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DAY-CARE REGULATION: LEGAL AND POLICY ISSUES

Erica B. Grubb

I. INTRODUCTION

Child day-care services in the United States have always been subject to government regulation. However, regulatory efforts have been far from perfect. They have been hampered by under-funded regulatory agencies, poorly drafted statutes, confusing overlaps between federal and state requirements, and a lack of understanding by day-care consumers and providers of the scope of regulation.

During the past year, two widely-publicized controversies directed public attention to regulatory issues that have troubled the day-care community for years. One controversy involved child abuse in day-care centers and generated support for increased regulation of day-care services. The other involved efforts by profit-making day-care entities to exempt themselves from regulation, or at least to distinguish themselves from nonprofit and publicly-funded day care providers.

While both controversies concern sensitive aspects of day-care delivery, they represent only two small facets of the overall scheme of day-care regulation. The purpose of this article is to examine the

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2. In Ohio, a group of proprietary day-care centers enjoined enforcement of licensing standards that had been recently issued by the state Dep't of Public Welfare. Samkel, Inc. v. Creasy, 7 Ohio St. 3d 17, 455 N.E.2d 493 (S. Ct. Ohio 1983). The court held that state law authorized such rules for nonprofit and publicly-funded centers, but not for full-time proprietary ones.

3. The actual incidence of child abuse by day-care providers is low. See generally H. Blank, Issues To Consider In Developing Legislation Concerning Background Checks For Child Care Providers As Well As Other Equally Important Initiatives To Help Improve Family Access To Quality Child Care, 1985 (available from Children's Defense Fund, 1520 New Hampshire Ave., Washington, D.C. 20036). Moreover,
overall day-care scheme, in order to identify regulations that are effective and consistent with legal requirements. Thus, in addition to addressing the two regulatory controversies mentioned above, the article will analyze other legal and policy issues that currently confront public officials and day-care advocates.

These issues include administrative law questions such as whether the government has properly delegated its authority to an executive agency; and constitutional law questions such as whether the regulatory mechanism meets the constitutional requirements of due process, equal protection, and reasonable searches and seizures. Other issues involve the need for uniform federal day-care standards; the dwindling supply of money and manpower to enforce minimum standards of care; and the steps to be taken by states as they modify traditional regulatory schemes.

Surprisingly, legal commentaries have virtually ignored these issues. Legislative staffers seeking model statutes or regulatory provisions have found little help in the law review literature and other current publications. This article is designed to begin filling that

New York, Ohio, and Virginia appear to be the only states in which proprietary centers have undertaken litigation or legislative advocacy to distinguish themselves from nonprofit centers. Telephone interviews with Glenda Pleasants, Virginia Division for Children, and New York attorney Sidney Gittelman (July 18, 1984).


5. See generally Collins, Child Care and the States: The Comparative Licensing Study, July 1983 Young Children 3. See also infra, § II.C.2 of this article.

6. See Lindsey, supra note 1.

7. Some states have recently undertaken to modify their regulatory schemes, but many legal and policy questions remain. For example, Virginia's effort during the 1970's to upgrade licensing and to issue more stringent regulations prompted church-based facilities to press for a statutory religious exemption. That exemption, now codified at Va. Code § 63.1-196.3 (1980) is the subject of pending litigation. See Forest Hills Early Learning Center v. Lukhard, 480 F. Supp. 636 (E.D. Va. 1979), vacated and remanded, 728 F.2d 230 (4th Cir. 1984). See also C. SANGER, DAY CARE LICENSING AND RELIGIOUS EXEMPTIONS: AN OVERVIEW FOR PROVIDERS (1985).

8. Social welfare commentators and academics involved in early childhood education have decried the scarcity of published work on licensing concepts. See, e.g., G. MORGAN, REGULATION OF EARLY CHILDHOOD PROGRAMS 4 (1973). "The subject is superficially dealt with at best, except in a handful of pamphlets and a few conferences. Apparently and surprisingly, professionals in the field seem unwilling to think about licensing and regulation in any depth."

Section II will present a history of child-care regulation in this country, to provide a context for the legal and policy issues now confronting regulatory officials. Section III will describe the types of child-care services currently available to parents, and will provide factual and statistical information about their operations, utilization, and financing. Section IV will analyze the legal doctrines from administrative and constitutional law that undergird all regulatory schemes. Section IV will then apply these doctrines to the specific practical problems of child-care regulation, and the open issues confronting reform-minded state officials.

II. A Short History of Regulation

Regulation of day care is primarily a function of the states and it would be simpler if this article did not need to focus on anything beyond state regulatory efforts. However, our country's political philosophy of "cooperative federalism" makes the inquiry more complicated.

On several occasions during this century, the federal government has responded by subsidizing children's services, including day-care services. The federal subsidies have often had strings attached, some of which intertwined with existing state regulatory efforts and others of which added new levels of regulation. All of them influenced the way state officials handled their duties. During the nineteenth century, however, there was no federal activity, thus the following discussion will deal only with state regulatory efforts.

A. Pre-Twentieth Century

Day-care licensing—the most common regulatory approach of state departments of health or public welfare—is a relatively recent development. It grew out of foster care licensing, which itself came into being in the latter part of the nineteenth century. While foster
care and child day care are intrinsically very different, they share the same regulatory origins. Both date back to the "poor laws" adopted by American Colonists.

Poor laws addressed the problem of how to deal with vagrant, orphaned, abandoned, or delinquent children. The children could be indentured to master craftsmen for care and instruction in a trade. They could be placed in "almshouses" along with adult beggars, prostitutes, and criminals. Or they could be assigned to orphan asylums operated by public or charitable organizations. While indenture and apprenticeship did not persist far into the nineteenth century, the foundling homes and almshouses did, and the children placed in them did not fare well. Many died, and scandals over the abuse of institutionalized children led to public support for stronger government controls.

States adopted various forms of control during the second half of the nineteenth century. They established public "children's aid societies;" they created state boards of charity; and they attached strings to public subsidies of private child-care agencies. A brief look at these efforts will confirm their role as precursors to actual licensing legislation.

1. Children's Aid Societies

The first children's aid society opened in New York in 1853. It sent thousands of homeless children from the streets of New York to families of farmers, craftsmen, and manufacturers in Western states. Despite some success as the country's first foster care placement agency, the New York society did have weaknesses:

Some of the children were placed in unsuitable homes and were

13. Regulators need to give "greater weight ... to parental responsibility in day care and [should have] a general reluctance to intervene in arrangements parents make privately for the part-time care of their children. [Hew Papers, supra note 11, at 34.
16. Id.
18. Legal Aspects, supra note 9, at 19.
19. S. Phadke, supra note 14, at 10.
ill-treated and exploited. No adequate follow-up or supervision of the foster homes was provided. A strong public reaction to unsupervised placement of children led to recognition of the need for state regulation of child-caring agencies.20

2. State Boards of Charity

Ten years after the first children's aid society opened, a different method of supervision was enacted in Massachusetts. The "state board of charities"21 was a lay group of prominent citizens appointed by the Governor to inspect and report on facilities that cared for dependent children. Nine other states established similar boards by 1873. While these boards did not have licensing power themselves, their reports contributed significantly to a climate favoring increased regulation.22

3. State-Subsidized Institutions

The institutions caring for dependent children were not necessarily public. Many were private charities of family homes that received subsidies from state or local governments, but were privately supported.23 Nonetheless, as more and more states began granting such subsidies—all but four did so by 1901—taxpayers demanded accountability and equitable use of those public funds.24 Some states, including Pennsylvania, Massachusetts, Illinois, Ohio, and Indiana, responded by enacting licensing laws.25 Others required subsidized agencies to disclose their admission and discharge policies, and to allow visitation and inspection by government officials.26 While these

20. Legal Aspects, supra note 9, at 19.
21. Id.
22. Acting on reports by boards of charities, Massachusetts prohibited detention of poor children in almshouses in 1879, and New York authorized county superintendents to remove children from institutions if they found the care to be unsatisfactory. See Licensing of Child Care, supra note 9.
23. See generally cases cited supra in note 14; see also A. Johnson, Public Policy And Private Charities (Univ. of Chicago) 1931.
25. The first was Pennsylvania. Its 1885 law made it a misdemeanor to "engage in the business of receiving, boarding, or keeping" children under the age of three without first obtaining a license from the mayor or justice of the peace. Massachusetts' 1892 law required anyone boarding two or more infants under two years of age to get a license from the State Board of Lunacy and Charity. Illinois' 1899 statute required that the State Board of Commissioners of Public Charity approve the articles of incorporation of any organization caring for dependent children. Ohio and Indiana passed similar laws in 1908 and 1909, respectively. S. Phadke, supra note 14, at 12; Licensing of Child Care, supra note 9, at 57-58.
early laws were weak and poorly enforced, "as the quality of child care in the voluntary sector improved, the states could begin to require quality beyond the mere elimination of deaths and blatant abuse." 27

The early laws focused on institutions and boarding homes where children lived. They did not contemplate regulation of facilities providing day care, partly because such facilities were rare and partly because the justification for state oversight was that children in foster care did not have parents to monitor their care and well-being. The children were "dependent," and the government needed to stand in loco parentis. However, some of the early licensing laws could be read to encompass regulation of day care. Well into the twentieth century, most state licensing laws applied the same standards to residential institutions and day care facilities. 28

B. Early Twentieth Century Regulatory Activity

1. The State Role

State regulation of all forms of private enterprise increased dramatically during the progressive era of the 1890's and the early twentieth century. 29 Policymakers continued to impose accountability measures on agencies caring for dependent children. But they also recognized that "[R]eformatories, orphanages, and other extrafamilial institutions for deviant and dependent children could not replicate families, and that the state should seek reforms to support children within their families rather than institutionalizing children." 30

This two-pronged public policy—one prong calling for government efforts to "shore up the family," and the other calling for increased government responsibility for children through public institutions—was the hallmark of a "child welfare" movement just developing in the United States. By 1909, the movement had achieved enough influence to sponsor an historic Conference on the Care of Dependent Children. 31 The conference, and the child wel-

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27. Regulation of Programs supra, note 9.
28. See generally M. Paulsen, supra note 9.
31. This was the precursor of the decennial White House Conference on Children. Meeting every decade since 1909, the conferences have been a forum for advocates and professionals to establish agendas for children. Unfortunately, the first conference was the only one to have any real effect on government policy towards children. The others primarily generated
fare movement that sponsored it, sought long-term federal involvement in children's services.

