
RECENT LEGISLATIVE DEBATE

PARLIAMENTARY PROCEDURE — FILIBUSTERS — TEXAS STATE SENATOR WENDY DAVIS FILIBUSTERS ABORTION BILL. — *Senate Session*, TEX. STATE SENATE (June 25, 2013), <http://www.senate.state.tx.us/avarchive/ramav.php?ram=00006278>.

As partisan gridlock has intensified in recent years, a familiar senatorial practice — the filibuster — has emerged as a prominent culprit. The filibuster, which allows a senator to block or delay legislation and nominations by taking advantage of rules permitting unlimited debate, has been lambasted as an arcane tradition that reduces legislative accountability and prevents the democratically elected majority from doing its work. On June 25, 2013, however, the nation witnessed a new kind of filibuster when Texas State Senator Wendy Davis stood on the floor of the state legislature for eleven hours to protest the passage of a bill severely restricting access to abortion: a filibuster propelled by social media. Senator Davis's stand both inspired and relied upon the engagement of the public to defeat the legislation. The episode suggests that in the age of new media, the talking filibuster may promote, rather than impede, democracy in the legislative process by rallying public involvement and boosting legislative accountability.

Senator Davis took to the floor of the Texas Senate at 11:18 AM on June 25, planning to filibuster until a special session of the Legislature ended at midnight.¹ The object of her protest was Senate Bill 5 (S.B. 5), a controversial abortion measure championed by the State Senate's Republican majority.² The bill sought to ban abortions after twenty weeks and impose new regulations on the administration of the abortion-inducing drug RU-486.³ The legislation also would have required abortion providers in the state to have admitting privileges at a hospital within thirty miles⁴ — a near-impossible requirement for many rural providers — and would have mandated that abortion facilities meet regulatory standards for ambulatory surgical centers,⁵ which

¹ Ben Teitelbaum, *5 Moments from Wendy Davis's Epic Filibuster*, DAILY BEAST (June 26, 2013, 10:22 AM), <http://www.thedailybeast.com/articles/2013/06/26/5-moments-from-wendy-davis-epic-filibuster.html>. Governor Rick Perry called the special legislative session to ratify redistricting maps and address other laws, such as the abortion measure, that were not passed in the Legislature's regular session. See Jay Root, *Perry Calls Special Legislative Session*, TEX. TRIB. (May 27, 2013), <http://www.texastribune.org/2013/05/27/perry-calls-special-session>.

² See Chris Tomlinson & Jim Vertuno, *Texas Abortion Bill Falls After Challenge*, ASSOCIATED PRESS (June 26, 2013, 4:31 AM), <http://bigstory.ap.org/article/texas-senator-filibusters-against-abortion-bill>.

³ See S.B. 5, 83d Leg., 1st Spec. Sess. § 3 (Tex. 2013), available at <http://www.capitol.state.tx.us/tlodocs/831/billtext/pdf/SB00005H.pdf>.

⁴ See *id.* § 2.

⁵ See *id.* § 4.

likely would have shuttered at least thirty-six of the state's forty-two abortion facilities.⁶ If Senator Davis could hold the Senate floor until midnight, the legislative session would end before the bill could be passed.

As the filibuster approached, Senator Davis and abortion-rights groups publicized the event via social media. Using Facebook, NARAL Pro-Choice Texas organized rides for supporters to watch the event at the Capitol.⁷ Bloggers exhorted readers to contact news outlets and to use Twitter ("tweet") to support the filibuster.⁸ On June 24, Senator Davis tweeted: "The leadership may not want to listen to TX women, but they will have to listen to me. I intend to filibuster [S.B. 5]."⁹ She urged supporters to "[s]tand with me tomorrow, and share your story with me so I can tell it from the Senate floor."¹⁰

Supporters heeded Senator Davis's call. Testimonials poured in to her website, providing content for her to read on the Senate floor.¹¹ Those testimonials proved crucial, as Texas filibuster rules limit senators to topics relevant to the bill being discussed.¹² Senator Davis's backers also tuned in to the online video stream of the Senate chamber, broadcast via YouTube by the *Texas Tribune*.¹³ Commentators noted that the stream's availability through YouTube — a more modern, accessible, and shareable platform than the Legislature's video interface — accounted for much of the filibuster's popularity.¹⁴

While YouTube supplied the technology for viewers to witness the filibuster, social media provided the publicity as Twitter, Facebook, and Tumblr users stirred up what one local activist termed a

⁶ Becca Aaronson, *New Abortion Limits, but More Money for Women's Health*, TEX. TRIB. (Aug. 9, 2013), <http://www.texastribune.org/2013/08/09/texas-policies-alter-future-womens-health-services>.

