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# Constitutional Law -- Due Process -- Fluoridation of Water Supplies

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CONSTITUTIONAL LAW — DUE PROCESS — FLUORIDATION OF WATER SUPPLIES. — In 1953 the California Court of Appeals held valid an ordinance of the city of San Diego authorizing the fluoridation of its water supply.<sup>1</sup> By 1956 similar ordinances were ruled constitutional by the high courts of Louisiana,<sup>2</sup> Oklahoma,<sup>3</sup> Ohio,<sup>4</sup> Washington,<sup>5</sup> Wisconsin<sup>6</sup> and Oregon.<sup>7</sup> Only the courts of North Dakota<sup>8</sup> and Indiana<sup>9</sup> voiced qualified objections. In the short space of four years the legality of fluoridation seemed to be well established.<sup>10</sup>

Yet, six years later cases questioning the validity of fluoridation ordinances and the authority of municipal governments to enact such ordinances as "health measures" are still finding their way to the courts; most noteworthy of which are two decided late in 1961, *Wilson v. City of Council Bluffs*<sup>11</sup> (Iowa) and *Readey v. St. Louis County Water Co.*<sup>12</sup> (Missouri). These cases even today raise the question of whether fluoridation can be considered a "settled" matter.<sup>13</sup>

The approach of this note will be to analyze the law of fluoridation in terms of these two most recent cases in the belief that they exemplify current thinking on the subject and indicate the direction of future development.<sup>14</sup>

Necessary to an understanding of the legal issues involved is some knowledge of the fluoridation problem generally. The substance fluorine first came into prominence when scientists began to notice an apparent relation between a condition of the teeth known as dental fluorosis and a lack of dental cavities. While dental fluorosis left the teeth in a mottled and sometimes unsightly condition, it appeared that such teeth were almost immune to tooth decay.<sup>15</sup>

On further investigation it was found that this condition appeared only in areas where there was a high incidence of natural fluorine, and it has now been established that the presence of fluorine in water does result in a hardening of tooth enamel thereby making the teeth more resistant to decay.<sup>16</sup>

Since tooth decay has been a steadily increasing American problem, it was not

1 De Aryan v. Butler, 119 Cal. App. 2d 674, 260 P.2d 98 (1953), *cert. denied*, 347 U.S. 1012 (1954).

2 Chapman v. City of Shreveport, 225 La. 859, 74 So. 2d 142, *appeal dismissed*, 348 U.S. 892 (1954).

3 Dowell v. City of Tulsa, 273 P.2d 859 (Okla. 1954), *cert. denied*, 348 U.S. 912 (1955).

4 Kraus v. City of Cleveland, 163 Ohio St. 559, 127 N.E.2d 609 (1955) *appeal dismissed*, 351 U.S. 935 (1956).

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

6 Froncek v. City of Milwaukee, 269 Wis. 276, 69 N.W.2d 242 (1955).

7 Baer v. City of Bend, 206 Ore. 221, 292 P.2d 134 (1956).

8 McGurren v. City of Fargo, 66 N.W.2d 207 (N.D. 1954).

9 Teeter v. Municipal City of LaPorte, 236 Ind. 146, 139 N.E.2d 158 (1956).

10 *E.g.*, Birnel v. Town of Fircrest, 53 Wash 2d 830, 335 P.2d 819 (1959). The court upheld a fluoridation ordinance specifically on the authority of Kaul v. City of Chehalis, 45 Wash. 2d 616, 277 P.2d 352 (1954).

11 110 N.W.2d 569 (Iowa 1961).

12 352 S.W.2d 622 (Mo. 1961), *appeal dismissed*, — U.S. —, 83 S.Ct. 20 (1962).

13 See Nichols, *Freedom of Religion and the Water Supply*, 32 SO. CAL. L. REV. 158, 176 (1959).

14 See, *Legal Aspects of the Fluoridation of Public Drinking Water*, 23 GEO. WASH. L. REV. 343 (1955) for an analysis of the 1953, 1954 fluoridation cases and *Fluoridation and Religion*, 2 CATH. LAW. 254 (1956) for a discussion of the 1956 case, Baer v. City of Bend, 206 Ore. 221, 292 P.2d 134 (1956).

