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OVERCOMING THE FEAR OF GUNS, THE FEAR OF GUN CONTROL, AND THE FEAR OF CULTURAL POLITICS: CONSTRUCTING A BETTER GUN DEBATE

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For most Americans, the “Great American Gun Debate”¹ isn’t particularly “great.” The question of how strictly to regulate firearms has convulsed the national polity for the better part of four decades without producing results satisfactory to either side. Drowning in a sea of mind-numbing statistics, ordinary citizens stand little chance of even understanding their opponents’ arguments, much less being persuaded by them. Battered by pro-control forces in one election and by anti-control ones in the next, moderate politicians say as little as they can get away with. The organizers of relatively extreme interest groups, in contrast, say—indeed, scream—as much as they possibly can, symbiotically nurturing a divided public’s anxiety that one side or the other is poised to score a decisive victory.

Our goal in this Article is to diagnose the pathologies that afflict the American gun debate and to prescribe a possible cure. That debate, we will argue, has been disfigured by two prominent misconceptions, one relating to

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¹ See generally DON B. KATES, JR. & GARY KLECK, *THE GREAT AMERICAN GUN DEBATE: ESSAYS ON FIREARMS & VIOLENCE* (1997).

what the gun debate is fundamentally about, and the other to how citizens of a liberal democracy should talk to each other when they are divided on issues of fundamental values. Overcoming these misconceptions almost certainly won't dispel Americans' differences of opinion on guns. But it will go a long way towards making our public discussion of this issue into one that honors rather than mocks our pretension to be a well-functioning deliberative democracy.

So what *is* the gun debate about? If one peruses academic journals or tunes in to the debates that pervade legislative chambers, the gun debate appears to hinge on a narrow factual question: whether more guns make society less safe or more. Control supporters, we are told, believe that the ready availability of guns *diminishes* public safety by facilitating violent crimes and accidental shootings; opponents, that such availability *enhances* public safety by enabling potential crime victims to ward off violent predation. Hoping to settle this disagreement, social scientists employ a wide array of empirical methods—multivariate regression models, contingent valuation studies, public-health risk factor analyses—to investigate these conflicting claims.²

But so long as statistics continue to fund the parties' arguments, the gun debate, we believe, will remain bankrupt. Purely instrumental arguments lack the power to persuade because they ignore what really motivates individuals to favor or oppose gun control—namely, their *cultural worldviews*.³

Their prominent (and in many respects fabled) role in American history imbues guns with a surfeit of social meanings. For one segment of American society, guns symbolize honor, human mastery over nature, and individual self-sufficiency. By opposing gun control, individuals affirm the value of these meanings and the vision of the good society that they construct. For another segment of American society, however, guns connote something else: the perpetuation of illicit social hierarchies, the elevation of force over reason, and the expression of collective indifference to the well-being of strangers. These individuals instinctively *support* gun control as a means of repudiating

² See generally JOHN R. LOTT, JR., MORE GUNS, LESS CRIME (2000); Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193 (2003).

³ For a sampling of work, from a variety of disciplines, addressing the cultural groundings of gun control attitudes (pro- and con-), see, for example, RICHARD SLOTKIN, *GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH-CENTURY AMERICA* (1998); WILLIAM R. TONSO, *GUN AND SOCIETY: THE SOCIAL AND EXISTENTIAL ROOTS OF THE AMERICAN ATTACHMENT TO FIREARMS* (1982); Jan E. Dizard et al., *Introduction: Guns Made Us Free—Now What?*, in *GUNS IN AMERICA: A READER 1* (Jan E. Dizard et al. eds., 1999); Richard Hofstadter, *America as a Gun Culture*, AM. HERITAGE, Oct. 1970, at 4; Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 452–59 (1999); Gary Kleck, *Crime, Culture Conflict and the Sources of Support for Gun Control*, 39 AM. BEHAV. SCI. 387 (1996).

these significations and of promoting an alternative vision of the good society that features equality, social solidarity, and civilized nonaggression.

These competing cultural visions, we will argue, are what drive the gun control debate. They are what dispose individuals to accept certain empirically grounded public-safety arguments and to reject others. Indeed, the meanings that guns and gun control express are sufficient to justify most individuals' positions on gun control independently of their beliefs about guns and safety. It follows that the only meaningful gun control debate is one that explicitly addresses whether and how the underlying cultural visions at stake should be embodied in American law.

So why isn't *that* what the protagonists in the mainstream academic and political debate are talking about? The answer is that they adhere to a common understanding—we intend to argue misunderstanding—about the inappropriateness of injecting partisan cultural values into democratic deliberations. Liberal norms are often thought to enjoin the state from imposing a cultural or moral orthodoxy. From this premise, it is said to follow that citizens and their representatives should avoid morally partisan stance-taking when debating public issues and instead frame their arguments in terms accessible to individuals of diverse cultural persuasions. The prevention of physical harm seems culturally ecumenical in this way. That's why most citizens are moved to speak in the empirical, consequentialist idiom of public safety, even though instrumental arguments conceal the cultural foundations of their views toward guns.

The problem with this strategy for minimizing cultural conflict, however, is that it doesn't work. Because what individuals believe about the *facts* of gun control is inextricably bound up with their cultural *identities*, factual disagreement turns out to be no less divisive than explicit appeals to contested cultural values. Indeed, far from quieting cultural conflict, consequentialism as a liberal discourse strategy tends only to accentuate it. Because it is attractive only to citizens who are averse to cultural conflict, consequentialism as a liberal discourse strategy assures that whatever transparent cultural discourse persists is dominated by cultural zealots, thereby exaggerating each side's perception that the other is bent on cultural domination.

So what is to be done? The solution that we will defend is the construction of a new vocabulary for the gun control debate. Rather than conceal their cultural commitments or assault one another with them, the moderate middle should address their competing visions in meaningful yet respectful terms.

Enabled to talk to each other in this way, the culturally pluralistic majority will displace the cultural imperialists and steer the gun control debate down a more productive path.

We will present our argument in three parts. In Part I, we use the cultural theory of risk perception to support our contention that empirical arguments in the gun debate lack the power to resolve it. In Part II, we connect the dominant, consequentialist framing of the gun debate to liberal discourse norms, which, far from dispelling cultural conflict over guns, actually serve to entrench it. And in Part III, we show how a culturally pluralistic form of deliberation, one in which the cultural meanings of public policy are embraced and multiplied rather than elided and suppressed, might be used to break the impasse in the American gun debate.

I. THE FUTILITY OF CONSEQUENTIALISM

To identify the types of information and the types of political procedures most likely to generate consensus on guns in America, it is necessary to figure out who fears guns, who fears gun control, and why. The cultural theory of risk supplies a methodological framework for investigating these issues. The conclusion that such an investigation generates, moreover, is that the American gun debate cannot be resolved by the mere amassing of empirical data on the consequences of private gun ownership or various types of gun control. We'll begin with a general account of the cultural theory of risk, and then use the theory to examine the American gun debate.

A. *Risk and Culture*

Public evaluations of risk bear a notoriously uneven correspondence to the objectively measured dangers associated with various activities. Thus many persons appear relatively tolerant of risk in their recreational activities but averse to it in their financial and workplace decisions.⁴ They also tend to identify as extremely grave, and thus worthy of intensive regulation, many types of risks—from nuclear accidents to industrial pollution of waterways—that environmental experts view as relatively low, while essentially disregarding other risks—e.g., of accidental drownings in swimming pools—

⁴ See, e.g., Elke U. Weber, *The Utility of Measuring and Modeling Perceived Risk*, in CHOICE, DECISION, AND MEASUREMENT 45, 52 (A.A.J. Marley ed., 1997).

that experts rate much more highly.⁵ Finally, risk perception has been shown to vary dramatically across different groups: ordinary citizens disagree not only with the experts but also with one another about how seriously to take various forms of environmental and industrial risk, not to mention risks relating to foreign aggression or economic collapse.⁶

Experts have traditionally advocated basing risk regulation on narrowly consequentialist measures of environmental and industrial hazards. Techniques such as "cost benefit analysis" and "comparative risk assessment" rank hazards according to a uniform expected-utility metric. The policies they generate are defended as superior to any based directly on public risk perceptions, the unruly character of which is attributed to the public's lack of information about the hazards posed by various technologies and to cognitive limitations that distort layperson's processing of such information.⁷

The inadequacies of this approach to risk regulation, however, are well known and, by this point, largely accepted even by many expert regulators.⁸ The gap between various objective measures of risk and public perceptions of the same is not entirely (or even largely) a consequence of imperfect information or cognitive defects but rather a reflection of the diverse social meanings that ordinary citizens attach to risk. Individuals (a host of disciplines have taught us) don't have generic attitudes toward risky activities; rather they evaluate them according to context-specific norms that determine what risk-taking connotes about their values and attitudes.⁹ Nowadays, smoking, at least for some, conveys an irresponsible disregard for the future and a contemptible weakness of will, whereas mountain climbing (which is in fact much more hazardous) conveys for many a laudable attainment of physical discipline and courage.¹⁰ It would be morally obtuse to expect individuals to evaluate the

⁵ See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 36-39 (1995).

⁶ See generally MARY DOUGLAS & AARON WILDAVSKY, *RISK AND CULTURE* (1982); Karl Dake, *Orienting Dispositions in the Perception of Risk: An Analysis of Contemporary Worldviews and Cultural Biases*, 22 J. CROSS-CULTURAL PSYCHOL. 61 (1991).

⁷ For an influential statement of this view, see STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 33-51 (1993). See also CASS R. SUNSTEIN, *THE LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* 130 (2005).

⁸ See generally Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941 (1999).

⁹ See MARY DOUGLAS, *RISK ACCEPTABILITY ACCORDING TO THE SOCIAL SCIENCES* 59-60 (1985); DOUGLAS & WILDAVSKY, *supra* note 6, at 73; Pildes & Sunstein, *supra* note 5, at 48, 68; Aaron Wildavsky & Karl Dake, *Theories of Risk Perception: Who Fears What and Why?*, *DAEDALUS*, Fall 1990, at 41, 49.

¹⁰ Joseph R. Gusfield, *The Social Symbolism of Smoking and Health*, in *SMOKING POLICY: LAW,*

desirability of these activities solely according to their respective health risks without taking into account the value that they attach to their distinctive social meanings.

The same holds true for public risk regulation. Many citizens tend to view nuclear waste disposal and global warming with alarm not just because they pose risks of a particular magnitude, but because running these risks (however small) conveys a host of undesirable meanings—of collective hubris, of generational selfishness, of disrespect for the sacredness of nature.¹¹ It would thus be morally obtuse for regulators to attempt to evaluate these risks relative to those associated with, say, recreational swimming (which regulators tend to view as much more serious)¹² without taking account of what citizens think the acceptance of the former says about their society's values and attitudes.¹³

Of course, what societal attitudes the law should express is often a matter of dispute. And that's exactly why risk regulation so often becomes the site of intense political conflict.

The best account of such conflict is supplied by the cultural theory of risk.¹⁴ This theory relates variance in risk perception to individuals' allegiance to competing clusters of values, which construct alternative visions—"egalitarian," "individualist," and "hierarchist" ones, for example—of how political life should be organized. The selection of certain risks for attention and the disregard of others reflects and reinforces these worldviews. Thus, by virtue of their commitment to the fair distribution of resources, egalitarians are predictably sensitive to environmental and industrial risks, the minimization of which reinforces their demand for the regulation of commercial activities productive of disparities in wealth and status. In contrast, individualists, precisely because they are dedicated to the autonomy of markets and other private orderings, tend to see environmental risks as low—as do hierarchists, in line with their confidence in the competence of authorities to solve society's problems. Hierarchists and individualists have their own distinctive

POLITICS, AND CULTURE 49, 49 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

¹¹ See generally DOUGLAS & WILDAVSKY, *supra* note 6 (describing in detail these associations and their effects on risk perception).

