

# Instructional Visualizations of the Work of the United States Supreme Court

2005 SLIS Doctoral Student Research Forum



Sept. 24, 2005

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[http://ella.slis.indiana.edu/~pahook/product/2005-09-24\\_sct.ppt](http://ella.slis.indiana.edu/~pahook/product/2005-09-24_sct.ppt)

## Research Questions

1. How can network graphing and information visualization techniques improve the understanding of the work of the United States Supreme Court?
2. What visualizations make the knowledge of experts quickly available to novices?

## Research Threads










1. Ideological Landscape of the Justices
2. Visual Explanations of Individual Cases
3. Topic Space of the 2004 Term
4. A Comparison of Lexis and Westlaw Headnotes

## Part I: Ideological Landscape of the Justices

**Learning Objective:** Students will understand the voting associations of the Justices of the Supreme Court and the ideological divide suggested by these associations.

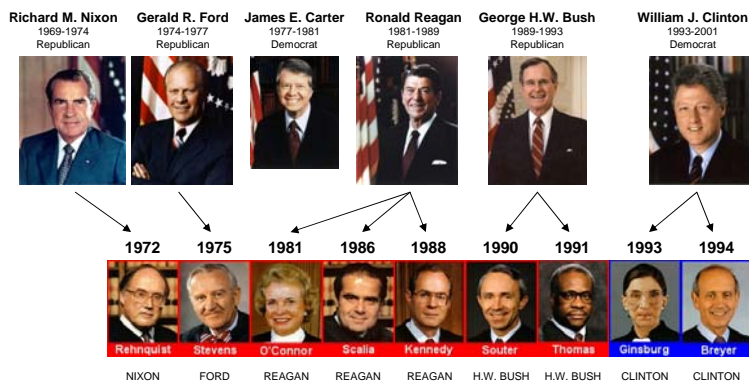
**Audience:** (1) Law Students, (2) Political Science Students, (3) All Non-Experts of the work of the Supreme Court.



# 9 Justices of the Supreme Court 1993-2004 Terms

1972	1975	1981	1986	1988	1990	1991	1993	1994
								
William H. Rehnquist	John Paul Stevens	Sandra Day O'Connor	Antonin Scalia	Anthony Kennedy	David Souter	Clarence Thomas	Ruth Bader Ginsburg	Stephen Breyer
47 80	55 85	51 75	50 69	51 69	51 65	43 57	60 72	55 67

1972 = Year Appointed  
 47 = Age On Start Date  
 80 = Age On Sept. 3, 2005  
 Mean Age On Sept. 3, 2005 = 71

# By Whom Appointed



 Appointed by a Republican  
 Appointed by a Democrat

# Representation of O'Connor as a Swing Vote

Even Poolside, Casinos Entice

After a Brief Shock, Advocates Quickly Move

Source: New York Times, July 2, 2005

**New York Times Representational Device:**

- Justices listed in linear fashion along a political spectrum (progressive to conservative)
- Justices in losing voting block are grayed-out.

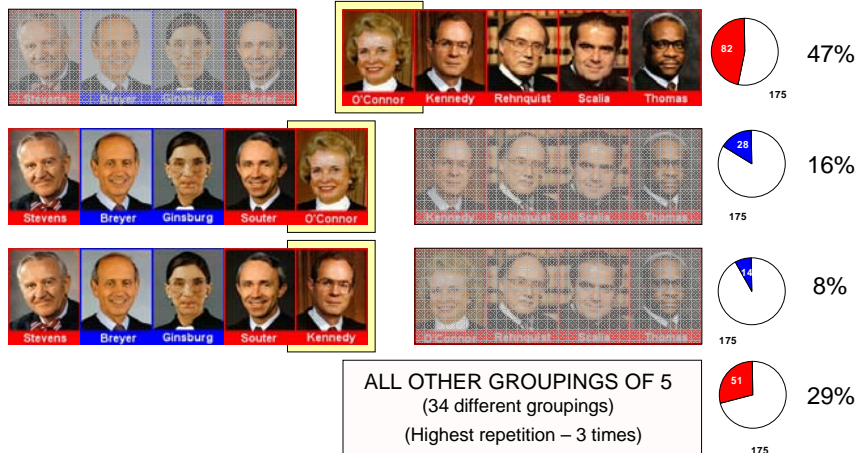
"Roberts would replace the late Chief Justice William Rehnquist, who had been the court's conservative anchor for 33 years."

"The next nominee would seek to succeed retiring Justice Sandra Day O'Connor, who often has been the swing vote on the nine-member court."

Reuters (2005), Senate Panel Backs Roberts Source, Appearing in: New York Times, September 22, 2005

## Frequency of Voting Blocks in 5-4 Cases

(1994 -2003 Supreme Court Terms)

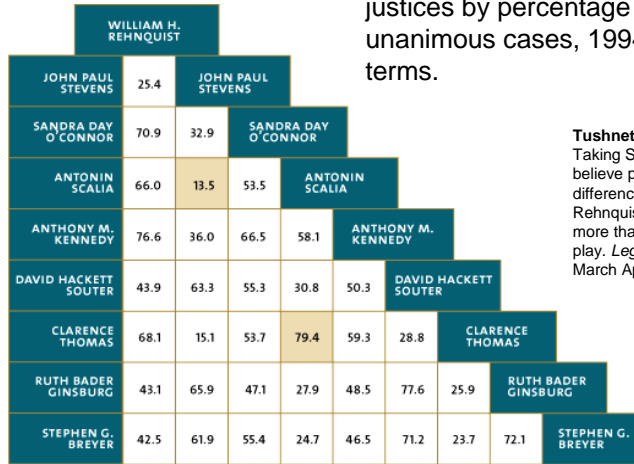


Total 5 to 4 Cases = 175

Source: Statistics harvested from the Harvard Law Review

# 2005 Legal Affairs

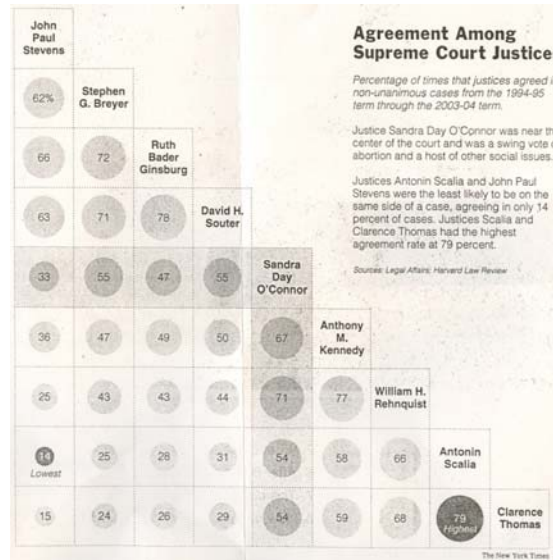
Agreement between pairs of justices by percentage in non-unanimous cases, 1994 to 2003 terms.