15 See Dietz, *Fluoridation and Domestic Water Supplies in California*, 4 HASTINGS L. J. 1 (1952); and *Legal Aspects of the Fluoridation of Public Drinking Water*, 23 GEO. WASH. L. REV. 298 (1955) for summaries of the dental health findings relating to fluoridation.

16 Grissom, *Fluoridation in Preventive Dentistry, Its Implications for Public Health Nursing*, 9 NURSING OUTLOOK 84 (1961); Miller, *The Effects of Continuity of Residence and Drinking Water Source on Caries Incidence in Dothan, Alabama*, 61 J. AM. DENTAL ASS'N 457 (1960); and Shaw, *The Safety of Fluoridation*, 28 POST GRADUATE MEDICINE 641 (1960) contain more detailed analyses of the medical and dental aspects of fluoridation.

long before a proposal was made that a fluoride compound be introduced into the drinking water of those areas where it did not appear naturally. Experimentation showed that the addition of 1 to 1.5 parts of a fluoride compound to every million parts of water would result in a material decrease in the number of dental caries while causing only "mild," often "unnoticeable" mottling.<sup>17</sup>

The opponents of fluoridation generally concede that the presence of fluorine does have a beneficial effect as to hardening teeth and reducing tooth decay.<sup>18</sup> The principal objection has to do with side effects; namely, that artificial fluoridation has not been tested to the point where it can be said with any certainty that fluoridated water is safe for human consumption over a long period of time. It is pointed out that fluorine is classified as a poison and in doses of any considerable amount has much the same effect as arsenic.<sup>19</sup> The contention is that the amounts of fluorine introduced in water supplies, while appearing to be safe, cannot be fairly evaluated for some time yet. The reason given is that fluorine is a cumulative poison which builds up in the system gradually and ill effects may not be noticed for years.<sup>20</sup> It is also indicated that some people are allergic to fluorine while others have impaired bodily functions allowing it to build up more rapidly than usual.<sup>21</sup> The argument, therefore, is that the long-term effects of fluoridation are simply too unknown to warrant its introduction on a large scale.

It is out of this background that the legal battle over fluoridation has developed. The reasons most commonly urged on the courts for striking down compulsory fluoridation are four. First, the municipality lacks statutory authority to pass a fluoridation ordinance.<sup>22</sup> Second, even if authority can be implied from the terms of a statute, it is an abuse of police power resulting in deprivation of 14th Amendment due process and equal protection.<sup>23</sup> Third, fluoridating drinking water violates the

17 See Dietz, *supra* note 15.

18 But they do maintain that it tends to make teeth brittle with the result that when a cavity develops it is much more difficult to fill properly. See letter from Dr. G. W. Heard to R. C. Day, March 15, 1954, on file in the Notre Dame Law Library.

19 Prolonged intake of even relatively small amounts of fluorides is said to cause brittleness in the bones, decrease blood clotting, affect the thyroid gland and rate of growth in children, induce loss of hair, affect the nervous system and cause anemia. *Industrial Medicine and Surgery*, A.M.A.J., February 10, 1951. Proponents of fluoridation are convinced that the amounts injected into the water are so small that none of these symptoms are likely to occur.

20 Pilot projects to test artificial fluoridation were set up in 1945 in Brantford, Ontario, Grand Rapids, Michigan and Newburgh, New York. In 1946 projects were established in Sheboygan, Wisconsin and Marshall, Texas; in 1947 in Evanston, Illinois and Lewiston, Idaho. The results to date have disclosed no noticeable toxic side effects resulting from the fluoridation. However, it is maintained by opponents of fluoridation that it will take at least 30 years before any toxic effects are likely to appear. SPIRA, *THE DRAMA OF FLUORIDATION, ARCH ENEMY OF MANKIND* (1953).

