

Remarks for Lillian Smith Award Luncheon, Nov. 6, 1999

Because my book is both methodologically and politically incorrect, I am particularly pleased to receive an award named for perhaps the most politically incorrect woman in the history of the South. To *conceive* the racial views that Lillian Smith did, at the time that she did, was advanced; to *express* them was radical; but to *broadcast* them throughout the nation was positively daring, even foolhardy. Probably only her genteel upbringing and demeanor, her gender (patronized and not taken altogether seriously then, but less threatening to men than it would be today), and her residence in the mountains of North Georgia, far from the center of segregationist hard-liners, saved her from a cross-burning that she might not only have seen, but that she might have felt much too warmly.

I cannot claim to have been anything like as brave or to have risked anything like as much as Lillian Smith did when she published *Strange Fruit* and *Killers of the Dream*. But I have, in *Colorblind Injustice*, challenged the conventional wisdom in the press and much of articulate opinion, which holds, first, that racial discrimination against minorities is largely dead in this enlightened era, merely important now to irrelevant people like historians; second, that the “conservative” judges appointed by Presidents Nixon, Reagan, and Bush, are unbiased, non-partisan, and anti-activist, unlike those of the notorious Warren Court; and third, that, as conservative icons such as Ward Connerly and Justice Clarence Thomas have asserted, the only thing needed to provide equal opportunity for all is for governments to adopt what they call “colorblind” policies, repealing affirmative action and all other protections of minorities against governmental and non-governmental discrimination. If such policies result in almost entirely

white and Asian-American elite universities, governmental bodies, and corporation offices, then, they tell us, that merely reflects the fair, natural order of things.

By attacking such popular dogmas, I have merely risked being ignored, failing to attain the celebrity of such racial neo-conservatives as Stephan and Abigail Thernstrom, Dinesh D'Souza, or Shelby Steele. Until today's award, I have been. The Thernstroms' derivative and poorly argued *America in Black and White* was launched with a two-page spread in *Time Magazine*. In contrast, *Colorblind Injustice* has yet to be reviewed, as far as I know, in a single newspaper or popular journal, and it may never be. When I was finishing the book, my friend Tom Pettigrew, a leading social psychologist and fellow native white southerner, who spent a good deal of the 1960s and 70s testifying as an expert witness in school integration cases, warned me not to hope for too much attention. "The times are not right," he wrote me. "Greed is in style, not justice." Fortunately, justice has never gone out of style at the Southern Regional Council.

But I am more interested in this book in injustice than I am in justice itself, in tracing the history and structure of inequities and the struggles against them than in prescribing a normative utopia, in discrimination than in equality. It is, after all, a book about American race relations, and there's a lot more inequality and struggle to study than there is justice. In the most general terms, I argue that institutions and institutional rules, not customs, ideas, attitudes, culture, or private behavior, have primarily shaped race relations and racial change in America. More

specifically, I concentrate on black and Latino political participation and the processes by which their political power has been increased or diminished, emphasizing to a greater degree than other historians the importance of small, incremental changes and relatively obscure people.

But at the center of my story lie the most powerful actors for good and bad, the justices of the U.S. Supreme Court. No amount of courage and hard work can withstand an authoritative decision of that court in the American system, and no amount of skullduggery and discrimination can finally survive unless the Supreme Court blesses or agrees to ignore it. Lillian Smith recognized that, calling for southern whites to put the *Brown* decision into force quickly and fully, and she properly realized the power of the Court to begin a startling transformation of the southern discriminatory structure and culture. It did so, too, in voting rights, beginning with the white primary case, *Smith (no kin) v. Allwright*, which the Supreme Court published the same year that Lillian Smith published *Strange Fruit*. After the Civil Rights Movement and the anti-Goldwater landslide in 1964 made the Voting Rights Act possible, the Supreme Court, working closely in line with stable congressional majorities, largely expanded the protections guaranteed by the VRA through the 1960s, 70s, and 80s.

Thus, in 1991-92, for the first time in American history, favorable judicial decisions interpreting the Voting Rights Act and the Constitution enabled African-American and Latino politicians and interest groups that represented minority voters to enjoy a fair chance to frame election arrangements. Supported by both the Republican and Democratic parties and at least

tolerated by a white public opinion anxious to appear fair toward minorities, the resulting reapportionments produced the largest increase in minority representation in Congress and southern state legislatures since the early 1870s. That upsurge, however, was too much for the right-wing Supreme Court majority.