¹² See Pildes & Sunstein, *supra* note 5, at 38.

¹³ See Revesz, *supra* note 8, at 944–46 (defending on this basis an enriched form of cost-benefit analysis that takes qualitative evaluations of risk into account). *But cf.* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE COST OF EVERYTHING AND THE VALUE OF NOTHING 12–35 (2004) (arguing that cost-benefit analysis resists qualitative evaluation of risks).

¹⁴ See generally DOUGLAS & WILDAVSKY, *supra* note 6; Dake, *supra* note 6; Wildavsky & Dake, *supra* note 9.

anxieties—of the dangers of social deviance, the risks of foreign invasion, or the fragility of economic institutions—which egalitarians predictably dismiss.¹⁵ Empirical testing suggests that cultural orientations so characterized more powerfully predict individual attitudes toward risk than myriad other influences, including education, personality type, and political orientation.¹⁶

The cultural theory not only explains why risk regulation so often generates political disputes but also why consequentialist modes of decision making are powerless to solve them. No amount of expected utility analysis can tell us whose vision of the good society—the egalitarian's, the hierarchist's, or the individualist's—to prefer. When commitments to ways of life figure explicitly into appraisals of societal dangers—"better dead than red!"—culture-effacing modes of risk-assessment and decision-making will simply miss the normative point.

To the extent that individuals treat social meanings as explicitly trumping consequentialist measures of danger, risk perceptions can be said to be morally derivative of cultural orientations. But perceptions of risk are likely to be cognitively derivative of culture orientations as well. By virtue of a collection of overlapping psychological and social mechanisms, individuals are likely to be relying on (and propagating) their worldviews even when they think that consequences are all that matter.

One mechanism that tends toward this result is cognitive dissonance avoidance.¹⁷ It is more comforting to believe that what's noble is also benign, and what's base is dangerous, than vice versa.¹⁸ It is not comforting—indeed, it is psychically disabling—to entertain beliefs about what's harmless and what's harmful that pit one against commitments and affiliations essential to one's sense of self.¹⁹

¹⁵ See Dake, *supra* note 6, at 66–79; Wildavsky & Dake, *supra* note 9, at 44–54.

¹⁶ See, e.g., Dan M. Kahan et al., *Gender, Race, and Risk Perception* (Yale Law Sch. Pub. Law & Legal Theory Research Paper Series, Pub. Law Working Paper No. 86, 2005), available at <http://ssrn.com/abstract=723762>.

¹⁷ See LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 3 (1957).

¹⁸ Slovic, for example, has shown that perceptions of risks and benefits for risky technologies is always inversely correlated, a finding suggesting that risk perceptions are influenced by cognitive dissonance. See, e.g., Paul Slovic, *Trust, Emotion, Sex, Politics and Science: Surveying the Risk-Assessment Battlefield*, in *THE PERCEPTION OF RISK* 390, 404–05 (2000); see also George A. Akerlof & William T. Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 *AM. ECON. REV.* 307, 310 (1982) (suggesting that cognitive dissonance deflates demand of workers to be compensated for accepting occupational risks).

¹⁹ See David K. Sherman & Geoffrey L. Cohen, *Accepting Threatening Information: Self-Affirmation and the Reduction of Defensive Biases*, 11 *CURRENT DIRECTIONS IN PSYCHOL. SCI.* 119, 120 (2002) ("To the

Another mechanism is the contribution that affect makes to risk perception. Emotion is one of the basic faculties by which we discern risk; our judgments of how dangerous activities are track the visceral reactions those activities trigger.²⁰ Whether those reactions are positive or negative is determined largely by cultural influences.²¹

Finally and most importantly, cultural orientations condition individuals' beliefs about risk through culturally partisan forms of trust. When faced with conflicting claims and data, individuals usually are not in a position to determine for themselves how large particular risks—leukemia from contaminated groundwater, domestic attacks by terrorists, transmission of AIDS from casual contact with infected gay men—really are. Instead, they must rely on those whom they trust to tell them which risk claims are serious and which specious. The people they trust, naturally enough, tend to be the ones who share their worldviews.²²

The tendency of individuals to adopt views shared by others of their cultural orientation is self-reinforcing. If as a result of cognitive dissonance, affect, trust—or even simple accident—the distribution of opposing beliefs about a risk starts out even slightly skewed across cultural groups, the propensity of individuals to defer to those who share their cultural allegiances

extent that information threatens self-worth, or is presented in a manner that threatens self-worth, people may dismiss, deny, or distort it in a fashion that serves to sustain their personal feelings of adaptiveness and integrity.”); see also Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 *PSYCHOL. BULL.* 497, 504 (1995) (“belongingness can affect how people process information about nearly all categories of stimuli in the social world”).

²⁰ See Melissa L. Finucane et al., *The Affect Heuristic in Judgments of Risks and Benefits*, 13 *J. BEHAV. DECISION MAKING* 1, 3 (2000); George F. Loewenstein et al., *Risk as Feelings*, 127 *PSYCHOL. BULL.* 267, 270 (2001); Paul Slovic et al., *Risk as Analysis and Risk as Feelings: Some Thoughts About Affect, Reason, Risk, and Rationality*, 24 *RISK ANALYSIS* 311, 313 (2004).

²¹ See Slovic, *supra* note 18, at 405–09.

²² See generally Geoffrey L. Cohen, *Party over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 *J. PERSONALITY & SOC. PSYCHOL.* 808, 809 (2003); Robert J. Robinson et al., *Actual Versus Assumed Differences in Construal: “Naive Realism” in Intergroup Perception and Conflict*, 68 *J. PERSONALITY & SOC. PSYCHOL.* 404, 405, 415 (1995). Indeed, even individuals who are in a position to evaluate complex data for themselves are subject to such influences. See Jonathan J. Koehler, *The Influence of Prior Beliefs on Scientific Judgments of Evidence Quality*, 56 *ORG. BEHAV. & HUM. DECISION PROCESSES* 28, 40–47 (1993) (reporting results of experiment showing that scientists' evaluations of the statistical methods employed in fictitious study of ESP were strongly influenced by whether study purported to find or discredit the existence of ESP); Slovic, *supra* note 18, at 405–09 (reporting experimental data showing that variation among professional toxicologists on persuasive of animal-carcinogen studies is explained by differences in cultural orientation).

will cause those beliefs to feed on themselves within groups, ultimately producing a highly polarized state of public opinion.²³

Because, for all these reasons, individuals inevitably conform their appraisals of risk to their worldviews, only modes of analysis that explicitly address culture can meaningfully guide risk decision-making. "Instead of being distracted by dubious calculations,"²⁴ to determine what sorts of dangers we are willing to face, we must openly address the question of what "kind of society . . . we would prefer to live in."²⁵

B. *Gun Risks and Culture*

The consequentialist version of the gun debate is naturally framed as one between two competing risk claims: that insufficient gun control will expose too many innocent persons to deliberate or accidental shootings; and that excessive gun control will render too many law-abiding citizens vulnerable to violent predation. Insofar as the worldviews featured in the cultural theory explain who fears what sorts of societal risks in general, it stands to reason that these worldviews would also explain who takes which of these gun risks more seriously as well.

Various forms of public opinion data along with ethnographic, historical, and journalist accounts of the gun debate all support this hypothesis.²⁶ Celebrated for their contributions to securing American independence and taming the American frontier, guns (at least for some) resonate as symbols of "freedom" and "self-reliance," associations that make opposition to gun control cohere with an individualist orientation. Guns are also pieces of equipment integral to traditional male roles—father, hunter, protector—and badges of authority for institutions like the military and the police. These social functions imbue guns with connotations of "honor," "courage,"

²³ See Donald Braman, Dan M. Kahan & James Grimmelman, *Modeling Facts, Culture, and Cognition in the Gun Debate*, 18 SOC. JUST. RES. 283, 289–90 (2005), available at <http://www.springerlink.com/link.asp?id=y082j1q56r13t0j0>; Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. (forthcoming 2006) (manuscript at 7–8); see also Sushil Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992, 994 (1992); Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225, 1229–30 (1997).

²⁴ DOUGLAS & WILDAVSKY, *supra* note 6, at 81.

²⁵ *Id.* at 189.

²⁶ See generally Kahan, *supra* note 3, at 451–52.

"obedience to authority," and "patriotism," virtues distinctive of a hierarchic outlook.²⁷

Aversion to guns and support for control, in contrast, cohere naturally with more egalitarian and communitarian (or anti-individualistic) worldviews. Precisely because they help to construct traditionally male roles and virtues, guns are often equated with a hypermasculine or "macho" personal style that many individuals, male as well as female, resent.²⁸ This egalitarian aversion is reinforced by the association of guns with the assassination of Martin Luther King Jr. and resistance to civil rights generally in the modern era,²⁹ and with social and legal controls that made the possession of guns "an important symbol of white male status"³⁰ in earlier times. And while control opponents see guns as celebrating individual self-sufficiency, control supporters see them as denigrating solidarity: "Every handgun owned in America is an implicit declaration of war on one's neighbor. When the chips are down, its owner says, he will not trust any other arbiter but force personally wielded."³¹

We have confirmed the fit between the cultural theory of risk and gun control attitudes. Working with our colleagues Paul Slovic and John Gastil, we conducted a nationwide survey of 1800 individuals.³² Our survey instrument included scales for measuring individual worldviews along two dimensions corresponding to hierarchy and egalitarianism, on the one hand, and individualism and solidarism, on the other. It also included various measures of individuals' attitudes toward the risks associated with guns and

²⁷ See, e.g., TONSO, *supra* note 3, at 287-88 ("Just to hold [a Colt Model 'P'] in your hand produces a feeling of kinship with our western heritage—an appreciation of things like courage and honor and chivalry and the sanctity of a man's world.") (quoting a gun collector); JAMES D. WRIGHT ET AL., *UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA* 113 (1983) ("The values of th[e pro-gun] culture are best typified as rural rather than urban: they emphasize independence, self-sufficiency, mastery over nature, closeness to the land, and so on."); James D. Wright, *Ten Essential Observations on Guns in America*, SOC'Y, Mar.-Apr. 1995, at 63, 68 (explaining that for the gun control opponent, the gun "symbolizes manliness, self-sufficiency, and independence, and its use is an affirmation of man's relationship to nature and to history."). See generally SLOTKIN, *supra* note 3 (examining historical evolution of pro-gun meanings in American culture). For an excellent ethnographic account of this feature of the pro-gun culture, see generally ABIGAIL A. KOHN, *SHOOTERS: MYTHS AND REALITIES OF AMERICA'S GUN CULTURES* (2004).

²⁸ See, e.g., H. Taylor Buckner, *Sex and Guns: Is Gun Control Male Control?* (Aug. 5, 1994) (unpublished manuscript), available at <http://www.tbuckner.com/SEXGUN.HTM#Sex%20and%20Guns>.

²⁹ See LEE KENNETT & JAMES LA VERNE ANDERSON, *THE GUN IN AMERICA: THE ORIGINS OF NATIONAL DILEMMA* 236-37 (1975).

³⁰ Hofstadter, *supra* note 3, at 84.

