Some Fresh Perspectives on the Abortion Controversy

Robert A. Destro

[*Professor Raoul Berger's new book,* Government by Judiciary, *is a significant contribution to the legal scholarship on the abortion controversy, says the author, who seeks to apply Berger's analysis to the subject he doesn't mention.*]

> When this Court decided *Roe v. Wade* and *Doe v. Bolton,* it properly embarked on a course of constitutional adjudication no less controversial than that begun by *Brown v. Board of Education,* 347 U.S. 483 (1954). The abortion decisions are sound law and undoubtedly good policy. . . .The logic of those cases inexorably requires invalidation of the present enactments. Yet I fear that the Court's decisions will be an invitation to public officials to approve more such restrictions. . . .When elected leaders cower before public pressure, this Court, more than ever, must not shirk its duty to enforce the Constitution for the benefit of the poor and powerless.[1]

The foregoing statement by Justice Thurgood Marshall, dissenting in the welfare-abortion cases, *Maher v. Roe,*[2] *Beal v. Doe,*[3] and *Poelker v. Doe,*[4] might well have been extracted from the pages of Professor Raoul Berger's latest work: *Government by Judiciary*[5] as a prime example of the judicial mind set which has prompted the federal judiciary to assume an ever-increasing role in the shaping of policies which govern everything from abortion[6] to zoning.[7] Justice Marshall's statement, as well as a concurring remark by his colleague Justice Blackmun,[8] dovetails nicely with the essence of Raoul Berger's observations of a federal judiciary run amok with an exalted sense of its own power.

Professor Berger chooses the desegregation and reapportionment cases, *Brown v. Board of Education*[9] and *Baker v. Carr,*[10] as illustrative of his view that the judiciary has unconstitutionally usurped political and legislative power.[11] The abortion cases are not even mentioned by name,[12] notwithstanding the fact that they are the most recent example of "government by judicial decree on a national basis."[13] They are, in fact, apologetically described (with the contraception cases) as a "comparatively innocuous use of judicial power."[14]

I will not attempt to discuss here, or otherwise elaborate on or criticize Professor Berger's major arguments. Rather, I will attempt

Robert A. Destro is currently General Counsel for the Catholic League for Religious and Civil Rights, his first contribution to this review (the memorable "Abortion and the Constitution: The Need for a Life Protective Amendment") appeared in our Fall, 1976 issue.

to relate them to an area where his scholarship appeared to fail him: abortion. One can only speculate as to the reasons for such a glaring omission, but one may readily eliminate any possibility that the arguments raised are inapplicable or that the situation is any more tolerable because the Constitution and its legislative history do not mention abortion.[15]

The primary focus of *Government by Judiciary* is the Fourteenth Amendment, the source of many of the "rights" the Court has established over the years. It contains an exhaustive review of the debates and arguments which went into the passage and ratification of the amendment. It proves that the Fourteenth Amendment had a very limited function to perform: assuring the basic personal rights of life, liberty and property, and had nothing to do with political or "civil" rights such as "one man, one vote," desegregation or abortion.

The book is already a controversial one, not so much for its conclusions, but for the subjects it chooses to illustrate their validity: race and voting. The involvement of the federal judiciary in these areas has become so common and so pervasive that the general public has come to take them for granted. Professor Berger is to be commended for his straightforward analysis of issues too long forgotten in the quest to assure governmental protection for the rights of minorities.

It is important to identify what both his book and this article are *not* about: social policies regarding the civil and political rights of minorities and women. The focus of each is allocation of political power between the federal judiciary and the states.

In an analysis of this type it is easy for the cynical reader to conclude that criticism of the Court's exercise of power must, of necessity, be based upon a sense of displeasure with the result. Although the critic often has a result-oriented axe to grind, such is not the case with Professor Berger.[16] His book is eminently readable, and a *must* for anyone who seeks to keep abreast of the shifting tides of power allocation in the federal system.

Simple examination of the federal judiciary's record on abortion should suffice to demonstrate the identity of the growing problems in this controversial area of civil rights with those identified by Mr. Berger.