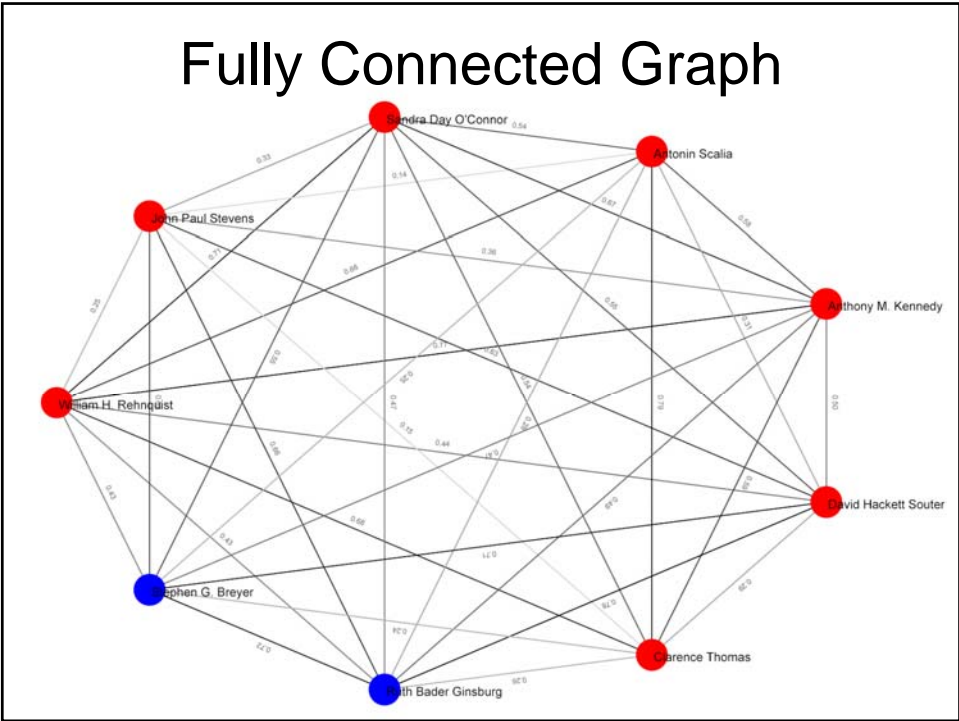
Tushnet, Mark (2005). Taking Sides: Many believe political differences rend the Rehnquist Court. But more than politics are in play. *Legal Affairs*, March April 2005.

[http://www.legalaffairs.org/issues/March-April-2005/numbers\\_marapr05.msp](http://www.legalaffairs.org/issues/March-April-2005/numbers_marapr05.msp)

