

1955

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Recommended Citation

Fluoridation - Is It Constitutional? Yes, 24 Fordham L. Rev. 674 (1955).

Available at: <https://ir.lawnet.fordham.edu/flr/vol24/iss4/10>

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if the water in unaffected, it must then merely act as a common carrier. The whole purpose of the fluoridation program is to improve, by chemical means, the human consumer. Why such a procedure is not deemed "medication" is puzzling indeed.

In short, it is the contention of this writer that we are drifting away from a sound principle which clearly and unerringly established a standard for determining the balance between the rights of the community to protection from public dangers and the rights of the individual to freedom of action, toward one that promises enforced improvement of the masses at the necessary cost of denying the individual the right to bodily integrity. To place it in general terms, that unless we redefine "reasonableness" to include, as formerly, the concept of public necessity arising from the pressure of great dangers, and not merely "convenience" or conduciveness, as interpreted in the light of recent judicial opinions, then due process as a guarantee against unwarranted intervention under the police power is on the wane.

It is urged that in present day compulsory health cases, a return be made to the emergency rule initiated in *Jacobson v. Massachusetts* when violation of personal liberty is the constitutional issue. Where such measures allegedly are violative of the free exercise of religion, it is also urged that a precedent be established by the application of the "clear and present danger test."⁵²

Finally, let it be remembered that ". . . the issue before us encompasses far more than the rights of one individual. It is in such ways as this, if at all, that our basic liberties will be lost. As a people we will rise quickly to defend our freedom from brazen dictators, foreign or domestic. Can we, however, withstand the insidious erosion produced by a multiplicity of little instances where, as here, a guaranteed right is set aside because it interferes with what is said to be good for us?"⁵³

FLUORIDATION — IS IT CONSTITUTIONAL? YES

The adoption of fluoridation programs by state legislatures in various sections of the country,¹ has revived the age-old problem of personal liberty versus governmental authority. Fluoridation, comparable to other forms of health legislation in the past,² has been met with objections that reflect the distaste,

52. See note 21 supra.

53. *State ex rel. Holcomb v. Armstrong*, 39 Wash. 2d 860, 873, 239 P. 2d 545, 553 (1952) (dissenting opinion).

1. *De Aryan v. Butler*, 119 Cal. App. 2d 674, 260 P. 2d 98 (1953); *Kraus v. Cleveland*, 116 N.E. 2d 779 (Ohio C.P. 1953), aff'd, 121 N.E. 2d 311 (Ohio Ct. App. 1954), aff'd, 163 Ohio St. 559, 127 N.E. 2d 609 (1955); *Chapman v. Shreveport*, 225 La. 859, 74 So. 2d 142 (1954); *Dowell v. Tulsa*, 273 P. 2d 859 (Okla. 1954); *Kaul v. City of Chehalls*, 45 Wash. 2d 616, 277 P. 2d 352 (1954).

2. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination); *Shapiro v. Lyle*, 30 F. 2d 971 (W.D. Wash. 1929) (food inspection regulations); *People v. Vogelgesang*, 221 N.Y. 290, 116 N.E. 977 (1917) (practice of medicine without a license); *Guarino v. City of Niagara Falls*, 184 Misc. 57, 50 N.Y.S. 2d 865 (Sup. Ct. 1944) (maximum working hours).

inherent under our form of government, toward any measure compulsory in nature.

It is difficult to understand the unanimity of the courts in their approval of fluoridation programs, despite these objections, without first being aware of what fluoridation is and what it is capable of accomplishing. While tooth decay does not carry the ominous connotations associated with smallpox or any other potentially fatal illness, nevertheless, the destructive qualities of tooth decay upon the general health of the community are well recognized by authorities.³ Thus, with tooth decay placed in its proper perspective as an existing health problem, public authorities soon discovered that communities whose supply of drinking water in its natural state contained fluorine had a much lower rate of tooth decay than those whose supply did not.⁴ Consequently, the fluoridation program will only affect those areas lacking naturally fluoridated waters.⁵ The object of the program is to supplant this deficiency by artificially adding fluoride ions to the municipality's drinking water thereby greatly reducing the incidence of tooth decay.