³¹ Don B. Kates, Jr., *Public Opinion: The Effects of Extremist Discourse on the Gun Debate*, in *THE GREAT AMERICAN GUN DEBATE*, *supra* note 1, at 93, 109 (quoting Gary Wills).

³² See The Cultural Cognition Project, National Risk & Culture Study, <http://research.yale.edu/culturalcognition/content/view/45/89/> (last visited January 28, 2006).

with both excessive and insufficient gun control. The study found that the relationship between cultural orientations and gun control attitudes was large, statistically significant, and consistent with our hypotheses: the more hierarchical and individualistic individuals were in their orientations, the more they opposed control; and the more egalitarian and solidaristic they were, the more they supported it.³³

Even more impressively, the cultural orientation measures, when combined, had a bigger impact on gun control attitudes than did any other individual characteristic. Indeed, after controlling for cultural orientations, there was no longer any difference in the attitudes of whites and blacks, southerners and northerners, or urbanites and country dwellers.³⁴

As it does for other risk-regulation conflicts, the cultural theory implies that consequentialist modes of analysis are bound to be politically inert in the gun debate. To begin, individuals' beliefs about the significance of competing gun risks, like their beliefs about other societal hazards, will be cognitively derivative of their cultural orientations. To avoid cognitive dissonance, egalitarians and communitarians will more readily take note of and credit evidence that insufficient gun control diminishes public safety; hierarchists and individualists will do the same for evidence that excessive gun control makes society less safe. Following the lead of socially constructed emotions, egalitarians and communitarians will instinctively recoil from guns in fear (as well as disgust), while feelings of security and confident self-sufficiency will impel hierarchists and individualists to reach out for them. And looking to those they trust to tell them whom to believe—the analysts and policymakers who say “more guns, less crime” or the ones who say “more guns, more crime”—individuals gravitate toward and become ever more firmly entrenched in the opinions dominant within their respective cultural group.³⁵

Culture theory tells us that individuals' beliefs about gun risks will also be morally derivative of their cultural orientations. Their preferred visions of the

³³ See Dan M. Kahan et al., *Gender, Race, and Risk Perception* 29–37 (Yale Law Sch. Pub. Law & Legal Theory Res. Paper Series No. 86, 2005), available at <http://ssrn.com/abstract=723762>.

³⁴ See *id.* at 36. See generally The Cultural Cognition Project, *Gun Risk Perceptions: Culture & Affect*, <http://research.yale.edu/culturalcognition/index.php?option=content&task=view&id=98> (last visited Jan. 28, 2006).

³⁵ Cf. David Hemenway, *Book Review*, <http://www.hsph.harvard.edu/faculty/Hemenway/book.html> (last visited Jan. 28, 2006) (“In his analyses, Lott virtually always uses complicated econometrics. For readers to accept the results requires complete faith in Lott’s integrity, that he will always conduct careful and competent research. Lott does not merit such faith.”).

good society will figure explicitly in their evaluations of the competing risks that the gun debate comprises. When confronted with social science evidence purporting to show that "shall issue" laws (provisions mandating that officials issue concealed-handgun permits to any adult without a criminal record) reduce crime, control supporters can be expected to spurn mass private weapons possession anyway as denigrating solidarity: better "a world with slightly higher crime levels . . . than one in which we routinely wave guns at each other."³⁶ No matter what the evidence shows, control proponents likewise will bridle at the idea that collective interests in security justify restricting the right of law-abiding citizens to own guns, which they see as a fundamental individual right.³⁷ Because of the influence that cultural orientations have in shaping perceptions of consequences, it is unlikely that many individuals would ever accept social science data that purports to contradict their prior beliefs on gun risks, but even those who can imagine being persuaded by such evidence would likely refuse to change their position on gun control as a result of it.³⁸

These dynamics help to explain the persistent ineffectiveness of empirical data in the American gun debate. Using econometrics, contingent valuation surveys, public-health risk-factor analyses, and the like, criminologists generate study after study on the consequences of various forms of gun control. But in the face of them, public opinion remains stubbornly immobile. Members of the public are either choosing to credit only the studies that confirm their prior beliefs or simply ignoring the empirics debate altogether. At least politically speaking, the lesson of the recent outpouring of high-quality empirical studies is neither "more guns, less crime" nor "more guns, more crime," but rather "more statistics, less persuasion."

If a picture is worth a thousand words, a good political cartoon is often worth a whole article section.

³⁶ Lindsay Boyer, Letter to the Editor, *Who Needs a Gun?*, N.Y. TIMES, June 19, 1999, at A14; Dan Kahan et al., Focus Group: Women Supporters of Gun Control (conducted Apr. 23, 2003) (on file with authors) ("I also don't want to live in a society where you have a gun, and you have a gun, and you have a gun.").

³⁷ See ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 25-26 (1995); Dan Kahan et al., Focus Group: Male Opponents of Gun Control (conducted Apr. 24, 2003) (on file with authors) ("[The framers of the constitution] gave us the right to be able to have free conversation. They gave us a gun to be able to protect that conversation. When that is gone, it's over.").

³⁸ See generally Kahan, *supra* note 3, at 452.

This one, which appeared in the *New York Times* Sunday Book Review, perfectly captures the seamless interconnection of facts and cultural worldviews in the American gun debate. It features the comic misadventures of two books—historian Michael Bellesiles's *The Arming of America: The Origins of a National Gun Culture*, and economist John Lott's *More Guns, Less Crime*. As the cartoon suggests, each book was initially celebrated by one side in the gun debate as setting forth decisive empirical facts, and then savagely attacked by the other as based on falsified evidence. But the punch line clearly appears in the last three panels. There, the animated hand-gun characters and Lott's book rally themselves by remembering that what matters is "the Dream": a society in which all members of the community, from ordinary citizens to toddlers to cats and dogs, incongruously demonstrate concern for one another by brandishing handguns. The cartoon explicitly asserts that control opponents see their commitment to a particular way of life as more important than the facts on guns. But it implicitly says the very same thing about control supporters by depicting the individualistic vision of their adversaries as abhorrent—thereby supplying a justification for restricting hand guns regardless of their impact on crime!

Our position is that the only way to make progress in the gun debate is to focus on the last panel of the cartoon. Because cultural orientations determine what individuals believe and how they evaluate competing gun risks, the attention of policymakers and analysts, in this risk-regulation setting as in others, must suspend (at least temporarily) their fixation on consequences and openly address the question of what sort of values the law should express.

II. THE FUTILITY OF LIBERAL CIRCUMSPECTION

At least some participants in the gun control debate, of course, *do* frame their appeals in explicitly cultural terms. These individuals speak not in the technical, detached language of statistics, but in the fiery, assaultive idiom of expressive condemnation.³⁹ Control partisans ridicule their adversaries as "hicksville cowboy[s]," members of the "big belt buckle crowd"⁴⁰ whose love

³⁹ See generally Kahan, *supra* note 3.

⁴⁰ Margery Eagan, *Rally Proves Trigger-Happy Crowd is Nuts*, BOSTON HERALD, May 18, 1999, at 4; see also Richard Cohen, *The Tame West*, WASH. POST, July 15, 1999, at A25 ("[Republican control opponents] all pretend to be upholding American tradition and rights, citing in some cases an old West of their fervid imagination and suggesting remedies that can only be considered inane."); Ted Flickinger, *Letter to the Editor*, DODGE CITY, PITTSBURGH POST-GAZETTE, June 1, 1999, at A10 ("The widespread availability of guns in a society in which many so-called adult males still embrace the frontier mentality makes it a certainty these

of guns stems from their "macho, Freudian hang ups,"⁴¹ while NRA President Charlton Heston declares "cultural war" against "blue blooded elitists" who threaten an "America . . . where you [can] . . . be white without feeling guilty, [and] own a gun without shame."⁴²

Most citizens undoubtedly find this culturally chauvinistic style of debate exceedingly unpleasant. We believe it is precisely the judgmental tone of expressive condemnation that explains the appeal of public safety arguments in the mainstream gun debate.

American political culture is heavily influenced by liberal discourse norms, which direct those engaged in public debates to disclaim reliance on contested visions of the good life and instead base arguments on grounds acceptable to citizens of diverse moral outlooks.⁴³ Consequentialist modes of decision-making seem to satisfy this standard. Furnishing apparently "objective procedures and criteria" for policy making, econometrics, cost-benefit analyses, contingent valuation studies and the like are "decidedly divorced from statements about morality."⁴⁴ Because they elide contestable judgments of value, instrumental arguments are the "don't ask, don't tell" solution to cultural disputes in the law—not just over gun control, but over policies like the death penalty, hate crimes, welfare reform, environmental regulation, and a host of other controversial policies.⁴⁵

periodic adolescent outbursts will be tragically repeated. It's still Dodge City out there, boys. Wahoo."); Perry Young, *We Are All to Blame*, CHAPEL HILL HERALD, Apr. 24, 1999, at 4 ("[W]e seem crippled by a mythological 'tradition' (a frontier gun world that ceased to exist 100 years ago and was wrong even then) and bullied into submission by a ridiculous minority of airheads like B-movie actor Charlton Heston and the National Rifle Association.").

⁴¹ Norman W. Nielsen, *Letter to the Times*, L.A. TIMES, Apr. 30, 1999, at B6; see also Robert Reno, *NRA Aims but Shoots Self in Foot*, NEWSDAY (New York, N.Y.), May 9, 1999, at F7.

⁴² David Keim, *NRA Chief Proves Big Draw at Vote Freedom First Rally*, KNOXVILLE NEWS-SENTINEL, Nov. 2, 2000, at A1 ("Our country is in greater danger now than perhaps ever before," Heston warned. "Instead of Redcoats, you're fighting blue-blooded elitists."); see Charlton Heston, *The Second Amendment: America's First Freedom*, in GUNS IN AMERICA: A READER 199, 203 (Jan E. Dizard et al. eds., 1999) (exhorting those who "prefer the America . . . where you [can] pray without feeling naive, love without being kinky, sing without profanity, be white without feeling guilty, own a gun without shame" to join and "to win a cultural war").

⁴³ See BRUCE A. ACKERMAN, *SOCIAL JUSTICE AND THE LIBERAL STATE* 8-12 (1980); JOHN RAWLS, *Lecture VI*, in *POLITICAL LIBERALISM* 212 (1996); see also AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 52-94 (1996).

⁴⁴ Martin Rein & Christopher Winship, *The Dangers of "Strong" Causal Reasoning in Social Policy*, *Soc'y*, July/Aug. 1999, at 38, 39.

⁴⁵ See Kahan, *supra* note 3, at 415-16; Rein & Winship, *supra* note 44, at 45-46; Note, *The CITES Fort Lauderdale Criteria: The Uses and Limits of Science in International Conservation Decisionmaking*, 114 HARV. L. REV. 1769, 1782 (2001).

If this sort of indirection were an *effective* strategy for suppressing attempts at cultural domination in law, it might be prudent to assent to the continued centrality of public safety arguments in the gun debate, notwithstanding—indeed, exactly because of—their remoteness from the cultural cleavages that really divide Americans on this issue. But the hope that the gun control debate can be made less contentious by confining it to empirical arguments is in fact naïve, and for two reasons.

