (*Source: Teacher's Guide, We the People the Citizen and the Constitution*)
8. Once students have sufficiently prepared, arrange the classroom. You will have multiple courts in session simultaneously; therefore, arrange the desks in the classroom into groups of three, one for each of the roles in the activity. Before beginning the activity, match one judge, one petitioner, and one respondent. Teachers may want to have the judges first take a desk in each of the groupings arranged around the room. Then ask one petitioner and one respondent to join the group. Matching role-players may be more easily accomplished by providing role tags so students can quickly identify who is a judge, petitioner, and respondent.



9. Conduct the court hearing using the following procedures:
  - Instruct the judges that when each has a petitioner and a respondent present, he /she may begin the court session.
  - The judge should first hear opening statements by the participants-first the petitioner and then the respondent. A one to two-minute time limit should be imposed on these statements.
    - The petitioner makes arguments and is questioned by the judge.
    - The respondent presents his/her defense and is questioned by the judge.
  - The judge asks each side for brief rebuttal statements.
  - The judge makes his/her decision and explains the reasoning which supports it.
10. After all courts are complete, debrief the activity with the class. Ask the judges to share their decisions and the reasoning supporting it. Discuss the strengths and weaknesses of the arguments and facts presented in the case. Count how many judges decided in favor of Lindsay and how many decided in favor of the School Board.

**Court's Opinion: *Board of Education v. Earls***

11. Use the attached *Board of Education v. Earls* opinion to discuss how the Supreme Court actually ruled in the Earls case (teachers can summarize and explain the opinion to students, or supply each student with a copy of the handout to read):
  - Do you agree or disagree with the holding and why?
  - The Supreme Court has said that minors have lower privacy expectations than adults. Do you agree with this? Why or why not?
  - What do you think will happen in the future...
    - Do you think that more schools will implement drug-testing policies like Tecumseh's?
    - Do you think the Supreme Court would approve a drug testing policy that required testing of all students who attend a school? Why or why not?

- Do you think the Supreme Court would approve the testing of students for substances such as tobacco, alcohol or Adderall?

### **Additional Activity**

- In *Board of Education v. Earls*, the Supreme Court held that random drug testing of students participating in extracurricular activities was constitutional. In coming to this decision, the majority examined the privacy expectations of students and the intrusiveness of the drug testing and the school board's interest.

Imagine your local school board has decided to implement a drug testing policy similar to the one in *Earls*. The only difference is that rather than testing only those students participating in extracurricular activities, the school board wants to test all students. Write a letter to the school board voicing your support or disapproval of the policy. You may use information from the documentary, *Vernonia*, and *Earls* to support your position.

As you write your letter, remember to:

- Organize your letter so that your ideas progress logically.
- Include relevant details that clearly develop your letter.
- Edit your letter for standard grammar and language usage.

### **Differentiation**

#### **Students with Special Needs**

- Ensure that students are placed in mixed ability groups.
- Students may have more difficulty with *Vernonia v. Acton* reading. Access a brief description of the case and court opinion at [www.oyez.org](http://www.oyez.org). Enter case name in the search bar in the top right hand.
- Students that may have difficulty participating in Moot Court can be assigned as news reporters. They will listen to arguments of one or more groups and write a newscast describing the facts of the case, the arguments that were presented, and the decision of the judge.

### **AIG**

- Have students review the School Board handbook and discuss issues they find to be related to constitutional rights. Discuss why the school board policies were passed.

Name: \_\_\_\_\_

***Board of Education v. Earls Viewer's Guide***

1. In *Vernonia*, what students were tested and why?
2. Under Tecumseh's policy, what happened the first time a student tested positive for drugs?
3. What extracurricular activity does Lindsay say she is involved in?
4. Who did David Earls contact for legal assistance?
5. Who is Graham Boyd?
6. Why did the ACLU like the 10<sup>th</sup> Circuit?
7. Who lost at the District Court?
8. What did Judge Ebel think was Lindsay's most compelling argument in front of the 10<sup>th</sup> Circuit?
9. What are some of Lindsay's arguments that the outcome of this case should be different from the outcome of *Vernonia*?
10. What are some of the School Board's arguments that the outcome of this case should be the same as the outcome of *Vernonia*?