Yet, despite its beneficial aspects, fluoridation like any other compulsory measure will of necessity give rise to constitutional considerations that exist in that grey area of the law where the rights of the individual end and those of the state begin. Upon what basis does the government predicate its authority to enact legislation of this type? And if the government has such authority what factors must exist before this power may be invoked? And further, will the exercise of this power unjustly infringe upon the personal freedom of the individual?

At the outset, a clear distinction must be made between the function of the legislature and the function of the court. This distinction is adequately presented by the United States Supreme Court in the case of *Powell v. Pennsylvania*.⁶ The Court in deciding that it was within the police power of the state to prohibit the use of oleaginous substances other than that of unadulterated milk or cream from unadulterated milk to manufacture substitutes for butter or cheese, stated: "It is not a part of their [the Court's] functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great,

3. Among the professional organizations that have investigated the problem and approved the program are: The American Dental Society; Council of Pharmacy and Chemistry of the American Medical Society; American Public Health Association; American Association of Public Health Dentists; State and Territorial Health Officers Association; United States Public Health Service; The National Research Council; The Commission Report to the President of the United States in the Health Needs of the Nation. *Kraus v. Cleveland*, 116 N.E. 2d 779 (Ohio C.P. 1953), *aff'd*, 121 N.E. 2d 311 (Ohio Ct. App. 1954), *aff'd*, 163 Ohio St. 559, 127 N.E. 2d 609 (1955); see also *Chapman v. Shreveport*, 225 La. 859, 74 So. 2d 142 (1954).

4. See note 1 *supra*.

5. *Kaul v. City of Chehalis*, 45 Wash. 2d 616, 277 P. 2d 352 (1954).

6. 127 U.S. 678 (1888).

and the discretion which that department of government has, in the employment of means to that end, is very large."⁷

To promote the general welfare the legislature resorts to the exercise of its police power. In one of the earliest and most quoted definitions of police power, it was said to be the power ". . . to make . . . all manner of wholesome and reasonable laws . . . as they [the legislature] shall judge to be for the good and welfare of the commonwealth"⁸

That public health is a legitimate object of police power is a fundamental axiom in our system of jurisprudence. Furthermore, public health is listed as a proper object of police power in all definitions given by leading authorities.⁹ It has been equally well settled that it is the legislature which decides what the communities' needs are in the area of public health. Therefore, once a legislative body has investigated a particular health problem and has gathered expert evidence on the matter, it is they who decide what measures if any, are to be adopted to cope with the particular health problem that confronts them.

However, it is not to be assumed that in determining this question no recourse to the court may be had at all. On the contrary, the use of the courts may be invoked to determine whether the legislatures have exercised their police power in a reasonable and lawful manner.¹⁰ There are then, definite limits imposed upon the legislature's exercise of its police power by the federal and state constitutions; with the function of the court being to interpret such constitutional restrictions as they may or may not affect the police power.

In order to comprehend recent court decisions holding that it is a proper function of the legislature's police power to adopt fluoridation programs, it is necessary to note certain characteristics of that power.¹¹ This power of government is actually synonymous with a government's sovereignty. One main distinguishing feature of police power from other governmental powers is its elasticity that enables the government to cope with the diversity of problems that are constantly facing them. For example, the police power is sufficiently diversified in scope to deal with the maximum working hours of barbers¹² on the one hand, and to establish requirements for the sale of milk¹³ on the other. But this does not mean to infer that any function which the state deems to take upon itself would be granted to the state by an overly elastic version of

7. *Id.* at 685.

8. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 85 (1851).

9. *Eubank v. Richmond*, 226 U.S. 137 (1912); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Kraus v. Cleveland*, 163 Ohio St. 559, 127 N.E. 2d 609 (1955). *Rottschaeffer*, *Constitutional Law* § 234 (1939), defines police power as ". . . the power of a state to regulate its internal affairs for the protection and promotion not only of the public health, safety and morals, but also of the general convenience, prosperity and welfare." See also 6 *McQuillin*, *Municipal Corporations* § 24.01 (3d ed. 1949); 3 *Willoughby*, *Constitution of the United States* § 1176 (1929).

10. *McLean v. Arkansas*, 211 U.S. 539 (1909); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

11. 6 *McQuillin*, *Municipal Corporations* § 24.03 (3d ed. 1949).