2. The Federal Role

In 1912, Congress established the United States Children's Bureau as an ongoing federal presence to monitor the well-being of children. The Bureau influenced numerous programs enacted during the progressive era. These included the mother's pensions program, which gave government funds to indigent mothers so that they could stay at home rather than seek employment; juvenile probation programs which allowed delinquent children to remain with their families rather than in institutions; and the first "day-care centers" for poor women who had to work but wanted to keep custody of their children.\(^3\)

Ironically, the federal programs that were designed to shore up the family actually increased the overall scope of public responsibility for the children. This result was consistent with the enabling legislation of the Children's Bureau, which spoke in terms of bettering the condition of all children,\(^3\) but it clashed with 1909 Conference rhetoric about private responsibility and the importance of family. The tension between public and private responsibility for children has persisted throughout this century, and has played a role in every effort to regulate day care since the progressive era.\(^4\)

C. The 1920's

1. The State Role

During this period, state regulatory activity in child care predominated over direct federal involvement. However, the federally established Children's Bureau continued to grow, and along with a companion entity in the private, nonprofit sector (the Child

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rhetoric. See Broken Promises, supra note 15, at 111. See also Licensing of Child Care, supra note 9, at 58.
33. Legal Aspects, supra note 9, at 21.
34. "The real legacy of the progressive era... was the reaffirmation of the two competing conceptions of responsibility for children which had been tentatively formulated in the nineteenth century. The uneasy coexistence of public responsibility with an ideology of private responsibility provided the setting for the subsequent expressions of family "crisis." Broken Promises, supra note 15, at 27; see also C. Joffee, Friendly Intruders 3 (1977).
Welfare League of America), the Bureau helped many states develop licensing laws and "standards of care" for all agencies serving children.

With the guidance of the Children's Bureau, state regulation of children's services burgeoned during this period. By the end of the 1920's, most states had passed some form of child-care regulation. Several aspects of these early laws and standards are worthy of note.

First, the laws still combined day care and foster care into the same licensing scheme; varying standards for different types of care came much later. Second, the "standards of care" were universally perceived as "goals" toward which licensed agencies would strive, rather than legal requirements for licensing. The Child Welfare League of America, which led the movement to formulate such standards, reaffirmed this perception. Third, even the licensing laws, which were mandatory often tended to be weak and impractical. Licensing agencies did not fully understand their responsibility and did not seem to know how to use either legal counsel or the courts to clearly define their powers. Most important, licensing staffs were generally too small to implement the law . . . .

Finally, the regulatory efforts were not directed towards a strand of the child-care movement that began to evolve during the 1920's. This was the nursery school movement, which catered to middle-class children and stressed developmental enrichment and cognitive growth. Its providers and consumers distinguished themselves from the welfare-related programs that catered to low-income families and stressed custodial care for children of working mothers.

35. Legal Aspects, supra note 9, at 22-3.
36. Id. See also Licensing of Child Care, supra note 9, at 59; P. Joffee & L. Klibanoff, supra note 14, at 3.
37. Reasons for the "advisory" nature of standards included: (1) reticence on the part of regulatory agencies to take an adversary stance with charitable institutions providing care; (2) reluctance to impose secular restraints on church-provided services; (3) the assumption that the state agency subsidizing the services would use its clout (and purse strings) to enforce high standards; (4) a passive approach on the part of the social workers staffing the licensing agencies; (5) cutbacks in subsidies during the Depression. Legal Aspects, supra note 9, at 22-23.
38. As recently as 1969, the League prefaced its publication of day-care standards with this caveat: "These standards are intended to be goals for continuous improvement of services to children. They are not the criteria for accreditation . . . ." Child Welfare League of America, Standards For Day Care Services (1969).
39. Licensing of Child Care, supra note 9, at 59.
40. Nursery school people regarded day nurseries with contempt: the day nurseries suffered the disadvantages of the stigma of inadequate resources, a clientele of the 'undeserving poor:' and social welfare goals rather than the more
Nonetheless, these laws represented the beginning of broad-based state commitments to systematically regulated child day care. During the 1920's, the federal contribution to this development remained advisory and consultative. The pendulum swung toward extensive federal involvement in children's services in the next two decades, however. State regulatory efforts faded into the background as the United States government grappled with two national crises.

D. The Great Depression of the 1930's

1. The Predominant Federal Role in Child Care

The federal government pumped huge sums of money into the desperate economy of the 1930's, much of which was used to subsidize new services for children. For example, the Federal Emergency Relief Act of 1933 provided welfare payments to all needy, unemployed persons and/or their dependents.\(^{41}\) The Works Progress Administration (WPA) supported nursery schools during the depression, so that parents of young children could work in WPA projects.\(^{42}\) And the Social Security Act of 1935\(^ {43}\) fostered the development of numerous child welfare services by providing new grant-in-aid funds to the states.

2. The State Role During the 1930's

The federal programs mentioned above were designed primarily to enable adults to work. They did, however, have one significant effect on state regulatory efforts. Most of the programs exemplified cooperative federalism by providing grants-in-aid to states. State agencies disbursed the money to eligible citizens according to federal guidelines. This enabled state agencies to hire additional personnel respectable efforts to educate young children. Even though nursery schools were never widespread, they provided a strong institutional image of what the education of young children ought to be, an image significantly different from that provided by day nurseries.

\(\text{BROKEN PROMISES, supra note } 15, \text{ at } 212. \text{ See generally M. O. STEINFELS, WHO'S MINDING THE CHILDREN: THE HISTORY AND POLITICS OF DAY CARE IN AMERICA (1973); S. ROTHMAN, OTHER PEOPLE'S CHILDREN: THE DAY CARE EXPERIENCE IN AMERICA, 30 THE PUBLIC INTEREST 11-27 (1973).}\)


\(^{42}\) LEGAL ASPECTS, supra note 9, at 23-4. The Works Progress Administration was established by Executive Order 7034 on May 6, 1935. It was renamed the Works Project Administration by Reorganization Plan 306, effective July 1, 1939, and liquidated by the Presidential Letter dated December 4, 1942.

to carry out all child welfare services, including licensing. Consequently, the amount of day-care services available increased along with the number of its regulators.

E. **World War II and the Postwar Era: More Federal Intervention and then the Pendulum Swings Back**

1. **The Federal Role During World War II**

The Lanham Act, passed during World War II in order to encourage women to work in the war effort, infused additional federal funds into day-care services. The act authorized fifty percent federal matching funds for day care centers. As a result, during World War II, over one million children attended programs subsidized through the Lanham Act.

This period saw little or no state regulation of child day care, even in states with strong licensing laws. Aggressive regulation would have "inhibited the massive expansion of day care which was seen as in the national interest at that time."47

2. **The Increased State Role After the War**

Lanham Act funds were withdrawn after the war, in accordance with prior congressional commitments. Congress had allotted Lanham Act funds "solely as a war emergency measure in order to facilitate the employment of women needed in the war industries. We are not subsidizing an expanded educational program nor a federal welfare program."48 During the years immediately following World War II, the federal government joined private industry in exhorting women to return home to raise their families.49

However, women continued to work outside the home at an ever-increasing rate.50 In order to meet the needs of working parents,

44. Licensing Of Child Care Facilities, supra note 9, at 59.
47. Legal Aspects, supra note 9, at 24.
private day-care facilities expanded in number, and state regulatory efforts expanded to monitor the growing day-care industry.

After World War II the number of states with specific day-care licensing laws rather than general laws regulating foster care and implicitly subsuming day care dramatically increased. Only nine states had passed such laws in 1944; by 1957 the number had grown to thirty-nine. Of perhaps greater interest than the number of states with such laws is the type of day-care facility that the states were regulating. Fifteen states required licensing for proprietary centers only. Throughout the country, proprietary centers represented a higher percentage of licensed facilities than publicly-funded or nonprofit ones.

Regulation of day-care facilities continued to be the province of state agencies that were successors to the nineteenth century Board of Charities: i.e., Departments of Welfare, or Health and Welfare, or simply Health. These state agencies had responsibility for monitoring private facilities as well as those receiving public subsidies. During the period after World War II, state agencies exercised that responsibility without any significant protest from the proprietary centers.

These proprietary centers still did not include part-time nursery schools. Such schools continued to cater to families with nonworking mothers, and continued to be distinguished for regulatory purposes from full-day programs serving the children of working parents. Nevertheless, during the 1950's, some of the cognitive and developmental goals of the nursery school movement began to filter into day-care regulation. This occurred because state agencies started collaborating with child advocacy groups, professional organizations, and concerned individuals in setting day-care standards. Such collaboration played a key role in the ability of states to develop and begin to enforce standards as well as to obtain legislative appropriations. Consensus could not always be reached on the definition of "quality care" or on minimal licensing standards, but, in general, a spirit of cooperation between state and private agen-

51. The number of day-care facilities of all types increased dramatically during the 1950's. In 1951, there were about 1,500 licensed day care centers; in 1964, there were 6,300. Id. at 8.
52. P. Joffek & E. Klibanoff, supra note 14, at 3-4.
53. Id. at 5-6.
54. Licensing of Child Care Facilities, supra note 9, at 59.
55. See authorities cited supra note 40.
cies continued uninterrupted through the late 1960's within the states. 58

F. The Great Society Programs of the 1960's

1. New Federal/State Collaboration

During the 1960's, the federal government renewed support for child welfare programs in ways that harkened back to the 1930's. Amendments to the Social Security Act in 1962 authorized $10 million of federal funding for day care under the Child Welfare Services Program. 57 This funding, appropriated under Title IV of the Social Security Act, was available to all children in need, though its primary beneficiaries were recipients of Aid to Families with Dependent Children (AFDC). 58 The 1962 amendments ushered in a new phase of federal involvement with day care regulation, when Congress tied the receipt of Title IV funds to a facility's compliance with state licensing codes. 59 As a consequence, states serving as conduits for the new federal funds began taking a closer look at their licensing schemes, with an eye toward strengthening and centralizing their regulatory efforts. 60

Other federal activities encouraged states to upgrade their licensing laws. The Children's Bureau, by then part of the United States Department of Health, Education and Welfare (HEW), funded a "Centennial Conference on the Regulation of Child Care Facilities." 61 With assistance from child development specialists and new child welfare organizations, the Children's Bureau began advocating cognitive growth and other indicia of "quality" as essential components of day-care programs. 62 This Children's Bureau worked

56. P. JOFFE & E. KLIBANOFF, supra note 14, at 6-7. See also Takanishi, supra note 47, at 152-54.
58. In order to emphasize "services to families," the name of the program was changed from "Aid to Dependent Children" to "Aid & Services To Needy Families With Children." Act of July 25, 1962, Pub. L. No. 87-543, § 104(a)(3), 76 Stat. 185. See also P. JOFFE & E. KLIBANOFF, supra note 14, at 8.
60. See also P. JOFFE & E. KLIBANOFF, supra note 14, at 8-9.
61. One of the papers read at this conference, held in Chicago in 1967, was prepared by Monrad Paulsen—then Dean of the University of Virginia School of Law. Dean Paulsen later revised and published this paper as the law review article cited supra note 9.
62. The Child Welfare League of America was no longer the only ally of the Children's Bureau involved in policy-making efforts. New organizations include the National Association for the Education of Young Children, the Association for Childhood Education International,
closely with state licensing agencies, encouraging them to emphasize “quality” in day care as well as compliance with minimum health and safety requirements.

