In this issue of *Policy Options*, as in an earlier article in the *Osgoode Hall Law Journal* ("The Charter Dialogue Between Courts and Legislatures: Or Perhaps the Charter of Rights Isn't such a Bad Thing After All," Vol. 35, no. 1, pp. 75-124) Peter Hogg and Allison Thornton argue that the alleged illegitimacy of the courts' new power under the Charter is much ado about nothing. According to their theory, the Charter encourages a "dialogue" between courts and legislatures. Courts scrutinize legislative means not ends. If courts do try to block an important legislative objective, governments have the option of the final say via the use of the section 33 override power the "notwithstanding clause"). The result is a democratic process enriched by a new rights dialogue between independent judges and accountable legislators.

I will briefly address three of the principal problems that I see in Hogg and Thornton’s “dialogue” defence of the Supreme Court’s activist exercise of Charter review.

To begin with, their definition of “dialogue” is self-serving. Obeying orders is not exactly what most of us consider a dialogue. If I go to a restaurant, order a sandwich, and the waiter brings me the sandwich I ordered, I would not count this as a “dialogue.” Yet this is how the concept is used in Hogg and Thornton’s 1997 study. They count as dialogue any legislative response to the judicial nullification of a statute. If a government repeals the offending legislation or amends it according to specifications laid out by the Court, this is “dialogue.” No wonder they found a two-thirds incidence of dialogue!

This lax operationalization of the concept of dialogue also obscures important differences between types of legislative response. When Parliament added a new search warrant requirement to the *Anti-Combinations Act* after *Hunter v. Southam* it simply did what the Court told it to do. After *Daviault*, by contrast, Parliament created a new offence that explicitly rejected the Court’s ruling that self-induced intoxication can be used as a *mens rea* defence against assault charges. Similarly, Quebec’s 1988 use of section 33 to avoid compliance with the Court’s ruling in the “French-only” public signs case is clearly not on a par with the same government’s decision in 1993 to comply with the Court’s ruling. Yet, in the 1997 study, these very different responses are all counted equally as “dialogue.”

Hogg and Thornton anticipate this response and declare that even if one excludes cases in which gov-
governments simply followed judicial directions, “there would still be a significant majority of cases in which the competent legislative body has responded to a Charter decision by changing the outcome in a substantive way” (p.98). It would have been more reassuring to have an actual number to attach to the phrase “significant majority.” It is also hard to reconcile this assertion with their earlier claim that, “In most cases, relatively minor amendments were all that was required in order to respect the Charter” (p.81). Were most of the 46 legislative responses “minor” or “substantive”? Did governments deliver the sandwich the judges had ordered or did they change the menu?

Another essential element of the dialogue theory is the means/ends distinction. By this account, Charter review only impinges on the “how,” not the “what,” of government policy. Under the “reasonable limitations” provisions of section 1 of the Charter, as operationalized by the now famous Oakes test, judges review government policy to ensure that legislators have chosen the “least restrictive means” of achieving their policy objectives. When judges believe a policy fails the “least restrictive means” test, it remains open to the responsible government to re-draft the legislation to achieve its original goal with more carefully tailored means.

As Rainer Knopff and I have argued elsewhere, the means/ends distinction sounds fine in theory but breaks down in practice. In the first place, politics is as much about means as ends. Everyone wants equal employment opportunities for women and racial minorities, but not everyone favours preferential treatment or quotas as the way to achieve this goal. No respectable person is willing to defend child pornography, but many will argue that restrictions on it must be balanced with our respect for freedom of expression and privacy.

A second difficulty is that apparent disagreement about means sometimes turns out to be disagreement about ends. Everything depends on the purpose(s) a judge attributes to the statute. The broader the purpose(s), the easier it is to find that the legislation passes the “least restrictive means” test. In fact, any half-clever judge can use procedural objections as a pretense to strike down legislation that he opposes for more substantive reasons. As examples, I would point to the very cases used by Hogg and Thornton: those involving voluntary religious instruction in Ontario schools and the federal prisoner-voting cases. In both instances, courts initially struck down policies for failing the “least restrictive means” test. In both instances, the responsible governments re-drafted the legislation to restrict its impact on religious freedom and voting rights, respectively. And in both instances, the courts again ruled that the new legislation was still “too restrictive” of the rights at stake. In cases such as these, the means/ends distinction becomes a charade for substantive disagreement about public policy.

