The filibuster in the U.S. Senate has been (rightfully) in the news quite a bit over the past few years. The use of the filibuster has dramatically increased in those years, to the point where there is currently a de facto 60-vote supermajority requirement to pass legislation in the Congress. That has led to a number of commentators (not all of them on the left) arguing that the filibuster has led to dysfunctionality in Washington, and that filibuster reform is one of the most important elements of any effort to fix what might (or might not) be broken in Washington. The group Common Cause recently even filed a lawsuit challenging the filibuster as unconstitutional.

From the perspective of environmental law, is the filibuster a bad thing? Dave Roberts at Grist claims that it is, because it more or less stopped the passage of the Waxman-Markey bill that would have regulated carbon emissions. I think that Roberts is probably right that Waxman-Markey would likely have passed in some form that could have been reconciled with the House bill if it had only needed 50 votes to pass.

But that doesn't necessarily mean that the existence of the filibuster is all bad from the perspective of environmental law. A quick comparison with Canada makes this clear. Canada's political system, as a parliamentary one, provides much fewer obstacles to the enactment of legislation: The majority party in Parliament can pretty much enact what it wants; the legislature is effectively unicameral (the Canadian Senate rarely obstructs lower house legislation); there is no independently elected executive who can veto legislation. That makes it relatively easy to enact legislation – say, a hypothetical carbon tax. But it also makes it relatively easy to repeal legislation – as recent efforts by the Tories to amend Canadian environmental laws show. (Our readers in Canada should correct me in the comments if I am wrong about any of this.)

So which is better? A system with high legislative inertia, such as the United States, where legislation is hard to enact but hard to repeal? Or a system like Canada's, where legislation is easy to enact and repeal? One possible answer is that, for environmental law, high inertia is a good thing. If you think that certain kinds of environmental harm are irreversible or at least extremely costly to remedy (think of species extinction), then short-lived environmental protections are pretty much the same thing as no environmental protection at all. Once the environmentally protective law is repealed and development occurs, reinstating the environmentally protective law later won't do much good (you can't bring back an extinct species). In fact, if you think that having laws on the books that look environmentally protective, but in fact don't do much at all, is problematic (perhaps because it deceives voters and the public), then environmentally protective laws that come and go might be worse than having no environmentally protective laws at all. In the former case, you have the same level of environmental harm, but the public may not understand what is occurring

because at least some of the time there are protective laws on the books; in the latter case, at least we're clear about what kinds of protection are or are not occurring.

Now, whether this kind of "truth in legislation" principle in environmental law outweighs the costs that high inertia imposes on the ability of a political system to respond to new environmental harms (e.g., climate change!) is a hard question. But I do think it means that from an environmental protection perspective, whether a supermajority requirement is a bad thing isn't obvious. Certainly, if we have President Romney in January 2013 and Republicans hold majorities (but not supermajorities) in both the Senate and the House, the filibuster might be seen as very environmentally friendly. Without that supermajority requirement, a bunch of environmental laws might get repealed or gutted in a short amount of time; and even if President Hilary Clinton storms to power in 2016 with massive Democratic majorities and reenacts all those laws, the interim environmental damage that might occur could be irreversible.