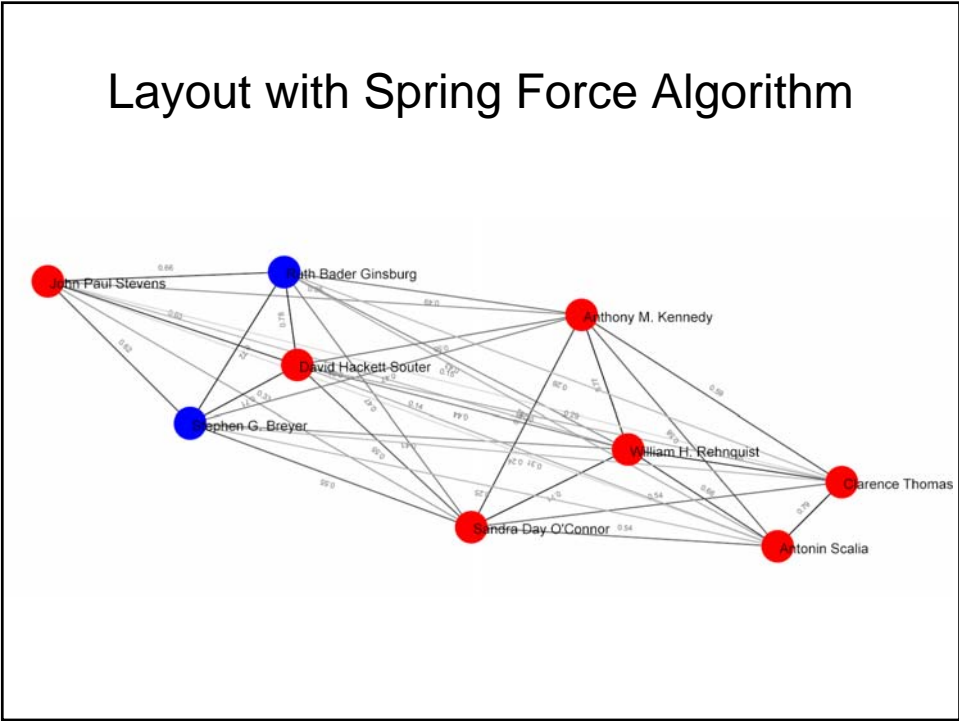
# July 2, 2005 New York Times



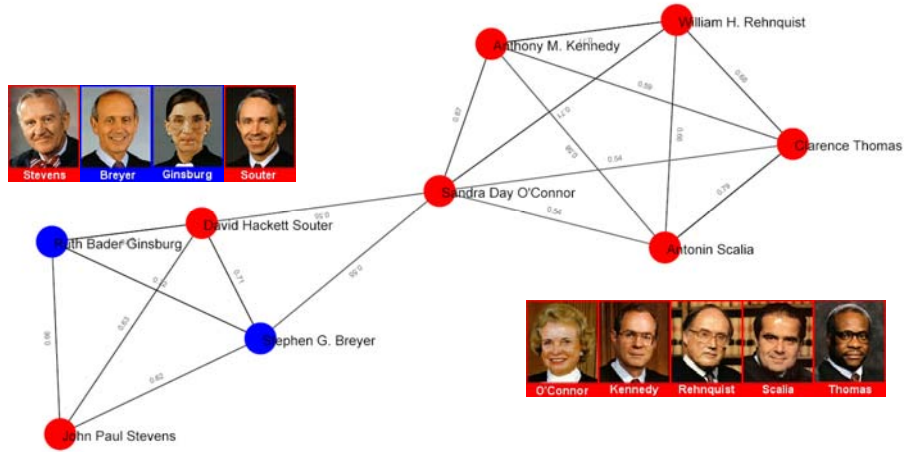
# Fully Connected Graph



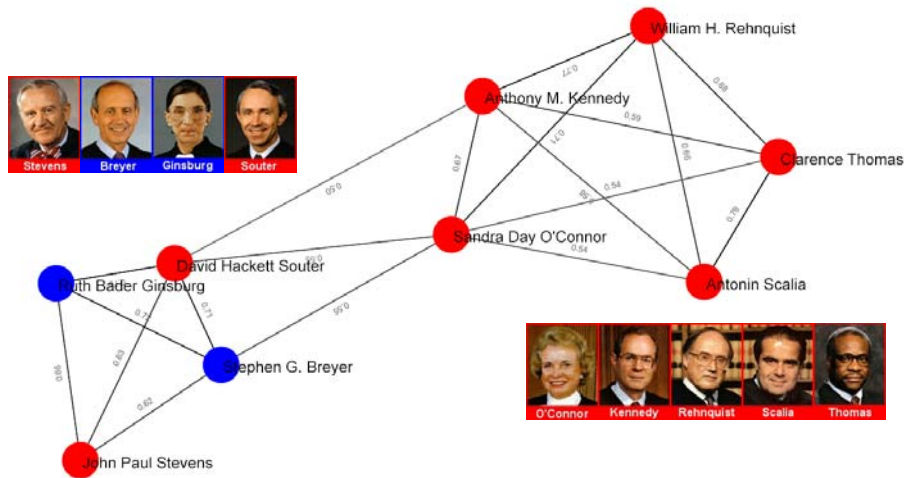
# Layout with Spring Force Algorithm



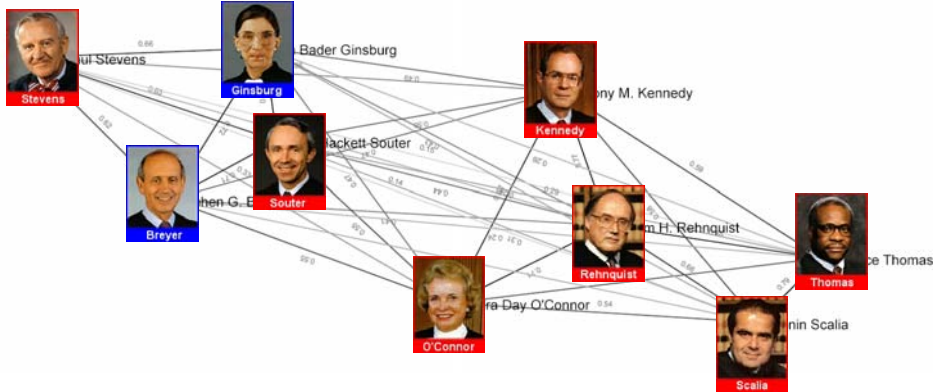
## Thresholding (Voting Together > 50%) Reveals Ideological Cliques



## Thresholding (Voting Together > 49%) Reveals Ideological Cliques



## Towards An Interactive Learning Environment



## Visualization Tools Applied Towards Pedagogy





## Part II: Visual Explanations of Individual Cases

**Learning Objective:** Students will quickly understand the facts, legal issues, voting, topic assignments, and procedural history for each case.

**Audience:** (1) Law Students, (2) Political Science Students, (3) All Non-Experts of the work of the Supreme Court.

**Holdings:** The Supreme Court, Justice [Stevens](#), delivering the opinion of the court in part, held that:

(1) federal sentencing guidelines are subject to jury trial requirements of the Sixth Amendment; and

(2) in an opinion by Justice [Breyer](#), delivering the opinion of the court in part, held further that Sixth Amendment requirement that jury find certain sentencing facts was incompatible with Federal Sentencing Act, thus requiring severance of Act's provisions making guidelines mandatory and setting forth standard of review on appeal;

(3) proper standard of appellate review for sentencing decisions was review for unreasonableness; and

(4) holdings as to Sixth Amendment applicability and remedial interpretation of the Sentencing Act were applicable to all cases on direct review.

Judgment of the Court of Appeals affirmed and remanded; judgment of the District Court vacated and remanded.

Justice [Stevens](#) dissented in part and filed opinion in which Justice [Souter](#) joined and Justice [Scalia](#) joined in part.

Justice [Scalia](#) dissented in part and filed opinion.

Justice [Thomas](#) dissented in part and filed opinion.

Justice [Breyer](#) dissented in part and filed opinion in which Chief Justice [Rehnquist](#), Justice [O'Connor](#), and Justice [Kennedy](#) joined.

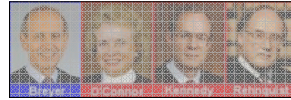
### ***United States v. Booker,*** **125 S.Ct. 738 (2005).**

- Most complex case of the 2004 term
- 5 – 4, 5 – 4 Decision (Two Main Opinions)
- Numerous Dissents
- Need a Map of these Joining Relationships

[STEVENS](#), J., delivered the opinion of the Court in part, in which [SCALIA](#), [SOUTER](#), [THOMAS](#), and [GINSBURG](#), JJ., joined. [BREYER](#), J., delivered the opinion of the Court in part, in which [REHNQUIST](#), C.J., and [O'CONNOR](#), [KENNEDY](#), and [GINSBURG](#), JJ., joined. [STEVENS](#), J., filed an opinion dissenting in part, in which [SOUTER](#), J., joined, and in which [SCALIA](#), J., joined except for Part III and footnote 17. [SCALIA](#), J., and [THOMAS](#), J., filed opinions dissenting in part. [BREYER](#), J., filed an opinion dissenting in part, in which [REHNQUIST](#), C.J., and [O'CONNOR](#) and [KENNEDY](#), JJ., joined.

