

“Shut Up!” He Explained: How the Effort to Keep Abortion Off the Political Agenda Has Shaped Canadian Politics

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ABSTRACT: Abortion has been excluded from the political agenda in Canada since our Supreme Court deemed our existing law unconstitutional in 1988 and the then government of Progressive Conservative Brian Mulroney failed to pass a law on the subject in 1989. Since then those who have hoped to maintain or to establish a competitive right-of-center political party in Canada have tried to prevent all discussion of abortion during election campaigns and in their party's platforms, despite the critical role that the moral traditionalists whom they want to silence have played in their present political success. This essay examines the political consequences of these efforts and argues the strategic case for abandoning these efforts.

My paper¹ has three aims. First, I mean to analyze the struggle between those who have tried, and mostly failed, over the past several years to place abortion on Canada's political agenda in our Parliament and in our electoral politics and those who have tried, successfully, to prevent this from happening. My second aim is to examine the role that the effort to prevent the political discussion of abortion has played in reshaping Canadian politics over these same years and, in particular, its role in the development of Canada's newest political party, the Conservative Party

¹ The title of my paper, “‘Shut up,’ he explained” is taken from the American humourist Ring Lardner.

of Canada. My third aim is to reflect upon the strategic problem that confronts those, on the one hand, who hope to see the Conservatives become a centre-right political party with enough continuous voter support to win a majority of seats in Canada's Parliament and, on the other, those concerned to affirm the wrongness and restrict the practice of abortion in Canada. I hope to show that avoiding the explicit public discussion of abortion benefits neither.²

² My paper requires that I tell at least something of a story— the story of abortion in Canada's politics. I can only develop my analysis in the form of reflections upon that story. I should say that I owe a great deal to various participants in the story that I will tell, including members of our Parliament and those who have tried to influence those MPs. Unfortunately my debt to some of those who have helped me most to see whatever I have seen often rules out thanking them by name. After a very useful meeting with some of our pro-life MPs my host said to me: "You know, we have told you too much. We may have to lock you up until after the next election."

On the morning of March 9th of this year the members of Parliament belonging to the Conservative Party of Canada—Canada's Official Opposition and the party with the second largest number of seats in a House of Commons in which no party has a voting majority—met in Caucus.³ Though the meeting of the Conservative Caucus was a regularly scheduled gathering and in fact many MPs were absent as an indirect result of the Party's strategy at the time of neither supporting nor

³ Caucus meetings occur behind closed doors and so what I report must be based on hearsay. My chief source is an unsigned article written by a political actor who attributes what he reports to "sources." The article, "How We Got to the Conservative Convention: A Time-Line," appeared in the April 2005 issue of *The Interim*, p.16. See also the editorial in the May issue of *The Interim*, p. 4. Conversations with the author, the fact that his account makes sense of facts that would otherwise be perplexing, and the absence of any denial of what he has reported all lead me to believe his version of these events. Nothing in my account of the Caucus meeting of March 9 comes directly from anyone who attended that meeting.

opposing the Federal Budget proposed in February by Canada's Finance Minister Ralph Goodale, what happened at this meeting was far from ordinary. Later I will discuss the several steps leading to the creation of the political party whose caucus met on this occasion and examine the role played by the issue of abortion in each of those steps, but the events of this particular Wednesday morning are a good place to begin my discussion both because of their dramatic character and because of their importance for my theme.

The Conservative party was little more than a year old and about to hold its first policy convention eight days later in Montreal.⁴ Most of the resolutions to be discussed and voted upon by MPs and by delegates chosen by their local riding associations came from those associations, meeting sometimes in larger regional groupings; other resolutions came from the party's National Caucus. Resolutions from the ridings would be reviewed by the party's central office to eliminate duplication and for the most part would then be forwarded to thematically organized working groups meeting on the first full day of the convention (Friday, March 18). Of these resolutions only those approved by the working group to which they were assigned would be brought to the plenary session of the convention on its second day of deliberation (Saturday). Resolutions proposed by the party's National Caucus would proceed directly to the plenary session. One resolution (P-90) that was moved by the Caucus and intended to fall under the platform heading "Democratic Reform" was intended to "restore democratic accountability" by allowing members of parliament to vote free of party discipline in all matters except the budget and main estimates. Resolution P-90 proceeded to acknowledge "the diversity of deeply held personal convictions among individual party members" on issues of what it called "moral conscience"

⁴The Party's policies up to this time were an amalgam of principles agreed to by the leaders who had negotiated the merger that created the new party, a "Governing Council" established at the time of the merger, and policies drafted before and during the Federal Election campaign of 2004. It seems fair to say that those policies were designed to avoid saying what would antagonize the various groups making up the new party or giving the Party's opponents the opportunity to attack the new party as "extremist."

and “the right of Members of Parliament to adopt positions in consultation with their constituents and to vote freely.” The resolution identified “abortion, the definition of marriage and euthanasia” as examples of the moral issues that it had in mind. This resolution was followed by four others also designated as plenary even though these originated in local constituencies or regional gatherings of constituencies. The first of these began like P-90 –its first two sentences are identical and were presumably adopted by the members of Caucus who drafted P-90. Resolution P-91 also claimed to restore democratic accountability by allowing free votes on all but budgetary matters. But instead of allowing MPs to defer to their own consciences, P-91 insisted that the free votes of MPs should “always reflect the best interests of their constituents” and in matters of “conscience and personal conviction” the will of their constituents should prevail over the “individual or personal views” of the members. If P-91 restated the seemingly populist principle of one of the political partners in the marriage that resulted in the new Conservative Party of Canada (the Canadian Alliance or even more its predecessor, the Reform Party), P-90 reflected something like the tradition of the older marriage partner, the Progressive Conservatives, or even the Burkean understanding of the role of the elected representative. But if P-90 reflected the older tradition of the Progressive Conservatives, it would also free pro-life MPs, many of whom had entered Parliament as members of the Alliance or even of Reform, from a restraint that they had long disliked. Following these opposing resolutions were a number of other measures: P-92, which said that a conservative government would uphold the traditional definition of marriage; P-93, which said that a conservative government would “not support any legislation to regulate abortion”; P-94, which said that a conservative government would support a ban on partial-birth abortions; and P-95, which proposed a royal commission inquiry into euthanasia, assisted suicide and palliative care. Attached to P-90 was a “Note” declaring that if P-90 were passed at the plenary, the plenary would not consider resolutions P-91 to P-95.

