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Article

Excessive Speech, Civility Norms, and the Clucking Theorem

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The classic free-speech axiom is that the cure for bad speech is more speech. This Article considers the possible social costs of speech, focusing on speech strategies that impede and degrade change, even if the speech itself is socially acceptable. This Article introduces the Clucking Theorem, which states that human nature unnecessarily inflates the costs of processes related to proposed legal changes. Clucking is a form of externality—it is an action that inflates the social costs associated with discourse over a new or revised norm. It also alters transitions, degrades the quality of reforms, impedes certain changes, and facilitates undesirable transitions. This Article's inquiry into the characteristics of clucking is supported by a qualitative study of debates and disputes over changes to backyard chicken laws in more than one hundred localities between 2007 and 2010. This study emphasizes that certain clucking characteristics are unrelated to the substance of the issue at stake, the size of the population, or the innovation in the proposed change. In synthesizing the study, this Article identifies five categories of individuals who engage in clucking: losers, winners, status quo enforcers, political opportunists, and human roosters. Finally, this Article stresses that civility norms and procedural rules are viable means to reduce the social costs of clucking.

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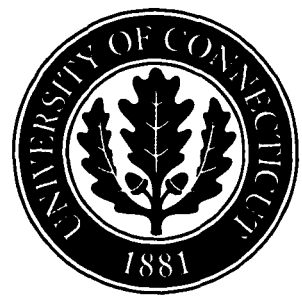

Excessive Speech, Civility Norms, and the Clucking Theorem

BARAK Y. ORBACH* & FRANCES R. SJOBERG**

I. INTRODUCTION

In January 2010, in his first State of the Union Address, President Barack Obama went to Congress to secure support for his landmark healthcare reform, to explain the regulatory response to the Great Recession, and to announce his commitment to repeal Don't Ask, Don't Tell.[1] Reflecting on the debates, controversies, and quarrels that surrounded his reforms, and anticipating more of the same down the road, President Obama noted: "Democracy in a nation of 300 million people can be noisy and messy and complicated. And when you try to do big things and make big changes, it stirs passions and controversy. That's just how it is."[2]

President Obama embraced traditional free speech doctrine and the resulting pain induced by reform in democratic societies. Within less than two years, however, economic and social debates escalated, exposing fractures in traditional free-speech theories, or at least calling for their reconsideration. Again and again, public attention was diverted toward "sideshows and carnival barkers" and away from core issues in which difficult and controversial decisions had to be made.[3] Responding to such a noisy sideshow, in April 2011, the President released a copy of his birth certificate to prove he was a legitimate occupant of the Oval Office.[4] In

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[1] President Barack Obama, State of the Union Address (Jan. 27, 2010).

[2] *Id.*

[3] President Barack Obama, Remarks from James S. Brady Press Briefing Room (Apr. 27, 2011).

[4] *See* Editorial, *A Certificate of Embarrassment*, N.Y. TIMES, Apr. 28, 2011, at A24; Joel Achenbach, *Certificate Unlikely to Appease 'Birthers,'* WASH. POST, Apr. 28, 2011, at A1; Kirk Johnson, *Despite the Evidence, 'Birther' Bills Advance*, N.Y. TIMES, Apr. 22, 2011, at A11; Michael D. Shear, *Citing 'Silliness,' Obama Shows Birth Certificate*, N.Y. TIMES, Apr. 28, 2011, at A1; Brian Stelter, *In Trying to Debunk a Theory, the News Media Extends Its Life*, N.Y. TIMES, Apr. 28, 2011, at

August 2011, Standard & Poor's removed the United States from its list of risk-free borrowers because its analysis showed that "political brinkmanship" made governance and policymaking in the United States "less stable, less effective, and less predictable, than what [was] previously believed."[5] Three days after Standard & Poor's downgraded the U.S. debt rating, Moody's stepped in to declare its confidence in the United States' AAA rating.[6] Regardless of the outcome, the rating debate confirmed the social costs of U.S. political gridlock can heavily tax the nation. Although representatives of all political views may honestly believe they serve the public by insisting on principles others cannot accept, by refusing to consider alternative views, and by flatly refusing to compromise, such inflexibility ultimately disserves the public.

This Article studies the social costs of the noise and mess associated with "changes"—that is, legal transitions—and calls this noise and mess "clucking." "Clucking" consists of avoidable debates, controversies, disputes, litigation, filibusters, and other argumentative processes. They are avoidable because economizing them would not sacrifice communication of substantive issues. Clucking inflates the social costs of processes that shape changes. It also alters transitions, degrades the quality of reforms, impedes certain changes, and facilitates undesirable transitions.[7]

Democratic societies rely on discourses, debates, and even disputes and disagreements to evolve and develop.[8] This study of clucking is *not* about substantive disagreements; it does *not* propose to hush dissent or

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A16; *see also* JEROME CORSI, WHERE'S THE BIRTH CERTIFICATE? THE CASE THAT BARACK OBAMA IS NOT ELIGIBLE TO BE PRESIDENT (2011).

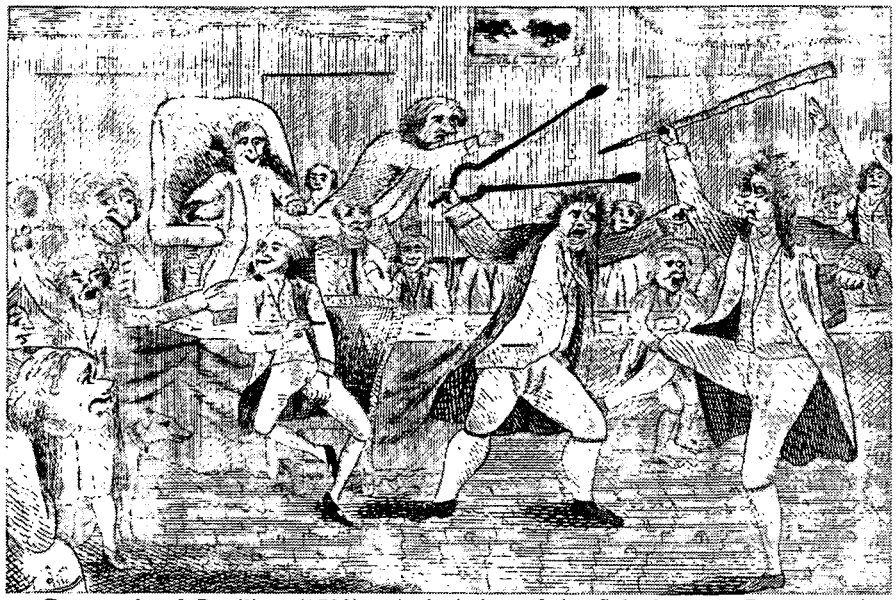
[5] Nikola G. Swann & John Chambers, *United States of America Long-Term Rating Lowered to 'AA+' on Political Risks and Rising Debt Burden*, STANDARD & POOR'S (Aug. 5, 2011).

[6] Steven Hess, *The Key Drivers Behind Moody's Confirmation of the US AAA Rating*, MOODY'S INVESTORS SERVICE (Aug. 8, 2011).

[7] The long struggle to end racial discrimination in the United States illustrates many of these themes. *See, e.g.*, CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT (1984); *see also The Decision of the Supreme Court in the School Cases—Declaration of Constitutional Principles*, 102 CONG. REC. 4459 (Mar. 12, 1956) (statement of Sen. Walter F. George introducing "The Southern Manifesto" into the Congressional Record, voicing a displeasure with the Supreme Court's decision to integrate public schools). In December 2010, Senator Jon Kyl expressed his views about the frequency in which clucking occurs in the Senate: "Too many times [a debate is] a senator coming down and giving a speech, and half of us aren't listening. Or more." David A. Fahrenthold, *Will the Gentleman Debate?*, WASH. POST, Feb. 4, 2011, at C1.

[8] *See generally* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT (2003). Executive Order 13563 articulates the general national principles of regulation, stressing that "[o]ur regulatory system must . . . allow for public participation and an open exchange of ideas." Exec. Order No. 13563, 76 Fed. Reg. 14,3821 (Jan. 21, 2011). Executive Order 13563 supplements Executive Order 12866 that provides that "[e]ach agency, [consistent with its own rules, regulations, or procedures] shall provide the public with meaningful participation in the regulatory process." Exec. Order No. 12866, 58 Fed. Reg. 190 (Oct. 4, 1993), *as amended by* Exec. Order No. 13258, 67 Fed. Reg. 40,9385 (Feb. 28, 2002) and Exec. Order. No. 13422, 72 Fed. Reg. 14,2763 (Jan. 23, 2007).

silence parties. Rather, it examines how parties consciously and unconsciously employ various strategies that inflate the social costs of legal-transition processes, thereby burdening the pace of progress and prosperity. The social costs associated with clucking are significant and include the waste related to unproductive debates and disputes, delayed changes, forgone transitions, compromised reforms, and willingness to tolerate socially undesirable norms.[9]



Congressional Pugilists (1798). A depiction of the fight between Representative Roger Griswold of Connecticut and Representative Matthew Lyon of Vermont, which took place at Congress Hall on February 15, 1798. Griswold attacked Lyon in response to a series of offensive political comments, unrelated to the debated issue.[10] Three days after the fight at Congress Hall, James Madison wrote to Thomas Jefferson: "The affair of Lyon & Griswold is bad [in] every way; but worst of all in becoming a topic of tedious & disgraceful debates in Congress."[11]

Clucking is a form of externality. Incivility, among other things, is the cost imposed on others by a party to a debate, controversy, or discourse. This

[9] For simplicity, we focus on clucking of particular parties to debates and controversies. However, counterparties choose their responses to clucking and may respond with counter-clucking. In such circumstances the social costs of the original clucking may be particularly high.

[10] For the debates and insults that triggered the Griswold–Lyon fight, see JAMES FAIRFAX MCLAUGHLIN, MATTHEW LYON: THE HAMPDEN OF CONGRESS 209–305 (1900). During the 1798 events, on January 30, 1798, Lyon spat on Griswold's face. For that, in early February, the House Committee of Privileges held Lyon liable for a "violent attack and gross indecency." *Id.* at 251–53. For this fight and other physical encounters on the floor of Congress, see *Fist Fights in the Halls of Congress*, N.Y. HERALD MAG., Jul. 10, 1910, at 6.

[11] Letter from James Madison to Thomas Jefferson (Feb. 18, 1798) (on file with authors).

imposition may result in lost time, lost participation, lost opportunity, increased administrative and recording costs, and degraded legal schemes. For this reason, this Article categorizes such an imposition as an uncivil act.

This Article's fundamental argument is that, because of actual or perceived divergence between private and social interests, individuals and organizations often inflate the social costs associated with discourse over a new or revised norm. They do so consciously or subconsciously, strategically or uncontrollably, in good faith or with improper intentions. They do so in pursuit of a particular goal and consequently impose costs on others. Other individuals and organizations respond differently to the divergence between private and social interests—although they are in the position to serve society, the private costs of engagement in debate and controversy deter them from doing so.

In this Article, we generalize the problem of divergence between private and social interests in debates and controversies in order to focus on processes of legal transition. Specifically, clucking is identified as an impediment to change. Steven Shavell made a related argument in the context of litigation,[12] pointing out that "the level of litigation is not generally socially correct because there exist what may fairly be called fundamental differences between private and social incentives to use the legal system."[13] Einer Elhauge stressed how interest groups can effectively "cluck" through litigation.[14] Others have criticized the social costs of the filibuster, employed by Senators to prevent and manipulate legal transitions.[15] In *Citizens United*,[16] the Supreme Court held that interest

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[12] *See* Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 577 (1997) (discussing the difference between private and social incentives to use the legal system) [hereinafter *Fundamental Divergence*]; Steven Shavell, *The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement*, 19 INT'L REV. L. & ECON. 99, 99 (1999) (seeking to find the socially optimal level of litigation).

[13] Shavell, *Fundamental Divergence*, *supra* note 12, at 577.

[14] Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991).

[15] *See, e.g.*, SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE (1997); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997); GREGORY KOGER, FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE (2010); Tom Harkin, *Fixing the Filibuster: Restoring Real Democracy in the Senate*, 95 IOWA L. REV. BULL. 67 (2010); GREGORY J. WAWRO & ERIC SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE (2006); *see also* Senator Jeff Merkley, Thoughts on the Reform of Senate Procedures (Nov. 16, 2010), *available at* http://voices.washingtonpost.com/plum-line/Senate%20Procedures%20Reform%20Memo.pdf (proposing reforming the filibuster); Carl Hulse, *Senate Democrats Drop Campaign to Limit Filibuster*, N.Y. TIMES, Jan. 27, 2011, at A20 (describing how the Democrats abandoned Senator Jeff Merkley's proposal in order to reach a bipartisan agreement to ease procedural gridlock); Letter from Republican Leader Mitch McConnell and Republican Whip Jon Kyl signed by all Republican Senators of the 112th Congress to Majority Leader Harry Reid, (Nov. 29, 2010), *available at* http://www.scribd.com/doc/44479259/Priorities-Letter-12-1-10 ("[W]e write to inform you that we will not agree to invoke cloture on the motion to proceed to *any legislative item* until the Senate has acted to

groups can fund political speech despite the divergence between private and social interests.[17]

This inquiry into the characteristics of socially costly speech is supported by a qualitative study of debates and disputes over changes to backyard chicken laws in more than one hundred localities between 2007 and 2010. This study emphasizes that *certain* characteristics of excessive speech—of *clucking*—are unrelated to the significance of the issue at stake, the size of the population, or the innovation in the proposed change. Rather, clucking often appears because of what change means for individuals and organizations of certain characteristics. These parties cluck to promote and preserve some perceived interest, triggering other parties to counter-cluck or to decline to cluck altogether. This study focuses on the parties who cluck, emphasizing the role of five profiles: losers, winners, status quo enforcers, political opportunists, and human roosters. While human nature may predispose an individual to cluck, this Article emphasizes that strong civility norms may deter the tendency of individuals and organizations to engage in this activity. By contrast, weak civility norms unleash clucking tendencies that inflate the social costs of transitions.[18] Because clucking tendencies are human, some clucking will

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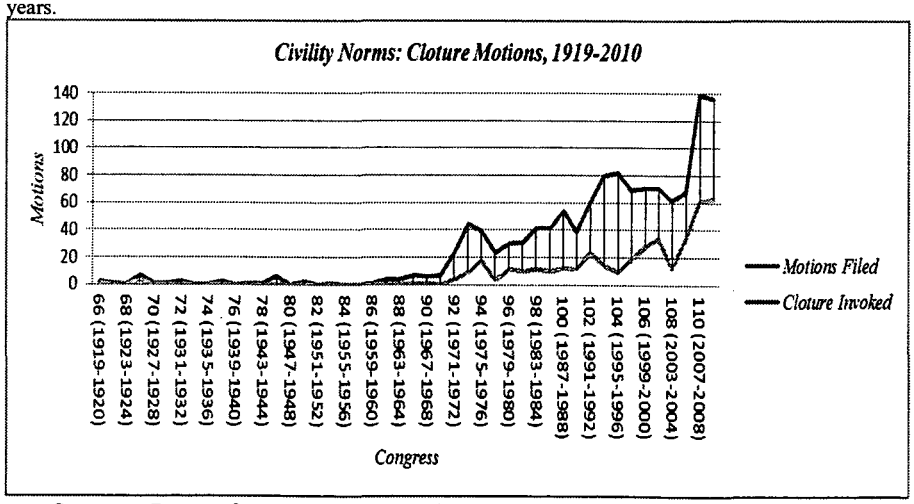
fund the government and we have prevented the tax increase that is currently awaiting all American taxpayers.") (emphasis added).

[16] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

[17] *Id.* at 913 (ruling, in a five-to-four decision, that the First Amendment bars the government from suppressing political speech of entities, despite the fact that organizations cannot vote, may be managed and controlled by nonresidents, and their interests may conflict with those of eligible voters).

[18] One way to think about civility norms and clucking in American cultures is through the use of filibuster in Congress. As the table below shows, the use of filibuster has grown dramatically over the years.



Source Data from Senate Action on Cloture Motions *available at* http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm.

exist under any set of civility norms, but the level of clucking may be mitigated over time with changes in civility norms. In other words, when social norms do not enforce civility, one should expect to observe more uncivil clucking.

This Article builds on the *Coase Theorem*, which turned fifty years old in 2010.[19] In his seminal work, *The Problem of Social Cost*, Ronald Coase transformed the way people think about transaction costs and legal rules. The central corollary of the *Coase Theorem* is that the state should strive to minimize transaction costs to improve economic efficiency. The next logical step in this prescription is *supposedly* that the state should minimize transaction costs in the process of adopting legal rules. Futile debates and unnecessary delays in legislative and regulatory processes introduce inefficiencies at the taxpayer's expense. Another way to think about the same problem—one that may be more consistent with the Coasean approach—is to avoid regulation in order to mitigate the inevitably high social costs of clucking.[20] We take as a given the need for regulation in society, and we ignore the latter perspective for its impractical nature and harmful consequences.[21]

Coase's original analytical framework was remarkably simple. He examined classic hypothetical neighbor disputes and provided insight into legal rules in the presence of externalities when negotiation is costly or inexpensive. Specifically, Coase argued that if parties can negotiate inexpensively, the outcome will be socially efficient.[22] Coase's thesis was quickly dubbed the "Coase Theorem," and it focused attention on transaction costs among parties and the efficacy of government regulation.[23]

Fifty years after the Coase Theorem began shaping minds, a new

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[19] R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

[20] *See infra* notes 40–41 and accompanying text.

[21] *See, e.g.*, FINANCIAL CRISIS INQUIRY COMM'N, FINANCIAL CRISIS INQUIRY REPORT (2011) (concluding that the Great Recession was avoidable and attributing the crisis to widespread failures to regulate); *see also* Barak Y. Orbach, *The New Regulatory Era—An Introduction*, 51 ARIZ. L. REV. 559 (2009).

[22] For a discussion of the Coase Theorem, see generally Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1 (1982).

[23] George Stigler takes the credit for labeling the Coase Theorem. In his autobiography, *Memoirs of an Unregulated Economist*, he writes:

> When, in 1960, Ronald Coase criticized Pigou's theory rather casually, . . . Chicago economists could not understand how so fine an economist as Coase could make so obvious a mistake. Since he persisted, we invited Coase . . . to come and give a talk on it. . . . I christened [Coase's] proposition the "Coase Theorem" and that is how it is known today.

GEORGE J. STIGLER, MEMOIRS OF AN UNREGULATED ECONOMIST 76–77 (1988).

urbanization trend emerged as a noisy source for neighbor disputes, forcing local governments to struggle with controversies over externalities while shaping municipal codes across the country. In twenty-first century America, backyard chickens have become popular pets and a trendy source for fresh, flavorful eggs.[24] Chickens and eggs have always been on the plates of urban families and, in small scale, some people have always kept chickens in urban localities.[25] The increased popularity of urban backyard chickens, however, inevitably gave rise to a tide of quarrels about externalities. Neighbors of backyard chicken owners found—or feared they would find—the poultry to be noisy and smelly. Some had concerns that fowl introduce health risks. The backyard chicken trend made unsettled neighbor disputes inescapable, and local governments intervened. In many localities, the clucking generated in the lawmaking process was noisier than the fowl themselves.