It is naïve, first, because it misapprehends the psychological interdependence of factual beliefs and values. As the cultural theory of risk itself illustrates, what individuals accept as truth cannot be divorced from the cultural commitments that define their identities. Our knowledge of all manner of facts—that men landed on the moon in 1969; that Andrew Wiles solved Fermat's Last Theorem; that the paternity of a baby can be determined from a DNA test—derives not from first-hand observation but from what we are told by those whose authority we trust. Whom we regard as worthy of such trust (religious leaders or scientists at major research universities; Rush Limbaugh or the editors of the *New York Times*) is governed by norms that we have been socialized to accept. For this reason, factual disagreement can be ripe with political and cultural conflict. If you insist that I am wrong to believe that the Holocaust took place, or that God created the world, you obviously aren't reporting that your sensory experience differs from mine; you are telling me that you *reject* the authority of institutions and persons I am morally impelled to defer to. And for that reason, I might well decide not merely that you are misinformed, but that you are evil.⁴⁶

Because the facts that individuals accept about gun control bear exactly this relationship with their cultural identities, there is little reason to think that recourse to empirics can shield us from the conflict generated by clashing worldviews. Indeed, it seems quite obvious that it has not. Indeed, commentators debating the facts engage in no less recrimination and name-calling than do activists who explicitly see gun control as part of a "culture war."⁴⁷ While predictably failing to change anyone's mind, empirical analyses

⁴⁶ See generally STEVEN SHAPIN, *A SOCIAL HISTORY OF TRUTH: CIVILITY AND SCIENCE IN SEVENTEENTH-CENTURY ENGLAND* 20 (1994) ("It is at least uncivil, and perhaps terminally so, to decline to take knowledge from authoritative sources. . . . Persistent distrust, therefore, has a moral terminus: expulsion from the community. If you will not know, and accept the adequate grounds for, what the community knows, you will not belong to it, and even your distrust will not be recognized as such.")

⁴⁷ See, e.g., Chris Mooney, *Double Barreled Double Standards*, MOTHER JONES, Oct. 13, 2003, http://www.motherjones.com/news/feature/2003/42/we_590_01.html (quoting Yale Law Professor Ian Ayres: "A lot of people would say, thank God Lott is still in the academy, but [I say] thank God he's not at my

do reinforce the conviction of those who already accept their conclusions that a rational and just assessment of the facts *must* support their position. The disagreement is then no longer seen as a reflection of differing visions of the good society, but an ethical battle over acceptance of an indisputable, objective truth. Instead of challenging one another's worldviews, those who continue the debate simply challenge one another's honesty and integrity.⁴⁸

Second, the hope that consequentialism will quiet cultural conflict naively misunderstands the strategic and psychological dynamics of political discourse. Most Americans are not cultural imperialists, but as the gun debate starkly illustrates at least some *are*. For them, the liberal norm against public moralizing lacks any constraining force. By speaking in the muted tones of public safety in a vain effort to avoid giving offense, moderate commentators, politicians, and citizens cede the rhetorical stage to these expressive zealots, who happily seize on the gun debate as an opportunity to deride their cultural adversaries and stigmatize them as deviants.⁴⁹

school."); John J. Donohue III, *The Final Bullet in the Body of the More Guns, Less Crime Hypothesis* 6 (Pub. Law & Legal Theory Working Paper Series No. 61, 2003), available at <http://ssrn.com/abstract=431220> ("As the eminent sociologist Otis Dudley Duncan has stated: 'The Lott episode is just one incident in a seemingly inexorable trend toward eliminating professionally competent research from discussions of social policy or overwhelming it with junk science. If that trend is not halted, the life blood of democracy itself will dry up.'"); Posting of "Mary Rosh" to http://groups.google.com/group/uk.politics.guns/browse_thread/thread/95237e643d20e5df/3014727e1e532342 (Sept. 23, 2002, 9:50 EST) ("The Ayres and Donohue piece is a joke. I saw it a while ago. Their own county-level data that did the year by year breakdown actually showed that Lott and Mustard were correct, but they weren't smart enough to know it. A friend at the Harvard Law School said that Donohue gave the paper there and he was demolished on this and other points. I haven't checked their paper again, but do they still have the county level breakdown by year or did they remove it because it was the most general test and it went the wrong way from their perspective? What academic journal are they going to get it published [sic] in?").

⁴⁸ See, e.g., Matt Bai, *The Gun Crowd's Guru*, NEWSWEEK, Mar. 12, 2001, at 36, 36 ("After one debate, [Lott] sent an email to Doug Weil, Handgun Control's resident Ph.D., which read in part: 'Either you no longer have a conscience and thus no longer care whether your false statements end up getting people killed, or you're unable to separate your dreams from reality.' His enemies are equally vitriolic. Perhaps because Lott comes from their own academic world, gun-control advocates just about lose their minds talking about him. 'This guy has been dishonest from day one,' shouts Weil. Opponents have accused Lott of getting funding from the gun industry (he hasn't) and lying about his Ph.D. (he didn't)."); Kevin Beck, Letter to Editor, *Conceal Carry*, ST. LOUIS DISPATCH, Aug. 12, 1998, at B6 (expressing gratitude to columnist for "expos[ing] Professor John R. Lott Jr. as an intellectually dishonest toady of the bullet manufacturing industry. Gun nuts have been in our faces lately with his alleged 'study' saying that not carrying a gun made our streets unsafe."); Ann Coulter, *More Facts, Fewer Liberals*, HUM. EVENTS, Mar. 12, 2001, at 5, 5 ("While having dinner recently with John Lott, author of *More Guns, Less Crime*, one of life's enduring debates came up: Are liberals evil or just stupid?").

⁴⁹ Cf. JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 321 (1991) ("A . . . condition that would seem essential for rationally resolving morally grounded differences in the public realm would be the rejection by all factions of the impulse of public quiescence. . . . [T]here is a tendency among those Americans in the middle of these debates to hesitate from speaking at all.")

No matter how obnoxious these cultural extremists might seem, moreover, their messages cannot be easily ignored. Their language, however intolerant, resonates much more deeply with the social meanings of guns and gun control than do the statistics, the equations, the graphs, and the figures of the mainstream empirical debate. The special attention that these zealots command, moreover, reinforces the perception of citizens on each side that they are facing an unreasonable and unreasoning adversary who is bent on cultural domination. Accordingly, so long as the zealots are the only ones with anything pertinent to say, the gun debate will remain divisive and unproductive.

In order to civilize the gun debate, then, *moderate* citizens—the ones who are repulsed by cultural imperialism of all varieties—must come out from behind the cover of consequentialism and talk through their competing visions of the good life without embarrassment. They must, in the spirit of genuine democratic deliberation, appeal to one another for understanding and seek policies that accommodate their respective worldviews. An open debate about the social meanings the law should express is not just the only *philosophically cogent* way to resolve the gun debate; it is also the only *practical* way to resolve it in terms that embody an appropriate dedication to political pluralism.

III. EXPRESSIVE PLURALISM AND THE GUN DEBATE

A. *Three Principles*

Our critique of the terms in which the American gun debate is carried out presupposes that expressive debate in law can be simultaneously pertinent and tolerant. The liberal anxiety that it cannot be—that the only way to avert “the domination of one cultural and moral ethos over all others”⁵⁰ is to cleanse public discourse of appeals to contested cultural views altogether—is far too pessimistic. Anthropologists, sociologists, and comparative law scholars have in fact cataloged many examples of communities successfully negotiating culture-infused controversies—ones between archaeologists and Native Americans over the disposition of tribal artifacts;⁵¹ between secular French

⁵⁰ *Id.* at 42.

⁵¹ See Gene A. Marsh, *Walking the Spirit Trail: Reparation and Protection of Native American Remains and Sacred Cultural Items*, 24 ARIZ. ST. L.J. 79, 105 (1992); Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 65–71 (1992); see also ROBERT WINTHROP, *CULTURAL SOLUTIONS, RESOLVING CULTURAL CONFLICT* (1999) (Briefing No. 2) (describing cultural dispute resolution techniques used to resolve conflicts over

educators and Muslim parents over the donning of religious attire by Muslim school children;⁵² between the supporters and opponents of abortion rights in France and Germany.⁵³

These culture-conflict success stories suggest three important principles that should guide deliberations over culturally charged political issues. One can be called *social-meaning overdetermination*. The best way to make cultural conflict recede isn't to drain it of social meaning (through, for example, the seemingly "neutral" idiom of empirical social-science methods)⁵⁴ but rather to make it so abundantly rich in meanings that members of all cultural groups can simultaneously find their values and hence their identities affirmed by it.⁵⁵

The second principle is *identity vouching*. Individuals of diverse worldviews can be persuaded to accept a middle-ground solution on a culturally charged issue when figures—who share their cultural identity and whose commitment to it are beyond question—assure them the compromise is acceptable. Because individuals look to those whom they trust to tell them what claims they should credit, the identity of the messenger matters at least as much as the content of the message.⁵⁶

Finally, the cultural-dispute-resolution literature suggests the importance of *discourse sequencing*. Parties to culturally grounded political conflict often do converge, ultimately, on instrumental policies supported by empirical data and methods. They do so, however, only after they have first devised expressive policies that satisfy the criterion of social meaning overdetermination and that

development of sacred Native American lands).

⁵² See MARC HOWARD ROSS, *THE MANAGEMENT OF CONFLICT* 5–7 (1993).

⁵³ See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 15–39 (1987).

⁵⁴ See generally Rein & Winship, *supra* note 44.

⁵⁵ See, e.g., CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* 219 (1983); GLENDON, *supra* note 53, at 15–39; Braman, Kahan & Grimmelmann, *supra* note 23, at 285.

⁵⁶ See Roderick M. Kramer, *Trust & Distrust in Organizations: Emerging Perspectives, Enduring Questions*, 50 ANN. REV. PSYCHOL. 569, 577 (1999) (noting that individuals "confer a sort of depersonalized trust on other ingroup members that is predicated simply on awareness of their shared category membership"); see also Marilyn B. Brewer, *Ethnocentrism and Its Role in Interpersonal Trust*, in SCIENTIFIC INQUIRY AND THE SOCIAL SCIENCES 345, 352–59 (Marilynn B. Brewer & Barry E. Collins eds., 1981) (describing the increase in distrust that accompanies ethnic difference); see also, generally, Marilyn B. Brewer, *In-Group Favoritism: The Subtle Side of Intergroup Discrimination*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 160, 161–65 (David M. Messick & Ann E. Tenbrunsel eds., 1996). Thus, while any number of individuals might present the same argument in the same term, those who are extended this trust are more likely to have their claims accepted as a result of identity-based trust. In this regard, identity vouching is an effective tool in convincing a community that a compromise speaks to their concerns.

are vouched for by cultural authority figures.⁵⁷ Once such policies dispel each side's apprehension that the other is poised to score a decisive victory in the struggle for social status, members of competing groups become more receptive to factual claims and data that they otherwise would have dismissed as the product of bad faith. Ironically, expressive politics turns out to be the midwife of sound instrumental policy making!⁵⁸

To make these principles more concrete, we'll first describe how they operated in a pair of culture-conflict success sorties. We'll then suggest how they might profitably be applied to the American gun debate.

B. Two Stories

I. Native American Artifacts: NAGPRA

Cultural disputes frequently arise between the indigenous peoples in the Americas and the nations that now claim their ancestral territory as sovereign. While there are numerous examples of conflict and resolution in this context,⁵⁹ the dispute over the repatriation of Native American remains and artifacts is perhaps the most prominent in recent U.S. history.

