

Covid-19 and Abortions

Recently I was interviewed on a radio program about the failure of the Supreme Court of the United States to grant an injunction in the case of *Whole Women's Health vs. Reeve*, 594 U.S. ____ (2021) and, in the same interview, I was questioned about Governor Wolf's mandate for students to wear masks in schools. One would think that the two issues have nothing to do with one another but that is not the entire story.

An expanding notion of civil rights and liberties, begun during the Warren Court, has put conservatives in the position of relying upon liberal case law. It used to be that the First Amendment, for example, was utilized to prevent the establishment of religion by the state, until conservatives realized that the First Amendment also protected their rights to religious practice. The courts have had no trouble addressing a parent's refusal to permit blood transfusions for children; the religious practice of snake bites; and use of the hallucinogenic peyote by Native Americans. In general, the police power of the state to protect individuals, was said to be paramount over individuals' rights and liberties, even if based upon religious practice.

In 1905, the United States Supreme Court decided *Jacobson vs. Massachusetts*, 197 U.S. 11. A Massachusetts statute required small pox vaccination. Mr. Justice Harlan, delivering the Opinion of the Court, with two dissenting Opinions, wrote that the police power of the state was superior to individual objections to the vaccination. That Opinion had more to do with police powers than the wisdom of vaccinations.

According to the great historian of the American Revolution, David McCollough, Washington vaccinated his troops against small pox which gave the colonists a major edge over the often ill redcoats. Washington survived small pox in his one trip outside the United States, to the Caribbean, and realized that it was because of his exposure to small pox.

However, *Jacobson vs. Massachusetts* is 116 years ago. Thanks to developments since then, we now have a very different notion about individual rights and liberties. Justice Harlan and his court would have laughed at a constitutional right to same sex marriage under *Obergefell vs. Hodges*; the right to own a handgun without regulation in *Heller vs. D.C.*; the right to an abortion during the first trimester in *Roe vs. Wade* and the right to sell/purchase birth control set forth in *Cantwell vs. Connecticut*.

The concept of individual rights and liberties providing a remedy for someone to oppose a mask mandate or vaccinations is not found anywhere in the United States Constitution, but either are many of those other "rights" that we have now come to accept as standard.

In *Whole Women's Health vs. Reeve*, the majority had to jump through some hoops to find that an injunction was not appropriate because of "complex and novel antecedent procedural questions...." at Page 1 of slip opinion. The majority went on to state that it is "unclear" whether the named defendants can or will enforce the Texas law and the sole-private citizen respondent filed an affidavit stating that he has no present

intention to enforce the law. In the meantime, the law permits plenty of other people to seek its enforcement. The dissenters expressed concern about the right to abortion being chilled during the course of the litigation.

The question that state and federal courts will eventually decide is whether there is a constitutional right found in the penumbra of the First or Fourteenth Amendment to resist facemask mandates and vaccination green cards, which was hitherto unknown to the courts and certainly not accepted by *Jacobson vs. Massachusetts*. As culture, society and the press evolve, so does our appreciation for individual rights and liberties. The balance between the common good and necessary health measures is informed by the overall view of the United States Supreme Court in terms of the nature and extent of constitutional protections. True that the Bill of Rights was added in order to encourage reluctant states to sign onto the new federal Constitution that became effective in 1789. That Bill of Rights was crafted to afford protections sought by citizens nervous about intrusive monarchical government. Today, the Bill of Rights is invoked as protection for individual, personal philosophical concerns.

Whether *Jacobson vs. Massachusetts* is still good law or will be restricted to the facts of the specific epidemic ongoing at that time remains to be seen. Those who aggressively assert a woman's right to choose, without interference from the government, must necessarily take a different view to the extent that they do not support an individual's right to refuse healthcare measures. Both points of view, the right to free choice over the growing fetus as opposed to the determination to reject facemasks and vaccines, implicate our notion of just what an orderly society consists of.

The debate between the federalists and the anti-federalists has come back to haunt us in what we now call right wing/left wing political jousting.

CAR/srb

*Rieders, Travis, Humphrey,
Waters & Dohrmann
161 West Third Street
Williamsport, PA 17701
(570) 323-8711 (telephone)
(570) 323-4192 (facsimile)*

Cliff Rieders is a Board-Certified Trial Advocate in Williamsport, is Past President of the Pennsylvania Trial Lawyers Association and a past member of the Pennsylvania Patient Safety Authority. None of the opinions expressed necessarily represent the views of these organizations.