Legal transitions through legislation, regulations, or court decisions are ubiquitous and, indeed, have drawn the attention of scholars.[26] Thus far, to the best of our knowledge, the literature of legal transitions has not conceptualized the social costs associated with the processes of debating and finalizing the transition.[27] This Article takes a step in that direction.

The Article introduces the *Clucking Theorem*, which states that human nature unnecessarily inflates the costs of processes related to proposed legal changes. A "theorem" is a proven statement, and, like Coase, we provide no proof of ours.[28] We use the word to embrace the proven failure

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[24] *See, e.g.*, *Keeping Poultry in Cities: Checking Out the Chicks*, ECONOMIST, June 18, 2009; Editorial, *Rebels Without a Chicken Permit*, DENVER POST, July 11, 2010, at D3; Karen Auge, *Shift in Urban Pecking Order*, DENVER POST, Mar. 16, 2009, at A1; Jessica Bennett, *The New Coop de Ville*, NEWSWEEK, Nov. 17, 2008, *available at* http://www.newsweek.com/2008/11/16/the-new-coop-de-ville.print.html; Elizabeth Giddens, *Chicken Vanishes, Heartbreak Ensues*, N.Y. TIMES, Feb. 3, 2011, at D4; Adrian Higgins, *Hot Chicks; Legal or Not, Chickens are the Chic New Backyard Addition*, WASH. POST, May 14, 2009, at H1.

[25] The trend to exclude livestock, including poultry, from residential neighborhoods emerged in the late nineteenth century and early twentieth century. ROBERT M. FOGELSON, BOURGEOIS NIGHTMARES 168–181 (2005).

[26] Louis Kaplow wrote the most influential works on legal transitions. *See* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986) (analyzing the financial impact of legal transitions); Louis Kaplow, *Transition Policy: A Conceptual Framework*, 13 J. CONTEMP. LEGAL ISSUES 161 (2003) (proposing a framework for looking at legal transitions). For additional literature on legal transitions, see also Michael J. Gaertz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 48 (1977) (looking at effective dates implemented in legal reforms), and Steven Shavell, *On Optimal Legal Change, Past Behavior, and Grandfathering*, 37 J. LEGAL STUD. 37 (2008) (stating that sometimes legal change is undesirable).

[27] For related literature, see Jack Knight & Jean Ensminger, *Conflict Over Changing Social Norms: Bargaining, Ideology, and Enforcement*, in THE NEW INSTITUTIONALISM IN SOCIOLOGY 105 (Mary C. Brinton & Victor Nee eds., 1998).

[28] The Coase Theorem is not a theorem in any mathematical meaning. *See* Varouj A. Aivazian & Jeffrey L. Callen, *The Coase Theorem and the Empty Core*, 24 J.L. & ECON. 175, 175–76 (1981). For

of humans to be consistently rational and strategic in situations such as the prisoner's dilemma, which could lead to escalation of conflict. By unnecessarily inflating the social costs of desirable transitions, certain types of advocacy and debate degrade the quality of those transitions, and may be mere campaigns to force a minority preference on others.

Our inquiry into clucking as a form of externality has many broad implications. Developments in collective preferences and knowledge lead to transitions through debates and controversies. For example, smoking used to be a socially acceptable norm. These days, smoking is treated as an activity that warrants prevention, in part because secondhand smoke and the long-term healthcare expenses of smokers are socially costly.[29] Consequently, fewer individuals engage in this practice. In December 2010, after a lengthy debate, President Obama signed into law the Don't Ask, Don't Tell Repeal Act.[30] Same-sex marriage rights, however, are still controversial and promise to fuel the divisive discourse that leads to political stalemate in the foreseeable future. The debate over the Patient Protection and Affordable Care Act, dubbed "Obamacare" by critics, was one of the longest in history,[31] and it still has not ended.[32] In recent years, private lawmakers have developed legal instruments, "battering-ram strategies," to create conflict between states and the federal government over federal policies.[33] Debates and controversies today, as in any other era, are part of our reality.

The *Clucking Theorem* states that certain aspects of debates and controversies constitute costly externalities. The cost of these externalities could be lowered by procedural rules and social norms.

This Article continues as follows. Part II recasts Coasean externalities, explaining Coase's analysis of neighbor disputes and externalities in *The Problem of Social Cost*, and presenting its prescribed normative solutions. Part III demonstrates, through the study of backyard chicken laws, that substantial debates over change are human nature. This is true even when the proposed rules are very simple and thoroughly analyzed elsewhere, and even when the proposed rules burden the majority and are mere tools to serve the interest of their proponents. We conduct this inquiry in two steps. Section III.A shows that during the twentieth century, localities

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Coase's response, see R. H. Coase, *The Coase Theorem and the Empty Core: A Comment*, 24 J.L. & ECON. 183 (1981).

[29] *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

[30] Pub. L. No. 111-321, 124 Stat. 3515 (2010).

[31] Pub. L. No. 111-148, 124 Stat. 119 (2010).

[32] At the time of writing this Article, Congress is considering Repealing the Job-Killing Health Care Law Act, H.R. 2, 112th Cong. (2011), that is cosponsored by 180 Republican Representatives.

[33] Barak Y. Orbach et al., *Arming States' Rights: Federalism, Private Lawmakers, and the Battering Ram Strategy*, 52 ARIZ. L. REV. 1161, 1163–64 (2010).

established a rich, diverse universe of legal rules that governed backyard chicken laws. Then, Section III.B presents the noise and mess—the clucking—that debates over backyard chicken laws generated during the urban chicken trend. While we do not quantify the social costs of the debates, controversies, and disputes, we do show that they were unexpectedly high, considering the fact that the issue at stake—whether and how to permit backyard chickens—is relatively insignificant. Part IV examines clucking's legal status and synthesizes our study of successful and failed transitions in more than one hundred localities, identifying five human profiles that inflate social costs in debates over transitions. Part V concludes.

II. COASEAN EXTERNALITIES

The Coase Theorem is a classic in modern legal and economic thinking, and generally it is thought not to require any explanation. However, since people continue to sharpen their minds with circular riddles about chickens and eggs, it may be useful to present the Coase Theorem in the context of the urban chicken puzzle.

A. *Regulating Externalities in the Shadow of Pigou*

The Problem of Social Cost is first and foremost Ronald Coase's response to the regulatory vision of his intellectual nemesis, Arthur Cecil Pigou.[34] Pigou died at age 81 in 1959, a year before the publication of *The Problem of Social Cost.* Coase, however, remained preoccupied, criticizing Pigou's intellectual legacy throughout his career.[35] In 1920, Pigou published his most influential work, *The Economics of Welfare*, in which, among other things, he analyzed the concept of externalities.[36] Pigou did not have the term "externality" at his disposal,[37] and he referred

[34] For Pigou's general regulatory vision, see ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE (1920). For a critique of Coase's criticism of Pigou's work, see generally Herbert Hovenkamp, *The Coase Theorem and Arthur Cecil Pigou*, 51 ARIZ. L. REV. 633 (2009); A.W. Brian Simpson, Coase v. Pigou *Reexamined*, 25 J. LEGAL STUD. 53 (1996). Coase responded to Simpson's critique in his own article. R.H. Coase, *Law and Economics and A.W. Brian Simpson*, 25 J. LEGAL STUD. 103 (1996). For additional commentary, see Harold Demsetz, *The Problem of Social Cost: What Problem?*, 7 REV. L & ECON. 1 (2011) (refuting allegations by Pigou and Coase that a competitive, private-ownership economic system that conforms to the neoclassical model fails to allocate resources efficiently).

[35] In 1988, Coase published a short collection of his own works. The book included a thirty-page introduction, of which ten pages were dedicated to criticism of Pigou's support of government regulation. R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 20–30 (1988). In 1991, Ronald Coase was awarded the Nobel Prize in Economics.

[36] PIGOU, *supra* note 34.

[37] Economists started using the term "external economies" in the early 1950s. *See, e.g.*, J. E. Meade, *External Economies and Diseconomies in a Competitive Situation*, 62 ECON. J. 54, 54 (1952); Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 389 (1954) [hereinafter *Pure Theory*]; Tibor Scitovsky, *Two Concepts of External Economies*, 62 J. POL. ECON.

to the "divergence between social and private net product."[38] He argued that government regulation may be the solution to externalities:

> It is plain that divergences between private and social net product . . . cannot . . . be mitigated by a modification of the contractual relation between any two contracting parties, because the divergence arises out of a service or disservice rendered to persons other than the contracting parties. It is, however, possible for the State . . . to remove the divergence . . . by "extraordinary encouragements" or "extraordinary restraints" . . . .[39]

Coase believed that regulation is socially costly and proposed to minimize state intervention in markets. In his mind, there was no doubt "the gain which would come from regulating the actions which [would] give rise to the harmful effects [would tend to] be less than the costs involved in Government regulation."[40] Thus, Coase argued "[a]ll solutions have costs and there is no reason to suppose that government regulation is called for simply because the problem is not well handled by the market . . . ."[41] One possible interpretation of Coase's skepticism of regulation may be a concern regarding clucking's social costs and the quality of regulations adopted in a clucking-heavy context.

Coase's article, *The Problem of Social Cost*, is dedicated to Pigou's treatment of externalities. Although by 1960, economists were already using the terms "external economies" and "externalities,"[42] Coase did not use any of these phrases in his seminal article.

143, 143 (1954). It is unknown who coined the term "externality," but by 1958 it was part of the economic jargon. *See, e.g.*, Francis M. Bator, *The Anatomy of Market Failure*, 72 Q. J. ECON. 351, 352, 362–363 (1958); Paul A. Samuelson, *Aspects of Public Expenditure Theories*, 40 REV. ECON. & STAT. 332, 334 (1958) [hereinafter *Aspects of Public Expenditure*].

[38] PIGOU, *supra* note 34, at 183.

[39] Pigou was not the first to consider externalities as a justification for government intervention in markets. John Stuart Mill, for example, argued that restraints on behavior should be limited to prevention of harm to others (i.e., externalities). JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 62 (John Gray ed., Oxford Univ. Press 2008) (1859). Pigou is regarded as the first modern economist to analyze the problem of externalities.

[40] Coase, *supra* note 19, at 18.

[41] *Id.*

[42] *See, e.g.*, Bator, *supra* note 37, at 352, 362–63; Meade *supra* note 37, at 54; Scitovsky, *supra* note 37, at 143; *Aspects of Public Expenditure*, *supra* note 37, at 334; *Pure Theory, supra* note 37, at 389.

B. *Insightful Neighbor Disputes*

1. *The Reciprocal Nature of Externalities*

Coase framed externalities in a circular manner reminiscent of the chicken and egg puzzle. He criticized the then-traditional approach to the problem of "A inflicts harm on B" that focused on the question "how should we restrain A?"[43] Coase stressed that "[w]e are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question to be decided is: should A be allowed to harm B, or should B be allowed to harm A?"[44] Coase had a clear answer to the question: "What has to be decided is whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm."[45]

To explore the reciprocal nature of externalities, Coase examined several sets of disputes among neighbors, such as a polluting factory that harmed nearby landowners;[46] straying cattle that destroyed a neighbor's crops;[47] a confectioner's loud machinery that curtailed a neighboring physician's business expansion;[48] new buildings that obstructed currents of air and hindered the working of windmills;[49] construction of an airport that turned a quiet, peaceful home into a dusty, noisy dwelling;[50] and railway sparks that set fire to adjacent properties.[51] In each example, Coase explained how any possible resource allocation would result in some loss to one or the other party, establishing his observation that the problem of externalities tends to have a reciprocal nature.

Coase also discussed neighbor disputes over backyard rabbits, analyzing the case of overrunning rabbits that invaded neighboring properties and caused monetary harm.[52] In *The Economics of Welfare*, Pigou made a short reference to the incidental costs that may be attributed to urban rabbits,[53] and thus "with reluctance,"[54] Coase dedicated three and a half pages of discussion to externalities associated with them. He stressed that the rabbit owner is legally liable for nuisance caused by the

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[43] Coase, *supra* note 19, at 2.

[44] *Id.*

[45] *Id.* at 27.

[46] *Id.* at 1–2.

[47] *Id.* at 2–8.

[48] *Id.* at 8–10.

[49] *Id.* at 20–21.

[50] *Id.* at 25–26.

[51] *Id.* at 29–34.

[52] *Id.* at 35–39.

[53] PIGOU, *supra* note 34, at 185 ("[I]ncidental uncharged disservices are rendered to third parties when the game preserving activities of one occupier involve the overrunning of a neighbouring occupier's land by rabbits.").

[54] Coase, *supra* note 19, at 36.

animals,[55] and noted that a person may be "liable for damage caused by smoke or unpleasant smells, without it being necessary to determine whether he owns the smoke or the smell."[56] Coase therefore concluded that "unless the courts act very foolishly," the ordinary law of nuisance could govern rabbits.[57]

Using the Coasean framework, neighbor disputes over backyard chickens illustrate the reciprocal nature of certain externalities. On the one hand, a legal rule that prevents fowl lovers from keeping poultry on their premises entails harm to households that could benefit from chicken ownership. Backyard chicken fans have myriad reasons to support their desire to care for fowl on their property. They articulate a wide range of economic, environmental, gastronomic, health, social, and emotional matters that call for the exercise of their property rights to raise chickens in their backyards, on their roofs, or on their balconies.[58] On the other hand, a legal rule that permits fowl may impose discomfort and other injuries on the chicken owners' neighbors. Many neighbors consider backyard hens and roosters to be sources of unacceptable levels of noise, smell, and health risks.[59]

2. *Negotiating and Settling Disputes over Externalities*

The genius of the Coase Theorem is in focusing analysis of legal problems on transaction costs. Coase stressed that parties will reach a socially efficient allocation of resources when transactions are costless and information is perfect.[60] He acknowledged, however, that in the real world transaction costs are very often significant:

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[55] *Id.* at 36–37.

[56] *Id.* at 37.

[57] *Id.* at 38.

[58] *See, e.g.*, Maryann Mott, *Whole Lotta Clucking Going On in the City*, CHRISTIAN SCI. MONITOR, Nov. 10, 2008, at 17; William Neuman, *Keeping Their Eggs in Their Backyard Nests*, N.Y. TIMES, Aug. 4, 2009, at B1; Susan Orlean, *The It Bird; The Return of the Back-Yard Chicken*, NEW YORKER, Sept. 28, 2009, at 30. The urban chicken movement is partially fed by the locavore movement, which advocates eating locally produced food because it is deemed to be more sustainable. *See generally,* AMY COTLER, THE LOCAVORE WAY (2009); BEN HEWITT, THE TOWN THAT FOOD SAVED (2010); THE BACKYARD HOMESTEAD 8–9 (Carleen Madigan ed., 2009). Both movements share deep concerns related to the quality of commercial food. *See generally* GARY PAUL NABHAN, COMING HOME TO EAT: THE PLEASURES AND POLITICS OF LOCAL FOODS 26–27 (2002); MICHAEL POLLAN, THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS 5 (2006). For a comprehensive review of motivations, see Jennifer Lynn Blecha, Urban Life with Livestock: Performing Alternative Imaginaries through Small-Scale Urban Livestock Agriculture in the United States (July 2007) (unpublished dissertation) (on file with Graduate School of University of Minnesota).

[59] *See* Barak Y. Orbach & Frances R. Sjoberg, *Debating Over Backyard Chickens*, 44 CONN. L. REV. CONNTEMPLATIONS 1 (2011), http://connecticutlawreview.org/conntemplations.htm; *see supra* note 24 (articles describing neighbors' complaints with backyard hens and roosters).

[60] Coase, *supra* note 19, at 15.

> In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly—sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost.[61]

Coase chose to analyze neighbor disputes because they supposedly offer setups in which transaction costs may be low: the parties know of the existence of the other and may even personally know one another; their long-term relationship creates a mutual interest in resolving disputes; and monitoring performance and detection of breaches are likely to be inexpensive when the parties share a fence. The major challenge for neighbors, therefore, is to negotiate an agreement that would settle their dispute. Again, the contemporary neighbor disputes over backyard chickens illustrate these points, and indeed as this study shows, many neighbors cannot agree on backyard chickens and resort to the legal system.[62]

Coase pointed out that in the presence of transaction costs "the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates."[63] Thus, he provided the following prescriptive insight into the design of legal rules:

> One arrangement of rights may bring about a greater value of production than any other. But unless this is the arrangement of the rights established by the legal system, the costs of reaching the same result by altering and combining rights through the market may be so great that this optimal arrangement of rights, and the greater value of production which it would bring, may never be achieved.[64]

He therefore recognized that the government could play an important role in markets, stating: "It is clear that the government has powers which might enable it to get some things done at a lower cost than could a private

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[61] *Id.*

[62] *See infra* Section III.B.

[63] Coase, *supra* note 19, at 16.

[64] *Id.*

organisation."[65] In a similar fashion, Coase advised courts to "understand the economic consequences of their decisions . . . [because] [e]ven when it is possible to change the legal delimitation of rights through market transactions, it is obviously desirable to reduce the need for such transactions and thus reduce the employment of resources in carrying them out."[66] During the twentieth century, local governments and courts applied this approach and developed regulatory schemes and a rich common law, creating a universe of backyard chicken laws that defined rights and governed disputes among neighbors.[67]

Coase, therefore, pointed out that, in a world of limited resources where friction between parties is inevitable, the parties will bear the cost of the friction and the rule that governs their interactions may minimize this cost. He believed private parties could efficiently negotiate the rule, and the state, if anything, should find ways to minimize the transaction costs associated with the negotiation. One way to read Coase is that the state could offer allocation rules for parties to economize their transaction costs when outcomes are predictable.

Robert Ellickson stressed the significance of social norms in neighbor disputes. He studied the resolution of animal trespass disputes in Shasta County, California and concluded that certain communities employ social norms rather than formal legal rules to settle their disputes.[68] Ellickson observed that "Coase implicitly assumed that governments have a monopoly on rulemaking functions . . . . Coase[,] [however,] failed to note that in some contexts initial rights might arise from norms generated through decentralized social processes, rather than from law."[69] In some of the communities we studied, neighbors ignored hostile laws, living by an informal "don't cluck, don't tell" norm.[70] In the absence of egregious violations or complaints, municipalities ignored disobedience of the law.[71]

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[65] *Id* at 17. Coase accompanied his recognition in potential merit of the government with a warning that "the governmental administrative machine is not itself costless . . . [and it] can . . . be extremely costly." *Id.* at 18. He emphasized that "direct governmental regulation will not necessarily give better results than leaving the problem to be solved by the market . . . equally there is no reason, why, on occasion, such governmental administrative regulation should not lead to an improvement in economic efficiency." *Id.*

[66] *Id.* at 19.

