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# Fluoridation of Public Water Supplies

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# COMMENTS

## FLUORIDATION OF PUBLIC WATER SUPPLIES

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Since the beginning of time, the cause and presence of dental caries has plagued man. Our modern-day medical and dental learning provides us with only partial understanding of the causes of caries. Nevertheless, a possible method for the partial prevention of dental caries has been introduced—"fluoridation of water."

It has been advocated that the adding of certain fluorides to city water supplies will cut down the incidence of tooth decay. It is believed that fluoride aids in building caries-resistant teeth in children. The benefits from fluoride flow to children whose teeth are forming, that is, from the prenatal period to about ten or twelve years of age. As it now stands, fluoride has little or no effect on already formed adult teeth. But, of course, children drinking fluoridated water are said to enjoy better adult teeth. It is to be noted, though, that fluoridation is only a *partial* combatant. It does not dispense with the need for normal dental care and attention.

Although fluorides are naturally in some waters over the world, many city water supplies contain, at most, only a trace of fluorides. Consequently, as a result of study made of the effect of water naturally containing fluorides, artificial fluoridation was introduced during the last decade. Past research has shown that fluorides can be highly toxic. Therefore, a specific balance must be maintained in supplies that are artificially fluoridated. The safe tolerance has been estimated to be between 0.8 and 1.2 p.p.m. (parts per million). The optimum concentration suggested is 1.0 p.p.m. This figure must be varied in certain localities because of changes in climatic conditions. Warmer weather requires a decrease in concentration. Too, it has been advised that no use be made of products naturally high in fluoride, or those to which fluoride has been added, where drinking water has been fluoridated.

Up to a point, continual overdoses of fluoride will produce "mottled teeth," or what is known as "dental fluorosis." Though fluorosed teeth are caries-resistant they are not pleasing in appearance; thus, esthetically objectionable. Fluorosis in its advanced stage completely destroys the enamel of the teeth. Beyond this point, overdoses of fluoride may be lethal.

As in the case of many innovations, whether good or bad, there has been some opposition to fluoridation. Because of the toxic character of fluoride, and the possibility of cumulative action, it has been argued that *any* concentration will have destructive effect upon the systems of the body. This aspect of the problem is, however, rightly a matter for scientific arbitration. A second objection is that fluoridation contravenes state laws and the Federal Constitution as it is compulsory "mass-medication." That fluoridation is

"mass-medication" seems a valid assumption as it is admittedly introduced into the water supply as a "preventive therapeutic agent."[1] A development of the law should answer the legal objection to fluoridation.[2]

The Legislature of the State of California at the 1951 session considered a bill, a part of which authorized purveyors of public water supplies to fluoridate under permit from the Department of Public Health. This portion of the bill was defeated. However, another bill was passed and added to the Health and Safety Code.[3] It provides, in substance, that fluorides may be added to water intended for sale to the public as bottled water for domestic use—subject to the approval of the Department of Public Health of the State of California and, subject to compliance with code labeling requirements. Prior to this time the State Board of Public Health of the State of California announced its policy on the matter approving fluoridation, "providing the local dental and medical societies also approve." Thereafter the following resolution was adopted:

"Resolution of the State Board of Public Health

(Adopted on September 14, 1951)

"WHEREAS, On August 29, 1950, the State Board of Public Health issued a statement approving the addition of fluoride to public water supplies in this State subject to prior approval of the local dental and medical associations; and

"WHEREAS, The Legislature considered at the 1951 Session a bill, a portion of which specifically authorized purveyors of public water supplies, including utility and irrigation districts, to add fluoride to their water supplies under permit from the State Department of Public Health; and

"WHEREAS, The Attorney General's Office has advised the State Department of Public Health that under existing statute there is no doubt that the department has authority to grant permits for addition of a beneficial mineral nonexistent or insufficient in those public water supplies not naturally endowed, if it finds that such treated water supplies will under all circum-