12. *Guarino v. City of Niagara Falls*, 184 Misc. 57, 50 N.Y.S. 2d 865 (Sup. Ct. 1944).

13. *People ex rel. Lodes v. Dept. of Health*, 189 N.Y. 187, 82 N.E. 187 (1907).

the police power. For the exercise to be a valid one, it is necessary that there exist a reasonable relationship between the end desired and the means which the legislature chooses to attain that end.¹⁴ No statute may be arbitrarily invoked or provide for a course of action in a discriminatory or partial manner.¹⁵ Nor may a statute concerning public health be invoked unless a situation exists that makes it reasonably necessary for the legislature to act.¹⁶

These basic boundaries have been noted by the courts in determining if there exists a proper relationship between the exercise of police power and public health and were succinctly stated in *Kraus v. Cleveland*.¹⁷ They are: (1) such legislation must be reasonable and necessary to secure the object thereof; (2) it must not contravene the federal or state constitutions, nor infringe upon any rights granted or received thereby; (3) it cannot be exercised in such an arbitrary and oppressive manner as to justify the interference of the courts to prevent wrong and oppression.¹⁸ The court stated these guides in discussing the relationship of police power to the specific public health measure of fluoridation.

The test then becomes, does there exist a situation reasonably necessary in its nature to warrant positive legislative action? Moreover, if such action is taken, does it, in its method of operation, infringe upon individual freedom to such a degree as to vitiate its originally worthwhile objectives?

The existence of this reasonably necessary situation is, in truth, a vague concept no more susceptible of being precisely defined than police power itself. Yet, for the immediate purpose of determining the legality of fluoridation it is sufficient to understand that there does exist a clear distinction between a reasonably necessary situation and a state of emergency.¹⁹

This distinction becomes important in measuring the effects of the case of *Jacobson v. Massachusetts*,²⁰ the leading United States Supreme Court decision involving a compulsory health measure. In the *Jacobson* case, the Court decided it was not an abuse of a state's police power to force a citizen to undergo compulsory vaccination. Generally, the Court expounded the principles that it is within the domain of the state's police power to enact compulsory public health statutes and that the liberty granted individuals by the constitutions is not in all instances wholly freed from restraint. The Court thus set the pattern that has been consistently followed from that time to the present by the majority of the cases concerned with public health measures, the recent cases on fluoridation proving no exception.²¹

14. *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Logan & Bryan v. Postal Telegraph & Cable Co.*, 157 Fed. 570 (1903); *Sperry & Hutchinson Co. v. Hoegh*, 65 N.W. 2d 410 (Iowa 1954); *Chapman v. Shreveport*, 225 La. 859, 74 So. 2d 142 (1954).

15. *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

16. *Graves v. Minnesota*, 272 U.S. 425 (1926); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

17. 116 N.E. 2d 779 (Ohio C.P. 1953), aff'd, 121 N.E. 2d 311 (Ohio Ct. App. 1954), aff'd, 163 Ohio St. 559, 127 N.E. 2d 609 (1955).

18. 116 N.E. 2d at 795.

19. See note 1 supra.

20. 197 U.S. 11 (1905).

21. See note 1 supra.

Yet, it has been argued, with a consistency that seems incredulous in the light of the weight of authority, that the rules of law expounded in the *Jacobson* case are not applicable to the fluoridation issue.²² This argument is founded upon the premise that the *Jacobson* case was confronted with a singular type situation, that is, a smallpox epidemic, an emergency, and therefore that everything the Court decided must be limited to that type of factual situation. However, the cases that have followed do not uphold that contention.²³ It has been the court's holding in subsequent cases that an emergency is not necessary and that an epidemic is not a prerequisite to the valid exercise of this power.²⁴ In the most recent case passing on the fluoridation issue, the court in finding that an emergency was not needed according to the great weight of authority stated: ". . . it is sufficient to say that there is no foundation in law for such a premise Clearly neither an overriding public necessity or emergency nor infectious or contagious disease are the criteria which authorize the exercise of the police power in relation to public health."²⁵ Thus the majority of the courts have justifiably concluded that a situation which reasonably necessitates attention by the legislature is a valid basis for the exercise of the police power and not an emergency.

