

Index

Abrams v. United States, 183 Ativah, P. S., 217 academic institutions, dissent and, "Auschwitz lie," 219–220 160-162 Ackerman, Bruce, 175–178 Bates, Daisy, 146 Alexander, J. R. H., 124 Beavers, Louise, 157 Alexander, Raymond Pace, 120, 132 Bell Atlantic Corp. v. Twombly, 50-51 Alito, Justice, 102 Bell, Derrick, 109-110, 190 allegation, counterfactual, 49 Benjamin, Walter, 22-23 Berg, Manfred, 151 Allen, J. Weston, 121 animus, 10-11, 90-91, 92-93 Best, Stephen, 24 Bipartisan Campaign Reform Act of basis for law, 93-95 conservative litigants, 101-104 2002, 223-224 culture of, 68-69 birthers, 205 Black, Hugo, 152, 156 in defense of, Romer v. Evans, Blackmun, Harry A., Bowers v. 63-68 dissenting against, 80-81 *Hardwick*, dissent, 9–10, 59–61, gay-marriage litigation and, 79–80 Boardman, Helen, 129 Boeing, Paul, 122 Lawrence v. Texas, 81–84 legal standing, basis for, 95-97 Boies, David, 98 Bowers v. Hardwick, 9–10, 58–63, liberal vs. conservative, 71-77 regeneration of, 84-88 84-88, 93-95 as zero-sum game, 88-90 Boy Scouts of America v. Dale, anti-lynching bill, 152-153 68-69 Brandeis, Louis, 188–189 Areopagitica, Milton, 182 Brandenburg v. Ohio, 183, 222 Aristotle, 183 Arnold, Thurman, 148 Branton, Wiley, 146 Brown v. Board of Education, 110, 192 Ashcroft, John, 50 Ashcroft v. Iqbal, 50-52 Bunche, Ralph, 118

231



232 Index

Burger, Warren E., Bowers v. Frost, 19–20 Hardwick, majority opinion, 59 in history, 21–22 judges and, 52-54 Butler, Judith, 2–3 jurors and, 52-54 California Civil Rights Act, 155 jury power, usurpation of, 48-52 ordinary experience of, 23-24 California Eagle (newspaper), 149, A Passage to India, 7–8, 26–34, 43 154-155 Campbell, Angus, 69 Rusk v. State of Maryland, 8-9, Canada, free speech and, 220-221 34-40, 44-48 Carter, Stephen, 211–212 counterfactual reasoning, 21 Ceruti, Burton, 135 Cover, Robert, 25 Chadbourn, James Harmon, Crawford, George, 12, 118–129 Crawford trial, 12, 118–129, 130 151-152 Crusader News Agency, 136 Chekhov, Anton, 57 Christian Legal Society v. Martinez, cultural dissent, 68-69 102 culture wars, 69 Cisar, Elizabeth, 218 Citizens United v. The Federal Dabney, Virginius, 119, 124 Election Commission, 72, Davis, Ben, Jr., 136 75-77, 223-226 Davis, Benjamin, Jr., 118 Civil Rights Cases, 158 Davis, John P., 118 civil rights politics. See also Houston, The Decline and Fall of the American Charles H.; Miller, Loren Republic (Ackerman), 175 dissent and authenticity, history Defense of Marriage Act, animus and, 88 of, U.S., 105-112 generational divide, 115-118 Delgado, Richard, 190 lawyers as dissenters, 11-14 democratic individuality, 2 top-down, 111 Devlin, Patrick, 66-67 civil rights unionism, 111 Diamond v. Charles, 100 Clark, Kenneth, 106 Dickerson, Earl, 132 Clarke, Thurmond, 157–158 disgust, legal expressions and, 66-67 Cognition and Emotion, Disgust Sensitivity Scale, 66-67 66-67 dissent Cohen v. California, 214–216 cascade, 195-197 costs of, 205-206 Colker, Ruth, 190 example, costs of, 197-201 Commager, Henry Steele, 1 Conley v. Gibson, 49-50 expert judgments and, 206 Cooper v. Aaron, 146 factual matters vs. normative, Costigan, Edward P., 152, 156 201-202 counterfactual allegation, 49 judicial, 193 counterfactual imagination, dissent management of, 194-195 and, 7-9, 54-55 objective social value, 213-214 Benjamin, 22-23 romantic vs. instrumental, 193