I.
The Fourteenth Amendment and Abortion

A. Background

The Fourteenth Amendment says nothing about abortion. The same can be said for the rest of the Constitution. Thus, one is left

with the inquiry which is central to Professor Berger's analysis:

> In a government of limited powers it needs always be asked: what is the source of the power claimed? 'When a question arises with respect to the legality of any power,' said Lee in the Virginia Ratification Convention, the question will be, *'Is it enumerated in the Constitution?* . . .It is otherwise arbitrary and unconstitutional.'[17]

Where then does the right to an abortion find its genesis? Mere invocation of the right to privacy does not go far enough, for Berger-style analysis demands to know the source of "privacy" rights too, and the Court's rationale is less than convincing:

> The Constitution does not explicitly mention any right to privacy. . . .
>
> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[18]

Dissection of the foregoing statement demonstrates that the Court's abortion decision exhibits at least three of the same "usurpations" identified by Berger in the contexts of desegregation and voting:

1. Assumption of powers not delegated by the people;
2. Use of the due process clause and "latitudinarian" construction to create new constitutional rights; and
3. Action akin to that of a "Council of Revision."

B. Unconstitutional Exercises of Judicial Power

1. Assumption of power not delegated by the people: "When does life begin?"

Although the right of privacy is often cited as the foundation of the abortion cases, the Court itself did not rest its decision in *Roe v. Wade* on such dubious grounds. The real basis for the abortion decisions is a finding that the unborn were not "persons" protected by the Constitution:

> The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. . . .If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment. . . .We. . . would not have indulged in statutory interpretation favorable to abortion in specified circumstances [In *United States v. Vuitch,* 402 U.S. 62 (1971)] if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.[19]

By the simple expedients of deciding that an unborn child is not a "person" entitled to constitutional protection and professing to safeguard the judicially-created "right to privacy" the Court sought

to draw attention away from what it was really doing: deciding when life begins.

Although defenders of the Court's position point vociferously to the now-famous statement that

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[20]

But the Court decided that very question by holding that "by adopting one theory of life,"[21] a state could not impinge on a women's rights, but that in assessing a *state's* interest, "recognition [could] be given to the *less rigid* claim that as long as at least *potential life* is involved the State [could] assert interests beyond the protection of the pregnant woman alone."[22]

This type of analysis, taken together with the Court's later statement that the point at which the State had the option to protect unborn life was viability "because the fetus then presumably has the capability of meaningful life outside the mother's womb,"[23] and, thus, it had "both logical and biological justifications,"[24] was merely a convoluted way of saying that the theory which Texas *had* adopted — that the unborn were human beings deserving of legal protection[25] — was *without* logical or biological justification.

But where did the Court find legal warrant for such a decision? It had already disclaimed any right to decide the medico-legal question, but proceeded to do so anyway — the distinction between actual and potential life is a substantial one. Where was the power to decide the *Constitutional* question of "who is a person?"

If one accepts the Court's view that the history of the Constitution gives no clue regarding an intent to include the unborn, it is equally true that the framers never considered the question of whether or not the Court was empowered to exclude them in order to invalidate state laws prohibiting abortion. When the Court decides that a change in the law is mandated by the Constitution, the ruling is inflexible, for the only method of change is through the Constitutional amendment process. By deciding that abortion was a matter of Constitutional right, the Court attempted to remove the controversy from the political process and impose its own views of an acceptable solution to the problem. Similarly, the Court's extension of "personhood" to corporations[26] was a means through which a controversy of major proportion could be avoided during a period of rapid economic expansion.[27] In both instances the result was anger and frustration based on an inability to effectuate change through the normal

processes of democracy. The Civil War was fought, in part, because the Court excluded Negroes from Constitutional protection[28] and removed the slavery issue from the political process; and Justice Black complained that "the people were not told that they were [ratifying] an amendment granting new and revolutionary rights to corporations"[29] when he attempted to argue that corporations were not protected by the Fourteenth Amendment.