[1]California's Health, Apr. 15, p. 146, col. 2. In regard to the possible toxic and cumulative effect of prolonged intake of smaller amounts of fluoride, see, a résumé of an article entitled, "Toxicological and Metabolic Effects of Fluorine-Containing Compounds," by J. Larner, in The Journal of the American Medical Association, Feb. 10, 1951; "The Menace of Fluorine to Health," The University of New Mexico Bulletin, No. 329 (1938); "Answer to the Ad. Hoc. Committee for Fluoridation of Water Supplies," by Dr. Chas. T. Betts, Toledo, Ohio (1951); Manning, "The Case Against Fluoridation," The Springfield Union, Springfield, Mass., Apr. 17, 1951; Letter to the Editor, by V. O. Hurme, D.M.D., N. Y. Times, May 23, 1951; Letter to the Editor, by William Gutman, M.D., N. Y. Times, Apr. 9, 1951; Letter to the Editor, by Dr. Robert S. Harris, Professor, M.I.T., The Springfield Union, Springfield, Mass., Nov. 16, 1951.

[2]Another interesting and novel objection against fluoridation has been propounded. It is contended that fluoridation is "medical experimentation." Therefore, it is in violation of standards for medical experimentation on humans as laid down by the judges at the Nuremberg war crimes trial. The two main standards cited as being violated directly by fluoridation are: voluntary consent of the human subject, and freedom of the subject to withdraw from the experiment when he can no longer physically or mentally endure it. The Springfield Sunday Republican, Springfield, Mass., Nov. 18, 1951.

[3]§ 26470.5 (Deerings 1951 Supp.).

stances and conditions be pure, wholesome and beneficial to health; now, therefore, be it

"RESOLVED, That the State Board of Public Health finds that fluoridation of public water supplies by the placing of a normal and beneficial mineral in proper concentration in those water supplies in which it does not occur in optimum amounts naturally, will tend to produce a water that under all circumstances and conditions is pure, wholesome, potable and beneficial to health; and be it further

"RESOLVED, That the State Board of Public Health herein reaffirms its policy statement of August 29, 1951, approving the fluoridation of public water supplies."

Notice the statement that the board "finds that fluoridation of public water supplies . . . will tend to produce a water that under all circumstances and conditions is pure, wholesome, potable, and beneficial to health. . . . " This statement has to do with the duty to which a purveyor of public water must conform, and when the board may order, or permit, changes in the water supply. "It is unlawful for any person to furnish or supply to a user, water used or intended to be used for human consumption or for domestic purposes which is unpure, unwholesome, unpotable, polluted, or dangerous to health."[4] The board may order,[5] or permit upon petition,[6] changes in the water supply when such will insure a continuous supply of pure, wholesome, and potable water.[7] Hence, this finding appears to give the board the authority to order fluoridation, or to grant a permit to fluoridate pursuant to a petition of a purveyor. However, this does not necessarily follow. It cannot be required that water the "purest and most healthful obtainable or securable be supplied."[8] The announced aim of fluoridation is to improve public health, not render the water pure, wholesome, and potable.[9] Public water supplies in the state have heretofore been considered such without the presence of fluoride. To now say that the addition of fluoride is necessary to meet the standard seems untenable. Fluoridation goes beyond this duty and would be a function for state and local health authorities to undertake. Otherwise, to say that a purveyor was under a duty to fluoridate

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[4]Calif. Health and Safety Code, § 4031 (Deering 1949 Supp.). "Person," includes municipalities. Calif. Health and Safety Code, § 4010. A municipality in furnishing water for its inhabitants is no longer acting in its governmental capacity, but rather in its private or proprietary capacity. It is then amenable to the same rules as a private water company. South Pasadena v. Pasadena Land and Water Co., 152 Cal. 579, 93 Pac. 490 (1908); Marin Water & Power Co. v. Sausalito, 168 Cal. 587, 143 Pac. 767 (1914).

[5]Calif. Health and Safety Code, § 4019 (Deering 1947).

[6]Calif. Health and Safety Code, § 4016 (Deering 1947).

[7]In passing, a possible distinction between "chlorination" and "fluoridation" might be noted. It seems that chlorine is introduced into water supplies to make them pure, wholesome, and potable, that is, to kill disease germs. Disease germs are not a part of pure water. Thus it would seem that "chlorination" is not "medication."

[8]Frost v. City of Los Angeles, 181 Cal. 22, 183 Pac. 342 (1919).