Index 233

U.S. government censorship and, government censorship and, 214-219 214-219 value of, 207-208, 209-229 objective social value, Dissent, Injustice, and the Meanings 213-214 of America (Shiffrin), 210 Freeman, Douglas, 124 dissident stance, 145 Frost, Robert, 19-20 Havel, 145 Houston, 146-147 Gaines, Kevin, 110 Miller, 146-147 Gallagher, Catherine, 21-22 Doe v. Reed, 102 Galleher, John, 122 Douglas, Lawrence, 6 Garvey, Marcus, 114-115 Douglas, William O., 4 Gates, Henry Louis, 3-4 Due Process and Equal Protection "The Gay and the Angry" (Karlan), Clauses, 98 Dworkin, Ronald, 66 gay-marriage litigation, animus and, 97-101 expertise, dissent and, 162-165, Germany, free speech and, 219–221 Ginsburg, Ruth Bader, Gonzales v. 206 Carhart, 72, 74-75 Gonzales v. Carhart, 72, 74-75 Fairchild v. Raines, 157 Federal Housing Authority (FHA), government, United States abuse of power, speech and, 158 First Amendment, 212 Harlan, 214-216 censorship, value of speech and, Lidsky, 216–217 214-219 Shiffrin, 6, 210-211 Gruening, Martha, 129 Guinier, Lani, 111 Stevens, 76 The First Amendment, Democracy, and Romance (Shiffrin), Harlan, John Marshall animus, legal standing and, 210 The First Amendment in Cross Cohen v. California, 214-216 Cultural Perspective Plessy v. Ferguson, 192 (Krotoszynski), 184 Fish, Stanley, 188 Hart, Brooke, 155 Fisher, Louis, 172-173 Hastie, William, 106, 118 Havel, Václav, 145 Foner, Eric, 169-170 Forster, E. M., 7–8, 26–34 Herndon, Angelo, 119 Fort, William E., 156 Heureux-Dube, Claire, 227-228 Frankfurter, Felix, 173–174 Holder, Eric, 89 free speech Holmes, Oliver Wendell, 4, 188-189 distrust principle, Supreme Court Holocaust denial, 219–220 and, 221–228 homosexuality, animus toward, Germany and, 219–221 70-72



234 Index

Houston, Charles H., 12-14 Karst, Kenneth, 190 Crawford trial, media reaction to, Kateb, George, 2 Kennedy, Anthony Crawford trial, proceedings, animus-based standing, 118–129 conservative litigants, 103–104 dissident stance, 146-147 Citizens United, majority opinion, Garveyism, 114-115 224-225 generational qualities, civil rights Lawrence v. Texas, majority politics and, 115-118, 147-149 opinion, 83-84 Jim Crow and, 146, 156 Romer v. Evans, majority opinion, NAACP St. Louis convention, Kettering Foundation, 184 137-139 Scottsboro debate, 140-141 Klueger, Richard, 106 Shelley v. Kraemer, 158-159 Korematsu v. United States, 11, 72-74 violence, toward African Korstad, Robert, 111 Americans and, 151–153 Krotoszynski, Ron, 184 Hughes, Langston, 134 Hustler v. Falwell, 223 Lawrence v. Texas, 10-11, 61-62, 81-84, 88-90, 94 ILD. See International Labor Lee, Susanna, 9-11 Defense legal academy, 160-162 Ilsley, Agnes, 12, 118 advocacy orientation, 180-181 The Imperial Presidency analyses of presidency, 175 (Schlesinger), 175 Congress, influence with, 172–173 individualism, American, 2 doctorate program, 170-171 instrumental dissent, romantic vs., expertise, collective decision making and, 162–165 full disclosure of relationships, International Labor Defense (ILD), engagements, 178–180 119, 153 Iqbal, Javaid, 50 importance of dissent, 185-186 influences, views of scholars, James, William, 25 165–166, 184 intellectual independence, dissent Jim Crow, 146, 156 Johnson, Charlie, 123 and, 181 judicial dissent, 193 internal institutional risks, to dissent, 186-189 counterfactual imagination and, limits, on dissent, 189-191 normative positions on law, power usurpation of power, 48-52 seduction and, 169-172 partisan politics and, 168–169, Kamisar, Yale, 166–167 Kansas's Industrial Relations Act of publication of professional work,

171-172

1920, 153-154



Index 235

Schlesinger, 174-175 stage of career and, 180 Supreme Court justices, ties with, 167-168 tenure, dissent and, 188-189 Lewis, William H., 116 Lidsky, Lyrissa Barnett, 216–217, 219 Lynching and the Law (Chadbourn), 151-152 lynchings, in United States, 151–153 Mack, Kenneth, 11–14 Marshall, John, 4-5 Marshall, Thurgood, 106–107, 148-149 Matthews, David, 184 McCain-Feingold Campaign Reform Act, 223–224 McDaniel, Hattie, 157 McLemore, James L., 124 Mill, John Stuart, 17, 202-204 Miller, Loren, 12-14, 105-106, 114 in California, 154–158 dissident stance, 146-147 generational qualities, civil rights politics and, 115-118, 149-151 Kansas legal education, 153-154 legal profession, 139-140 NAACP and, 135-136, 138, 139-140 NAACP St. Louis convention, 137-138 political affiliations, 133-134 restrictive covenant cases, 157-158 Scottsboro debate, 140–141 Shelley v. Kraemer, 158-159 violence, toward African Americans and, 151–153 writing career, 131–137 Missouri ex rel Gaines v. Canada, 113 Moon, Henry Lee, 134 moral intuitions, 67–68

moral opprobrium, voice of people and, 70–80 Morris, Edward H., 116 Morson, Gary Saul, 56 Mueller, Robert, 50 Muller v. Oregon, 157 Murphy, Frank, Korematsu v. United States, 72–74