## United States v. Booker, Voting Blocks

Opinion: Part 1



Opinion: Part 2



## United States v. Booker, 125 S.Ct. 738 (2005).

Opinion:  
Part 1



Stevens

Dissent



Breyer

Opinion:  
Part 2



Breyer

Stevens I



Stevens II

Stevens IV

Except  
Footnote  
17,  
Part IV

Stevens III



Dissent



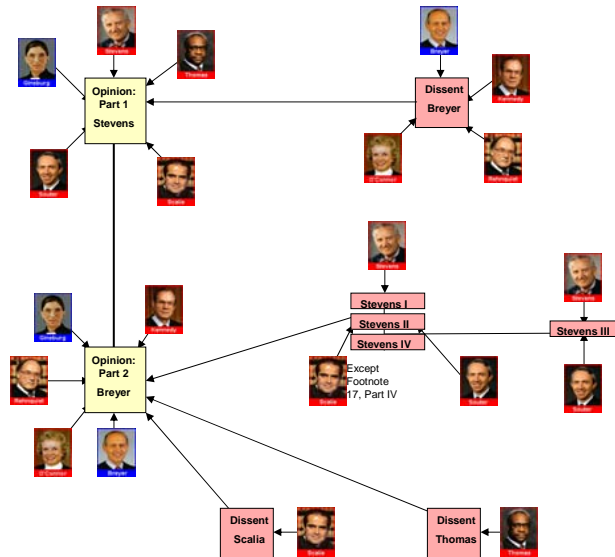
Scalia

Dissent



Thomas

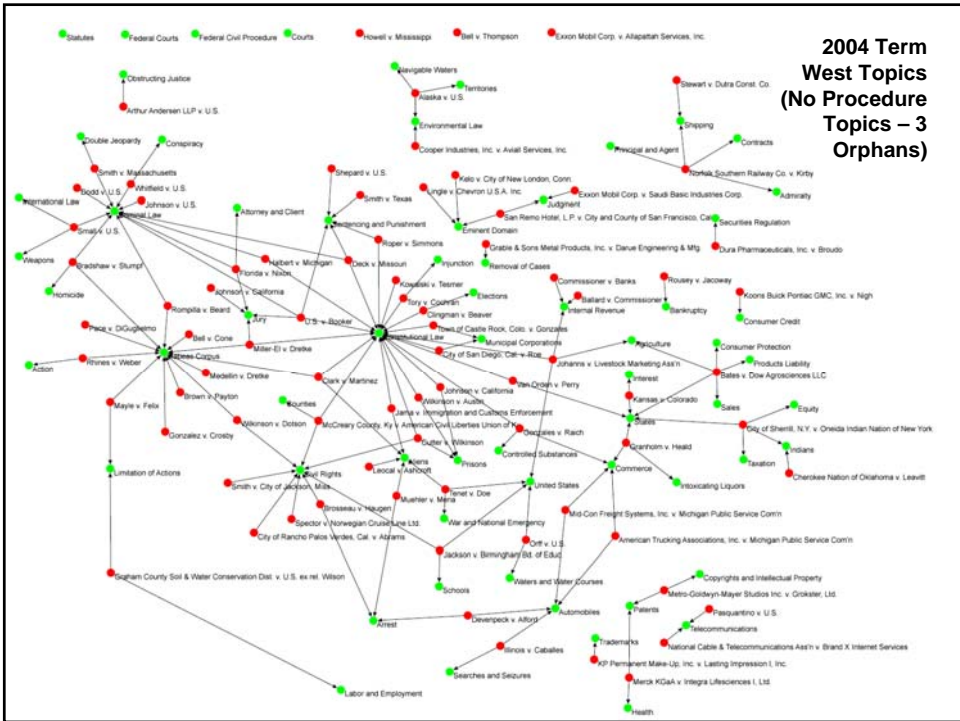
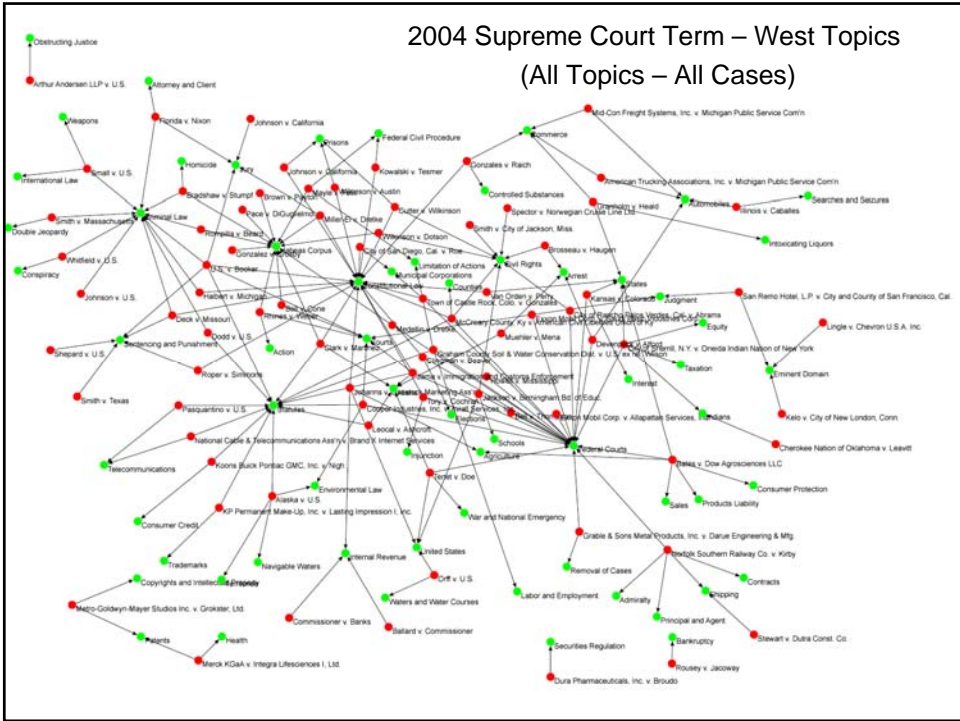
## Network Graphic Approach to *Booker*



## Part III: Topic Space of the 2004 Term

**Learning Objective:** Students will understand what topics were considered for any particular term, how those topics relate to each other, and how the current term fits the overall trend in topics covered by the Supreme Court from 1944 to the present.

**Audience:** (1) Law Students, (2) Political Science Students, (3) All Non-Experts of the work of the Supreme Court.



# Part IV: Lexis and Westlaw Headnote Comparison

**Learning Objective:** Students and practitioners will become aware of the large difference in the amount of headnotes assigned by each publisher and the difference in language deemed worthy of a headnote.