⁷ Caitlin Dewey, *Wendy Davis 'Tweetstorm' Was Planned in Advance*, WASH. POST: THE FIX (June 26, 2013, 5:16 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/26/this-tweetstorm-was-planned-in-advance>.

⁸ *Id.*

⁹ Wendy Davis, TWITTER (June 24, 2013, 11:06 PM CDT), <https://twitter.com/WendyDavisTexas/status/349377951877443584>.

¹⁰ Wendy Davis, TWITTER (June 24, 2013, 11:08 PM CDT), <https://twitter.com/WendyDavisTexas/status/349378485099307009>. Senator Davis gained nearly 41,000 Twitter followers during the filibuster. See Dewey, *supra* note 7.

¹¹ See Dewey, *supra* note 7.

¹² S. Res. 4, 83d Leg., Reg. Sess. R. 4.03 (Tex. 2013), available at <http://www.senate.state.tx.us/rules/SenateRules83.pdf>. Texas Senate rules also forbid filibustering senators from eating, drinking, sitting, or leaning against a desk or chair. See *id.* R. 3.02, 4.01. Filibustering senators cannot take breaks, although they may pause for questions, and after three violations of debate rules, the chamber can force a filibustering senator to yield. See *id.* R. 4.03.

¹³ Brian Stelter, *From Statehouse to YouTube, Filibuster Is a Success*, N.Y. TIMES, July 1, 2013, at B1. Despite the filibuster's popularity online, cable networks did not cover it live. *Id.*

¹⁴ E.g., *id.* ("[I]t was through YouTube that Ms. Davis's filibuster was widely seen and shared.").

“tweetstorm” in support of Senator Davis’s endeavor.¹⁵ Interest groups such as Planned Parenthood Texas and Annie’s List “live-tweeted” from the Senate gallery, reporting snippets of the action to Twitter followers.¹⁶ The American Civil Liberties Union’s Texas branch coined the Twitter hashtag “#standwithwendy,” which was used more than half a million times¹⁷ and trended worldwide,¹⁸ making it one of the most commonly discussed topics on Twitter that evening. Famous politicians added their voices, further raising the filibuster’s profile: U.S. House Minority Leader Nancy Pelosi tweeted a message of support¹⁹ and President Barack Obama soon followed suit, writing that “[s]omething special is happening in Austin tonight” and linking to the live video stream.²⁰ More than 17,000 Twitter users “retweeted,” or shared, President Obama’s message.²¹ As the clock ticked toward midnight, nearly 200,000 viewers simultaneously tuned in to YouTube,²² and protesters crowded into the Senate gallery and the rest of the Capitol building.²³

Ultimately, social-media involvement proved central to the filibuster’s success as spectators transformed into direct participants.²⁴ Around 10 PM, when Lieutenant Governor David Dewhurst cited Senator Davis for her third, filibuster-ending violation — she discussed a 2011 Texas law that requires women to receive sonograms before abortions²⁵ — dissent exploded online and in the Senate gallery, where protesters began shouting “No!”²⁶ and “Let her speak.”²⁷ Democratic

¹⁵ Dewey, *supra* note 7.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Heather Kelly, *Texas Filibuster on Abortion Bill Rivets Online*, CNN (June 26, 2013, 3:55 PM), <http://www.cnn.com/2013/06/26/tech/social-media/texas-filibuster-twitter>.

¹⁹ Nancy Pelosi, TWITTER (June 25, 2013, 5:53 PM CDT), <https://twitter.com/NancyPelosi/status/349661603102330880>.

²⁰ Barack Obama, TWITTER (June 25, 2013, 8:40 PM CDT), <https://twitter.com/BarackObama/status/349703625616011264>.

²¹ *Id.*

²² Stelter, *supra* note 13.