The Children’s Bureau and child welfare advocates also influenced other Great Society programs enacted by Congress. Their influence could be seen in the 1964 Economic Opportunity Act, which authorized grants for “developmental” day care under Head-Start and other community action programs; and the 1968 amendments to the Social Security Act, which made federal matching grants for “family and child welfare” services available to the states.

These programs had a broader purpose than their analogs from the 1930’s. In both eras the federal government sought to help needy Americans find work. But during the 1960’s, lawmakers also recognized the needs of the children of working parents. If federal dollars were going to be used to purchase day-care services for those children, then the federal government wanted to guarantee that 1) the services met the highest standards of quality, and 2) state agencies receiving federal dollars to purchase those services thoroughly monitored and regulated them.

2. The Federal-State Collaboration Gone Awry

Unfortunately, the federal government’s new money was accompanied by mixed signals about what “high quality” meant, and how the states were supposed to monitor it. HEW imposed one set of regulations on all the state agencies receiving funds under the Social Security Act, but HEW was not the only federal agency disbursing money for day care. The Departments of Labor, Agriculture, Defense, Housing and Urban Development, and the Bureau of Indian Affairs also funded day-care services. These agencies acted under

and the Day Care and Child Development Council of America. LEGAL ASPECTS, supra note 9, at 26-28.


65. HEW provided matching funds to a single agency in each state —usually the health and/or welfare department. The “single state agency,” as it came to be known in regulatory parlance, was responsible for purchasing day-care services from public or private facilities, and for ensuring that those facilities complied with state licensing codes and HEW regulations. P. JOFFE & E. KLIBANOFF supra note 14, at 8. See also HEW PAPERS, supra note 9, at 34.

different congressional authorizations and appropriations, and until 1968, each had its own regulations and procedures. Subsidized day-care providers were held to different standards depending on which federal agency was the source of their funding.

In 1968, HEW devised a common set of standards that it sought to have adopted by all federal agencies involved in funding day-care programs.67 These standards were promulgated as the Federal Interagency Day Care Requirements (FIDCR). They provided that federally funded day-care services must meet state licensing regulations as well as new federal standards on adult-child ratios, group size limits, environmental and safety considerations, social services, and health and nutrition.68 For reasons that will be discussed in the next section, this effort at federal standard-setting was not a success.

G. The 1970’s and 1980’s: Dismantling the Great Society

Although the FIDCR were modified in 197569 and incorporated into Title XX of the Social Security Act,70 by the mid-1970’s the federal government’s commitment to day care was waning. President Nixon’s 1971 veto of the Comprehensive Preschool Education and Child Day Care Act71 heralded the end of the Great Society promises of publicly-supported child care for all parents.72 As Great Society programs were dismantled, regulatory efforts like the FIDCR generated increasing controversy.

From their inception, FIDCR provisions had the same intrinsic weakness that had always undermined state licensing laws: they

68. HEW PAPERS, supra note 9, at 34.
70. 42 U.S.C. § 1397a (1982). Title XX provided federal funds for child care for low-income families since 1975. The funds went to the states, which then purchased child-care services directly from providers. Children from eligible families were placed in program slots subsidized by the Title XX funds. Although states could use these funds for a wide variety of social services, Title XX actually mandated that a portion of them be allocated to child-care services. 42 U.S.C. § 1397a(a)(A) (1982).
72. Nixon’s veto message expressed the belief that day care weakens families, and that a “family centered approach” was preferable to communal approaches to childrearing. Ironically, Nixon had earlier been a strong proponent of day care for poor women. The duality inherent in his position reflected the “cultural ambivalence about child-care” that originated during the progressive era. See text supra note 34; GREENMAN, supra note 50; C. JOFFEE, supra note 34, at 3.
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were drafted as "goals" rather than enforceable obligations. The public affected by the FIDCR—day-care consumers, providers, and state regulatory officials—had not participated in drafting them, and several attempted to enjoin their enforcement in federal court. Many people also mistakenly believed that the FIDCR applied to all facilities, not just federally-funded ones. Moreover, the FIDCR were never adopted by all federal agencies; the Defense Department and Headstart programs continued to apply their own regulatory standards. Even the agencies that did adopt the FIDCR showed little inclination to enforce them.

A good deal of the controversy stemmed from the FIDCR's attempt at "cooperative federalism." Title XX required the states to enforce compliance with the FIDCR, and the regulations authorized severe sanctions against states that failed to do so. However, the federal government never provided guidance to the states on how to monitor compliance, and never imposed any of the sanctions.

State agencies struggled to devise administrative structures that

73. See supra note 37, and accompanying text. See also HEW REPORT, supra note 66, at 146:

The language of the FIDCR often raises questions about the mandatory status of individual provisions . . . . HEW policy-makers contributed to the confusion over the degree of compliance required by the FIDCR. In October 1975, Stephen Kurzman, the Assistant Secretary for Legislation, testified before the Congress that the Department regarded the FIDCR as goals and would work with the States to develop good faith efforts to meet them rather than concentrate on strict enforcement.

Id.

74. HEW REPORT, supra note 66, at xxix.

75. E.g., Stiner v. Califano, 438 F. Supp. 796 (W.D. Okla. 1977) (three-judge court). This litigation was brought by day-care operators and parents. Both claimed that the FIDCR staffing ratios would result in dramatically increased costs, causing the centers to close and the parents to quit work, thus depriving both parents and proprietors of property without due process of law. The three-judge court held that the FIDCR portion of Title XX was constitutional under the Spending Power; and the statute and HEW regulation 45 C.F.R. § 228.42 were not so irrational as to violate due process. The court cited Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955) for the point that FIDCR "may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement." Id.

76. Senator Bartlet of Oklahoma testified against the FIDCR in 1975 on the basis of a misapprehension that they applied to "every day-care center in the United States . . . regardless of State laws to the contrary. . . . " Hearings on S. 2425, Before the Senate Comm. on Finance, 94th Cong., 1st Sess. 15-23 (Comm. Print Oct. 8, 1975).

77. HEW REPORT, supra note 66, at xxxii.

78. Id. at xxix.

79. The Secretary of HEW had authority to withhold a state's entire Title XX grant for failure to administer the FIDCR, or to deny payment for any day care that did not meet the FIDCR requirements. 45 C.F.R. §§ 228.13 and 228.42.

80. HEW REPORT, supra note 66, at 151.
would meet their Title XX obligations. Some "piggy-backed" FIDCR activities onto state licensing procedures, and others actually revised their licensing codes to incorporate FIDCR provisions. But no one was really satisfied with the implementation of these requirements. Even HEW concluded that:

[T]he organizational model a State follows to implement FIDCR enforcement . . . does not appear to be related to how effective a State is in complying with the regulations. . . . [T]here is only inconclusive, anecdotal information on compliance because it is difficult to determine what constitutes compliance. As mentioned earlier, the lack of specificity in the language of the FIDCR leaves them open to wide variations in interpretation.

After more than a decade of confusion and protest about the FIDCR, the Department of Health and Human Services ("HHS") developed new child-care regulations to replace them. Most of these regulations went into effect in October 1980, but two months later, Congress postponed their effective date as it debated massive cutbacks in social services. Finally, as part of the Social Services Block Grant program enacted in 1981, Congress eliminated the statutory basis for the FIDCR, and HHS repealed them in February 1982. Between 1981 and 1984, child-care services subsidized with block grant funds had only to comply with "applicable standards of state and local laws."

Publicity about child abuse during 1984 prompted Congress to renew some efforts at standard-setting. First, Congress required the HHS to draft a Model Child Care Standards Act for the states' consideration, by January 12, 1985. Second, Congress authorized

81. Id. at 152-4.
82. Id. at 137; see also LEGAL ASPECTS, supra note 9, at 38.
(without appropriation) child abuse prevention activities by the states, which would be eligible for federal funds during fiscal 1986. Third, Congress authorized and appropriated $25 million under the Title XX Social Services Block Grant to be distributed as training funds for providers, operators, and staffs of federally subsidized day care.

While it is still too early to evaluate the impact of these federal initiatives, it is at least clear that their scope is far narrower than that of the FIDCR. The primary focus is on prevention of child abuse, and the responsibility for such prevention has been delegated to the states. The most that can be said is that states are struggling, with almost no guidance from the federal government, to devise procedures for checking the employment history, background, and criminal records of current and prospective child care workers. In doing so, the states are confronting logistical and legal problems that revive all the federal/state tensions that were prompted by the FIDCR. Moreover, while the public supports new vigilance about child abuse, the states may be adopting screening measures that are ineffective and violative of civil liberties.

development, supervision, and evaluation of staff; (2) Parent Visitation; (3) Staff-Child Ratios; (4) Job qualification requirements, by classification; (5) Probation periods for new staff; (6) Employment history for new staff.

89. Id.

90. In order to avoid losing half of these funds during fiscal year 1986-87, however, states must have in effect by September 30, 1985: (1) procedures established by state law or regulations to provide for employment history and background checks, and (2) provisions of state law consistent with Pub. L. No. 92-544, Title II, 86 Stat. 1115 (1972) requiring nationwide criminal record checks for all current and prospective operators, staff, or employees. Id.

91. The "Model Day Care Standards and Guidance To States To Prevent Child Abuse" issued by HHS in January 1985 could have reactivated the FIDCR. Instead it merely paraphrased the six areas contained in Congress' enabling legislation, and appended child-care standards from the Child Welfare League, National Association for the Education of Young Children, and the National Child Care Management Association. (Copies available from Marie Byrd, Publications, Office of Human Development Services, 200 Independence Ave. S.W., Washington, D.C. 20201).

92. See supra note 90.

93. See Office of Inspector General, HHS Region X, Preventing Sexual Abuse In Day Care Programs, (Draft Report, November 1984).

94. See generally A. Cohen, Vigilant In The Protection Of Our Children Or Vigilantes? Legal Considerations In Drafting Screening Laws And Recommendations For Safeguarding Children In Child Care Settings, Report Of Child Care Law Center 2-5 (1985).

95. Child abuse experts agree that using registries of family-based child abuse will not help to screen out institutional child abuse. Unfortunately, the consensus seems to be that "prediction based on known profiles or indicators is not possible with our current level of knowledge." V. J. Fontana, M.D. and J. D. Alfaro, Letter to the editor N.Y. Times, Nov. 7, 1984; see also D. Gordon, No Child Abuse, No Adult Abuse, N.Y. Times, March 3, 1985,
H. Concluding Historical Observation

This historical discussion should make clear that day care regulation has confronted many of the same issues for almost a century. Section III will examine these issues in their current policy formulations, and will provide the factual background for the legal discussion that follows in Section IV.