The materials in question are extensive. Museums and universities currently hold in their collections hundreds of thousands of Native American human remains and millions of Native American cultural objects. Members of the scientific and curatorial communities who work with these materials view archaeological artifacts and remains as invaluable resources for research and education, analogizing them with the rarest value of books written "in a language that we are only beginning to understand" which depends on their care and preservation.⁶⁰ Because much of our knowledge of human evolution

⁵⁷ See GLENDON, *supra* note 53, at 47-49 (arguing that the symbolic compromise in other Western nations over abortion has not only made for a more respectful public debate on the issue, but also allowed legislators to shift their attention from warring cultural ideals to common instrumental concerns).

⁵⁸ See Kahan & Braman, *supra* note 23, at 38-40. See generally Braman, Kahan & Grimmelmann, *supra* note 23.

⁵⁹ See, e.g., Norman Dale, *Cross-Cultural Community-Based Planning: Negotiating the Future of Haida Gwaii (British Columbia)*, in THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 923, 923-24 (Lawrence Susskind, Sarah McKernan & Jennifer Thomas-Larmer eds., 2000) (describing the aftermath of the "most publicized environmental conflict to date in British Columbia: the struggle over logging South Moresby, the southernmost third of Haida Gwaii").

⁶⁰ See *Native American Museum Claims Commission Act: Hearings before the Select Comm. on Indian Affairs*, 100th Cong. 124 (1988) [hereinafter *Senate NAAMCA Hearings*] (statement of Cheryl Ann Munson, Chairman, Governmental Affairs Committee of the Society for American Archaeology, representing the

and North American history would simply not exist without these materials, researchers and educators view their preservation as both a professional duty and a public trust.⁶¹ It is a humanistic vision of objective scientific research and universal social benefit.

Many Native Americans, however, view these same materials quite differently.⁶² Their ancestral objects and remains had not simply been “disinterred” for study, they felt, but torn from their rightful place in the web of life with the potential to, as one member of the Pawnee tribe put it, “wreak havoc among the living, bringing sickness, emotional distress, and even death.”⁶³ Further, because many of the materials now in museums and research collections were obtained during or after native populations were forcibly (and often violently) removed from their traditional homelands, their excavation and study is strongly associated with the oppression of native populations over the centuries.⁶⁴

During the 1970s and 80s, as tribes became more aware of both the extent of existing material collections and the methods employed in contemporary research, they began demanding that researchers repatriate many items to tribes for ritual reburial.⁶⁵ The public exchanges between the tribes and researchers during this period are reminiscent of those between protagonists in the debates over gun control and abortion, with disputants presenting arguments that appear coherent to those who share their worldview but which often seem unintelligible or offensive to those who do not.⁶⁶

Society for American Archaeology, Washington, D.C.) (“[T]he scientific value of human remains, both for the present and future, resides in the . . . maintenance of large collections of human remains from all time periods and from varied geographic areas.”).

⁶¹ Over the course of the last century, researchers have become increasingly concerned about the destruction of these materials by vandals, thieves, and amateur “pot hunters” helping to draft and then pressuring Congress to pass laws protecting Native American materials found on federal lands and tribal reservations. See Antiquities Act of 1906, 16 U.S.C. §§ 431–433 (2000); Archaeological Resources Protection Act of 1979 § 470bb(1) (2000).

⁶² There is, of course, significant diversity within the Native American community that is not captured by these gross generalizations. Nevertheless, these are the rough outlines of the debate.

⁶³ James Riding In, *Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians*, 24 ARIZ. ST. L.J. 11, 13 (1992).

⁶⁴ See, e.g., James Riding In, *Repatriation: A Pawnee’s Perspective*, 20 AM. INDIAN QUART. 238, 238 (1996) (describing a widely held view among American Indians of archaeology as an “oppressive and sacrilegious profession that claimed ownership over many of our deceased relatives, suppressed our religious freedom, and denied our ancestors a lasting burial”).

⁶⁵ See, e.g., *Senate NAAMCA Hearings*, *supra* note 60, at 73–74 (statement of William Parker, Spokesperson, Northern Cheyenne Tribe, Lame Deer, Mont.) (describing requests for various objects).

⁶⁶ The problems inherent in any cross-cultural communication are exacerbated when conflict has further eroded trust between parties. As Robert Winthrop, an anthropologist who works on resolving cultural

As a number of archaeologists and Native Americans openly acknowledged, at issue was not simply the disposition of the cultural objects and remains, but what the outcome would say about the status of the worldviews of the parties involved. Laws mandating repatriation mattered, wrote one archaeologist, because they represented "a serious and sustained assault" on the "worldview of western science."⁶⁷ The concerns of Native Americans mirrored those of scientists, as they wondered whether science and archaeology would be used to denigrate and dehumanize Native Americans as it had in the past.⁶⁸

As in the gun debate, moreover, parties interested in resolving the debate (mainly archaeologists and museum curators) attempted to sidestep the clash over worldviews by framing their arguments in consequentialist terms. In congressional hearings and other fora,⁶⁹ they argued that permitting libraries and museums to retain the artifacts could secure the interests of both the scientists, who would be able to continue studying them, and the Native American tribes, which would be assured the preservation of artifacts integral to their cultural heritage. This reasoning did nothing to quell the controversy. Looking back, one participant in the legislative debates recalled that neither side "had the ability to let down their respective guards and work together."⁷⁰

At an impasse, representatives of the respective communities held two sets of meetings to discuss possibilities for compromise. The first was the 1989 World Archaeological Congress, at which archaeologists and indigenous peoples from around the world endorsed what became known as the

conflicts, has noted, this is in part because the values underlying the dispute are often not explicitly articulated.

⁶⁷ G.A. Clark, Letter to the Editor, *NAGPRA and the Demon-Haunted World*, SAA BULL., Nov. 1996, <http://www.saa.org/Publications/SAAbulletin/14-5/SAA4.html>.

⁶⁸ See, e.g., James Bishop Jr., *Bones of Contention*, HIGH COUNTRY NEWS, Oct. 25, 1999, http://www.hcn.org/servlets/hcn.Article?article_id=5372 (describing these concerns).

⁶⁹ As late as 1988, representatives of the archaeological and curatorial communities testified against and helped to defeat The Native American Museum Claims Commission Act (NAMCCA), federal legislation intended to facilitate the repatriation of sacred objects, items of cultural patrimony, and human remains. See *Senate NAAMCA Hearings*, *supra* note 60 (statements of Dean Anderson, Michael Fox, and Cheryl Ann Munson) (arguing that cases should be handled at the local level, between the parties directly involved, and that current state and local law were sufficient). Native American groups criticized these tactics, questioning their motives, questioning the accuracy of their testimony, and calling for significant expansion in the scope of the proposed legislation. *Id.* at 88 (statement of Walter Echo-Hawk, Staff Attorney, Native American Rights Fund, Boulder, Colo.) (arguing that "the bill should very clearly cover private institutions and individuals and parties as well as public," and for greater Native American representation on the proposed commission for resolving disputes).

⁷⁰ Michael J. Fox, *Repatriation: Mutual Benefits for Everyone*, 24 ARIZ. ST. L.J. 7, 7 (1992).

Vermillion Accord.⁷¹ While the Accord was almost purely symbolic,⁷² the effect was nevertheless substantial. Many saw it as the first public expression of mutual respect between native peoples and scientists over this issue. To their surprise, many representatives of indigenous populations who had previously viewed archaeology as “anti-Indian,”⁷³ found archaeologists and curators speaking respectfully about Native American concerns.⁷⁴ Archaeologists and museum curators found that, similarly, many from indigenous communities could be sensitive to the loss that broad repatriation could impose on the scientific community.⁷⁵

The second set of meetings was held by the Panel for a National Dialogue on Museum/Native American Relations over the course of the same year.⁷⁶ The panel consisted of six representatives of Native American interests and six representatives of museum and archaeological research interests.⁷⁷ All were trusted and prominent members of their respective communities.⁷⁸

⁷¹ The name “Vermillion Accord” was taken from the location of the World Archaeological Congress: Vermillion, South Dakota. See Michael Day, *Archaeological Ethics and the Treatment of the Dead*, 6 ANTHROPOLOGY TODAY 15, 15 (1990) (describing the 1989 meeting of the Congress).

⁷² The Accord committed parties to the principle that any decision about repatriation should be arrived at “on the basis of mutual respect for the legitimate concerns of communities for the proper disposition of their ancestors, as well as the legitimate concerns of science and education.” *Id.*

⁷³ See, e.g., Vine Deloria, Jr., *A Simple Question of Humanity: The Moral Dimensions of the Reburial Issue*, 14 NATIVE AM. RIGHTS FUND LEGAL REV. 4, 1 (1989); Roger C. Echo-Hawk, *Working Together: Exploring Ancient Worlds*, 11 SOC’Y AM. ARCHAEOLOGY BULL. 4, 5 (1993).

⁷⁴ As one Native American activist recalled, the Vermillion Accord was his first indication that “not all [archaeologists] are scum of the earth.” Steve Russell, *Archaeology Interview: The Roots of NAGPRA*, <http://www.archaeology.about.com/library/weekly/aa083197.htm> (last visited Jan. 28, 2006).

⁷⁵ Phone Interview with Dr. Larry Zimmerman, Professor of Anthropology & Museum Studies Pub. Scholar, Native Am. Representative, Ind. Univ.-Purdue Univ. Indianapolis & Eiteljorg Museum (June 7, 2003) (“I think it was something of a surprise [among archaeologists] that [Native Americans] were so willing to say that there was some benefit here. . . . Many Indians are aware that certain aspects of their culture were literally saved by anthropologists.”).

⁷⁶ *Report of the Panel for a National Dialogue on Museum/Native American Relations, Feb. 28, 1990, reprinted in 24 ARIZ. ST. L.J. 487 (1992) [hereinafter Panel Report].*

⁷⁷ The panel included several who had testified before Congress on opposing sides of proposed legislation regarding repatriation. *Id.* at 489.

⁷⁸ The panel members were: Willard L. Boyd, President, Field Museum of Natural History; W. Roger Buffalohead, Director, American Indian Learning and Research Center, University of Minnesota; Vine Deloria, Jr., Professor of Political Science, University of Arizona; Lynne Goldstein, Associate Professor of Anthropology, University of Wisconsin-Milwaukee; Suzan Shown Harjo, Executive Director, National Congress of American Indians; Walter R. Echo-Hawk, attorney, Native American Rights Fund; Oren Lyons, member, Chiefs Council of the Onondaga Nation, Six Nations Iroquois Confederacy; Will Mayo, member, Chiefs Conference; Michael Moratto, President of INFOTEC Research, Inc., and Fellow and Research Associate in Anthropology, California Academy of Sciences; Harriet Toro, Phoenix Area Vice President, National Congress of American Indians; Reuben A. Snake, Jr., Chair, Winnebago Tribal Council; Martin Sullivan, Director and Assistant Commissioner of Education, New York State Museum; Douglas H. Ubelaker,

The Panel's report, written after nearly a year of meetings and deliberations, begins by setting forth general principles that describe and affirm the values of both Native Americans and the scientific community.⁷⁹ It "recognizes the value of historic and scientific research and public education,"⁸⁰ while affirming that such activities should be undertaken without violating "the rights of Native American nations and people;"⁸¹ it states both that "[e]ducating the public about past cultures and societies is inherently worthwhile"⁸² and that "[h]uman remains must at all times be accorded dignity and respect."⁸³ The panelists also developed a number of policy recommendations.⁸⁴

Using the panel's report as a guide, Congress quickly drafted and passed the Native American Graves Protection and Repatriation Act (NAGPRA).⁸⁵ NAGPRA asserts tribal ownership and control over remains and "objects of cultural patrimony" found on federal and tribal lands.⁸⁶ Under the Act, federally funded institutions are to provide inventories of their Native American collections to a federal clearinghouse for review by tribes and the public. Where tribes demonstrate cultural affiliation and request repatriation, the Act requires these institutions to return the items in question.⁸⁷ However, when an item is "indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States," the Act holds that repatriation may be delayed until the study is completed.⁸⁸ The Act

Head, Division of Physical Anthropology, Smithsonian Institution; and Peter H. Welsh, Director of Research/Chief Curator, The Heard Museum, President, Council for Museum Anthropology. *Panel Report*, *supra* note 76, at 491-93.

