Mr. Smith wants his filibuster back

Democracy relies on decision by simple majority. It’s time to limit the minority veto power

By Andrew Reding

Democracy as conventionally understood relies on decision by simple majority. Whichever side has more votes wins. Supermajority requirements stand this principle on its head. Whenever the side with the greater number of votes fails to reach the designated threshold, the side with the least votes prevails.
The inevitable outcome is minority veto power. Though minorities cannot govern, supermajority requirements enable them to prevent majorities from governing as well. That is the primary structural source of our political gridlock at the federal and state levels.

At the federal level, the U.S. Senate’s filibuster is a prime example. The abuse of this procedure has created a de facto 60% threshold to pass legislation or approve appointments.

At the state level, supermajorities are required to raise taxes in 16 states. Among them are California and Washington, which have been stuck in permanent budget crises, hobbled by provisions requiring approval by two-thirds of both houses of their legislatures to raise taxes. Other states require majorities of 60% to 75%.

Now, a growing number of U.S. senators are calling for a filibuster overhaul. And in Washington state, legislators are challenging the constitutionality of voter-approved initiatives that require two-thirds majorities to pass tax increases. Should these efforts succeed, they will help reverse a dangerous trend toward minority veto power.

The Constitution, crafted to overcome gridlock under the Articles of Confederation, limits supermajorities to a few special cases: amending the Constitution, which should not be subject to the whim of transient majorities; ratifying international treaties, which have a permanence beyond ordinary legislation; overriding presidential vetoes; and removing a president, a member of Congress or a federal judge from office.

Only once in U.S. history has a serious argument been made for a more extensive supermajority requirement, in an unsuccessful effort to preserve slavery in 1849. Sen. John C. Calhoun of South Carolina, fearing that Northerners would eventually gain a congressional majority that would take what Southerners considered their “property,” proposed “the adoption of some restriction or limitation, which shall so effectually prevent any one interest, or combination of interests, from obtaining the exclusive control of the government.”

Though the “interest” Calhoun cared about was the Southern slaveholding aristocracy, he framed the argument abstractly enough to encompass any minority interest. Today, it offers a rationale for the minority vetoes that are paralyzing the U.S. Senate and many state governments.

How did a discredited political concept re-emerge more than a century after being crushed in the Civil War?

The Constitution says that each house of Congress “may determine the rules of its proceedings.” In the Senate, a rule originally intended to allow ample debate gradually morphed into the filibuster, a seldom-used round-the-clock talkathon to delay the inevitable. Then, in 1975, the requirement that filibusters be sustained by actual floor debate was dropped. Filibusters became de facto minority vetoes. Worse yet, any single senator can place a “hold” on legislation or an appointment. Shamefully, both parties have sustained this departure from democratic protocol because it enhances their power while in the minority.

The Senate filibuster as presently constituted is arguably unconstitutional. It effectively negates the only constitutional authority of the vice president, other than succeeding the
president: breaking tie votes as president of the Senate. With a de facto requirement of a 60% supermajority to pass a bill, there are no “equally divided” votes to break.

State constitutions also limited supermajorities to constitutional amendments or overriding gubernatorial vetoes. But they have been circumvented by powers not in the federal Constitution: initiatives and referendums.

These powers can be useful for submitting ordinary legislation to voters. But when used to amend basic constitutional principles, they become dangerous, especially when framed to play to human weakness. Most citizens like to receive government benefits and entitlements, but not pay for them. Ask voters to approve a mechanism to impede their legislators from raising taxes, and they generally will. That is what has happened in California, with Proposition 13 in 1978, and in Washington, with Initiative 960 in 2007 and Initiative 1185 in 2012.

But none of these measures would have been enacted had the two-thirds principle they championed been a condition for passage. There is something incongruous about using majority rule to undermine the majority rule that is at the core of democracy.

Supermajority rules are also inconsistent and discriminatory. In California and Washington, the legislature may lower taxes by simple majority but can only raise taxes by two-thirds votes.

The only foreign entities that rely on supermajorities are the European Union and the Northern Ireland Assembly, likewise notorious for political gridlock.

Minority vetoes must be challenged — in the Senate, in courts of law and in the court of public opinion. There is precedent for repeal of supermajorities. In 2010, Californians removed the two-thirds requirement for legislative adoption of the state budget.

But the most promising development would be for the Senate to eliminate “holds” by individual senators on bills and appointments, and to return to earlier rules that required round-the-clock floor debate to sustain a filibuster. That would ensure that it is again seldom used, restoring majority rule, breaking deadlocks and allowing the business of government to proceed.

*Andrew Reding is a senior fellow of the New York-based World Policy Institute.*