The Draft Resolutions for the Policy Convention including P-90 to P-95 were published on March 7. Although the resolutions were the

work of the membership and caucus, their ordering and the note attached to P-90 were the work of the Leader's own staff. The order of the resolutions and the note stating that approval of P-90 would rule out discussion of P-91 to P-95 immediately provoked a storm of protest among party members, prospective delegates to the Convention, and MPs against what was perceived as an effort by the Stephen Harper, the Leader of the Conservatives, to silence debate at the Convention on all of the issues dealt with in resolutions P-92 to P-95 but especially the definition of marriage and abortion. Critics of the Note argued that acceptance of the principle that MPs should finally vote as their conscience dictated did not rule out the Convention's discussion or approval of resolutions declaring how a Conservative government ought to legislate. Indeed, the argument that P-90 ruled out discussion of all matters on which free votes were to be allowed would imply that the party would have no policy on anything but budgetary matters or that the grassroots would have no role in formulating that policy. Some political analysts have suggested that the party leader feared that the partial-birth abortion ban might be approved and, whether approved or not, would re-ignite the opposition and media attacks on the Conservatives for wanting to restrict what the media liked to call "a woman's right to choose."⁵ They think that Harper preferred to have a completely free hand to deal with the defining of marriage as his own political calculations might require at any point in time. However this may be, Harper seems to have miscalculated that pro-lifers would accept the note attached to P-90 because they were satisfied with that resolution even if this was all they got and would not want to risk what actually did happen, the approval of P-93 that said that a Conservative government

⁵ As riding associations began the process of selecting delegates to the Policy Convention, Harper may at first have feared that too many would be chosen who shared his distaste for socially conservative positions but were also unfriendly to his own Leadership. Later, he realized that a very large number of delegates were going to be (a) social conservatives and (b) Harper supporters. Aware that his own position was secure, Harper began to worry about how to prevent a Convention discussion of the issues important to social conservatives. This, at any rate, is the surmise of the author of the analysis in *The Interim* cited above.

would not support legislation restricting abortion. Pro-life MPs and party-members may have thought P-93 would not pass, or supposed that even if it did it would not restrict their own freedom as legislators very much given the approval of P-90. Or they may simply have wanted the Party to commit itself clearly to opposing same-sex marriage and could not therefore concur in a ruling that would forbid its discussion.⁶ In any case, Harper faced a divided caucus, many of whose members regarded the actions of his staff as highhanded.⁷ In fact, the caucus was evenly divided and Harper was forced to cast the deciding vote. After an agonized hesitation, Harper voted with the opponents of the interpretation of P-90 included in the Note that his own staff had added, presumably with his approval and possibly at his direction. Whether or not the Conservative leader subsequently saved the situation at the Convention

⁶ Strategically the treatment of abortion and marriage as examples of the moral issues in which conscience trumped other considerations may have been a mistake, but it is hard to see how Harper or his advisers could have imagined any alternative to this.

⁷ Many members of the Conservative caucus were absent on this occasion, for the party's parliamentary strategy at the time was to avoid voting in favor of or against the budget of the minority Liberal government.

as he understood that situation by appealing to delegates in his opening speech to pass P-90 and P-93—they over-whelmingly approved the former but only narrowly endorsed the resolution declaring that a Conservative government would not support legislation restricting abortion—his decision at the meeting of Caucus on March 9th not to persist in his own scheme to prevent the discussion of abortion at the Conservative’s policy convention is a dramatic illustration of the dilemma in Canadian politics constituted by the issue of abortion.

The larger (if underlying) practical aim of my paper is to argue the case for “arguing the case” with regard to abortion by examining the consequences for Canadian politics of trying to avoid that argument. The importance of abortion in U.S. national and state politics, its place within the platform of the GOP, and its apparent role in the “red state” tide that carried George W. Bush to a second term in office in 2004 make the past fourteen years of inaction and near-silence in Canada even grimmer. On the other hand, as Hadley Arkes has reminded us, engaging in the public and political discussion of abortion is something even American conservatives find difficult and Robert George’s description of the Administration of George Bush, Sr. as “all action, no talk” points in the direction of a painful truth that it behooves us to make sense of.⁸ Those who want to get abortion back on to the political agenda in Canada can learn much from the successes and the failures of the Americans who have tried to restrict abortion in fact and to challenge the implicit premises of those who defend it as a right through legislation like the Partial Birth Abortion Act, and Arkes’s own Born Alive Act.⁹

⁸ See his *Natural Rights and the Right to Choose* (Cambridge, UK: Cambridge Univ. Press, 2002), pp. 290-93 and his more recent essay, “Bush’s Second Chance” in *First Things* (April 2005): 13-18, in which George’s quip is cited at p. 16.

⁹ The Born-Alive Act called for so little that politically astute supporters of abortion rights in Congress saw that they could hardly oppose it without horrifying public opinion by revealing how far their commitment to abortion went: to the demand that any unborn child slated for abortion die even if in the process of abortion that infant was born alive. They preferred to let the law pass

But even more useful in thinking through the problem of promoting a political conversation about abortion is the example furnished by the nineteenth-century struggle over slavery in America. It is easy to read that history as simply encouraging, and doubtless this is a good reason for invoking it. Opponents of abortion in their darker moments may well tell themselves that ultimately the struggle against slavery succeeded because “history” was on the side of freedom in that struggle. What they ought also to note is that success in the struggle against slavery was by no means inevitable or even probable if viewed in strictly human terms. In any case, what I want to note is how much of that struggle was not about the evil or injustice of slavery but about whether the subject ought even to be discussed. William Lee Miller’s *Arguing about Slavery* has shown how persistent and generally successful were the efforts of those in leadership positions in both of America’s major political parties who wanted to avoid the topic of slavery in the 1830s and early 1840s.¹⁰ And even in the great debate between Lincoln and Stephen Douglas that began with the repeal of the Missouri Compromise in 1854, the issue was less the injustice of slavery than whether national political leaders ought to address that question. In that case, as in our own, public opinion was deeply divided, or rather ambiguous. Just as a large body of public opinion in both of our countries thinks abortion wrong but hesitates to restrict by law a woman’s “right to choose,” so the public opinion of the white Northerners to which Lincoln and Douglas both appealed feared the implications of racial equality almost as much as it hated the injustice of slavery.¹¹ And so, much of Senator Douglas’s

without discussion. On the other hand, it was precisely the aim of Arkes and others who sponsored his proposal that the premises of the new law be spelled out, for these went to the principles underlying the universal right to abortion established by the Court in *Roe v. Wade*. Especially disturbing to Arkes and readers of his account is the reluctance of many supposedly pro-life Republicans to insist upon the public and congressional discussion that the proposal sought. See *Natural Rights and the Right to Choose*, pp. 235, 259-64, 274-94.