**Audience:** (1) Law Students, (2) Lawyers

4 Headnotes assigned by West to *Brown v. Payton*

**Westlaw**

125 S.Ct. 1432  
125 S.Ct. 1432, 05 Cal. Daily Op. Serv. 2398, 18 Fla. L. Weekly Fed. S 175, 73 USLW 4223, 2005 Daily Journal D.A.R. 3338, 161 L.Ed.2d 334  
(Cite as 125 S.Ct. 1432)

125 S.Ct. 1432, 05 Cal. Daily Op. Serv. 2398, 18 Fla. L. Weekly Fed. S 175, 73 USLW 4223, 2005 Daily Journal D.A.R. 3338, 161 L.Ed.2d 334  
[Briefs and Other Related Documents](#)

Supreme Court of the United States  
JILL L. BROWN, Warden, Prisoner,  
v.  
William Charles PAYTON,  
No. 05-9109  
Argued Nov. 11, 2004.  
Decided March 22, 2005.

**Background:** After his conviction for first-degree murder and rape and two counts of attempted murder, each sentence of death, were affirmed on direct appeal. *5 Cal.4th 1055, 819 P.2d 1035, 13 Cal.Rep.2d 526*, prisoner sought writ of habeas corpus. The United States District Court for the Central District of California granted a writ, habeas corpus, and prisoner cross-appealed. The Court of Appeals for the Ninth Circuit, *299 F.3d 1115*, affirmed. The United States Supreme Court, *538 U.S. 377, 125 S.Ct. 1432, 155 L.Ed.2d 662*, granted state's petition for writ of certiorari, vacated the judgment, and remanded the case. On remand, the Court of Appeals again affirmed. State again petitioned for writ of certiorari which was granted.

**Holdings:** The Supreme Court, Justice **Kennedy**, held that: (1) for purposes of habeas corpus relief under the Antirretention and Effective Death Penalty Act (AEDPA), determination of the California Supreme Court that the California jury instruction directing jurors to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" allowed jury to consider postcrime religious conversion evidence of defendant's religious conversion, was not contrary to an unreasonable application of precedent of the United States Supreme Court; and (2) California Supreme Court reasonably applied precedent of the United States Supreme Court in concluding that prosecutor's argument and remarks did not mislead jury into believing that it could not consider defendant's mitigating evidence of post-crime religious conversion under jury instruction, precluding federal habeas corpus relief.

Reversed.

Justice **Sotomayor** filed concurring opinion in which Justice **Thomas** joined.

Justice **Breyer** filed concurring opinion.

Justice **Stevens** filed dissenting opinion in which Justice **Scalia** and Justice **Ginsburg** joined.

Chief Justice **Roberts** took no part in the decision of the case.

**West Headnotes**

(1) Habeas Corpus 197 C274432  
1973523 Most Cited Cases  
For purposes of habeas corpus relief under the Antirretention and Effective Death Penalty Act (AEDPA), a 9th-circuit decision is contrary to the clearly established precedents of the United States Supreme Court if it applies a rule that contradicts the governing law set forth in the Court's cases, or if it confronts a set of facts that is materially indistinguishable from a decision of the Court but reaches a different result. *538 U.S. 377, 125 S.Ct. 1432, 155 L.Ed.2d 662*.

(2) Habeas Corpus 197 C274430  
1973523 Most Cited Cases  
For purposes of habeas corpus relief under the Antirretention and Effective Death Penalty Act (AEDPA), a 9th-circuit decision involves an unreasonable application of the clearly established precedents of the United States Supreme Court if the state court applies the Court's precedents to the facts in an objectively unreasonable manner. *538 U.S. 377, 125 S.Ct. 1432, 155 L.Ed.2d 662*.

(3) Habeas Corpus 197 C274438  
1973523 Most Cited Cases

**Westlaw**

125 S.Ct. 1432  
125 S.Ct. 1432, 05 Cal. Daily Op. Serv. 2398, 18 Fla. L. Weekly Fed. S 175, 73 USLW 4223, 2005 Daily Journal D.A.R. 3338, 161 L.Ed.2d 334  
(Cite as 125 S.Ct. 1432)

For purposes of habeas corpus relief under the Antirretention and Effective Death Penalty Act (AEDPA), determination of the California Supreme Court that the California jury instruction directing jurors to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" allowed jury to consider postcrime religious conversion evidence of defendant's religious conversion, was not contrary to an unreasonable application of precedent of the United States Supreme Court. *538 U.S. 377, 125 S.Ct. 1432, 155 L.Ed.2d 662*. *West's Ann.Cal.Penal Code § 1973523* (CALDC 1.8.1).

(1) Habeas Corpus 197 C274438  
1973523 Most Cited Cases  
California Supreme Court reasonably applied precedent of the United States Supreme Court in concluding that prosecutor's argument and remarks did not mislead jury into believing that it could not consider defendant's mitigating evidence of postcrime religious conversion under jury instruction directing jurors to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," precluding federal habeas corpus relief. *538 U.S. 377, 125 S.Ct. 1432, 155 L.Ed.2d 662*. *West's Ann.Cal.Penal Code § 1973523* (CALDC 1.8.1).

West Codes/Negative Treatment: Vacated (Rem'd) *538 U.S. 377, 125 S.Ct. 1432, 155 L.Ed.2d 662*.

(2) The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Shattuck*, 492 U.S. 295, 110 S.Ct. 2127, 28 S.Ct. 232, 50 L.Ed.2d 499.

