

TYRANNY OF THE MINORITY: SUPERMAJORITY VOTING & BUILDING MORE EQUAL LAW SCHOOLS

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In 2025, much is being discussed in the United States about common strategies used to turn democracies towards authoritarianism. Since authoritarian regimes are characterized by disrespect for both the rule of law and its underlying principle, equality before the law, these discussions and the events precipitating them deeply implicate law schools' role in society today. Therefore—particularly for those of us who are civil rights attorneys, teachers, and scholars, but arguably for all in the legal profession and especially at this moment in history—one of the most important aspects of law schools' role is promoting equality.

There are seemingly endless ways by which law schools can—and do—promote equality, many of which are not really about the law school itself. The education and training that law schools provide their students, for instance, shapes legal practice and the law throughout the nation and world. The research and analysis produced by lawyers, law faculty, and students, and fostered by law school-supported law reviews and journal platforms, creates new ideas and knowledge about how law does, can, and should operate. However, in addition to such external-facing influences, law schools have important vectors for promoting and modeling equality within their own walls, opportunities that are too often ignored or squandered.

This essay makes a case for seizing one such internal-facing opportunity: promoting equality through faculty hiring—meaning not only *who* a law school hires onto its faculty but *how* it does so. To start building that case, consider first the “who” in the context of this analogy: at the height of #MeToo, in a *Washington Post* collection of op-eds entitled *The One Best Idea for Ending Sexual Harassment*,¹ the most frequently proposed solution was hiring more women, especially in leadership positions. These op-eds, as well as several others in the compilation, show recognition not only that women are statistically much less likely to sexually harass others, but that the opposite is true: they are more likely to have been harassed or observed colleagues being harassed.² As a result,

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1. *The One Best Idea for Ending Sexual Harassment*, WASH. POST (Dec. 8, 2017), <https://www.washingtonpost.com/blogs/post-partisan/wp/2017/12/08/the-one-best-idea-for-ending-sexual-harassment/>.

2. *Id.*

women—especially women leaders—are more likely to use their power to institute serious sexual harassment prevention methods, thus greatly increasing their workplaces' chances of ending sexual harassment.

Similarly, promoting equality both inside and outside law schools requires leaders—i.e., faculty—whose personal and professional experiences lead them not only to value equality, but also to understand how bias and discrimination undermine equality. Because overly homogenous environments can facilitate such bias and discrimination—usually regardless of the awareness or values of the homogenous in-group—when new, out-group entrants start to diversify a previously homogenous workplace or profession, it is especially critical that the leadership is diverse as well. Diverse faculty—like all leaders—have the power to advance equality and/or any number of other principles they value, but like women leaders in the case of ending sexual harassment, diverse faculty's own experiences and/or the experiences of those close to them increase their likelihood of success in that advancement.

Yet as the remainder of this essay details, diversifying law school faculties has proven to be extraordinarily difficult, and these failures often have as much to do with the “how” as with the “who.” That is, if individuals or institutions do not think bias exists—something much more likely to occur in homogenous environments—then they likewise are unlikely to identify the bias-related barriers to diversifying a faculty. Moreover, even those who see bias and bias-related barriers often primarily notice individual *attitudes* resulting from implicit and explicit biases, even though structural aspects of the faculty hiring process can be equally important obstacles to diversifying a law school's faculty.

This essay therefore delves into some of these structural barriers, including how they provide scaffolding for attitudinal biases, then does a deeper dive into one such practice: the rule, adopted by some but not all law faculties, that a supermajority of voting faculty vote in favor of hiring each faculty candidate. Drawing parallels with other supermajority rules, like the filibuster, this essay's analysis shows how this practice empowers those who actually represent a minority of a faculty to throw up obstacles to a majority's efforts to diversify. It concludes that faculties should eliminate practices such as supermajority voting rules, as well as other similar structural obstacles to diverse faculty hiring, so that they stop providing biased scaffolding for attitudinal biases.

I. DIVERSE FACULTIES' CONTRIBUTIONS TO A MORE EQUAL LAW SCHOOL EXPERIENCE AND LEGAL PROFESSION

The benefits of diversity in education have been articulated so many times for so many years that they have become an “of course!”-kind of proposition. Yet this now truism of education almost always focuses on “feel-good” benefits such as the greater diversity of ideas and talents that can be expected when schools widen the pool of communities from which they draw students, faculty, and staff. This rose-colored-glass-tinged perspective is often generated by a reluctance to acknowledge the darker undercurrent of “identity capitalism”—explained by Professor Nancy Leong as the exploitation of superficially including marginal

outsiders for the benefit of privileged insiders.³ This reluctance in turn contributes to institutional cultures of *de facto* segregation and increasing dissatisfaction, anger, and cynicism on the part of those who experience bias and who feel it is being willfully ignored.