[67] *See infra* Section III.A.

[68] ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 1 (1991) [hereinafter ORDER WITHOUT LAW]; Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 672–73 (1986).

[69] ORDER WITHOUT LAW, *supra* note 68, at 139.

[70] *See, e.g.*, Peter Applebome, *Envisioning the End of "Don't Cluck, Don't Tell,"* N.Y. TIMES, Apr. 29, 2009, at A21.

[71] Many scholars have studied policy choices to tolerate and even ignore certain violations of law. For the classic work on this topic, see generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). For a comprehensive review of the literature, see A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, *in* 1 HANDBOOK OF LAW AND

As the gap began to widen among differing social norms within a community, neighbor disputes arose, and individuals turned to the legal system either to preserve norms or reform them.

As the squawking became more noticeable in many neighborhoods, the chicken urbanization trend complicated neighbor disputes in many communities. No longer could neighbors settle disputes quietly, but rather their vocal clucking drew public attention. New interest groups formed, and they pressured localities to enforce the existing backyard chicken law, to tighten it, or to make it friendlier to poultry and its fans.[72] The chicken urbanization trend illustrates how intimate parties (i.e. neighbors) and the government respond to social changes that require redefinitions of certain harms and externalities.

C. *Coasean Bargaining and Legal Transitions*

In *The Problem of Social Cost*, Coase generally focused on a static world with unchanged preferences and social norms. His analysis of disputes among neighbors included references to certain transitions. Coase noted that in Anglo-American law "the character of the neighborhood is relevant in deciding whether something is, or is not, a nuisance."[73] The parties he studied evolved over time. They erected new buildings,[74] demolished existing buildings,[75] and added rooms to their established businesses.[76] These factual developments primarily influenced economic values; in general, Coase did not consider the possibility that parties' preferences evolve over time.

Theoretically, Coasean bargaining could resolve disputes that arise as a result of preference evolution. Upon formation of a new set of preferences, parties can negotiate or renegotiate the rules that govern their relationships. A business owner may decide to expand his business in a way that would affect his neighbors, and thus the neighborhood would require a new rule for nuisance. Neighbors may live in chicken-free harmony for many years—then one of them acquires a taste for keeping feathered pets. The new preference may require a new rule. Neighbors can negotiate these new rules. If they cannot reach an agreement, they will resort to the legal

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ECONOMICS 403 (A. Mitchell Polinsky & Steven Shavell eds. 2007). We use the word "disobedience" because a certain portion of backyard chicken owners who consciously broke local law felt that they were engaging in "civil disobedience." For the theory of this strategy, see Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897, 1897–1905 (2005).

[72] *See, e.g.*, Carolyn Feibel, *Chicks in the City*, HOUSTON CHRON., Jun. 16, 2008, at A1 (describing the increase in chicken-related complaints in Houston); Nancy Woods, *Afowl of the Law*, OREGONIAN, Jan. 8, 2004, at 1 (describing the typical urban chicken owner in the Portland area).

[73] Coase, *supra* note 19, at 21.

[74] *Id.* at 20–21.

[75] *Id.* at 22–23.

[76] *Id.* at 8–10.

system.

Changes, transitions, and reforms result in impassioned noisy debates and controversies. From personal experience, each one of us is familiar with the high transaction costs associated with negotiating change. When informed decision-makers act decisively, these clucking costs may be reduced. When they labor over decisions, trying to please everyone, the costs are high and take many forms.

III. THE TRANSFORMATION OF BACKYARD CHICKEN LAW

Backyard chickens may be a cause for neighbor disputes but they do not necessarily introduce any regulatory challenge. Simple legal rules have always governed the rights of landowners to keep fowl on their premises. This Article documents rules varying from strict bans on backyard chickens, through regulatory schemes that impose restrictions to protect neighbors, to unrestricted rights of chicken owners. It should be simple for local governments to draft such rules, and it would be even simpler for local governments to borrow a successful model rule from another locality. As such, lengthy and costly debates over backyard chicken law may be regarded as counterintuitive. Nevertheless, we have documented numerous debates, controversies, and litigation over transitions relating to backyard chickens.

This Section summarizes our study of debates over the backyard chicken laws during the 2007–2010 chicken urbanization trend. We use this study to illustrate clucking in action. To keep things in perspective, legal transitions related to backyard chickens are not comparable in significance to national reforms in healthcare, financial markets, civil rights, or environmental resources. However, for the purpose of studying avoidable debates and controversies, we believe that legal transitions relating to backyard chickens offer an insightful analytical framework.

Every transition has peculiar characteristics that inspire debate and controversy. A study of national controversies over significant transitions is always subject to interpretations and disagreements. The chicken urbanization trend has generated hundreds of local transitions with similar characteristics, allowing us to distinguish common properties of controversies over change from peculiar characteristics that undermine efficient legal transitions. Our study examined a short period of time, transitions between 2007 and 2010, during which civility norms that governed debates and controversies were relatively weak.[77] Our data therefore may stress debates and controversies over transitions because of the social norms of the era. We could not control for these norms that

[77] *See generally* Orbach, *supra* note 33 (studying conflict strategies during 2008–2010); *see also infra* notes 70–72 and accompanying text.

unleash human clucking tendencies.

Section III.A describes the richness of the backyard chicken law prior to the urbanization trend. Section III.B maps the controversies and disputes over changes in existing laws.

A. *Backyard Chicken Law Before the Urbanization Trend*

Urban poultry did not generate any substantial case law before the end of the nineteenth century, when localities started adopting policies that excluded livestock from residential neighborhoods.[78] In November 1877, New York City amended its Sanitary Code to provide:

> That no live geese, ducks, or other fowls shall be kept in any yard, area, cellar, coop, building, or other place within the built-up portion of the city of New York, except in the public markets, without a permit in writing, from [the Health] Department.[79]

Eleven years earlier, New York City inspired the country with its Metropolitan Health Bill,[80] which reformed sanitary conditions in the city and was the first comprehensive health regulatory framework in the country.[81] The Board of Health passed the 1877 ban on urban chickens, arguably only for sanitary reasons related to health risks associated with slaughter.[82] Other cities followed New York. For example, in 1896, Boston adopted an almost identical ban:

> That no live chickens, geese, ducks, or other fowls, shall be brought into, or kept, or held, or offered for sale, or killed or plucked, in any place in the city of Boston, without a permit therefor [sic] in writing from the Board of Health, which shall be subject to revocation by said Board at any time.[83]

During the twentieth century, the law of urban chickens evolved in

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[78] FOGELSON, *supra* note 25, at 168–81.

[79] N.Y.C. SANITARY CODE § 197 (1877).

[80] An Act to Create a Metropolitan Sanitary District and Board of Health therein for the preservation of Life and Health, and to prevent the spread of Disease, NY (Feb. 26, 1866).

[81] *See generally* Gert H. Brieger, *Sanitary Reform in New York City: Stephen Smith and the Passage of the Metropolitan Health Bill*, 40 BULL. HIST. MED. 407 (1966).

[82] New York City banned urban pigs in 1819. Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 899.

[83] CITY OF BOS. ANNUAL REPORT OF THE HEALTH DEP'T (25th ed.), CITY DOC. NO. 12, 158 (1896).

several directions, but drew little attention,[84] probably for good reason. When Coase wrote his seminal article, he ignored the rich case law that analyzed neighbor disputes over externalities caused by vocal roosters and hens.[85]

For simplicity, using a classic Calabresi-Melamed framework, we organized common state and local backyard chicken laws according to their status before the chicken urbanization trend began:[86]

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[84] For two exceptional works that focus on the fine humor of chicken law, see James L. Huffman, *Chicken Law in an Eggshell: Part III—A Dissenting Note*, 16 ENVTL. L. 761, 762 (1986), and Roger I. Abrams, Note, *Law and the Chicken: An Eggs-agerated Curriculum Proposal*, 17 NOVA L. REV. 771, 771–72 (1993).

[85] *See, e.g.*, Higgins v. Decorah Produce Co., 242 N.W. 109, 112–13 (Iowa 1932) (refusing to enjoin a poultry plant from operation, but requiring that the plant remove offal in closed containers); Myer v. Minard, 21 So. 2d 72, 76–77 (La. Ct. App. 1945) (affirming the dismissal of a suit seeking to enjoin the defendant from maintaining roosters on his premises and allowing them to crow, disturbing the plaintiff); Wade v. Miller, 73 N.E. 849 (Mass. 1905) (holding that odors and sounds arising from henhouses in a residential neighborhood were not a nuisance); McCollum v. Kolokotrones, 311 P.2d 780, 783 (Mont. 1957) (holding that evidence did not prevent against finding that a lot owner failed to establish the existence of a nuisance from a chicken raising business nearby her property); Vaszil v. Molnar, 33 A.2d 743, 744 (N.J. Ch. 1943) (denying a motion to restrain defendants from keeping chickens on their property in vicinity of plaintiff's property); New York v. Filactos, 12 N.Y.S.2d 175, 177 (1939) (reversing conviction for keeping rooster on property because permit granting permission to keep chickens did not distinguish between male and female fowl); New York v. Davis, 79 N.Y.S. 747, 747, 751 (1903) (affirming conviction for the keeping and killing of chickens without a special permit); Houston v. Adams, 326 S.W.2d 627, 631 (Tex. Civ. App. 1959) (holding that the trial court did not abuse its discretion by granting a temporary injunction to prevent the city from enforcing an ordinance making it unlawful to keep fowl in the city within 100 feet of the residence of another).

[86] *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089–93 (1972) (describing multi-step framework analyzing what side to favor, how to enforce the choice, and what kind of protection to grant); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 715–24 (1996); Carol M. Rose, *The Shadow of* The Cathedral, 106 YALE L.J. 2175, 2175–82 (1997).

Rule Type	*Beneficiaries*	*Typical Rule Framing*
Liability Rules	Aggrieved Neighbors	Common law nuisance[87] Regulatory standard that allows fowl as long as they do not create nuisance as defined in the regulation[88]
	Chicken Owners	Denying nuisance claims[89] Liability for damages to harmed chickens[90]

[87] *See, e.g.*, St. Paul v. Nelson, 404 N.W.2d 890, 891–92 (Minn. Ct. App. 1987) (finding that numerous complaints of a rooster's frequent crowing at inconvenient times demonstrate a nuisance); Lambert v. Matthews, 757 So. 2d 1066, 1071 (Miss. Ct. App. 2000) (finding that keeping nineteen roosters and twenty-six hens was a nuisance to surrounding landowners and enjoining the chicken owner from keeping more than two roosters); Forrester v. Webb, No. CA98-04-070, 1999 WL 74543, at *2 (Ohio Ct. App. Feb. 16, 1999) (affirming a judgment against chicken owners who raised roosters for cockfighting and allowing them to keep up to six roosters on the property).

[88] *See, e.g.*, HONOLULU, HAW., REV. ORDINANCES ch. 7, art. 2 §§ 2.1–2.3 (2011) (defining "animal nuisance" as "any animal, farm animal or poultry which . . . [m]akes noise continuously and/or incessantly for a period of 10 minutes or intermittently for one half hour or more to the disturbance of any person at any time of day or night" and provides that "[i]t is unlawful to be the owner of an animal, farm animal or poultry engaged in animal nuisance"); KEY WEST, FLA., CODE § 53.01 (1986) (defining prohibited "nuisance" as "[a]n animal or poultry that . . . makes . . . bothersome noises, for continued duration, or upon three or more occasions cumulatively during any nine-hour period from 10:00 p.m. to 7:00 a.m., so as to disturb, across a residential or commercial property line, the reasonable peace and quietude of any person"); MAPLEWOOD, MINN. ZONING ORDINANCE § 36-66(c)(1) (1988) (prohibiting the "raising or handling of livestock or animals causing a nuisance"); *see also* Minnesota v. Nelson, 499 N.W.2d 512, 514 (Minn. Ct. App. 1993) (holding proper statutory interpretation of the regulation suggests that roosters may not be banned).

[89] *See, e.g.*, *Myer*, 21 So. 2d at 76–77 ("We cannot conceive of a normal person, endowed with ordinary sensibilities and ordinary habits, being greatly discomforted by the announcement of a new day from the well-trained voice of a stately cock . . . . The voice of the rooster can be heard daily in motion pictures, on the radio and at the birth of a new day all over the world, whether in the country, town or city, one only has to awaken to hear the cheery voice of Chanticleer announce the day. He has been doing that all over the world since before the year 1 and, so far as we can find, no one has until now tried to silence his cheerful greetings . . . . Without further proclaiming the cheerful and gallant qualities of the big red rooster, we are convinced beyond a reasonable doubt that the cheery outbursts at the break of day *cannot be so disturbing as to become a nuisance to a normal person of ordinary sensibilities and of normal habits and tastes*, and that to continue to allow the rooster to crow is not in derogation of the rights of the plaintiffs." (emphasis added)); *see also Wade*, 73 N.E. at 849 (holding that the neighbor who was disturbed by "a number of hens and not more than two roosters" was "a nervous invalid," but the nuisance standard applies to "persons of ordinary health and sensitiveness, rather than upon those afflicted with disease or abnormal physical conditions").

[90] *See, e.g.*, United States v. Causby, 328 U.S. 256, 266–67 (1946) (finding government taking where frequent, low-level flights harmed chickens, reducing value of the property for farming); Vanderslice v. Shawn, 27 A.2d 87, 88–91 (Del. Ch. 1942) (enjoining small airplanes from flying low over property where the airplane's exhaust harms chickens, among other damages, making ordinary use or occupation physically uncomfortable).

Rule Type	*Beneficiaries*	*Typical Rule Framing*
Property Rules	Aggrieved Neighbors	Neighbor consent is required for permit[91]
	Chicken Owners	Allowing fowl with restrictions on distance of the coop from the neighbor's house[92] Allowing poultry with restrictions on the number of fowl[93] Permit requirements (renewal applications may be needed)[94]
Inalienability Rules	Aggrieved Neighbors	Bans on poultry.[95] Bans on roosters.[96] Bans on slaughtering chickens in backyards.[97]
	Chicken Owners	N/A

[91] *See, e.g.*, ST. PAUL, MINN. LEGIS. CODE §§ 198.02–04, (requiring an applicant for a backyard chicken permit to obtain written consent of seventy-five percent of the owners or occupants of real estate within one-hundred-fifty feet of the outer boundaries of her premises); *St. Paul v. Nelson*, 404 N.W.2d. at 890, 892 (upholding the city's requirement for written consent).

[92] *See, e.g.*, ALEXANDRIA, VA., CODE OF ORDINANCES § 5-7-2 (2011) ("It shall be unlawful for any person to keep or allow to be kept within the city, within two hundred feet of any residence or dwelling not occupied by such person, any fowl."); BALT., MD., CITY HEALTH CODE, tit. 2 § 2–106 (2007) ("No pen may be closer than 25 feet to any residence."); TUCSON, ARIZ., ORDINANCE No. 268 § 2 (Sept. 16, 1907) ("It shall be unlawful to keep . . . within twenty feet of the dwelling house of any person . . . any coop, house, shed, or other structure for the purpose of housing, keeping or caring of any pigeons or fowls of any kind."); *see also* Houston v. Adams, 326 S.W.2d at 633 (upholding an ordinance with geographic restrictions).

[93] *See, e.g.*, Erwin v. Alvarez, 752 So. 2d 1261, 1262 (Fla. Dist. Ct. App. 2000) (addressing a procedural aspect in a six-year old neighbor dispute over alleged violation of a county ordinance that caps the number of chickens and roosters per lot at 25); BALT., MD., CITY HEALTH CODE, tit. 2 § 2-106 (2007) (allowing up to four hens over the age of one month); BOISE, IDAHO, MUNICIPAL CODE, ch. 11-09-09.09 (1995) (allowing up to twelve chickens per half acre of land); NAPLES, FLA. ORDINANCE No. 01-9152 § 102–52(5) (Apr. 18, 2001), (allowing single-family residences to keep up to 25 fowls); S.F., CAL., HEALTH CODE, art. 1, § 37 (2011) (capping the number of "chickens" in residential districts at four).

[94] *See, e.g.*, BALT., MD., CITY HEALTH CODE, tit. 2 § 2-106 (2007); BOS., MASS., CITY CODE § 16-1.8A (1991); DENVER, COLO., CITY CODE, art. IV § 8.91 (1950) (requiring a permit application for fowls with mandatory annual renewal process); D.C. MUN. REGS., tit. 24, § 902 (1981).

[95] BANGOR, ME., CITY CODE, art. III § 65–10 (1998); IOWA CITY, IOWA, CODE § 8-4-6 (1997). *C.f.* Des Plaines v. Gacs, 382 N.E.2d 402, 406–07 (Ill. App. Ct. 1978) (holding that the city council's discretion allowed for them to enact laws limiting the keeping of racing pigeons within city limits).

[96] *See, e.g.*, CHANDLER, ARIZ., ORDINANCE, No. 3044 § 14-7 (1999) ("It shall be unlawful for any person to have, herd, or keep any hog, pig, shoat, jack, jenny, burro, donkey or rooster, within the City."); DALLAS, TEX., CITY CODE § 7.7.3 (2011); SAN JOSE, CAL., CITY CODE § 7.60.820 (2011); *see also* New York v. Filactos, 12 N.Y.S.2d 175 (1939).

[97] *See, e.g.*, Simon v. Cleveland Heights, 188 N.E. 308, 310 (Ohio Ct. App. 1933) (holding that a ban on poultry slaughtering was unconstitutional).

A chicken owner or an aggrieved neighbor holds an entitlement protected by a liability rule if the present legal regime provides that destruction of the entitlement should be compensated.[98] For example, if an aggrieved neighbor holds an entitlement protected by a liability rule, a chicken owner whose fowl create a nuisance will have to compensate the neighbor for the destruction of his entitlement. Alternatively, if a chicken owner holds an entitlement protected by a liability rule, an aggrieved neighbor could stop the chicken nuisance but he must compensate the chicken owner.[99]

A chicken owner or an aggrieved neighbor holds an entitlement protected by a property rule[100] if the governing legal regime provides him with a right "that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller."[101] When a chicken owner holds a property entitlement, it means that the legal rule protects her right to keep chickens in her backyard, and disturbed neighbors would have to buy from her the option to maintain her premises chicken-free. By contrast, when the neighbors hold the entitlement, the chicken owner would have to obtain their consent, buying it if needed, in order to keep chickens in her backyard.

The mapping of backyard chicken law in the era before the present urbanization trend stresses a straightforward Calabresi–Melamed observation: "most entitlements to most goods are mixed."[102] Many urban chicken regulations include rules of several types. For example, a local ordinance may ban roosters and allow a certain number of hens, to the extent that they do not create a nuisance. Such a regulation bundles liability, property, and inalienability rules.

Freely traded entitlements protected by property rules "involve a collective decision as to who is to be given an initial entitlement but not as to the value of the entitlement."[103] Calabresi and Melamed's phrase "collective decision" is critical for the understanding of social transitions. As Section III.B demonstrates, a collective decision over entitlements in backyard chickens, let alone more valuable assets, is socially costly. The

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[98] Calabresi & Melamed, *supra* note 86, at 1092.