III. Day-Care Regulation in the 1980's

A. The Day-Care Markets

The demand for day care in the 1980's is greater than ever before. Between 1940 and 1976, the number of working mothers increased tenfold. In 1965, twenty percent of mothers with children under six worked outside the home; by 1982, the figure was fifty percent, and it was even higher (sixty-six percent) for mothers of children between six and eighteen. The rate at which mothers are entering the labor force continues to grow, and it is estimated that by 1990, forty-four percent of the nation's twenty-three million preschool children will have mothers working outside the home.

The number of day-care facilities in the United States is also growing, although no one knows exactly how many there are. In part because Congress was thwarted in its effort to establish a comprehensive, nationwide child-care delivery system, the choices available to parents resemble "a patchwork quilt made up of public and private programs provided by individuals and groups in a variety of ways."

(Op-Ed page).

100. C. Barsky & M. Personick, The Outlook For Industry Output and Employment Through 1990, 104 MONTHLY LAB. REV. 29 (April 1981); see generally Zeitlin & Campbell, supra note 85, at 3-8.
101. In 1978, there were approximately 18,300 licensed day-care centers, serving about 900,000 children. Cong. Budget Office, Child Care and Preschool: Options For Federal Support 7 (1978). Even if the most generous estimate of family day-care slots were added to this figure, see infra, note 113, it would not come close to approximating the number of preschool children in need of day care. See generally Children's Defense Fund, Employed Parents And Their Children: A Data Book (1982).
ETY of settings, including homes and centers, licensed and nonregulated services.103 Day care is provided in "almost every conceivable setting," including homes, storefronts, warehouses, hospitals, garages, schools, hospitals, and church basements.104 Despite this range of programs and settings, day-care providers may be categorized into three broad groups which were introduced in the historical section of this article.

1. Subsidized Day Care

The first category consists of nonprofit centers and a few licensed family day-care homes that receive government subsidies or charitable support from entities such as the United Way. The subsidies enable nonprofit programs to serve low-income children, making them direct descendants of the institutions that cared for "dependent children" in the early 1900's. These programs were formerly subject to the FIDCR, and they must now comply with whatever regulatory "strings" are attached to their present subsidies. Nonprofit, subsidized programs have "received the lion's share of the public and professional attention and resources."105

2. Proprietary Day Care

The second category consists of private facilities that are operated as profitmaking businesses. They depend on fees paid by parents,106 and range from small "Mom-and-Pop" centers to chains of day-care franchises, of which there are now more than 150.107 The category also includes centers operated by a handful of large corporations for their employees, and preschool programs that originated as half-day nursery schools but now provide full-day care for infants or toddlers as well as children over three.108

104. GREENMAN, supra note 50, at 8-9.
105. Id.
106. Id.
107. The largest, Kinder Care Learning Centers, operates about 850 day-care centers throughout the country. Other large companies are LePetit Academy of Kansas City, Missouri; Children's World of Evergreen, Colorado, and National Child Care Centers of Houston, Texas. Lindsey, supra note 1, at 16.
108. See supra text accompanying notes 40 and 55. By the 1970's, the private nursery schools that had assiduously differentiated themselves from "day care" since the 1920's had to begin defining themselves as day-care programs in order to remain open. So many working parents needed full day-care for their young children that there were no longer enough "traditional" middle class families to support half-day nursery school programs. Integrating nursery
3. Family Day Care

The third category consists of family day-care homes, "the most widely used and least understood form of child-care," which are responsible for nearly half of all children who receive out-of-home child-care. Family day care is provided in the home of a friend or neighbor, who also often cares for his or her own children or those of a relative. The typical group size is three children, though most states allow family day-care providers to care for up to six children. Because it is home-based, family day-care varies in atmosphere and program much more than center-based care does. Family day-care homes are also harder to regulate; it has been estimated that ninety-four percent of such homes are unregulated.

None of the three broad categories is necessarily better than the others. Each is different enough from the others, though, that some day-care advocates argue that they merit different regulatory approaches.
In some cases, the interests of all three categories of day-care providers are the same; in other cases their interests are obviously different. The paragraphs that follow, which set forth a range of policy concerns that day-care advocates are currently presenting to lawmakers, illustrate the varying agendas of the three broad day-care constituencies.\textsuperscript{117} It should be apparent at the end of this discussion that a legal framework is necessary to resolve many of the policy concerns.

B. Current Policy Issues In Day-Care Regulations

1. Policy Issue 1: Overlapping Regulatory Schemes Should Be Strengthened Or Unified

State licensing agencies are not the only official entities regulating child-care facilities. Most states have several overlapping bureaucracies that enforce different sets of legal requirements for day-care providers. In addition to enforcement by licensing agencies, state or local fire marshals enforce building and fire codes;\textsuperscript{118} and state or local health departments enforce sanitation and health codes.\textsuperscript{119} Fur-

\begin{footnotesize}
\begin{tabular}{l}
\textsuperscript{117} These policy issues concern regulatory matters, not the fundamental imperfections in the day-care market. The latter issues, which include demand that far outstrips supply, poor access to information about day care, decreases in the number of slots for low-income children, and unaffordable services, extend beyond the scope of this article. See generally D. R. Powell, \textit{Finding Child Care: A Study Of Parents; Search Processes} (1980); \textit{Children's Defense Fund, Children And Federal Child Care Cuts 5-11} (1983); R. Neugebauer, \textit{The Relationship Of The Day Care Center To Its External Environment, reprinted in Making Daycare Better 112} (Greenman & Fuqua, eds. 1984); R. Ruopp, J. Travers, F. Glantz & C. Coelen, \textit{Final Report Of The National Day Care Study} (1979); Ruopp and Travers, \textit{Janus Faces Day Care: Perspectives on Quality and Cost, reprinted in Day Care: Scientific and Social Policy Issues} (E.F. Zigler and E.W. Gordon, eds. 1982); Bennetts, \textit{supra} note 116.

\textsuperscript{118} E.g., California and Illinois require the state fire marshal to conduct annual inspections of all day-care centers (but not family day-care homes), pursuant to a uniform state code, \textit{Cal. Health & Safety Code} \S\ 13143 (West 1984); \textit{Ill. Rev. Stat.}, ch. 12712, \S\ 9 (1953) and \textit{Ill. Admin. Reg.} \S\ 407 (1981); Florida requires annual fire inspections of day-care centers and family day homes, pursuant to local fire codes \textit{Fla. Stat. Ann.} \S\ 402.305-6 (West 1984); Ohio requires annual inspections of centers (but not family day homes) by local fire inspectors, \textit{Ohio Rev. Code Ann.} \S\ 5104.05(B) (Page 1981); Michigan requires centers and family day homes to be inspected once by a "qualified fire inspector," pursuant to local fire codes, \textit{Mich. Comp. Laws} \S\ 722.113 (West Supp. 1984); and New Jersey requires a fire inspection for centers every three years, conducted by its licensing agency, \textit{N.J. Admin. Code} 10:122-1.1 (1982).

\textsuperscript{119} Ohio and North Carolina have uniform statewide health codes requiring annual inspections of day-care centers by local health inspectors or sanitarians. \textit{Ohio Rev. Code Ann.} \S\ 5104.05.1 (Page, 1981); \textit{N.C. Gen. Stat.} \S\ 130.170 (1981); Texas has local health inspectors doing annual inspections pursuant to local health codes. \textit{Tex. Stat. Ann. Art.}
\end{tabular}
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Nevertheless, state welfare departments must enforce the licensing
codes, and city or county governments must enforce the local zon-
ing ordinances that deliberately or inadvertently exclude day-care fa-
cilities from specified land uses.

Even the most diligent providers of day care endure frustrating
delays and expense to comply with these overlapping requirements.
Only a few states have made any effort to coordinate and consolidate
them, yet such an effort represents the most salutary change in

4442a(2) (Vernon 1976); New Jersey and California require such inspections every three
years. N.J. REV. STAT. § 26.1A-9, 18, 23 (1964); CAL. HEALTH & SAFETY CODE § 17920;
17953 (West 1984).

120. E.g., ALA. CODE § 38-7-1 to-17 (1975); ALASKA STAT. § 47.35 (1984); ARIZ.
STAT. ANN. § 36-881 (West Supp. 1975-1984); ARK. STAT. ANN. § 83-801 (1983); CAL.
HEALTH & SAFETY CODE § 1500 (West 1979, Supp. 1984); COLO. REV. STAT. § 26-6-101
(1982); CONN. GEN. STAT. ANN. § 19-436 (West 1977); DEL. CODE ANN. tit. 31 § 390
(Michie 1975); D.C. CODE ANN. § 3-301 (1981); FLA. STAT. ANN. § 402.301 (West 1973);
GA. CODE ANN. § 99-201 (1981); HAWAII REV. STAT. tit. 19, Ch. 346-18 to 26 (1976); ILL.
REV. STAT. ch. 23 § 2211 (1968 and Supp. 1984); IND. CODE ANN. § 12-3-2-1 (Burns 1973);
IDAHO CODE ANN. § 39-1211 and 39-1213 to 22 (1977); IOWA CODE ANN. § 237A.1 (West
Supp. 1984); KAN. STAT. ANN. § 39-1001 (1981) (day care for mentally retarded and handi-
capped children) and § 65-501 (1980); KY. REV. STAT. § 199-896 (1982); LA. REV. STAT.
ANN. § 46-1401-1412 (West 1982); ME. REV. STAT. ANN. tit. 22 §§ 7701-7805 (West 1980 &
Supp. 1984); MD. ANN. CODE art. 88A, 20B-36C (MD) § 26 (1979); MASS. GEN. LAWS
1984); MINN. STAT. ANN. §§ 245.781-801 (West 1982 & Supp. 1984); MISS. CODE ANN. §
43-20-1 to -21 (1981); MO. ANN. STAT. § 210.201-245 (Vernon 1983); MONT. CODE ANN.
§53-4-501 to 515 (1983). NEB. REV. STAT. § 71-1901 to 1918 (licensing) (Supp. 1984); NEV.
REV. STAT. Ch. 432A.131-220 (1979); N.H. REV. STAT. ANN. § 170-E:1-20 (Supp. 1985);
N.J. STAT. ANN. 18A:70-70-1 (West 1968); N.M. STAT. ANN. § 40-7A.1 (1983); N.Y. SOC.
SERV. LAW § 390 (McKinney 1983); N.C. GEN. STAT. § 108.78 (1979); N.D. CENT. CODE
§ 50.06 (Supp. 1983); OHIO REV. CODE ANN. § 5104.01 (Page 1981); OKLA. STAT. ANN. tit.
10 § 401 (West 1966); OR. REV. STAT. § 418.805 (1983); 62 PA. CONS. STAT. ANN. § 1001
(Purdon 1981); R.I. GEN. LAWS. § 40-13-7 (1977); S.C. CODE ANN. § 20-7-2980(1) (Law-
yers Co-op. 1983); S.D. CODIFIED LAWS ANN. § 26-6-1 (1984); TENN. CODE ANN. § 14-10-
101 (1980); TEXAS HUM. RES. CODE § 42.001 (Vernon 1980); UTAH CODE ANN. § 55-9-1
(1983); VT. STAT. ANN. tit. 33, § 2852 (1981); VA. CODE § 63.1-195 (1980); N. VA. CODE §
49-2B-2 (1984); WIS. STAT. ANN. § 48.65 (West 1979); WYO. STAT. ANN. § 14-4-101
(Michie 1983); WASH. REV. CODE ANN. § 74.15.010 (1982).