⁷⁹ *Id.* at 494-96 ("Relationships between museums and Native American peoples with regard to Native human remains, funerary objects, sacred ceremonial or religious object and items of national or cultural patrimony should be governed by respect for the human rights of Native Americans and for the values of scientific research and public education.").

⁸⁰ *Id.* at 495.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 496.

⁸⁴ *Id.*

⁸⁵ Pub. Law 101-601 § 3, 104 Stat. 3050 (1990) (codified at 25 U.S.C. § 3002(a)(1)-(2) (1994)).

⁸⁶ 25 U.S.C. § 3002(a)(1)-(2) (1994). Tribes may, however, relinquish ownership of such items. 25 U.S.C. § 3002(e). Ancillary provisions restrict the excavation and removal of Native American human remains or cultural items and require notification of inadvertent discoveries of such material. § 3002(d). Items found on private property, however, are not subject to NAGPRA. § 3002(a).

⁸⁷ Where patrimony is uncertain, or where more than one tribe claims an item, the museum will care for the materials until the matter of patrimony is resolved. § 3005(e).

⁸⁸ § 3005(b).

also establishes a voluntary review process that would allow for a negotiated settlement to any disputes that might arise.⁸⁹

While not perfect,⁹⁰ NAGPRA has succeeded in that it is regularly praised and explicitly supported not only by the National Congress of American Indians and the Native American Rights Fund, but also by the Society for American Archaeology and the American Association of Museums.⁹¹ Little over a decade after its passage the compromise legislation has both considerably improved relations between Native Americans, anthropologists, and museums and dramatically expanded the scope and quality of empirical research being undertaken.

Moreover, since the passage of the Act, tribes, museums, and archaeologists have entered into hundreds of cooperative agreements, many not required by law.⁹² And while prior to NAGPRA there were accounts of Native Americans who studied archaeology being ostracized,⁹³ the last decade has seen a dramatic increase in interest in archaeological methods and findings by tribes and the establishment of successful and popular programs to train Native Americans in archaeological methods.⁹⁴ NAGPRA, as one observer noted, has “sparked more analysis of human remains and funerary objects in [its first] eight years than was done in the [previous] 100.”⁹⁵

⁸⁹ See James A.R. Nafziger & Rebecca J. Dobkins, *The Native American Graves Protection and Repatriation Act in Its First Decade*, 8 INT'L J. CULTURAL PROP. 77, 92–97 (1999).

⁹⁰ Some Native Americans feel that NAGPRA does far too little, leaving those tribes not formally recognized by the federal government powerless, and excluding overseas and private collections from the reach of federal criminal law. See, e.g., Anna Kiss, *Non-recognized Tribes and Repatriation*, <http://www.inspiritproductions.com/articles/kiss/non-recognized.html> (last visited May 1, 2006). At least one researcher considers NAGPRA to be “an unmitigated disaster,” and reinterment to be a permanent loss of public property, an impermissible restriction of their First Amendment rights, and a clear valuation of religious over secular and scientific perspectives. Clark, *supra* note 67.

⁹¹ See Keith W. Kintigh, *Statement of the Society for American Archaeology and the American Association of Physical Anthropologists* (Apr. 20, 1999), available at <http://www.saa.org/publications/sabulletin/17-5/saa3.html> (describing the “coalition of scientific organizations and Native American groups that strongly supported NAGPRA’s enactment”).

⁹² *Id.*

⁹³ Vine Deloria, Jr., *Anthros, Indians, and Planetary Reality*, in INDIANS & ANTHROPOLOGISTS: VINE DELORIA, JR., AND THE CRITIQUE OF ANTHROPOLOGY 209, 219 (1997).

⁹⁴ See JOE WATKINS, *INDIGENOUS ARCHAEOLOGY: AMERICAN INDIAN VALUES AND SCIENTIFIC PRACTICE* 4–11 (2001) (describing the emergence of these programs and the implications for both archaeology and Native American self-understanding).

⁹⁵ Burke Museum of Natural History and Culture, *Anthropologists’ Views about Native Americans, NAGPRA, and Kennewick Man*, <http://www.washington.edu/burkemuseum/kman/anthropologists.htm> (last visited Jan. 28, 2006) (statement of Timothy McKeown, Anthropologist, National Park Service, 1998).

The success of NAGPRA, we believe, reflects all three principles of successful cultural dispute resolution. First, the diverse provisions of the Act symbolically affirm the worldviews of both sides, satisfying the principle of social meaning overdetermination. Because the law gives tribes the authority to grant or withhold consent, NAGPRA recognizes tribal sovereignty and manifests respect for their claim that such remains must be handled with the dignity that attends their spiritual significance. Indeed, against the background of these provisions, most tribes have proven perfectly willing to *agree* to continued institutional custody of tribal artifacts and remains. At the same time, by setting up a procedure for obtaining custody of the artifacts with consent, and for memorializing findings when consent is withheld, the law affirms the archaeologists' cultural allegiance to a scientific cultural style founded on a humanist and enlightenment values.⁹⁶ In the context of the respect for the scientific community expressed in these measures, the cataloguing of collections, tasks that might be considered onerous and demeaning are instead viewed as an expression of valued craft norms.⁹⁷

Second, NAGPRA illustrates the efficacy of identity vouching. The principles endorsed in the Vermillion Accord and the proposals formulated by the Panel for a National Dialogue on Museum/Native American Relations were not intrinsically more coherent or penetrating than compromises that had been proposed earlier by interested parties. What gave *these* understandings the power to break the impasse over the artifacts was the identity of their sponsors. The role of prominent scholars and museum curators in devising NAGPRA's procedures assured archaeologists and anthropologists that the Act, despite its recognition of tribal rights, was not hostile to their claim to be recognized as involved in valuable scientific research. The participation of tribal leaders, who previously had been instrumental in fighting for repatriation, likewise

⁹⁶ The legislation does not forbid federally funded institutions from the display of artifacts or require that they be returned; rather, it requires the very diligence in care and consultation with Native Americans that museums and researchers have advocated as the best possible approach for some time. 25 U.S.C. § 3005 (1994).

⁹⁷ The Act also contains measures congenial to both parties, expanding criminal penalties for trafficking in items obtained in violation of the law's provisions, measures that were strongly supported by the researchers who have long bemoaned the private pillaging of Indian grave sites, preventing later study and documentation. 25 U.S.C. § 3007 (1994). In this and other respects, NAGPRA is closely related to the Archaeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. § 470aa-470mm (1994). ARPA reasserts federal control over archaeological resources on federal and tribal lands and provides stiff penalties for persons who knowingly excavate, remove, or engage in transactions involving those resources without a federal permit. *Id.* These measures thus not only clearly affirmed the relationship that Native Americans felt they had with their ancestors and their material culture but also included measures that the archaeological community had long supported protecting these materials from private collectors, tourists, and vandals.

assured Native Americans that the Act, despite its protections for scientists, respected Native Americans' cultural ideals. Moreover, NAGPRA works, at least in part, because Native American archaeologists are themselves involved in administering its procedures. Native Americans are much more likely to accept the claim that scientific study of tribal remains is consistent with Native American values when archaeologists who personally hold those values assert it.

Finally, the success of NAGPRA illustrates the principle of discourse sequencing. NAGPRA has in effect made both scientists and Native Americans better off in a purely consequentialist sense. Rather than insist on repatriation, Native American tribes typically assent to continued institutional custody over remains and artifacts on conditions that they believe assure their interests in memorializing tribal heritage. Museums and scholars have not lost access to these materials, as they were at risk of doing before NAGPRA. Indeed, they have obtained even more thoroughgoing access to them as more and more tribes have joined in scientific efforts to find such artifacts and secure them from destruction.

Even before NAGPRA was enacted, many museum curators and scholars had argued that permitting continuing custody of Native American artifacts could simultaneously advance the interests of scientists in studying them and of Native Americans in memorializing their cultural heritage. But that argument wasn't accepted—indeed, it wasn't even seriously entertained—until *after* the enactment of NAGPRA created a climate in which both sides could see such agreements as congenial, rather than hostile, to their cultural worldviews.

2. *Abortion: The French Solution*

The struggle over abortion laws in the United States is a paradigmatic culture conflict. What citizens believe about abortion—that it is an “unnatural and threatening manipulation of the human body,”⁹⁸ “a question of equality,”⁹⁹

⁹⁸ Patricia Hershwitzky, *Birth Control, Abortion Are “Unnatural Manipulations,”* WASH. TIMES, Aug. 14, 1996, at C2.

⁹⁹ Ruth Conniff, *The Peace Candidate*, PROGRESSIVE, Apr. 2003, at 12, 13 (quoting Dennis Kucinich and discussing his candidacy for President).

an "abomination,"¹⁰⁰ a "private act,"¹⁰¹ "murder,"¹⁰² a "fundamental right,"¹⁰³ "selfish,"¹⁰⁴ "about freedom,"¹⁰⁵ "about life,"¹⁰⁶ and so on—reflects competing understandings of nature, of personal virtue, and of the just society. What position the *law* takes on the issue is understood by both sides to embody a judgment about the moral truth of these competing visions, and about relative social status of those who subscribe to them.¹⁰⁷

The same used to be true in France, where the abortion issue had for decades provoked intense controversy between citizens committed to conflicting culturally laden ideals.¹⁰⁸ But this changed when, in 1975, France enacted a law that Mary Ann Glendon characterizes as establishing a regime of abortion "for a reason."¹⁰⁹ A woman may have an abortion under French law during the first ten weeks of pregnancy, but only if she certifies that the procedure is necessitated by personal "distress" sufficient to overcome the fetus's "right to life." The conditions that constitute "distress" and "emergency" are not defined by the law; nor is any state agent authorized to second guess the woman's certification that such a condition exists. After a woman certifies that she is facing personal distress or emergency, however, she must wait one week before obtaining an abortion, during which time she is counseled about the sources of state support available to her should she decide to forgo the procedure and have her child. Since the enactment of that law, the controversy over abortion in that nation has largely abated.

The primary reason the French law overcame the cultural impasse is that "abortion for a reason" satisfies the social meaning overdetermination principle. Because no authority looks behind the individual woman's certification of emergency, those who support abortion rights can see in the law as affirming personal autonomy. Yet because the law *does require* such

¹⁰⁰ Laurette Elsberry, *Letters*, SACRAMENTO BEE, Jan. 31, 2002, at B8.

¹⁰¹ Editorial, *Approval of Abortion Pill a Win for Women's Health*, ATLANTA J.-CONST., Sept. 29, 2000, at A22.

¹⁰² Judy Holland, *Peterson Case Stirs Debate over Abortion, Unborn Victims*, CHI. TRIB., Apr. 30, 2003, at B3 (quoting Rep. Jerrold Nadler).

¹⁰³ Alan Diamonstein, *Virginia Voters Guide 2001*, WASH. POST, May 31, 2001, at T04 (statement by candidate for Lieutenant Governor).