[99] *Id.* at 1116.

[100] Inspired by the way hunting communities in the Labrador Peninsula organized to maintain their livestock of undomesticated animals, Harold Demsetz defined the nature of property rights and motives for their emergence. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348–53 (1967).

[101] Calabresi & Melamed, *supra* note 86, at 1092.

[102] *Id.* at 1093. Or as Calabresi and Melamed noted: "The categories [of entitlements] are not, of course, absolutely distinct; but the categorization is useful since it reveals some of the reasons which lead us to protect certain entitlements in certain ways." *Id.* at 1092.

[103] *Id.* at 1092.

same point generally applies to entitlements protected by liability rules, since parties can design legal instruments and trade liabilities and waivers from liabilities.

A chicken owner or an aggrieved neighbor holds an inalienable entitlement when the state or local government bans the trade in particular rights.[104] For example, when a local government bans the keeping of fowl in residential neighborhoods, a landlord who desires to become a chicken owner cannot purchase from his neighbors the right to keep poultry in his backyard. Similarly, when a local government imposes a ban on roosters or a ban on chicken slaughtering, a neighbor's willingness to receive some payment to tolerate conduct in violation of the ban is a legally insufficient transaction. Calabresi and Melamed explained inalienability rules with efficiency objectives, arguing that in certain circumstances "a transaction would create significant externalities—costs to third parties," that may justify bans on transactions.[105] Backyard chicken laws in the form of inalienability rules that address general sanitary and health concerns illustrate this point. The willingness of a landowner to tolerate chicken slaughtering in the neighboring backyard is irrelevant if the slaughter harms public welfare. Calabresi and Melamed also acknowledged that paternalism rather than efficiency may dictate the adoption of inalienability rules.[106] In the context of urban chickens, paternalism is often about community image. Before the chicken urbanization trend, backyard chickens arguably reduced property value and signaled low class.

Margaret Radin developed a comprehensive framework that analyzes particular inalienability rules.[107] Her study of inalienability rules responded to debates over bans on prostitution, baby-selling, and surrogate motherhood.[108] In Radin's framework, "human flourishing" is a central motivation for inalienability.[109] Some chicken owners could relate to this argument, finding their squawking pets reflect their value in sustainable food supply. While diligent research may locate court decisions or legal rules that support any view or argument, before the chicken urbanization trend, chicken owners generally had no inalienability entitlements. Local governments that adopted inalienability rules passed laws that imposed strict restrictions on urban poultry. When localities started regulating urban chickens in the late nineteenth century, the most common form of rule they adopted was an inalienability rule that granted an entitlement to

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[104] *Id.* at 1092–93.

[105] *Id.* at 1111–13.

[106] *Id.* at 1113–14.

[107] Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1851 (1987).

[108] *See, e.g.*, Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 324 (1978); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987).

[109] Radin, *supra* note 107, at 1851–52.

neighbors and the community at large.[110] Sanitary conditions were the driving force behind the rules. Over time, sanitary concerns have diminished, and modern inalienability rules against fowl focus mostly on nuisance and residential image—where "nuisance" stands for externalities and "image" stands for value of the properties in the mind of potential buyers, who may not appreciate the noise, the smell, or the very idea of neighboring livestock.[111] Thus, at least in today's backyard, Calabresi and Melamed appear to explain inalienability better than Radin.[112]

The Calabresi-Melamed framework integrates Coasean notions of transaction costs. With respect to the choice among entitlements, Calabresi and Melamed pointed out that "the simplest reason for a particular entitlement is to minimize the administrative costs of enforcement."[113] For example, the nineteenth-century broad ban on urban poultry focused primarily, though not exclusively, on concerns associated with chicken slaughtering. Hypothetically, cities could have allowed chickens and simply banned their slaughter, but the enforcement of a wholesale ban on chickens was probably significantly cheaper than the enforcement of a particularized ban on residential slaughter in the city.

This intuitive logic equally applies to administrative processes associated with changes of laws. One would expect public decision-makers to choose processes that minimize transaction costs for the community—that is, to deliver legislative outcomes to the taxpayer at a lower price. For example, once New York City debated the ban on urban poultry, Boston reduced costs for its residents by borrowing the New York City ordinance.

Like Coase, Calabresi and Melamed proposed that the initial allocation of entitlements would be efficient in the sense that it would minimize future transactions among parties.[114] They clarified that property rules are superior to liability rules when parties can reasonably transact in entitlements, but when parties are not in the position to efficiently carry out transactions in entitlements, liability rules may be superior to property

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[110] *See supra* notes 78–83 and accompanying text.

[111] Robert Fogelson offers some anecdotal evidence of private arrangements in property to exclude poultry farming in the late nineteenth century. His study is focused on nuisance and exclusivity of property. FOGELSON, *supra* note 25, at 168–81.

[112] Susan Rose-Ackerman offered a more nuanced framework for inalienability rules. Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 931 (1985) (noting that restrictions on transferability, ownership, and use should not be treated as "analytic stepchild[ren]").

[113] Calabresi & Melamed, *supra* note 86, at 1093.

[114] *Id.* at 86, at 1093–94 (internal citation omitted) ("Economic efficiency asks that we choose the set of entitlements which would lead to that allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before. This is often called Pareto optimality.").

rules.[115] Specifically, Calabresi and Melamed stressed hold-out problems as a source for negotiation failure that may make liability rules advantageous.[116] Using these principles, it appears that traditional backyard chicken law generally evolved in efficient directions. Local governments identified the costs associated with enforcement of liability rules and gradually shifted toward property rules. Most localities, however, imposed restrictions on property rules, understanding potential bargaining failures among neighbors. For example, when the choice of a property rule granted an entitlement to aggrieved neighbors, localities dismantled hold-out problems by requiring consent for chickens from the majority of neighbors (often seventy-five percent), but not all. By contrast, when the property rule granted an entitlement to chicken owners, very often it came with restrictions on the number of chickens, and in many towns with bans on roosters.

B. *Transforming Law Through Squawking and Clucking*

Coase might have been chicken-indifferent and could have expected neighbors to negotiate over the governing norms related to chickens. His expectation from the state (or the locality) would have been to identify the norms that neighbors would agree upon to minimize private transactions and friction. To a large extent, traditional backyard chicken laws functioned this way. The chicken urbanization trend, however, reflects a massive change in norms related to backyard fowl. More people want to have chickens as pets and want to have fresh eggs produced at home. As a result, other people find themselves in proximity to neighboring backyard chickens.

Urban chickens may be emotionally loaded and controversial, but they do not raise complex regulatory issues. Roosters are vocal, can be used for illegal cockfighting,[117] and are *not* needed for the production of eggs. In any given lot, the sound and odors created by fowl increase with their number. These variables and a century of regulatory experience could simplify the regulatory process for localities. Moreover, logic dictates that localities would save costs by learning from the legal transitions of other localities that had laws similar to their own, especially neighboring localities. Nevertheless, contrary to this intuition, the urban chicken revolution often did not result in quiet legal transitions. A common transformation of municipal backyard chicken law came with socially

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[115] *Id.* at 1106–10.

[116] *Id.* at 1107–08.

[117] Louisiana was the last state to ban cockfighting in July 2007. LA. REV. STAT. ANN. § 14:102.23 (2010). In 2007, a federal law reinforced this ban. Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88 (2007) (making interstate commerce related to cockfighting a federal felony).

costly squawking and clucking.

We studied more than one hundred localities that debated the transformation of their backyard chicken laws between 2007 and 2010. The Appendix lists these localities. We summarize elsewhere the debates and controversies in forty communities.[118] In this Section, we rely on these materials to demonstrate clucking in action. Part IV builds on this Section and characterizes clucking.

This Section analyzes the nature of quarrels resulting from proposed changes to backyard chicken laws. It utilizes four starting points of localities—indifference, friendliness, tolerance, and hostility—to analyze their relative transitions. These starting points allow us to examine possible relationships between clucking and the scope of the transition. Specifically, the starting points allow us to illustrate that clucking can appear in any transition regardless of the significance of the issue at stake and the innovation of the proposed innovation. As the level of clucking increases, quality risks appear. For a wide range of reasons—political compromises, procedural constraints, and others—the quality of the transition may be degraded, or an undesirable transition may emerge.

In many localities, the increased private preference to keep chickens created conflicts over laws and pressure for reforms. Chicken-friendly localities considered imposing limits on urban farming, while localities whose laws were hostile to fowl considered the popularity of urban chickens and the rising enforcement costs of their unpopular laws. On this spectrum between chicken-friendly and chicken-hostile localities, chicken-tolerant localities that allowed residents to keep some fowl on their premises, under defined restrictions, faced pressures to relax some of the restrictions. The initial universe of diverse legal rules provides us with an opportunity to examine the legal-transition process in multiple contexts.

1. *Chicken-Indifferent Localities*

Chicken-indifferent localities do not have any specific laws that apply to backyard chickens. Rather, they rely on the common law of nuisance to provide individuals with a remedy for harm caused by neighboring fowl. Before backyard chickens were a fad, no special rules were needed. Some localities expressly defined the reliance on nuisance standards in their municipal laws. For example, in Chevy Chase, Maryland, the city code states: "It shall be unlawful for any person to keep any domestic animals . . . or wild animals, livestock and fowl in such manner as to constitute a nuisance or a health hazard."[119] Such liability rules tend to benefit chicken owners, providing little redress to aggrieved neighbors because conflict

[118] *See* Orbach & Sjoberg, *Debating Over Backyard Chickens*, *supra* note 59 (documenting the debates and controversies over backyard chicken laws in forty localities between 2007 and 2010).

[119] CHEVY CHASE, MD., CITY CODE, ch. 3 § 3-1 (2010).

resolution relies on costly and unpredictable litigation. Many chicken-indifferent local governments considered legal transitions in response to the chicken urbanization trend. The chosen strategies of the "reformers" often involved clucking and did not always result in successful outcomes.

In this Section, debates in four localities: Chicago, Illinois; Los Angeles, California; Cambridge, Massachusetts; and Ridgway, Colorado are presented as illustrative. In Chicago, the failed reform ended with no change, and the city effectively remained chicken-friendly. Los Angeles experienced a quiet and successful transition that focused on socially condemned activities and was very narrow in scope. In Cambridge and Ridgway, vocal attempts to introduce chicken-friendly norms backfired; the cities adopted restrictive rules. Chicago, Cambridge, and Ridgway represent failed vocal attempts to advance significant transitions.

Chicago illustrates an unsuccessful attempt to tighten its nuisance law in response to backyard chickens. Chicago does not regulate backyard chickens or roosters. In response to the chicken urbanization trend, in the spring of 2007, Alderman Lona Lane launched a campaign to ban urban chickens altogether,[120] citing concerns about odor, infectious disease, rodents, and ritual slaughter (though Chicago does ban residential slaughtering).[121] By November of that year, the Chicago Animal Care and Control Commission had received 717 noise complaints about roosters and sixty-five additional nuisance complaints about chickens.[122] Nevertheless, chicken advocates mobilized to lobby city government,[123] and the ban failed to advance.[124] After the 2007 failure, chicken advocates continued to form groups to share information about chicken keeping and local laws.[125] Alderman Lane also continued to advocate against urban chickens,[126] but as of October 2011, the proposal has not been reintroduced, and no restrictive or regulatory laws have been passed in Chicago. The proposed change in Chicago was uncompromising and encountered significant opposition. Both sides were vocal for at least thirty months, thereby postponing legal transition and effectively maintaining the status quo.

Los Angeles was also a chicken-indifferent locality. In 2009, the Public Safety Committee studied the number of urban chickens,

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[120] Gary Washburn, *City May Be No Place for Chickens*, CHI. TRIB., Nov. 21, 2007, at N4.

[121] *Id.*; Sara Olkon, *Chickens Earn Keep in Chicago Backyards*, CHI. TRIB., Dec. 15, 2008, at C16.

[122] Washburn, *supra* note 120.

[123] Mark Konkol, *Don't Call Her Chicken: Word of Move to Ban Poultry from Homes Spurs Hen Owner to Take on City Hall*, CHI. SUN-TIMES, Jan. 11, 2008, at 16.

[124] Olkon, *supra* note 121.

[125] Alissa Irei, *Controversial Urban Chickens Still Roost Around Chicago*, MEDILL REPORTS, Mar. 9, 2010, at 10, *available at* http://news.medill.northwestern.edu/chicago/news.aspx?id=160734t .

[126] Olkon, *supra* note 121.

particularly urban roosters, in response to concerns about crowing and cockfighting.[127] The City Council responded by prohibiting ownership of more than one rooster on any premise, reasoning that "multiple roosters creates a serious public nuisance" associated with "noise, odors, health, and sanitation issues . . . ."[128] The City Council noted that "a great many roosters bred, raised or kept within the City of Los Angeles are used for the illegal blood sport called cockfighting . . . ."[129] These two reasons convinced the entire Council to vote for the moderate ordinance that did not record any significant objections in the city.[130] Some members of the public, during the comment period, expressed concern that the ordinance would affect legitimate chicken-keeping.[131] This argument was not compelling to the lawmakers, probably because a single rooster is unnecessary for hens to lay eggs and is sufficient to lay fertile eggs for breeding. The transition in Los Angeles was relatively quiet and successful because of its narrow scope and its framing, which focused on cockfighting rather than backyard farming.

Cambridge, Massachusetts was a chicken-indifferent locality that changed its laws to become chicken-hostile. Its municipal code did not specifically address urban fowl. This statutory silence led one resident to believe she had the right to keep three ducks and two chickens in her yard.[132] An angry neighbor complained to the Inspectional Services Department, which cited the poultry owner, stating that because a chicken coop is not specifically provided for under the city's zoning ordinances, the urban poultry were illegal.[133] The neighbors' dispute developed into a matter of statutory interpretation of the term "Accessory Use" in the city's zoning ordinance,[134] defined as "a use subordinate to the principal use and customarily incidental to the principal use."[135] The central question was whether chicken-keeping is customary in Cambridge.[136] More than ninety people attended the hearing, which included three hours of public comment

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[127] L.A. PUB. SAFETY COMM. REP., File No. 07-3491, 07-3492 (Sept. 2009) (on file with authors).

[128] L.A., CAL., ORDINANCE 180,889 (Oct. 31, 2009) (adding § 53.71 to the Los Angeles Municipal Code).

[129] *Id.*

[130] *See* David Zahniser, *L.A. Council Clamps Down on a Crowing Problem: Roosters*, L.A. TIMES, Sept. 22, 2009, at A5 (discussing the L.A. Council's decision to limit the number of roosters per property to one without proper licensing).

[131] L.A. PUB. SAFETY COMM. REP., *supra* note 127.

[132] Jillian Fennimore, *Cambridge Woman Angry Over Neighbor's Ducks, Chickens*, CAMBRIDGE CHRON., Jan. 21, 2010, *available at* http://www.wickedlocal.com/cambridge/news/lifestyle/health/x1301086485/Cambridge-woman-angered-over-neighbors-ducks-chickens#axzz1T4HCGUJn.

[133] *Id.*

[134] Xi Yu, *Chicken and Duck Owners in Cambridge Lose Appeal*, HARV. CRIMSON, Feb. 12, 2010, *available at* http://www.thecrimson.com/article/2010/2/12/chickens-cambridge-use-over/.

[135] CAMBRIDGE, MASS., ZONING ORDINANCE art. 2.000 (2010).

[136] Yu, *supra* note 134.

by residents.[137]

Cambridge chicken proponents argued that chicken keeping fell within the spectrum of pet ownership, and was thus a universal custom.[138] They also provided evidence that neighboring communities Belmont and Boston provide for residential chickens, albeit with some regulation.[139] The complainant, however, worried about odor, chicken waste, the possibility of getting bird flu, and potential increase in neighborhood rodents and mosquitoes.[140] In a four-to-one decision, the Board of Zoning Appeals voted against chickens in the city.[141] Although the Appeals Board gave its ruling, chicken proponents continue to lobby the city, and an MIT Special Program for Urban and Regional Studies team is developing a coop that will mitigate noise and odor in an effort to facilitate more chicken-friendly laws.[142] Cambridge officials expressed amenability to the proposed coop and amended regulations.[143] The neighboring complainant, however, is happy with the Appeals Board ruling, stating: "[The fowl] are gone and we are happy with the way it is . . . . [I]f people don't want chickens and ducks in an urban setting, they have to speak up."[144]

Cambridge became chicken-hostile as a result of an individual's unsuccessful attempt to enforce a pro-chicken preference in her community and her inability to anticipate the extent of—and the government response to—chicken-hostile neighbors. The individual had some community support, but her choice of process probably was not the best to deliver a transition. She did, however, generate considerable noise. Cambridge illustrates how a clucking strategy may trigger counter-clucking strategies of rival parties, and how the resulting outcome of the noisy controversy may not necessarily reflect the broad social preferences.

Ridgway, Colorado's status as a chicken-indifferent locality led to its first jury trial in thirty years—to explore the legal status of roosters. In 2008, a chemical engineer and landscape designer who goes by the name Planet Janet started raising forty-two chicks, eight of whom grew up to be vocal roosters. The noise irritated neighbors, who filed complaints with the town.[145] In July 2009, the City Council passed an ordinance that allows

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[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] Fennimore, *supra* note 132.

[141] Orbach & Sjoberg, *Debating Over Backyard Chickens, supra* note 59 at 20–21; Yu, *supra* note 134.

[142] Jillian Fennimore, *MIT Group Tries to Build a Better Chicken Coop for Cambridge*, CAMBRIDGE CHRON., May 13, 2010, *available at* http://www.wickedlocal.com/cambridge/features/x1560855783/MIT-group-builds-coop-for-chickens-in-Cambridge#axzz1WSfvQuhN.

[143] *Id.*

[144] *Id.*

[145] Nancy Lofholm, *Court Loss Won't Stop Rooster Booster*, DENVER POST, July 7, 2010, at B4.

a person to keep up to six hens on premises but prohibits roosters.[146] Planet Janet refused to comply with the ordinance, and, for locality-specific oddities, the controversy developed into a jury trial with witness testimony, videotape presentations in the courtroom, and corresponding media coverage.[147] Planet Janet was acquitted of the nuisance charge but found guilty of keeping prohibited roosters in town, and she was fined $300.[148] Her attorney appealed the decision, aiming to argue that the city's requirement to remove roosters is an unconstitutional taking under state law.[149] At the time of this writing, there is no additional information about the status of Planet Janet's appeal.

Chicago, Los Angeles, Cambridge, and Ridgway serve as examples of chicken-indifferent localities that faced possible transitions. Across the country, there are many other localities that were at this same starting point when the backyard chicken fad began. These cities and towns illustrate three distinct outcomes: maintenance of the status quo in Chicago; changes in Los Angeles and Ridgway toward chicken-friendly laws, which are somewhat more restrictive than chicken-neutral laws; and a transition in Cambridge from chicken-neutral to chicken-hostile law.