121. Day care can be inhibited by zoning ordinances that (a) fail to list it as a permissi-
ble use; or (b) deliberately exclude it from permissible uses; or (c) consider it to be a com-
mercial use rather than an "essential community service." When day care is not listed or is delib-
erately excluded, day-care providers must seek a "variance" from the zoning provisions and go
through public hearings that often require legal assistance. When day care is classified as a
"commercial" use, providers must often pay a fee to conduct their "commercial" venture. This
adds another cost to the already expensive delivery of day care. Day-care providers may also
face zoning requirements that are inconsistent with state licensing requirements. Change
Through Regulation, supra note 116, at 165.

122. E.g., ARIZ. REV. STAT. ANN. § 36-883(G) (1974) and HAWAII REV. STAT. § 346-
20 (1976), both of which mandate a comprehensive biennial review of day-care rules and
regulations in consultation with the state fire marshal, state department of education, and
other agencies; ARK. STAT. ANN. § 83-911 (1976), which vests regulatory powers in a "Child
day-care regulations that could be achieved by reform-minded legislators. Each of the three broad day-care constituencies support the goal of streamlining the regulatory process, although they sometimes disagree about which state agency should have regulatory authority. 123

2. Policy Issue 2: Day-Care Facilities Should Be Distinguished From Other Regulated Community Care Facilities

Many regulatory efforts are still hampered by a failure to distinguish day care for children from other regulated services. Most statutes govern not only day-care facilities but the full range of "child-caring institutions." Some statutes purport to govern all "community care facilities," including day-care centers, homes for the elderly, foster homes, and homes for unwed mothers. 124 This generic approach ignores critical differences in the services provided, populations served, and ability of consumers to monitor health and safety compliance in the specific type of facility.

For example, foster homes entail twenty-four hour care, and presuppose the absence or non-involvement of a child's natural parents. The government's watchdog role in such a situation should exceed what is appropriate in the day-care context, in which parents have a daily opportunity to observe the facilities used by their children, and to complain about any deficiencies they perceive. 125

Day care and nursing home care differ even more sharply.

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123. Change Through Regulation, supra note 116, at 165.
124. E.g., CAL. HEALTH & SAFETY CODE § 1501 (West Supp. 1984), which governs all "community care facilities," including day-care centers, family day-care homes, foster homes, and residential care facilities for the elderly; LA. REV. STAT. ANN. § 46.1401-1412 (West 1982), which prescribes licensing for all "childcare institutions," including maternity homes, agencies placing children in foster homes, adoption agencies, foster homes, group homes, and day-care centers; N.C. GEN. STAT. § 108-78 (1979), which covers all "child-caring institutions," including day care centers, foster homes, and juvenile detention facilities; OKLA. STAT. ANN., tit. 10 § 401-410 (West 1966), which covers "any public or private institution, child placing agency, foster family home, group home, day-care center, or family day-care home..."; TENN. CODE ANN. § 14-10-101 (1980), which covers all "child welfare agencies" including maternity homes, family boarding homes, group care homes, day-care centers, child placing agencies, and family day-care homes.
125. LEGAL ASPECTS supra note 9, at 6.
Nursing homes fit squarely within a medical model of care, and involve complex skills, specialized equipment, and round-the-clock services that are difficult or impossible for the general public to evaluate. As such, nursing homes are part of the pervasively regulated health care industry. Day-care facilities, on the other hand, involve equipment and teaching materials that parents are in the best position to evaluate. Moreover, the population served by day-care is neither sick nor in need of round-the-clock care.

Although it might be possible under existing statutes to promulgate different sets of regulatory standards for different types of facilities (one set for foster homes, another for juvenile detention group homes, yet another for day-care centers), there is no guarantee that this will occur. Any legislation that purports to cover a broad range of community care facilities conveys the false impression that they have more similarities than differences. Such legislation may also confuse the people responsible for drafting the regulations. There is much to be said for legislation that treats day care as sui generis, or at least urges regulators to remember the intrinsic differences between day care and other "child-care" entities.

3. Policy Issue 3: Day-Care Facilities Should Be Distinguished From Schools

Numerous day-care facilities are styled "nursery schools" or "preschools," and other day-care facilities that do not use the word "school" nonetheless provide highly educational programs. Proprie-
tary centers that are descendants of the nursery school movement have particular difficulty accepting the fact that if they now provide full-day care, they fall within the same regulatory purview as all other day-care centers.

Thus, some day-care facilities have contended that they should be regulated by their state department or board of education—whose jurisdiction over public and private schools is separate from that of state agencies regulating day care. Courts presented with such contentions look to the function, purpose, and operational hours, rather than the names the centers have chosen, but the issue of their categorization continues to arise in litigation. Classification is complicated in certain states by the fact that public schools do provide some day-care services. Because such programs are funded by the school authorities, it is appropriate that they be regulated by the department of education and exempt from other day-care regulation. Most day-care delivery, however, is not part of the public or private school system, and its "essential function . . . is to provide care and safety," not education. Thus, it is important to distinguish schools from day-care facilities for regulatory purposes. Many state laws would benefit from clearer specification of the distinctions.

129. See supra text accompanying notes 40 and 55.
130. E.g., Montessori School House Inc. v. Department of Social Servs., 120 Cal. App. 3d 248, 175 Cal. Rptr. 14 (1981) (Montessori school provided "the kind of services intended to be regulated" by the day-care licensing act, whether or not it called itself a "school."); cf. Possekel v. O'Donnell, 51 Ill. App. 3d 313 (1977) (regardless of whether a licensed day-care center offers educational instruction, the Child Care Act defines its liability by injury to children, not by the School code's immunity provision); Johnson v. Department of Social Servs., 123 Cal. App. 3d 878, 177 Cal. Rptr. 49 (1981) (preschool is subject to the day care licensing regulations which prohibit corporal punishment; it is not deprived of equal protection merely because schools are allowed to administer corporal punishment; schools and day care facilities are not similarly situated).
133. See supra text accompanying note 96.
135. E.g., Texas' previous licensing statute, (now repealed) exempted "bona fide educational facilities," but specified no criteria for such facilities. The current statute is far more precise, excluding the following educational entities from licensing:
   (7) an educational facility accredited by the Central Education Agency or the Southern Association of Colleges and Schools that operates primarily for educational purposes in kindergarten and above;
   (8) an educational facility that operates solely for educational purposes in grades
4. Policy Issue 4: Day-Care Facilities Should Conform to Enforceable Minimum Standards, Developed with Input from Consumers, Providers, and Regulators

Some regulatory bodies still misconstrue the purpose of day-care standards, which should be to establish a floor of quality below which no day-care facility may go. Few would disagree that day care should strive towards developmental programs of the highest quality. However, the intangible attributes of the best child-care programs (the warmth, humor, and flexibility of the caregivers) cannot be enforced adequately. Unless regulatory provisions are considered "minimum requirements," dealing with such measurable criteria as physical space, staffing ratios, appropriateness of corporal punishment, parental involvement, and equipment, they are unenforceable.

Regulatory schemes that emphasize lofty goals rather than minimum standards result from the influence of the child welfare organizations that helped state agencies devise day-care standards. Although this particular result is misguided, the concept of input from interested members of a day-care community is valid and consistent with basic tenets of administrative law. The input, however, must come from more than one constituency. As one advocate of regulatory reform has proposed:

- The federal government or a national organization should

kindergarten through at least grade two, that does not provide custodial care for more than one hour during the hours before or after the customary school day, and that is a member of an organization that promulgates, publishes, and requires compliance with health, safety, and sanitation standards equal to standards required by state, municipal, and county codes;
(9) a kindergarten or preschool educational program that is operated as part of a public school or a private school accredited by the Central Education Agency, that offers educational programs through grade six, and that does not provide custodial care during the hours before or after the customary school day.

TEX. REV. CIV. STAT. ANN. Art. 695(c) (Vernon 1976). See also ALA. CODE § 38-7-2(8) (1975).

136. Change Through Regulation, supra note 116, at 178; see also TEXAS DEP'T OF HUMAN RESOURCES, A REPORT ON DAY-CARE LICENSING 5-6 (1984)[hereinafter cited as TDHR REPORT].


139. See supra text accompanying notes 37, 38, and 73.
maintain an ongoing record of current state requirements for licensing, building code requirements for day-care, and specific day-care sanitation codes for use by other states at the time of revising requirements;
- Licensing statutes should designate advisory task forces to assist state agencies in developing standards;
- Participants in these task forces should represent the whole spectrum of the day-care community—not just providers and regulators, but also consumers, academics, and information and referral organizations;
- Task force participants should have access to orientation materials "to assure good communication and full understanding of the nature of licensing requirements."

While no state has implemented all of these suggestions, several have recently undertaken to make the process more fair. Some laws designate task forces to assist state agencies in drafting day-care regulations. Others have almost eliminated the state agencies, by empowering a Child-Care Advisory Board to draft regulations, handle consumer complaints, and generally enforce the day-care requirements. Utilization of broad input allows the various day-care constituencies to help devise more realistic and workable rules, and also reflects a commitment to make official regulatory bodies accountable to the public.

5. Policy Question 5: Few Exemptions from Regulatory Minimums Should be Granted

The three broad categories of day-care providers are most likely to disagree on the need for exemptions from specific regulatory provisions. Proprietary centers are distinguishable from nonprofit programs, and both are different from family day-care. However, day-care regulation is predicated on notions of consumer protection, and if minimum standards truly represent the "floor" below which no facility should go, then there should be a presumption against exempting facilities from such standards.