**Board of Education v. Earls Viewer's Guide-ANSWER KEY**

1. In *Vernonia*, what students were tested and why?

*Athletes were tested in Vernonia because they were the leaders of the drug culture and there was a risk that they would be hurt while participating in sports.*

2. Under Tecumseh's policy, what happened the first time a student tested positive for drugs?

*The first time a student tested positive, he or she would receive counseling.*

3. What extracurricular activity does Lindsay say she is involved in?

*Lindsay says she was involved in choir.*

4. Who did David Earls contact for legal assistance?

*David Earls contacted local attorneys who were not interested in the case. He also contacted the ACLU who chose to take the case*

5. Who is Graham Boyd?

*Graham Boyd is Lindsay's attorney. He is the director of the ACLU's program that challenges drug-related laws.*

6. Why did the ACLU like the 10<sup>th</sup> Circuit?

*The ACLU liked the 10<sup>th</sup> Circuit because the Court had already decided a Fourth Amendment case against the government and because the 10<sup>th</sup> circuit has a reputation for being very liberal.*

7. Who lost at the District Court?

*Lindsay.*

8. What did Judge Ebel think was Lindsay's most compelling argument in front of the 10<sup>th</sup> Circuit?

*Judge Ebel said that Lindsay's strongest argument was that if a student is using drugs, the best way to get them to stop is to keep them busy in school.*

9. What are some of Lindsay's arguments that the outcome of this case should be different from the outcome of *Vernonia*?

*Vernonia should be limited to athletes. There is not a drug problem at Tecumseh like there was at Vernonia. The invasion of privacy here is much greater than it was in Vernonia, because athletes have a lower expectation of privacy*

10. What are some of the School Boards arguments that the outcome of this case should be the same as the outcome of *Vernonia*?

*Vernonia is not only limited to athletes, it can apply to any policy where the school has a special need. The invasion of privacy here is minimal because urine samples are common and the procedure used was not any more invasive than using a public restroom.*



## Anti-Drug Campaign Assignment



Welcome to the \_\_\_\_\_ Advertising Agency! As advertising specialists, your group's job is to design an Anti-Drug Campaign for your school district. But there are many other firms that would love to win the project as well. Your responsibility is to present a creative and effective campaign proposal to the School Board members to win the job.

### Responsibilities:

- ✓ Develop a campaign to pitch to the School Board. Remember, the audience for your campaign is high school students. Your campaign should include at least two of the following components:
  - A visual aid (posters, billboards, etc.)
  - An announcement to be played over the intercom or local radio station
  - A song or rap to be played over the intercom or local radio station
  - A skit to be presented at a school assembly
  - A commercial to be aired on the local TV station during class
- ✓ Your campaign must include an overall motto (catchy slogan)
- ✓ Plan a sales pitch about why your campaign will reduce drug use in the school district to share with the School Board members.

When finished, you will present your sales pitch (an introduction to your campaign in which you share your motto/slogan, as well as why your campaign will be effective in reducing drug use); followed by the presentation of your actual campaign (you will act out your skit or commercial, perform your song or rap, show your visual aid, etc.)

At the end of class, each of you will assume the role of a school board member and vote on which advertising firm you want to hire.



**Comparing Vernonia School District v. Acton to Earls v. Board of Ed.**

**Facts of the Earls Case:** The Student Activities Drug Testing Policy adopted by the Tecumseh, Oklahoma School District (School District) requires all middle and high school students to consent to urinalysis testing for drugs in order to participate in any extracurricular activity. Two Tecumseh High School students and their parents brought suit, alleging that the policy violates the Fourth Amendment. The District Court granted the School District summary judgment. In reversing, the Court of Appeals held that the policy violated the Fourth Amendment. The appellate court concluded that before imposing a suspicionless drug-testing program a school must demonstrate some identifiable drug abuse problem among a sufficient number of those tested, such that testing that group will actually redress its drug problem, which the School District had failed to demonstrate.

**Constitutional Question:** Is the Student Activities Drug Testing Policy, which requires all students who participate in competitive extracurricular activities to submit to drug testing, consistent with the Fourth Amendment?

**VERNONIA SCHOOL DISTRICT v. ACTON  
515 U.S. 646 (1995)**

During the late 1980s, schools in the community of Vernonia Oregon were experiencing a sharp increase in drug use and disciplinary problems among students. The school district was particularly concerned that student athletes, the leaders of the drug culture, might suffer sports-related injuries. The District responded by implementing a new policy, which required that all students wishing to play a sport sign a form consenting to the testing. Athletes were tested at the beginning of the season and athletes were drawn weekly from a pool for random testing. In 1991, James Acton was denied participation in football after he refused to consent to testing. The Actons filed suit, which was subsequently dismissed by the District Court. The United States Court of Appeals for the Ninth Circuit reversed, holding that the policy was unconstitutional.

**Justice SCALIA delivered the opinion of the Court**

The Fourth Amendment to the United States Constitution provides that the Federal Government shall not violate “the right of the people to be secure in their persons . . . against unreasonable searches and seizure” Whether a particular search meets the reasonableness standard “is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”

The first factor to be considered is the nature of the privacy interest upon which the search at issue intrudes. Minors lack some of the most fundamental rights of self-determination; they are subject to the control of their parents or guardians. For their own good, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases. Therefore, “students within the school environment have a lesser expectation of privacy than members of the population generally.” Privacy expectations are even less with regard to student athletes. School sports are not for the bashful, and locker rooms are not notable for the privacy they afford.