While clucking cannot be explicitly quantified, these examples illustrate how debates and controversies over simple issues can consume relatively substantial social resources and may not even result in any productive outcome. At the time of this writing, Chicago has spent resources but adopted no rule. Los Angeles escaped clucking, but addressed only limited aspects of the regulatory issues. That is, every property owner in the city can still own a vocal rooster and as many hens she would like to have. Cambridge adopted a rule that is consistent with customary statutory interpretation techniques but may not reflect community preferences; thereby illustrating the potential of clucking to degrade transitions or to further unwelcome and undesirable transitions. It may be that a ban is the desirable norm for Cambridge, despite disobedience and enforcement cost, but the continued lobbying and willingness of city officials to entertain the issue again suggests it is an undesirable or suboptimal norm that emerged because of clucking. In Ridgway, lawmakers adopted a backyard chicken law that is consistent with the general preference of most residents, but the community costs imposed by Planet Janet were relatively high.

2. *Chicken-Friendly Localities*

Chicken-friendly localities articulate either no restrictions or very

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[146] *Id.* at B4; RIDGWAY, COLO., ORDINANCE No. 09-95 (July 8, 2009).

[147] Lofholm, *supra* note 145, at B4.

[148] *Id.*

[149] *Id.*

minor restrictions on chicken owners. Chicken-friendly laws may ban roosters or limit the number of chickens, but limits are high, allowing for enough chickens to produce at least enough eggs or meat to provide for an average-sized family with surplus. Even before the recent fad, many localities embraced chickens. For example, the San Francisco Health Code imposes some restrictions on chicken owners but does not ban roosters or limit the number of birds.[150] New York City, among the first cities to ban urban fowl in the late nineteenth century, re-embraced hens in the early twentieth, prohibiting only roosters.[151] Tucson bans roosters and allows households to keep up to twenty-four hens.[152]

The chicken urbanization trend increased the number of neighbor disputes in such localities because of the increase in the number of properties housing backyard chickens. We documented transitions in chicken-friendly localities—including Anchorage, Alaska and Moscow, Idaho—that adopted stricter restrictions on urban fowl because of neighbor disputes.

Anchorage did not regulate backyard chickens under its animal control rules,[153] but it had a zoning law that required structures or enclosures for animals to be kept at least 100 feet from any lot line.[154] This law largely went unenforced until August 2006 when a neighbor dispute over a rooster led to a campaign to revise the law.[155] The city proposed new zoning regulations that would prohibit roosters, limit the number of backyard animals on lots smaller than 10,000 square feet, allow for a ten-foot setback from the property line, and require owners to purchase a $115 permit every two years.[156] A coalition of chicken advocates fought these rules, largely because the permits were considered too expensive.[157] Two years later, in 2008, the Anchorage Assembly was still considering chicken regulation with lobbying inputs from the same chicken advocates.[158] The municipality provisionally adopted new zoning laws that were similar to those proposed in 2007, but allowed for a greater number of chickens on smaller-sized lots and no longer required the permit fee.[159] To date, these provisional additions have not been incorporated into the municipal

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[150] S.F., CAL., HEALTH CODE art. 1 § 37 (2011).

[151] N.Y.C., N.Y., HEALTH CODE art. 161, § 161.19 (2000).

[152] TUCSON, ARIZ., CODE ch. 4 §§ 4-56, 4-59 (2011).

[153] ANCHORAGE, ALASKA, CODE OF ORDINANCES ch. 17.10 (2011).

[154] *Id.* ch. 21.40.045.

[155] Julia O'Malley, *Urban Chickens: Crowing Rooster Spoiled the Hen Party at a Hillside Home*, ANCHORAGE DAILY NEWS, Aug. 14, 2006, at A1.

[156] Julia O'Malley, *Backyard Outlaws*, ANCHORAGE DAILY NEWS, Aug. 20, 2007, at B1.

[157] *Id.*

[158] Lucy Peckham, *Shelter for Backyard Pets Shouldn't Be Limited to Dogs*, ANCHORAGE DAILY NEWS, July 8, 2008, at B7.

[159] ANCHORAGE, ALASKA, MUN. CODE, AO 2008-49, tit. 21.05.070D.14.b.ii, Outdoor Keeping of Animals, Provisionally Adopted Sept. 16, 2008.

code.[160]

Moscow, Idaho allowed up to twenty-five fowl on lots up to 5000 square feet.[161] In October 2009, the Moscow City Attorney was asked to draft a new chicken ordinance for the town of 23,000 residents. To the press, the City Attorney explained the pressing legislative need: "We're getting two competing interests . . . . There are people complaining about roosters and neighborhood chickens, and then we have increasing inquiries from people who want to raise chickens in their backyards."[162] Thus, although "[c]hickens aren't normally part of the discourse of any municipal function . . . they [became] the main topic of the Moscow Administrative Committee's meeting . . . ."[163] A month later, the town adopted an ordinance that allows up to six adult hens on a 5000 square foot lot.[164] The new law "is meant to balance the historical, agricultural, and local egg and poultry meat production with the desires of city dwellers to be free from unwanted noise, smells, and health nuisances."[165]

Anchorage and Moscow represent a particular category of locality: the city or town in which the transitions were motivated by unorganized chicken-detractors and less-vocal individuals. Although aggrieved neighbors complained, generally they did not have the chicken owners' cause of passion to organize themselves in interest groups. In this category of localities, excessive discussion in backyard chicken regulation was still observed, but it was generally less vigorous than in other categories.

3. *Chicken-Tolerant Localities*

Chicken-tolerant localities impose restrictions on ownership of backyard chickens to protect the interests of neighbors and the community. The restrictions may include a city-issued permit requirement, a neighbor notification or consent prerequisite for a permit, a limit on the number of permits issued or the number of hens per permit, a minimum distance from lot lines, special housing, or special food storage requirements.[166] In some towns, like New Haven, Connecticut, the law on the books banned urban chickens, but the actual policy was "don't cluck, don't tell."[167] In many chicken-tolerant localities, the chicken urbanization fad created pressure to lift some of the restrictions imposed on chicken owners.

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[160] ANCHORAGE, ALASKA, CODE OF ORDINANCES ch. 21.04 (2011).

[161] MOSCOW, IDAHO, CODE, tit. 10, ch. 4, § 4-12 (1965).

[162] *More Chickens Raised in Moscow*, IDAHO PRESS-TRIBUNE, Oct. 6, 2009, at 5.

[163] Mark Williams, *Inner-City Fowl Proposal Headed to Council*, MOSCOW-PULLMAN DAILY NEWS, Nov. 10, 2009.

[164] MOSCOW, IDAHO, ORDINANCE No. 2009-23 (Nov. 16, 2009).

[165] *Id.*

[166] *See* Orbach & Sjoberg, *Debating Over Backyard Chickens*, *supra* note 59 (compiling examples of restrictions).

[167] Applebome, *supra* note 70.

Boston, Denver, and the District of Columbia allow residents to keep fowl on their premises but require them to obtain permits from the city. In 2009, the cities and their elected and appointed officials started debating whether the permit requirement was desirable or outdated.[168] At the time of this writing, two years later, these debates continue.

St. Paul, Minnesota prohibits keeping more than one chicken on a lot without a permit from the city.[169] There was disobedience in the community,[170] and the chicken urbanization trend led to the formation of lobbying coalitions that promoted a campaign for more liberal laws.[171] After a delayed vote and considerable deliberation, the council voted four-to-three against a proposed ordinance amendment to repeal the permit requirement, but it was willing to reduce the permit fee.[172]

Arkadelphia, Arkansas witnessed a more nuanced debate. The city's 1949 Ordinance provides that:

> It shall be unlawful for any person to keep or to allow to run at large within the city any chickens, ducks, geese, turkeys or any other kind of domestic fowl; provided, however, that the board of directors may upon proper application . . . permit the keeping of fowl within the limits of the city."[173]

Pursuant to a neighbor's complaint, an animal control officer issued a citation to a backyard chicken owner. Subsequently, the chicken owner, a non-practicing attorney, exercised his right to apply for a permit from the Arkadelphia Board of Directors.[174] On July 1, 2010, the city board convened to discuss the application.[175] The directors had mixed feelings about chickens in the city, stressing that "the ordinance was written in 1949, when people in Arkadelphia did not live in close proximity to one

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[168] *See, e.g.*, Editorial, *Bring On the Personal Fowl*, BOS. GLOBE, Aug. 3, 2009, at 10; Jeremy P. Meyer, *Coops on Table at City Meeting*, DENVER POST, Dec. 13, 2010, at A14; Michael Neibauer, *D.C. Proposes Looser Restrictions on Urban Chickens*, WASHINGTON EXAMINER, Oct. 1, 2009.

[169] ST. PAUL, MINN., MUN. CODE OF ORDINANCES § 198.02(b) (2011).

[170] St. Paul City Council Meeting Minutes, Oct. 14, 2009, at 5.

[171] Scott Nichols, *No Peeps of Protest at Public Hearing but Proposed Poultry Provision Still Pulled*, SOUTHWESTREVIEWNEWS.COM, Sept. 20, 2009, *available at* http://southwestreviewnews.com/Main.asp?SectionID=62&SubSectionID=275&ArticleID=4644.

[172] Patrick B. Anderson, *A Few Feathers Plucked from Chicken-Ownership Ordinance*, ST. PAUL PIONEER PRESS, Oct. 14, 2009, at B2; St. Paul City Council Meeting Minutes, Oct. 14, 2009, at 6.

[173] ARKADELPHIA, ARK., MUNICIPAL CODE § 4-4 (1949).

[174] Letter from Jordan French to Arkadelphia Board of Directors (Undated).

[175] Joe Phelps, *'Fowl' Play?—For Now, Directors Allow Man to Keep Chickens in City*, ARKADELPHIA DAILY SIFTINGS HERALD, July 2, 2010 *available at* http://www.siftingsherald.com/highlight/x41617803/-Fowl-play-For-now-directors-allow-man-to-keep-chickens-in-city.

another. But now they do, and some might find chickens 'offensive[]' . . . ."[176] The mayor moved to say "no" and turn down the application, but his motion died for lack of a second.[177] Ultimately, the chicken owner received the permit.[178]

Again, we observe that even debates over specifications and application of simple laws can be noisy and socially costly. The debate over permits also highlights how clucking can degrade transitions. In an effort to please squawking parties, inefficient regulatory schemes survive or are adopted. Burdening a locality and individuals with an onerous administrative permit process encourages disobedience and undermines the credibility of the local regulatory system.

4. *Chicken-Hostile Localities*

Chicken-hostile localities ban chickens altogether. This inalienability rule with entitlement to aggrieved neighbors has triggered numerous campaigns for reform across the country. Chicken advocates are organized, firm in their convictions, and sometimes uncompromising. We documented attempts to change local laws through city councils, town committees, and courts. Some struggles ended with victories for chicken fans. In others, chicken advocates were defeated. Many of these campaigns were lengthy, vocal, and unproductive.

Significant fights were documented in city councils in Sacramento, California; Imperial Beach, California; Durango, Colorado; Longmont, Colorado; Evanston, Illinois; Lockport, Illinois; Lafayette, Indiana; Iowa City, Iowa; Franklinton, Louisiana; Bangor, Maine; Ann Arbor, Michigan; Grand Rapids, Michigan; Belgrade, Montana; Buffalo, New York; Oklahoma City, Oklahoma; Salem, Oregon; and many other localities.[179] Further, litigation, sometimes bitter and high-profile, occurred in Hollywood, Florida; Roswell, Georgia; and Montgomery County, Maryland.[180]

To illustrate the struggles, we summarize three controversies that provide greater insight into the backyard chicken controversy. In Iowa City, Iowa, the 2009 campaign to legalize urban fowl failed, with the mayor leading the opposition at the council, articulating concern that students may move and leave behind their chicken pets.[181] Franklinton, Louisiana also banned chickens, and many residents felt that the

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[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] For descriptions of these documented battles, see Orbach & Sjoberg, *Debating Over Backyard Chickens, supra* note 59.

[180] *Id.* at 7–8, 13.

[181] G. Jeffrey MacDonald, *Urban Chickens Gaining Traction Nationwide*, IOWA CITY PRESS-CITIZEN, Nov. 10, 2009, at 3A.

prohibition was outdated; these residents disobeyed the law.[182] The board of aldermen responded to pressures from the community, reconsidering the chicken trend and changing times; nonetheless, the board ruled against chickens, since, as the mayor pointed out: "You can't raise animals or livestock in the city."[183] Durango, Colorado also considered whether the legalization of backyard chickens would threaten its modern image. In fact, the battle over the legalization of urban chickens was one of the town's major political controversies in 2009 and ended in a rare three-to-two vote of the city council in favor of chickens.[184]

Backyard chickens generated political capital for a local politician in Ann Arbor, Michigan. Until 2008, Ann Arbor banned backyard chickens.[185] Councilor Stephen Kunselman leveraged the local popularity of urban poultry and championed a successful campaign for a backyard chicken ordinance. Kunselman publically launched his campaign in December 2007.[186] In response to chicken detractors, he suggested that Ann Arbor need not debate the issue: "You can live in New York City and have chickens. It is not a matter of how urban you are. It's a matter of political will."[187] Nonetheless, Ann Arbor was subject to eight months of political pressure from chicken advocates and significant media coverage before the city finalized an ordinance in August 2008 that allows urban chickens.[188] It was a split vote in which advocates presented educational and food production values and detractors presented indecency claims.[189] The 2008 ordinance bans roosters, allows residents to keep up to four hens, and requires chicken owners to obtain a five-year permit from the city.[190] To qualify for a permit, residents must submit an "Adjacent Neighbor Consent Form." Although this might be deemed a win for chicken

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[182] Richard Meek, *Franklinton Updates Dated Ordinance*, DAILY NEWS, *available at* http://www.gobogalusa.com/articles/2010/07/06/news/doc4c24bd591dba2254431020.txt.

[183] *Id.* For the events in Franklinton, see Orbach & Sjoberg, *Debating Over Backyard Chickens, supra* note 59, at 16.

[184] Garrett Andrews, *Council Approves Chickens in Town*, DURANGO HERALD, Nov. 4, 2009, at A1, *available at* http://durangoherald.com/article/20091104/NEWS01/311049961/Council-approves-chickens-in-town; *see also* Orbach & Sjoberg, *Debating Over Backyard Chickens, supra* note 59, at 6.

[185] *See* Judy McGovern, *Chicken Supporters Crowing*, ANN ARBOR NEWS, Jun. 3, 2008, at A1 (discussing the passage of an ordinance allowing residents to keep up to four chickens in their backyards).

[186] Paul Egan, *If Councilman Gets His Way, Chickens Could Come Home to Roost*, DETROIT NEWS, Dec. 3, 2007, at B1; Tom Gantert, *Chickens in Ann Arbor Backyards?*, ANN ARBOR NEWS, Dec. 2, 2007, at A1; *Ann Arbor Councilman Pushes Chicken Rights Law*, ASSOCIATED PRESS, Dec. 2, 2007.

[187] *Ann Arbor May Allow Chicken Coops*, UPI, Dec. 3, 2007.

[188] *See* McGovern, *supra* note 185 (discussing the passage of the plan allowing homeowners to keep up to four hens in their backyards in June of 2008, nearly eight months after the introduction of the plan).

[189] *Hens Get Green Light from City*, ANN ARBOR NEWS, July 12, 2009, at Y1.

[190] *Id.*

keepers, an advocate indicated that the law was merely "fairly OK."[191] Indeed, the permit renewal process and neighbor consent form reflects future costs for taxpayers and chicken keepers alike.

In 2004, Buffalo, New York banned chickens in response to chicken fighting and health concerns, which may have been heightened by media reports about avian influenza.[192] Five years later, in response to a neighbor complaint, Buffalo Police issued a citation to a resident chicken owner and sought to enforce the ban.[193] With support of other neighbors and a city councilor, the chicken owner successfully campaigned to once again amend the municipal code of Buffalo.[194] Compared with reports from other cities, Buffalo's amendment process appeared to be conciliatory.[195] The city's corporation counsel researched urban chickens and determined that, while advocates claim small-scale farming minimizes disease risk, others worry about avian flu transmission.[196] Local lawmakers attempted to draft a regulation that would satisfy both interests. At the hearing, with only a one hour debate and only two detractors out of forty speakers, the chicken amendments passed as expected, with a very strict permitting process.[197] Upon cursory glance, the new code does satisfy the interests of chicken owners while addressing other residents' health concerns. It allows for a limited number of hens with requirements relating to: neighbor identification and consent; coop construction and inspection; fencing; adult supervision of chickens; food storage; annual permit fees; and articulated plans for chicken litter.[198] In considering its details, however, the significant compromises enable city officials to very closely monitor and manage chicken owners in Buffalo, resulting in an onerous law.[199] The council's senior legislative assistant warned that the law would "spawn red tape."[200] This warning was prescient. Upon receipt of an application, the Buffalo city clerk must notify the city council and mayor, as well as all property owners within fifty feet of the applicant's property.[201] If the clerk

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[191] *Id.*

[192] Brian Meyer, *Chickens Routed from Roost, For Now*, BUFFALO NEWS, Mar. 31, 2009, at B1; Jay Rey, *Chickens Take Rightful Place*, BUFFALO NEWS, Sept. 21, 2009, at C1; Gerry Rising, *Highly Pathogenic Avian Influenza*, BUFFALO NEWS, Mar. 21, 2004.

[193] Meyer, *Chickens Routed from Roost*, *supra* note 192, at B1.

[194] *Id.*; Brian Meyer, *Rivera's Henhouse Visit Raises Hope on Law*, BUFFALO NEWS, Apr. 2, 2009, at B1; Rey, *supra* note 192, at C1.

[195] *See* Meyer, *Chickens Routed from Roost*, *supra* note 192, at B1 (discussing the strategy session the Buffalo city council held to discuss amendments to the ordinance).

[196] *Id.*

[197] BUFFALO, N.Y., CODE §§ 341-11.1 to 341-11.4 (2009); Rey, *supra* note 192.

[198] BUFFALO, N.Y., CODE §§ 341-11.1 to 341-11.4 (2009).

[199] Brian Meyer, *Discussion Seeks Ways to Allow City Residents to Keep Chickens*, BUFFALO NEWS, Apr. 4, 2009, at D3; *see also*, BUFFALO, N.Y., CODE §§ 341-11.1 to 341-11.4 (2009).

[200] Meyer, *supra* note 192.