[9]See note 1 *supra*.

would amount to requiring that water the "purest and most healthful obtainable or securable" be supplied, caries-preventionwise. It not being the duty of the purveyor to fluoridate, does the board, under state statutes, have the authority to authorize fluoridation itself?

The Legislature has authorized the Department of Public Health to establish a Division of Dental Health to study, plan, and administer all functions of the department relating to dentistry, and all such matters should be referred to this division.[10] This division has the power to initiate and develop educational activities designed to protect and improve dental health of the state; to initiate and develop research programs in service and prevention to protect and improve the dental health of the people of the state; and to correlate such work with official and non-official agencies and educational institutions.[11] The division is not authorized to compel dental examinations or services.[12]

The department is also authorized to establish and maintain a Bureau of Child Hygiene.[13] The purpose of this bureau is to investigate and disseminate educational information relating to conditions affecting the health of children of the state.[14] The bureau is not authorized to force compulsory medical or physical examinations of children.[15] If the bureau is not authorized to compel mere examinations, involving no medication, it seems reasonable to infer that, *a minore*, it could not compel any direct form of medication.

Now, in the light of the above and the authorizing of fluoridated bottled water, can it be said that the Board has the right to authorize fluoridation of public water supplies? It appears not. Ultimately, under the existing statutes, the board determines whether a purveyor can fluoridate the water supply.[16] Therefore, the board is directly responsible for the water being fluoridated. When the water supply is fluoridated, pursuant to a permit from the department, it amounts to "mass-medication" of the users and, ergo, compulsory dental services. This the board is not authorized to do. Such is expressly prohibited by the above statute.[17] It could not be contended that the board had the authority to compel anyone to have his teeth painted with fluoride. The case at hand is, in the final analysis, no different. Nor

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[10]Calif. Health and Safety Code, § 350 (Deering 1949 Supp.).
[11]Calif. Health and Safety Code, § 352 (Deering 1949 Supp.).
[12]Calif. Health and Safety Code, § 353 (Deering 1949 Supp.).
[13]Calif. Health and Safety Code, § 300 (Deering 1947).
[14]Calif. Health and Safety Code, § 302 (Deering 1947).
[15]Calif. Health and Safety Code, § 303 (Deering 1947).
[16]See note 6 *supra*.
[17]See note 12 *supra*. The suggestion has been made that the Division of Dental Health may not administer fluoride, but the resolution indicates that the Board has no objection to it being done by a municipality or other water purveyor which satisfies the licensing requirements, citing Calif. Health and Safety Code § 4010, *et seq.*

could it be contended that by authorizing fluoridated bottled water the Legislature removed the prohibition against compulsory dental services or medical services.

Neither could it be contended that by authorizing fluoridated bottled water the Legislature included fluoridation of public water supplies. That bill was defeated. Furthermore, in defining "poison," the Legislature has included "fluorides soluble in water, and preparations."[18] (Notice no mention is made as to concentration.) While nothing in the code prohibits fluoridated bottled water, this section should extend to everything else not so exempted. It would follow that the addition of any concentration of fluoride to a public water supply would be "poisoning" the water in the eyes of the Legislature. If this be the case, fluoride, poison under the statute, added to a public water supply would render it unpure, unwholesome, unpotable, and injurious to health. The board, in such a case, cannot issue a permit to fluoridate, nor order such itself.[19]

The Health and Safety Code makes it unlawful and prohibits the advertisement of drugs or devices representing that they have any effect on certain enumerated diseases, one of which is "dental caries."[20] A preceding section gives the board authority to authorize advertisement of drugs having curative or therapeutic effect on such diseases when it determines an advance in medical science has made any type of *self-medication* safe.[21] Fluoridated bottled water is not controlled by these sections.[22] Further, it is advertised as a "self-medication." The Legislature itself has deemed it safe. There is no authority given by the statute to represent or advertise that fluoridated public water will have curative or therapeutic effect on dental caries. The board is limited to findings of safe drugs or devices for "self-medication."[23] Fluoridation of public water is *mass-medication.* The distinction between "self-medication" and "mass-medication" is an important one. In the former the administration of the drug or device is at the whim and discretion of the individual taking it. In the latter it is at the whim and discretion of the purveyor, without regard to the need of the user. Consequently, it seems that none other than purveyors of fluoridated bottled water have the right to advertise that fluoridated water has effect on dental caries.

