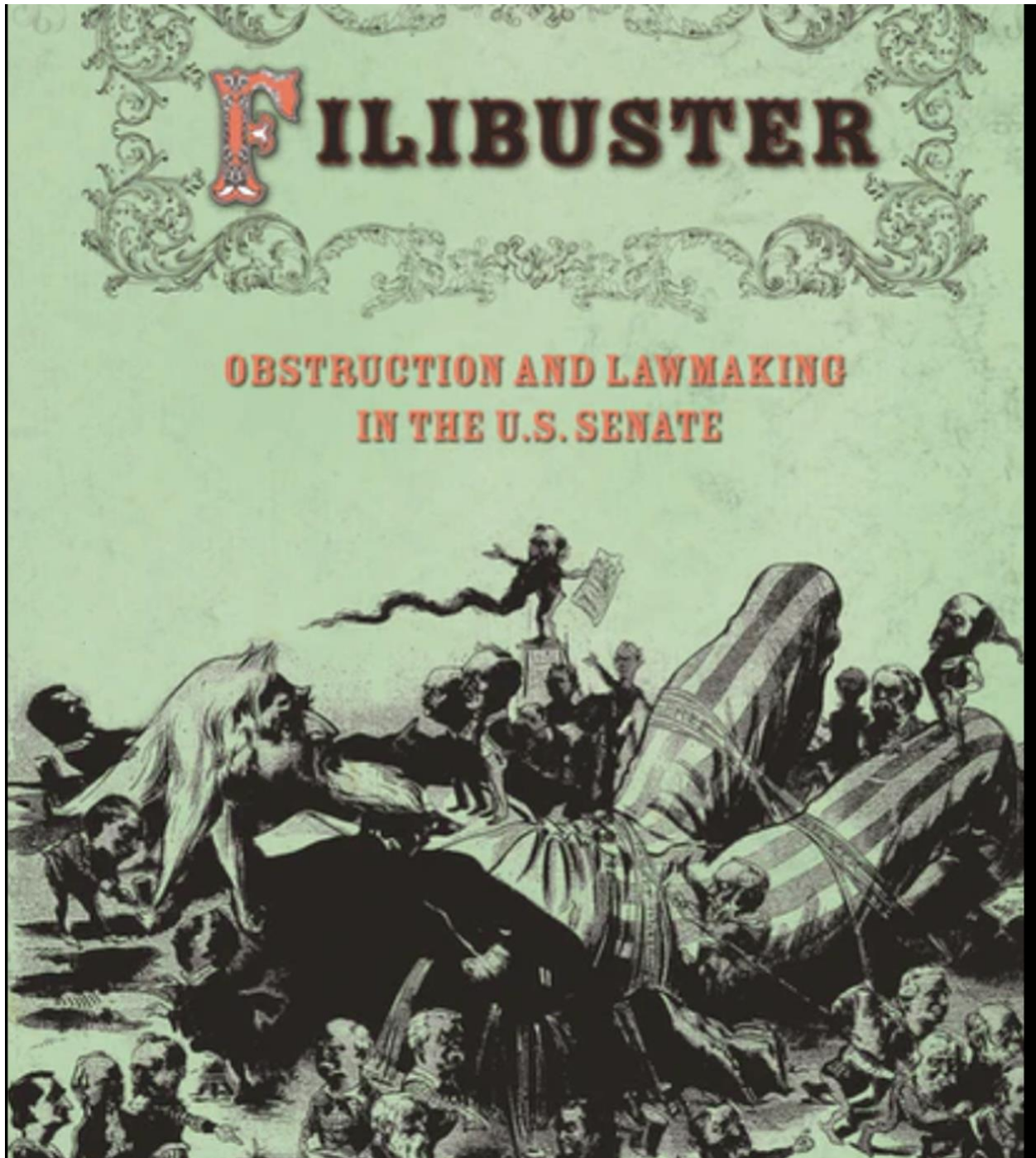


**Supplemental Notes to Lecture 11: Tyranny of the Minority? The
Senate Filibuster: Part I**



I. The Federalists' Contested Legacy

"Filibusters are a necessary evil, which must be tolerated lest the Senate lose its special strength and become a mere appendage of the House of Representatives," warned the late Senator Robert Byrd, a Democrat from West Virginia.

Should the Senate lose its autonomy, Senator Byrd argued, it would no longer be able to prevent ill-considered legislation that comes out of the House of Representatives from becoming law.

The fear that the "lower" House would pass flawed bills was also expressed by Madison in Federalist # 62, where he maintained that the Senate should be regarded as the body that guards against "the propensity . . . [of the members of the House] to yield to the impulses of sudden and violent passions."