[201] BUFFALO, N.Y., CODE § 341-11.1 to 341-11.4 (2009).

receives no written comments within twenty days, the applicant will receive a non-transferable, one-year permit, subject to inspection.[202] If opposing comments *are* submitted to the clerk, the council may deny the license or impose additional conditions on its issuance.[203] Each May, the council and mayor are to be notified of all licenses and their expiration dates.[204] The council or mayor may choose not to renew a license or may file complaints regarding hens.[205] Despite the apparent win for chicken owners, some deemed the law to be too restrictive to be practicable or accessible.[206] Chicken advocates signaled an interest in lobbying anew for a friendlier law.[207]

Roswell, Georgia had an ordinance that prohibited "[l]ivestock raising, not including poultry and hogs."[208] A Roswell resident, Andrew Wordes, had about thirteen chickens[209] and a total of 150 various birds, some miniature, on a lot that was just about one acre.[210] He had raised chickens on this property for many years when the city received an anonymous complaint,[211] and he was cited by the city and ordered to remove the birds from his yard.[212] He refused to comply, and was then ordered to appear before the Roswell Municipal Court, where he was represented by former Georgia Governor Roy Barnes.[213] The defense demurred, arguing the birds were not a nuisance and that the ordinance was ambiguous.[214] The litigation was well publicized, and Wordes capitalized on the media attention with chicken promotional campaigns such as the distribution of six hundred chicks in downtown Roswell under the title "Chicken Stimulus Package."[215] Prior to the trial date, the Georgia General Assembly passed, and current Governor Purdue signed into law, the Landowner Protection Act, which provided: "No . . . municipality . . . shall adopt or enforce any

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[202] *Id.* § 341-11.4(A)(4).

[203] *Id.* § 341-11.4(A)(5)–(6).

[204] *Id.* § 341-11.4(B)(1).

[205] *Id.* § 341-11.4(B)(4)–(6).

[206] Rey, *supra* note 192, at C1.

[207] *Id.* (explaining that Mr. Watts intended to spend "some time to make sure other people are able to do it").

[208] ROSWELL, GA., ZONING ORDINANCE § 5.13.2, tbl.5.1.

[209] Doug Nurse, *Chickens As Pets? That Doesn't Fly in Roswell*, ATLANTA J.-CONST., Mar. 18, 2009, at 1A.

[210] Ralph Ellis, *Roosters Not Allowed to Rule Roswell Roosts*, ATLANTA J.-CONST., Dec. 16, 2009, at 1B.

[211] Nurse, *supra* note 209, at 1A.

[212] City of Roswell (Ga.) Code Enforcement, Citation # 00866, Feb. 17, 2009.

[213] Ralph Ellis & Alexis Stevens, *City's Case Against Chickens Dismissed*, ATLANTA J.-CONST., May 30, 2009, at B1.

[214] General Demurrer at 1, 3, Roswell v. Wordes, Citation No. C00866 (Roswell Mun. Ct. Mar. 19, 2009).

[215] Jamie Gumbrecht, *Chick Giveaway Draws A Flock, Some Squawks*, ATLANTA J.-CONST., Apr. 12, 2009, at B6.

ordinance . . . regulating . . . animal husbandry involved in the production of agricultural or farm products on any private property."[216] Barnes filed a plea in bar, arguing that the city was preempted from further prosecution of Wordes for "animal husbandry."[217] Without addressing the preemption issue, the court found the law to be invalid on the grounds that it was "too vague and ambiguous for enforcement."[218] Subsequently, the city drafted an amended ordinance that would regulate the number of chickens kept on residential property.[219] There was significant debate at the council's first reading and public comments in September 2009 and a planning commission meeting in October 2009.[220] Commission members came to an agreement to include a "grandfather clause" to satisfy resident participants, particularly Wordes and his supporters.[221] This agreement and other prior understandings were not reflected in the amendment presented at a council meeting in December 2009, leading to another two-and-a-half hour debate that resulted in the council approving the contentious amended ordinance.[222] Roswell police arrested Wordes on his way out of the meeting and detained him overnight for an unrelated traffic violation, which Wordes suggested was retribution for his impassioned chicken advocacy.[223]

As noted, the publicized event in Roswell and other Georgia towns persuaded the state legislature of the need to enact the Landowner Protection Act, signed into law by Governor Sonny Purdue on May 1, 2009.[224] The Act provides that no local government "shall adopt or enforce any ordinance, rule, regulation, or resolution regulating crop management or animal husbandry practices involved in the production of agricultural or farm products on any private property."[225] Although the Georgia Landowner Protection Act could presumably end the local

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[216] GA. CODE ANN. § 2-1-6(a) (2009) (prohibiting regulation of farm products by local government).

[217] Plea in Bar at 2, Roswell v. Wordes, Citation No. C00866 (Roswell Mun. Ct. May 26, 2009).

[218] Order, Roswell v. Wordes, Citation No. C00866 (Roswell Mun. Ct. June 5, 2009).

[219] Hatcher Hurd, *Chicken Ordinance Gets Roswell Consideration*, REVUE & NEWS (Alpharetta-Roswell, GA, Nov. 11, 2009), http://www.northfulton.com/Articles-c-2009-11-180597.114126_Chicken_ordinance_gets_Roswell_consideration.html.

[220] Roswell (Ga.) Planning Commission Meeting Minutes, Oct. 20, 2009, at 11–35 (describing the extensive debate about the ordinance and the comments of both supporters and those in opposition of the ordinance).

[221] Ralph Ellis, *North Fulton Residents Fighting for their Fowl*, ATLANTA J.-CONST., Sept. 5, 2009, at 1A.

[222] Ellis, *Roosters Not Allowed*, *supra* note 210, at 1B.

[223] Ty Tagami, *Chicken Man: Arrest Was City's Payback*, ATLANTA J.-CONST., Dec. 18, 2009, at B9.

[224] Press Release, Georgia Office of the Governor, Governor Perdue Signs Landowner Protection Act (May 1, 2009), *available at* http://www.georgia.gov/00/press/detail/0,2688,78006749_139486062_139649502,00.html.

[225] GA. CODE ANN. § 2-1-6 (2009).

disputes by preempting backyard chicken laws, at the time of this writing, it has not.

The controversies and disputes over backyard chicken law in chicken-hostile localities during the fowl fad may be intuitive, but they underscore the great cost of excessive debates. These lawmaking conflicts divert resources toward unproductive activities and potentially degrade the quality of the legal norm. The backyard chicken movement illustrates how clucking can lead to elaborate and socially costly regulatory regimes and deployment of enforcement resources to matters with minor social significance.

IV. CLUCKING AND TRANSITIONS

We define "clucking" as an action that inflates the social costs associated with discourse over a new or a revised norm. An individual or organization that engages in clucking may do so consciously or subconsciously, strategically or uncontrollably, in good faith or with improper intentions. From the social perspective, the consciousness and motives of the party that engages in clucking are somewhat irrelevant. Regardless of the mental state of the clucker, clucking results in impediments to change, degraded transitions, undesirable reforms, and other social costs. It is a form of externality. For the design of particular policy tools that address clucking, the ability to identify the mental state or motives may be relevant.

Clucking is generally background noise in our reality. In many respects we are all familiar with clucking, and we probably have contributed to clucking at one stage or another of our lives. Section A, discusses the legal status of clucking and expresses reservations. Section B, describes several profiles of cluckers.

A. *Clucking and Civility in the Marketplace of Ideas*

1. *The Conventional Perspective*

Clucking, although we regard it as an uncivil act, is an inevitable reality in every society and more so in democratic societies. About this, even parties with opposite political views agree.[226] In his famous 1919

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[226] *Compare* President Barack Obama, Remarks by the President in State of the Union Address (Jan. 25, 2011) ("The debates have been contentious; we have fought fiercely for our beliefs. And that's a good thing. That's what a robust democracy demands. That's what helps set us apart as a nation."), *with* Sarah Palin, Statement in Response to the Tucson Tragedy (Jan. 12, 2011) ("Vigorous and spirited public debates during elections are among our most cherished traditions. . . . Public discourse and debate isn't a sign of crisis, but of our enduring strength. It is part of why America is exceptional.").

dissent in *Abrams v. United States*,[227] Justice Holmes articulated the classic "marketplace of ideas" metaphor, endorsing the value of clucking. Justice Holmes stressed that "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . . ."[228] Holmes was concerned about censorship and firmly believed that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[229] In his mind, clucking and counter-clucking offered a recipe to enhance knowledge and information in society.

Eight years later, Justice Brandeis, who joined Justice Holmes' *Abrams* dissent, articulated an understanding that the best antidote to bad speech is more speech: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[230]

Justices Holmes and Brandeis framed free speech as a core element in American law and established two complementary frameworks: the marketplace of ideas and fighting bad speech with more speech.[231] The concept of the marketplace of ideas has been subject to extensive criticism,[232] but it dominates American jurisprudence, stressing the positive value of clucking. The underlying premise of "the marketplace of ideas" is that the social costs of clucking tend to generate a greater good—the convergence of ideas leads to better understanding of controversial issues and potential agreements.

In *Snyder v. Phelps*,[233] almost a century after Justice Holmes wrote his dissent about the marketplace of ideas, the Supreme Court held that the First Amendment provides immunity against tort liability for clucking. Writing for the majority, Chief Justice Roberts explained the conventional logic for accommodating clucking. "Speech is powerful. It can stir people

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[227] 250. U.S. 616, 630 (1919) (Holmes, J., dissenting).

[228] *See also* Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.").

[229] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[230] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[231] *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 1–6 (1948) (describing the United States' two different freedoms of speech).

[232] *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 6–7, 12–17 (1989) (pointing out flaws in the marketplace theory's assumptions); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1995); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5–6 (1984) (exposing the marketplace theory's fallacies); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005); Harry Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1106–07 (1979) (explaining why expression deserves extensive governmental immunity).

[233] 131 S.Ct. 1207 (2011).

to action, move them to tears of both joy and sorrow, and . . . inflict great pain. . . . As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[234]

In the context of campaign financing, the Supreme Court examined specific costs of speech. First in *Davis*[235] and then in *Bennett*,[236] the Court reviewed regulatory schemes that sought to assist political candidates whose rivals had deep pockets of private funds. In *Davis*, the Court reviewed the so-called Millionaire's Amendment of the Bipartisan Campaign Reform Act of 2002.[237] Under that Amendment, a candidate for the United States House of Representatives, whose rival spent more than $350,000 of his personal funds, was permitted to collect more funds from individual contributors. In *Bennett*, a candidate who agreed to limit his personal spending to $500, participate in at least one debate, and return unspent money would receive public funds based on the amount spent by privately financed opponents and by independent groups supporting them.

In both cases, the Court was divided five-to-four, with the same five Justices in the majority.[238] The majority ruled that the regulatory schemes were unconstitutional because they burdened protected political speech. By expanding the financial possibilities of political rivals, the challenged regulatory schemes threatened to diminish the effectiveness of speech of well-funded candidates. Following this logic, writing for the majority in *Davis*, Justice Alito argued that the scheme "impose[d] an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right."[239] Similarly, in *Bennett*, Chief Justice Roberts argued that any increase in speech of publically financed candidates is a "burden imposed on privately financed candidates and independent expenditure groups [that] reduces their speech."[240]

Put simply, the majority in *Davis* and *Bennett* opposed regulatory schemes that added speech, based on the theory that the additional speech, or clucking, is a burden that diminishes the effectiveness of existing speech. The majority dismissed the possibility that some of the existing

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[234] *Id.* at 1220. In *Snyder*, members of the Westboro Baptist Church picketed military funerals to communicate their belief that God hates the United States for its tolerance of homosexuality, particularly in America's military. In an eight-to-one decision, the Court refused to hold the church liable for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. *Snyder* does not distinguish between content and quantity of speech (clucking). However, its reasoning is general.

[235] Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008).

[236] Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 131 S.Ct. 2806 (2011).

[237] 2 U.S.C. § 441a–1(a) (2006).

[238] Justices Alito, Kennedy, Roberts, Scalia, and Thomas were in the majority in both cases. In *Davis*, the four Justices in the dissent were Breyer, Ginsburg, Souter, and Stevens. In *Bennett*, Justices Kagan and Sotomayor replaced Justices Souter and Stevens, who retired.

[239] *Davis*, 544 U.S. at 738.

[240] *Bennett*, 131 S.Ct. at 2820.

speech, the privately funded speech, could be the source of burdensome clucking, and that establishing greater vocal parity may mitigate the symptoms.[241] In *Citizens United*,[242] the same five Justices who voted for the ruling in *Davis* and *Bennett* lifted restrictions on the use of private funds in political campaigns. The present law, therefore, accommodates privately funded clucking in campaigns but restricts the use of regulatory schemes that seek to diminish the effectiveness of such clucking.

2. Refining Excessive Speech Analysis

Despite the persistence of the conventional constitutional protection of clucking,[243] we argue that the legal system can benefit society by reducing levels of clucking. Certain forms of speech stifle the public debate, rather than enrich it. More is not necessarily better. Our analysis of clucking supplements familiar discussions of the freedom of speech and the marketplace of ideas. Market theories have evolved since Justices Holmes and Brandeis formulated their freedom of speech frameworks. Justice Holmes wrote his decision in *Abrams* a year before Pigou published his work on externalities[244] and before economists developed a coherent understanding of market failures.[245] When Justice Brandeis wrote his concurrence in *Whitney* he might have been familiar with Pigou's pioneering work, but he could not have been equipped with any modern understanding of markets.

Our basic critique of the conventional constitutional protection of clucking begins with the observation that more speech is not necessarily the cure for bad speech or socially desirable at all. Certain speech strategies impede and degrade change, even if the speech itself is socially acceptable. As the study of debates over backyard chicken laws shows, individuals and organizations, consciously or subconsciously, strategically or uncontrollably, in good faith or with improper intentions often inflate the social costs of debates and controversies that could be handled at lower costs.

Clucking is an externality. Participants in debates and controversies do

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[241] Writing the dissent in *Bennett*, Justice Kagan examined the scenario in which private funding is related to corruption. This hypothetical is somewhat related to our point. Our point is valid even in the absence of corruption—the privately funded speech could divert attention from important issues or confuse voters without any corrupt motives.

[242] 130 S.Ct. 876 (2010).

[243] Martin Redish argued that "the constitutional guarantee of free speech ultimately serves only one true value, [which he] labeled 'individual self-realization.'" Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

[244] *See supra* notes 34–36 and accompanying text (noting that "Pigou died at age 81 in 1959, a year before the publication of *The Problem of Social Cost*").

[245] *See, e.g.*, Francis M. Bator, *The Anatomy of Market Failure*, 72 Q. J. ECON. 351, 351 (1958) (describing market failure as "the failure of a more or less idealized system of price-market institutions to sustain 'desirable' activities or to estop 'undesirable' activities").

not fully internalize the social costs and benefits of their actions, may not be aware of them, or may disregard them in favor of their private interests. When clucking results in a divergence between private and social interests, markets may break, leading to undesirable outcomes. For example, Congress (or state legislatures) may fail to integrate developments in social values because the costly clucking of some elected members discourages others from engaging in the debate or diverts them to invest their energies in other causes.[246] In the case of backyard chickens, passionate participants in public debates burden others and sometimes succeed in promoting unpopular preferences because less passionate participants are unwilling to invest resources in the debate. Withdrawal or compromises may reflect a divergence between the private interests of participants and social welfare. At the extreme, uncompromising groups may be willing to engage in endless debates even if that would entail prohibitive social cost, such as government shutdown.[247]

When participation costs are inflated because of clucking, some parties to debates and controversies may choose to withdraw or make compromises because of their private costs, while society as a whole will bear the social costs of such decisions. This may be the most significant social cost of clucking.

Withdrawal from debates and controversies may take various forms. At the extreme, a withdrawing party may simply vote with her feet and leave the community. Several economic models describe how members of a community use the strategies of "voice" and "exit" with respect to participation in the community.[248] A member may employ a voice strategy, expressing her views, or an exit strategy, leaving the community.

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[246] *See infra* notes 273–275 and accompanying text (noting that "Senator John McCain employed numerous clucking techniques to postpone and protest the repeal of Don't Ask, Don't Tell").

[247] This almost happened during the 2011 Congressional debates over the budget, when abortion opponents threatened to fail the budget deal to the extent that abortion providers would receive federal funds. *See* Erik Eckholm, *Budget Feud Ropes In Planned Parenthood*, N.Y. TIMES, Feb. 18, 2011, at A16 (discussing a proposed amendment to the federal budget bill that "would also bar Planned Parenthood from receiving any federal funds for any purpose"); David A. Fahrenthold & Amy Gardner, *'No Compromise' Puts Lawmakers in a Corner*, WASH. POST, Apr. 7, 2011, at A6 (noting that the strongest voices against a budget compromise are "the conservative Republicans who have said they won't accept a deal with Democrats on spending cuts, even if that means a government shutdown"); Jennifer Steinhauer, *Late Clash on Abortion Shows Sway of Social Conservatives*, N.Y. TIMES, Apr. 9, 2011, at A1 (describing abortion as "the last and most contentious of the issues that held up the budget deal").

[248] *See, e.g.*, ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 21–25, 30–37 (1970) (describing consumer use of the exit and voice options); *see also* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417, 420–22 (1956) (arguing that "in terms of a satisfactory theory of public finance, it would be desirable to force" consumer-voters to reveal their preferences so that the expenditure wants of a typical consumer-voter may be accurately quantified). *See generally* William A. Fischel, *Footloose at Fifty: An Introduction to the Tiebout Anniversary* Essays, *in* THE TIEBOUT MODEL AT FIFTY 1, 2 (William A. Fischel ed. 2006).

Because clucking is a voice strategy, these models may appear relevant to our analysis. The availability of exit options in ordinary debates and controversy over legal transitions is questionable because exit is costly and may not practically be available to many parties.

An exit strategy requires a party to liquidate her assets in one place, purchase assets in another place, and reorganize her entire life. Furthermore, exit strategies require available destinations to which an individual or household may move. Such destinations are supposedly available in the contexts of debates at the state or local level, but less so when the issue is a national debate. At any rate, even when this process is possible, it is very costly.[249]

The absence of viable exit options may motivate parties to engage in clucking, since they have voice at their disposal. This may be one interpretation of Brandeis' proposed antidote to bad speech. Counter-clucking as response to clucking, however, is not necessarily consistent with the concept of the "marketplace of ideas," because clucking is often not about substance. The rival parties do not exchange ideas, but rather employ procedural means and other measures to advance their goals. Through clucking, each party increases the social costs of a debate without necessarily contributing value.

Not all individuals who lack viable exit options counter-cluck. Some may find clucking and other voice strategies to be too costly. They withdraw from controversy, leaving the stage to vocal cluckers. To illustrate, an individual may not move from one town to another because of unfavorable changes in backyard chicken laws,[250] but she may still avoid participation in debates over local backyard chicken laws—even where she has an opinion on such a matter—either because she does not want to contribute to the discord or because she believes there is better use for her time.

Thus, while debates are socially desirable and dissent is valuable, the analysis of clucking in society shows that, contrary to the conventional

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[249] For further discussion of exit costs, see James W. Friedman, *Non-Cooperative Equilibria for Exit Supergames*, 20 INT'L ECON. REV. 147, 147–51 (1979) (explaining the Exit Game Model); Pankaj Ghemawat & Barry Nalebuff, *Exit*, 16 RAND J. ECON. 184, 191–93 (1985) (describing exit cost differences).