¹⁰ William Lee Miller, *Arguing about Slavery* (New York NY: Knopf, 1996).

¹¹ For a subtle discussion of Lincoln’s understanding of and response to the ambivalence of public opinion in the North, see Harry V. Jaffa, *The Crisis of the*

career as a powerful political leader and as an orator was devoted to shutting down the discussion upon which Lincoln insisted. But shutting down the discussion of slavery or abortion can never be as simply done as desired. Stopping the discussion in the House of Representatives in the 1830s could not be accomplished without silencing the handful of Congressmen who insisted upon having that discussion, and one of them, the former American President John Quincy Adams, would not be silenced. Those who wanted to stop the argument tried to censure him. But Adams could not be censured by the House without allowing him to defend himself, and Adams relished that opportunity because it allowed him to attack slavery.¹² So too, Democrats under Senator Douglas's leadership could not defend the popular sovereignty solution to slavery as a way of avoiding a national public discussion of slavery without claiming that the black man was less than human and could not maintain that position without embracing a Court decision that would break their own political party in two. For my purpose it is important to observe that one major if indirect consequence of the effort of most of the existing political leadership to suppress the political discussion of slavery by congressional gag rules and by transferring the right to restrict slavery in the new territories from Congress to the settlers of those territories was the creation of a new and soon powerful political party, the Republicans.

House Divided (New York NY: Doubleday, 1959), pp. 362-86.

¹² Miller, *Arguing about Slavery*, pp. 440-44.

At this time there is no federal law in Canada and no provision of our Criminal Code that restricts abortion. In this Canada is extraordinary if not unique. How has this come to be and what can we learn about the prospects for the public discussion of abortion and the political consequences of avoiding that discussion by examining how we have arrived at this condition? Canada's abortion law (from 1892, when it was incorporated into our first Criminal Code, until its reform in 1969) was modeled on the British law of 1803. It made abortion a punishable offense while absolving those whose "good faith" actions to save a woman's life resulted in the death of the child in her womb. The new law of 1969, part of a so-called Omnibus bill that also liberalized Canadian laws on divorce, contraception, and homosexuality, was introduced in 1967 when Pierre Elliott Trudeau was Canada's Justice Minister and it became law after Trudeau's election as Prime Minister.¹³ Section 251 of the Canadian Criminal Code continued to describe abortion as a punishable offense but absolved those performing abortions of criminal liability if the abortion was performed in a hospital following the agreement of the majority of a three-member Therapeutic Abortion Committee that continuation of a woman's pregnancy "would or would be likely to endanger her life or health." The public discussion of abortion in the years preceding this change was limited to an article in a popular women's magazine, a campaign by one national newspaper, and increasing pressure on the part of the Canadian Bar Association and the Canadian Medical Association. The chief argument for the new law was that it would legitimize in law what was already happening in Canadian hospitals. The new law, on the other hand, was opposed by two new and rapidly growing groups of critics. Feminists attacked the law because it left control over abortion in the hands of doctors and made access to abortion depend upon the willingness of hospitals to establish Therapeutic Abortion Committees. Section 251 was attacked by pro-

¹³ For a useful and not quite so cursory account of the events here summarized, upon which I have often relied, see "Courts, Politics and Morality" in Robert M. Campbell and Leslie A. Pal, *The Real World of Canadian Politics* (Peterborough, Ontario: Broadview Press, 1991). See also Janine Brodie et. al., *The Politics of Abortion* (Toronto, Ontario: Oxford Univ. Press, 1992).

lifers because it permitted abortion for almost any reason and so afforded no protection for the unborn. A law designed to protect doctors who performed abortions from possible criminal prosecution was attacked by feminists who appealed to a woman's right to control over her body, and by pro-lifers who appealed to the rights of the unborn. It was also attacked by two individuals: Henry Morgentaler, who became Canada's leading champion of abortion and our most famous abortionist; and Joe Borowski, a former Minister in the government of Manitoba who sought at the provincial and federal level a court ruling that would recognize the rights of the unborn human child as a "person" and so render Section 251 unconstitutional under the Canadian Bill of Rights and later under Canada's Charter of Rights and Freedoms.

In the years that followed, Borowski won standing from the Supreme Court to make his case for the personhood of the unborn, but he saw his case rejected by a Saskatchewan Appeals Court in 1987 and appealed to the Supreme Court. In the same years, Morgentaler performed abortions illegally at various clinics across the country; he was arrested and sometimes acquitted, sometimes convicted. In 1984 he was acquitted by a Toronto jury of violating Section 251, but his acquittal was overturned in 1985 on appeal to the Ontario Court of Appeal. In 1986 the Supreme Court heard Morgentaler's case against the constitutionality of Canada's 1969 abortion law, and in January 1988 five of the seven judges hearing the case ruled the law invalid. The judges who ruled Section 251 unconstitutional provided three separate opinions for their decisions; all five acknowledged that the state had some interest in protecting the fetus and only one judge affirmed that women have a "right to abortion." Four of the judges attacked the arbitrariness of the procedures that made abortions available wherever hospitals had established Therapeutic Abortion Committees and unavailable where they had not (or the arbitrariness of the fact that a woman who obtained an abortion where there was no hospital with a Therapeutic Abortion Committee could be prosecuted while others could not). This objection to Section 251 seemed to imply that procedures regulating access to abortion might be devised that would be approved by the Court. Four of the judges ruling Section 251 unconstitutional also

claimed that their decision did not dispose of the claim of personhood for the unborn still being advanced by Borowski, although a year later the Court declared that his constitutional objection to Section 251 was moot since the law to which he had objected was no longer law.¹⁴ Also in the summer of 1989 the Supreme Court moved with unprecedented haste to quash a July 17th decision of Quebec's Court of Appeals upholding an injunction issued to the father of a twenty-week-old fetus. The Court agreed to hear arguments in this case on August 8th and delivered its unanimous decision overthrowing the injunction later that same day even though the Court had learned following its lunch break that the woman whose abortion had been enjoined had already slipped into the U.S. and obtained the abortion for which the injunction being appealed had been granted and even though the Court was not ready to furnish the reasons for its decision for another three months.¹⁵ By ruling Section 251 unconstitutional in the *Morgentaler* decision, by denying the possibility of paternal injunctions against abortion in the *Daigle* case, and by dismissing Borowski's effort to establish protection for the