Both of the foregoing situations illustrate that the Court is perceived as an institution of limited powers, possessing only the authority expressly granted by the terms of the Constitution. Where the result of a decision is to remove powers held and exercised by the states when the Fourteenth Amendment was ratified, the constitutionality of the exercise of judicial power is suspect unless it expressly appears that the grant of the power exercised was considered during the debates and the ratification process. Otherwise, the Court has no jurisdiction to consider the question and must leave its resolution to the states. Organic changes in the Constitution are only permissible through the amendment process provided by Article V.[30]

2. Use of the "Due Process" Clause and "latitudinarian" construction to create new constitutional rights: The "Right to Privacy"

Since the right to abortion is based at least in part on the Fourteenth Amendment concept that "liberty" (*i.e.* privacy) may not be deprived without "due process of law," the abortion cases suffer from the same defect Professor Berger finds in other cases resting on the due process clause. In short, the basic criticism of substantive "due process" is that the Court has used it as a mechanism to strike down legislation with which it disagrees.

Even if the right of privacy were the basis of the right to abortion, there is no constitutional warrant for striking down state legislation under its aegis because "[t]he detriment the State would impose upon the pregnant woman by denying [the] choice [of abortion] altogether is apparent."[31] The Court itself admits that the "right to privacy" is not mentioned in the Constitution, so where does the power to alter state law because it conflicts with such a right come from? Professor Berger answers the question with a question that contains its own answer:

> With [Thomas C.] Grey, I consider the question whether the Court may 'enforce principles of liberty and justice' when they are 'not to be found within the four corners' of the Constitution as 'perhaps the most fundamental question we can ask about our fundamental law,' excluding only 'the question of the legitimacy of judicial review itself.'[32]

He also professes agreement with John Hart Ely's view that the Court "is under obligation to trace its premises to the charter from which it derives its authority," for if a principle is not rooted in the Constitution "it is not a Constitutional principle and the Court has no business imposing it."[33]

The language and history of the Constitution clearly do not support the concept of a judicial tribunal which is empowered to invalidate, in whole or in part, the laws of every state because its holding "is consistent with the relative weights of the respective interests involved, with the lessons and example of medical and legal history, with the leniety of the common law, and with the demands of the profound problems of the present day."[34]

> 'The people,' averred James Iredell, one of the ablest of the Founders, 'have chosen to be governed under such and such principles. They have not promised to submit upon any other.' . . . We must therefore reject, I submit, Charles Evans Hughes' dictum that 'the Constitution is what the Supreme Court says it is.' No power to revise the Constitution under the guise of 'interpretation' was conferred on the Court; it does so only because the people have not grasped the reality — an unsafe foundation for power in a government by consent.[35]

Professor Berger spends considerable time and effort in Chapter Eleven of his book proving that, notwithstanding current orthodoxy which claims that the meaning of "due process" is "vague" and, therefore, susceptible to varied meanings,

> Whether one can determine 'precisely' what due process meant, however, is not nearly so important as the fact that one thing quite plainly *it did not mean,* in either 1789 or 1866; it did not comprehend judicial power to override legislation on substantive or policy grounds.[36]

The import of such a statement in view of the Supreme Court's invalidation of the abortion laws of all fifty states on the grounds that the states' interest in protecting fetal life was not sufficiently "compelling" in the Court's view to sustain their validity is unmistakable. If the Court's actions were taken on grounds which can be described as other than substantive or policy-related, one is hard pressed to determine what they are in light of the following:

> Those [lower federal courts] striking down state [abortion] laws have generally scrutinized the State's interest in protecting health and potential life and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy.[37]

For *any* federal judge to "scrutinize" state interests and "conclude" that the legislative policies based on them are not justifiable and that "liberty" is "broad enough" to include abortion is the essence of judicial usurpation of the legislative function—a result clearly not

contemplated when the concept of due process found its way into Constitution:

> The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; *they can never be referred to an act of the legislature.*[38]

3. Action akin to that of a "Council of Revision"

In deciding that the decision to have an abortion was constitutionally protected, the federal courts invoked both the Ninth and Fourteenth Amendments.[39] The propriety of employing the Fourteenth Amendment for such a purpose has already been discussed and found wanting; the use of the Ninth Amendment points even more clearly to the penchant of the federal courts to revise the Constitution according to their personal predilections. The Ninth Amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