21 Fluorine is largely passed out through the kidneys, therefore a person having an impaired kidney function could build up dangerous amounts of fluorine before a normal person. Instances of this have been reported but are probably still inconclusive. See *Readey v. St. Louis County Water Co.*, 352 S.W.2d 622 (Mo. 1961) for a résumé of the alleged side effects of fluorides.

22 *E.g.*, *Chapman v. City of Shreveport*, 225 La. 859, 74 So. 2d 142, *appeal dismissed*, 348 U.S. 892 (1954); *Kaul v. City of Chehalis*, 45 Wash. 2d 616, 277 P.2d 352 (1954); *De Aryan v. Butler*, 119 Cal. App. 2d 674, 260 P.2d 98 (1953), *cert. denied*, 347 U.S. 1012 (1954).

23 See Justice Hill's dissent in *Kaul v. City of Chehalis*, 45 Wash. 2d 616, 277 P.2d 352 (1954), and the District Court's unreported opinion, in *Chapman v. City of Shreveport*, quoted in part by the dissenters in that case. Both emphasized the distinction between "public" health and "private" health, contending that, since tooth decay is not a contagious disease, its prevention is a private matter not bearing a reasonable relation to public health and not within the purview of the state's police power.

It is also argued that fluoridation is a violation of the equal protection clause of the 14th amendment since the measure will serve to benefit only that portion of the population between the ages of six and twelve. The reply has been that the whole population need not be benefited directly by a measure in order for it to be a permissible exercise of police power. So long as the interest protected is of a sufficiently serious nature to become a matter of public concern it is a valid subject of police power. *Baer v. City of Bend*, 206 Ore. 221, 292 P.2d 134 (1956).

freedom of religion of certain sects who object to taking any form of medication.<sup>24</sup> Last, it is a violation of state or federal pure food and drug laws or is an unauthorized practice of medicine or pharmacy.<sup>25</sup>

In the first of the 1961 cases, *Wilson v. City of Council Bluffs*,<sup>26</sup> plaintiffs staked their entire case on the argument of lack of statutory authority and were able to enjoin enforcement of the city fluoridation ordinance on that ground. On appeal to the Supreme Court of Iowa, the State District Court was reversed and the injunction dissolved. The Supreme Court ruled that the right to fluoridate could be implied from the general power of a municipal corporation to pass such laws, "as shall seem necessary and proper to provide for the safety [and] preserve the health . . . of such corporation and the inhabitants thereof. . . ."<sup>27</sup> The Court held that the existence of statutes defining the authority of a municipality over its water supply did not preclude treatment of the water in a fashion not specifically mentioned in those statutes.

The District Court, in issuing the injunction had gone on the view that §§ 397.1<sup>28</sup> and 397.26<sup>29</sup> of the Iowa Code were intended to limit the general power of a municipality to prescribe for the health and welfare of its citizens as provided for in § 366.1.<sup>30</sup> Since there was no mention in either of these sections of a right to treat the water supply it was held that no such right existed.

The Supreme Court refused to accept this reasoning and indicated that the two statutes in question related only to the power of a city or town to purchase and maintain waterworks and that the manner in which the water could be purified or

In *Readey v. St. Louis County Water Co.*, 352 S.W.2d 622 (Mo. 1961) the plaintiffs emphasized deprivation of freedom of choice. This too was rejected.

24 The basis of this argument is that some religious sects, specifically Christian Scientists, object to taking any form of medication and to force them to drink fluoridated water is mass medication, violating their freedom of religion. The counterargument is that we have in the past limited freedom of religious action when the public need called for it, as in the case of compulsory vaccination. See Dietz, *supra* note 15 for the arguments favoring constitutionality of fluoridation; and Nichols, *Freedom of Religion and Water Supply*, 32 So. CAL. L. REV. 158 (1959) for contentions that fluoridation is a violation of freedom of religion.