The problem then becomes a question of whether or not it is reasonably necessary to the public health to enact a fluoridation program. And in order to resolve this it must first be determined that fluoridation is necessary to improve and protect dental health and that dental health is an integral part of the public health of the community. The courts have taken judicial notice of the close relationship that exists between dental health and the general health of the community.²⁶ As to the problem of whether it is necessary to fluoridate the water supply to eliminate the serious consequences of dental caries, it has been the consensus of opinion of the overwhelming majority of experts who have investigated this problem, that it is the only practical way efficiently to check this disease.²⁷ It may be noted that this is not the unanimous opinion of all the experts nor need it be before legislative action is taken. It has been held that a common belief may be acted upon although this belief is not universally held.²⁸

Finally, a successful fluoridation program necessarily calls for action on the part of the municipal government and may not be left to the individual care of the private citizen on a voluntary basis. The courts, in the cases dealing with fluoridation, have decided that several existing factors place this responsibility upon the municipality rather than the individual.²⁹ These factors are that fluorides if not used in proper amounts can be extremely dangerous and in

22. *Ibid.*

23. *Buck v. Bell*, 274 U.S. 200 (1927); *Zucht v. King*, 260 U.S. 174 (1922).

24. *Ibid.*

25. *Kraus v. Cleveland*, 163 Ohio St. 559, 561, 127 N.E. 2d 609, 611 (1955).

26. *Dowell v. Tulsa*, 273 P. 2d 859 (Okla. 1954).

27. See note 3 *supra*.

28. *Matter of Viemeister*, 179 N.Y. 235, 72 N.E. 97 (1904).

29. *Chapman v. Shreveport*, 225 La. 859, 74 So. 2d 142 (1954); *Kraus v. Cleveland*, 116 N.E. 2d 779 (Ohio C.P. 1953), *aff'd*, 163 Ohio St. 559, 127 N.E. 2d 609 (1955).

order for worthwhile effects to be produced the fluoride ion must be present in the drinking water at all times and not administered sporadically. Moreover, the economic burden of placing the program on an individual voluntary basis might prove difficult for the lower income groups. With these facts controlling, the courts have deemed it reasonably necessary that the municipal government administer the program.

Therefore, it has been the unanimous opinion of all but one of the courts, that one being subsequently reversed,³⁰ recently dealing with fluoridation,³¹ that a situation does exist sufficiently serious in its nature to warrant the legislature to exercise its police power based upon the workable hypothesis of reasonable necessity.

No discussion of this particular problem would be complete without determining whether or not the fluoridation program will deprive an individual of his constitutionally guaranteed personal freedoms. As it has been previously stated, the courts are cognizant of the limitations that are imposed upon police power by the constitution and are constantly striving to keep this power within such limits. Very often challenges to compulsory public health statutes have been presented to the courts based upon the theories that there has been a deprivation of individual religious freedom, a violation of the equal protection clause of the United States Constitution or the introduction of a form of socialized medicine into our governmental system.

RELIGIOUS FREEDOM

The problem of an individual's religious freedom is indeed a serious one and is not to be bantered about by legal niceties or used at convenience for the advancement or defeat of some legal objective. However, in order to properly understand the balance achieved by the courts between an individual's religious freedom and a state's prerogative to act despite a particular religious faith, it becomes necessary to determine what meaning the courts attribute to the phrase "exercise of religious liberty."

The mere fact that a religious belief is opposed to a certain act of the state is no bar to the state's authority to act.³² The great weight of authority leaves no doubt that the religious liberty granted by the federal and state constitutions is not in all circumstances free of restraint by state regulation.³³

A general principle applicable to cases of this character was well defined by Justice Cardozo, in his concurring opinion in the case of *Hamilton v. Board of Regents*.³⁴ The learned Justice, in discussing the proper balance to be achieved in this sphere of the law stated: "The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of govern-

30. *Chapman v. Shreveport*, No. 116, 282, 1st Dist. Ct. La., rev'd, 225 La. 859, 74 So. 2d 142 (1954).

31. See note 1 supra.

32. *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934).