Although leaders of educational institutions—here, of law schools—have numerous methods by which they can intervene in and try to shift such dynamics, it is hard to think of one that does not start with diversifying the faculty. If one wishes to educate a relatively homogenous faculty—especially one with an even more homogenous past—about gender- and race-based bias, for example, one needs people who not only understand at least some of the dynamics of such biases, but also *care* about reducing such biases. While just being part of a historically disempowered group—an “outgroup” in Leong’s language—doesn’t make one an expert on bias, it does make one more likely to have more information and understanding of bias than faculty who are in historically powerful “ingroups.”

As anyone who has been designated the “token” diverse faculty member on an otherwise homogenous committee has experienced, however, it is massively unfair to place all the burden of educating those who have few experiences with bias on the shoulders of one or even a few of those who do have such experiences. Moreover, that burden is often piled on top of the other burdens those who are tokenized are asked to carry. For instance, as university promotional materials acknowledge,⁴ many schools—law schools included—seek to recruit increasingly diverse student populations, especially with regard to race and gender, and in many respects, they have been quite successful. However, diverse student populations bring a greater diversity of needs, including needs related to the bias that these new entrants into legal education and the legal profession face. Those diverse students often seek out faculty with whom they share a community or an identity to get help with such needs, piling greater responsibilities on these diverse faculty. As a matter of logic, experience, and research,⁵ the fewer faculty who share an identity or community with these students, the greater the burden on those faculty.

3. See NANCY LEONG, *IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY* 2-3 (2021) (defining “ingroups” as those people whose shared identity puts them in “the group that control[s] power and resources” and “outgroups” as “the group, often a numerical minority, without access to the ingroups’ power and resources”).

4. *Id.* (“Colleges and universities enhance their appeal to prospective students by featuring members of outgroups in their promotional materials.”).

5. See generally DOROTHY EVENSEN & CARLA D. PRATT, *THE END OF THE PIPELINE: A JOURNEY OF RECOGNITION FOR AFRICAN AMERICANS ENTERING THE LEGAL PROFESSION* (2012) (discussing the different experiences of African American law students and new lawyers in comparison to their white peers, as well as the programs and policies that do or can assist them); see also MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* (2019) (reporting Dr. Deo’s extensive empirical research comparing the professional and personal experiences of women of color professors with white women, white men, and men of color faculty from assistant professor through dean emeritus); ANGELA P. HARRIS & CARMEN G. GONZÁLEZ, *Introduction*, in *PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA* 1, 1-8 (Gabriella Gutiérrez y Muhs et al. eds., 2012) (describing the contents of the essays included in the edited volume, consisting of narratives of women faculty of color’s experiences in American academia, as well as both quantitative and qualitative research regarding those experiences, including with regard to student expectations of women faculty of color).

For these reasons—and many, many more—a faculty needs to be more diverse than just having an island or two of diverse faculty members in a sea of homogeneity. Only with a truly diverse faculty are there enough people to handle the enormous teaching and service-related workload of supporting a diverse student body, while still contributing diverse ideas and perspectives both inside and outside the law school, never mind (getting back to my original example) educating their colleagues about bias and how to reduce and address it.

II. HOW BIASED ATTITUDES AND HIRING PRACTICES “TEAM UP” TO SUPPRESS FACULTY DIVERSITY

Of course, to achieve a diverse faculty, a law school must overcome barriers that often seem virtually insurmountable. For instance, law faculties have long been accused of uncritically gravitating towards faculty candidates who are “like them,” a tendency that leans toward sustained and even increasing homogeneity among a faculty in both the short and long term, as the faculty repeatedly replicates itself.⁶

Several common faculty hiring practices play a role in this replication of homogeneity and often powerfully influence entry-level hiring, in particular. As a result, a committee specially formed by the Association of American Law Schools, the Committee on Recruitment and Retention of Minority Law Teachers and Students (CRRMLTS), held a panel on “Reimagining Law School Faculty Recruitment.”⁷ Panelists, including two law faculty who write and speak about minority faculty hiring and bias in the hiring process, four current or past law school deans, and one college president, discussed several of such practices.⁸

Drawing from the CRRMLTS remarks—in particular remarks by Professor Carliss Chatman, based on research and experiences discussed in her co-authored (with Professor Najarian Peters) article, *The Soft-Shoe and Shuffle of Law School Hiring Committee Practices*⁹—as well as my own experiences, the paragraphs that follow describe several examples of hiring practices that serve as scaffolding for individual biases. All of the practices Professor Chatman discusses, she identifies as having been named by at least ten different law faculty sources.¹⁰ I have added to that list several hiring practices that I have experienced multiple times at the ten or so law schools at which I did campus visits during my years on the entry-level and junior lateral hiring markets, and/or at one of the five law schools at which I

6. THE ASS’N OF AM. L. SCHS., *AALS Committee on Recruitment and Retention of Minority Law Teachers and Students – Reimagining Law School Faculty Recruitment* (SoundCloud, independently recorded Jan. 6, 2024), https://m.soundcloud.com/aals-2/aals-committee-on-recruitment-and-retenti-on-of-minority-law-teachers-and-students-reimagining-law-school-faculty-recruitment/s-JpJmYx5SR5x?si=741d851d48104883ab4df57306a880a4&utm_source=clipboard&utm_medium=text&utm_campaign=social_sharing.