25 The key to this argument is the assumption that fluoride, in the minute doses in which it is added to drinking water, is the same poison which was intended to be regulated by the various statutes. The cases have uniformly considered them to be different, though the difference be one of quantity only. *E.g.*, *Dowell v. City of Tulsa*, 273 P.2d 859 (Okla. 1954), *cert. denied*, 348 U.S. 912 (1955); *Kraus v. City of Cleveland*, 55 Ohio Op. 36, 121 N.E.2d 311, *aff'd*, 163 Ohio St. 559, 57 Ohio Op. 1, 127 N.E.2d 609, *appeal dismissed*, 351 U.S. 935 (1954).

26 110 N.W.2d 569 (Iowa 1961).

27 IOWA CODE § 366.1 (1958).

28 IOWA CODE § 397.1 (1958):

Cities and towns shall have the power to purchase, establish, erect, maintain, and operate within or without their corporate limits . . . waterworks, . . . , with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus, and other requisites of said works or plants, and lease or sell the same.

29 IOWA CODE § 397.26 (1958):

For the purpose of maintaining and protecting such works or plants from injury, and protecting the water of such waterworks from pollution, the jurisdiction of such city or town shall extend over the territory occupied by such works, and all reservoirs, mains, filters, streams . . . and other requisites of said works or plants used in or necessary for the construction, maintenance, and operation of the same, and over the stream or source from which the water is taken for five miles above the point from which it is taken.

30 IOWA CODE § 366.1 (1958):

Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, *preserve the health*, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof. . . . (Emphasis added.)

otherwise treated was left indefinite; apparently to be justified by the more general "health and welfare" provision of § 366.1.<sup>31</sup>

In both approach and outcome this case bears a resemblance to one of the first fluoridation cases, *Chapman v. City of Shreveport*<sup>32</sup> decided in 1954. There, as here, the lower court issued the injunction on the basis of a lack of authority by the city to pass such an ordinance, only to be overruled on appeal.<sup>33</sup>

The court in *Chapman* concluded that fluoridation of water bore a reasonable relationship to the public health and therefore was permissible under the terms of the city charter which granted the power, "to promote the general welfare of the city and the safety, health . . . and morals of its inhabitants. . ."<sup>33a</sup>

The plaintiffs in *Chapman* questioned whether fluoridation really was a valid health measure, alleging an expected cumulative injury to consumers of the fluoridated water, maintaining that the ordinance would be an unwarranted exercise of police power. These contentions were likewise dismissed.<sup>35</sup>

Other cases involving a strong attack on the statutory authority of the municipality to pass a fluoridation ordinance were *DeAryan v. Butler*<sup>36</sup> and *Kaul v. City of Chehalis*.<sup>37</sup> *DeAryan* was the first case to rule on the permissibility of compulsory fluoridation and involved all the now standard objections. The court found authority of the city to pass such an ordinance in the city charter which granted the right to legislate for the health and welfare of its citizens. *Kaul* presented a similar situation except that there the court interlaced the state constitution and three sections of a statute concluding finally that fluoridation was justifiable under the power, "to prevent the introduction and spread of disease. . ."<sup>38</sup>

Of all the fluoridation decisions, this produced the most disagreement as is evidenced by the existence of three dissenting opinions.<sup>39</sup>

*Wilson v. City of Council Bluffs*<sup>40</sup> is unlike the average fluoridation case in that the efficacy of fluoridation was not questioned. Most of the previous cases were premised on the assumption, either stated or implied, that fluoridation was not only without benefit, but was physically harmful. This contention, if proven, would naturally be an important factor in determining the reasonableness of allowing the

31 *Ibid.*

32 225 La. 859, 74 So. 2d 142, *appeal dismissed*, 348 U.S. 892 (1954).

33 The reason given by the respective lower courts for their refusal to infer the power to fluoridate from the general "health and welfare" police power was that tooth decay is a non-contagious disease and as such is a matter of "private" health rather than "public" health.