33. *Poulos v. New Hampshire*, 345 U.S. 395, 402-03 (1953); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

34. 293 U.S. 245 (1934).

ment."³⁵ The Justice made this statement while deciding that the state has the right to insist on military training despite a person's religious belief that such training was immoral. In the same case Justice Cardozo by way of analogy stated that if the state was deprived of this right, then the next logical step would be to deprive the government of the right to tax in time of war any individual who has religious objections to war.³⁶ For the courts to move in this direction and support the premise that a government may act, only if in so acting they do not offend the religion of all, would severely stifle governmental authority to the detriment of the common good.

This is not to say that the position of the individual is held completely subservient to the whim of the state. The individual is amply protected from abuse by actual distinctions that the courts make whenever testing the constitutionality of any compulsory measure. There is a basic distinction made between what a person may believe and how a person may act.³⁷ A person's beliefs are his own affairs and are subject to no restrictions. However, the manner in which a person acts will naturally affect those around him and here the government may impose restrictions whenever it deems it necessary.³⁸

In the last analysis the courts will examine each particular statute in issue making the necessary distinctions where they must. For example, in the case of *West Virginia State Board of Education v. Barnette*,³⁹ the United States Supreme Court considered the problem of whether or not school children should be compelled pursuant to state authority to salute the flag if such be considered by their religion an idolatrous act. The children were forbidden by their parents to attend classes under such circumstances, and as a result became susceptible to fines and punishment as truants. With this peculiar situation in mind, the Court struck down the state's regulation as unconstitutional since those whose religious scruples prohibited compliance were subsequently subject to punitive sanction. In many instances, balance is achieved in this grey area where the rights of the individual begin and those of the state end by judicial common sense,⁴⁰ the jurist keeping in mind the multitude of religions that exist throughout the nation. This then is the background of judicial interpretation of constitutional guarantee of religious freedom to which the particular issue of fluoridation must conform.

All the reported decisions involving the specific issue of religious freedom and

35. *Id.* at 268.

36. *Id.* at 268.

37. *Breard v. Alexandria*, 341 U.S. 622 (1951); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

38. *Reynolds v. United States*, 98 U.S. 145 (1878) (Mormon convicted of polygamy); *Commonwealth v. Herr*, 229 Pa. 132, 78 Atl. 68 (1910) (prohibited wearing religious dress).

39. 319 U.S. 624 (1943).

40. *State ex rel. Weiss v. District Board of City of Edgerton*, 76 Wis. 177, 200, 44 N.W. 976, 975 (1890). The court, while upholding petitioner's claim that the reading of the St. James version of the Bible violated their religious belief, indicated this application of judicial common sense by setting forth the following example: "For example, a Mormon may believe that the practice of polygamy is a religious duty; yet no court would regard his conscience in that behalf for a moment, should he put his belief into practice."

fluoridation have followed these principles. They have noted with care the distinction between a compulsory act with a punitive sanction and an act without one. In *Kraus v. Cleveland* the lower court concluded its discussion of fluoridation and religious freedom with the statement: "As previously indicated, freedom to act in the exercise of religion is subject to regulation for the protection of society. When government in the proper and lawful exercise of its police power seeks to attain a permissible end, in this instance a health measure both necessary and desirable, the constitutional guaranty under discussion [religious liberty] must yield to the regulation in the interests of the public welfare."⁴¹ The courts that have dealt with fluoridation have followed the pattern set by the weight of authority in negating the proposition that a municipal fluoridation program is violative of an individual's constitutional guaranty of religious freedom. In the practical administration of government, as well as in logic, no other course could be adopted.

EQUAL PROTECTION

It has been contended by the opponents of fluoridation programs as with the opponents of more ancient programs of health legislation,⁴² that such a program is a violation of the equal protection clause of the fourteenth amendment.⁴³ The reality of Justice Holmes' remark that the equal protection clause is the ". . . usual last resort of constitutional arguments . . ."⁴⁴ is sharply brought to mind when the argument is made that since the program will only benefit children it is discriminatory. The Justices who have heard this argument have pointed to the fallacy of this position.⁴⁵ It is not necessary to the passage of any statute that its objectives should encompass the entire community.⁴⁶ This is not the meaning that the courts have attributed to equal protection. For the courts to maintain such a premise would be to contradict all reason.