¹⁰⁴ Aryl-Jeanne Reed, *A Selfish or Lazy Option*, HOUSTON CHRON., Jan. 27, 2001, at A35.

¹⁰⁵ Ted Cohen, *Augusta, Portland Rallies Note Anniversary of Roe v. Wade*, PORTLAND PRESS HERALD, Jan. 20, 2002, at 3B (quoting Jennifer Halm-Perazone).

¹⁰⁶ John Coppes, *Life is Precious*, RECORD (Kitchener-Waterloo, Ont.), Nov. 10, 1995, at A12.

¹⁰⁷ See, e.g., KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 1-11 (1984).

¹⁰⁸ See GLENDON, *supra* note 53, at 16.

¹⁰⁹ *Id.* at 15.

certification, it also affirms the moral view of those who see fetal life as having intrinsic moral worth, and who consequently see “abortion on demand” as a denigration of the sacred value of life. This interpretation of the law is reinforced by its explicit textual recognition of the fetus’s “right to life,” by a (precatory) statutory injunction against “voluntary termination of pregnancy . . . [as] a means of birth control,”¹¹⁰ and by the waiting period and counseling provision—all of which reinforce the message that the decision to abort is not just a matter of personal choice but a matter of serious moral concern for the entire community. The French abortion law, Glendon argues, thus achieves a symbolically rich compromise that is “greater than the sum of the parts.”¹¹¹ By including in the legislation provisions affirming concern for fetal life, women’s liberty, and maternal health, the French legislature made it possible for both opponents and supporters of abortion to find evidence that the state respects their cultural identities.¹¹²

The success of social-meaning overdetermination in quieting the French abortion controversy illustrates an important principle about the political economy of culturally charged political conflicts. Despite appearances, such controversies are not typically zero-sum games. Most citizens are not cultural extremists. They are satisfied so long as they know that the law respects their cultural worldviews; they don’t insist in addition that it denigrate the worldviews of persons who subscribe to different cultural ideals. Despite appearances, then, most culturally charged conflicts are not zero-sum games, where one side’s interest can be realized only at the expense of the other’s interest. Indeed, the only reason that such controversies appear to be zero-sum games is that moderates adhere too readily to the liberal prohibition against culturally transparent discourse, and thus allow the culture debate to be dominated by zealots, who *do* aspire to make the law compatible with only one worldview.¹¹³ More meanings, not less, are essential to resolving cultural disputes.

¹¹⁰ *Id.* at 16.

¹¹¹ *Id.* at 18.

¹¹² For a similar account, see RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 63–65 (1994)

¹¹³ Steven Teles makes this point in the context of discussing the historic consensus in American society on the appropriateness of social welfare programs for the poor. See generally STEVEN M. TELES, *WHOSE WELFARE? AFDC AND ELITE POLITICS* (1998). This consensus was underwritten, Teles argues, by a surfeit of meanings that made it possible for hierarchists, egalitarians, and individualists simultaneously to affirm such programs. *Id.* at 55. The consensus broke down as a result of the demand of cultural extremists who insisted that social welfare be infused with a meaning agreeable only to one orientation and not the others. *Id.* at 165.

France's solution to its abortion controversy also demonstrates the workings of discourse sequencing. Since enactment of the law broad consensus has emerged for both state-sponsored birth control and state-sponsored support services for single and indigent mothers. Even before the 1975 law, abortion rights activists had advocated such policies as a means for reducing *demand* for abortions. Abortion opponents resisted these proposals, however, because the threat that the abortion rights movement posed to their cultural identities made them distrust the intentions of those who advocated such policies, and hence doubt the credibility of the empirical evidence that these policies would in fact *reduce* abortion. Once the 1975 law eased their cultural anxiety, however, abortion opponents relaxed their opposition. And it turned out these policies worked exactly as their advocates had predicted.¹¹⁴ So today, even though abortion is effectively even easier to obtain in France than in the United States, the abortion *rate* among women of child-bearing years is much lower in France than it is here.¹¹⁵

In other words, there was a consequentialist or utilitarian solution to the cultural conflict in France, but the parties couldn't see it and implement it *until after* they had constructed a pertinent yet respectful expressive idiom for reconciling their competing demands for *affirmation*.

C. *The Gun Debate*

We believe the same principles that were used to resolve the disputes over abortion in France and Native American tribal artifacts in the United States can be used to treat the pathologies that afflict the American gun debate as well. We don't want to be understood, however, to be arguing that one can derive or deduce a "solution" to the American gun controversy from these principles simply by thinking hard about the problem. What sorts of policies fit the demands of social-meaning overdetermination; who the qualified identity vouchers are and how they can be enlisted to support expressively overdetermined policies; what kinds of instrumental regulations are likely to emerge from an appropriately sequenced gun debate—all will necessarily be shaped through real-world political activity. Indeed, more important than guessing what these three principles might entail is to identify the *democratic deliberative procedures* most likely to make them operative in the American

¹¹⁴ GLENDON, *supra* note 53, at 17–18.

¹¹⁵ See Wm. Robert Johnston, Percentage of Pregnancies Aborted—By Percentage, <http://www.johnstonsarchive.net/policy/abortion/wrjp333pd.html> (last visited Apr. 24, 2006).

gun debate. But to motivate the task of formulating and implementing such procedures, we offer an imaginative preview of the outcomes an expressively pluralistic gun debate might yield.

1. Social Meaning Overdetermination

We would suggest consideration of three “compromise” gun policies that satisfy the social-meaning overdetermination principle. The first can be called the “big trade.” In exchange for control proponents acknowledging that the Second Amendment creates a genuine *individual right* to gun ownership, control opponents should assent to universal registration of hand guns.

In isolation, each of these policies resonates with expressive imperialism. To control advocates, the individual rights conception of the Second Amendment glorifies individualism and militarism. To control opponents, hand-gun registration is a device for stigmatizing their behavior as deviant, and portends a total ban on handgun ownership.

But when these policies are combined, their meanings change. Because they can see that gun owners, through registration, are submitting to society’s claim to regulate their activity in the interest of the common good, control advocates need no longer see acceptance of an individual-rights conception of the Second Amendment as repudiating social solidarity.

Likewise, when they see that society recognizes their *individual right* to own a gun, gun owners are assured that acquiescing in registration will not lead to an ultimate dispossession of their weapons. In addition, because the law recognizes that gun ownership is an *individual right*, registration need no longer be seen as connoting moral deviancy. Instead, it can be conceptualized as symbolizing the exercise of civic duty and personal responsibility, values that cohere with gun owners’ own world view. Indeed, this connotation has historical antecedents that should be especially congenial to both hierarchists and individualists: during the founding era, state militias consisted of all registered voters, who were *obliged* to possess firearms for militia service.¹¹⁶

The second proposal can be called the “ownership and registration reward.” Upon registration of his or her handgun (pursuant to either a voluntary or a

¹¹⁶ See Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 891.

mandatory registration requirement) an owner would be entitled to a tax rebate or some other monetary award.

This policy satisfies the social-meaning determination insofar as both the supporters and opponents of gun control can see the bounty as an effective and fair solution to a collective action problem. For control supporters, registration of guns promotes safety by making it easier to trace the ownership of weapons used to commit crimes. That societal good, however, is enjoyed by the community at large, and not just by those who register their weapons. Consistent with egalitarian sensibilities, control supporters can thus envision the bounty as a means of fairly compensating individuals for being made to bear a burden that benefits society at large.

For control opponents, in contrast, the relevant public good is the reduction of violent crime in a community in which a relatively high proportion of individuals own guns. Again, this benefit is enjoyed not just by gun owners, but by others, who can free-ride on the asserted general deterrent effect of widespread gun ownership. Because they don't believe individuals should be expected to endure disproportionate burdens to benefit society at large, individualists will think it is perfectly appropriate to compensate individual gun owners for the contribution they are making to public safety. So will hierarchists, who can see the bounty as a fitting public acknowledgement of such an individual's virtuous willingness to promote the common good.

Reform can also be entirely symbolic, reassuring those on both sides of the debate that their concerns are legitimate. A third proposal involves "civic registration" programs; any time a citizen registers as a voter, as a juror, or as a keeper or bearer of a firearm, they would be presented with the opportunity to register as all three on the same civic registration form. The combination would bring firearm ownership *and* registration in line with other more commonly respected civic practices such as voting and jury registration and participation. The goal of combining gun registration with jury and voter registration is not to impose any new requirements on gun owners or any new restrictions on the state's ability to regulate arms. Instead, the goal is to change what gun ownership *signifies* for those who don't own guns and what registration signifies for those who do.

For gun rights advocates, the combination of gun ownership with other constitutionally protected rights should reassure; like voting and jury service, gun ownership is constitutionally protected. Rather than connoting suspicion of deviance, in the context of other constitutionally protected rights,

registration can be viewed as affirming their claims about the civic and moral value of gun ownership.

For non-gun owners, the combined registration would suggest that society takes their interest in registration seriously, reminding the public that gun ownership should not be an assertion of libertine abandonment of civic responsibilities. It is a program that highlights, for them, the connection between these practices and the responsibilities that come with them—namely, registration.

Obviously, for the “big trade,” the “ownership and registration rewards,” and “civic registration,” some of the meanings that are attributed to the respective policies are antagonistic. But expressive politics is not a zero-sum game; the vast majority of citizens demand only that the law be susceptible to a meaning that affirms their identities, and not that it be cleansed of any potential meaning congenial to citizens of some other cultural orientation. This is the lesson of France’s solution to its abortion controversy and the United States’ solution to the controversy over Native American artifacts. It is a teaching that policymakers must fully exploit in the gun debate.

2. *Identity Vouching*

It is not enough to identify gun policies sufficiently rich in meanings to affirm the worldviews of citizens of diverse cultural orientations. To assure hierarchists and egalitarians, individualists and solidarists that the acceptance of a gun-control compromise is not tantamount to cultural treason, expressively overdetermined policies must be conspicuously endorsed by figures whose cultural credentials are beyond question.

There is a natural constituency for this form of identity vouching: elected representatives. Most politicians naturally loathe polarization, which exposes them to electoral hazard no matter which way they turn. Offered a way to avoid this dilemma on guns, influential members of both major political parties can be expected to sign on and to pressure others within their ranks to do the same.

Indeed, there is already a move in this direction. Taking aim at both NRA and pro-control groups like the Brady Center to Prevent Gun Violence, a new group, Americans for Gun Safety, seeks to “bring[] a new voice to the debate over guns and gun safety, which for too long has been dominated by the far left

and far right.”¹¹⁷ Proclaiming, “with rights come with responsibilities,” AGS has recruited Senators John McCain and Joseph Lieberman as its primary spokespersons. McCain, of course, is not alone among Republicans who support reasonable gun regulations when balanced with effective protection of gun rights.¹¹⁸ Similarly, a number of Democratic members of the House and Senate—not to mention a growing number of Democratic governors—have publicly affirmed their support for an individual right to bear arms when balanced with reasonable regulation.¹¹⁹

If a substantial coalition of moderate Republicans and Democrats supported policies like the big trade and the registration bounty, they could have a transformative effect on the gun debate. Ordinary citizens—gun-owners and non-gun-owners alike—would see that reasonable and trustworthy representatives had reached a compromise that affirmed both rights and responsibilities.