¹⁴ On the complex struggle that preceded the Court's decision, see F.L. Morton, *Morgentaler v. Borowski* (Toronto: McLelland and Stewart, 1992), pp. 250-72. Note especially the closing argument of Mary Eberts for an advocacy group concerned to protect the situation resulting from the *Morgentaler* decision (*LEAF*), which Morton cites. Eberts urged the Court not to consider Borowski's claim because its acceptance by the Court would transform the task before parliament in the wake of *Morgentaler* from that of reconciling a conflict setting rights against interests to that of reconciling a conflict between opposing rights (p. 269).

¹⁵ *Daigle v. Tremblay*, [1989] 2 S.C.R. Morton argues that the Court's actions and decision indicate partiality to the abortion cause. The Court had shown judicial activism in dealing with the rights of the mother by quashing an injunction that no longer had any actual affect and by moving beyond the issue posed under Quebec's civil law to deny the possibility of injunctions halting abortion under the common law operative in the rest of Canada, but appealed to judicial restraint when ruling on the rights of the unborn (pp. 288-89). An incisive critique of the Court's *Daigle* decision is also furnished by David M. Brown, "Life's Dominion in Canada: A Legal Survey" in *Life and Learning VIII: Proceedings of the Eighth University Faculty for Life Conference*, ed. Joseph W. Koterski, S.J. (Washington, D.C.: Univ. Faculty for Life, 1999), pp. 9-10.

unborn in the Charter, the Supreme Court brought Canada to its present situation: the absence of any federal law restricting abortion.¹⁶ Whether the Court or various of its members meant to invite legislative action by implicitly setting out the parameters of a law that the Court might accept, or to settle the question while avoiding taking sides on the issues that divided pro-lifers and abortion advocates remains disputable. Certainly the result of its decisions was the creation of a *status quo* that has proven satisfactory to abortion rights advocates and so far impossible for pro-lifers to overcome.

¹⁶ For present purposes I leave aside the extent to which provincial laws do—or might—restrict abortion.

In the spring and summer of 1988 following the Court's *Morgentaler* decision and again following the federal election of November 1988, which was fought chiefly on the issue of free trade with the U.S. and returned a reduced but "still comfortable" Conservative majority, the government of Prime Minister Brian Mulroney attempted but failed to enact legislation regulating abortion. Pro-life MPs vastly outnumbered abortion supporters in the House, and those who would prefer at least some restriction upon abortion to the *status quo* constituted a clear majority; public opinion would clearly have accepted and likely welcomed a moderate restriction. Even so, the *status quo* prevailed, for reasons that have been described with great clarity and shrewdness by political scientist Tom Flanagan.¹⁷ In the first attempt during the summer of 1988 Mulroney introduced a resolution— not a law—based on a gestational approach and allowed a free vote on this resolution and on amendments that MPs might propose to this law. Although much the largest support was given by members to an amendment that would have restricted abortion to circumstances that threatened the life of the mother (118 against, 105 in favor), none of the amendments achieved a majority and the government's own resolution was also defeated (147 against, 76 in favor) and withdrawn. The miscalculation of pro-life MPs that handed their foes a victory that they could not otherwise have won stemmed from their belief that the government would have to introduce a new proposal much nearer their own preferred option. Pro-life MPs thought that they could vote strategically against the government's proposal and force its hand. To be sure, as Flanagan acknowledges, Prime Minister Mulroney might at this point have opted for the slightly modified

¹⁷ "The Staying Power of the Legislative Status Quo: Collective Choice in Canada's Parliament after *Morgentaler*," *Canadian Journal of Political Science* 30/1 (1997): 31-53. Flanagan has served as a political advisor to Stephen Harper, the present leader of the Conservative Party, in his present capacity and in his contest to win the leadership of the Canadian Alliance, the immediate precursor of the CPC. He was also an adviser to Preston Manning, the inventor and first leader of the Reform Party, out of which the Alliance was formed. He plays a key role in my discussion for, as we shall see, he has given those whom he has served critical advice as to how they might deal with, or rather avoid the issue of abortion.

version of the pro-life amendment that had fared best in the parliamentary discussion so far and he might well have crafted a law satisfactory to public opinion. In Flanagan's view, however, such a law would have divided Mulroney's Cabinet and angered the women he had named to it and would very likely have been blocked by a hostile majority in Canada's Senate. Mulroney seems to have reached the same conclusion. In his "second try" in the fall of 1989, Mulroney introduced a deliberately ambiguous bill, C-43. C-43 made abortion a criminal offense except when the continuation of a pregnancy threatened the life or health of the mother, but it defined health very broadly and left the assessment of that threat to the sole judgment of the qualified medical practitioner who performs or directs the performance of the abortion.¹⁸ Although this proposal satisfied neither pro-life MPs nor those happy with the *status quo*, Mulroney secured its approval. How? He and his Ministers warned pro-lifers that his Bill was the best possible, nay the only possible legislation at this time while assuring angry feminists and doctors that it would have no effect. In the House Mulroney spoke for C-43 at Second Reading. Mulroney required members of his cabinet to support the legislation, and he announced that if this Bill failed, he would introduce no other. Passed by the House in May 1990, Bill C-43 went to Canada's Senate, where it was finally defeated on a tie vote, 43-43, in January 1991 at the hands of a group of Senators, at least nine of whom opposed the bill because it did not sufficiently protect the unborn. Pro-lifers have praised those Senators who voted thus for their devotion to principle. Whether they deserve praise for their prudence is another question.