But, as Professor Berger aptly notes, the fact that "certain non-enumerated rights are 'retained by the people,' it does not follow that federal judges are empowered to enforce them."[40] Although the Ninth Amendment was strenuously argued to be the basis of a "right to abort,"[41] neither the Supreme Court nor the lower courts considering the issue addressed the point raised by Professor Berger. Rather than address the contention that " 'the Ninth Amendment was intended to protect against the idea that "by enumerating particular exceptions to the grant of power to the Federal Government," those rights which were not singled out were intended to be assigned' to it,"[42] the federal judiciary and the supporters of abortion law revision focused on the Amendment as a repository of rights waiting to be tapped.[43] By adopting most of the arguments raised by Cyril C. Means in his 1971 Symposium Article entitled, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right about to Rise from the Nineteenth Century Legislative Ashes of Fourteenth Century Common-Law Liberty?*[44] the Court tacitly accepted Means' theory that the federal courts could revise state laws found to be outmoded or otherwise out of step with the times.[45]

That such a revisionary power was not contemplated is underscored by Professor Berger's reliance on Alexander Hamilton:[46]

> That [Hamilton] meant to leave no room for displacement of [the] 'intention' [of the people] by the Justices is underscored by his scornful dismissal of the notion that 'the courts on the pretense of a repugnancy may substitute their own pleasure [for] the constitutional intentions of the legislature.'[47]

Yet the single-minded dedication of most federal courts to the pro-

tection of the newly-created right to abortion is evidence that the courts themselves have lost sight of the constitutional boundaries of their *own* power.

II.
Conclusion

If there is any doubt that the federal courts have become "Councils of Revision," such doubts may be set at rest by an examination of the heavy-handed techniques employed by the federal courts in dealing with the ever-increasing crush of abortion-related litigation.

—When the mayor of St. Louis declared that public hospitals in that city would not provide elective abortions, he was held liable for attorneys fees because his acts were "in bad faith," notwithstanding the support of the citizenry of St. Louis.[48]

—Virtually every federal tribunal ruled that states must allocate tax revenues for elective abortions.[49]

—A single federal judge forbade compliance with an express Congressional limitation on the expenditure of federal funds (the so-called "Hyde Amendment")[50] notwithstanding an express Constitutional directive that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law."[51]

—Cities and states may not impose safety regulations on abortion clinics which perform first trimester abortions, no matter how reasonable.[52]

—A city may not zone abortion clinics into use categories appropriate to their business because such laws are not, in the court's view, "zoning" laws, but rather prohibited "anti-abortion" laws.[53]

—Preliminary injunctions are granted enjoining the enforcement of abortion clinic safety standards without evidentiary hearings.[54]

—Every section of a challenged abortion statute is invalidated, including those clearly constitutional and separable, because the judge does not care to perform "delicate surgery" on the statute[55] or "rewrite" it.[56]

—An ongoing state prosecution of a physician who performed an illegal third-trimester abortion is enjoined because the state acted in "bad faith" by founding an indictment on the fact that the baby was born alive and died twenty days later. The rationale: the baby was not "viable" because it died.[57]

—A single federal judge has been asked to rule that congres-

sional anti-abortion legislation establishes "one religious view" and free federal funds for abortions.[58]

—Parents may not stop the performance of abortions on their minor children, notwithstanding their ability to demand the opportunity to consent to other medical procedures.[59]

—A father may not prevent the abortion of his unborn child because the state is powerless to defend his right.[60]

—A public hospital must hire abortionists if the staff will not perform them.[61]

—Legislators are sued for acting in "bad faith" by enacting abortion-related regulatory legislation.[62]

The list goes on and the situation is fast reaching the point where the filing of a constitutional challenge to newly enacted legislation touching on abortion is a matter of ritual. Legislators must be lobbied to authorize defensive litigation because the hostility of the federal courts makes defensive tactics both expensive and doomed to failure from the start.