7. *Id.*

8. *Id.*

9. Carliss N. Chatman & Najarian R. Peters, *The Soft-Shoe and Shuffle of Law School Hiring Committee Practices*, 69 UCLA L. REV. DISCOURSE 2 (2021).

10. THE ASS’N OF AM. L. SCHS., *supra* note 6.

have served on the faculty or in positions that allowed me to observe the faculty hiring process.

First, many law school faculties bemoan a “pool problem” in, especially, the entry-level hiring market, claiming that too few diverse faculty candidates—or even none at all—are available for hiring. Several of the CRRMLTS panelists noted the ways in which law schools’ narrow criteria for determining who is a candidate worthy of consideration drastically reduces the pool of candidates who are diverse in one or more ways. These criteria include: (1) the limited number of law schools at which an acceptable candidate must have gotten their degree(s) (with a heavy emphasis on degrees from two law schools in particular); (2) the expectation that candidates have done a judicial clerkship (one as high in the federal courts as possible), a prestigious fellowship or Visiting Assistant Professorship, a Ph.D. in addition to their J.D., or, increasingly, all three; and (3) the number of highly-placed scholarly articles a candidate has published beyond their job talk paper.

The pool gets narrowed even further by a combination of what Professor Chatman calls the “competition for the market star” and the “we’re all Yale” phenomena,¹¹ both of which are similar to concepts about which her co-panelist, Dean Angela Onwuachi-Willig, wrote nearly fifteen years ago.¹² According to their and my own observations, these phenomena work in the following way: (1) one diverse candidate with all or nearly all of the narrow criteria listed above gets identified as the single diverse candidate that every law school wants and believes will welcome an offer from that school; (2) this candidate gets forty-plus screening interviews and twenty-ish callbacks; (3) every school—no matter the school’s geography, salary levels, place in the “pecking order” of law schools, and/or the competitiveness of the offer it can make to the “market star”—is convinced that this candidate will not only welcome but accept its offer; and (4) other diverse candidates with ninety percent or more of the market-star’s qualifications are rejected as not being good enough.

In my experience, these phenomena are not necessarily limited to diverse candidates—but the closer a candidate mirrors the characteristics of the existing, homogenous faculty, the more likely that candidate will be regarded as a market star (the article “a” instead of “the” here shows how more than one non-diverse candidate can have this moniker, whereas there is generally only one diverse market star). Even when the diverse candidates’ qualifications far surpass the more-homogenous candidates’ (e.g., a friend of mine once remarked of such a direct comparison: “if he’s a rockstar, she’s Beyonce”), faculties too rarely follow Professor Chatman’s solution to this problem and simply evaluate diverse candidates the same way they evaluate more-homogenous candidates, including by accepting diverse candidates who are perhaps more average.¹³ As several

11. *Id.*

12. Angela Onwuachi-Willig, *Complimentary Discrimination and Complementary Discrimination in Faculty Hiring*, 87 WASH. U. L. REV. 763 (2010).

13. See Chatman & Peters, *supra* note 9, at 6.

CRRMLTS panelists pointed out, in the law teaching market, “average” is already exceptional.¹⁴

In the entry-level hiring market, the hiring practice of focusing exclusively or nearly exclusively on assessments of a candidate’s scholarship in the hiring decision adds additional scaffolding for attitudinal bias. Assessment of quality in any scholarship is a notoriously subjective endeavor, and in legal academia, agreement does not even exist as to the *kind* of scholarship that is most worthwhile.¹⁵ In my experience, faculties also disagree as to how much scholarship an entry-level candidate should have. On the one hand, entry-level candidates who have fewer pieces of completed scholarship will be judged on “scholarly potential,” an assessment that essentially allows the hiring faculty to fantasize about what an entry-level candidate will write in the future. If a faculty member otherwise thinks a candidate is a worthy hire, including because the candidate “looks like a law professor”—i.e., shares characteristics with the existing, homogenous faculty—that faculty member’s fantasies about what the candidate will write in the future will support hiring that candidate. The opposite also commonly occurs, and in neither case is the assessment of scholarly potential particularly based in reality. On the other hand, if the entry-level candidate has many publications, such scholarly productiveness can be discounted in other ways, such as by dismissing the candidate’s scholarship as “trendy or gimmicky” (a statement often made about race-, gender-, sexuality-, etc.-related topics in particular).¹⁶ Either way, biased attitudes—sometimes explicit, but usually implicit—play an outsized role when candidates’ “worthiness” is virtually exclusively based on scholarship.

Moreover, such discounting of scholarly productiveness is only one example of how each of the qualifications so valued in the portfolio of the single diverse market-star and the several more homogeneous market stars can be easily devalued in other candidates through the operation of double-binds and double-standards. For instance, not only can a candidate’s scholarship be questioned, but so can a candidate’s other qualifications through what Professor Chatman terms “the mini tenure review.”¹⁷ Only diverse—not homogeneous—candidates are subjected to the mini-tenure review, often at the insistence of one hiring faculty member who is determined to “expose” diverse candidates as people who have managed to con the multiple top-tiered schools, courts, and/or employers listed on their CVs. As a result, the diverse candidate’s scholarship and other qualifications are extra-closely scrutinized, including through requests outside the hiring law school to senior faculty in the field. At the baseline of such behaviors is a mix of stereotypes such as the stereotype that women—especially women of color—are not credible,¹⁸ as

14. THE ASS’N OF AM. L. SCHS., *supra* note 6.

15. Danielle K. Citron & Robin West, *On Legal Scholarship*, in CURRENT ISSUES IN LEGAL EDUC. 1, 2 (2014), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1074&context=shorter_works.