We turn next to the character of the intrusion that is complained of. Under the District’s Policy male students produce samples at a urinal along a wall. Female students produce samples in an enclosed stall, with a female monitor standing outside. These conditions are nearly identical to those typically encountered in public restrooms. Under such conditions, the privacy interests compromised are in our view negligible. Accordingly, we reach the conclusion that the invasion of privacy was not significant.

Finally, we turn to consider the nature and immediacy of the governmental concern at issue here. The District “must demonstrate a ‘compelling need’ for the program.” The phrase describes an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy. Whether that relatively high degree of government concern is necessary in this case or not, we think it is met.

School years are the time when the physical, psychological and addictive effects of drugs are most severe. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. Finally, it must not be lost sight of that

this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport are particularly high.

Respondents argue that a “less intrusive means to the same end” was available, namely, “drug testing on suspicion of drug use.” It may be impracticable, for one thing, simply because the parents who are willing to accept random drug testing of athlete are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame. Respondents’ proposal brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students.

Taking into account all the factors we have considered above . . . we conclude Vernonia’s Policy is reasonable and hence constitutional. We therefore vacate the judgment, and remand the case to the Court of Appeals for further proceedings consistent with this opinion.

Justice GINSBURG, concurring.

The Court constantly observes that the School District’s drug-testing policy applies only to students who voluntarily participate in interscholastic athletics. I comprehend the Court’s opinion as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school.

**Justice O’CONNOR, with whom Justice STEVENS and Justice SOUTER join, dissenting.**

The population of our Nation’s public schools, grades 7 through 12, numbers around 18 million. By the reasoning of today’s decision, the millions of these students who participate in interscholastic sports, an overwhelming majority of whom have given school officials no reason to suspect they use drugs at school, are open to an intrusive bodily search.

I have serious doubts whether the Court is right that the District reasonably found that the lesser intrusion of a suspicion-based testing program outweighed its genuine concerns for the adversarial nature of such a program, and for its abuses. The fear that a suspicion-based regime will lead to the testing of “troublesome but not drug-likely” students, for example, ignores that the required level of suspicion in the school context is objectively reasonable suspicion. In addition to overstating its concerns with a suspicion-based program, the District seems to have understated the extent to which such a program is less intrusive of students’ privacy. By invading the privacy of a few students rather than many (nationwide, of thousands rather than millions), and by giving potential search targets substantial control over whether they will, in fact, be searched, a suspicion-based scheme is significantly less intrusive.

The great irony of this case is that most of the evidence the District introduced to justify its suspicionless drug testing program consisted of first- or second-hand stories of particular identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use – and thus that would have justified a drug-related search. In light of all the evidence of drug use by particular students, there is a substantial basis for concluding that a vigorous regime of suspicion-based testing (for which the District appears already to have rules in place) would have gone a long way toward solving Vernonia’s school drug problem while preserving the Fourth Amendment rights of James Acton and others like him.

I find unpersuasive the Court’s reliance, on the widespread practice of physical examinations and vaccinations. It is worth noting that a suspicion requirement for vaccinations is not merely impractical; it is nonsensical, for vaccinations are not searches for anything in particular and so there is nothing about which to be suspicious. As for physical examinations, the practicability of a suspicion requirement is highly doubtful because the conditions for which these physical exams ordinarily search, such as latent heart conditions, do not manifest themselves in observable behavior the way school drug use does. It might also be noted that physical exams (and of course vaccinations) are not searches for conditions that reflect wrongdoing on the part of the student, and so are wholly nonaccusatory and have no consequences that can be regarded as punitive.

It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis. But we must also stay mindful that not all government responses to such times are hysterical overreactions; some crises are quite real, and when they are, they serve precisely as the compelling state interest that we have said may justify a measured intrusion on constitutional rights. The only way for judges to mediate these conflicting impulses is to do what they should do anyway: stay close to the record in each case that appears before them, and make their judgments based on that alone. I cannot avoid the conclusion that

the District's suspicionless policy sweeps too broadly, and too imprecisely, to be reasonable under the Fourth Amendment.

*[NOTE: This opinion has been edited for use by students and teachers. For ease of reading, no indication has been made of deleted material and case citations. Any legal or scholarly use of this case should refer to the full opinion.]*

Name: \_\_\_\_\_

**VERNONIA SCHOOL DISTRICT v. ACTON Guided Reading Questions**

1. How was the Vernonia school district policy similar to the Tecumseh, Oklahoma School District policy?
2. How was the Vernonia school district policy different from the Tecumseh, Oklahoma School District policy?
3. How did the District court respond to the suit filed by the Actons?
4. How did the Appeals court respond to the actions of the District Court? How did the judges in the Appeals court rule on the Vernonia school board policy?
5. What amendment does Justice Scalia refer to in the majority opinion?
6. Does Justice Scalia find the process of administering the drug test to students to be overly intrusive to the students' privacy?
7. Does Justice Scalia find a drug problem at a school to be an important issue?
8. How does Justice Scalia respond to critics that want a "less intrusive means to the same end" for drug testing policy"?
9. Why does Justice O'Connor support a "suspicion-based" drug test policy?
10. In your opinion, who makes a more supported, logical argument: Justice Scalia or Justice O'Connor? Explain.