²³ Christy Hoppe, *After Raucous Abortion Fight, Perry Calls Legislature Back for Round 3*, DALL. MORNING NEWS (June 26, 2013), <http://www.dallasnews.com/news/politics/headlines/20130626-after-raucous-abortion-fight-perry-calls-legislature-back-for-round-3.ece>.

²⁴ See Dewey, *supra* note 7; Kelly, *supra* note 18; Kate Sommers-Dawes, *The Wendy Davis Filibuster: A Win for New Media*, MASHABLE (June 27, 2013), <http://mashable.com/2013/06/27/wendy-davis-win-new-media-democracy>; Rachel Weiner, *6 Key Moments from Wendy Davis’ Filibuster*, WASH. POST: THE FIX (June 26, 2013, 9:49 AM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/26/key-moments-from-wendy-daviss-11-hour-filibuster>.

²⁵ Senator Davis’s first two strikes occurred when: (1) she discussed court decisions on abortion, which was ruled not germane to the topic at hand; and (2) a colleague helped her don a back brace, which was deemed an impermissible use of physical support. See Hoppe, *supra* note 23.

²⁶ *Id.* (internal quotation marks omitted).

²⁷ Weiner, *supra* note 24 (internal quotation marks omitted).

lawmakers asked procedural questions to delay a vote,²⁸ and as midnight neared, the crowd erupted in “deafening and sustained” cheers that postponed the final vote by several minutes.²⁹ Amid the noise, lawmakers were unsure if the vote had occurred before midnight.³⁰

Legislators later announced that the bill had failed: while the 19–10 vote had taken place before midnight, the lieutenant governor could not sign the law promptly because of the crowd-induced confusion.³¹ Senator Davis called the result “democracy in action” and called her supporters “the reason that [the bill’s failure] happened.”³² However, this so-called “people’s filibuster”³³ did not permanently halt the progress of the legislation; Governor Rick Perry convened another special session of the legislature and the bill passed in July.³⁴

Although Senator Davis’s win was short lived, it nevertheless heralds a potential new role for filibustering in the age of new media. As filibusters have become increasingly common, critics have lambasted them as antidemocratic.³⁵ Some argue that the practice hinders the majority’s ability to enact the will of the people,³⁶ while others contend that it reduces legislative accountability by hiding the cause of gridlock from voters.³⁷ But Senator Davis’s filibuster suggests that the opposite may be true: in a world where people can join legislative debates from their homes and offices, the filibuster — at least as Senator Davis used it — may in fact promote democracy in lawmaking.³⁸ If practiced according to Senator Davis’s model, the filibuster holds the power to counteract two antidemocratic obstacles in the legislative process: first,

²⁸ Weiner, *supra* note 24.

²⁹ Hoppe, *supra* note 23.

³⁰ *Id.*

³¹ Tomlinson & Vertuno, *supra* note 2.

³² Weiner, *supra* note 24 (internal quotation mark omitted).

³³ See, e.g., Tomlinson & Vertuno, *supra* note 2.

³⁴ See Shefali Luthra, *Perry Signs Abortion Bill into Law*, TEX. TRIB. (July 18, 2013), <http://www.texastribune.org/2013/07/18/perry-signs-abortion-bill-law>.

³⁵ See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 183–84 (1997).

³⁶ See, e.g., Tom Harkin, Response, *Fixing the Filibuster: Restoring Real Democracy in the Senate*, 95 IOWA L. REV. BULL. 67 (2010); Aaron Belkin, *Power to the People, Not the Minority*, N.Y. TIMES ROOM FOR DEBATE (Apr. 18, 2013, 11:48 AM), <http://www.nytimes.com/roomfordebate/2012/12/02/do-filibusters-stall-the-senate-or-give-it-purpose/abolish-the-filibuster-to-restore-democracy>.

³⁷ See, e.g., MIMI MARZIANI, BRENNAN CTR. FOR JUSTICE, *FILIBUSTER ABUSE* 10 (2010), available at http://www.brennancenter.org/sites/default/files/legacy/Filibuster%20Abuse_Online%20Version.pdf; Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 CONN. L. REV. 1041, 1051–52 (2011); Ezra Klein, *How the Filibuster Destroys Accountability*, WASH. POST (May 6, 2010, 12:00 PM), http://voices.washingtonpost.com/ezra-klein/2010/05/how_the_filibuster_destroys_ac.html.

