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Diversity*, 17 Const. Comment. 1 2000

But Cf. . . .

AGAINST DIVERSITY

"Diversity" is a concept that has outgrown its origins and outlived its usefulness. In the end, it is really just a code word for preferential treatment. With little analytic basis, it was originally designed as a remedy for vague and undocumented fears of covert discrimination. Now it has become instead an automatic haven for the lucky few. Those who are able to benefit from it are, in fact, usually at no greater disadvantage than those who cannot do so. Often the differences between them amount to little more than happenstance. Indeed, some of those who can claim its benefits are *less* likely to be victims of discrimination than some of those who are excluded from its coverage. Outcomes should not turn on the fortuity of characteristics totally irrelevant to the merits.

And diversity itself has become a battleground, spawning much litigation and fierce scholarly battles. Now we have disputes about how to *define* diversity. We have ongoing debates over whether it is properly invoked in a variety of situations beyond the original paradigm. Then there are individual choices that often create further difficulties, fostering dishonesty and manipulation. Some refuse to avail themselves of the benefits of diversity despite their apparent entitlement to do so. Others unwarrantedly try to claim its benefits through lies or subterfuge. Some even attempt to block its use altogether.

Moreover, diversity is not a panacea. Those who benefit from it sometimes find it more of a hindrance than a help and later regret their choice. And, of course, there are always victims: those who suffer because others can turn diversity to their own advantage. And for what? There is no hard evidence that diversity helps eliminate any of the problems that beset those who invoke it. There is indeed a large scholarly literature that attempts to assess whether diversity provisions benefit anyone.

Those who invoke the code word "diversity" are not really seeking equal treatment. They are simply trying to manipulate the system to gain a particular advantage for constituent groups who can only be considered "clients."

Luckily, there is a simple remedy. We need only have the courage to use it: Congress should repeal 28 U.S.C. § 1332 in its entirety, abolishing diversity jurisdiction altogether.

S.S.