These factors, taken in combination with the willingness of some judges to impose personal damage awards against elected representatives for "bad faith" (*i.e.,* anti-abortion) actions, have resulted in the near paralysis of the state, local and federal legislative processes by the federal judicial oversight. Like Professor Berger, this writer can only ask: By what right?

NOTES

1. *Beal v. Doe,* 432 U.S. 438, 461-62 (Marshall, J. dissenting).

2. 432 U.S. 464 (1977).

3. 432 U.S. 438 (1977).

4. 432 U.S. 519 (1977).

5. R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment,* (Cambridge: Harvard University Press, 1977). [hereinafter Berger]

6. *See,* e.g., *Abortion Coalition of Michigan v. Michigan Dept. of Public Health,* 426 F. Supp. 471 (E.D. Mich 1977); *Mahoning Women's Center v. Hunter,* No. C76-2034 (N.D. Ohio, May 25, 1977).

7. *See,* e.g., *Fox Hill Surgery Clinic, Inc. v. City of Overland Park, Kansas,* No. 77-4120 (D.Kan. filed Nov. 9, 1977); *West Side Women's Services, Inc. v. City of Cleveland,* No. C77-1112 (N.D. Ohio filed March 1, 1978). (on motion for preliminary injunction)

8. 432 U.S. at 462-463:

> The result the Court reaches is particularly distressing in *Poelker v. Doe,* [432 U.S. 519], where a presumed majority, in electing as mayor one whom the record shows campaigned on the issue of closing public hospitals to nontherapeutic abortions, punitively impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound, with a touch of the divil-take-the hindmost. This is not the kind of thing for which our Constitution stands.
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> * * * * *
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> There is another world "out there" [a political one—*Ed.*], the existence of which the Court, I suspect, either chooses to ignore or fears to recognize. And so the cancer of poverty will continue to grow. This is a sad day for those who regard the Constitution as a force that would serve justice to all evenhandedly and, in so doing, would better the lot of the poorest among us.

9. 347 U.S. 483 (1954).

10. 369 U.S. 186 (1962).

11. Berger at 407-418.

12. *Roe v. Wade,* 410 U.S. 113 (1973); *Doe v. Bolton,* 410 U.S. 179 (1973).

13. Justice White, dissenting, called the cases "an exercise of raw judicial power." *Doe v. Bolton,* 410 U.S. 179, 221 (1973).

14. Berger at 392. The reference quotes Justice Harlan for the proposition that the reapportionment cases are a "much more audacious and far-reaching [example of] judicial interference with the state legislative process . . ." "than the so-called "privacy" cases.

If Professor Berger actually intends to say that the "right to privacy" gives the federal judiciary the right to revise the federal constitution and state legislation, he is inconsistent. If he actually agrees with the position taken by Professor Ely in "The Wages of Crying Wolf: A Comment on *Roe v. Wade,*" 82 *Yale L.J.* 920 (1973) reprinted also in *The Human Life Review,* Winter 1975, Vol. 1, No. 1; *see* Berger at 285 & N. 7, his omission of any explicit reference to the abortion cases is curious.

15. *See,* generally, Berger, Chs. 16-21.

16. *See,* generally, Berger, Ch. 23.

17. Berger at 407, *quoting* 3 Elliot 186 (emphasis in original).

18. *Roe v. Wade,* 410 U.S. at 152-153.

19. *Id.,* at 156-57, 159.

20. *Id.,* at 159.

21. *Id.,* at 162.

22. *Id.,* at 150 (initial emphasis added).

23. *Id.,* at 163.

24. *Id.*

25. *Thompson v. State,* 493 S.W. 2d 913 (Tex. Crim. App. 1971) *vacated and remanded,* 410 U.S. 950 (1973) (pursuant to *Roe*).

26. *Santa Clara County vs. Southern Pacific RR,* 118 U.S. 394, 396 (1886).

27. *C.f.,* Berger, pps. 105-9. In these pages, Berger discusses the so-called conspiracy theory of the 14th Amendment, which argues that the Framers had concealed some of these purposes from the voters while seeking ratification of the amendment.