¹⁸ Flanagan does not note this last feature of C-43 even though it figured prominently in discussions of the bill inside and outside Parliament.

In the fourteen years since the defeat of Bill C-43 in Canada's Senate "no federal government has introduced legislation to criminalize, restrict or regulate abortion."¹⁹ Several private members' bills have been introduced that propose restrictions on abortion, the removal of public funding, procedures requiring some measure of informed consent on the part of those undergoing abortion, and restrictions on embryonic stem cell research. Generally such legislative proposals have been carefully researched by their MP authors or the MP's assistants, and often supporters in the House have shown themselves well-informed and articulate in discussion. Pro-life members of Canada's two largest parties who themselves number some seventy strong participate more or less actively in a pro-life caucus and of late have hired a part-time co-ordinator.²⁰ On the other hand, as the author of several of these bills told me, attendance in the House when those bills are debated is sparse. And if, as rarely happens, a private member's bill does engage the interest of any sizeable number of MPs, the level of discussion dramatically declines. Those speaking against the Bill generally content themselves with denouncing the proposal for wanting to return abortion to the back alley world of rusty coat-hangers. In any case, whatever the quality of research invested in the preparation of a private-member's bill and

¹⁹ Brown, "Life's Dominion in Canada: a Legal Survey," p.9.

²⁰ Neither the Co-ordinator Barbara McAdorey nor the Ottawa Lobbyist for Campaign Life Coalition would tell me how many MPs belong to the Caucus. I mention this as one possible indication of the perceived vulnerability of being known as "pro-life."

however much the importance of such bills is praised as an expression of the true meaning of parliament, such initiatives receive little public attention and have almost no chance of becoming law.²¹

²¹ One MP told me of a private member's bill to erect a statue to John Diefenbaker that he had "seconded" in his early days in Parliament, but he acknowledged that this was a peculiar case—the government of the day wanted to see such a statue erected but preferred that this be done on a non-partisan basis. He knew that his example did not much resemble the case of abortion.

Nor has any proposal to restrict abortion in any way figured in any major political party's recent platform. Consider the case of the Liberals who have governed Canada since the federal election of 1993, which took place a few months after the resignation of Conservative Prime Minister Brian Mulroney. Although the Liberal Party includes a number of MPs who participate in the Pro-life Caucus—some were explicitly elected as pro-lifers and one of its members co-chairs the Caucus—the Party has been increasingly willing to present itself as the champion of abortion rights. As leader of the Liberal Party in three federal elections, Jean Chrétien has variously described the absence of any regulation of abortion as reflecting a consensus that ought not to be disturbed, or as the recognition of a right to abortion established in the Charter and discovered there by the Supreme Court. He also boasted that Canadians were glad that he did not feel bound by the teachings of his Church and he has compared himself favorably to George W. Bush and to his own 2000 election foe Stockwell Day, both of whom seemed to attach an importance to their religious beliefs that Canadians as described by Chrétien could only find peculiar. In the election of 2004, Chrétien's successor Paul Martin, a man who is almost invariably described by the press as "a devout Catholic" in articles dealing with his support of abortion and same-sex marriage, moved a step further by directing fierce attacks and authorizing attack ads against his election rival for permitting candidates and MPs in his party even to discuss possible restrictions upon abortion. Martin indicated that he would discourage pro-life MPs in his party from offering private members' bills to limit abortion or would even forbid them from doing so. He added that if any such bill should somehow win approval from the House, he would disregard it.²²

²² The Pro-Choice Action Network, "Abortion in the Election: A Chronology,

June 1," <http://www.prochoiceactionnetwork-canada.org/print-friendly/election-chronolgy.shtml>.

But what of the Conservatives, who now constitute the official opposition in Canada's parliament and recently came within a single vote of defeating the Government on a motion of non-confidence? It is here, I think, that we see the most remarkable evidence of how the effort to avoid the subject of abortion has reshaped our political life. Here we see a political party whose very existence is in part the unintended consequence of the efforts of various Canadian political leaders to avoid the discussion of abortion—and a party whose leadership continues to try in vain to avoid that discussion. The Conservative Party of Canada came into being when a merger of the Progressive Conservatives and Canadian Alliance negotiated by the leaders of the two parties, Stephen Harper and Peter MacKay, was ratified by a vote of the membership of both parties in late 2003. The Progressive Conservatives were the smallest party in Canada's parliament at the time of the merger but were the descendants of the party that governed Canada in the 1980s and whose failure to pass a law regulating abortion we have already discussed. Mulroney's Justice Minister Kim Campbell, who had as Justice Minister tried to persuade pro-abortion and pro-life critics of Bill C-43 to support the bill, became Mulroney's successor as party leader. In the election of 1993 her party fell from a strong majority of 169 to just two (of 295 seats). One reason for the defeat of the Progressive Conservatives was the emergence of a powerful new rival for conservative votes, especially in Western Canada, with the rise of the Reform Party under the leadership of Preston Manning. The new party won 52 seats in 1993, 60 in 1997. A recent study of that party's electoral success against the older Progressive Conservatives shows that "a key factor" in explaining the new party's success was its appeal to moral traditionalism on issues like abortion.²³ Be this as it may, the party's leader Preston Manning responded to Reform's failure to make political inroads outside Western Canada in 1997 by taking steps that he was advised would make the party more appealing in Ontario. Manning transformed the Reform Party into the Canadian Alliance, divorced himself and the party so far as he could from issues like abortion, and agreed to an open

²³ Michael Lustzig and J. Matthew Wilson, "A New Right? Moral Issues and Partisan Change in Canada," *Social Science Quarterly*, 86/1 (2005): 109-28.

contest for the leadership of the new party by a vote of its membership. In a shocking upset in July 2000, Manning was defeated both in Ontario and in his home province and replaced by a morally conservative and immensely charming former member of the Alberta government, Stockwell Day. Many close observers of the contest believe that it was Manning's perceived distancing of himself from his own roots as an evangelical Christian and moral conservative that made his defeat inevitable as soon as a plausible candidate whose views were morally conservative entered the race. Taking advantage of the new leader's inexperience, Canada's then Prime Minister Jean Chrétien called an election in the fall of 2000 in which the Alliance increased its share of the national vote but made only slight progress in its campaign for seats in Canada's largest province, Ontario. Perceived fumbles in the election campaign, a lack of support from Alliance MPs in the caucus, mistakes in the handling of his office as Leader of the Opposition and a press very hostile to Day and especially contemptuous of his religious and moral views soon led to a full-fledged mutiny in Parliament and to Day's agreement to a new leadership contest. That contest in 2003 was won by Stephen Harper. Harper's campaign was directed by Tom Flanagan. And Harper, as we have observed, proceeded quickly to negotiate a merger of the Alliance with the remnant of the Progressive Conservatives, won the leadership of the new Conservative Party of Canada, and led that party in the federal election of 2004 that saw the Liberal Party reduced to a perilous minority.