16. See Chatman & Peters, *supra* note 9, at 9.

17. *Id.*

18. See Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 40 (2019).

well as the stereotype, particularly directed at African Americans, that they are not as smart as white people (a stereotype widespread and old enough to be the subject of a 1977 *Saturday Night Live* skit that included civil rights leader Julian Bond).¹⁹ Combined, these stereotypes create the suspicion among some hiring faculty that impressively-credentialed diverse candidates must be “scammers”²⁰ because they cannot possibly be as smart as their credentials suggest they are.

Many of the CRRMLTS deans discussed the importance of making sure that the hiring faculty members described above (i.e., those always seeking to expose diverse candidates as supposed con artists) do not sit on the appointments committee.²¹ This advice acknowledges appointments committees’ critical gatekeeper function, which is in turn related to another entry-level hiring practice that acts as scaffolding for attitudinal bias in the hiring process. That is, when the appointments committee can decide whether to advance a candidate to a full faculty vote after a callback interview. Under this practice, biases held by faculty both on and off the committee can be allowed greater influence by, for example, a faculty member on the appointments committee who does not support a candidate claiming that faculty not on the committee do not support the candidate, usually despite not having written evaluations from enough hiring faculty to determine accurately the strength of the support or opposition to the candidate. Such post-callback gatekeeping is easily avoidable (unlike hiring committees’ inevitable *pre*-callback gatekeeping) through adopting a rule—as many law schools have—that all callback candidates will simply be advanced to a full faculty vote. Such automatic advancement eliminates any justification for giving certain faculty members unequal power and influence over whether a candidate gets a full faculty vote and allows all of the hiring faculty an equal vote once they have all had an equal chance to read candidates’ scholarship, attend their job talks, and/or interview them.

Finally, the CRRMLTS panel noted repeatedly the “getability” justification, collectively described in the following way: numerous schools all make offers to the diverse market star and, occasionally, to a few other diverse candidates who are almost as spectacularly credentialed.²² Many of those offers are unattractive, either because the school is not capable of overcoming certain, often geographic, realities (e.g., the lack of an Asian grocery store or a salon capable of competently cutting and styling a Black person’s hair) or because the school is unwilling to offer/negotiate tangible and intangible items (like a smaller teaching load, more scholarship support, etc.). Then, when the diverse star turns the offer down, that candidate is blamed with such conclusions as “these people” “don’t appreciate our culture; they don’t get how awesome we are.” Even more troubling, this single diverse candidate’s rejection of a demonstrably inadequate offer (regardless of whether that inadequacy is the hiring faculty’s “fault”) becomes justification for

19. Julian Bond, *Civil Rights Leader Julian Bond’s SNL Hosting? Regret (Guest Column)?*, THE HOLLYWOOD REP. (Jan. 15, 2014, at 07:00 ET), <https://www.hollywoodreporter.com/tv/tv-news/snl-civil-rights-leader-julian-671054/>.

20. See Chatman & Peters, *supra* note 9, at 6.

21. THE ASS’N OF AM. L. SCHS., *supra* note 6.

22. *Id.*

not even bothering to screen future diverse candidates, based on the attitude that “diverse candidates obviously don’t want to come here, so trying to recruit and hire them in the future is a waste of time.”²³ Yet in my experience, such “getability” reasons are rarely ever discussed as a reason not to consider more-homogenous market stars in future hiring cycles.

The examples above are a mix of structural and attitudinal biases, including many that are implicit and not conscious. As illuminating as they are, however, none come close to demonstrating the power of the bias that a hiring practice can structurally enable as do supermajority voting rules. Accordingly, the remainder of this essay will focus on how such voting rules, requiring a supermajority (usually sixty percent or two-thirds) to make an offer to a faculty candidate, act as scaffolding for attitudinal biases both inside and outside legal academe.