Exempting one type of day-care facility from regulatory provi-

140. Change Through Regulation, supra note 116, at 141.
142. ARK. STAT. ANN. § 83-911 (1976).
143. See infra text accompanying notes 179-183.
sions will inevitably trigger litigation, because exemptions are explicit classifications that may raise equal protection questions.\textsuperscript{144} If challenged in court, an exemption’s ultimate validity will be determined as a matter of constitutional law rather than public policy.\textsuperscript{145} That is certainly the case with the most common day-care exemption for church-based day-care programs. These programs will survive only if fundamental First Amendment rights are held to overcome the state’s legitimate interest in health and safety.\textsuperscript{146}

On the other hand, a legislative decision not to write any exemptions into a regulatory scheme will probably go unchallenged, because no explicit classifications have been created.\textsuperscript{147} Given the importance of minimum standards in day-care, policy-makers should decline to exempt particular categories of day-care from regulation. If different types of day-care facilities merit slightly different approaches to regulation, policymakers can incorporate those differences into the regulatory scheme, without taking the extraordinary measure of exempting one type of facility altogether.


Agencies charged with enforcing day-care regulations presently have insufficient enforcement methods and sanctions for use against

\[\text{144. See infra § IV.D.}\]


\[\text{146. See generally CHILDREN'S DEFENSE FUND REPORTS, WHEN CHURCH AND STATE CONFLICT 4 (Feb. 1984); C. SANGER, CHILD CARE LAW CENTER PUBLICATIONS, DAY CARE LICENSING AND RELIGIOUS EXEMPTIONS: AN OVERVIEW FOR PROVIDERS (1985). The policy of religious exemptions from day-care regulation is beyond the scope of this article. The legal discussion in Section IV, infra, will, however, compare the standards that courts use to evaluate religious vs. nonreligious exemptions.}\]

\[\text{147. Religious exemption seekers are probably the only parties likely to challenge a statute for failing to grant an exemption. They are unlikely to be successful. E.g., State of Texas v. Corpus Christi People's Baptist Church, 683 S.W.2d 692 (S. Ct. Tex. 1984).}\]
day-care violators. This insufficiency is evident at each stage of the regulatory process—from prelicense screening to revocation of existing licenses—and it is partly attributable to lack of knowledge.

For example, most statutes prohibit licensing persons with criminal convictions, or histories of child abuse and neglect. However, current background checks (relying upon registries of family-based child abuse) fail to screen out perpetrators of institutional child abuse. Existing information and studies have not generated reliable profiles or indicators of institutional child abuse, and until such information exists, regulatory agencies may simply be incapable of screening out day-care facilities where abuse may occur.

This puts more pressure on regulatory agencies to enforce the law against facilities that are already licensed. Most agencies have authority to seek injunctive relief in order to close a facility, but they are dependent on the state attorney general or county attorney to represent them in court. These legal offices frequently consider day-care compliance a low priority, or have limited resources that hamper enforcement efforts. Even egregious violators are hard to penalize.

Moreover, even assuming that a licensing agency does have effective legal support, injunctive relief may not be a sufficiently severe

148. *E.g.*, [Ohio Rev. Code Ann. § 5104.06 (Page, 1981)](https://example.com), which requires the licensing agency to "ascertain" that "neither the administrator nor any employee has been convicted of child abuse or other crime involving moral turpitude"; [Cal. Health & Safety Code § 1522 (West Supp. 1984)](https://example.com), which requires the licensing agency to "secure from an appropriate law enforcement agency a criminal record to determine whether the applicant . . . has ever been convicted of a crime other than a minor traffic violation"; [Colo. Rev. Stat. § 26-6-108(2)(a) (1982)](https://example.com), which bars licensing of anyone "convicted of any offense involving moral turpitude" but does not indicate how the licensing agency ascertains such a conviction. In many states, the statute does not specify what types of criminal convictions preclude licensing; specification is left to the "minimum standards" (i.e., regulations), and the statute is silent as to the agency's authority to conduct criminal checks. *See generally TDHR Report, supra note 136, at Table 6.*

149. Even worse, they destroy employment opportunities for many people who have never mistreated a child. In the wake of publicity about child abuse in a Bronx day-care center, hundreds of New York day-care workers and applicants were fingerprinted in late 1984. Less than half of 1% had felony convictions, and none of the workers actually charged with abuse at the Bronx center were found to have criminal records. D. R. Gordon, *No Child Abuse, No Adult Abuse*, N.Y. Times, March 3, 1985, (Op-Ed page).

150. *See supra* notes 94 and 95.


penalty for some violations. Day-care providers guilty of child abuse or neglect should be subjected to criminal prosecutions; yet the licensing agency may not have the authority to initiate such proceedings, or to remain involved in them once another agency takes charge.\footnote{153. TEX. HUM. RES. CODE § 42.076 (VERNON 1980), provides criminal penalties only for operating without a licensed facility. In a situation of child abuse, licensing officials must work with the "protective services" arm of the state Dep't of Human Resources, whose policies and procedures are different. TDHR REPORTS, supra note 136, at 14. With a properly drafted statute, compliance with licensing requirements may be compelled by civil injunctive relief or criminal action or both. E.g., Cavanaugh v. State Dep't of Social Servs. 644 P.2d 1 (Colo. 1982), appeal dismissed, 459 U.S. 1011 (1983). See, e.g., COLO. REV. STAT. 26-6-112 (1982) (any violation of licensing act or intentional false statement is a misdemeanor); CAL. HEALTH & SAFETY CODE § 1540 (West Supp. 1984) (violation of statute or willful/repeated violation of regulation thereunder is misdemeanor).}

Although many present sanctions are too lax, closing down a facility may sometimes be too harsh a measure. Facilities with technical violations—ones that do not jeopardize health and safety—often go unremedied because licensing statutes do not provide an intermediate range of sanctions. Effective sanctions for technical violations might include fines, additional monitoring visits, press releases and media publicity about violations, and notification of facility patrons when technical violations exist.\footnote{154. See Change Through Regulation, supra note 116, at 183; TDHR REPORT, supra note 136, at 9-12.}

Better enforcement of day-care regulation will require legislative changes giving regulatory agencies more effective control over a greater range of sanctions. New legislation must also recognize the costs of such measures, and recent publicity about child abuse in day-care centers may generate public support for increased appropriations.

7. Policy Question 7: Regulation of Family Day Care Should Be Different From Regulation Of Center-Based Care

Family day-care has always raised difficult issues, because regulation through licensing has failed so consistently. While state regulatory efforts reach about ninety-five percent of all center-based day-care, they miss almost that percentage of family day-care homes.\footnote{155. Sale, supra note 109, at 21.} Numerous attributes of family day care make it difficult to regulate: the large number of caregivers, the small number of children cared for in each home, the casual way that many providers enter the mar-
ket, and the location of family day care in private homes. 156

Disincentives to regulation operate on both the regulators and the providers of family day care. The regulators face logistical complications and costs:

[B]y its very nature, family day-care is very costly to supervise. A typical licensed home may have only three children. On a per-child basis, the cost of licensing and monitoring a home is, therefore, burdensome in comparison with the costs of monitoring and licensing a day-care center where the average enrollment may be fifty or more. 157

Providers of family day-care resent the outside interference that licensing entails:

Like a family, there is great reluctance to give a government body the right to come into the place we call home, and tell us how to raise our children, how many children we may have, how we should feed them, teach them, etc . . . . [T]his is how many, probably most, family day-care providers feel. 158

Many parents who are either unaware that this type of day care is subject to regulation, or who realize that regulation does not guarantee health and safety compliance, appear willing to use family day care homes whether or not they are licensed. 159

There are three ways to deal with these problems. The first is to deregulate family day care altogether, thereby abandoning the notion of consumer protection. The second is to develop several regulatory models that are tailored to the realities of family day care and that differentiate it from center-based care. The third is to continue regulating family day care as if it were identical to center-based care.

156. Child Care Law, “Issue Paper: Family Day Care Regulation” 1 (1983); see also GAC Report, supra note 126, at 10:

[I]t is necessary to emphasize the differences between family day care and center care. Family day-care homes are obviously smaller and have fewer children. The relations between care-givers and parents tend to be more consistent than is true in centers where there is a larger staff and more turnover. Because family day care takes place in a home, health and safety issues are easier for parents to evaluate than may be true for centers. Because of their small size, administrative problems—such as paperwork and visits involved in the licensing process—are especially burdensome . . . .

Id.

157. NDCHS EXECUTIVE SUMMARY, supra note 109, at 27.

158. Sale, supra note 109, at 10.

159. NDCHS EXECUTIVE SUMMARY, supra note 109, at 32. See also GAC Report, supra note 126 at 10; Change Through Regulation, supra note 116, at 170. It is possible that parental willingness to use unlicensed family day care is due to the sheer unavailability of affordable day care.
As a matter of policy, the second approach makes the most sense, and many states are developing new regulatory models for family day care.\textsuperscript{160}

The most prevalent mode is registration. Family day-care providers register with a specified government agency and certify that they meet health and safety requirements. Registration does not necessarily entail inspections, although some registration systems provide for home visits to a random sample of family day-care providers.\textsuperscript{161} The state agency then makes the list of registered homes available to parents, and puts the burden of verifying compliance on the parents. By giving parents copies of the health and safety requirements, encouraging them to report violations, and inspecting promptly when parents complain, the regulations reinforce the consumers' role in enforcing day-care standards. It appears to be succeeding in a number of states, particularly those with computer capability.\textsuperscript{162}

Another regulatory approach is the licensing of family day-care "systems," which are networks of homes operated under the administrative auspices of an "umbrella" sponsoring organization.\textsuperscript{163} The umbrella agency is granted a license to cover all the family day-care homes in its network. The license-holding agency is responsible for visiting the homes in its system, monitoring compliance with standards, and risking loss of its license if a member of its system fails to meet those standards.

Few states have actually implemented this system; in 1981 there were about 30,000 family day-care homes under such umbrellas, representing about two percent of all family day-care facilities.\textsuperscript{164} Because no state could force all family day-care homes to become

\begin{itemize}
\item \textsuperscript{160} There is little debate over whether or not family day care should be regulated. The disagreement arises over the form that regulation should take." Sale, \textit{supra} note 109, at 33; Adams, \textit{Family Day Care Regulations: State Policies In Transition, 1 Day Care J. 9-13} (1982).
\item \textsuperscript{161} \textit{E.g.}, \textit{Mont. Code Ann.} § 53-4-511 (1983) (annual inspection of 15% of all registered homes); \textit{Iowa Code Ann.} § 237A.4 (West Supp. 1984-85) (Periodic Inspections); \textit{Mich. Comp. Laws Ann.} § 722.115(2) (West Supp. 1984) (inspection within 90 days of registration; then 10% sample).
\item \textsuperscript{162} \textit{Change Through Regulation, supra} note 116, at 170. States that have experimented with registration have seen both an increase in the percentage of facilities submitting to regulation, and a decrease in the cost of regulation. \textit{See GAC Report, supra} note 126, at 11; Adams, \textit{supra} note 160, at 10; \textit{Michigan Dep't of Social Servs., Demonstration Project For The Registration Of Family Day Care Homes (Final Report)} (1977).
\item \textsuperscript{163} \textit{NDCHS Executive Summary, supra} note 109, at 43.
\item \textsuperscript{164} Adams, \textit{supra} note 160, at 11. In 1981, family day-care systems provided care for most state and federally subsidized children in family day-care settings. \textit{NDCHS Executive Summary, supra} note 109, at 43; Sale, \textit{supra} note 109, at 40-41.
\end{itemize}
part of a such system, this approach is “not a complete answer to the issue of regulating family day-care.” It is nonetheless important because it reinforces the notion that family day-care regulation must be differentiated from regulation of day-care centers.