In the penalty phase of respondent Payton's trial following his conviction on capital murder and related charges, his counsel presented witnesses who testified that, during the one year and nine months Payton had been incarcerated since his arrest, he had made a sincere commitment to God, participated in prison Bible study and a prison ministry, and had a calming effect on other prisoners. The trial judge gave jury instructions that followed verbatim the text of a California statute, setting forth 11 different factors, labeled (a) through (k), to guide the jury in determining whether to impose a death sentence or life imprisonment. The last such instruction, the so-called factor (k) instruction, directed jurors to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." In his closing, the prosecutor offered jurors his incorrect opinion that factor (k) did not allow them to consider anything that happened after the crime. Although he also told them several times that, in his view, they had not heard any evidence of mitigation, he discussed Payton's evidence in considerable detail and argued that the circumstances and facts of the case, coupled with Payton's prior violent acts, outweighed the mitigating effect of Payton's religious conversion. When the defense objected to the argument, the court admonished the jury that the prosecutor's comments were merely arguments, but it did not explicitly instruct that the prosecutor's interpretation was incorrect. Finding the special circumstance of murder in the course of rape, the jury recommended that Payton be sentenced to death, and the judge complied. The California Supreme Court affirmed. Applying *Beane v. California*, 493 U.S. 350, 110 S.Ct. 1190, 108 L.Ed.2d 246, which had considered the circumstantiality of the identical factor (k) instruction, the state court held that, considering "1454 the content of the proceedings, there was no reasonable likelihood that the jury believed it was required to disregard Payton's mitigating evidence. The Federal District Court disagreed and granted Payton habeas relief, ruling also that the Antirretention and Effective Death Penalty Act of 1996 (AEDPA) did not apply. The en banc Ninth Circuit affirmed and, like the District Court, held that AEDPA did not apply. On remand from this Court in light of *Proffitt v. Georgia*, 538 U.S. 202, 123 S.Ct. 1198, 151 L.Ed.2d 363, the Ninth Circuit purported to decide the case under the defendant's standard AEDPA grounds. It again affirmed, concluding that the California Supreme Court had unreasonably applied *Beane* in holding the factor (k) instruction was not unconstitutionally ambiguous in Payton's case. The error, the court determined, was that the factor (k) instruction did not make it clear to the jury that it could consider the evidence concerning Payton's postcrime religious conversion and the prosecutor was allowed to urge this erroneous interpretation.

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# 1 Headnote assigned by Lexis to *Brown v. Payton*

125 S. Ct. 1432, \* 161 L. Ed. 2d 334, \*\*;  
2005 U.S. LEXIS 2753, \*\*\*1; 73 U.S.L.W. 4223

Page 2

LENSE 125 S. Ct. 1432

JILL L. BROWN, WARDEN, Petitioner v. WILLIAM CHARLES PAYTON  
No. 03-1039

SUPREME COURT OF THE UNITED STATES

125 S. Ct. 1432; 161 L. Ed. 2d 334; 2005 U.S. LEXIS 2753; 73 U.S.L.W. 4223; 18 Fla. L. Weekly Fed. S.175

November 10, 2004. Argued  
March 22, 2005. Decided

NOTICE: \*\*\*1  
The LEXIS pagination of this document is subject to change pending release of the final published version.

SUBSEQUENT HISTORY: US Supreme Court rehearing denied by *Brown v. Payton*, 125 S. Ct. 2248, 2005 U.S. LEXIS 4151 (U.S. Mar. 16, 2005).

PRIOR HISTORY: ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. *Payton v. Wash. Bd. of Prof. & Bus. Reg.*, 346 F.3d 1204, 2003 U.S. App. LEXIS 21112 (9th Cir., 2003)

DISPOSITION: Reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Respondent prisoner inmate was convicted in state court of rape and murder and sentenced to death. The inmate asserted that the penalty phase jury was misled to believe that the inmate's postcrime religious conversion in prison was not mitigation. Upon the grant of a writ of certiorari, petitioner's custodial official appealed the judgment of the U.S. Court of Appeals for the Ninth Circuit which affirmed a grant of a writ of habeas corpus.

OVERVIEW: The jury was instructed to consider any circumstance which extenuated the gravity of the crime, and the prosecutor erroneously argued that the jury could not consider the inmate's postcrime conduct as mitigation and that, in any event, the inmate's violent criminal past outweighed his alleged religious conversion. The Ninth Circuit found that the jury was likely to have been misled into disregarding the inmate's postcrime mitigation. The U.S. Supreme Court held, however, that the Ninth Circuit's decision was contrary to the limits on habeas corpus review imposed by 28 U.S.C. § 2254(d) since, even if the state court incorrectly determined that the jury

was not likely to disregard the postcrime mitigation, such determination was not an unreasonable application of federal law. Supreme Court precedent established that precise circumstances could be mitigating, and it was not unreasonable for the state court to decline to distinguish between precise and postcrime mitigation. Further, despite the prosecutor's misstatement of law, the inmate's postcrime mitigation was extensively presented to the jury and it was unlikely that the jury disregarded the mitigation evidence.

OUTCOME: The judgment affirming the grant to the inmate of a federal writ of habeas corpus was reversed.

CORE TERMS: proponent, mitigating evidence, mitigation, postcrime, conversion, gravity, jurors, religious, extenuate, defense counsel, lesson, precise, reasonable likelihood, state-court, sentence, penalty phase, prison, mitigating, incorrect, rejected, rape, mistreatment, evidence, death penalty, objectively unreasonable, death sentence, jury believed, legal excuse, aggravating, jail

LexisNexis® Headnotes

**Criminal Law & Procedure - Habeas Corpus - Standards of Review**

[N1] The Antiterrorism and Effective Death Penalty Act of 1996 provides that, when a habeas petitioner's claim has been adjudicated on the merits in state-court proceedings, a federal court may not grant relief unless the state court's adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). A state-court decision is contrary to the Supreme Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme

Court but reaches a different result. A state-court decision involves an unreasonable application of the Supreme Court's clearly established precedents if the state court applies the Supreme Court's precedents to the facts in an objectively unreasonable manner.

DECISION:

[\*\*344] Federal Court of Appeals' decision affirming grant of federal habeas corpus relief to state prisoner, on ground that jury instructions had not permitted consideration of prisoner's postcrime religious conversion, held contrary to limits on habeas review imposed by 28 USC § 2254(d).

SUMMARY:

After the guilt phase of a trial in the Superior Court of Orange County, California, a defendant was convicted of murder and other crimes. During the trial's penalty phase, several witnesses testified that in the year and 9 months that the defendant had spent in prison since his arrest, he had (1) undergone a religious conversion, (2) participated in prison Bible study classes and a prison ministry, and (3) had a calming effect on other prisoners.

The trial judge gave the jury a conchal "factor (k)" instruction—as set forth in a California statute then in force—directing the jurors to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The prosecutor's closing argument included statements that (1) factor (k) did not allow the jury to consider anything that had happened after the crime, and (2) the circumstances of the case outweighed the mitigating effect of the defendant's religious conversion. When the defense objected to this argument, the trial judge (1) admonished the jury that the prosecutor's comments were merely argument, but (2) did not explicitly instruct that the prosecutor's interpretation of factor (k) was incorrect. The jury returned a verdict recommending a death sentence, and the judge sentenced the defendant to death.