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[18]Calif. Health and Safety Code, § 20703 (Deering 1949 Supp.). Amended, Stats. 1951, ch. 425, § 1 (Deering 1951 Supp.). The suggestion has been made that there is nothing inconsistent in the requirement not to sell bottled fluoridated water unless labeled as poison, and the right of the water purveyor freely to distribute fluoridated water without the requirement of a warning that it is to be considered poisonous. The position is taken that this section applies only to the dispensing of such drugs under the statute and the regulation of the California State Board of Pharmacy, but has nothing to do with the fluoridation of water, as such.

[19]See notes 5 and 6 *supra.*

[20]Calif. Health and Safety Code, § 26286.5 (Deering 1951 Supp.).

[21]Calif. Health and Safety Code, § 26273 (Deering 1951 Supp.).

[22]See note 3 *supra.*

[23]See note 21 *supra.*

Going back to the resolution approving fluoridation, the board has attempted to leave itself a rather large loophole. It approves fluoridation, "subject to the prior approval of the local dental and medical association." Assuming the Legislature itself could provide for fluoridation of public water supplies, then such could be delegated to the board.[24] But re-delegation of such discretion to local dental and medical societies could not be done.[25] In such a case, either the board must authorize fluoridation, or not, in its own discretion. It cannot subject its discretion to the approval of anyone.[26] Although it may be desirable that the cooperation of these local societies be sought, they are not the proper bodies to determine a matter of police power. Local dental and medical societies possess no police power. They cannot be delegated legislative authority by the state.[27] Any action they might deem advisable toward protecting or promoting public health must be accompished by the proper authorities. Their views can have no binding effect on the decision of the board. The board would be the sole voice of authority in such a matter, and rightly so.

Assuming the validity of fluoridation under state statutes, does it meet constitutional requirements? Laws providing for pure, wholesome, and potable water are validly within the police power.[28] There is an intimate connection between a pure water supply and the health of a community. But can a state, purporting to act under its police power, require or provide for fluoridation of city water supplies, such amounting to "mass-medication?"

Basically, police power is the inherent right in every sovereignty to govern persons and things within its jurisdiction—an essential element of government.[29] More specifically, it is often defined in general terms of scope and limitation.

> "The police power embraces regulations designed to promote the public convenience or general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety, and the validity of such regulations must depend upon the character of the regulation,

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[24]Calif. Health and Safety Code, § 102 (Deering 1947).

[25]Police power cannot be delegated to any agency not recognized by the Constitution (Calif.) as legislative. Schaezlein v. Cabaniss, 135 Cal. 446, 67 Pac. 755 (1902).

[26]Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); Mutual Film Corp. v. Industrial Comm., 236 U.S. 230 (1915).

[27]The Legislature is prohibited from delegating its powers to private persons or agencies. Carter v. Carter Coal Co., 298 U.S. 238 (1935). The suggestion has been made here that this resolution does not have the force or effect of law, citing: Calif. Const., Art. IV, § 15; Mullen v. State, 114 Cal. 578, 583; 23 Cal.Jur. 604, § 4; 50 Am.Jur. 16, § 4. Rather, it merely states the policy of the board that it approves fluoridation, as such, but it is a local matter. Apparently, it does no more than to indicate in advance of the presentation of an actual problem that the board will approve of fluoridation as long as the local authority requesting the license shows that it has the approval of the local dental and medical associations.

[28]Frost v. City of Los Angeles, *supra* note 8; State Board of Health v. St. Johnsbury, 82 Vt. 276, 73 Atl. 581 (1915).