Vouching by political representatives will go a long way, but ordinary citizens will need to be involved in the deliberation as well.¹²⁰ When pro-control citizens see that gun owners are also average citizens—after all, a sizeable minority of Americans are gun owners¹²¹—they will become less distressed about entrusting one another with the rights and responsibilities that ownership entails. Moreover, as gun owners come to see that most Americans oppose radical gun control and support their right to bear arms, they will become more willing to entrust their fellow citizens with information about gun ownership.

¹¹⁷ Americans for Gun Safety, Who is AGS? Overview: A New Way for an Old Debate, http://www.americansforgunsafety.com/who_is_ags.html (last visited Jan. 28, 2006).

¹¹⁸ For example, Republican senators Lincoln Chafee, Mike DeWine, John Warner, Richard Lugar, and George Voinovich have all supported as many or more bills endorsed by the Brady Campaign to Prevent Gun Violence. See Brady Campaign—Congressional Voting Scorecard, <http://www.bradycampaign.org/facts/scorecard/scorecard.php?report=ar> (last visited Mar. 22, 2006) (providing a detailed accounting of congressional votes on numerous bills).

¹¹⁹ Howard Dean, the new Chairman of the Democratic National Committee, along with many Democratic governors and senators are also supporters of moderate gun control balanced with protection of Second Amendment rights. See Susan Milligan, *Democrats Recast Gun Control Image*, BOSTON GLOBE, Dec. 17, 2005, at A1 (describing increased support for gun rights among, and increased support of the NRA for, Democratic candidates).

¹²⁰ This point is made forcefully by James S. Fishkin. See generally JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* (1991); see also, generally, JOHN GASTIL, *BY POPULAR DEMAND: REVITALIZING REPRESENTATIVE DEMOCRACY THROUGH DELIBERATIVE ELECTIONS* (2000).

¹²¹ See Gallup: 38 Percent of U.S. Homes Armed, UPI, Jan. 4, 2005.

Precisely how citizens should engage one another in deliberative discussion and debate is a question that has received significant attention of late. Bruce Ackerman and James Fishkin, for example, have suggested one intriguing way of encouraging democratic deliberations: instituting a national "Deliberation Day."¹²² Prior to national elections, citizens would be paid to gather in small groups to discuss the issues raised in the upcoming elections.¹²³ These citizen panels would watch a national debate and request information on the issues they consider important from party representatives.¹²⁴ These deliberative panels, they note, can produce surprising agreements on policy.¹²⁵

Whether one adopts a project as ambitious as Deliberation Day, or simply encourages more modest approaches, the principle of vouching suggests why mechanisms like deliberative polling work so well.¹²⁶ When they see that *other citizens* in their community support compromise positions—citizens they depend on and trust in other areas of their lives—they, too, will be more willing to support such positions. Moreover, they can then return to their personal networks of friends and family where they can then vouch for the reasonableness of such positions. The principle of identity vouching thus teaches us that the information citizens gain *about one another* is just as important as the information they gain about the issues they vote on.¹²⁷

¹²² Bruce Ackerman & James S. Fishkin, *Deliberation Day*, 10 J. POL. PHIL. 2, 129, 129 (2002).

¹²³ *Id.* at 135.

¹²⁴ *Id.* at 135–38.

¹²⁵ See JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE* 163–65 (1995) (describing the effects of deliberative polling in various settings).

¹²⁶ Ackerman and Fishkin have another account; they believe that it is the information provided to voters about the candidate or issue that increases democratic agreement in such deliberations. Citizens, they argue, would be informed not only through information provided to them on Deliberation Day, but also indirectly by campaigns and the media in anticipation of Deliberation Day. Ackerman & Fishkin, *supra* note 122, at 134–35 (describing this as a "leveraging strategy"). Being better informed, they would be more likely to agree on matters of policy.

¹²⁷ It is worth noting that this is precisely the function that juries served in the early republic. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 284 (Henry Reeve trans., 3d ed. 1839) ("[Jury participation] teaches men to practise equity; every man learns to judge his neighbor as he would himself be judged. . . . By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society."). There is, at least in the context of judicial panels, evidence supporting the social norms perspective. See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 103–04 (2000) (reviewing moderation and polarization as the result of deliberation in heterogeneous and homogenous groups).

3. *Discourse-Sequencing*

Quieting cultural conflict through policies that permit individuals of diverse orientations to see their identities affirmed is a substantial achievement in and of itself. But as the examples of the French abortion law and NAGPRA illustrate, expressive gains of this sort frequently enable the parties to secure mutual instrumental benefits as well.

How might discourse sequencing work in the gun debate? Here's one small example of how it already has succeeded. Suicides and homicides account for nearly 50,000 deaths each year in the United States, a large portion which are gun-related. That's about twenty percent more deaths than result from motor vehicle accidents,¹²⁸ and yet, while we have excellent data gathering and reporting mechanisms for auto accidents, we have no such mechanisms for gathering and reporting information on violent deaths. The CDC has long proposed collecting gun-violence statistics, but during the Clinton administration was unable to muster support for it.¹²⁹

Why is the data so elusive? As described above, the parties involved in the gun dispute grasp the power of statistical data when operating within the constraints of traditional liberal discourse—indeed, they regularly assault one another with statistics about the danger and benefits of gun ownership and regulation. This, of course, places tremendous pressure on any decision to institutionalize data collection related to gun violence. Gun rights advocates feared that data about gun violence-related injuries would focus on gun violence to the exclusion of other kinds of violence and almost certainly to the exclusion of protective gun use.¹³⁰ This, in turn, they felt, would simply be used to justify greater restrictions on firearm ownership and, eventually, confiscation.

Their concerns were not entirely unfounded. The Director of the CDC's National Center for Injury Prevention and Control under the Clinton administration, Mark Rosenberg, described the administration's proposed initiative on gun violence this way: "We need to revolutionize the way we look at guns, like what we did with cigarettes. It used to be that smoking was a

¹²⁸ Marilyn Marchione, *Project That Tracks Gun Deaths Expands*, MILWAUKEE J. SENTINEL, Jan. 25, 2002, at B1.

¹²⁹ Telephone Interview with Richard Withers, Co-director, Medical College of Wisconsin's Firearm Injury Center (undated) (recording on file with authors).

¹³⁰ *Id.*

glamour symbol, cool, sexy, macho. Now it is dirty, deadly and banned."¹³¹ Even if one were trying, it would be hard to script a less culturally attentive or overdetermined message.

While the proposal predictably stalled under these conditions, a change in administrations opened the door to a different approach. Understanding the concern of gun rights advocates, proponents of data collection expanded the proposed program from one focusing on gun fatalities to violent deaths of all kinds.¹³² This, the new CDC Administrator assured nervous gun rights advocates, would allow them to measure the extent to which restrictions on gun ownership created substitution effects, where the scarcity of guns drives criminals and suicidal individuals to employ different means.¹³³ This provided an account that was far less threatening to the gun lobby, and quieted opposition to the program.¹³⁴ Of course, the fact that an administration that had publicly avowed its support for an individual right to bear arms¹³⁵ was vouching for the program also helped to reassure. As a result of the current Administration's attention to the symbolic concerns at play, we now have a National Violent Death Reporting System.¹³⁶

It may seem ironic that, having argued that statistical arguments often aggravate cultural conflicts, we are now telling a success story in which the success will, essentially, result in more (and more accurate) statistics. But the argument has not been that scientific inquiry is without merit; rather the point has been that liberal discourse norms lead disputants to put the empirical cart before the cultural horse. The principle of discourse sequencing seeks to rectify the situation.

The example of the National Violent Death Reporting System is, to be sure, a small one, as the debate over gun control rages on around it. But it is suggestive of the potential for a larger compromise, and even larger gains that might be had if we, as a polity, can manage the expressive capital of the law more wisely. What the fine details of such a compromise will be, and what

¹³¹ Fox Butterfield, *New Tactics Urged in Fight Against Crime*, N.Y. TIMES, Oct. 16, 1994, at 25.

¹³² Interview with Richard Withers *supra* note 129.

¹³³ As David Hemenway of Harvard's Injury Control Research Center put it, "Everyone can be for it. . . . The more data, the better. This is not only more politically correct. It makes a lot more sense in terms of the science." *Measuring Violence*, WASH. POST, June 25, 2002, at F1.

¹³⁴ *Id.*

¹³⁵ *History Shows Ashcroft Is Right On Guns*, AUGUSTA CHRON., May 18, 2002, at A4.

¹³⁶ See Facts About National Violent Death Reporting System, <http://www.cdc.gov/ncipc/profiles/nvdrs/facts.htm> (last visited Mar. 22, 2006).

concrete gains for our collective welfare we will reap as a result, we cannot say for sure. That, after all, is part of the job of respectful deliberation.

CONCLUSION

Why is the American gun debate so unproductive and divisive? What can be done to make democratic deliberations over guns more constructive?

The way in which the gun issue is now framed in American politics, we've argued, reflects two mistakes. One is a basic misunderstanding of what the gun controversy is all about. The dominant approaches to gun policy-making (legislative, as well as judicial) assume that the issue is what sorts of regulations will best promote public safety. What this view overlooks, however, is *social meaning*. Guns are at the center of an expressive struggle between the adherents of competing visions of the good society—one egalitarian and communal, the other hierarchic and individualistic. What gun laws *say* about the status of the groups who adhere to these visions matters at least as much to ordinary citizens as what gun laws will *do* to reduce or increase crime.

The second mistake concerns the process best calculated to resolve the American gun conflict. Most policymakers and analysts assume that the gun question should be debated in consequentialist terms. The attention that they pay to measuring and characterizing the cost and benefits of gun regulation derives in part from the view that the gun debate is only about public safety. But the prominence of empirical methods also reflects the influence of liberal discourse norms, which enjoins those engaged in democratic deliberations to justify their positions in terms accessible to individuals of diverse cultural orientations. Many politicians and policy analysts no doubt realize that the gun debate is really about culture, not consequences. But precisely to *avoid* committing the law to picking sides in the struggle between the egalitarian and solidaristic proponents of control, on the one hand, and the hierarchic and individualistic opponents of it, on the other, they prefer the seemingly neutral idiom of econometrics.

But whatever motivates it, the preferred position of empirical methods is incapable of bringing the gun debate to a close. No matter how compelling, statistical proofs of the efficacy of gun control don't give citizens who care passionately about the meanings of guns a reason to change their minds. Indeed, precisely because they care so much about the values guns express,

individuals are unlikely to find compelling any statistics that purport to justify a gun policy contrary to the position they already prefer.

It is also idle to hope that empirical methods will reduce the intensity of cultural partisanship in the gun debate. Moderate citizens might find the apparent neutrality of costs and benefits appealing, but immoderate ones—those intent not just on avoiding cultural domination but on conquering their cultural adversaries—obviously will not. The refusal of moderate commentators, politicians, and citizens to address what social meanings gun laws should express creates a vacuum that zealots are quick to fill with ridicule and recrimination. Bombarded by this intolerant style of expressive discourse, ordinary citizens on both sides infer the worst about the character of their adversaries and about the prospects for compromise.

The only way to resolve the gun debate is to correct the two mistakes that have deformed it over the course of the last half century. *Moderate* citizens must openly attend not just to the consequences that gun control laws promote but to the cultural values they express. And they must do so through a deliberative process, making it possible for individuals of diverse cultural orientations to see their identities affirmed rather than denigrated by the law.

Resolving culturally grounded political conflict is not easy, but it *is* possible. Armed with a pertinent but pluralistic expressive idiom, those who favor compromise and accommodation will finally stand a fighting chance to defeat those who insist that everyone see only their vision of America.