On direct appeal to the Supreme Court of California, the defendant argued that the jury incorrectly had been led to believe that the jury could not consider the mitigating evidence of his postconviction conduct, in violation of 1985's *Felton v. California*, 459 U.S. 157, 48 L. Ed. 2d 316, 110 S. Ct. 1190—had established that the text of factor (k) was broad enough to accommodate the postcrime mitigating evidence presented by the defendant in the case at hand (3 Cal. 4th 408, 1050, 13 Cal. Rptr. 2d 526,

839 P.2d 1085, cert den 510 U.S. 1040, 126 L. Ed. 2d 649, 114 S. Ct. 652).

The United States District Court for the Central District of California granted the defendant's petition for a writ of habeas corpus. A panel of the United States Court of Appeals for the Ninth Circuit reversed in pertinent part but after rehearing in banc, the Court of Appeals affirmed the District Court's order granting habeas corpus relief (259 F.3d 915).

The United States Supreme Court granted certiorari, vacated the Court of Appeals' judgment, and remanded the case for reconsideration under the deferential review standard of an Antiterrorism and Effective Death Penalty Act of 1996 provision (28 USC § 2254(d)(1)), under which a state prisoner's application to a federal court for a writ of habeas corpus was not to be granted with respect to any claim that had been adjudicated on the merits in state court proceedings unless the adjudication of the claim had resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court (538 U.S. 973, 125 L. Ed. 2d 662, 123 S. Ct. 1785).

On remand, the Court of Appeals once again affirmed the District Court's grant of habeas corpus relief, on the ground that (1) the factor (k) instruction was likely to have misled the jury under the circumstances presented, and (2) it was an unreasonable application of the United States Supreme Court's cases for the California Supreme Court to have concluded otherwise (346 F.3d 1204).

On certiorari, the United States Supreme Court reversed. In an opinion by Kennedy, J., joined by O'Connor, Scalia, Thomas, and Breyer, JJ., it was held that the Court of Appeals' decision was contrary to the limits on federal habeas corpus review imposed by § 2254(d), for:

(1) The California Supreme Court had not acted unreasonably in reading *Felton v. California* as establishing that the text of factor (k) was broad enough to accommodate the defendant's postcrime mitigation evidence.

(2) Even on the assumption that the California Supreme Court had incorrectly concluded that the prosecutor's argument and remarks about factor (k) had not misled the jury, this conclusion was not unreasonable.

Scalia, J., joined by Thomas, J., concurring, (1) agreed that the California Supreme Court's decision was not "contrary to" or "an unreasonable application of" the United States Supreme Court's cases, and (2) expressed the view that limiting a jury's discretion to consider all mitigating evidence is not within the English common-law tradition.

[\*\*346] Breyer, J., concurring, expressed the view that (1) in a death-penalty case, the Federal Constitution

## Portion of Opinion That Headnote Language Summarizes

Westlaw

125 S. Ct. 1432  
125 S. Ct. 1432; 161 L. Ed. 2d 334; 2005 U.S. LEXIS 2753, \*\*\*1; 73 U.S.L.W. 4223, 2005 Daily Journal D.A.R. 3338, 161 L. Ed. 2d 334 (Cite as: 125 S. Ct. 1432)

Page 6

of *Felton*, the Court of Appeals purported to decide the case under the deferential standard AEDPA mandates. It concluded, however, that the California Supreme Court had unreasonably applied that Court's precedents in holding the factor (k) instruction was not unconstitutionally ambiguous in *Payton*'s case.

The Court of Appeals relied, as it had in its initial decision, on the proposition that *Beale* concerned precise, not postcrime, mitigation evidence. *Beale*, in its view, remained that a jury would be unlikely to disregard mitigating evidence so "chastise because of the long-held solid belief that defendants who commit criminal acts attributable to a disadvantaged background may be less culpable than defendants who have no such excuse. As to postcrime mitigating evidence, however, the Court of Appeals concluded that "there is reason to doubt that a jury would similarly consider postcrime evidence of a defendant's religious conversion and good behavior in prison." 346 F.3d at 1212. It cited no precedent of this Court to support that proposition.

In addition, it reasoned that unlike in *Beale*, the prosecutor in *Payton*'s case misstated the law and the trial court did not give a specific instruction regarding that misstatement, relying instead on a general admission that counsel's arguments were not evidence. These two differences, the Court of Appeals concluded, made *Payton*'s case unlike *Beale*. 346 F.3d at 1216. In its view, the factor (k) instruction was likely to have misled the jury and it was an unreasonable application of this Court's cases for the California Supreme Court to have concluded otherwise.

II  
[12] AEDPA provides that, when a habeas petitioner's claim has been adjudicated on the merits in state-court proceedings, a federal court may not grant relief unless the state court's adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). A state-court decision is contrary to the Supreme Court's clearly established precedents if it applies a rule that contradicts the governing

if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result.

LEXIS 1 2005 U.S. LEXIS 2753, \*\*\*1; 73 U.S.L.W. 4223, 2005 Daily Journal D.A.R. 3338, 161 L. Ed. 2d 334 (Cite as: 125 S. Ct. 1432)

WEST 2  
In this Court's precedent to fairly and reasonably measure the state court's decision, the state court's decision must be based on the law as it existed at the time of the state court's decision. These conditions for the grant of federal habeas relief have not been established.

A  
[1] The California Supreme Court was correct to identify *Beale* as the starting point for its analysis. *Beale* involved a challenge to the same instruction at issue here, factor (k). As to the text of factor (k), *Beale* concluded that it does not limit the jury's consideration solely to circumstances of the crime.

WEST 3  
[10] In so holding, we expressly rejected the suggestion that factor (k) precluded the jury from considering evidence pertaining to a defendant's background and character because these circumstances did not concern the crime itself. *Beale* instead found that factor (k) by its terms, directed the jury to consider any other circumstance that might excuse the crime, including factors related to a defendant's background and character. We held

"The factor (k) instruction did not, in any sense, suggest, limit the jury's consideration to 'any other circumstance of the crime which extenuates the gravity of the crime.' The jury was directed to consider any other circumstance that might excuse the crime, which certainly includes a defendant's background and character." *Beale* (emphasis in original).