Perhaps the best example of this instrumental use of procedural objections comes from the Chief Justice of Canada. In the 1988 Morgentaler case, Justice Lamer joined Justice Dickson in an opinion striking down the abortion provisions of the Criminal Code because the procedures required to attain a legal abortion were too restrictive and ambiguous. However, speaking on the tenth anniversary of the Morgentaler decision in 1998, Mr. Lamer told law students at the University of Toronto that in fact he voted to strike down the abortion law for a very different reason: because a majority of Canadians were against making it a criminal offence. Does this mean that his 1988 procedural objections were simply after-the-fact rationalizations to justify striking down a law that he opposed for other reasons?

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Hogg and Thornton assume that if a government is unhappy with a judicial nullification of one of its policies, then it has the means at its disposal to reverse it — either by enacting revised legislation or, more emphatically, by re-instating the old law through the use of the section 33 notwithstanding clause. “If there is a democratic will, there will be a legislative way,” they declare. If a government fails to use the tools at its disposal, that’s the government’s fault, not the court’s.

This account fails to recognize the staying power of a new, judicially-created policy status quo, especially when the issue cuts across the normal lines of partisan cleavage and divides a government caucus. I develop this argument by adapting Thomas Flanagan’s recent analysis of the Mulroney government’s response to the Court’s 1988 Morgentaler ruling.

Contrary to Chief Justice Lamer’s beliefs, in 1988 the majority of Canadians were not opposed to the abortion policy that he voted to strike down. Under that pol-
icy, abortion was deemed wrong in theory but available in practice. (Dr. Morgentaler and his lawyers could not produce a single witness who had actually been prevented from getting an abortion.) This compromise accurately reflected Canadians’ conflicting opinions on the abortion issue. In 1988, 24 per cent said that abortion should be legal under any circumstances; 14 per cent that it should be illegal under any circumstances; and 60 per cent that it should be legal only under certain circumstances.

A recently published study of abortion politics in Canada and the US found that from the late 1960s through the early 1990s “the contours of public opinion toward abortion have been generally unchanged. What exists is a situation where two intense minorities have polarized views of abortion policy that do not represent the feelings of a majority of Americans or Canadians. In both countries, the majority stands to the right of the strongest pro-choice position but left of the absolutist pro-life position.”

This pattern of support was replicated in House of Commons voting on the Mulroney government’s efforts to enact a new abortion policy after the Morgentaler ruling. The new policy was designed to meet the procedural problems identified in the written judgment of Justices Dickson and Lamer. (The government mistakenly believed these were the “real” reasons for Justice Lamer’s vote.) It left abortion in the Criminal Code, but would have significantly widened access to it. In its final form, the new policy would have abolished the requirement of committee approval, broadened the definition of health to include “mental and psychological” health, and lifted the “hospitals only” restriction.

The government’s “compromise” approach was opposed by both pro-choice and pro-life factions within Parliament, albeit for opposite reasons. Two pro-choice amendments — which basically affirmed the new judicially-created policy status quo of “no abortion law” — were easily defeated in the House by votes of 191-29 and 198-20. A strong pro-life amendment, which would have created a more restrictive policy than the one struck down by the Court, received much more support but was narrowly defeated, by a vote of 118-105. A paradoxical coalition of pro-choice and pro-life MPs then combined to defeat the government’s own compromise proposal by a vote of 147-76.

The following session, the government introduced a new compromise abortion policy — Bill C-43. To avoid a repeat of the earlier disaster, Prime Minister Mulroney invoked party discipline for his 40 cabinet ministers and warned pro-life MPs that this would be his last attempt. The House then approved the bill by a vote of 140-131. However, it was subsequently defeated by a tie vote (43-43) in the Senate. As in the House of Commons the year before, the pro-choice and pro-life minorities combined to vote against the policy compromise, but in the Senate there were no Cabinet ministers to save it. The new judicially-created policy status quo of “no law” thus continued by default, not because it commanded majority support in either Parliament or the public.

The defeat of Bill C-43 illustrates a common dynamic between public opinion and Supreme Court decisions on contemporary rights issues. Contrary to the rhetoric of majority rule and minority rights, on most contemporary rights issues there is an unstable and unorganized majority or plurality opinion, bracketed by two opposing activist minorities. In terms of political process, the effect of a Supreme Court Charter ruling declaring a policy unconstitutional is to transfer the considerable advantages of the policy status quo from one group of minority activists to the other. The ruling shifts the burden of mobilizing a new majority coalition (within voters, within a government caucus and within a legislature) from the winning minority to the losing minority.