34 Shreveport city charter § 2.01 as quoted in *Chapman v. City of Shreveport*, 225 La. 859, 74 So. 2d 142, 145 (1954).

35 The court laid great stress on the opportunity afforded by fluoridation to improve the dental health of the community. It dismissed contentions of mass medication on the grounds that the compulsion was only indirect and technically no one *had* to drink fluoridated water; objecting parties could always obtain their water elsewhere. Also rejected was the contention that fluoridation was unwarranted because it benefited only a single class: *i.e.*, children.

36 119 Cal. App. 2d 674, 260 P.2d 98 (1953), *cert. denied*, 347 U.S. 1012 (1954).

37 45 Wash. 2d 616, 277 P.2d 352 (1954).

38 WASH. REV. CODE § 35.23.440(27) (1952) was read in connection with WASH. CONST., art. XI, § 11:

Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws

and (24) (56) of WASH. REV. CODE § 35.23.440 (1952) which gave to city councils the power:

(24) To adopt, enter into and carry out means for securing a supply of water for such city or its inhabitants. . . .

(56) To provide for the general welfare.

39 For Justice Hill's view see *supra* note 23. Justice Donworth in his dissent emphasized the authority of the city to furnish water; to him this meant the power to furnish water and nothing else but water — no fluorides. Justice Hamley, also dissenting, objected to introducing fluoride into the water because, to his mind, there was no sufficiently compelling reason to authorize such a use of police power in the absence of a contagious or infectious disease.

40 110 N.W.2d 569 (Iowa 1961).

process. For instance, the court in *Chapman v. City of Shreveport*<sup>41</sup> emphasized that one of the reasons it held fluoridation to be a reasonable exercise of police power was the failure on the part of the plaintiffs to prove that fluoridation would have any toxic effects. Conversely the two cases which found for the plaintiffs did so on the ground that at least as a matter of law it could not be said that fluoridation was harmless. In *Teeter v. Municipal City of LaPorte*<sup>42</sup> the Indiana Supreme Court refused to sustain the defendant's demurrer. In overruling the lower court it stated:

[U]nder the present state of scientific experience and opinion we do not feel we are in a position to hold conclusively as a matter of law fluoridation will not have cumulative toxic effects.<sup>43</sup>

In *McGurren v. City of Fargo*<sup>44</sup> the North Dakota Supreme Court held that, taking the evidence in the light most favorable to the plaintiffs, it could be reasonably found that fluoridating violated an implied contract between the city and its inhabitants whereby the city would furnish pure and wholesome water.

*Baer v. City of Bend*<sup>45</sup> is the only case where the lower court sustained a demurrer and was upheld by the Supreme Court. The principal contention there, however, was that fluoridation constituted a violation of freedom of religion. Harmfulness of the fluoride was not at issue.

In *Dowell v. City of Tulsa*<sup>46</sup> the Oklahoma Supreme Court held that there was neither a violation of freedom of religion, nor an abuse of police power, nor a violation of the state food and drug act. Again there was no evidence introduced attempting to show deleterious effects of fluoride.

*Kraus v. City of Cleveland*<sup>47</sup> in adopting the comprehensive opinion of the trial judge<sup>48</sup> likewise found no violations of either the first or fourteenth amendments or of the state food and drug law. Neither was there an unauthorized practice of medicine or pharmacy. In this case the trial court had carefully considered the conflicting scientific claims and held that the state of expert evidence concerning harmful effects of fluoride was such that either side could be reasonably followed. This view was apparently accepted by the Supreme Court since they made no comment, passing instead to the purely legal considerations.

Much the same was *Froncek v. City of Milwaukee*<sup>49</sup> in which the court took the position that it was not for it to say whether fluoridation was beneficial if it was reasonable in light of circumstances.

So the general pattern is clear. As to violation of freedom of religion, analogy is usually made to vaccination or chlorination<sup>50</sup> with much emphasis on Justice Harlan's opinion in *Jacobson v. Massachusetts*.<sup>51</sup> Exercise of police power is usually permitted as being a justifiable attempt to protect the health, here the dental health, of the citizens, and not a deprivation of rights guaranteed by the 14th Amendment.