**VERNONIA SCHOOL DISTRICT v. ACTON Guided Reading Questions- ANSWER KEY**

1. How was the Vernonia school district policy similar to the Tecumseh, Oklahoma School District policy?  
*Drug tests for athletes in the Vernonia School District without individual suspicion of drug use.*
2. How was the Vernonia school district policy different from the Tecumseh, Oklahoma School District policy?  
*Policy only regarded students that played sports to sign a form stating their willingness to take a drug test, unlike the Tecumseh policy for all students involved in extracurricular activities.*
3. How did the District court respond to the suit filed by the Actons?  
*The District court dismissed the case.*
4. How did the Appeals court respond to the actions of the District Court? How did the judges in the Appeals court rule on the Vernonia school board policy?  
*The Appeals Court ruled that the school board policy was unconstitutional.*
5. What amendment does Justice Scalia refer to in the majority opinion?  
*4<sup>th</sup> Amendment- Protection of Privacy*
6. Does Justice Scalia find the process of administering the drug test to students to be overly intrusive to the students' privacy? Explain.  
*No. Scalia argues it is no more invasive than usual bathroom process.*
7. Does Justice Scalia find a drug problem at a school to be an important issue?  
*Yes. Scalia argues that it affects other students and faculty.*
8. How does Justice Scalia respond to critics that want a "less intrusive means to the same end" for drug testing policy"?  
*Scalia states "the parents who are willing to accept random drug testing of athlete are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame."*
9. Why does Justice O'Connor support a "suspicion-based" drug test policy?  
*Drug testing students that teachers and administrators suspect are using drugs would have a larger effect on solving the drug problem rather than testing students that are unlikely to be using drugs.*
10. In your opinion, who makes a more supported, logical argument: Justice Scalia or Justice O'Connor? Explain using supporting details from the text.  
*Answers will vary.*

## Moot Court Tips: The School Board

### Overview

1. Your job, as the lawyer for the petitioner, is to convince the judge that the Board's drug-testing policy is constitutional and so the Court of Appeal's holding should be overruled. As the petitioner, you will have a chance to make a rebuttal after the respondent makes his or her argument, so make sure to pay attention to the arguments he or she makes so you can effectively respond to them.

2. For your opening statement, explain that the Court of Appeal's decision was incorrect and briefly explain why. Then, conclude your opening by explaining that for these reasons, the lower court's decision should be reversed.

3. Make sure your presentation includes arguments and facts from the documentary that will help you persuade the judge that the drug-testing policy is constitutional.

### Formulating Your Argument

In order to help you come up with your strongest arguments, answer these key questions:

- How is this case similar to *Vernonia*, where the Supreme Court held that testing student athletes was constitutional?
- What difficulties would the School Board face if they could only administer drug tests when there was reasonable suspicion about a student's drug use?
- Do students have the same expectations of privacy as non-students? Why?
- Do minors have the same expectations of privacy as adults? Why?
- How intrusive is a drug test? Is it more intrusive than receiving a school-required physical or immunization? Why not?
- What is the Government/School Board's concern and how important is it? Do random drug tests meet these concerns?

### **Overview**

1. Your job, as the lawyer for the respondent, is to convince the judge that the Board's drug-testing policy is unconstitutional and so the Court of Appeals' decision should be upheld. As the respondent, you will not have a chance to make a rebuttal, so make sure to pay attention to the petitioner's arguments so you can effectively respond to them when it is your turn to present.
2. For your opening statement, explain that the Court of Appeal's decision was correct and briefly explain why. Then, conclude your opening by explaining that for these reasons, the lower court's decision should be upheld.
3. Make sure your presentation includes arguments and facts from the documentary that will help you persuade the judge that the drug-testing policy is unconstitutional.

### **Formulating Your Argument**

In order to help you come up with your strongest arguments, answer these key questions:

- How is this case different from *Vernonia*, where the Supreme Court held that testing student athletes was constitutional? Why might athletes need to be tested, but not choir members?
- Why wouldn't it be a problem for the School Board to administer drug tests only when there was reasonable suspicion about a student's drug use?
- Do students have the same expectations of privacy as non-students? Why?
- Do minors have the same expectations of privacy as adults? Why?
- How intrusive is a drug test? Is it more intrusive than receiving a school-required physical or immunization? Why?
- What is the Government/School Board's concern and how important is it? Do random drug tests meet these concerns?