³⁸ The desirability of a more democratic lawmaking process is debatable; however, those scholars who deem the filibuster antidemocratic tend to adopt the premise that prodemocratic features benefit legislatures. See generally sources cited *supra* note 37.

a lack of accountability on the part of legislators, and second, public disengagement. If the filibuster is to continue to exist, lawmakers should look to the “people’s filibuster” as a guide for reform proposals that promote democratic legislative structures such as participation and accountability.

Much criticism of the filibuster as opaque and unaccountable has focused on the U.S. Senate.³⁹ Over time, the filibuster in that chamber has evolved into what scholars have called the “stealth filibuster”: by signaling to the majority leadership that she intends to filibuster a measure, a single senator can prevent the item from even making it to the floor to be considered.⁴⁰ Worse, a hold can be placed anonymously, although a recent rule change has sought to reduce the prevalence of anonymous holds.⁴¹ The stealth filibuster arguably destroys legislative accountability by preventing voters from knowing whom to blame for Senate gridlock; citizens who do not understand the complexities of the chamber’s rules may believe legislative logjams are the fault of the majority, when in fact they may be caused by one minority-party senator.⁴² Moreover, when holds prevent an issue from reaching the floor for debate, constituents cannot see how a senator voted or determine her stance on the issue.⁴³

Senator Davis’s stand, by contrast, reveals that the filibuster can be practiced in a way that holds lawmakers accountable for policy choices. Aided by accessible platforms like YouTube, talking filibusters minimize the accountability problems that plague their stealth counterparts. Talking filibusters reveal the source of gridlock and enable voters to hear a lawmaker’s reasons for opposing a measure.⁴⁴ They also allow citizens to determine which senators support or oppose the filibustering lawmaker, based on who helps her by asking questions or engaging in colloquies. Once constituents understand their lawmaker’s

³⁹ See, e.g., sources cited *supra* note 37. For a comprehensive history of the filibuster in the U.S. Senate, see generally GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* (2006).

⁴⁰ See Fisk & Chemerinsky, *supra* note 35, at 200–09.

⁴¹ See Bruhl, *supra* note 37, at 1056–57. For the text of the resolution that aimed to cut down on secret holds, see S. Res. 28, 112th Cong. (2011).

⁴² See MARZIANI, *supra* note 37, at 10 (“Voters are left to wonder: Should we fault the majority for failing to override the filibuster or should we hold the minority responsible for obstructing the majority’s will?”); Bruhl, *supra* note 37, at 1051–52 (“[T]he majority party lacks the power to enact — and be judged upon — its own preferred program even when it nominally controls all the legislative organs.” *Id.* at 1052.).

⁴³ See MARZIANI, *supra* note 37, at 10. A two-year deal crafted in January 2013 aims to limit senators’ ability to filibuster the motion to proceed. See S. Res. 15, 113th Cong. (2013).

⁴⁴ Of course, filibusters also cut off debate, preventing citizens from hearing floor speeches from majority-party senators who oppose the filibustering lawmaker. That said, to the extent that filibusters respond to well-articulated majority perspectives, they also point voters toward those majority perspectives by drawing attention to the existence of controversial issues.

position, they can evaluate her performance — a central part of republican governance — and respond at the polls.

Not only does the talking filibuster avoid the stealth filibuster's accountability problems, but it also may affirmatively promote accountability by exposing majority-party attempts to rush controversial measures through the legislative process. For example, by altering a procedural rule for its special session, Texas's Republican majority enabled S.B. 5 to reach the floor for a vote when, under the chamber's usual rules, the Democrats could have blocked it.⁴⁵ Without Senator Davis's high-profile filibuster, many Texas voters might not have realized that the measure, which failed to win sufficient support during the regular session, stood ready to pass. At the national level, too, majority lawmakers sometimes rush divisive legislation to a vote,⁴⁶ evading heightened scrutiny by the minority and the public. Filibusters can be used "to block hasty legislation."⁴⁷ The talking filibuster has the added advantage of being a *transparent* antidote: it not only obstructs passage, but also sheds light on majority attempts to hasten votes and thus holds legislators accountable for these last-ditch tactics.