III. SUPERMAJORITY VOTING RULES AS DIVERSITY-SUPPRESSING HIRING PRACTICE

Supermajority voting rules are not uniformly followed by law school faculties—even faculties of similar profiles—nor are their purposes clear. For example, based on responses to my inquiries via law school listservs and to several friends on other law school faculties, as well as my own direct knowledge of several law schools, every “tier” of law schools has both supermajority and simple majority faculty hiring rules.²⁴ And with regard to the policy goals of such voting rules, the only reasons I have heard advanced deal with the relationship between voting rules for hiring and those for tenure, justifications that often contradict each other. Some faculty shared that hiring at their institution requires a supermajority because tenure votes require a supermajority, and the two rules must be consistent. At other schools, consistency is apparently not a concern, with supermajority hiring rules being required because tenure votes use a *simple* majority—the justification being that hiring supermajorities somehow guard against overly easy tenure determinations. Finally, at least one response to my listserv postings described the responder’s school’s rules as a simple majority for hires but a supermajority for tenure.²⁵

23. *Id.*

24. I posted the following question to two listservs: “does your law school require a simple majority (over fifty percent) or a supermajority (typically sixty percent or two-thirds, although other percentages above the simple majority threshold would technically count as a supermajority) of voting faculty members to approve making an offer to a faculty candidate?” Of the approximately two dozen institutions represented in the responses I received, not only were faculties using simple majorities and supermajorities evenly split, in each “tier” of the 2024 U.S. News Rankings (1-50, 51-100, 101-150, 151-196), there were both simple majority and supermajority faculties represented.

25. Several listserv responses shared more information about hiring practices or their effects at various law schools. For instance, several respondents spontaneously shared their views that supermajority voting had disparately negative effects on faculty candidates of color or those from marginalized backgrounds. Another example dealt with the use and interpretation of rules that candidates to whom the voting faculty expressed “substantial opposition” would not be made an offer. At one school, “substantial opposition” had traditionally been interpreted to mean that a supermajority of the faculty had to vote in favor of a candidate. At other schools, after the faculty voted (whether the voting rule was a simple majority or a supermajority), the dean was charged with

Despite this lack of clear policy objectives, the *effects* of supermajority voting rules as a faculty hiring practice are both quite evident and consistent with what we know about supermajority voting rules in other contexts. For instance, in corporate law, supermajority voting rules are widely understood to “create[] a powerful holdout right.”²⁶ Similarly, when a faculty adopts a supermajority voting rule, it empowers a minority of the faculty to hold out against the preferences of the majority. In the case of a law faculty that has historically been quite homogenous and is trying to move in a more diverse direction, the faculty who “represent” homogeneity in both senses of the word (i.e., they not only fit into the identity categories that dominated the faculty’s homogenous past, but they support continuing that homogeneity) can retain disproportionate power. As such, they can keep a faculty from diversifying, even when a majority of their colleagues would support such diversification.

Some would perhaps say—at least with a faculty that has successfully moved in a more diverse direction over time—that a rule allowing a minority who represents a faculty’s more homogenous past to retain disproportionate levels of power in hiring decisions just requires some patience on the part of the more diverse majority, as that majority will eventually become a supermajority. Such reasoning has several potentially fatal flaws. First, the expansion of the diverse majority is hardly inevitable, especially if a minority is enabled by a supermajority voting rule to block the hiring of additional faculty who will add diversity, thus halting or reversing overall faculty diversification. Such minorities could succeed in authorizing deans only to make offers to candidates who share the characteristics of the homogenous minority. Moreover, the frustration with the inequalities of the voting rules—which are much more likely to be identified as biased by newer faculty entrants who do not “fit in” with the homogenous minority—could induce the diverse newer entrants to lateral to another faculty, retire if eligible, or otherwise disengage with the law school and their biased colleagues.

Second, the law school could fail to hire *any* new faculty should the diverse majority fail to vote for candidates who fit the homogenous minority while that minority is blocking the hiring of more diverse candidates. Failed searches make all faculty feel as if their time has been wasted. However, they also exacerbate the inequitably greater teaching and service workloads of diverse faculty resulting from the aforementioned mismatch between a diverse student body and a more homogenous faculty. As a result, failed searches can add to the factors pushing diverse faculty to lateral, retire, or otherwise disengage. Any diverse faculty who remain might, once tenured and secure in their faculty posts, refuse to take on the greater burdens already discussed. Since that work does not go away, the law school will have to find other ways of getting it done, a reality that could lead to, for instance, the hiring of more adjunct professors to cover teaching needs that the

talking to faculty members in opposition to a candidate to assess the strength of that opposition, which was then factored into the determination regarding whether there was “substantial opposition” on the faculty.

26. Usha Rodrigues & Mike Stegemoller, *Exit, Voice, and Reputation: The Evolution of SPACS*, 37 DEL. J. CORP. L. 849, 849 (2011). My thanks to my colleague, Professor Maya Watson, for suggesting I look at supermajority voting rules’ function in corporate law and for recommending sources to get me started.

faculty's hiring dysfunction has made impossible to cover with tenure-track faculty. "Adjunctification" is recognized as a real threat to the academy's values and contributions in other disciplines²⁷ that have not been as protected from this trend as law faculties have (largely due to ABA accreditation standards²⁸).

Finally, although homogeneity does not *automatically* lead to bias, research confirms that homogenous groups—both within and outside of legal academia—tend to be less aware of bias, the problems that come with mismatches between homogenous and diverse groups, or even of their own homogeneity.²⁹ For those in the homogenous group, in other words, oftentimes homogeneity just looks like the status quo, and—especially for insiders who have benefitted from and are invested in the status quo—not only is there nothing wrong with the status quo, but the status quo is affirmatively worth fighting to preserve.