The usual answer to the objections concerning violation of food and drug laws or the unauthorized practice of medicine and pharmacy is that fluorine in the doses

41 225 La. 859, 74 So. 2d 142 (1954).

42 236 Ind. 146, 139 N.E.2d 158 (1956).

43 *Id.* at 161.

44 66 N.W.2d 207 (N.D. 1954).

45 206 Ore. 221, 292 P.2d 134 (1956). See Comment, *Fluoridation and Religion*, 2 CATHOLIC LAW. 254 (1956).

46 273 P.2d 859 (Okla. 1954), *cert. denied*, 348 U.S. 912 (1955).

47 163 Ohio St. 559, 127 N.E.2d 609 (1955).

48 Reported at 116 N.E.2d 779 (1953).

49 269 Wis. 276, 69 N.W.2d 242 (1955).

50 Dietz, *supra* note 15 deals extensively with the development of the law relating to vaccination and chlorination.

51 197 U.S. 11 (1905). Jacobson has been argued by both sides since on the one hand it did uphold compulsory vaccination but on the other made allowances for exceptions to the rule.

in which it is administered is not the fluorine poison that the statutes aimed at controlling.<sup>52</sup>

In light of these cases *Wilson v. Council Bluffs*<sup>53</sup> is novel. In no other fluoridation case is the absence of the usual arguments so noticeable.<sup>54</sup> Indeed, in disposing of *Wilson* the Iowa Supreme Court did not cite a single authority dealing with the problem of fluoridation. Its decision is based solely on Iowa cases concerned with the statutory rights of a municipality.

Quite unlike *Wilson* is the second 1961 case, *Readey v. St. Louis County Water Co.*<sup>55</sup> The plaintiffs there pulled out all stops in their attempt to show the invalidity of the fluoridation statute. Their arguments ranged from lack of statutory authorization, through abuse of police power and deprivation of due process to violation of freedom of religion and charges of adulteration of nonalcoholic drinks in contravention of Missouri law.

The first point, concerning statutory authority to pass a fluoridation ordinance, was somewhat unusual. Whereas, the usual objection based on lack of authority is that the statute isn't broad enough to cover treating the water with fluorides,<sup>56</sup> the *Readey* plaintiffs based their objection on the lack of authority of the county to pass an ordinance which affected those living within the incorporated areas of the county.

It was pointed out that the St. Louis County charter empowered the county council "To exercise legislative power pertaining to public health, police and traffic, building, construction, and planning and zoning in the part of the County outside incorporated cities. . . ."<sup>57</sup> It was argued that this precluded the county from passing a county-wide statute such as the one being contested.

The Missouri Supreme Court refused to accept this reasoning. They pointed to Missouri Statute § 192.300 which empowers the county courts of class-one counties "to make and promulgate such rules, regulations or ordinances as will tend to enhance the public health and prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county. . . ."<sup>58</sup> The court concluded that in this lay the necessary authorization to pass a county-wide health measure; that when read in conjunction with the section of the county charter<sup>59</sup> empowering the county to exercise all powers granted to class-one counties, there was indicated an intent that the council should be able to pass health measures applicable throughout the entire county. Thus, though the argument was different, the judicial approach was the same, an attempt to find an applicable enabling statute if at all possible.<sup>60</sup> Section 192.300 was the court's choice.

The court next considered the argument that fluoridating the water consti-

52 See *supra* note 25.

53 110 N.W.2d 569 (Iowa 1961).

54 It was stipulated before the trial that the beneficial or detrimental effects of fluoride would not be brought into question. As to constitutional arguments, they were not pleaded before the trial court so the Supreme Court refused to consider them. The only other contention made by the plaintiffs was that fluoridation violated IOWA CODE § 205.5 (1958) which limits the sale and dispensing of poison to licensed pharmacists. The court took the position that § 205.5 was designed to deal with the sale of poisons as such and that fluoride used in the proposed manner was not such a poison. Hudson, *When a Vending Machine is Not a Vending Machine*, 11 DRAKE L. REV. 3 (1961) indicates that the court in so construing § 205.5 bent over backwards to arrive at a construction consistent with the supposed legislative intent.

