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Constitutional Law - Freedom of Religion - Fluoridation of City Water

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CONSTITUTIONAL LAW—FREEDOM OF RELIGION—FLUORIDATION OF CITY WATER—In its proprietary capacity the City of Bend maintains and operates a water system with the exclusive right to supply water to its inhabitants. In February 1952 the mayor and city commissioners adopted an ordinance providing for the introduction of fluorine into the water supply to reduce dental caries in the teeth of young children. The plaintiff as a resident and taxpayer brought suit to enjoin such action. A demurrer to his complaint was sustained. On appeal, *held,* affirmed. A city, in the exercise of its police power, may enact reasonable regulations for the protection of the public health, safety and welfare notwithstanding a conflict with the free exercise of religion of some of its citizens. *Baer v. City of Bend,* (Ore. 1956) 292 P. (2d) 134.

Although references to the protective qualities of fluorine appear as early as 1880,[1] only recently has it been advocated that the ingestion of fluorine could confer resistance to dental caries.[2] In reliance on tests of

[1] See Dietz, "Fluoridation and Domestic Water Supplies in California," 4 HASTINGS L.J. 1 (1952).

[2] Certain demonstrations indicate that small quantities of fluorine will not affect the palatability, potability or purity of the water. See Rhyne and Mullin, "Fluoridation of Municipal Water Supply," National Institute of Municipal Law Officers, Report No. 140 (1952). See tabulation of the results of seven test centers at p. 7. There has, however, been vigorous dissent by some other scientists from the view that such findings conclusively demonstrate the desirability and safety of fluoridation. See, generally, 43 A.L.R. (2d) 453 (1955).

the efficacy of fluoridation of municipal water systems,[3] many communities have adopted plans similar to the one challenged in the principal case.[4] All seven cases reported to date in which the validity of such programs has been directly in issue have upheld them.[5] One of several arguments used against fluoridation is that it abridges the religious freedom protected by the First and Fourteenth Amendments to the Constitution,[6] on the ground that it conflicts with the religious convictions of some sects against forced medication.[7] It is well-recognized that freedom of religion ". . . embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[8] It is subject to regulation under the police power for the protection of the public health, safety and welfare. The courts have developed some guiding considerations in determining the scope of the police power in this field. The Supreme Court has distinguished between direct and indirect restraints.[9] If it can be said that a regulation is not compulsory the courts have no trouble enforcing it. Thus X-rays may be made an entrance requirement[10] and military training a required course[11] at state universities. The drinking of fluoridated water is not made compulsory but it becomes a practical necessity because of the prohibitive cost of a substitute. This theoretical distinction has weighed heavily with the courts.[12] Even determination that a regulation is compulsory is not conclusive against its validity. Direct restraints on religious freedom have been upheld when imposed "under the pressure of great dangers."[13] The extent of danger required is not clear. It has been held that no such danger existed to permit enjoining

[3] See, generally, Rhyne and Mullin, "Fluoridation of Municipal Water Supply," National Institute of Municipal Law Officers, Report No. 140 (1952). See also Kraus v. Cleveland, (Ohio Common Pleas, 1953) 116 N.E. (2d) 779 at 807, affd. (Ohio App. 1954) 121 N.E. (2d) 311, affd. 163 Ohio St. 559, 127 N.E. (2d) 609 (1955), app. dismissed 351 U.S. 935 (1956).

[4] See Chapman v. Shreveport, 225 La. 859 at 866, 74 S. (2d) 142 (1954), app. dismissed 348 U.S. 892 (1954), where it is stated that by November 1953 more than 840 communities had adopted such plans affecting a population of over fifteen million people.

[5] DeAryan v. Butler, 119 Cal. App. (2d) 674, 260 P. (2d) 98 (1953), cert. den. 347 U.S. 1012 (1954); Chapman v. Shreveport, note 4 supra; Kraus v. Cleveland, note 3 supra; Dowell v. Tulsa, (Okla. 1954) 273 P. (2d) 859, cert. den. 348 U.S. 912 (1955); Kaul v. Chehalis, 45 Wash. (2d) 616, 277 P. (2d) 352 (1954); Froncek v. Milwaukee, 269 Wis. 276, 69 N.W. (2d) 242 (1955). But see McGurren v. Fargo, (N.D. 1954) 66 N.W. (2d) 207.

[6] Other arguments include deprivation of a fundamental right to care for one's own health, discrimination against adults who do not benefit therefrom, unlawful delegation of power, illegal practice of medicine, violation of pure food and drug acts, and breach of contract to supply pure water.

[7] Principal case at 136.

[8] Cantwell v. Connecticut, 310 U.S. 296 at 303-304, 60 S.Ct. 900 (1940); Reynolds v. United States, 98 U.S. 145 (1878).

[9] Hamilton v. Regents of the University of California, 293 U.S. 245, 55 S.Ct. 197 (1934); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178 (1943).

[10] State ex rel. Holcomb v. Armstrong, 39 Wash. (2d) 860, 239 P. (2d) 545 (1952).

[11] Hamilton v. Regents of the University of California, note 9 supra.

[12] DeAryan v. Butler, note 5 supra.

[13] Jacobson v. Massachusetts, 197 U.S. 11 at 29, 25 S.Ct. 358 (1905).

the teaching of foreign languages in schools.[14] On the other hand, the dangers arising from child labor[15] and failure to provide medical attention for a child[16] have been held to justify making those acts criminal. Vaccinations to prevent contagious diseases may be made compulsory.[17] However, the fact that dental caries are not contagious has had no effect upon the courts.[18] That the disease is a serious health problem is considered as presenting a sufficient danger,[19] and courts refuse to find a distinction between chlorination to purify the water, which appears to be a uniformly accepted regulation,[20] and fluoridation to fortify it.[21] The freedom of religion issue has been avoided altogether by some courts by refusing to consider fluoridation of water as a medication any more than the preparation of a balanced diet.[22] Alternative means of achieving the desired goal without infringing a guaranteed freedom have been sought by some courts. Self-medication by fluoridating limited quantities of water in special fountains, or by fluoridated milk supplies, has been suggested but rejected as dangerous and impractical.[23] The decisions in this field indicate that the courts are not prone to overturn a legislative determination unless arbitrary or palpably unreasonable,[24] and the question is raised as to what other elements could be added to drinking water by legislative order. Would it be possible to add anti-biotics to combat the common cold? Absent a change in the legal climate, those who object to such measures must take their case to the polls, where, in fact, a considerable degree of success has been achieved in defeating fluoridation programs.[25]

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14 Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923).

15 Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438 (1944).

16 People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903).

17 Jacobson v. Massachusetts, note 13 supra. It should be noted that this support of affirmative action goes far beyond mere negative interference with individual actions, such as the enjoining of child labor.

18 Kaul v. Chehalis, note 5 supra.

19 Chapman v. Shreveport, note 4 supra.

20 Commonwealth v. Town of Hudson, 315 Mass. 335, 52 N.E. (2d) 566 (1943); 7 MCQUILLAN, MUNICIPAL CORPORATIONS, 3d ed., §24.265 (1949).

21 Dowell v. Tulsa, note 5 supra.

22 Ibid.

23 Ibid.

24 DeAryan v. Butler, note 5 supra.

25 As of Dec. 11, 1954, over 400 communities had rejected mass medication; after DeAryan v. Butler, note 5 supra, the people of San Diego voted to stop fluoridation. See 23 GEO. WASH. L. REV. 343 (1943).