Thus, having supermajority voting rules for faculty hiring is likely to make diversifying a faculty more difficult and to give attitudinal biases longer and stronger legs than they would have on a faculty which uses a simple majority voting rule. As the corporate law professors referenced above hint at, moreover, the evidence of inequality and bias resulting from supermajority voting rules can be found in numerous other legal and political contexts. Accordingly, the next section looks at examples of supermajority voting rules in the constitutional, corporate, legislative, and tax law contexts, some of which simply enhance the power of those already in power to maintain that power and others of which clearly use supermajority voting rules to maintain and enhance *white supremacist* powers specifically.

27. See Hank Kalet, *Adjuncts: The Gig Workers of Higher Education*, PROGRESSIVE MAG. (Feb. 8, 2023, at 13:54 ET), <https://progressive.org/op-eds/adjuncts-gig-workers-of-higher-education-kale-t-230208/>.

28. See Dan Rodriguez, *ABA Accreditation Regs: Proposed Adjunct Rule Rollback*, PRAWFSBLAWG (June 19, 2017, at 10:18 ET), <https://prawfsblawg.blogs.com/prawfsblawg/2017/06/aba-accreditation-regs-proposed-adjunct-rule-rollback.html> (discussing an effort to roll back these restrictions, an effort that was unsuccessful). Compare A.B.A., ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 32 (2013-2014), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.pdf, with Memorandum from Gregory G. Murphy, A.B.A. Council Chairperson to Interested Persons and Entities 2 (Mar. 24, 2017), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20170324_notice_and_comment_memo.authcheckdam.pdf (on file with author) (rule appearing unchanged from the version listed in footnote 1 of the 2017 proposal).

29. See, e.g., JENNIFER L. ERBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO (2019) (extensive review of implicit or unconscious racial bias research, including stories, science, and strategies to address such bias); *Understanding Unconscious Bias*, HARV. T.H. CHAN SCH. OF PUB. HEALTH: OFF. OF DIVERSITY & INCLUSION, https://content.sph.harvard.edu/wwwhsph/sites/2597/2022/06/Types-of-Bias-Ways-to-Manage-Bias_HAN_DOUT-1.pdf (last visited Dec. 18, 2025) (reviewing different kinds of bias, including unconscious or implicit bias, “[a]ffinity bias - [t]he tendency to gravitate toward people similar to ourselves,” and “[c]onfirmation bias - [t]he tendency to look for pieces of information that support our pre-existing views and ignore data that contradicts our views”).

IV. SUPPRESSING DIVERSITY VIA SUPERMAJORITY RULES OUTSIDE OF THE LEGAL ACADEMY

In the absence of clear reasons for supermajority voting rules in the faculty hiring context—whether from widespread and consistent past practice or substantive policy goals—I decided to look outside of legal academia for examples to elucidate why supermajority voting rules are adopted. As a result, I discuss, *infra*, two doctrinal areas in which supermajority voting is quite common, corporate law and constitutional law, and for which a fair amount of scholarly discussion has teased out the goals and purposes, as well as the undesirable side effects of these rules. Next, I examine examples from the legislative process and from specific laws, each of which shows that supermajority voting rules may not just *happen* to create *side* effects of inequality and bias, but can in fact be *structured* to do exactly that, specifically to protect white supremacy through structures that are inextricably tied to the U.S.’s history of chattel slavery.

Beginning with corporate law, the Corporate Finance Institute describes the basic point of supermajority voting rules for business organizations as ensuring “corporate actions that may significantly impact the future of the company” have the support of “a large majority of shareholders.”³⁰ Investopedia gives the following examples as the kinds of “[c]orporate decisions that usually require a supermajority[:] mergers and acquisitions, executive changes, and taking a company public.”³¹ In this sense, one can see that corporate law uses supermajority rules to promote stability by making fundamental changes to the corporation subject to a supermajority.

However, the negative side effects of supermajority voting rules in the corporate context are so common and obvious that these basic informational sources immediately acknowledge them, stating that they “may cause gridlock among shareholders,” “adversely affect the corporate efficiency of the company [by making] it more difficult for corporate actions to pass,” and “may allow for a minority to block the preferences of the majority.”³² Even accounting for the fact that voting power in a corporation is based on number of shares held, whereby one individual shareholder votes their percentage of the shares of the company, as opposed to the one-person-one-vote democratic principle, supermajority voting “can prevent a certain action from taking place if [a small group] do[es] not think it is in their best interest, even though it might be for the company.”³³

On a more complicated level, the gridlock problem can empower corporate managers at the expense of shareholder power. For instance, a report on *ESG and Responsible Institutional Investing Around the World* discusses the academic

30. *Supermajority Voting Provision*, CFI, <https://corporatefinanceinstitute.com/resources/equities/supermajority-voting-provision/#> (last visited Dec. 18, 2025) [hereinafter CFI Webpage].

31. James Chen, *Supermajority: What It Means, Examples in Corporate Finance*, INVESTOPEDIA (June 27, 2021), <https://www.investopedia.com/terms/s/supermajority.asp>.