What role did the issue of abortion play in these events? We have suggested that there is some evidence that grass roots support for moral conservatism was a major factor in the near demise of the Progressive Conservatives and in the initial success of the Reform Party. And there is even stronger evidence that the defeat of Reform's inventor in the contest to lead the new Canadian Alliance was at least partly a result of Manning's effort to silence his followers' moral conservatism. But was not Day's failure to realize the hopes of his supporters in the election of 2000 and his ouster as leader of the party at the hands of Harper a result of Day's own moral conservatism? And has the Conservative Party not found the best available solution to its dilemma by agreeing as it did in its March convention to allow individual MPs to decide moral issues on

the basis of individual conscience, while promising that a Conservative government would not support legislation regulating abortion? To begin to answer these difficult questions, I would note, first, that though many who supported Stockwell Day in his successful bid to replace Preston Manning as Leader of the Alliance knew him to be pro-life, Day did not himself raise the issue of abortion either in the election campaign of 2000 or in the leadership contest with Harper, except to defend himself against attacks from the media and political rivals.²⁴ In fact, Day's difficulty in dealing with the issue in the campaign of 2000 seemed to result from his inability to reconcile what friends and foes took to be his own deepest convictions with the apparent campaign strategy of sidestepping the issue as irrelevant, or to reconcile those convictions with the Reform principle, awkwardly preserved by the Alliance, that treated abortion and other moral issues as questions to be resolved by deferring in the short run to the consensus or majority opinion of each MP's own constituents while awaiting a possible national referendum on the issue to be triggered by a petition. The failure to articulate that procedure successfully—the fact that that procedure could not be successfully articulated—easily gave credence to the claim of Day's foes. That claim was not that the Alliance under Day wrongly meant to

²⁴ Lustzig and Wilson conclude their study of the 1993, 1997, and 2000 Canadian Election Studies (cited above) by noting the irony that moral issues remained in the election of 2000 “an overwhelmingly powerful predictor of Alliance support even as the party consciously sought to de-emphasize these positions in its public presentation” (p. 128).

restrict abortion, but that they meant to do so and yet would not admit to this intention, that the Alliance and its leader had “a secret agenda.”

Nor is this interpretation of what happened in the election of 2000 to be dismissed as the wishful thinking of pro-lifers. The same interpretation was stated in a remarkably candid post-election analysis by Tom Flanagan, the present leader’s chief adviser, whose analysis of the failure of the Mulroney effort to pass a law regulating abortion in 1988-91 we have previously relied upon.²⁵ According to Flanagan, the common interpretation—of journalists, Bay Street, and former Progressive Conservatives—that the failure of the Alliance to win many seats in Ontario resulted from its social conservatism “is more wrong than right.” What is wrong with this interpretation? First, that Westerners are just as divided as Easterners on matters “like abortion, gay rights, capital punishment, and immigration.” And, second, that the Alliance does not “profess social conservatism.” From 1987 onwards Reform’s stance was rather to favor process over policy in these matters by making use of devices of direct democracy like an eventual national referendum and, in the absence of such a referendum, free votes in parliament with candidates guided entirely by their constituents’ opinions. Although this process accorded with Western populism, the reason that it was adopted by Manning and recommended by Flanagan was to allow potential supporters of the new conservative party to put aside their differences on moral questions by leaving them to be settled in some distant future by “direct appeal to the people.” That the party has nevertheless become associated with social conservatism results from the fact that “advocates of traditional morality” joined the party anyway in the hope of working for their causes within the very process adopted in order to avoid this result. So, “what is to be done?” Flanagan asks, explicitly invoking the name of Lenin. The devices of direct democracy must be given up. “Paris is worth a Mass,” said Huguenot Henry of Navarre “as he converted to Catholicism and thereby became King of France. The

²⁵ “Direct Democracy: Western Roots, Eastern Fears,” *National Post*, 22 December 2000. An early adviser to Manning, who later became his critic, Flanagan would soon become manager of Harper’s campaign to replace Stockwell Day as leader of the Alliance.

comparison is Flanagan's. In any case, as it turns out, Flanagan has little attachment—and several objections to the devices borrowed from direct democracy except their possible use to avoid division on moral matters, and in this they have failed. Since they are disliked in Ontario, there is no reason to maintain them.

So—to repeat Flanagan's (and Lenin's) question—what is to be done? Resolution P-90, which made the conscience of individual MPs the final arbiter of moral questions by eliminating an opposing principle (restated in P-91), was always disputable as an interpretation of the elected representative's role and objectionable to many MPs themselves.²⁶ The principle abandoned was unappealing to Ontario voters and (whatever its roots) no longer insisted upon by Western conservatives. It had failed to accomplish its primary purpose as that purpose is revealed by Flanagan: to distance the Party from moral conservatism. On the other hand, the Leader's agreement to P-90 did not mean that he had agreed to an open discussion of abortion or any other issue of concern to the Party's moral conservatives. On the contrary, the failed attempt of Harper's Office to add a note to P-90 that would preclude further discussion at the Policy Convention of matters like abortion and the definition of marriage tried (just as the devices of direct democracy had done a decade earlier) to prevent that discussion. The effort to persuade pro-life MPs and party members to accept that note proposed that they agree to continued silence rather than entering into an argument that they might well lose. Perhaps the Leader's effort would have succeeded had those same MPs and party members not wanted also to discuss the marriage issue. In any case, as we have seen, the actual argument at the Convention strongly affirmed the resolution supporting the traditional