Narrative and Freedom (Morson), 56
National Association for the
Advancement of Colored
People (NAACP)
black lawyers, 1910s–1920s, 120–121
dissent, within black community,
109–112
dissident stance, 146–147
legal history of, 106
St. Louis convention, 130
negative individuality, 2
New Masses (journal), 136–137, 149
New York Times Co. v. Sullivan,
222
Nichomechean Ethics, Book One
(Aristotle), 183

O'Connor, Sandra Day, Lawrence v. Texas, majority opinion concurrence, 82–83, 88 Olsen, Culbert, 154 Olson, Theodore, 98 "One Way Out: Communism"

Norrie, Kenneth, 69

notice pleading, 49-50

(Miller), 136 Organization for a Better Austin v. Keefe, 215

Partial Birth Abortion Ban Act, 74–75 partisan politics legal academy, temptations of power and, 168–169 toxicity of, 183–184



236 Index

A Passage to India (Forster), 7-8, Rosenblum, Nancy, 168 26-34, 43 Ross, Susan, 5 Rusk, Edward, 34, 44 Perez v. Sharp, 156 The Petitioners: The Story of the Rusk v. State of Maryland, 8-9, Supreme Court of the United 34-40, 44-48 States and the Negro (Miller), 105, 140-141 same-sex marriage, animus and, Pildes, Richard, 14-15 Planned Parenthood of Southeastern Scalia, Antonin Pa. v. Casey, 505 U.S. 84-88 culture wars, 69 Platt, Ida, 116 Lawrence v. Texas, dissent, 61-62, Plessy v. Ferguson, 192 65, 94 Planned Parenthood v. Casey, Proposition 8, California, 97–98 85-87 Schlesinger, Arthur, Jr., 174-175 racial politics, history of, dissent, 105-112. See also Houston, Scottsboro Boys, 119 Charles H.; Miller, Loren "Serving Two Masters: Integration generational divide, 115-118 Ideals and Client Interests in importance of, 107-109 School Desegregation NAACP and, 109-112 Litigation" (Bell), 109–110 outsider groups, 107 Shelley v. Kraemer, 158–159 Shiffrin, Steven, 2, 6, 193, 210-211 racism, Korematsu v. United States, sideshadowing, 56-57, 60-61 72-74 Ransom, Leon, 123 Simple Justice (Klueger), 106 Sinclair, Upton, 154 Reconstruction: America's Unfinished Revolution, 1863–1867 (Foner), Snyder v. Phelps, 207, 222–223 Southern Commission on the Study 169-170 Redish, Marty, 218 of Lynching, 152 Reed, Stanley, 192 Stefancic, Jean, 190 Stevens, John Paul, Citizens United Reichman, Ravit, 7-9 Rich, Stephen, 70, 81 v. The Federal Election "The Road Not Taken" (Frost), Commission, 72, 75-77 Stolen Valor Act, 204–205 Roberts, John, Snyder v. Phelps, strategic majority construction, 70 Strong, S. I., 66 Roe v. Wade, 410 U.S. 113, 84–88 romantic dissent Summers, Robert S., 217 Sunder, Madhavi, 68-69, 81 instrumental vs., 193 Sunstein, Cass, 16, 190, 192 judicial, 193 Romer v. Evans, 10, 63-68, 93-95 argument against, 192-193 Roosevelt, Eleanor, 151 cascade, 195-197 Roosevelt, Franklin D., 152–153, Lawrence v. Texas, 80 173-174 management of dissent, 194-195



Index 237

romantic vs. instrumental dissent, 193 social science research, 201–202

Taft, Robert, 174–175
There Is No Such Thing As Free
Speech (Fish), 188
"Thesis on the Philosophy of
History" (Benjamin), 22–23
Torture Memos (Yoo), 185–186
Traynor, Roger J., 156–157
Truman, Harry S., Schlesinger and,
174–175
Tushnet, Mark, 15–17
Tyson, James, 123

United Kingdom, free speech and, 220–221 United States government abuse of power, speech and, 214–219 censorship, value of speech and, 214–219

Villard, Oswald Garrison, 121

Wagner, Robert F., 152, 156 Walkowitz, Rebecca, 40, 41 Warren, Earl, 192 Waters, Ethel, 157 "The Way Out" (Miller), 136 Weaver, Robert, 118 West, Rebecca, 40 White, Byron, Bowers v. Hardwick, majority opinion, 58-59 White, Walter, 121, 151 Whitman, James, 220 Whitney v. California, 274 U.S. 357, 189, 192 Why Societies Need Dissent (Sunstein), 16, 192 Wilkins, Roy, 111 Wills, Gary, 217 Wilner, Alan, 38–39 Wilson, Butler, 121–122 Wolff Packing Co. v. Court of Industrial Relations, 154 Woodward, C. Vann, 106

Yoo, John, 185–186