32. CFI Webpage, *supra* note 30.

33. Chen, *supra* note 31.

literature on investing based on nonfinancial data,³⁴ including the efforts of various shareholder groups to use their power to compel corporate managers to factor ESG considerations into their decisions. The report discusses an “influential article” in which the authors created a “governance-index” based on “power-sharing rules between investors and managers” that includes supermajority voting rules on the list of governance provisions that “restrict shareholder rights (increase managerial power)”³⁵ and was later used by another group of authors to create a “Entrenchment-Index” of governance provisions that allow managers to block mergers and acquisitions through, among other strategies, requiring shareholder supermajorities to support them.³⁶

Although the corporate law literature does not seem to use the term “status quo” frequently to describe what supermajority voting rules allow managers to protect, the kinds of corporate changes that require supermajorities are those that certainly would upset the status quo. For instance, they could lead to managers losing their jobs entirely (e.g., as the result of a merger or acquisition) and/or managers’ jobs being significantly changed (e.g., in any executive changes approved by shareholders).

In constitutional law, however, in which discussion of both the purposes and undesirable side effects of supermajority voting rules are also common, protection of the status quo is mentioned frequently in the literature. For example, in *Countersupermajoritarianism*, law professors Frederic Bloom and Nelson Tebbe criticize a trend among “[c]onservative constitutional theorists” who claim that “supermajorities are better, politically and constitutionally, than majorities,”³⁷ pointing out that

[s]upermajority rules...privilege one possible outcome over all others: the status quo. In a supermajoritarian regime, those who benefit in the status quo will be more likely to benefit in the future—for the current state of affairs is deliberately and decidedly harder to change. Those who suffer now, in turn, will be more likely to suffer in the future as well.³⁸

Furthermore, they note,

Supermajority rules...may in fact harm vulnerable minorities...[by] allow[ing] the adoption of policies that are truly harmful in a net-utility sense, so long as the harms are sufficiently concentrated on a particular out-group. And they may thwart any real

34. PEDRO MATOS, CFA INST. RSCH. FOUND., *ESG AND RESPONSIBLE INSTITUTIONAL INVESTING AROUND THE WORLD: A CRITICAL REVIEW 1* (2020), <https://www.cfainstitute.org/sites/default/files/-/media/documents/book/rf-lit-review/2020/rflr-esg-and-responsible-institutional-investing.pdf>.

35. *Id.* at 16.

36. *Id.* at 16-17.

37. See Frederic Bloom & Nelson Tebbe, *Countersupermajoritarianism*, 113 MICH. L. REV. 809, 813, 815 (2015).

38. *Id.* at 817; see also Melissa Schwartzberg, *Should Progressive Constitutionalism Embrace Popular Constitutionalism?*, 72 OHIO ST. L.J. 1295, 1305-09 (2011).

momentum for progress, since supermajority rules may make it impossible for out-groups to build coalitions capable of transforming the status quo.³⁹

Political scientist and constitutionalism scholar, Professor Melissa Schwartzberg, explains this dynamic further: “supermajority rules...may grant a veto to already powerful minority groups rather than to vulnerable ones...[and/or] instead benefit once powerful minority groups, seeking to lock in their interests.”⁴⁰ Thus, these scholars all agree that—especially in the “real world”—supermajority voting rules are often most favored by already powerful individuals and groups who benefit from the status quo. They point to specific evidence of their structural inequality and bias, moreover, such as the failure of the Equal Rights Amendment,⁴¹ and the timing of conservative constitutional theorists’ infatuation with supermajority voting rules, which coincide with present and anticipated demographic shifts as the U.S. heads towards soon being a “minority-majority” country.⁴²

Professors Bloom and Tebbe also discuss the filibuster in the U.S. Senate, which the Brennan Center for Justice describes as “an attempt to delay or block a vote on a piece of legislation or a confirmation” using a procedural rule that requires sixty votes to end debate on the Senate floor.⁴³ They explain that “Senate filibuster rules now effect a form of supermajoritarianism...that defeats popular, even overwhelmingly popular, sentiment. Far from securing true political ‘consensus,’ in fact, they may do just the opposite...allowing as little as one-tenth of the population to thwart overwhelming democratic will.”⁴⁴

Although these authors do not focus on it, and although the filibuster was not explicitly created to perpetuate a *white supremacist* status quo, it has most often been used for exactly such purposes. President Obama called it a “Jim Crow relic,”⁴⁵ a reference to a history dating back to its use by pro-slavery Southern senators before and after the Civil War.⁴⁶ According to one study, fifty percent of the filibusters between 1917 and 1994 succeeded in derailing civil rights measures that would have targeted racial discrimination and inequality.⁴⁷ Another confirmed that “during the Jim Crow era [] it was widely taken for granted that the filibuster

39. Bloom & Tebbe, *supra* note 37, at 818.

40. Schwartzberg, *supra* note 38, at 1311.

41. *Id.* at 1313.

42. Bloom & Tebbe, *supra* note 37, at 825.

43. Tim Lau, *The Filibuster Explained*, BRENNAN CTR. FOR JUST. (Apr. 26, 2021), <https://www.brennancenter.org/our-work/research-reports/filibuster-explained?ref=popsugar.com>.