## Moot Court Tips: Judge

### Overview

1. Your job as the judge is to evaluate both sides' arguments and decide how you are going to rule. In order to make the best decision you can, it is important to ask both sides clarifying questions.
2. First you will ask the petitioner to step forward and give his or her arguments. While the petitioner is speaking, you may interrupt at any time to ask questions. When the petitioner is finished, tell him or her to be seated and call forward the respondent. Again, you may interrupt him or her at any time to ask questions. Finally, once the respondent is finished, call forward the petitioner for his or her rebuttal.
3. Once the petitioner is done, take a few minutes to go over your notes and make your decision. When you are done, tell the petitioner and respondent what you have decided and why.

### Formulating Questions

In preparation for court, you will want to think about the arguments that each side will make. For example, Lindsay Earls' Lawyer may argue that having someone listening to you while you urinate is a great invasion of privacy, so you may want to ask, "How is this any different than using a public restroom?"

In order to come up with the best questions to ask, answer the following questions:

- What is the petitioner's best argument? Ask the respondent about this.
- What is the respondent's best argument? Ask the petitioner about this.
- Is there a drug problem at the school?
- What privacy expectation do students have while in school?
- How is the situation in Tecumseh similar to, or different from, the situation in Vernonia?
- Do athletes have a different expectation of privacy than non-athletes?



## TEACHER'S GUIDE: MOOT COURT ARGUMENTS

As students work together to develop arguments for their side, walk around the classroom and offer assistance. You may choose to give each side some examples of strong arguments or you may use this guide as a tool to ask students questions that will guide them to the arguments.

### What are the Best Arguments for Each Side?

#### Best Arguments for the Petitioner (The School Board):

- The situation in Tecumseh is not very different from the situation in *Vernonia*. School administrators should not have to wait until a drug problem becomes an epidemic; any drug use in school is cause for concern and should be dealt with in administrator's best judgment.
- Expanding drug testing to extracurricular activities is only a very small expansion of the *Vernonia* case. Students in extracurricular activities are often in situations that could be dangerous if the student is intoxicated, and are often in situations such as traveling or changing uniforms in which they have a lesser expectation of privacy.
- The drug testing procedures are not particularly invasive of students' privacy, particularly given how common drug testing is in adult employment.

#### Best Arguments for the Respondent (Lindsay Earls)

- The situation in Tecumseh is entirely different from the situation in the *Vernonia* case. There is no drug "epidemic," no state of rebellion in schools, and whatever drug use there might be was not confined to an identifiable group, like athletes.
- Students in extracurricular activities do not have the same exposure to danger and lesser expectation of privacy as athletes.
- Having students taken from class to provide urine samples under teachers' supervision is an unjustified invasion of the students' privacy.
- The school board's drug testing program is likely to be counterproductive, as one of the best ways to prevent students from using drugs is to keep them involved in extracurricular activities.

## Glossary

**ACLU:** The American Civil Liberties Union uses litigation, legislation and community education to defend and preserve the individual rights and liberties that are guaranteed by the U.S. Constitution. The ACLU often provides legal assistance in cases where civil liberties may be at risk.

**Civil Rights:** The rights given to the people by the United States Constitution, such as freedom of speech, freedom of religion and the right to privacy.

**The Fourth Amendment:** The Fourth Amendment states that: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”

**Vernonia:** *Vernonia School District v. Acton* was decided by the Supreme Court in 1995. The Court held that suspicionless drug-testing of student athletes was constitutional.

**Special Needs Doctrine:** The Supreme Court has held that a search without probable cause may be constitutional when special needs make the warrant and probable-cause requirement impracticable.

**Probable Cause:** A police officer has probable cause to arrest someone if he or she reasonably believes a crime has been committed and that the person to be arrested committed the crime. A police officer has probable cause for a search if he or she reasonably believes that a specific item related to a crime will be found in the place to be searched.

**Warrant:** An order signed by a judge that allows an official to search someone’s property.

**Search:** When police enter an area which a person reasonably expects to be private (such as a home) looking for evidence, it is legally considered a search. When police listen to private telephone conversations, such as with a wiretap, it is also considered a search. Sometimes police may do things outside a home, such as use heat-sensing equipment to detect the presence of heat lamps, that are still considered searches. The police can search a person’s property if it is not in a private place (for example, garbage bags left out at the street) or if that person does not demonstrate that he or she expects it to be private (telephone conversations that others can hear).

**Board of Education v. Earls Opinion**  
**536 U.S. 822, 122 S. Ct. 2559 (2002)**

**Justice THOMAS delivered the opinion of the Court.**

The city of Tecumseh, Oklahoma, is a rural community located approximately 40 miles southeast of Oklahoma City. The School District administers all Tecumseh public schools. In the fall of 1998, the School District adopted the Student Activities Drug Testing Policy (Policy), which requires all middle and high school students to consent to drug testing in order to participate in any extracurricular activity. In practice, the Policy has been applied only to competitive extracurricular activities sanctioned by the Oklahoma Secondary Schools Activities Association, such as the Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, pom pon, cheerleading, and athletics. Under the Policy, students are required to take a drug test before participating in an extracurricular activity, must submit to random drug testing while participating in that activity, and must agree to be tested at any time upon reasonable suspicion. The urinalysis tests are designed to detect only the use of illegal drugs, including amphetamines, marijuana, cocaine, opiates, and barbiturates, not medical conditions or the presence of authorized prescription medications.