The Senate was able to fulfill this constitutional role since those who sat in its chamber were not directly elected; moreover, in comparison to the House of Representatives, the members of the Senate were fewer in number and held longer tenures. For such reasons, they provided a bulwark against legislation passed in the House, whose members faced the electorate directly every two years.

And yet, the lower House should not be denigrated or disempowered if our representative democracy, which derives its legitimacy from the people, is to endure. As discussed in the Supplemental Notes to Lecture 2, *the central problem for Madison and the Federalists* who designed the new US Constitution was how best to serve and protect the socioeconomic interests of the elites while also maintaining a representative democracy based upon the principle of political equality underlying the state constitutions that existed during the time of the Articles of Confederation.

As Madison puts it with admirable candor in Federalist # 10: "To secure the public good and private rights against the danger of . . . a faction [representing the socioeconomic interests of a majority], and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed."

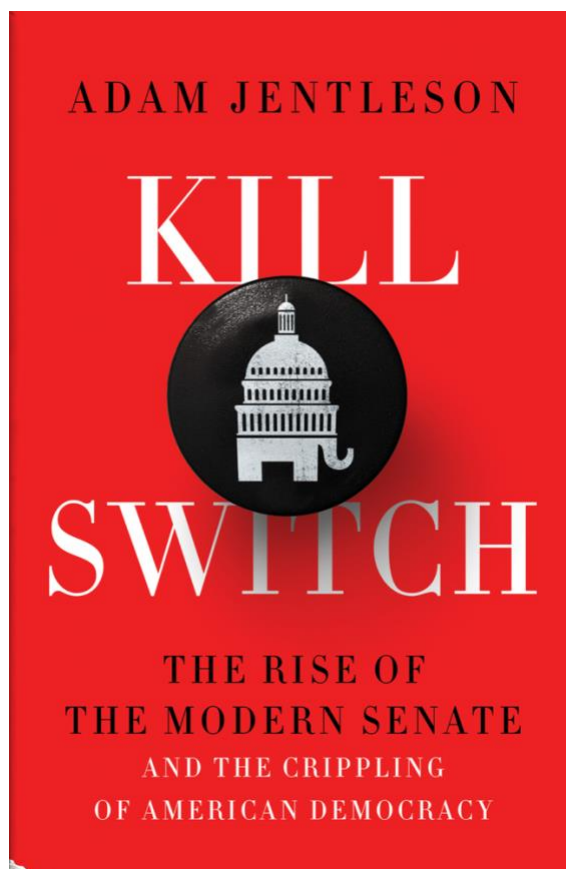
As Madison saw it, the US Constitution, especially after incorporating the Bill of Rights, not only protected the rights of the minority but also supported majority rule. Two centuries later, Byrd thought the best way to maintain that balancing act was to keep a rule (the filibuster) whose necessity Madison failed to envision.

Viewed in this light, one could argue that we honor the spirit if not the letter of Madison's conception of the Senate by preserving the filibuster. Such is the argument put forth by Byrd and, more recently, Senator McConnell. As we will see in Part II of Lecture 11, there are currently those who think abolishing the filibuster is a plan that promotes a lesser evil, in the sense that getting rid of it, though risky, is deemed preferable to keeping it. Why? Because with the

filibuster in place, nothing gets done, and vital social problems remain unresolved. In short, rather than viewing the filibuster as a “necessary evil,” they regard its abolition as a lesser evil.

II. The Rules of the Game in the Antebellum Period

After the “previous question rule” was taken off the books in 1806, the change went unnoticed for years, as senators for the most part followed the rules of decorum, which proscribed protracted, intemperate, or superfluous debates. The change did, however, create a loophole, which, in the words of Adam Jentleson, author of the recently published, *Kill Switch: The Rise of the Modern Senate and the Crippling of American Democracy*, “lay dormant until the right person came along to exploit it.”



In Jentleson’s telling, the “right person” turned out to be Senator John Calhoun of South Carolina: “It is the fusion of speechifying with the principle of minority rights that came to define the filibuster and give it its enduring power. That fusion was Calhoun’s innovation.”

It would take some sixty years, however, before Calhoun’s innovation produced real results. For most of the 19th century, filibusters occurred with relative infrequency (especially if compared with the last fifty years), and when they were used, and this point is crucial, they usually failed to block legislation. Why? For one thing, senators had to continuously occupy the senate floor to

sustain a filibuster. But even more importantly, the belief that the minority should eventually defer to the majority out of respect for democratic norms remained hegemonic.