C. Concluding Observation About Policy Issues

The issues summarized above represent the salient policy concerns of day-care providers, consumers, and regulators at this time. Because of the polyglot nature of the day-care community, however, only the first two issues have attracted anything like a consensus. As to the other issues, the point of view expressed in this article reflects the position of many prominent day-care advocates; but it must be acknowledged that some members of the day-care community continue to press for exemptions, or regulation by school authorities, or higher than “minimum standards.”

Many of these issues present legal questions as well as policy concerns, but the debate in the day-care community does not always include pertinent legal doctrines and arguments. Section VI will address the major legal questions that arise in connection with day-care regulation, and will provide lawmakers and regulatory officials with a legal framework for evaluating day-care proposals from all constituencies.

IV. The Legal Framework For Evaluating Day-Care Regulation

A. Introduction

Serious regulatory reform works only if it complies with basic administrative and constitutional law doctrines. Thus, policymakers contemplating changes in day-care regulation should understand the doctrines, and tailor their reform efforts to the relevant legal requirements.

One such requirement is that the state must have the power to regulate, and must delegate that power to a specific agency. Another is that the agency must understand the parameters of the power

165. Change Through Regulation, supra note 116, at 171. Another factor that will keep family day-care systems from proliferating is the likelihood that family day-care providers will be considered employees of the umbrella agency rather than independent contractors. This makes the nonprofit umbrella agency liable for unemployment insurance for an untenable number of “employees” and has forced existing family day-care systems to close. See In The Matter Of NVCC Child Care Centers, Inc., Liability Decision #119, pursuant to Va. Code § 60.1-70 (1984).
given to it, and must act within those parameters. A third require-
ment is that the agency's methods of implementing its regulatory
power must comply with the constitutional dictates of due process
and equal protection. If a regulatory scheme fails to satisfy these
mandates, it can be invalidated by a court.

This section will define the legal terms that govern the concepts
outlined above; apply the concepts to general approaches to day-care
regulation; and test them against specific regulatory provisions that
have been adopted throughout the country. The purpose of this dis-
cussion is two-fold. One purpose is to give day-care advocates and
policy makers the basic legal framework they need to evaluate regu-
latory options. The second purpose is to analyze which options seem
to resolve the policy concerns mentioned in Section III, and at the
same time meet the legal requirements to be set forth in this Section.

B. Regulatory Authority Derives from Police Powers and Parens
Patriae

The major source of state regulatory authority over day-care
services is the "police power," a concept that has been applied in
American jurisprudence since the early nineteenth century. The
police power is generally defined as the power to legislate for the
health, morals, safety, and welfare of the community. If properly
exercised, the police power can justify burdens on the enjoyment of
private property without triggering any government obligation to
compensate.

166. The phrase "police power" was first used by Chief Justice Marshall in Brown v.
Law 323 (1978). The concept was applied in the land use context in Charles River Bridge v.
Court and the State Police Power (1957).


168. While the 5th Amendment to the U.S. Constitution, which applies to the states
through the 14th Amendment, prohibits the taking of property without just compensation,
cure regulation of the use of property is not the same thing as a "taking." E.g., Day-Brite
Lighting v. State of Missouri, 342 U.S. 421, 425 (1952): Most regulations of business necessarily impose financial burdens on the enter-
prise for which no compensation is paid. Those are part of the costs of our
civilization . . . . The public welfare is a broad and inclusive concept. The
moral, social, economic, and physical well-being of the community is one part of
it; the political well-being, another. The police power which is adequate to fix
the financial burden for one is adequate for the other.

Id.

It is, however, possible for regulation to go too far and to amount to a "taking." See, e.g.,
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (prescribing a balancing test to deter-
mine when a land use regulation amounts to an unconstitutional taking).
Police power has been the predicate for Supreme Court decisions upholding state licensing laws, \[169\] land use restrictions, \[170\] health and safety measures, \[171\] and zoning provisions. \[172\] State courts have also relied upon the police power to uphold countless regulatory provisions, including some relating to day care. \[173\]

Because the state seeks to control individual and institutional behavior through licensing, the relationship between police power and licensing has received particular attention from courts and commentators. \[174\] Professor Ernst Freund’s definition of licensing—“the administrative lifting of a legislative prohibition”—expresses this relationship. \[175\]


171. E.g., Willson v. The Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829) (Delaware could safeguard the health of its citizens by draining a marshy creek that was technically an interstate waterway).

172. E.g., Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (ordinance requiring all residences to be single-family served legitimate police power goal of preserving quiet family neighborhoods); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding comprehensive zoning plan, including use, height, and area restrictions).

173. E.g., Wininger v. Texas Dep’t of Human Resources, 663 S.W.2d 913 (Tex. Ct. App., 1983) (upholding child-care licensing statute as valid exercise of state police power); State of Missouri v. Liddle, 520 S.W.2d 644 (Mo. Ct. of App. 1975) (zoning ordinance, as “legislative exercise of the delegated police power,” does not bar juvenile group home); Ocean House Corp. v. Rent Control Bd. of Santa Monica, 147 Cal. App. 3d 395, 195 Cal. Rptr. 147 (1983) (state community care facilities act is a “comprehensive regulatory scheme” superseding local rent control ordinance).


A privilege granted by a governmental jurisdiction, such as a city or state, permitting an applicant for a license to engage in an activity that he would not be entitled to conduct without a license. (citations omitted) Every state has enacted
Licensing agencies perform two main functions: controlling entry into the trade and supporting/enforcing standards of practice required of licensed practitioners.\textsuperscript{176} Social work Professor Norris Class, in one of his discussions of police power, explained:

The State has the authority to regulate private enterprise for the general welfare. First the public becomes aware of an activity, such as the daytime care of children, the unregulated conduct of which is not in the public interest. Legislation is then enacted to prohibit the activity generally, and an administrative agency is designated to permit the activity specifically, through the issuance of licenses. This is the administrative lifting of a legislative prohibition—the essential feature of any licensing operation.\textsuperscript{177}

Thus, there should be no question that state governments have the \textit{power} to regulate day-care services, whether such services are delivered by nonprofit/philanthropic entities or by proprietary/commercial ones.\textsuperscript{178}

Moreover, it is not only the state’s “police powers” that authorize regulatory oversight, but also the state’s \textit{parens patriae} role.\textsuperscript{179} Traditionally, \textit{parens patriae} applied when parents were absent and not able to look after their own children.

\footnotesize{licensing laws and created agencies to regulate the issuance or suspension of licenses . . . .

\textit{Id.}

The federal Administrative Procedure Act defines “license” to include:

- The whole or a part of an agency permit, certificate, approval, registration, charter membership, statutory exemption or other form of permission; . . . ‘licensing’ includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license . . . .


\textsuperscript{176} The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud.


\textit{See also} Hawker v. New York, 170 U.S. 189, 192-4 (1898) (upholding the good “moral character” requirement of medical licensing law):

- No precise limits have been placed upon the police power of a state and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. Care for the public health is something confessedly belonging to the domain of that power.

\textit{Id.}

\textsuperscript{177} \textit{Id.} Licensing of Child Care, \textit{supra} note 9, at 7.

\textsuperscript{178} \textit{Id.}

\textsuperscript{179} These words mean “father of his country,” and in English common law they applied to the king; today, they “are used to designate the state, referring to its sovereign power of guardianship over persons under disability.” \textit{In re Turner}, 94 Kan. 719, 145 P. 871 (1915).
Every statute which designed to give protection, care, and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails.\textsuperscript{180}

Recent case law has extended the \textit{parens patriae} doctrine to situations when parents are present and even when the doctrine disagrees with the state’s protective measures. One of the clearest examples occurred in \textit{Prince v. Massachusetts},\textsuperscript{181} in which the Supreme Court upheld a state law barring child labor despite parental wishes:

The state’s authority over children’s activities is broader than over like actions of adults . . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection . . . . It is too late now to doubt that legislation appropriately designed to reach such evils is within the state’s police power, [even] against the parent’s claim to control of the child.\textsuperscript{182}

More recently, a California appellate court invoked \textit{parens patriae} to justify a day-care regulation prohibiting corporal punishment, even though parents wanted their child’s nursery school to use it.\textsuperscript{183} The Kansas Supreme Court also invoked \textit{parens patriae} to uphold the licensing, inspection, and regulation of residential child-care facilities, as prescribed by a statute that also covered day-care facilities.\textsuperscript{184} Further, the Ninth Circuit recently bowed to the “vital governmental interest in the protection of children,” to uphold warrantless inspections of family day-care homes.\textsuperscript{185}

\begin{itemize}
\item \textsuperscript{180} Wisconsin Indus. School for Girls v. Clark County, 103 Wis. 391, 79 N.W. 422, 427 (1899).
\item \textsuperscript{181} 321 U.S. 158 (1944) (upholding state prohibition against child labor in case where child was helping parent distribute religious handbills).
\item \textsuperscript{182} Id. at 168-69.
\item \textsuperscript{183} Johnson v. Dep’t of Social Servs., 123 Cal. App. 3d 878, 886, 177 Cal. Rptr. 49, 53 (1981) (When parental decisions may jeopardize the health or safety of a child, the state may assert important interests in safeguarding health and safety).
\item \textsuperscript{184} Kansas v. Heart Ministries, 227 Kan. 244, 607 P.2d 1102 (1980).
\item \textsuperscript{185} Rush v. Obledo, 756 F.2d 713, (9th Cir. 1985). Although the Ninth Circuit reversed the district court’s holding that warrantless searches of family day-care homes were unconstitutional, it did not disturb the \textit{dictum} that:
\end{itemize}

The state has a strong and important interest in protecting, via inspection, the health and welfare of the children in care. Children are entitled to special protection and solicitude from the state; enforcing standards of quality in extrafamilial child care is a legitimate and indeed laudable goal of state regulation.
A state's interest in protecting young children from harm can sustain governmental actions that would probably not be constitutional if directed towards adults. If the parens patriae doctrine can overcome such constitutional infirmities, it should a fortiori buttress state regulations with a clear, constitutional basis in the police power.