At the time of their suit, both respondents attended Tecumseh High School. Respondent Lindsay Earls was a member of the show choir, the marching band, the Academic Team, and the National Honor Society. Respondent Daniel James sought to participate in the Academic Team.

[Both Earls and James filed suit against the School District under 42 U.S.C. §1983 alleging that the policy violated their Fourth Amendment rights. On cross-motion for summary judgment, the District Court upheld the policy finding that there was a history of drug abuse at the school that presented “legitimate cause for concern” even if not an epidemic. The 10<sup>th</sup> Circuit Court of Appeals reversed finding insufficient proof of a serious drug problem that would justify the policy. The Supreme Court granted certiorari.]

The Fourth Amendment to the United States Constitution protects “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Searches by public school officials, such as the collection of urine samples, implicate Fourth Amendment interests. We must therefore review the School District’s Policy for “reasonableness,” which is the touchstone of the constitutionality of a governmental search.

In the criminal context, reasonableness usually requires a showing of probable cause. Given that the School District’s Policy is not in any way related to the conduct of criminal investigations, respondents do not contend that the School District requires probable cause before testing students for drug use. Respondents instead argue that drug testing must be based at least on some level of individualized suspicion. It is true that we generally determine the reasonableness of a search by balancing the nature of the intrusion on the individual’s privacy against the promotion of legitimate governmental interests.

Significantly, this Court has previously held that “special needs” inhere in the public school context. While schoolchildren do not shed their constitutional rights when they enter the schoolhouse, “Fourth Amendment rights ... are different in public schools than elsewhere; the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.” *Vernonia*. In particular, a finding of individualized suspicion may not be necessary when a school conducts drug testing.

In *Vernonia*, this Court held that the suspicionless drug testing of athletes was constitutional. The Court, however, did not simply authorize all school drug testing, but rather conducted a fact-specific balancing of the intrusion on the children’s Fourth Amendment rights against the promotion of legitimate governmental interests. Applying the principles of *Vernonia* to the somewhat different facts of this case, we conclude that Tecumseh’s Policy is also constitutional.

We first consider the nature of the privacy interest allegedly compromised by the drug testing. As in *Vernonia*, the context of the public school environment serves as the backdrop for the analysis of the privacy interest at stake and the reasonableness of the drug testing policy in general.

A student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical

examinations and vaccinations against disease. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.

Respondents argue that because children participating in nonathletic extracurricular activities are not subject to regular physicals and communal undress, they have a stronger expectation of privacy than the athletes tested in *Vernonia*. This distinction, however, was not essential to our decision in *Vernonia*, which depended primarily upon the school's custodial responsibility and authority.

In any event, students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes. Some of these clubs and activities require occasional off-campus travel and communal undress. All of them have their own rules and requirements for participating students that do not apply to the student body as a whole. We therefore conclude that the students affected by this Policy have a limited expectation of privacy.

Next, we consider the character of the intrusion imposed by the Policy. Urination is "an excretory function traditionally shielded by great privacy." But the "degree of intrusion" on one's privacy caused by collecting a urine sample "depends upon the manner in which production of the urine sample is monitored." *Vernonia*.

Under the Policy, a faculty monitor waits outside the closed restroom stall for the student to produce a sample and must "listen for the normal sounds of urination in order to guard against tampered specimens and to insure an accurate chain of custody." The monitor then pours the sample into two bottles that are sealed and placed into a mailing pouch along with a consent form signed by the student. This procedure is virtually identical to that reviewed in *Vernonia*, except that it additionally protects privacy by allowing male students to produce their samples behind a closed stall. Given that we considered the method of collection in *Vernonia* a "negligible" intrusion, the method here is even less problematic.

In addition, the Policy clearly requires that the test results be kept in confidential files separate from a student's other educational records and released to school personnel only on a "need to know" basis. Moreover, the test results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences. Rather, the only consequence of a failed drug test is to limit the student's privilege of participating in extracurricular activities. Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students' privacy is not significant.

Finally, this Court must consider the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them. This Court has already articulated in detail the importance of the governmental concern in preventing drug use by schoolchildren. The drug abuse problem among our Nation's youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse. Indeed, the nationwide drug epidemic makes the war against drugs a pressing concern in every school.

Additionally, the School District in this case has presented specific evidence of drug use at Tecumseh schools. Teachers testified that they had seen students who appeared to be under the influence of drugs and that they heard students speaking openly about using drugs. We decline to second-guess the finding of the District Court that "[v]iewing the evidence as a whole, it cannot be reasonably disputed that the [School District] was faced with a 'drug problem' when it adopted the Policy."