55 352 S.W.2d 622 (Mo. 1961).

56 *Wilson v. City of Council Bluffs*, 110 N.W.2d 569 (Iowa 1961) is typical.

57 ST. LOUIS, MO., COUNTY HOME RULE CHARTER art. III, § 22 (20) (1950). (Emphasis added.)

58 MO. ANN. STAT. § 192.300 (1959).

59 ST. LOUIS MO., COUNTY HOME RULE CHARTER art. I, § 2 (1950).

60 Illustrative of this is the approach of the court in *Kaul v. City of Chehalis*, 45 Wash. 2d 616, 277 P.2d 352 (1954) which involved correlating the state constitution with three sections of a statute. See *supra* note 38.

tuted an abuse of police power in that it bore no reasonable relationship to the public health and if anything was detrimental to it. It was stated:

Respondents' evidence tended to show further that fluorine is not an essential element of the human body and that all chemicals bearing the fluoride ion are insidious poisons and are cumulative in the human body.  
...<sup>61</sup>

On the other hand:

Appellants adduced evidence, including the opinions of apparently well-qualified experts, tending to establish the proposition that fluoridation of water as proposed by the ordinance in question would . . . be highly beneficial to the residents of St. Louis County in that it would reduce dental decay in children up to 14 years of age by as much as sixty-five per cent by means of hardening the enamel on their teeth. . . .<sup>62</sup>

The court concluded that, "there is substantial evidence to support a conclusion either way"<sup>63</sup> and that in such a situation the county council could reasonably find fluoridation to be a safe and effective health measure. Such a finding on the basis of the evidence in the record was ruled a permissible exercise of police power.

The contention that fluoridation constituted a deprivation of freedom of religion was dismissed summarily when it appeared that none of the plaintiffs were members of any religious sect which objected to the taking of medication.<sup>64</sup> The suggestion that the court should take judicial notice of the Christian Scientist opposition to any kind of medication was met with the observation that even the water then taken from the Missouri River contained .5 parts per million of fluorine and it should make little difference from a religious standpoint if the county augmented this by adding another .5 parts per million.<sup>65</sup>

More consideration was given to the argument that fluoridation was "forced medication" and as such was a deprivation of liberty without due process in violation of both the United States Constitution<sup>66</sup> and the Missouri Constitution.<sup>67</sup>

In answer to this the court relied on the *Jacobson*<sup>68</sup> case which upheld the constitutionality of compulsory vaccination.

The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community \* \* \* [T]he 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.<sup>69</sup>

Reliance was also had on *West Coast Hotel Co. v. Parrish*,<sup>70</sup> which, in upholding the constitutionality of a state minimum wage law against the objection of deprivation of freedom of contract, said:

Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.<sup>71</sup>

Following the lead of these cases the Missouri Court concluded that the problem of tooth decay was of such importance that the council could, in the public

61 352 S.W.2d at 626.

62 *Ibid.*

63 *Id.* at 627.

64 Nichols, *supra* note 24, at 158, 159, indicates that this failure to show a personal interest in the religious determination has been common to most of the fluoridation cases and the inference is that this lack of a showing of personal injury has been a factor in the courts refusing to accept the argument of violation of freedom of religion.

65 The court seems to realize that the soundness of this observation may be questionable and refused to rule on the religious objection, holding it unnecessary to do so in light of the absence of any showing of personal injury.

66 U.S. CONST. amend. XIV, § 1.

67 Mo. CONST. art. I, § 10 (1945).

68 *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

69 *Id.* at 26, 29.

70 300 U.S. 379 (1937).

71 *Id.* at 391.



interest add the fluoride as a health measure and any liberty of which the plaintiffs were deprived would have to be counted a concession to a paramount public interest.<sup>72</sup>

The last argument put forth in *Readey* was that adding the fluoride amounted to an adulteration of a nonalcoholic drink in violation of Missouri law.<sup>73</sup> This contention was quickly disposed of in the same fashion as it was in *Dowell v. City of Tulsa*<sup>74</sup> and *Froncek v. Milwaukee*,<sup>75</sup> simply by noting that the statute was never intended to apply to the problem of additives in water. It was indicated that the Missouri statute was probably aimed at regulating soft drinks.