In the longest chapter in the book, I examine the Supreme Court's decisions on so-called "racial gerrymandering," especially the 1993 decision in *Shaw v. Reno* and its principal successors, *Miller v. Johnson* and *U.S. v. Hays* in 1995, and *Shaw v. Hunt* and *Bush v. Vera* in 1996. I argue that they are radical departures from earlier decisions; that they are based on formalistic standards that ignore both common sense and readily available empirical evidence; that they are inconsistent with each other; that they impose a variety of racial double standards, a separate and unequal equal protection clause that makes it much easier for whites than for minorities to win cases about voting rights; that they ignore or misinterpret evidence from the particular instances of redistricting that they consider, evidence that undermines their conclusions on racial intent; and that, along with other contemporary Supreme Court rulings on redistricting, they also impose a partisan double standard that strongly favors the Republican party which appointed the five-person *Shaw* majority and which benefits most strongly from the ethnic antagonisms that *Shaw* exacerbates. These decisions are not "colorblind," as their defenders claim, but intensely color-conscious. They are designed to make blacks and Latinos the only interest groups that cannot be recognized in redistricting, thus, ironically, employing the Fourteenth Amendment to deny equality to those relatively powerless minorities that the Amendment was meant to protect. If the nation is to fulfill the egalitarian promises of the

Fourteenth and Fifteenth Amendments, I conclude, *Shaw* and its progeny must be reversed.

In one of the few scholarly reviews of *Colorblind Injustice* so far, my position has been linked with those of Chief Justice Roger Brooke Taney in *Dred Scott* and Justice Henry Billings Brown in *Plessy v. Ferguson*, on the grounds that all color-conscious policies are fundamentally the same, and that by recognizing that race always has played a role in redistricting, I am contending that it always should. This is a bit like saying that in *Strange Fruit*, Lillian Smith was attempting to mandate that all sex be interracial, not just to argue for an end to discrimination against people who happened to fall in love with others, of whatever race and perhaps, in some recent interpretations of her work, of whatever gender. If I have to be associated with a Supreme Court justice, I prefer Harlan Fiske Stone, whose famous footnote 4 in *U.S. v. Carolene Products* (1938) recognized the special responsibility of the Supreme Court to insure fair political processes and to protect those “discrete and insular minorities” who were relatively powerless against discrimination by adverse majorities even if the political process was fair.

As an interdisciplinary book, spanning history, political science, and law, *Colorblind Injustice* doesn't quite fit anywhere and gets criticized everywhere. Two of the fundamental postulates of the common law were that the law made sense and that the judges didn't matter -- that law is “found,” not “made” -- and the residue of these postulates still clogs the minds of law professors today. Thus, when I presented a paper based on part of the book at the University of Southern California Law School, faculty members treated with icy disdain my suggestion that the best explanation of the inconsistent, illogical, and unprincipled opinions of the Supreme

Court in *Shaw* and its successors was that a radical majority of the justices was partisan and racially unfair. It was as if I done or said something so embarrassing that the really genteel thing to do was to ignore it. This strikes me as an insular and unproductive response. The only way to build knowledge is to confront and refute findings that you believe are wrong or otherwise not in accord with the evidence.

But that is not a popular methodological stance in history today, either. Thus, in a review of my book by a historian, my efforts to regularize the search for racial and other motives by offering explicit guidelines, as well as to test hypotheses about intent in particular instances, are treated as quaintly naive. According to the reviewer, judges will never respond to anything but their “political values and ideology,” and because historians only “mirror their own times,” attempts to arrive at better explanations through systematic analyses of theories and evidence are futile. Racial reform through the courts is hopeless, and only a new and continuing civil rights movement will accomplish anything lasting.

I reject these counsels of political and intellectual despair, and I think Lillian Smith would have, too. Though she was not a systematic thinker or researcher, and though she relied heavily on psychology and emotion in her books and essays, she did also appeal to reason, and the very act of trying to persuade indicates that she thought persuasion possible, even in times much darker than today’s. It is just as wrong to think that better arguments and evidence never prevail as that they always do, to believe that interest always clouds vision as that it never does. Superior logic and evidence sometimes convince even a hostile judge, and if they do not, they may at least make her law clerks sweat more. Historians find plenty to dispute about within

every generation, and explicit statements and tests of hypotheses, while not trendy today in the discipline of history, have long been the standard practice in science and social science. And while a new grass-roots movement would no doubt be desirable, it is hard to see how it would move life-tenured judges, many of whom serve for a generation or more, or how it would affect such legislative decisions as where, precisely, the boundaries of election districts are to be placed. To wait for a new incarnation of Martin Luther King is paralyzing and to demand it is irresponsible to the task of intellectuals, which is to use what means they have to increase knowledge and understanding, and ultimately, to make a better world. Lillian Smith was dedicated to this task, and I am proud to accept the award given in her name.