Furthermore, this Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing. The need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy. Indeed, it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.

Given the nationwide epidemic of drug use, and the evidence of increased drug use in Tecumseh schools, it was entirely reasonable for the School District to enact this particular drug testing policy. As we cannot articulate a threshold level of drug use that would suffice to justify a drug testing program for schoolchildren,

we refuse to fashion what would in effect be a constitutional quantum of drug use necessary to show a “drug problem.”

Respondents also argue that the testing of nonathletes does not implicate any safety concerns, and that safety is a “crucial factor” in applying the special needs framework. They contend that there must be “surpassing safety interests,” in order to override the usual protections of the Fourth Amendment. Respondents are correct that safety factors into the special needs analysis, but the safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike. We know all too well that drug use carries a variety of health risks for children, including death from overdose.

We find that testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District’s legitimate concerns in preventing, deterring, and detecting drug use. While in *Vernonia* there might have been a closer fit between the testing of athletes and the trial court’s finding that the drug problem was “fueled by the ‘role model’ effect of athletes’ drug use,” such a finding was not essential to the holding. *Vernonia* did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school’s custodial responsibilities. Evaluating the Policy in this context, we conclude that the drug testing of Tecumseh students who participate in extracurricular activities effectively serves the School District’s interest in protecting the safety and health of its students.

Within the limits of the Fourth Amendment, local school boards must assess the desirability of drug testing schoolchildren. In upholding the constitutionality of the Policy, we express no opinion as to its wisdom. Rather, we hold only that Tecumseh’s Policy is a reasonable means of furthering the School District’s important interest in preventing and deterring drug use among its schoolchildren. Accordingly, we reverse the judgment of the Court of Appeals.

**Justice BREYER, concurring.**

In my view, this program does not violate the Fourth Amendment’s prohibition of “unreasonable searches and seizures.” I reach this conclusion primarily for the reasons given by the Court, but I would emphasize several underlying considerations, which I understand to be consistent with the Court’s opinion.

In respect to the school’s need for the drug testing program, I would emphasize the following: First, the drug problem in our Nation’s schools is serious in terms of size, the kinds of drugs being used, and the consequences of that use both for our children and the rest of us. Second, the government’s emphasis upon supply side interdiction apparently has not reduced teenage use in recent years. Third, public school systems must find effective ways to deal with this problem. Today’s public expects its schools not simply to teach the fundamentals, but “to shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, and providing medical and psychological services,” all in a school environment that is safe and encourages learning. The law itself recognizes these responsibilities with the phrase *in loco parentis* -- a phrase that draws its legal force primarily from the needs of younger students (who here are necessarily grouped together with older high school students) and which reflects, not that a child or adolescent lacks an interest in privacy, but that a child’s or adolescent’s school-related privacy interest, when compared to the privacy interests of an adult, has different dimensions. A public school system that fails adequately to carry out its responsibilities may well see parents send their children to private or parochial school instead -- with help from the State.

Fourth, the program at issue here seeks to discourage demand for drugs by changing the school’s environment in order to combat the single most important factor leading school children to take drugs, namely, peer pressure. It offers the adolescent a nonthreatening reason to decline his friend’s drug use invitations, namely, that he intends to play baseball, participate in debate, join the band, or engage in any one of half a dozen useful, interesting, and important activities.

In respect to the privacy-related burden that the drug testing program imposes upon students, I would emphasize the following: First, not everyone would agree with this Court’s characterization of the privacy-related significance of urine sampling as “negligible.” Some find the procedure no more intrusive than a routine

medical examination, but others are seriously embarrassed by the need to provide a urine sample with someone listening “outside the closed restroom stall.” When trying to resolve this kind of close question involving the interpretation of constitutional values, I believe it important that the school board provided an opportunity for the airing of these differences at public meetings designed to give the entire community “the opportunity to be able to participate” in developing the drug policy. The board used this democratic, participatory process to uncover and to resolve differences, giving weight to the fact that the process, in this instance, revealed little, if any, objection to the proposed testing program.

Second, the testing program avoids subjecting the entire school to testing. And it preserves an option for a conscientious objector. He can refuse testing while paying a price (nonparticipation) that is serious, but less severe than expulsion from the school.

I cannot know whether the school’s drug testing program will work. But, in my view, the Constitution does not prohibit the effort. Emphasizing the considerations I have mentioned, along with others to which the Court refers, I conclude that the school’s drug testing program, constitutionally speaking, is not “unreasonable.” And I join the Court’s opinion.

**Justice GINSBURG, with whom Justice STEVENS, Justice O’CONNOR, and Justice SOUTER join, dissenting.**

This case presents circumstances dispositively different from those of *Vernonia*. True, as the Court stresses, Tecumseh students participating in competitive extracurricular activities other than athletics share two relevant characteristics with the athletes of *Vernonia*. First, both groups attend public schools. Concern for student health and safety is basic to the school’s caretaking, and it is undeniable that “drug use carries a variety of health risks for children, including death from overdose.”