Commenting on the filibuster that, in 1848, failed to prevent the outlawing of slavery in the Oregon Territory, Senator William King of Alabama declared that yielding to the majority “would comport better with the dignity of the Senate, with their standing in the country, and with public sentiment, than by persisting in opposing this resolution.”

In a similar vein, Senator Thomas Rusk of Texas added: “According to the course which had heretofore been pursued in the Senate, when a majority, a clearly ascertained majority, had agreed upon a measure, it was proper that [the senator who engaged in a filibuster] should yield, that . . . [those in the majority] might have the opportunity of passing it, and assuming to God and their country the responsibility of the act.”

III. The Filibuster Bends to the Winds of War (But it does not break; in fact, it then grows stronger)

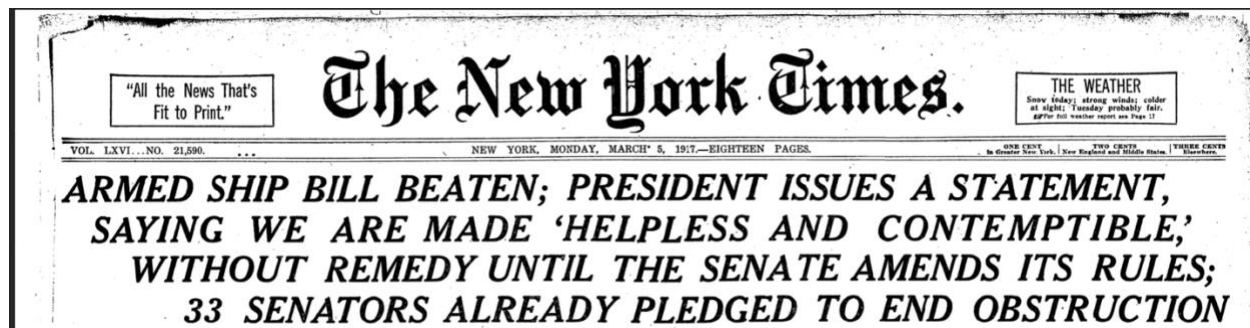
On March 1 of 1917, the House overwhelmingly passed legislation that would have armed merchant ships, which were being harassed by German submarines. But rather than sailing through the senate, the bill then died there, thanks to a timely filibuster led by Robert La Follette (the filibuster needed only to last two days, since the Senate was set to adjourn on March 3.)

The filibuster was harshly and immediately condemned by President Wilson and the media, as evidenced by this lead from *The New York Times*: The filibuster led by “Senator La Follette . . . one without political responsibility . . . was an evil endeavor, in which no loyal American would have engaged, dangerous to the country, a humiliation to the people, shameful, disgraceful, detestable.”

Given the outcry, it was no surprise that with unprecedented alacrity, the senate rules committee convened and passed Rule 22 by a vote of 76-3. As we know from Lecture 11, Rule 22 enabled the Senate to end debate by invoking cloture. In this case, the intent of the senators who voted in favor of the rule change was clear: it provided the body with a tool to terminate successful filibustering. As stated in a Congressional Research Report published in 1949: every senator who voted for Rule 22 “did so with a clear understanding that he was voting for an enforceable rule to close debate.” Indeed, in his 1940 book on Congress, historian Franklin Burdette described Rule 22 as “the most important potential and actual curtailment of the filibuster ever undertaken by the Senate.” And yet, what the senators *intended* in no way corresponded with what instituting Rule 22 actually brought about.

As we will see next week, requiring a supermajority to stop debate ended up endowing senate minorities with the ability to kill certain types of legislation. For this to have happened, of course, several other historical factors had to come into play, developments that we will examine next week.

But first, a final word on the battle that took place between Wilson and La Follette in 1917.



The “armed ship bill” that was killed by the filibuster never actually passed. Though the senate moved quickly following Wilson’s statement (quoted in Lecture 11 and referred to in the above headline), it did not do so fast enough. While it was voting to “end obstruction” (a first step, taken in order to break the filibuster), Wilson bypassed Congress altogether and signed an Executive Order arming the merchant marine ships (we will focus on the Executive Order as a form of presidential power in two weeks). In any event, the armed ship bill was soon rendered moot when the US declared war on Germany.

Quiz Question 5: Why did the late Senator Robert Byrd view the filibuster as a “necessary evil”?

Quiz Question 6: What is one reason why the senate filibuster usually failed to block legislation when it was used in the 19th century?

Quiz Question 7: How did historian Franklin Burdette describe Rule 22, which the Senate established in 1917?