[250] We located one family that employed the exit strategy multiple times in order to raise roosters for cockfighting in its backyard. *See* Minnesota v. Nelson, No. C0-96-692, 1996 WL 706848, at *1 (Minn. Ct. App. Dec. 10, 1996) (holding that the trial court did not err in its ruling that chickens are not livestock, but sheep are livestock, within the meaning of a zoning ordinance); Minnesota v. Nelson, 499 N.W.2d 512, 514 (Minn. Ct. App. 1993) (holding that chickens, roosters, and other poultry are not "livestock" within the meaning of a zoning ordinance criminalizing raising or handling livestock); St. Paul v. Nelson, 404 N.W.2d 890, 891–892 (Minn. Ct. App. 1987) (holding that an ordinance allowing denial of a permit to keep a rooster within city limits did not unconstitutionally restrict the kind of pet owner could keep while exempting certain organizations and animals from permit regulations).

wisdom,[251] certain speech strategies stifle rather than enhance public debate. More speech is not the cure for these strategies; rather, less speech is the answer.

This argument, however, does *not* suggest that the legal system should accommodate clucking and impose restrictions on speech that burdens clucking, as *Citizens United*, *Davis* and *Bennett* effectively do. If clucking is permitted, then the procedural design of any system should take into account its effects. The most likely effects are to stifle public discourse. The first-best remedy would be to reduce the level of clucking. The second-best solution would be to diminish clucking's effectiveness with more speech. The evolving reasoning in *Citizens United*, *Davis* and *Bennett*, therefore, is inconsistent with the goal of fostering healthy public debate.[252]

3. *Legal Norms*

Our analysis of clucking focuses on the social costs of excessive speech. We argue that, from some point, it is uncivil to extend a debate because delays, and even the threat of delays, introduce a wide range of social costs.

Civility is a shadow norm in our legal system. Courts often refer to "civility" but such references have no consistent objective and no grounded meaning.[253] "Incivility," at least in the abstract, is the cost an uncivil party imposes on others—that is, an "externality." Clucking, therefore, is a form of incivility.

Our normative argument is that society will benefit from reducing the levels of clucking. We make two general related arguments regarding the design of rules for the reduction of clucking. First, any reduction in the level of clucking is socially desirable, assuming it does not entail greater costs in other dimensions. We define "clucking" as avoidable debates, controversies, disputes, litigation, filibusters, and other argumentative processes. They are avoidable because economizing them would not sacrifice communication of substantive issues. Thus, any reduction of clucking will be socially beneficial.

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[251] *See supra* note 233 and accompanying text.

[252] The three decisions are listed according to their logical order, rather than chronological order.

[253] *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc. 523 U.S. 75, 81 (1998) (holding that recognizing liability for same-sex harassment will not transform Title VII into a general civility code for the American workplace); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (discussing the meaning of "habits and manners of civility"); *In re* Snyder, 472 U.S. 634, 647 (1985) ("The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone."); Healy v. James, 408 U.S. 169, 194 (1972) ("[T]he wide latitude accorded by the Constitution to the freedoms of expression and association is not without its costs in terms of the risk to the maintenance of civility and an ordered society."); Rosenfeld v. New Jersey, 408 U.S. 901, 909 (1972) (Rehnquist, J., dissenting) ("We have witnessed in recent years a disquieting deterioration in standards of taste and civility in speech.").

Second, for the purpose of targeting clucking, procedural rules appear to be superior to contextual rules. A contextual rule could ban or restrict clucking once identified. The drawback of such rules is that they condemn content using the unpopular "I know it when I see it" formula.[254] In contrast, procedural rules regulate time and other quantifiable variables available to speakers. With some flexibility for unusual circumstances, such procedural rules could reduce levels of clucking without affecting substantive content.

B. *Characterizing Cluckers*

In this Section we use our study of disputes over backyard chicken laws to explore traits of parties that engage in clucking. For simplicity, we present these traits as "profiles," as if a party possesses a single trait. The list is not exhaustive and the traits are not mutually exclusive. Rather, the list consists of prominent traits identified in our study. Furthermore, a person who engages in clucking may possess more than one trait.

1. *Winners and Losers*

Changes, including in the form of legal transitions, entail a wide range of costs and benefits to various groups in society.[255] Many of the costs and benefits are known in advance, or at least are believed to be known. Others are estimated or are speculative, and some are unintended and realized over time.[256] Potential "losers" tend to engage in clucking to postpone, mitigate, and possibly even prevent losses. As every lawyer knows, by inflating the cost of the process, losing parties may improve their positions.[257] Similarly, potential "winners" may engage in clucking to increase the benefits they capture and to signal to future rivals that conflicts with them are costly.[258]

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[254] Justice Potter Stewart popularized the formula in his concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). *See* Paul Gewirtz, *On "I Know It When I See It"*, 105 YALE L.J. 1023, 1023–26 (1996).

[255] *See* Kaplow, *An Economic Analysis of Legal Transitions*, *supra* note 26, at 511–14. *See generally* Kaplow, *Transition Policy: A Conceptual Framework*, *supra* note 26.

[256] *See generally* Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 895–96 (1936).

[257] *See, e.g.*, Lucien Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1, 1–2 (1996); Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 229 (1982); Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT'L REV. L. & ECON. 3, 4 (1990); Ivan P.L. P'ng, *Strategic Behavior in Suit, Settlement, and Trial*, 14 BELL J. ECON. 539, 544 (1983); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 415 (1973); Jennifer F. Reinganum & Louis L. Wilde, *Settlement, Litigation, and the Allocation of Litigation Costs*, 17 RAND J. ECON. 557, 563 (1986).

[258] *See, e.g.*, Cooter et al., *supra* note 257; P'ng, *supra* note 257, at 228; Posner, *supra* note 257, at 544; Reinganum & Wilde, *supra* note 257, at 563; *see also* David M. Kreps & Robert Wilson,

Where opponents and proponents for backyard chickens debate over legal rules, the resulting law casts invested parties as "winners" or "losers." Communities that debate backyard chickens usually adopt a legal rule that accommodates fowl under certain restrictions (a regulatory scheme), but some may also adopt strict bans, or, though we rarely observe it, remove existing restrictions altogether.[259] Although choices on this spectrum tend to represent compromise, some compromises may be perceived as a defeat to certain parties. For opponents of backyard chickens, any legal rule that accommodates poultry may seem to be a defeat, regardless of restrictions in the rule that protect the interests of neighbors. Similarly, individuals who are attached to their pet roosters, breed different chicken species, or simply love to be surrounded by hens, often consider rooster bans or restrictions on the number of hens to be a violation of their basic rights.

Furthermore, perceptions of victory and defeat are shaped by the benchmark rule that, could be no rule, a ban on backyard chickens, or some regulatory scheme in between. For opponents of backyard chickens, the defeat may appear to be worse when the law shifts from a ban to some permissible regulatory scheme than it would be when the law shifts from no legal rule to the same permissible regulatory scheme. Similar biases apply to backyard chicken fans. These differences between the benchmark rule and potential state of the world if a proposed rule becomes law appear to influence the willingness of parties to invest in the public debate. In their minds, the potential losses or benefits may be larger than actual changes in well-being.

The chicken urbanization trend has increased the stakes for potential "winners" and "losers" in debates over legal rules. On the one hand, an increase in the urban poultry population has increased the level of externalities for neighbors. On the other hand, chicken owners have increased their investments in fowl, believing they derive increased value from poultry ownership as well as benefits from social networks related to urban chickens. Backyard chicken ownership offers some positive network externalities, at least in the sense that many urban chicken owners organize their social networks.

Thus, debates over transitions end with perceived winners and losers, and these perceptions are likely to shape the conduct of parties to the debate.[260] Some clucking parties ignore the social costs they generate and

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Reputation and Imperfect Information, 27 J. ECON. THEORY 253, 254–55 (1982) (modeling how players could acquire credibility for being tough); Gary Myers, *Litigation as a Predatory Practice*, 80 KY. L.J. 565, 577–79 (1992) (discussing how litigation can be used to prevent or delay a competitor's entry into a market).

[259] *See supra* Part III; *see infra* App.

[260] Much of the literature of legal transition has focused on rights of winners and losers in transitions. *See, e.g.*, Richard A. Epstein, *Beware of Legal Transition: A Presumptive Vote for the Reliance Interest*, 13 J. CONTEMP. LEGAL ISSUES 69, 69 (2003); Jill E. Fisch, *Retroactivity and Legal*

may be myopic to the possibility that present perceptions of payoffs may change over time.

2. *Status Quo Enforcers*

A proposal for change tends to have a familiar alternative: doing nothing and maintaining the status quo. In some circumstances, an exogenous event undermines the ability to continue doing business as usual, and members of society have to decide how to proceed. These circumstances are rare. Abundant empirical evidence shows that humans often exhibit a significant status quo bias.[261] At the time of decision-making, when a person has to choose between (1) the familiar option of doing nothing and maintaining one's previous position, and (2) the uncertain option presented by a proposed change, many individuals stick to the status quo.[262] Moreover, the status quo bias influences individuals to disfavor changes even when they are free of risks.[263]

Many of the debates in chicken-hostile localities over the possibility of reforming local laws exhibited status quo biases. New York City allows backyard chickens,[264] but in Franklinton, Louisiana, where people ignored the formal ban, the mayor felt that modern times do not allow people to raise animals in the city.[265] Similarly, some of the members of Franklinton's Board of Directors felt that people could find chickens offensive.[266] In Iowa City, the mayor developed a theory that students often leave pets behind, and the city would need to develop shelter facilities for abandoned chickens.[267] Despite unmitigated citizen support for chicken-friendly laws in Belgrade, Montana, the city council voted to keep a ban, citing concerns about workload, inspection, and, in the words of one councilperson, "the idea of chicken coops in people's yards."[268] In characterizing the clucking that preceded a vote to allow regulated

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Change: An Equilibrium Approach, 110 HARV. L. REV. 1055, 1058 (1997); Graetz, *supra* note 26; Kaplow, *An Economic Analysis of Legal Transitions*, *supra* note 26, at 511–14; Kaplow, *Transition Policy*, *supra* note 26; Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657 (1999); Kyle D. Logue, *Legal Transitions, Rational Expectations, and Legal Progress*, 13 J. CONTEMP. LEGAL ISSUES 211 (2003).

[261] *See, e.g.*, Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 193–97 (1991); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 7–9 (1988).

[262] Samuelson & Zeckhauser, *supra* note 261, at 8–9; Kahneman et al., *supra* note 261, at 197–99.

[263] *See* Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q. J. ECON. 1039, 1039–42 (1991) (discussing empirical evidence supporting the idea that loss aversion causes people to favor the status quo).

[264] *See* Orbach & Sjoberg, *Debating Over Backyard Chickens*, *supra* note 59, at 25.

[265] *Id.* at 12.

[266] *Id.*

[267] *Id.*

[268] *Belgrade Nixes Chickens*, BOZEMAN DAILY CHRON., Nov. 6, 2009, *available at* http://www.bozemandailychronicle.com/news/article_426ea204-d273-5453-aa4c-1f2e0c3dfbdc.html.

backyard chickens, one Evanston, Illinois chicken advocate posited the theory that "[p]eople are afraid of change . . . . After the first year [of permitting chickens in the city], residents won't be concerned."[269]

In Grand Rapids, Michigan, the mayor described a public debate over backyard chickens as "one of the best public hearings [he has] witnessed during his fifteen years on the city commission," since "[e]veryone ha[d] been insightful and even brilliant."[270] Despite the inspiration, the proposed transition failed at the city council in a three-to-three split vote.[271]

Beyond chicken debates, there are many examples of fights against changes in the status quo.[272] On August 28, 1957, Strom Thurmond of South Carolina began the longest speech in the history of the Senate, speaking for twenty-four hours and eighteen minutes during a filibuster against passage of the Civil Rights Act.[273] In 2010, Senator John McCain employed numerous clucking techniques to postpone and protest the repeal of Don't Ask, Don't Tell.[274] As a junior Congressman, John McCain also opposed 1983 legislation that made the birthday of Martin Luther King, Jr. a public holiday.[275]

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[269] Jonathan Bullington, *Chickens Can Fly in Evanston; City Council Approves Ordinance Allowing Hens in Backyards*, CHI. TRIB., Sept. 29, 2010, at C10.

[270] Jim Harger, *Chicken Fans Show Pluck at Hearing on Urban Poultry*, GRAND RAPIDS PRESS, July 14, 2010, at A1.

[271] Jim Harger, *Chicken Foes Rule the Roost—Backyard Birds Must Go After Divided City Commission Rejects Proposed Ordinance*, GRAND RAPIDS PRESS, Aug. 11, 2010, at A1.

[272] *See, e.g.*, Karen Tumulty, *McConnell Could Chart New Course in Senate*, WASH. POST, Jan. 30, 2011, at A1 (describing the profile of the Republican leader the in Senate, Mitch McConnell, who used to refer to himself as "the abominable no-man." Stating that "[i]n the first two years of Barack Obama's presidency, Mitch McConnell raised the art of obstructionism to new levels. When McConnell and his united GOP troops couldn't stop things from getting through the Senate, they made sure the Democrats paid a heavy price for winning").

[273] KEITH M. FINLEY, DELAYING THE DREAM: SOUTHERN SENATORS AND THE FIGHT AGAINST CIVIL RIGHTS, 1938–1965 184–85 (2008).

[274] *See, e.g.*, Editorial, *Waiting for Senator McCain*, N.Y. TIMES, Nov. 11, 2010, at A34; Elisabeth Bumiller, *Top Brass and McCain Square Off Over Gays*, N.Y. TIMES, Dec. 3, 2010, at A16; Dana Milbank, *After McCain Flares Up, Senate's Cooler Heads Prevail*, WASH. POST, Dec. 19, 2010, at A8. At some point, McCain's wife, Cindy McCain, joined the public campaign for the repeal of Don't Ask, Don't Tell. Ashley Parker, *Cindy McCain Calls for Repeal of 'Don't Ask'*, N.Y. TIMES, Nov. 13, 2010, at A10. On December 22, 2010, President Barack Obama signed into law the Don't Ask, Don't Tell Repeat Act of 2010, Pub L. No. 111-321, 124 Stat. 3515 (2010).

[275] 129 CONG. REC. 22242–43 (statement of Sen. John McCain) (1983). On April 8, 1968, four days after the assassination of Dr. Martin Luther King, Jr., Congressman John Conyers introduced the first bill to establish a national holiday in honor of the slain leader. He introduced the bill again and again, until Congress adopted his proposal and President Ronald Reagan signed it into law on November 2, 1983. An Act to Amend Title 5, United States Code, to Make the Birthday of Martin Luther King, Jr., A Legal Public Holiday, Pub. L. 98-144, 97 Stat. 917 (1983). Senator Jesse Helms led the opposition to pass any such law. In October 1983, he delivered a speech in the Senate, *The King Holiday and Its Meaning*, arguing that Dr. King was affiliated with communists and unworthy of national acknowledgment. 129 Cong. Rec. 26866–69 (statement of Sen. Jesse Helms) (Oct. 3, 1983). For an account of McCain's vote, see Michael Cooper, *McCain Sees King Speech as Chance to Mend Ties*, N.Y. TIMES, Apr. 4, 2008, at A14.

As discussed at the outset, backyard chickens highlight the reciprocal nature of externalities. A change may mean compromise of interests. In more complex issues—financial reform, environmental policy, and healthcare regulation, for example—economics, finance, and science could provide answers to the desirability of reform. Often, however, we observe reluctance, among lawmakers and lobbyists alike, to consult with facts.

3. *Political Opportunists*

Studies in political economy show that divergence among interest groups offers politicians, administrators, and bureaucrats opportunities for various forms of capital.[276] A potential change represents an opportunity to capture, collect, and squeeze capital from various interest groups. Politicians, administrators, and bureaucrats are often in a position to influence change through clucking and may do so in order to take advantage of their political opportunities.[277] Individuals who appear to be

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[276] *See, e.g.*, KENNETH G. CRAWFORD, THE PRESSURE BOYS: THE INSIDE STORY OF LOBBYING IN AMERICA ix–xi (1939) (describing the tactics used by interest groups, or "pressure boys," to influence legislation and legislators); FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 17–19 (1997) (discussing the gaps in the rent-extraction model and proposing a new economic model from which to view the role of politicians in the regulatory state); ANDREI SHLEIFER & ROBERT W. VISHNY, THE GRABBING HAND: GOVERNMENT PATHOLOGIES AND THEIR CURES 13–17 (1998) (discussing the grabbing hand model by focusing on how political interests shape policies and institutions); HARMON ZEIGLER, INTEREST GROUPS IN AMERICAN SOCIETY 264 (1964) (discussing the role of interest groups in institutional decision-making); *see also* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371, 376–380 (1983) (arguing that groups compete for political influence through expending time, energy and capital); Gary S. Becker, *Public Policies, Pressure Groups, and Dead Weight Costs*, 28 J. PUB. ECON. 329 (1985); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 211–13 (1976) (discussing the role of regulation in creating competition between different political groups); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 335–36 (1974) (discussing the "capture" theory and "public interest" theory of regulation and the competition for power that is created when regulations are enacted); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3–4 (1971) (discussing regulations as a potential threat to industries and who receives the benefits of regulation).

[277] Political scientists study the role of policy entrepreneurs—individuals who play key roles in changing the direction of governing rules. *See, e.g.*, PETER EISINGER, THE RISE OF THE ENTREPRENEURIAL STATE (1988) (enumerating the individuals who serve critical roles in the creation of policy); Michael Mintrom & Phillipa Norman, *Policy Entrepreneurship and Policy Change*, 37 POL'Y STUD. J. 649, 649–50 (2009) (applying the theory of policy entrepreneurship to politics of policy making); Michael Mintrom & Sandra Vergari, *Advocacy Coalitions, Policy Entrepreneurs, and Policy Change*, 24 POL'Y STUD. J. 420, 421 (1996) (discussing the advocacy coalition framework for policy making in which varying groups with a shared system of belief coordinate their efforts over time to construct policy); Michael Mintrom, *Policy Entrepreneurs and the Diffusion of Innovation*, 41 AM. J. POL SCI. 738, 738–39 (1997) (analyzing how policy entrepreneurs advance ideas and policy innovations onto government agendas); MARK Schneider & Paul Teske, *Toward a Theory of the Political Entrepreneur: Evidence from Local Government*, 86 AM. POL. SCI. REV. 737, 737 (1992) (discussing political entrepreneurs in state and local government); Carol S. Weissert, *Policy Entrepreneurs, Policy*

in positions of influence do *not* have to deliver change; rather, through noisy clucking alone they may gain political capital. For example, a political opportunist may promote a bill that could never become law to gain the approval of a particular constituency. Such opportunistic clucking does not necessarily serve the clucker's sector, but it is an instrument to signal willingness to act on behalf of the constituency's pet cause. Because of the dual use of clucking as both a signaling instrument and a device to influence process, the effect may be particularly noisy.[278]

In the context of local governments, the variance in law among localities (or states) generates pressure and opportunity for local politicians. The Tiebout model of local government predicts that individuals will vote with their feet to exit localities that do not provide services that match their preferences.[279] Unfavorable backyard chicken laws may not cause people to move to a different town. Our study shows, however, that residents will put pressure on their local government to change the laws when they prefer those of another community.

