

## ***An Old Debate Warmed Over***

In *Jacobson vs. Massachusetts*, 197 U.S. 11, the Supreme Court of the United States ruled on February 20, 1905, that a Massachusetts statute requiring small pox vaccination was legal and appropriate. Mr. Justice Harlan, delivering the Opinion of the Court, with two dissenting Opinions, wrote that the police power of the state was paramount to during an epidemic.

The legislature of Massachusetts required vaccination of its inhabitants and set appropriate penalties for refusal. The objection was predicated upon the Fourteenth Amendment to the Constitution.

In arguments about the Constitution, there are those who argue original intent. If we utilize the “original intent” framework, the police power was frequently held to be paramount over civil rights and liberties which we take for granted today. Those who look back to the past as good old days, be careful what you wish for.

The Court noted: “The authority of the State to enact this statute is to be referred to what is commonly called the police power – a power in which the State did not surrender when becoming a member of the Union under the Constitution.” at 25.

It is beyond peradventure and often repeated that the police power of a State encompasses “reasonable regulations” established by the legislature that will protect the “public health and the public safety.” Citing *Gibbons vs. Ogden*, 9 Wheat 1, 203 and other cases.

The argument over the propriety of vaccinations has a very modern ring:

We come, then, to inquire whether any right given, or secured by the Constitution, is invaded by this statute as interpreted by the state court. The defendant insists that his liberty is invaded when the State subjects him to a fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such as way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter what reason, is nothing short of an assault upon his person. at 26-28.

The Court explained, what is familiar to every law student; that no citizen is “wholly freed from restraint.” *id.*

The Court was informed by the concept of common good.

There is, of course, a sphere within which an individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the

safety of its members, the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. at 29.

We could not have said it better today. Mandatory vaccinations for Covid-19 and probably the green passport would certainly pass muster under the current jurisprudence of the United States Supreme Court. A future court may hold that individual rights and liberties must be protected in a more robust fashion against the overarching threat of the police power. However, what the courts have done in the past is to balance the threat and danger to the public against the risk of government intrusion into personal liberty. That balance has always been exercised in favor of the public good, over individual objections to infringement of liberty interest.

Interestingly, the 1905 court is heavily influenced by “high medical authority.” At 36. The state legislature, stated the United Supreme Court, embraced the theory which recognized vaccination, “as at least an effective if not the best-known way in which to meet and suppress the evils of the small pox epidemic that imperiled an entire population.” At 31.

The nation’s highest court had no difficulty characterizing small pox as a dangerous and contagious disease. “If vaccination strongly tends to prevent the transmission or spread of this disease, it logically follows that children may be refused admission to the public schools until they have been vaccinated.” At 34.

Interestingly, Justice Harlan was willing to look at what other countries had done. The defense was that the vaccination could cause serious and permanent injury to the health of the person vaccinated. There were possible side effects that could be dire. The Court recognized this concern and did not easily write it off, but nevertheless determined that fears of vaccine side effects were less important than the benefits of the vaccination.

We are not prepared to hold that a minority, residing or remaining in any city or town where small pox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all....

The Court did leave a door open to vaccine objection just a tad. In the case of a person who could show that he was not fit for vaccination, by reason of his condition, that “would seriously impair his health or probably cause his death,” the Court might rule differently. The Court went on to state that no such case had been presented to the United States Supreme Court.

The Court noted that the case before the Justices concerned a person who was in perfect health and a fit subject for vaccination. The protection of the public health and public safety easily was found to be superior to the objections based upon personal conscience, individual freedom or the right to damage one’s own body.

If this all sounds familiar, it should. The same arguments are being made today by those who object to the Covid vaccination. The real issue concerns the safety, efficacy

and utility of the vaccine based upon hundreds of millions of people who have received the vaccine worldwide in the last year.

I recall first reading *Jacobson vs. Massachusetts* in law school. Like many law students, we debated just how far the police power can go in permitting courts to decide what is best and right for our population. Do the courts act as moral, social or scientific overseers determining what is best for the entire population? Some would argue that Justice Harlan took this role. The dissents of Justice Brewer and Peckham deserve evaluation as well.

The debate over the seesaw of individual rights and liberties as opposed to the exercise of the police power has been an issue in this nation since its founding and is likely not to end anytime soon.

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