[29]11 Am.Jur., Const. Law, § 246.

whether arbitrary or unreasonable, and whether really designed to accomplish a legitimate public purpose."[30]

Thus, a police regulation designed to promote public health must depend for its validity upon whether arbitrary or unreasonable, and whether really designed to accomplish a legitimate public purpose. Also, the means employed to accomplish the desired end must be reasonably adapted to that end.[31]

Correlative with the rights of police power in the state are inherent individual rights. The Constitution secures to each individual the right to life and liberty. The state cannot infringe upon nor deprive an individual of these rights. These rights, too, must be reasonably exercised. They are not absolute rights. Rather they are subject to reasonable restraint—"liberty regulated by law."[32] An exercise of police power depriving an individual of any of these rights must conform to due process.[33] To answer what is due process, we look back to our definition of police power. It is a reasonable and unarbitrary restraint or deprivation brought about to accomplish a legitimate public purpose.[34] In the case of fluoridation, the asserted right of the state is protecting and promoting the public health against dental caries. The right of the individual is the right to liberty. Liberty is a broad general term.[35] More specifically, we can say that liberty embraces the right to "physical integrity,"[36] or the inherent right in the individual to care for

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[30]Chicago B. & Q. R. Co. v. Ill., 200 U.S. 561 (1905). "It is only when the public health . . . is or may be jeopardized that the police power may be invoked for its protection by restriction or regulation of private rights of persons and property." Abbey Land & Imp. Co. v. San Mateo County, 167 Cal. 434, 139 Pac. 1068, 1070 (1914); Matter of Miller, 192 Cal. 694, 124 Pac. 427 (1912).

[31]Liggett Co. v. Baldridge, 278 U.S. 105 (1928); Burns Baking Co. v. Bryan, 264 U.S. 504 (1924).

[32]Jacobson v. Mass., 197 U.S. 11 (1905); Crowley v. Christensen, 137 U.S. 86 (1890); In re Moffett, 19 Cal.App.2d 7, 64 P.2d 1190 (1937).

[33]U.S. Const., Amend. XIV, § 1; Stone v. Cordua Irr. Dist., 72 Cal.App. 331, 237 Pac. 554 (1925).

[34]Chicago B. & Q. R. Co. v. Ill., *supra* note 30; Nebbia v. State of N. Y., 291 U.S. 502 (1934).

[35]"And 'liberty' . . . is not restricted to mere freedom from imprisonment, but embraces the right of a person to use his God-given powers, employ his faculties, exercise his judgment in the affairs of life, . . . subject only to such restraints as are imposed by the law of the land for the public welfare. The word 'liberty', as thus employed in the Constitution and understood in the United States is a term of comprehensive scope." Block v. Schwartz, 27 Utah 387, 76 Pac. 22, 26 (1904); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

[36]SPENCER, SCHEME OF NATURAL RIGHTS 351. Pound classifies this as "interests of personality,—the individual and spiritual existence." He divides the interests in the physical person into five categories: "Immunity of the body from direct or indirect injury; preservation and furtherance of bodily health and; immunity of the will from coercion, freedom of choice, and judgment as to what one will do." These three have long been recognized. The other two are products of the progression of civilization: "Immunity of the mind and nervous system from direct or indirect injury and the preservation and furtherance of mental health; and freedom from annoyance which interferes with mental poise and comfort." "These interests, within limits, shall be recognized legally and given effect through the force of the state." Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 349, 355, 356 (1915). It would seem that if it was up to the state to give force and effect to these rights, it should not be allowed to invade them itself. Such seems to be the case with fluoridation.

his own body and health.[37] Ultimately, it is a weighing of the interest the state has to protect against the particular individual interest involved. A leading case discloses how these rights are weighed.

In the case of *Jacobson* v. *Massachusetts* the problem involved was similar to the one at hand, that is, "compulsory mass-medication." A Massachusetts statute provided that, when in the opinion of a local Board of Health it was necessary for the public health and safety, vaccination of all the inhabitants could be required. Any adult, not under guardianship, who refused to be vaccinated was subject to a $5 fine. Children who presented evidence that they were unfit subjects for vaccination were exempted. Pursuant to this statute the Board of Health of the City of Cambridge passed a regulation requiring vaccination for smallpox because of its prevalent and increasing nature. Defendant refused to be vaccinated; was tried, convicted, and fined. Defendant put in various defenses. His main contention was that the statute was in derogation of rights secured to him by the Fourteenth Amendment; especially that it violated due process in depriving him of his freedom of liberty. Further, he attacked vaccination as a means of prevention of smallpox, and asserted it was dangerous to life and health. He also contended that the statute denied him equal protection in that it exempted only children who were unfit subjects, therefore, an unreasonable classification. The Supreme Court of the United States upheld the conviction on the following reasoning.[38]