Thus, comparing *Raedeey* to the earlier fluoridation cases, it is clear that fundamentally the same arguments are being put forth today as were urged in 1953.<sup>76</sup>

It is submitted that there are two reasons why these same arguments are still being propounded even though they have not been accepted by even one jurisdiction.

The first reason is that fluoridation is, by its very nature, a jurisdiction by jurisdiction struggle. As each new state considers it there is always the possibility of a changing judicial attitude, one favorable to the plaintiffs. *Readey* indicates, however, that judicial attitudes have not so changed and apparently are not likely to.

The second reason appears to be a scientific conviction as to the alleged deleterious effects of fluoride.<sup>77</sup> As was pointed out, many of the challenges were based on the argument of abuse of police power.<sup>78</sup> This was grounded in the belief that fluoridation would, over a long period of time, produce harmful side effects,<sup>79</sup> and therefore, is not in the interests of the health and welfare of the community.<sup>80</sup> It is believed that in this lies the only likelihood of a change in judicial attitude. The cases clearly indicate that on the basis of the law as it now stands fluoridation is constitutionally unobjectionable. Since no appreciable changes of judicial temper have been manifested in dealing with the conventional arguments, it would appear that only if fluoridation could be proven harmful and thereby an abuse of police power, would the courts change their appraisal of its legality. Until some tangible proof is adduced tending to prove such harmful effects, the constitutionality of fluoridation will likely stand without serious question.<sup>81</sup>

*Glassen J. Gramm, Jr.*

72 The contrary position is expressed in Judge Hamley's dissent in *Kaul v. City of Chehalis*, 45 Wash. 2d 616, 277 P.2d 352, 365 (1954).

73 MO. ANN. STAT. §§ 196.125-196.145 (1949).

74 273 P.2d 859 (Okla. 1954).

75 269 Wis. 276, 69 N.W.2d 242 (1955).

76 *E.g.*, *De Aryan v. Butler*, 119 Cal. App. 2d 674, 260 P.2d 98 (1953).

77 These effects are summarized in *Readey* at 352 S.W.2d 626.

78 *E.g.*, *Chapman v. City of Shreveport*, 225 La. 859, 74 So. 2d 142 (1954); *Kaul v. City of Chehalis*, 45 Wash. 2d 616, 277 P.2d 352 (1954).

79 Whether such toxic effects will show up is still a moot question though all the evidence to date seems to indicate that fluoride is safe.

80 Waldbott, *The Case Against Mass Fluoridation*, *The Detroit News*, September 18, 1960, p. 10, provides a good summary of the medical-scientific objections to fluoridation. Dr. Waldbott argues particularly that it is not uncommon to find people with an abnormal sensitivity to fluorine and for these people especially, fluoridation can be highly dangerous.

It is noteworthy, however, that the American Medical Association in its 1957 Statement on Fluoridation of Public Water Supplies concludes: No evidence has been found since the 1951 statement by the Councils to prove that continuous ingestion of water containing the equivalent of approximately 1ppm of fluorine for long periods by large segments of the population is harmful to the general health.

81 It is possible that if the situation ever arose where harmful effects could be traced to the consumption of fluorine that recovery in tort against the fluoridating municipality would be the vehicle for the breakthrough, rather than a suit on constitutional grounds. To date there appear to be no cases on record of tort recovery against a municipality and RHYNE, *FLUORIDATION OF MUNICIPAL WATER SUPPLY — A REVIEW OF THE SCIENTIFIC AND LEGAL ASPECTS* (1952) suggests that the likelihood of there being a successful recovery is small. This may be explained not only by the apparent safety of fluoridation but by the evidentiary problem of proving that an injury resulted from drinking the municipality's water rather than from some other cause.