THANKS, GOVERNOR CASEY

THE NATION OWES A DEBT of gratitude to Gov. Robert P. Casey and the Pennsylvania Legislature for their bipartisan collaboration on a state law to regulate abortion, most of whose provisions the Supreme Court upheld as constitutional on June 29. Governor Casey is a Democrat, and the fact that two weeks later the managers of the Democratic convention refused to give him a chance to speak only brought shame on the party and contradicted Bill Clinton's evident desire to bring his party closer to that "middle" where he thinks the Presidential election must be won.

Never mind. The Supreme Court decision now destined to be called "Casey" set a precedent that may at long last be heading the nation toward a legal compromise that comports with what polls indicate is the nation's majority view: Under certain circumstances abortion will be legal, but it can also be restricted. "Abortion on demand," as known and practiced since Roe v. Wade, is not a "fundamental right" that suffers no abridgment or regulation.

That the writers of the majority opinion—Sandra Day O'Connor, Anthony Kennedy and David Souter—are striving for revision and compromise in the wake of Roe is apparent, even painfully so, in obiter dicta in which they employ the first-person plural to represent the nation's moral anguish: "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision"; "the reservations any of us may have in reaffirming the central holding of Roe"; "the stronger argument is for affirming Roe's central holding, with whatever degree of personal reluctance any of us may have."

These Justices describe their Casey compromise as the sort that "calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." In essence, their compromise finds a constitutional right ("mandate") for women to end pregnancy "before viability," but insists that even in the period before viability the state has an interest in protecting fetal life and may tilt legislatively toward that protection so long as its laws do not put an "undue burden" on the woman's right.

The four dissenting Justices think that this compromise will not work and that, instead of bending over backward to uphold Roe, the Court should have overturned it. They foresee ugly and endless litigation to test the meaning of "undue burden." They may be right. Their more serious doubts about the validity of Roe, and ours too, are not now the law of the land, but the language of the Casey decision does balance the woman's right to choose with the state's right to protect the unborn:

- "The independent existence of the second life [fetal-life after viability] can in reason and all fairness be the object of state protection that now overrides the rights of the woman."
- "In some broad sense it might be said that a woman who fails to act before viability has consented to the state's intervention on behalf of the developing child."
- "Roe v. Wade speaks with clarity in establishing not only the woman's liberty but also the state's 'important and legitimate interest in potential life.' That portion of the decision in Roe has been given too little acknowledgment and implementation."
- "Even in the earliest stages of pregnancy, the state may enact rules and regulations designed to encourage her [the pregnant woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term."
- "Not every law which makes a right more difficult to exercise is ipso facto an infringement of that right."
- "These considerations of the nature of the abortion right illustrate that it is an overstatement to describe it as a right to decide whether to have an abortion 'without interference from the state.'"
- "Before viability, Roe and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy."

THIS CASEY decision, that is to say, makes it amply clear the Supreme Court is balancing two values, a woman's liberty and unborn life—and two rights, a woman's right to an abortion and the state's right to protect life. It remains to be seen whether the language of Casey provides better protection to unborn life than Roe, which afforded virtually none. But the revision represented by the Casey decision reveals as nonsense both Randall Terry's claim that the Justices have blood on their hands and Justice Harry Blackmun's claim that the Roe decision he wrote is a regimen of "light." It also reveals as unbalanced the push of prochoice forces in Congress to pass a Freedom of Choice Act that aims at overriding Casey. The burden is on them, and on people like Mr. Clinton, to explain why even Casey's precarious purchase on protecting unborn life should now be done away with.