²⁶ Stockwell Day addressed this difficulty in 2000 by saying that the elected representative is obligated to represent his constituents so far as he is able by voting in accordance with their wishes but cannot be bound to vote for measures that would "abrogate inalienable human rights, such as the rights to life, liberty, and property." He added that abortion did "abrogate inalienable human rights." His statement is cited on the Lifesite Election 2000 home page. <http://www.theinterim.com/2000/election2000/partyleaders.html>

definition of marriage and much less firmly upheld the resolution (P-92) committing a Conservative government not to support legislation regulating abortion. The meaning of that latter commitment for Conservative MPs—whether or not the Conservatives come to form a government before the Party's next policy convention—is unclear. Whether that commitment will achieve the apparent aim of its supporters or of the Party's Leader to remove the subject of abortion from our next federal election must also be doubtful. The nearly even division between supporters and opponents of P-92 is unlikely to discourage Party members who want to see the Conservatives move towards some restriction on abortion, and there remain a sizeable number of pro-life MPs in the Conservative caucus. The opportunity continues to exist therefore for the Conservatives' political foes, especially the Liberals, to charge the Conservatives with wanting to restrict abortion, and there is no good reason to expect that the opportunity will not be seized by the Liberals and taken up by the media. Will resolution P-92 enable the Conservative leader to defend his party against this attack more easily than he could without it? Or will it only add a new potential for intra-party discord between those who see it as a rule forbidding discussion and those who appeal to P-90 as a rule justifying their continuing efforts to limit abortion, a discord that the Conservatives' rivals will be quick to exploit?

To explain the failure of right-to-lifers in the Mulroney parliament to find a way to overcome the *status quo* of unrestricted abortion following the Court's *Morgentaler* decision, Tom Flanagan appealed to the implicit rules of a particular model of game theory. He and his leader Stephen Harper appear to be trapped in a situation calling for a similar explanation at this time. His Party's Ontario wing of fiscal conservatives and former Progressive Conservatives regularly advises the Leadership that it must dump moral conservatism, and certainly the continuing presence of moral conservatives in his party exposes the Party to the attacks it suffered in the elections of 2000 and 2004. But Harper and Flanagan know that the moral conservatives constitute a large portion—perhaps the single largest portion—of the Party's voter base and constitute the largest group of members who support Harper's own leadership within the party. To do as Harper's Ontario advisers recommend would

be to commit political suicide. But the strategy of silencing his morally conservative supporters on which he has fallen back is little better. The strategy risks a wider rebellion within the Party such as the one that forced Harper to abandon his attempt to prevent discussion of moral issues at the Policy Convention, and it leaves him open to the Liberal claim that his party has a secret agenda. If Harper can neither dump nor silence his moral conservatives, what can he do? The Conservatives' American cousins—Republicans like George Bush and many others—have found a variety of ways to appeal to moral conservatism and even to opponents of abortion and have thereby developed a successful political strategy at the national and state level.²⁷ To be sure, there are important differences between Canada's political culture and political regime and that of the U.S. that bear upon the prospects for such a strategy. The religious right—Evangelicals and Catholics—have hesitated much longer than their American counterparts to engage in serious political action. And our parliamentary system of government, calling as it does for greater party discipline within the legislature, makes it harder for a political party to contain widely divergent factions. On the other hand, religiously based moral conservatism is rapidly becoming a conspicuous

²⁷ For a subtle and useful account of this ambiguous success, see William Saletan, *Bearing Right: How Conservatives Won the Abortion War* (Los Angeles CA: Univ. of California Press, 2004). In calling this account "ambiguous," I mean to note what Saletan's subtitle implies: that it is moral conservatives, not right-to-lifers, who have "won" the abortion war on which he reports. According to Saletan, conservatives like Bush have found it worthwhile to appeal to the ground shared by pro-lifers and moral conservatives: opposition to public funding for abortion and support for requiring parental and even spousal consent.

force in Canadian politics, and the Conservatives have already committed themselves to loosening party discipline in the House, by promising free votes as a step towards greater democratic accountability. And there are important similarities in our circumstances. Opinion surveys, for example, continue to show that Canadians like Americans disapprove of the universal public funding of abortion. Certainly in Western Canada the declared moral conservatism of candidates for parliament has not discouraged voters. And, as Flanagan noted in his 2000 post-election comment, the range of opinions about abortion is not markedly different in Western than in Central and Eastern Canada.

The conclusion to which the argument and the analysis of this paper leads is that those who want the political success of the Conservative Party and those who want to restrict abortion in Canada have a common strategic interest in talking about abortion. Of course, neither sees the matter this way, so I must argue that both are mistaken. The leadership of the Conservative Party and the political opponents of abortion in Canada are for the most part agreed that it would be best at present to shut up about abortion. The politically organized arm of the pro-life movement in Canada, i.e., the Toronto-based Campaign Life Coalition, was glad to see the Conservatives agree to the principle (P-90) that moral questions should be dealt with by free votes in the House of Commons, with members consulting their constituents but deciding in accordance with their own conscience. The leaders of Campaign Life Coalition did not see why P-90 should preclude further discussion of moral questions by the Policy Convention, but they had not prepared for a major fight in support of the Partial Birth Abortion Ban resolution (P-94). Campaign Life Coalition's apparent strategy has been to question potential candidates for Parliament in order to identify them as pro-life or as supporters of abortion and to let pro-life voters in each riding know what they have been able to determine. The organization generally urges its supporters to vote for the most pro-life candidate in their own riding regardless of the candidate's party affiliation. The aim is chiefly and almost exclusively to get as many pro-life MPs as possible in Parliament. It would be wrong to suggest that Campaign Life Coalition does not want to see a political discussion of abortion, but it seems fair

to say that it does not make the opening up of that discussion a high priority, and even to suggest that it is willing to give up opportunities for that discussion in order to secure the primary goal of electing pro-life MPs.²⁸ And how do pro-life MPs regard the prospect of a public discussion of abortion? One told me that he thought that about 20% of public opinion support abortion strongly, that 20% oppose it strongly, and that the remaining 60% do not want to talk about it. And he seemed to think that it was not the responsibility of pro-life politicians like him to disturb that 60%. Change would occur, if at all, this MP thought, only when non-political leaders—the clergy, for example—brought about a change of attitude on the part of the deliberately silent majority.