The police power of a state embraces reasonable regulations, established directly by legislative enactment, protecting public health and safety. The manner in which such results are to be accomplished is within the discretion of the Legislature, subject to the condition that no regulation contravenes the Constitution of the United States; or infringes upon any individual right granted or secured by it. However, individual rights secured to every person by the Constitution are not absolute. They are subject to all kinds of reasonable restraints in order to secure public health. As a measure of self-defense, it was proper for a community to protect itself against an "epidemic of a prevalent and increasing contagious and infectious disease." It was not open for the court to say whether the mode adopted to combat the danger was arbitrary and not justified by the necessities of the case. As a matter of common knowledge, for nearly a century vaccination had been regarded as a preventive of smallpox. Thus, the fact that a better method might be available was not open to debate by the court. Courts will always regard

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[37]Inferentially, the court in the Jacobson case, *supra* note 32, recognized such a right in the defendant. And the court, speaking in Tomlinson v. Armour & Co., 75 N.J.L. 748, 70 Atl. 314 (1908), said: "Among the most fundamental of personal rights is the right of personal security, including the preservation of a man's health from such practices as may prejudice or annoy it."

[38]Jacobson v. Mass., *supra* note 32.

facts of common knowledge. The judiciary is not allowed to usurp the function of another branch of government. The interest of the state in protecting its population from the spread of a contagious and infectious disease, the emergency of an epidemic, far outweighs any individual right. Lastly, there was no denial of equal protection. There was more need for protecting a child of tender years from the dangers of vaccination than an adult. Nevertheless, by way of dictum, if there was a showing that vaccination would endanger the life or health of an individual, though not exempted by the statute, the judiciary would be competent to interfere. To say otherwise would be cruel and inhuman in the last degree. The same general reasoning has been applied in cases dealing with quarantine laws.[39]

Now, how do these principles apply to fluoridation? Dental caries is a disease. However, it is not contagious or communicable. It technically may be called "infectious," but not such an infectious disease as that to which the courts have commonly made reference. Furthermore, there is no "epidemic or emergency" presented by the presence of dental caries. The cases dealing with the police power of the state to prevent or combat a disease, through medication or quarantine, seem to involve the presence of an "epidemic or emergency" of a "contagious or infectious disease." In the absence of such conditions it would seem that the state has no interest to protect. There would be no danger to the public health. There would be no "reasonable basis" to support the exercise of the police power. The action of the state would then appear to be "unreasonable and arbitrary," and subject to judicial review.

The Court in the *Jacobson* case made a point of the fact that "as a matter of common knowledge" for nearly a century vaccination had been known as a preventive of smallpox. It took judicial notice of the fact and would hear no evidence to the contrary. There still seems to be much speculation and study of fluoride and its effects. Only in the last few years has artificial fluoridation become prevalent as a possible method for the partial prevention of dental caries. It is submitted that the courts would not be obliged to take judicial notice of fluoridation as a partial preventive of dental caries. Consequently, one would be free to put in evidence refuting artificial fluoridation.

Then, *assuming* the state could employ some preventive for dental caries in children, is fluoridation of public water supplies reasonably adapted to that end? In the vaccination and quarantine cases it was necessary to deal with adults and children alike in order to prevent the spread of disease.

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[39]Morgan's Louisiana & T. R. S. S. Co. v. Board of Health of State of Louisiana, 188 U.S. 455 (1886); Wong Wai v. Williamson et al., 103 Fed. 1 (1900); Jew Ho v. Williamson et al., 103 Fed. 10 (1900).