A statute would be a violation of the equal protection clause if it affected two people, *all* circumstances and conditions being equal, in a different manner, to the prejudice of one of the two. For example, a law providing for the minimum working hours for minors is valid so long as it affects all minors in an equal manner; it is not violative of the equal protection clause for the reason that it does not affect adults since adults would not fulfill the requirement of all circumstances and conditions being equal. The fluoridation statute affects two classes in two different ways since fluorides are more beneficial to children than to adults.⁴⁷ However, such a twofold affect will not give rise to

41. 116 N.E. 2d 779, 808 (Ohio C.P. 1953), *aff'd*, 121 N.E. 2d 311 (Ohio Ct. App. 1954), *aff'd*, 163 Ohio St. 559, 127 N.E. 2d 609 (1955).

42. *Zucht v. King*, 260 U.S. 174 (1922).

43. U.S. Const. amend. XIV, § 1.

44. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

45. *Chapman v. Shreveport*, 225 La. 859, 863, 74 So. 2d 142, 146 (1954). The court stated: "A health measure is not necessarily arbitrary because it affects primarily one class. . . . Ultimately, of course, the fluoridation will benefit the whole population because the retarding of decay extends into adult life of the child. . . ."

46. *Miller v. Wilson*, 236 U.S. 373 (1915); *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358 (1910).

47. See note 45 *supra*.

a valid objection upon the grounds of discrimination since the two groups affected in varying degrees do not present a situation *equal* in circumstances and conditions. Add to this the factor that it is not prejudicial, that is, not harmful to adults, then it is easily understandable that the courts will not uphold the contention that fluoridation is a violation of the equal protection clause.

This concept of equal protection is not easily grasped since there are many laws that upon cursory examination would certainly seem prejudicial and discriminatory but yet the courts have held otherwise. A classic example of this is a statute forbidding *women* to work as bartenders but at the same time making an exception in favor of *women* who are either the wives or daughters of tavern owners.⁴⁸ The United States Supreme Court did not consider this either discriminatory or partial within the meaning of the equal protection clause of the fourteenth amendment. In this statute *all* the wives or daughters were included in the exception. As to the effects of fluoridation *all* the children will be benefited in an equal manner, as *all* the adults will receive the benefits to a lesser degree.

Moreover, the unique position of children in society is a factor that must be considered.⁴⁹ In determining the legality of a statute, the courts will consider the broader implications which the beneficial aspects will provide for the community at large, looking not only to the present but to the future as well. Whatever is done for the benefit of all the children of today's society is done naturally for the benefit of all society in the next generation. The courts can never divorce reality from legal considerations if their result is to be truly beneficial to the entire community.

The courts in determining this issue of equal protection, will always consider the overall objectives of the statute and the practical methods available to the government for achieving these ends. Consequently, the courts in the fluoridation cases have found no difficulty in approving the program and in establishing that such a health statute does not deprive any citizen of the equal protection of the laws.⁵⁰

SOCIALIZED MEDICINE

If the fluoridation of a municipality's water supply was in fact the practice of medicine then it certainly would be the beginning of socialized medicine. Socialized medicine would be opposed, in spirit if not in fact, to our principles of government. It would deprive the individual of his right to care for his own health in the manner he deems best. But before it can be considered socialized medicine it must first of all be the practice of medicine.

The courts have pursued two approaches to this particular problem. First, they have analyzed the elements of the legally accepted definition of the practice of medicine and compared these elements with fluoridation;⁵¹ secondly,

48. Mich. Stat. Ann. § 18.990 (1) (Cum. Supp. 1947), *Goesaert v. Cleary*, 335 U.S. 464 (1948).

49. *Miller v. Wilson*, 236 U.S. 373 (1915).

50. See note 1 *supra*.

51. *Kraus v. Cleveland*, 116 N.E. 2d 779 (Ohio C.P. 1953).

they have supplemented this legal approach by applying rules of reason and common sense.⁵²

In their approach from the technical position as to what is the practice of medicine, the courts have noted three major elements that are necessarily present to constitute such a practice. In order for an act to be the practice of medicine there must exist a personal relationship between physician and patient; the act must include diagnosing as well as treating human beings; and there must be a public manifestation by the physician as to his ability and purpose to heal.⁵³ It is obvious that there is no personal relationship nor any public manifestation on the part of the municipality to cure anyone. The manifest purpose of fluoridation is to prevent the growth of dental caries, not cure or do away with those presently in existence.