Those risks, however, are present for *all* schoolchildren. *Vernonia* cannot be read to endorse invasive and suspicionless drug testing of all students upon any evidence of drug use, solely because drugs jeopardize the life and health of those who use them. Many children, like many adults, engage in dangerous activities on their own time; that the children are enrolled in school scarcely allows government to monitor all such activities. If a student has a reasonable subjective expectation of privacy in the personal items she brings to school, surely she has a similar expectation regarding the chemical composition of her urine. Had the *Vernonia* Court agreed that public school attendance, in and of itself, permitted the State to test each student’s blood or urine for drugs, the opinion in *Vernonia* could have saved many words.

The second commonality to which the Court points is the voluntary character of both interscholastic athletics and other competitive extracurricular activities.

The comparison is enlightening. While extracurricular activities are “voluntary” in the sense that they are not required for graduation, they are part of the school’s educational program; for that reason, the petitioner (hereinafter School District) is justified in expending public resources to make them available. Participation in such activities is a key component of school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience. Students “volunteer” for extracurricular pursuits in the same way they might volunteer for honors classes: They subject themselves to additional requirements, but they do so in order to take full advantage of the education offered them.

Voluntary participation in athletics has a distinctly different dimension: Schools regulate student athletes discretely because competitive school sports by their nature require communal undress and, more important, expose students to physical risks that schools have a duty to mitigate. For the very reason that schools cannot offer a program of competitive athletics without intimately affecting the privacy of students, *Vernonia* reasonably analogized school athletes to “adults who choose to participate in a closely regulated industry.” Industries fall within the closely regulated category when the nature of their activities requires substantial government oversight. Interscholastic athletics similarly require close safety and health regulation; a school’s choir, band, and academic team do not.

On “occasional out-of-town trips,” students like Lindsay Earls “must sleep together in communal settings and use communal bathrooms.” But those situations are hardly equivalent to the routine communal undress associated with athletics; the School District itself admits that when such trips occur, “public-like restroom facilities,” which presumably include enclosed stalls, are ordinarily available for changing, and that “more modest students” find other ways to maintain their privacy.

The “nature and immediacy of the governmental concern” faced by the Vernonia School District dwarfed that confronting Tecumseh administrators. Vernonia initiated its drug testing policy in response to an alarming situation. Tecumseh, by contrast, repeatedly reported to the Federal Government during the period leading up to the adoption of the policy that “types of drugs [other than alcohol and tobacco] including controlled dangerous substances, are present [in the schools] but have not identified themselves as major problems at this time.”

Not only did the Vernonia and Tecumseh districts confront drug problems of distinctly different magnitudes, they also chose different solutions: Vernonia limited its policy to athletes; Tecumseh indiscriminately subjected to testing all participants in competitive extracurricular activities.

At the margins, of course, no policy of *random* drug testing is perfectly tailored to the harms it seeks to address. The School District cites the dangers faced by members of the band, who must “perform extremely precise routines with heavy equipment and instruments in close proximity to other students,” and by Future Farmers of America, who “are required to individually control and restrain animals as large as 1500 pounds.” Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree. There is a difference between imperfect tailoring and no tailoring at all.

The Vernonia district, in sum, had two good reasons for testing athletes: Sports team members faced special health risks and they “were the leaders of the drug culture.” No similar reason, and no other tenable justification, explains Tecumseh’s decision to target for testing all participants in every competitive extracurricular activity.

Nationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are their less-involved peers. Even if students might be deterred from drug use in order to preserve their extracurricular eligibility, it is at least as likely that other students might forgo their extracurricular involvement in order to avoid detection of their drug use. Tecumseh’s policy thus falls short doubly if deterrence is its aim: It invades the privacy of students who need deterrence least, and risks steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems.

To summarize, this case resembles *Vernonia* only in that the School Districts in both cases conditioned engagement in activities outside the obligatory curriculum on random subsection to urinalysis. The defining characteristics of the two programs, however, are entirely dissimilar. The Vernonia district sought to test a subpopulation of students distinguished by their reduced expectation of privacy, their special susceptibility to drug-related injury, and their heavy involvement with drug use. The Tecumseh district seeks to test a much larger population associated with none of these factors. It does so, moreover, without carefully safeguarding student confidentiality and without regard to the program’s untoward effects. A program so sweeping is not sheltered by *Vernonia*; its unreasonable reach renders it impermissible under the Fourth Amendment. For the reasons stated, I would affirm the judgment of the Tenth Circuit declaring the testing policy at issue unconstitutional.

NOTE: This opinion has been edited for use by students and teachers. For ease of reading, no indication has been made of deleted material and case citations. Any legal or scholarly use of this case should refer to the full opinion.