28. *Dred Scott v. Sandford,* 60 U.S. (19 How) 393 (1857).

29. *Connecticut General Ins. Co. v. Johnson,* 303 U.S. 77, 86 (1938) dissenting opinion) *quoted in* Berger at 71 n. 7.

30 *See* Berger at 317-337.

31. *Roe v. Wade,* 410 U.S. at 153.

32. Berger at 283-284 *quoting "Do We Have an Unwritten Constitution?" 27 Stanford L. Rev.* 703 (1975).

33. *Id.,* at 285 & n. 7.

34. *Roe v. Wade,* 410 U.S. at 165.

35. Berger at 295-296 (footnotes omitted).

36. *Id.,* at 193-194.

37. *Roe v. Wade,* 410 U.S. at 156.

38. *The Papers of Alexander Hamilton* 35 (H. C. Syrett and J. E. Cooke, eds., 1962) *quoted in* Berger at 194 & n. 4 (emphasis by Berger).

39. See note 18 *supra.*

40. Berger at 388.

41. *See,* e.g., Means, "The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment about to Rise from the Nineteenth Century Legislative Ashes of a Fourteenth Century Common-Law Liberty?" 17 *N.Y.L. Forum* 335 (1971).

42. Berger at 389 & n. 66.

43. *See,* e.g., *Doe v. Bolton,* 410 U.S. 179, 209 (Douglas, J., concurring).

44. 17 *N.Y.L. Forum* 335 (1971).

45. Means viewed abortion as a matter of common law right and felt that it was incorporated into the Ninth Amendment as an "unenumerated" right. For a detailed criticism of Professor Means' views and

conclusions see Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," 63 *Calif. L. Rev.* 1250 (1975), reprinted in part in *The Human Life Review*, Fall 1976, Vol. II, No. IV.

46. *The Federalist Papers*, No. 78 at 506, 507 *quoted* in Berger at 395.

47. *Id.*, at 395.

48. *Doe v. Poelker*, 515 F.2d 541 8th Cir. (1975), *rev'd.*

49. E.g., *Doe v. Poelker*, 515 F.2d 541 (8th Cir 1975) *rev'd* 432 U.S. 519 (1977); *Maher v. Roe*, 408 F.Supp. 660 (D. Conn 1975), *rev'd and remanded* 432 U.S. 464 (1977); *Doe v. Rampton*, 366 F. Supp. 189 (D.Utah 1973).

50. *McRae v. Califano*, No. 76 Civ 1804 (JFD) E.D. NY (1976) (preliminary injunction).

51. U.S. Const. Art. I.§7.

52. *See*, e.g., *Mahoning Women's Center v. Hunter*, No. C76-203Y (N.D. Ohio filed May 25, 1977) (elevator capable of transporting stretcher, RH immune globin); *Fox Valley Reproductive Health Care Center v. Arft*, No. 78-C-28 (E.D. Wis. filed March 8, 1978) (informed consent, notice to parents of procedures performed on minors) (preliminary injunction).

53. *Fox Hill Surgery Clinic, Inc. v. City of Overland Park, Kansas*, No. 77-4120 (D. Kan. filed November 9, 1977) (on motion to intervene). But *see West Side Women's Services, Inc. v. City of Cleveland*, No. C77-1112 (N.D. Ohio filed March 1, 1978) (preliminary injunction denied).

54. E.g., *Fox Valley Reproductive Health Care Center, Inc. v. Arft*, No. 78-C-28 (E.D. Wis. filed March 8, 1978).

55. *Id.*, at p. 8 (slip opinion).

56. *Mahoning Women's Center v. Hunter, supra.*

57. *Floyd v. Anders*, No. 75-1481 (D.S. Carolina filed Nov. 4, 1977).

58. *McRae v. Califano*, No. 76 Civ 1804 (JFD) (E.D. N.Y.) (amended complaint filed January 4, 1978).

59. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

60. *Id.*

61. *Poelker v. Doe, supra.*

62. E.g., *Fox Hill Surgery Clinic v. City of Overland Park, Kansas, supra; Fox Valley Reproductive Health Care Clinic v. Arft, supra.*