While backyard chickens may appear insignificant, local politicians have used the topic to gain publicity. Ann Arbor Councilor Stephen Kunselman, who spearheaded the campaign to legalize backyard chickens in his city, leveraged the topic for his local political career.[280] Indeed, many of the local representatives who introduced backyard chicken law proposals enjoyed media coverage for doing so.[281] Elected officials who engaged in the backyard chicken debate often appeared to be motivated by the political capital it offered rather than by the benefit to the public.

4. *Human Roosters*

While most rules in life have exceptions, the Coase Theorem has none—every bargaining failure is an outcome of some transaction cost or informational failure.[282] Uncompromising positions generally are unrealistic. For that reason, we assume that most transactions are just a matter of "haggling over the price" as Bernard Shaw put it.

However, as life experience illustrates and our study shows,

Opportunists, and Legislative Effectiveness, 19 AM. POL. Q. 262, 262–63 (1991) (analyzing the role and effectiveness of policy entrepreneurs).

[278] The costly threat of a government shutdown in 2011 offered an example for the use of this strategy. Some politicians were willing to vote against the entire budget because Planned Parenthood received federal funds. *See supra* note 247 and accompanying text.

[279] Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416–18 (1956). *See generally* THE TIEBOUT MODEL AT FIFTY, *supra* note 248.

[280] *See supra* notes 186–191 and accompanying text.

[281] Orbach & Sjoberg, *Debating Over Backyard Chickens, supra* note 59, at 19.

[282] Economists have shown several sets of circumstances in which even in a world with zero transaction costs and perfect information the Coasean prediction will not fulfill itself. *See, e.g.*, Aivazian & Callen, *supra* note 28, at 175–77. For a discussion of this point, see Maxwell Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1233–39 (1994).

uncompromising individuals exist and are willing to engage in conflict with an entire community to force their preferences.[283] They are undeterred by the possibility of repeat conflicts because they are unwilling to compromise. Studies in the psychology of reasoning provide a wide range of evidence that one common function of reasoning is argumentative.[284] Rather than reasoning as a means to improve personal knowledge and make better choices, humans often use reasoning to evaluate arguments related to any change in their preferences, beliefs, and positions. The reasoning, however, may not be used to examine these preferences, beliefs, and positions; only to argue for them.[285] Human roosters use reasoning to argue, and generally they do not consider the purpose of arguing or the logic of their positions.

Human roosters burden all forms of debates with excessive speech. Local debates over backyard chicken laws are not exempt from their toll. In Barre, Vermont, a chicken owner and self-described "hatch-aholic" rebuffed an order to get rid of all but one of her roosters under the state nuisance law.[286] Despite complaints of constant crowing by numerous neighbors from as far as several streets away, the chicken owner, acknowledging the situation was not ideal, defended her right to raise the chickens and roosters on her property, claiming "I've got to start somewhere," and "[t]hese are the baby steps to getting to the big dream."[287]

In Ridgway, Colorado, there had not been a jury trial for decades prior to that in which Planet Janet was found guilty of having roosters in violation of the town's prohibition, an ordinance passed after her neighbors made nuisance complaints to the city.[288] For Planet Janet, the issue was ideological—"It's about the state, the country, the planet" she argued, and she vowed to litigate all the way to the state supreme court in order to keep her eight roosters.[289]

Citing concerns about noise, rodents, disease, and ritual slaughter

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[283] *See, e.g.*, 157 CONG. REC. S433 (daily ed. Feb. 2, 2011) (statements of Sen. Rand Paul delivering his maiden speech in the Senate, discrediting the famous Senator of Kentucky, Henry Clay, who was known as "the Great Compromiser," and explaining why uncompromising positions are valuable); Jennifer Steinhauer, *No, No, No, No, No, No, No, No, No, No, No, No,* N.Y. TIMES, Apr. 15, 2011, at A12 (describing the contrarian approach of Representative Justin Amash, who, for peculiar reasons, does not vote for measures that align with his views); *see also* ELIZABETH ANNE OLDMIXON, UNCOMPROMISING POSITIONS: GOD, SEX, AND THE U.S. HOUSE OF REPRESENTATIVES 188–92 (2005) (arguing that effective policy-making surrounding significant cultural issues will continue to be impeded as long as legislators remain uncompromising).

[284] For a survey of the literature see Hugo Mercier & Dan Sperber, *Why Do Humans Reason? Arguments for an Argumentative Theory*, 34 BEHAV. & BRAIN SCI. 57 (2011).

[285] *Id.*

[286] David Delcore, *Chicken Standoff: Woman Resists Town Efforts to Rein in Roosters*, BARRE–MONTPELIER TIMES ARGUS, Sept. 22, 2009.

[287] *Id.*

[288] Nancy Lofholm, *Court Loss Won't Stop Rooster Booster*, DENVER POST, July 7, 2010, at B4.

[289] *Id.*

(which was already illegal), Alderwoman Lona Lane in Chicago could not be persuaded to reconsider her proposal for a sweeping ban on chickens in favor of regulation or ward-by-ward laws.[290] Two years later, with her proposed ban seemingly suppressed, Lane continued to assert the same concerns despite contrary safety arguments by chicken advocates who cited veterinary and public health experts.[291] When stymied in her citywide efforts, Lane indicated she would narrow her scope and go after chicken owners in her ward for violating a recently passed noise ordinance, stating, "[a]ll things considered, I think chickens should be raised on a farm."[292]

Uncompromising individuals may develop an internal logic for their positions, relying on partial facts or fabrications. For example, in current political discourse, some use a quote attributed to Samuel Adams to justify relentless protest: "It does not require a majority to prevail, but rather an irate, tireless minority keen to set brush fires in people's minds."[293] The quote, however, could not be located in Adams' writing, nor could any use of the quote be found prior to 2000. According to the Oxford English Dictionary, the word "irate" was first used in 1838,[294] thirty-five years after Samuel Adams's death. The first known use of "brush fire" is dated 1850.[295] In fact, Samuel Adams condemned uprising against the Republic,[296] and, despite reservations about the U.S. Constitution, he was judicious in his comments at the ratifying convention, more often listening to others' arguments than propounding his own objections.[297]

There are many species of human roosters, who express themselves regardless of the value of their positions, the potential influence of their

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[290] Mark Konkol, *Don't Call Her Chicken; Word of Move to Ban Poultry from Homes Spurs Hen Owner to Take on City Hall*, CHI. SUN-TIMES, Jan. 11, 2008, at 16.

[291] Alissa Irei, *Controversial Urban Chickens Still Roost Around Chicago*, MEDDILL REP. CHI., Mar. 9, 2010 *available at* http://news.medill.northwestern.edu/chicago/news.aspx?id=160734&terms=controversial%20urban%20chickens.

[292] *Id.*

[293] *See, e.g.*, RAND PAUL, THE TEA PARTY GOES TO WASHINGTON 9 (2011); ERICK ERICKSON & LEW UHLER, RED STATE UPRISING: HOW TO TAKE BACK AMERICA 181 (2010); KATEN ZERNIKE, BOILING MAD: INSIDE TEA PARTY AMERICA 34 (2010).

[294] OXFORD ENGLISH DICTIONARY (2d ed. 1989). In America, "irate" did not appear in the 1928 first edition of *Webster's Revised Unabridged Dictionary*; it appeared in *Webster's* 1913 edition, qualified as a "recent term."

[295] OXFORD ENGLISH DICTIONARY (2d ed. 1989). Although the OXFORD ENGLISH DICTIONARY cites the use of the phrase "brush fire" in American writer H.L. Garrett's 1950 publication WAH-TO-YEH, AND THE TAOS TRAIL, it was as yet an unrecorded term in the 1913 edition of *Webster's Revised Unabridged Dictionary.*

[296] JOHN K. ALEXANDER, SAMUEL ADAMS: AMERICA'S REVOLUTIONARY POLITICIAN 202–03 (2004) (quoting Adams: "[T]he man who dares rebel against the laws of the republic ought to suffer death").

[297] *See id.* at 205–06 ("As the convention progressed, Adams thus demonstrated a judicious, fair-minded, and pragmatic approach.").

expression, and the opportunity costs of the speech. Some human roosters do not engage in conflict, but their clucking may nevertheless be socially costly. For example, Congressman Ted Poe of Texas "want[s] to be the first thing that is said on the House floor each day . . . [since he has] core issues that are important to him."[298] His ambitious daily goal is to "set the tone" for the day at the House.[299] In the 111th Congress, he accomplished this goal approximately seventy-five percent of the days that the House was in session.[300] The perceived politeness of such individuals and the civil nature of the content of their speech may suggest they are harmless, but the excessive nature of their speech means it is an uncivil act and socially costly. Such speech is clucking, and it does not substantively further the discourse. The speaker (or another) may be repeating an already expressed view, or his audience may be unable to absorb additional details. The extensive expression imposes cost on others.

The clucking costs of human roosters are diverse and can be significant. They include opportunity costs of various types—the time of a captive audience, unperformed valuable tasks of the speaker and others, administrative costs of the discourse and its recording, and potential consequences of response, among others.

IV. CONCLUSION

Clucking is an action that inflates social costs associated with discourse about a new or a revised norm. It includes certain campaign activities, since most political campaigns involve promises for change. Clucking is an externality because it is a private action that burdens others.

After an unsuccessful effort to reduce clucking-related externalities by limiting the scope of a fierce chicken debate to a specific topic on the agenda, Mayor John Brady of Monkato, Minnesota voted against a public meeting to discuss amending the city's backyard chicken ban, stating, "[t]here's a lot of anger around this issue for some reason. More so than the war by far. I don't think it would be a healthy discussion."[301]

As an externality, the prevalence of clucking undermines a central belief in American constitutional law that the cure for bad speech is more speech. The social costs of clucking may be significant and include, among other things, delays and compromises in transitions, as well as the

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[298] Jennifer Steinhauer, *Forget Having the Last Word; This Texan Always Wants the First*, N.Y. TIMES, Mar. 19, 2011, at A16.

[299] *Id.*

[300] *See id.* (stating that the Congressman addressed the chamber 234 of the 317 days the House was in session).

[301] Dan Linehan, *Lots of Clucking About Chickens at Council Meeting*, FREE PRESS (May 10, 2010), *available at* http://mankatofreepress.com/local/x1414090073/Lots-of-clucking-about-chickens-at-Council-meeting.

promotion of undesirable changes.

Ronald Coase analyzed neighbor disputes and argued they could be privately settled in a socially efficient manner. This Article analyzed neighbor disputes and showed how clucking tends to increase the social costs of agreeing on legal rules in circumstances where parties are unlikely to settle disputes. This Article argues that clucking is inevitable, and concludes it is an uncivil act.

Civility norms have many possible interpretations and meanings that vary across cultures,[302] one of which may be the costs individuals and organizations impose on others while they debate or dispute a matter. Under this interpretation, *incivility* is the cost a party imposes on others during discourse, and clucking, therefore, is an uncivil act. Neither Coase nor Pigou considered clucking, or common incivility, as an impediment to private agreements or to change delivered through government regulation. This point, however, is intuitive, and we should expect to have more uncivil acts when a society curbs its expectations for civility.

Customary social norms of civility influence clucking levels in society—the legitimacy of the strategy and perceptions of entitlements. When civility norms condemn clucking, Senators may think hard before overusing the filibuster, politicians may consider the value of ideological objections, interested parties may evaluate the use of litigation, parties may consider the value of debating every issue at stake, and backyard chicken laws may become less controversial. Perhaps most importantly, civility norms may influence public views of non-compromising individuals, including politicians, who may no longer be able to rely on the "non-compromising principle" to gain political capital.

This Article argues, therefore, that every community could and should maintain procedural rules to reduce clucking levels. An example of such an effort is the historic reform in the Senate's rules passed in early 2011 and repeated attempts to reform the filibuster rules.[303] Bruising

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[302] *See, e.g.*, STEPHEN L. CARTER, CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY xi (1998) (discussing the collapse of civility in America); James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1281 (2000) (discussing comparative law in the context of civility issues); *see also* Laurie Goodstein, *A Phrase With Roots in Anti-Semitism*, N.Y. TIMES, Jan. 13, 2011, at A20 (explaining the anti-Semitic roots of the phrase "blood libel," the phrase Sarah Palin used in a statement about the shooting of Representative Gabrielle Giffords); Jeff Zeleny & Michael D. Shear, *Palin Joins Debate on Heated Speech With Words that Stir New Controversy*, N.Y. TIMES, Jan. 13, 2011, at A20 (blaming "journalists and pundits" of "blood libel that serves only to incite . . . hatred and violence").

[303] The Senate often struggles with rules that impose limits on the power of a single lawmaker to block legislation and nominations. *See, e.g.*, David A. Fahrenthold, *Will the Gentleman Debate?*, WASH. POST, Feb. 4, 2011, at C1 (discussing an agreement among Senate leaders to end two practices that limited debate and slowed action on bills); Carl Hulse, *Senate Approves Changes Intended to Ease Gridlock*, N.Y. TIMES, Jan. 28, 2011, at A20 (discussing procedural changes to "ease persistent Senate gridlock"); *See also* STANLEY BACH, CONG. RESEARCH SERV., 97-368, SENATE FLOOR PROCEDURE: A

confirmation procedures clog presidential nominations because they provide Senators with a seemingly irresistible opportunity to cluck.[304] Campaign financing and rules that affect interest groups' participation in public debates influence clucking levels.[305] As the Clucking Theorem shows, human nature unnecessarily inflates the costs of processes related to proposed legal change. Improvements in procedural rules are important to reduce the social costs of clucking, but should be supported by social norms that condemn clucking. These social norms may find definition in the term "civility."

Our study of the transformation of backyard chicken law in American localities stresses the social costs of certain debates—those that lack civility—on the legal and normative transitions in many of these localities. The study identified individuals who engaged their communities in debates, controversies, and legal disputes over simple matters. Many of these individuals lacked civility, although their conduct was characteristic of that encouraged by present social norms.

In January 2011, almost a year after the State of the Union Address in which President Obama remarked on the noise and mess of Democracy,[306] the President spoke to the nation from the memorial event for the victims of a Tucson shooting rampage.[307] The shooting, which targeted Congresswoman Gabrielle Giffords, began a national debate about the nature of our national debates. In his remarks, President Obama stressed: "[O]nly a more civil and honest public discourse can help us face up to the challenges of our nation."[308]

The Article concludes where it began: Democratic societies rely on discourse, debates, and even disputes to evolve and develop. The foregoing criticism of excessive speech is consistent with the fundamental democratic concept of the marketplace of ideas. Clucking inflates the social costs of processes that shape change. It alters transitions, degrades the quality of reforms, impedes certain changes, and facilitates undesirable

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SUMMARY 2 (2001) ("A strict adherence to the rules themselves can create the danger of deadlocks developing that cannot be resolved promptly by simple majority.").

[304] *See* Carl Hulse, *Lawmakers Seek to Speed System of Confirmation*, N.Y. TIMES, Apr. 25, 2011, at A1 ("Ever since the Senate rejected President George Bush's selection of John G. Tower as Secretary of Defense in 1980, Senate confirmations have become bruising public affairs that delve deep into a nominee's background.").

[305] *See supra* Sections II.A.1–2; *see also* Orbach et al., *supra* note 33 (discussing the effect of *Citizens United* on conflicts between interest groups and the federal government).

[306] *See infra* notes 1–2 and accompanying text.

[307] President Barack Obama, Remarks at a Memorial Service for the Victims of the Shooting in Tucson, Arizona (Jan. 12, 2011).

[308] *Id.*; *see also* Helene Cooper & Jeff Zeleny, *Obama Calls Americans to a New Era of Civility*, N.Y. TIMES, Jan. 13, 2011, at A1 ("President Obama . . . call[ed] on Americans to draw a lesson from the lives of the fallen and the actions of the heroes, and to usher in a new era of civility in their honor.").

transitions. Within the context of debate, clucking burdens substantive discourse, and by extension it harms all parties.

APPENDIX: STUDIED LOCALITIES

Our study of clucking relies on the study of debates and examination of backyard chicken laws in the following localities. A detailed description of many of these debates is available in Orbach & Sjoberg, *Debating Over Backyard Chickens, supra* note 59.

ALABAMA
1. Homewood
2. Mobile

ALASKA
3. Anchorage
4. Eureka Springs

ARKANSAS
5. Arkadelphia
6. Boonville
7. Rogers

CALIFORNIA
8. Bishop
9. Brentwood
10. Forest Grove
11. Los Angeles
12. Paradise
13. Sacramento
14. San Mateo County

COLORADO
15. Denver
16. Durango
17. Fort Collins
18. Greeley
19. Ridgway

CONNECTICUT
20. Cheshire
21. New Haven

DELAWARE
22. Newcastle County

DISTRICT OF COLUMBIA
23. Washington

FLORIDA
24. Fort Lauderdale
25. Hollywood

GEORGIA
26. Dunwoody
27. Johns Creek
28. Roswell

IDAHO
29. Idaho Falls
30. Kootenai
31. Moscow

ILLINOIS
32. Chicago
33. Evanston
34. Lockport

INDIANA
35. Lafayette

IOWA
36. Cedar Rapids
37. Davenport
38. Iowa City

KANSAS
39. Roeland Park

LOUISIANA
40. Franklinton

MAINE
41. Bangor
42. Orono
43. Portland
44. South Portland
45. Waterville

MARYLAND
46. Baltimore
47. Chevy Chase
48. Montgomery County

MASSACHUSETTS
49. Boston
50. Cambridge
51. Springfield

MICHIGAN
52. Ann Arbor
53. Grand Rapids
54. Traverse City
55. Ypsilanti
56. Emmet County
57. Zeeland

MINNESOTA
58. Furgus Falls
59. Mankato
60. St. Paul

MISSOURI
61. Clayton
62. Columbia
63. Maplewood
64. Springfield
65. St. Louis

MONTANA
66. Belgrade
67. Bozeman

NEBRASKA
68. Bellvue
69. Waverly

NEW YORK
70. Albany
71. Buffalo
72. New York City

NORTH CAROLINA
73. Concord
74. Garner

OHIO
75. Bexley
76. Montgomery

OKLAHOMA
77. Oklahoma City

OREGON
78. Beaverton
79. Damascus
80. Greshem
81. Medford
82. Salem

PENNSYLVANIA
83. Philadelphia

RHODE ISLAND
84. Providence

SOUTH CAROLINA
85. Aiken
86. Clemson
87. Columbia
88. Greenville

TENNESSEE
89. Nashville

TEXAS
90. Fort Worth
91. Katy

UTAH
92. Centerville
93. Layton
94. Midlave
95. Salt Lake City
96. Salt Lake County

VERMONT
97. Barre

WASHINGTON
98. Bremerton
99. Gresham
100. Portland
101. Seattle

WISCONSIN
102. Madison
103. Milwaukee