



John Samples on the Filibuster

By: Jason Sorens - January 29, 2013

Allowing majority rule to always trump minority interests would undercut the intent and structure of the Constitution, with its many protections of minorities from the tyranny of majorities.

As political scientist Gregory Koger has noted, the filibuster has been used to force Senate majorities to consider minority amendments. A majority has every reason to prevent such amendments; they often force senators in the majority to cast tough votes on controversial issues. By forcing amendments, however, the filibuster enhances accountability while expanding the scope of the debate.

While the House is organized along partisan lines, the Senate is much more individualist, partly because of the filibuster. Getting rid of the filibuster would increase the power of party leaders. Will senators represent their states better if they are more at the mercy of party leaders? In a polarized age, do we really need more partisanship in the Senate?

The current threat of filibusters requires the majority party to move toward the center, satisfying more voters. In a polarized time, the filibuster tends to make Senate actions more representative of the nation as a whole.

John is right that the filibuster makes the Senate a more consensual body and drags what the Senate passes toward the national median. He's also right that the U.S. system of government is one of separation of powers and a large number of veto players, and the filibuster merely sharpens that feature of the system.

But all political institutions pose tradeoffs. In my last post on the topic, I noted that the filibuster has important harmful consequences for the federal judiciary and tax code. What John celebrates as the individualist character of the Senate also opens the door wider to parochial pork and lobbyist influence. If one Senator demands a "side payment" (in the form of favorable legislation) in exchange for allowing legislation to proceed smoothly, (s)he can often get it. That's how the federal tax code became so byzantine. It's how the "Cornhusker kickback" and

“Louisiana purchase” originally got into Obamacare. Furthermore, stronger party leadership in the Senate would help clarify responsibility for policy. As it stands now, voters usually don’t know whom to blame for unpopular policies, and politicians are usually able to obfuscate responsibility because the filibuster complicates the voting record in the Senate (voting for the rule can often be more important than voting against final passage).

Note as well that when the House and Senate are controlled by different parties, as has often been the case, there is the same incentive for cross-party collaboration that John praises as part of the filibuster. The U.S. system already has many safeguards for minorities. Precisely for that reason, I see the filibuster as unnecessary. Since all institutions have tradeoffs, institutions that are “in a sort of middle” (with apologies to Edmund Burke) are usually more robust than those at either extreme of the majoritarian-consensus continuum.

Extreme status-quo bias might be justified if the status quo were rosy. But in the U.S., it’s not. Look at the economic freedom rankings. The U.S. is now #18 in the world, far behind countries like New Zealand, Canada, Australia, and even the United Kingdom — all English-speaking countries with parliamentary systems and few veto players. The countries with systems most like the U.S. system of separation of powers — Latin American countries like Brazil and Mexico — are well behind (Brazil is #105, Mexico is #91). The status quo in the U.S. is not very good, and we should tweak the system in favor of letting through more change.

Finally, I’d like to elaborate the bureaucracy problem more fully and illustrate its relevance to today. With the filibuster, it is difficult for legislators to constrain bureaucratic excesses, so long as 40 Senators are willing to protect the agency. Right now, the EPA is planning to regulate greenhouse gases as pollutants without explicit statutory authority. In many other instances, the EPA has overreached recently, even drawing a unanimous rebuke from the Supreme Court. But no matter how out-of-control the EPA gets, and no matter what the partisan composition of the Senate is, it will be very difficult for Congress to pass any legislation reining them in. Even if Republicans take the majority, they will be unable to prevent the EPA from regulating greenhouse gases with command-and-control mandates. A better alternative to command-and-control mandates would be a carbon tax or “clean” cap-and-trade (without the industry and consumer giveaways from the 2009 Waxman-Markey bill). But conservative Republicans will block that with all their might, no matter what the EPA does. And without that as an alternative, Democrats won’t go along with a reining in of the EPA. So instead we’re left with a Pareto-inferior outcome that no one really wants.

Now, given time, effort, and a modicum of good will, legislators can find ways around the filibuster and could probably even resolve the EPA issue mentioned above. But the filibuster increases the bargaining costs of reaching deals. In that way spatial models of legislation are imperfect. Pareto-improving deals don’t always happen when transaction costs are high enough. Look at the fiscal cliff. Look at the sequester. No one is happy with the way those are turning out. A robust political system needs safeguards for minorities, yes, but it also needs to keep bargaining costs manageable.