In deciding contentious issues such as abortion or gay rights, Canadian courts have often opted for clean, “non-judgmental” solutions. In fact, “non-judgmentalism” usually decides the issue in favour of one of the extreme positions. What is needed when emotions run high are (often messy) compromises of the sort that legislatures, but not courts, are good at brokering.

En se prononçant sur des questions litigieuses comme l’avortement ou les droits des gais, les tribunaux canadiens ont souvent opté pour « des solutions propres, dépourvues de jugement de valeur ». En fait, ces solutions favorisent souvent une position extrême. Ce dont on a besoin lorsque le débat devient très émotif, c’est de compromis (souvent compliqués) comme ceux auxquels les législatives, pas les tribunaux, parviennent souvent.

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Charles Tupper, Nova Scotia’s chief father of Confederation — and later Canada’s shortest-serving prime minister (yes, even shorter than John Turner or Kim Campbell!) — was a hard-nosed politician. Like the Athenian youth Polemarchus, who appears early in Plato’s Republic, Tupper subscribed to the ethic of rewarding friends and punishing enemies. As Christopher Moore puts it in his wonderful 1867: How the Fathers Made a Deal, Tupper was a “bully [who] was constantly eager not merely to defeat but to humiliate his rivals.” Tupper, it was aptly said, got his name from the French tu perds, “you lose.”

By introducing it so early in the Republic, Plato indicated that the kind of belligerent partisanship that both Polemarchus and Tupper represented is endemic to political life. James Madison, writing much later, agreed. Faction, said Madison, is rooted in human nature. It stems from the fact that reason is connected to self-love, so that we become passionately attached to our own opinions and wish to see them triumph over the opinions of others. By faction, Madison obviously meant more than simple disagreement; he meant political zealotry. Political controversy, he suggested, is animated not by the philosophical yearning for truth and wisdom but by the lust for victory.

So powerful is the tendency toward zealous factionalism, Madison maintained, “that where no substantial occasion presents itself the most frivolous and fanciful distinctions have been sufficient to...excite [the] most violent conflicts.” In other words, if politics involves the desire for victory, great victories are much better than small ones, and combatants are thus inclined to turn objectively minor disagreements into major conflicts. Tupperism — the inclination to exult in the phrase tu perds — leads to the exaggeration and inflation of public disagreements. One thinks here of the conflict between those Lilliputians who broke their eggs at the small end and those who, contrary to the Emperor’s
Saunders invalidated the Surrey School Board’s refusal and, in the greatest extent possible, will avoid subordinating these decisions. The Charter’s basic theory underlying the Charter is that the state is neutral, at least during the earlier stages of pregnancy, to the fetus is a person — the pro-choice position implies, will undercut hatred, and thus remove the cause of strife. Public neutrality, in other words, is an education in moderation and harmony.

Unfortunately, public neutrality on such intensely controversial issues is impossible. The state, as Harvard political scientist Michael Sandel has observed, cannot avoid taking sides. For example, when Stephen Douglas claimed in 1858 that each new American state should be free to vote slavery up or down, Abraham Lincoln rightly pointed out that this “pro-choice” position made sense only if slaves were not human persons. Douglas had taken sides on precisely the issue that divided slavers and abolitionists. His rhetoric of public neutrality camouflaged a far-from-neutral judgment.

Similarly, if the fetus is a person, abortion is murder; and no one can legitimately be neutral about murder. Only if the fetus is not a person does the pro-choice position on abortion make sense. Again, far from being neutral about the central issue — whether the fetus is a person — the pro-choice position implicitly, and quite judgmentally, gives victory to one side of the debate.

The same is true with respect to the Surrey case. A school curriculum that places same-sex relations on the same plane as heterosexual relations necessarily takes sides on the central issue of whether they deserve equal status. Traditionalist parents will rightly object that such a curriculum indoctrinates their children in beliefs contrary to those taught in the home. If the books are not placed on the curriculum, on the other hand, gays and lesbians can claim with equal justice that children are being indoctrinated in the abnormality or even deviance of same-sex relationships. The curriculum inescapably sends one or the other of these messages. It cannot avoid judging and discriminating.
Non-judgmental neutrality in intense moral conflicts really represents the victory of one of the extremes.

Far from being the path of moderation, in other words, non-judgmental neutrality in intense moral conflicts really represents the victory of one of the extremes. The apparent neutrality is just a disguised way of saying *tu perds*.

Nor should this rhetorical disguise be expected to achieve the hoped-for approval of alternative lifestyles. Hatred, if Madison is right, cannot be expunged from human affairs. Toleration, understood as equal approval, is not a widespread possibility. At best people can learn to be tolerant in an older sense of that term, namely, putting up with what they hate rather than trying to eliminate it. But people are unlikely to learn this lesson from a public policy that treats hatred and toleration as polar opposites rather than as two sides of a single coin. We should not be surprised when, having been taught that toleration presupposes approval, people refuse to tolerate what they hate. Ironically, the non-judgmentalism intended to diminish intolerance may actually increase it.

It follows that moderation in controversial moral issues lies not in public neutrality, but in relatively messy compromise — the kind of compromise difficult to justify by the strict standards of judicial rationality, but precisely the kind attractive to representative assemblies.

The 1969 abortion law struck down in *Morgentaler* is a good example. This legislative compromise allowed for abortion if a therapeutic abortion committee (TAC) determined that continuation of the pregnancy threatened the life or health of the mother. Whether or not TACs were established at accredited hospitals, and how they defined “life and health,” were questions left to local determination, so that the country had a *de facto* patchwork of local abortion regimes, ranging from no local access in some places to complete freedom of choice in others.