Although dental caries is present in adults and children, fluoridation, so far as it is now known, has little or no beneficial effect on adult teeth. In order to allegedly minimize the incidence of dental caries in children, adults are compelled to take doses of fluoridated water along with the children. It would seem erroneous to contend that adults could be vaccinated or quarantined as well as children, if only children were susceptible to, or carried, a disease. The method employed would have no relation to the object sought. The case before us is no different. If fluoridation can have no beneficial effect on adult teeth, the means used to combat dental caries in children is not reasonably adapted to the end sought. Rather, it seems unreasonable and arbitrary. While an attack on dental caries in children might be valid, to require adults to take the same medicine would be restraint without due process—a greater deprivation of rights. If alternate methods are available for attaining a desired end, the fact that one entails a greater deprivation than the other is a factor for consideration on the validity of the state's choice.[40] Consequently, even assuming that the state could validly act to prevent dental caries in children, fluoridation of public water supplies does not seem reasonably adapted to that end.

The Massachusetts statute exempted children who showed themselves unfit subjects for vaccination. However, the court indicated that an adult would be exempted if he showed he too was an unfit subject. To say otherwise would be cruel and inhuman in the last degree. No such exemption seems possible in the case of fluoridation. Once introduced into the water supply, fluoride would be indiscriminately administered to every man, woman, and child without regard to their need. They would have to drink, cook, and bathe with fluoridated water. Assuming any person, adult or child, showed that fluoridated water was likely to impair his health or cause his death, what could be done? In order to save his life or health he would have to move elsewhere, or maintain his own private water supply. Home softening units would not be the answer. The salt regeneration system will not remove fluoride.[41] To require one either to move or maintain his own private water supply would be an extreme, harsh, and expensive burden. No contention could be made that this was a reasonable alternative for the user of public water. This goes to the unreasonable, arbitrary, and capricious nature of fluoridated public water supplies as a partial prevention of dental caries in children.

It is suggested that another right guaranteed by state statutes and the Federal Constitution is invaded by fluoridation, i. e., "freedom of religion." Certain religious groups maintain and practice the belief that medication

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[40]Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926).
[41]California's Health, Apr. 15, 1951, p. 149, col. 1.

in any form is foreign to the human body and not necessary for the healing or prevention of disease. It follows that to fluoridate public water supplies would require one within such a group to take medication against his religious convictions.

The Health and Safety Code refuses the right to the department to force compulsory dental examinations or services.[42] Although this section is not directed to any particular group or class of persons, it seems broad enough to protect religious beliefs. It equally applies to everyone. However, even in the absence of this section there is a sanction specifically given to religious beliefs by the statutes. "Nothing in this chapter or in any rule or regulation prescribed by the State Department of Public Health in accordance herewith shall compel any practitioner who treats the sick by prayer in the practice of religion of any well recognized church, sect, denomination, or organization or any person . . . to give any information about a disease or disability which is not infectious, contagious, or communicable *or authorize any compulsory education, medical examination, or medical treatment.*"[43] Notice that it is stated that nothing in the code or in any rule or regulation by the department shall authorize that any compulsory medical treatment be performed by a religious practitioner. Further sanction of the use of religious beliefs in the practice of medicine is given in the Business and Professions Code.[44] Fluoridated water goes over the head of these practitioners and requires that all persons who are opposed to medication take it anyway. If a practitioner can't be compelled to employ medication, it would not seem reasonable to say that those who maintained beliefs against medication could be compelled to take it. If the practitioner can't be forced to employ medication, *a fortiori,* no one else with contrary religious beliefs should be compelled to employ it. It then seems that the code denies the right to the department to fluoridate public waters because in violation of sanctioned religious beliefs.

Now to the constitutional aspect. The First Amendment provides that Congress shall make no law prohibiting the free exercise of religion.[45] Before the passage of the Fourteenth Amendment the Federal Constitution made no provision for protecting citizens of the respective states in their religious liberties. Such was left to the states to regulate, there being no inhibition imposed by the Constitution on the states in this respect.[46] However, since the passage of the Fourteenth Amendment and recent Supreme Court decisions a different rule prevails.[47]

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[42]See note 12 *supra.*
[43]Calif. Health and Safety Code, § 1110.5 (Deering 1949 Supp.).
[44]§ 2146 (Deering 1947).
[45]U.S. Const., Amend. I.
[46]Permoli v. Municipality No. 1 of City of New Orleans, 44 U.S. 589 (1845).
[47]Cantwell v. Conn., 310 U.S. 296 (1940).