The purpose behind the legislatures' action was the solving of a public health problem attendant upon the entire community; there is no diagnosing of each person nor is there the subsequent application of fluorine according to the need. The municipality is adding a fixed amount of fluoride ions to the entire supply of the community's drinking water.⁵⁴

Also, in relation to the problem of whether fluoridation is or is not medication, one factor in particular is worthy of consideration. This is, that the municipality in adding fluorides to the drinking water is supplying an element that is found in water in its natural state in other areas. If a comparison is to be made it certainly would be more analogous to the chlorination of drinking water than the administering of penicillin.⁵⁵

This factor leads to the practical common sense approach that places the issue of fluoridation in its proper perspective. This approach was adequately summed up by the court in *Dowell v. Tulsa*⁵⁶ in which the court stated: ". . . in the contemplated water fluoridation, the City of Tulsa is no more practicing medicine or dentistry or manufacturing, preparing, compounding, or selling a drug, than a mother would be who furnishes her children a well balanced diet, including foods containing vitamin D and calcium to harden bones and prevent rickets, or lean meat and milk to prevent pellagra. No one would contend that this is practicing medicine or administering drugs."⁵⁷ The courts then, in both approaches, negate the idea that a municipality that fluoridates the water supply is engaged in the practice of medicine. Naturally,

52. See note 26 supra.

53. *Chalmers-Francis v. Nelson*, 6 Cal. 2d 402, 57 P. 2d 1312 (1936); *State v. Catellier*, 63 Wyo. 123, 179 P. 2d 203 (1947).

54. See note 5 supra.

55. In answering the argument that chlorination is distinguishable from fluoridation, since the former kills germs in the water while the latter will not, the court stated: "To us it seems ridiculous and of no consequence in considering the public health phase of the case that the substance to be added to the water may be classed as a mineral rather than a drug . . . just as it is of little, if any, consequence whether fluoridation accomplishes its beneficial result to the public health by killing germs in the water (Chlorination), or by hardening the teeth (Fluoridation) . . ." *Dowell v. Tulsa*, 273 P. 2d 859, 863 (Okla. 1954).

56. 273 P. 2d 859 (Okla. 1954).

57. *Id.* at 864.

if the act of fluoridation is not the practice of medicine, no possible interpretation of the facts can make it mass medication or socialized medicine.

CONCLUSION

Fluoridation then, demonstrates the balance that the courts have achieved once again in the grey area of law concerned with any conflict that may arise between personal liberty and governmental authority. According to law expounded by past decisions involving public health statutes of all types, the approval of fluoridation was to be expected. In order to achieve a worthwhile balance, the courts have had to adopt a practical approach, treating each individual problem that arose in this field of legislation in the light of its own facts. They have been able to accomplish much in adopting the law to constantly changing conditions by basing their decisions upon the premise of police power operating within an area of reasonable necessity. The courts, cognizant of the constitutional limitations on police power have unanimously held that the fluoridation program is not detrimental to any particular class. It has been resolved with finality that it is not a form of socialized medicine either openly or by stealth.

The court's decisions have strengthened the tradition of a living constitution, allowing an eighteenth century document to advance with still another method of public health improvement. This is not to say that there are not instances wherein individual dignity must take precedence over a scientific fact. In this respect, there have been rulings in which the courts have permitted the legislature to go to excess.⁵⁸ Fluoridation, however, is well within the extreme boundary line of the sterilization of mental incompetents.

The success of any government in any area of public affairs does not rest upon extreme measures. The attainment of a balance between the individual and the state enables the business of government to progress in an orderly manner, avoiding for the most part, the evils inherent in extreme individualism as well as those found in the socialized state. Fluoridation then, lies within this area of legislative moderation and must be added to chlorination, minimum wages, pasteurization of milk, maximum working hours and many other compulsory statutes enacted by the legislatures and permitted by the courts in the interests of the real needs of the community.

58. *Buck v. Bell*, 274 U.S. 200 (1927).