This transfer is a significant new advantage for the winning minority. Just as, prior to the Morgentaler decision, it was impossible for pro-choice activists to persuade either the Trudeau or Mulroney governments to amend Parliament’s compromise abortion law of 1969, so, after the ruling, it has been impossible for pro-life activists to interest the Chrétien government in amending the new judicially-created policy status quo of no abortion law. The reasons are the same: The issue is not a priority for the government, the opposition parties or the majority of voters.

Indeed, the priority for most governments on such “moral issues” is to avoid them as much as possible. Such issues cross-cut normal partisan cleavages and thus fracture party solidarity, from the cabinet to the
The safest thing to do was to do nothing. To act risks losing support from the activist policy minority you abandon without securing the support of the activists you help. (After all, you only did what was "just.") On such issues, political self-interest favours government inaction over action.

A similar pattern occurred in Alberta after the Supreme Court's Vriend ruling in April, 1998. The Klein government — and the Conservative Party of Alberta — were deeply divided on whether to add sexual orientation to the Alberta Human Rights Act. Two previous task forces had recommended against it, but with minority reports. Gay rights groups had lobbied aggressively for the reform. Social conservatives — a force to be reckoned with in Alberta politics — were just as strongly opposed. For the majority of Albertans, it was an issue of secondary importance.

When the Supreme Court "read in" sexual orientation to the Alberta Human Rights Act, there was a strong public outcry — especially among the rural wing of the Alberta Tories — to invoke section 33. After a week of public debate, the Cabinet was as divided as before. In the end, Premier Klein declared that his personal preference was not to invoke section 33 and a majority of the caucus fell into line.

Describing the Alberta government's decision to "live with" the Vriend ruling, Hogg and Thornton write: "But because 'notwithstanding' was an option, it is clear that this outcome was not forced on the Government, but was the Government's own choice." They are only half right in this assertion. They ignore that the Court's decision decisively changed the government's options. Its preferred choice was not to act at all — to simply leave the status quo in place. The Court destroyed this option and — with the clever use of the "reading in" technique — created a new policy status quo.

Before the ruling, the government could safely ignore the issue — upsetting only a small coalition of activists, few of whom were Tory supporters in any case. After the ruling, the government had to choose between accepting the judicially-created policy status quo or invoking the notwithstanding clause — a decision it knew would be strongly criticized in the national media and which risked creating a backlash among otherwise passive government supporters. The judicial ruling significantly raises the political costs of saying "no" to the winning minority. The same reasoning that caused the Klein government to refuse to alter the old policy status quo now caused it to accept the new judicially-created policy status quo. In both instances, the safest thing to do was to do nothing.

Hogg and Thornton write that judicial nullification of a statute "rarely raises an absolute barrier to the wishes of democratic institutions" (p. 81). The observation is right, but the conclusion they draw from it wrong. Nullification does not have to raise an absolute barrier. Depending on the circumstances, a small barrier may suffice to permanently alter public policy.

To conclude, Hogg and Thornton's theory must be qualified to account for different circumstances. A government's ability to respond to judicial nullification of a policy depends on a variety of factors. When the policy is central to the government's program, it should have little difficulty mustering the political will to respond effectively. Examples of this pattern of dialogue would include the Quebec government's use of the override in response to Ford and the Devine government's overruling of the Saskatchewan Court of Appeal's rejection of its back-to-work legislation.

By contrast, when the issue cuts across partisan allegiances and divides the government caucus, and when public opinion is fragmented between a relatively indifferent middle bracketed by two opposing groups of policy activists, the judicial creation of a new policy status quo may suffice to tip the balance in favour of one minority interest over another. Both Morgentaler and Vriend illustrate this pattern of response. Some, of course, will applaud these practical results. Others, such as my colleague Rainer Knopff, would see them as further examples of how courts are "more apt to intensify than moderate the tendency to Tupperism in political life."

In sum, what Professor Hogg and Ms. Thornton describe as a dialogue is usually a monologue, with judges doing most of the talking and legislatures most of the listening. They suggest that the failure of a government to respond effectively to judicial activism is a matter of personal courage, or the lack thereof, on the part of government leaders. The fault, if there is any, rests with individuals. By contrast, I believe that legislative paralysis is institutional in character — that, in certain circumstances, legislative non-response in the face of judicial activism is the "normal" response. When the issue in play is cross-cutting and divides a government caucus, the political incentive structure invites government leaders to abdicate responsibility to the courts — and this may be even more true in a parliamentary as opposed to a presidential system. If I am correct, the Canadian tradition of responsible government is in for a rough ride in our brave new world of Charter democracy.

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