By attracting attention to legislative action and fostering an interactive dialogue between citizens and lawmakers, talking filibusters may also enhance public engagement in the legislative process. As a rare, dramatic *performance* that voters can watch and understand, the filibuster stands in stark contrast to committee hearings and floor votes — which, though broadcast, may seem too dull or complex to appeal to viewers.⁴⁸ Even televised public events held by legislators, such as press conferences, typically lack the drama and authenticity that filibusters offer. As one journalist put it, filibusters draw public attention for several reasons: first, as "political theater of the highest sort," they appeal to people's taste for the dramatic; second, they allow citizens to root for the underdog; and third, they offer uncharacteristic authenticity from politicians that contradicts popular cynicism.⁴⁹

⁴⁵ See Root, *supra* note 1. The usual rules require a bill to be supported by two-thirds of senators to reach the floor, but that requirement was abandoned during the special session, allowing bills to proceed with the support of a simple majority. See *id.*

⁴⁶ See Hanah Metchis Volokh, *A Read-the-Bill Rule for Congress*, 76 MO. L. REV. 135, 135–39 (2011); Editorial, *Read This!*, WASH. POST, Sept. 23, 2009, at A28.

⁴⁷ Norman Ornstein, Op-Ed., *A Filibuster Fix*, N.Y. TIMES, Aug. 28, 2010, at A19.

⁴⁸ While it is difficult to determine how many Americans watch legislative proceedings online or on television — especially because C-SPAN does not track ratings — a Pew survey found that only five percent of Americans regularly watch C-SPAN. See PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, ONLINE NEWS AUDIENCE LARGER, MORE DIVERSE 3 (2004), available at <http://www.people-press.org/files/legacy-pdf/215.pdf>.

⁴⁹ Chris Cillizza, *Wendy Davis and the Political Power of the Filibuster*, WASH. POST: THE FIX (June 26, 2013, 8:17 AM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/26/wendy-davis-and-the-political-power-of-the-filibuster>. According to Chris Cillizza, a filibuster's

Talking filibusters have long captivated the public, from *Mr. Smith Goes to Washington*'s iconic 1939 stand⁵⁰ to Senator Rand Paul's twelve-hour protest of drone policy in March 2013.⁵¹ At times, this public attention has prompted change. When southern lawmakers filibustered the Civil Rights Act of 1964 for seventy-four days, for example, daily news reports on the filibuster "personalized and dramatized the halting processes of our government to the average viewer in a way no amount of words or secondary reports could have."⁵² The high profile of that filibuster is credited with "stirring up voter outrage against the Southern intransigence on civil rights."⁵³

In the era of new media, talking filibusters are even more capable of attracting national attention and fostering dialogue between citizens and lawmakers. Comments about Senator Davis's filibuster flew on social media sites, allowing citizens to converse about the proposed legislation.⁵⁴ Some messages were aimed at Texas lawmakers.⁵⁵ Research has suggested that involvement in the legislative process may increase — and the quality of public dialogue may improve — when people can participate online.⁵⁶ Moreover, online forums, and in particular social media, may promote participation by traditionally underinvolved groups — for example, low-income voters, who may

authenticity lies in the fact that it "is, in the eyes of the public, a testimony to the politics of principle." *Id.*

⁵⁰ See MR. SMITH GOES TO WASHINGTON (Columbia Pictures 1939). Senator Davis's filibuster has been compared to Mr. Smith's fictional stand. See, e.g., Alexandra Petri, *Don't Mess with Wendy Davis in Texas*, WASH. POST: COMPOST (June 26, 2013, 7:55 AM), <http://www.washingtonpost.com/blogs/compost/wp/2013/06/26/dont-mess-with-wendy-davis-in-texas>. The deliberate construction of Senator Davis's filibuster as a public-relations event differs from Mr. Smith's impromptu, last-resort filibuster, and may make the social media-fueled filibuster seem less authentic or quixotic.