The California Supreme Court read *Beale* as establishing that the text of factor (k) was broad enough to accommodate the postcrime mitigating evidence *Payton* presented. *Beale v. Felton*, 459 U.S. 157, 48 L. Ed. 2d 316, 110 S. Ct. 1190, 13 Cal. Rptr. 2d 526, 839 P.2d 1085. The Court of Appeals held *Beale* establishing that not every *Payton*'s case because *Beale* concerned precise, not postcrime, mitigation evidence. 346 F.3d at

WEST 1

Westlaw

125 S. Ct. 1432  
125 S. Ct. 1432; 161 L. Ed. 2d 334; 2005 U.S. LEXIS 2753, \*\*\*1; 73 U.S.L.W. 4223, 2005 Daily Journal D.A.R. 3338, 161 L. Ed. 2d 334 (Cite as: 125 S. Ct. 1432)

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1211-1212  
We do not think that, in light of *Beale*, the California Supreme Court acted unreasonably in declining to distinguish between precise mitigation evidence. After all, *Beale* considered the mitigating effect of a defendant's religious conversion, and it is not unreasonable to believe that a postcrime character transformation could do so. Indeed, to accept the view that such evidence could not because it occurred after the crime, one would have to reach the surprising conclusion that someone could never serve to lessen or excuse a crime. But mitigation, which by definition can only be experienced after a crime's commission, is commonly thought to lessen or excuse a defendant's culpability.

B  
[1] That leaves respondent to defend the decision of the Court of Appeals on grounds that, even if it was at least reasonable for the California Supreme Court to conclude that the text of factor (k) did not limit the jury's consideration of postcrime evidence, it was in *WEST 4* the prosecutor's argument and its reliance on *Beale* into believing it could not consider *Payton*'s mitigation evidence. As we shall explain, however, the California Supreme Court's conclusion that the jury was not reasonably likely to have accepted the prosecutor's narrow view of factor (k) was an application of *Beale* to similar but not identical facts. From on the assumption that its conclusion was incorrect, it was "1400 not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review."

The following language from *Beale* should be noted at the outset: "We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. ... [J]uries do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be brushed out in the

deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." *Beale* U.S. at 160-161, 110 S. Ct. 1190 (footnote omitted).

WEST 3  
[10] Unlike in *Beale*, the prosecutor here argued to jurors during its closing that they should not consider *Payton*'s mitigation evidence, evidence which concerned postcrime as opposed to precise conduct. Because *Beale* sets forth a general framework for determining whether a challenged instruction precluded jurors from considering a defendant's mitigation evidence, however, the California Supreme Court was correct to structure its own analysis on the premises that controlled *Beale*. The *Beale* analysis applies here, and, even if it did not dictate a particular outcome in *Payton*'s case, it refutes the conclusion of the Court of Appeals that the California Supreme Court was unreasonable.

The prosecutor's mistaken approach appears most prominently at three different points in the penalty phase. First, its chambers and outside the presence of the jury he argued to the judge that background and character (whether of precise or postcrime) was simply beyond the ambit of the instruction. Second, he told the jurors in his closing argument that factor (k) did not allow them to consider what happened "after the [crime] or later." App. 60. Third, after defense counsel objected to his narrow view, he argued to the jury that it had not heard any evidence of mitigation. *Id.* at 70. *Beale*, however, mandates that the whole context of the trial be considered. And considering the whole context of the trial, it was not unreasonable for the state court to have concluded that this line of prosecutorial argument did not put *Payton*'s mitigation evidence beyond the jury's reach.

The prosecutor's argument came after the defense presented eight witnesses, spanning two days of testimony without a single objection from the prosecution as to its relevance. As the California Supreme Court recognized, like in *Beale*, for the jury to have believed it could not consider *Payton*'s mitigation evidence, it would have had to believe that the penalty phase served virtually no purpose at all. *Payton*'s counsel recognized as much, arguing to the jury that "[t]he whole purpose for the second phase [of the trial] is to decide the proper punishment to be imposed. Everything that was

# Methodology

1. Database is populated with all Lexis and West Headnotes.
2. Two human coders educated in the law determine the degree of overlap and which Lexis headnote equals which West headnote.
3. All headnotes are machine processed to determine the degree of semantic overlap between any two headnotes (percentage and uniqueness of words in common).
4. Results are compared with that of human coders to determine if some threshold semantic similarity indicates that two headnotes gloss the same legal principle and may be considered equivalent.
5. Comparisons are published as to the co-extensiveness of Lexis and West headnotes.
6. Preliminary findings indicate a surprising lack of overlap and co-extensiveness of the opinion language covered.

## Thank You! – L546 Database Development



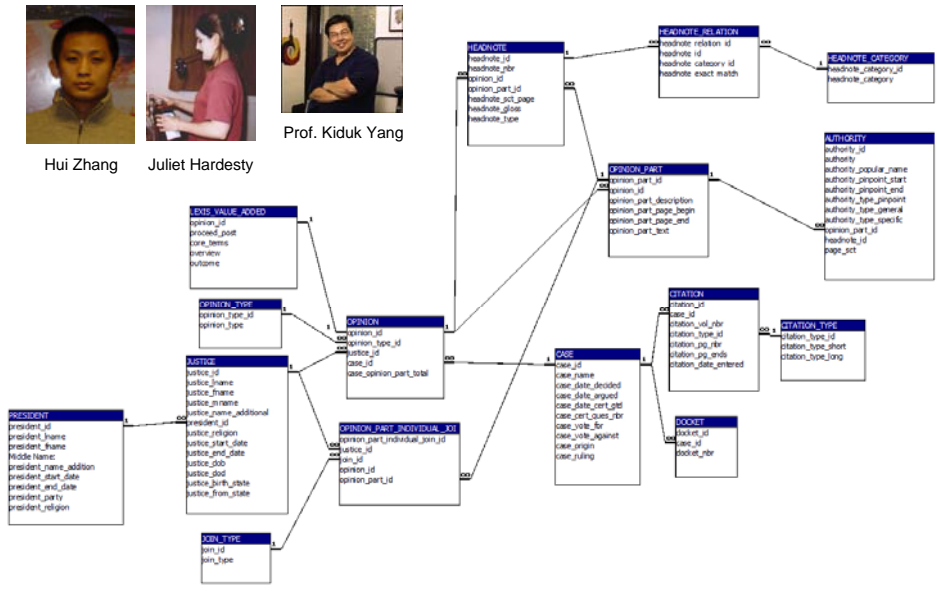
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Weimao Ke

- Slides Available:

[http://ella.slis.indiana.edu/~pahook/product/2005-09-24\\_sct.ppt](http://ella.slis.indiana.edu/~pahook/product/2005-09-24_sct.ppt)