The fundamental concept of liberty embodied in the Fourteenth Amendment embraces the liberties of the First Amendment.[48] And though traditionally there has been a presumption of constitutionality of legislation passed pursuant to an exercise of a state's police power, the presumption is one of unconstitutionality when First Amendment liberties are involved.[49] *Cantwell* v. *Connecticut* was the first case squarely holding that freedom of religion, as guaranteed by the First Amendment, is protected by the Fourteenth Amendment from state interference.[50] The court there reasoned that freedom of religion has a dual aspect: freedom to believe, and freedom to act exercising such beliefs. The first is an absolute right, the second is not. Conduct remains subject to regulation for the protection of society.[51] But conduct must be so regulated as not to infringe upon the protected freedom. The test, again, is one of weighing the interest of the state against the right to exercise religious beliefs. But, before the interest of the state will outweigh the interest of the individual, there must be a showing that the exercise of the particular religious belief is of such a nature as to create a "clear and present danger" that it will bring about substantive evils that the state has the right to prevent. Although the *Cantwell* case did not deal with an attempt to force medical treatment against religious beliefs, its principles seem applicable to the case at hand.

Therefore, freedom to maintain and practice the belief that medication is not to be taken is protected by the Fourteenth Amendment. Freedom to exercise this belief is guaranteed so long as it does not present a "clear and present danger" to the health of the public. The question remains to be asked, does the belief against taking medication present a "clear and present danger" to the health of the public which the state has the right to prevent? That is, if the state were denied the right to fluoridate water solely because it was said to deprive freedom of religion, would this create a "clear and present danger" to the public health? As already developed, the presence of dental caries creates no ("clear and present danger" of an) epidemic or emergency of a contagious or infectious disease. Therefore, we have no "clear and present danger" of any evil at all.[52] There is a failure to rebut the presump-

[48]Schneider v. Irvington, 308 U.S. 147 (1939).
[49]Thomas v. Collins, 323 U.S. 516 (1945).
[50]Cantwell v. Conn, *supra* note 47.
[51]Reynolds v. U. S., 98 U.S. 145 (1878); Davis v. Beason, 133 U.S. 333 (1890).
[52]The dissenting opinion in a recent case, dealing with forced X-ray examinations against religious convictions, spelled out the elements of the "clear and present danger" test. What, then, is a "clear and present danger?" "*First*, it must be a danger of some 'extreme serious' substantive evil." The presence of dental caries can hardly be said to produce such a danger. "*Second*, the danger must be 'clear', that is, there must be proof that the evil will almost inevitably result from the particular of freedom." There is no such proof in the case of fluoridation. "*Third*, the danger must be 'present', that is, the 'degree of imminence extremely high', or 'immediate and urgent'; it 'must not be remote or even probable; it must be immediately imperil'." Again, dental caries does not seem to meet such a test. State v. Armstrong, —— Wash. ——, 239 P.2d 545 (1952).

tion of unconstitutionality. Consequently, it must stand that fluoridation of public water is unconstitutional because in violation of freedom of religion. To hold otherwise would amount to allowing the state to unduly suppress the free exercise of religious beliefs under the guise of securing desirable conditions. This a state cannot do.[53]

It is submitted that fluoridation of water is, therefore, in violation of state laws and the Federal Constitution. Of course, the invalidity of fluoridation under state laws can be cured by the Legislature. Nevertheless, the more serious constitutional objections must be hurdled before a state validly may introduce fluoride into public water supplies.

Neither the right of police power in the state nor individual rights are to be taken lightly. As these rights are always in conflict with one another, there must be a close scrutiny and weighing of the interests in each case and a fair and just balance reached. Holmes once said that "police power is often used in a wide sense to cover and to apologize for the general power of the Legislature to make a part of the community uncomfortable by a change."[54] It seems there is no need for excuse or apology in the case of fluoridation. If the state wants to make fluoridated water available to children in order to partially prevent dental caries, fluoridated bottled water could be placed in the schools for those who want it. The conflict would then be resolved and at a cheaper price moneywise, and from the standpoint of infringement upon individual rights.

[53]Cantwell v. Conn, *supra* note 47.
[54]See Tyson Bros. v. Banton, 273 U.S. 418 (1927) (dissenting opinion).