⁵¹ See Ashley Parker, *Republicans, Led by Rand Paul, Finally End Filibuster*, N.Y. TIMES: THE CAUCUS (Mar. 6, 2013, 10:01 PM), <http://thecaucus.blogs.nytimes.com/2013/03/06/rand-paul-does-not-go-quietly-into-the-night>. Senator Paul's filibuster "bec[a]me must-watch reality television for much of the inside-the-Beltway crowd" and provoked a slew of supportive tweets. *Id.*

⁵² Fisk & Chemerinsky, *supra* note 35, at 200 (quoting William Small, *Equality of Access for Broadcast Journalism*, in CONGRESS AND THE NEWS MEDIA 66, 68–69 (Robert O. Blanchard ed., 1974)) (describing Roger Mudd's reporting for CBS News).

⁵³ *Id.*

⁵⁴ Notably, many of those discussing the filibuster were not Texas residents and thus arguably deserved no role in influencing the state's legislative outcomes. However, national attention may encourage participation by state residents — for whom more is at stake — as they may hear about the issue from out-of-state sources.

⁵⁵ See Aja Romano, *#StandWithWendy Trends Online During Texas Senator's Abortion Filibuster*, MASHABLE (June 26, 2013), <http://mashable.com/2013/06/26/standwithwendy-texas-abortion-filibuster-wendy-davis> (displaying a message from a Twitter user to a senator).

⁵⁶ See Rich Nafziger & Laurie E. Maak, Essay, *Increasing Public Participation, Understanding, and Transparency of the Legislative Process Through the Use of Web Dialogue*, NAT'L CIVIC REV., Summer 2008, at 31, 32–37.

lack the time and resources to actively participate, and youth.⁵⁷ Senator Davis's filibuster suggests that public apathy toward the legislative process may not be intractable; rather, it may be addressed by changing the way that the legislature communicates with citizens.

The filibuster's value as a legislative tool has been hotly debated, and whether it should continue to exist in any form is contestable.⁵⁸ However, assuming that the practice will persist,⁵⁹ the "people's filibuster" in Austin has demonstrated a more democratic way to use it.⁶⁰ A filibuster that enhances public engagement and legislative accountability better serves the original purpose of unlimited debate: "protect[ing] free speech, improv[ing] the quality of deliberation, and reveal[ing] the intensity of preferences in the Senate."⁶¹ Perhaps more importantly, boosting engagement and accountability ensures that the U.S. Senate, and the state senates modeled after it, remain the bulwarks against majority tyranny that they were designed to be. The Founders knew, and subsequent jurists and scholars have echoed, "that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."⁶² This was a principle that those who took a stand in Austin — and in cyberspace — understood, whether they stood with Senator Davis or against her.

⁵⁷ Cf. *id.* (describing the benefits for youth, and for people who lack time and resources, of online participation in the legislative process).

⁵⁸ Some critics argue that filibusters permit an impermissible form of minority rule. See, e.g., Josh Chafetz & Michael J. Gerhardt, Debate, *Is the Filibuster Constitutional?*, 158 U. PA. L. REV. PENNUMBRA 245, 249 (2010).

⁵⁹ Even many of the filibuster's most vociferous opponents have proposed reforming the filibuster rather than abolishing it. For a January 2013 reform plan by several Senate critics, see S. Res. 4, 113th Cong. (2013). See also David A. Graham, *How Senate Graybeards Killed Real Filibuster Reform*, THE ATLANTIC (Jan. 24, 2013, 5:00 PM), <http://www.theatlantic.com/politics/archive/2013/01/how-senate-graybeards-killed-real-filibuster-reform/272495> (describing the idea of eliminating the filibuster as "always fringe, even within the hardcore reform group").

⁶⁰ Of course, as an attention-grabbing theatrical event, the talking filibuster has some democratic costs as well as benefits. Specifically, the public engagement surrounding Senator Davis's filibuster disrupted the legislative process, halted the work of the elected majority, and replaced the Senate's order with crowd-induced chaos. Moreover, mandating a return to the talking filibuster could prompt overuse of the practice, which could risk eventually inuring the public to it. However, the challenges inherent in the talking filibuster — for example, the difficulty of holding forth for hours — would stem its overuse and prevent frequent, trivial interruptions to the law-making process. See, e.g., Ornstein, *supra* note 47. The political costs of openly filibustering a frivolous or uncontroversial measure might also ward off overuse.

⁶¹ Gerard N. Magliocca, Essay, *Reforming the Filibuster*, 105 NW. U. L. REV. 303, 308 (2011).

⁶² *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).