44. Bloom & Tebbe, *supra* note 37, at 819.

45. Max Cohen, *Obama Calls for End of ‘Jim Crow Relic’ Filibuster if It Blocks Voting Reforms*, POLITICO (July 30, 2020, at 15:10 ET), <https://www.politico.com/news/2020/07/30/barack-obama-john-lewis-filibuster-388600>.

46. Sarah Binder, *Mitch McConnell Is Wrong. Here’s the Filibuster’s ‘Racial History.’*, WASH. POST (Mar. 24, 2021), <https://www.washingtonpost.com/politics/2021/03/24/mitch-mcconnell-is-wrong-heres-filibusters-racial-history/>.

47. *Id.*

was directly tied to [blocking] civil rights.”⁴⁸ Furthermore, during the administration of the nation’s first and only Black president, in less than five years, nearly one and a half times the number of presidential nominees were filibustered than in the previous six *decades*.⁴⁹

Another example even more obviously linked to demographic shifts and the maintenance of a white supremacist status quo can be found in the supermajority rules related to state and local tax codes adopted by Southern states during Jim Crow. These rules were part of demographic shifts that took place first in the South, after the Civil War, when the Reconstruction Amendments and civil rights laws made formerly enslaved people all-of-a-sudden full citizens and no longer three-fifths of a person with no rights whatsoever, and then spread North as a result of Black Americans’ Great Migration to escape Jim Crow.

As tax professor Francine Lipman details, during the Jim Crow period, these supermajority voting rules helped to shift tax burdens so that “black tax rates were between two and six times as high as white tax rates,”⁵⁰ as well as to ensure that those inequalities endure until today.⁵¹ This shift was accomplished by requiring a supermajority vote for any tax increase, thereby compelling states to rely instead on “fines and fees that disproportionately push people of color into debt, the cycle[s] of impoverishment, unwarranted engagement with the criminal justice system, and even incarceration and death.”⁵² “[S]outhern states led by white, wealthy legislators passed new constitutions to...ensure that any antiracist policy changes to racist tax systems would be nearly impossible by requiring supermajority votes...to approve all state tax increases while simultaneously disenfranchising nearly all Black voters,” tactics that “spread across America” after the Great Migration and Civil Rights Movement.⁵³

Finally, another Civil Rights Movement-related example derives from those same Southern states harkening back to the Confederacy to express opposition to *Brown v. Board of Education* and the legal changes that followed. As recounted by its Supreme Court, in South Carolina anger at *Brown* was so intense, the legislature passed a law directing the state’s capitol to fly the Confederate flag, kicking off nearly sixty years of fighting to remove it again, the last episode of which included adopting a supermajority voting requirement to make removing the flag and other Confederate symbols more difficult.⁵⁴ As a result, it was not until 2015, when a white supremacist killed nine African Americans worshipping at the Charleston AME Church, that two-thirds of both legislative houses voted to

48. Zack Beauchamp, *The Filibuster’s Racist History, Explained*, VOX (Mar. 25, 2021, at 11:20 ET), <https://www.vox.com/policy-and-politics/2021/3/25/22348308/filibuster-racism-jim-crow-mit-ch-mcconnell>.

49. Lindsay Holst, *Here’s Why Today’s Filibuster Rule Change Is a Big Deal*, PRESIDENT BARACK OBAMA WHITE HOUSE (Nov. 21, 2013, at 16:19 ET), <https://obamawhitehouse.archives.gov/blog/2013/11/21/heres-why-todays-filibuster-rule-change-big-deal>.

50. Francine J. Lipman, *How to Design an Antiracist State and Local Tax System*, 52 SETON HALL L. REV. 1531, 1538 (2022).

51. *Id.* at 1540.

52. *Id.* at 1542.

53. *Id.* at 1538-39 (citations omitted).

54. *Pinckney v. Peeler*, 862 S.E.2d 906, 910 (S.C. 2021).

remove the flag.⁵⁵ Subsequent litigation invalidated the supermajority voting requirement in the statute, with the South Carolina Supreme Court reasoning that the state constitution did not authorize a legislature to limit the powers of future legislatures.⁵⁶

CONCLUSION

Now more than ever, U.S. law schools must do all they can to protect the rule of law and the principle at its core: equality before the law, including by confronting bias and discrimination and taking steps to eliminate them in law faculty hiring. Although bedeviled by challenges, many of which harken back to faculty homogeneity, any law faculty that takes diversifying seriously will eliminate structural scaffolding for attitudinal biases. Most critically, supermajority voting rules must be abandoned, as they have been shown in contexts outside of law schools to have the purpose and effect of maintaining the status quo, including a white supremacist status quo.

55. Jeffrey Collins, *S. Carolina Law Makes It Tough to Lower Confederate Flags*, AP NEWS (Feb. 26, 2017, at 10:30 ET), <https://apnews.com/general-news-6ba0b159cbec441aa6b93b2a80527687>.

56. *Pinckney*, 862 S.E.2d at 920.