Ought the political individuals and organizations outside Parliament who oppose abortion to seek a political debate on the subject—a debate in Parliament and a debate around the election of Parliament?²⁹ One can say, I think, that every day or year of silence makes the re-opening of that question more difficult. Although much can be done to persuade individuals against abortion in their own or their daughters' cases by advertising, for example, the law is a great moral teacher, and the years of silence tend surely to transform the legal *status quo* created by the Court's *Morgentaler* decision into a normative framework for many individuals and even a coercive framework for doctors, nurses, and others engaged in furnishing medical care. Silence seems to confirm the claims of some—politicians and abortion supporters—who say that our present situation reflects a broad consensus that is happy with the absence of any legal restriction on abortion. Public silence, broken only

²⁸ Political pro-lifers were not exactly content with Stockwell Day's unwillingness to make abortion an issue in the 2000 election but I think they were more than willing to see him avoid any explicit discussion of the issue in his initial campaign for the leadership and even in his unsuccessful attempt to preserve his position against the challenge from Harper in 2003. This is not said to condemn Campaign Life Coalition. At the time and even in retrospect this may have been the only plausible strategy.

²⁹ Campaign Life Coalition has certainly tried to promote the public discussion of abortion through its support of a national newspaper (*The Interim*) and on-line news-service (Lifesite).

by the occasional ill-attended Parliamentary debate of a private-members bill, must also limit the political effectiveness, undermine the morale, and even threaten the continued existence of that sizeable number of pro-life MPs now in Parliament. How effective can a political tool be that is seldom used and for which no large public purpose is even contemplated? On the other hand, to ask whether political foes of abortion *ought* to promote a public debate on abortion may be to ask an unfair question. "Ought" implies "can," and it is doubtful whether such a serious public discussion of abortion could be initiated without the cooperation of the leadership of one of our political parties. The critical question becomes then whether it can be shown to be in the strategic interest of that leadership—the leadership of the Conservative Party—to talk about abortion.

A few years before Stephen Harper became the Leader of the Canadian Alliance Party, he and Tom Flanagan assessed the prospects for overcoming the divisions within Canadian political conservatism so as to create a political party competitive with the Liberals, who have ruled Canada with a few brief interruptions since 1900.³⁰ They concluded that those prospects would remain dim unless and until Canada abandons its first-past-the-post electoral system but the reasoning that led to this conclusion supposed the improbability of just what Harper himself accomplished shortly after becoming leader of the Canadian Alliance: a merger with the Progressive Conservatives. Harper and Flanagan identified three divisions among Canadian conservatives: economic vs. social conservatism, populism vs. traditionalism, and "one Canada vs. two nations." Of these, the third, which divides English-speaking and French-speaking conservatives, they regarded as most difficult to overcome, but this division, as they acknowledged, also threatens the continued dominance of the Liberal Party. The merger of the Alliance and Progressive Conservatives and the agreement at the recent Policy Convention to replace the ultimate appeal in moral

³⁰ The analysis was developed in two essays: "Our Benign Dictatorship," *The Next City* (Winter 1996/97), and "Conservative Politics in Canada" in *After Liberalism*, ed. William Gairdner (Toronto, Ontario: Stoddart, 1998).

questions to the views of the MPs' constituents with an appeal to their own judgment or conscience would seem to mark great progress in overcoming the dangers that Flanagan and Harper associated with populism. As for the tensions between economic and social conservatism, Harper and Flanagan said that these constitute "the least of the problems confronting those seeking to build an effective conservative political force," for "both brands of conservative thought share a common ethos—free will, personal responsibility, family values— as well as a common electorate."³¹ If the possibility of a coalition of at least the two English Canadian conservative parties in Canada has become a reality in the years since the Harper and Flanagan analysis was published, what of the possibility of that alliance becoming genuinely competitive with the Liberals? Harper and Flanagan rightly estimated the popular support for that alliance at some 30%.³² But although they insisted that the various kinds of conservative must recognize that each is an authentic part of a larger conservative philosophy, they gave little thought to how the whole made up of these parts might be made more numerous. In fact, they seemed to suppose the work of changing public opinion and public policy to belong not to political parties or their leaders but to what they called "the conservative movement."³³ Although

³¹ "Conservative Politics," p. 178.

³² "Our Benign Dictatorship," p. 7.

³³ By the "Conservative movement" they mean an "organizational network" made up of Research Institutes like the Fraser Institute, Advocacy Organizations like the Canadian Taxpayers' Foundation, and publications like *The Western Standard* and *The National Post*, that is able to develop and communicate "a sophisticated conservative message." See "Conservative Politics," pp. 169-70,

they acknowledged that many Liberals are also social conservatives and so in conflict with their Party's leadership, Harper and Flanagan did not consider the possibility of attracting those potential supporters from their present political home, although it has been by doing this that the Republicans in the U.S. have made the Democrats a minority. But, of course, there is no way of appealing to those potential Conservatives without talking about the things that concern them. And this, Harper and Flanagan have been—so far—unable to contemplate.

In 1860 Abraham Lincoln insisted that the new Republican Party continue to focus upon the issue of slavery—to fail to address that issue, as some advised, would be to undercut the new political party's very reason for existence. On the other hand, he also insisted that the party's national platform say exactly what needed to be said and not more: Republicans must oppose the extension of slavery into the new western territories, but they must not oppose the recently enacted Fugitive Slave legislation although that legislation deeply offended abolitionist sentiment. They must appeal to the wide segment of Northern white opinion that objected to slavery without disturbing the almost equally popular sentiment that could not stomach the thought of complete racial equality. If the Party said what Eastern abolitionists wanted it to say, this would guarantee that no Republican would be elected in Illinois and that the Republicans would not win the Presidency in 1860. And slavery might well extend into Kansas and Nebraska as a result. Lincoln knew that arguing about slavery was dangerous, but he also knew that it was necessary—he did little else from 1850 to 1860. So too it is important for the Conservatives that they take up the subject of abortion. To be sure, it is no less important that they make the right arguments about abortion, and it is no simple task to discover what those arguments are. But the failure to look for those arguments not only leaves abortion where it is in Canada. It also leaves the Conservatives where they are, or worse.

Silence is not always golden.