This patchwork law satisfied neither extreme in the abortion debate, and was predictably challenged in court by both extremes. Moreover, the law’s local variation offended those who insist on legal coherence. From the standpoint of moderation and political accommodation, however, the 1969 law had the virtue of giving something to both sides and taking local opinion into account. No haughty *tu perds* here.

When the Supreme Court struck down this fragile compromise, it proved impossible to replace it, even though most of the justices were careful to leave room for new legislation. Unlike Justice Wilson, in other words, the rest of the Morgentaler majority insisted only on policy coherence, not on neutrality. They simply wanted a law that restricted abortion in procedurally cleaner and more equal ways. Of course, what they got — what we all got — was no law at all, which is to say, the complete victory of one of the extremes in the abortion debate. No one could reasonably claim that this result has calmed or moderated the debate. Far from it! Even a carefully moderated judgment fanned, rather than cooled, the flames of extremism.

But perhaps *Morgentaler* is the exception. Peter Hogg and Allison Thornton point to other cases in which legislatures, engaging in a more productive “dialogue” with courts, have enacted more moderate versions of invalidated legislation. When the Supreme Court struck down Quebec’s signs law, for example, the province initially used the Charter’s legislative override to resurrect the law. Five years later, however, Quebec allowed the override to lapse and amended the law along the lines indicated by the Court, namely, allowing the reasonable use of other languages while still giving French preferential status. Here, surely, we have an example of how courts can moderate an emotional policy controversy.

Or have we? Hogg and Thornton neglect the broader political context of this case. The Bourassa government had been poised to moderate the law in any case but had to scrap its plans in order to resist the policy imposition of “Ottawa’s Court.” The moderation of the law eventually came, but it was very likely delayed rather than facilitated by the Court’s ruling.

A more important point is that, for the public outside Quebec, the Court’s ruling vastly inflated the stakes in Quebec’s language disputes. The language wars, to be sure, were not as trivial as the Lilliputian wars between the Big Endians and Small Endians, but neither was Quebec’s restriction on English in commercial

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advertising a tyrannical violation of truly “fundamental rights.” The law was arguably foolish and wrong-headed, but the state was not killing or jailing anyone because of their race, religion, or political views. Even those who couldn’t read French could still recognize *Arrêt* signs and find Eaton’s — or Eaton — and McDonald’s. But for Canadians outside Quebec, the Supreme Court had said “fundamental rights” were being ignored, and that was enough. Enough, for example, to help kill the Meech Lake Accord. How, after all, can one possibly compromise with tyrants who trample on fundamental rights? Yes, a more moderate form of the language law eventually emerged from the “dialogue” between court and legislature, but in the meantime, a major constitutional accord was undermined. Even Meech sceptics — and I am one — should be troubled by this.

Finally, one may wonder about the utility of the term “dialogue” to describe what happens in such cases. As Ted Morton’s contribution to this issue of *Policy Options* points out, it is a very strange “dialogue” when the major “input” of legislatures consists of following judicial instructions.

Coming back to gay rights and the Surrey School Board case: Given the impossibility of neutrality, what kind of messy compromise might emerge in the public school system? One view is to leave controversial issues about sexuality and the family out of the early grades and address them only later on. Another holds that this part of the curriculum, whenever it is introduced, should be optional, so that dissenting families could withdraw their children. A variation would require an “opt in” rather than an “opt out” for such classes. Others argue that equally credible representatives of all sides should be invited to address the issues in class. Still others advocate two streams of classes, one for “traditionalists,” one for “progressives.” None of these solutions is perfect or consistent, and none would be acceptable to either extreme. But they are precisely the kinds of questions being discussed in some school boards.

Far from contributing to such discussion, the decision in the Surrey case seems more likely to foreclose it and to harden what debate does take place. Indeed, a predictable — and surely ironic — consequence of the Surrey judgment is that some children will migrate out of the public schools into private schools.

One swallow does not a summer make, and the few examples that could be cited in this short essay cannot clinch my argument that courts are more apt to intensify than moderate the tendency to Tup-

Christopher Moore observes with amazement that Tupper refused to attend the 1864 Charlottetown conference unless leaders from the opposition benches accompanied him. Why? Because he could not be sure of ramming a Charlottetown agreement through his legislature. Given the less disciplined legislative context of the time, he felt compelled to share both the credit and the potential blame for the risky Confederation enterprise. If his hated partisan foes contributed to the making of the agreement, they would have no choice but to help sell it, rather than torpedo it, on the home front. In short, the institutional context in which Tupper worked gave him the incentive to get together with partisan foes to formulate controversial policy, a procedure that is almost bound to produce compromises, albeit often messy ones. As Moore recounts, the other delegations to the Charlottetown conference were similarly multi-partisan.

In the last 130 years, of course, the legislative process has changed dramatically. In our own era of hyper-disciplined parties, partisan opponents have less influence over the policy process. Indeed, the apparent decline of checks and balances in the legislature is one of the justifications for enhanced judicial power: Inter-institutional dialogue between legislatures and courts supposedly can substitute for intra-institutional dialogue within legislatures. But this amounts to saying that the increasingly unaccountable power of legislatures should be balanced by the even more unaccountable power of judges — that good policy (i.e., moderate policy) will come from a (one-sided) “dialogue” of the unaccountable.

Forgive me if I resist this conclusion. I’d much rather look carefully to see if the legislative policy process is really as unaccountable — and undeliberative — as it is made out to be (which is exactly the kind of work that Queen’s University’s Janet Hiebert is contributing to the IRPP’s longer research studies on judicial policy-making). And if it turns out that the legislative process really is so terribly unaccountable, then I’d rather look for ways of reforming it than turn power over to judges. As a system of checks and balances, a “dialogue of the unaccountable” holds little attraction, especially if, as I think, it will not often achieve the central purpose of any good system of checks and balances: political moderation and compromise.

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