However, merely concluding that states have the power to regulate day-care does not end the legal inquiry. Police powers must be exercised within specific limits, and any statute or regulatory scheme may be challenged for exceeding them. The remainder of this section will address those limits, explain the legal standards that define them, and evaluate particular day-care provisions in light of them.

C. Delegation Of Legitimate Police Powers

1. The Unlawful Delegation Doctrine

Statutes that delegate police power to administrative agencies must contain standards to guide the agency in implementing its mandate. If they do not, the statutes may be unconstitutional under the "unlawful delegation" doctrine.

This doctrine recognizes that legislative bodies must be able to entrust administrative agencies "with broad control over activities which in their detail cannot be dealt with directly by the Legislature." But the legislative bodies must also provide discernible standards to limit the agencies.

The courts insist on this for two reasons. First, they fear that administrators may indulge in arbitrary actions when their dis-
cretion is unrestricted. Such arbitrary action would violate the concept of due process of law . . . Secondly, the courts refuse to allow the Legislature to divest itself of its duty to make law; delegation without standard—"delegation run riot"—would give the administrator power to make law.189

Courts and administrative law experts have disagreed about how specific the legislative standards must be. An early New York licensing law, which covered boarding homes, day nurseries, and private schools, was held to be an unlawful delegation because it merely authorized the state agency to "make such rules and regulations as it deems best,"190 while an almost identical California statute satisfied the criteria for lawful delegations under the state constitution.191

In 1950, the Washington Supreme Court overturned the state child-care licensing law as an "arbitrary, unlimited, and unconstitutional delegation of the legislative function," because it merely required the licensing director to be "satisfied" about the applicant's "intentions," "provisions for capable workers," and "desirability for the public welfare."192 The statute contained no standards to guide the director's determinations. This prompted the court to write:

We can conceive of few requirements more susceptible to the individual whim, caprice, and personal prejudices of a director. . . . [Moreover] the differences of opinion between the various social agencies in the field of child-care as to what constitutes capable or trained workers suggests that different directors might have widely divergent views on that subject.193

Despite such strong criticisms, commentators note that "some state high courts would have little difficulty sustaining the . . . Washington law."194 Indeed, in the past, very broad delegations have been upheld when conditions cannot conveniently be investigated by the legislative branch,195 or when

[T]he discretion to be exercised relates to police regulations for the protection of public morals, health, safety, or general wel-

191. Note, supra note 189, at 324.
193. Id. at 552.
194. Paulsen, supra note 9, at 13.
195. Housing Authority of City of Dallas v. Higginbotham, 135 Tex. 289, 143 S.W.2d 79, 87 (1940).
fare, and it is impracticable to fix standards without destroying the flexibility necessary to enable the administrative officials to carry out the legislative will...  

Nevertheless, recent developments suggest that greater specificity will be required in order for statutes to satisfy the delegation doctrine. Particularly in the context of day-care regulation, courts and commentators seem to be exacting increasingly precise delegations from legislative authority.

For example, Illinois' licensing law was upheld in 1965 because it set forth "eleven specific areas with which the Department shall be concerned in promulgating rules and regulations for the enforcement of the act." Texas' current day-care licensing law, which was challenged in court shortly after its enactment in 1977, has been upheld because its general delegation of rulemaking authority to the Department of Human Resources was "followed by sixteen guidelines more specific with respect to standards, as well as by definitive sections on immunization of children, inspection of child-care homes, and licensing, thereby overcoming any doubt implying vagueness or generality in the Act." The delegation in Ohio's current licensing


[W]hen the discretion to be exercised relates to a police regulation for the protection of the public morals, health, safety, or general welfare, and it is impossible or impracticable to provide such standards, and to do so would defeat the legislative object sought to be accomplished, legislation conferring such discretion may be valid and constitutional without such restrictions and limitations.

Id.

197. This trend was presaged in Note, supra note 189, at 325:

Even though the [broad delegation] is upheld, we hope the California Legislature is not content to leave it, and the whole problem of private school regulation, in the present condition. More definite and detailed standards should be provided as a guide for the regulations. The present rules... tend to require ideal physical conditions; it might be wiser to make the Department give greater consideration to existing circumstances. Finally, the Legislature should re-examine the desirability of exempting sectarian organizations from laws designed to protect child welfare.

Id.


201. Oxford v. Hill, 558 S.W.2d at 560. The court went on to hold that:

The Legislature did not go beyond its recognized constitutional right to delegate to an administrative agency authority to establish rules, regulations, and minimum standards reasonably necessary to carry out the expressed purposes of the Act which are to guard and protect the health, safety, and well-being of children
law, on the other hand, was found to be so specific and narrow that it permitted the state Department of Public Welfare to issue regulations governing only nonprofit day-care centers. While the Department contended that the statute implicitly delegated authority over proprietary centers, the court read the statute closely and held:

[A]n implicit delegation of such claimed rulemaking authority was not intended by the General Assembly . . . [The statute] grants the Director of Public Welfare authority to prescribe only the manner of licensing, and authority to issue orders to insure compliance with the statute. This section does not supply the director with authority to establish standards for compliance as a condition to licensing.

These decisions suggest that broad delegations of police power in the social welfare or public health areas may no longer by acceptable as a matter of state constitutional law. Statutes that do not formulate substantive guidelines for the rulemaking activities of state agencies may be increasingly vulnerable.

of the state who reside in child care facilities.

Id.

In Wininger v. Texas Dep't of Human Resources, 663 S.W.2d at 915, the court followed Oxford v. Hill, and held that: "in defining regular care and the minimum standards . . . regulating registered family homes, the Department of Human Resources was exercising its duty to establish rules, regulations, and minimum standards."

202. Ohio Rev. Code Ann. § 5101.02, 5104.01 (Page 1981). Relevant sections of this statute provide that "The director of public welfare shall establish procedures to be followed in inspecting and licensing child day-care centers . . . . The director may issue orders to secure compliance with Chapter 5104 . . . ."


204. Id. at 494.

205. As a matter of policy, they have long been questioned:

[Specificity] gives the applicant for a license an indication of the areas in which he must accept regulations, and helps the staff of the administrative agency to determine what the matters are with which it should be concerned. Welfare licensing, in particular, since it is a new field, has not fully clarified the licensing responsibility or defined the licensing job. Methods are still being tested empirically and there are many individual differences among workers.


206. E.g., Hawaii Rev. Stat. §346-20 (1976) (prescribing standards "to protect the best interests of minor children"); Vt. Stat. Ann., tit. 33, § 2852 (prescribing regulations to insure that children receive "wholesome growth and educational experiences, and are not subject to neglect, mistreatment, or immoral surroundings"). It is possible to give more substantive guidance to regulatory agencies. See, e.g., Mont. Code Ann. § 53-4-504 (1983), which prescribes standards on:

(1) character, suitability, and qualifications of an applicant and other persons directly responsible for the care of children;

(2) the number of individuals or staff required for adequate supervision and care of children in day-care facilities;

(3) child-care programs and practices necessary to ensure the health, safety,
2. A Caveat About Too Much Specificity

There is, however, a limit to the detail that should be written into statutes, for if they are too specific, the legislative intent may be to delegate no discretion to the agency. Samkel Inc. v. Creasy, held that Ohio’s licensing statute delegated no rulemaking authority over proprietary day-care facilities. This conclusion was supported by two observations. One was that the statute gave the agency power to issue standards only “for part-time day-care centers.” The second was that the statute itself contained a list of “minimum requirements” as comprehensive as most states’ administrative rules.

The Ohio statute, and the recent state supreme court decision construing it, demonstrate that overly specific legislative standards can undermine the basic goals of delegation as much as overly vague ones can.

safety in transportation, development, and well-being of children;
(4) adequate and appropriate admission policies;
(5) adequacy of physical facilities and equipment;
(6) general financial ability and competence of an applicant to provide necessary care for children and maintain prescribed standards;
(7) the ages and numbers of children that may be cared for in a day-care facility.

Id.

See also IOWA CODE ANN. § 237A.12; FLA. STAT. ANN. § 402.305 (regarding minimum standards on nutrition and food services); IOWA CODE ANN. § 237A.12; ARIZ. REV. ST. ANN. § 36-883 (regarding parental participation and staff training); and COLO. REV. ST. § 26-6-106; ALA. CODE § 38-7-7 (regarding discipline of children).

207. 7 Ohio St. 3d 17, 455 N.E. 2d 493 (1983).
209. For example, instead of merely authorizing the Dep’t. of Public Welfare to issue rules on “physical facilities,” e.g., IOWA CODE ANN. § 237A.12(2), Ohio’s statute requires day-care centers to have

for each toddler, pre-school child, school-age child, and infant for whom the center is licensed, at least thirty-five square feet of indoor floor space wall-to-wall regularly available for the day care operation exclusive of any part of the structure in which the care of children is prohibited by law or by rules adopted by the board of building standards . . . [and] a safe outdoor play space which is enclosed by a fence or otherwise protected from traffic or other hazards . . . [containing] not less than sixty square feet per toddler, pre-school child, or school-age child using such space at any one time . . .


3. *Is Piecemeal Delegation Unlawful Delegation?*

In an ideal world, legislatures would delegate their police powers only after comprehensive study of an issue and careful evaluation of which state agency would best implement legislative goals. In the real world, however, "not every situation that must be dealt with can be foreseen by the legislature," and delegation of police power often stems from early legislation that is substantially amended in the course of years. State legislatures try to keep pace as the needs of the population and economy grow more complex, but they must often react to crises and rarely have the luxury of addressing the complete range of issues at once.

This crisis orientation may result in legislative gaps, or in the creation of regulatory agencies with overlapping authority. The latter has occurred in the day-care context. The pertinent legal question is whether the creation of such overlaps, or a failure to eliminate them when they are revealed, constitutes an unlawful delegation of the police power.

There are several scenarios in which multiple agencies might regulate the same industry; not all of them present delegation problems. For example, the unlawful delegation doctrine does not preclude a state legislature from making one agency responsible for licensing and another agency responsible for enforcing fire safety, as

210. Professor Kenneth Culp Davis has strongly criticized judicial opinions on the delegation doctrine for failing to recognize these legislative realities. See, e.g., K. C. DAVIS, DISCRETIONARY JUSTICE 45-46 (1979):

A clear statement of legislative objectives in every delegation of power is unquestionably desirable whenever the legislative body is itself clear about its objectives. Furthermore, legislative bodies should unquestionably strive for such clarity. But the lack of meaningful standards in statutes which delegate power seldom stems from a draftsman's failure to put into words the objectives that have taken shape in the minds of legislators, or committee members, or of committee staffs. The lack of meaningful standards almost always results from one or more of three facts and usually from a mixture of all three: (1) Each legislator and each assistant to a legislator concerned with a bill has limited confidence in his own capacity in the time available to dig very far into the specialized subject matter, and such a state of mind produces general and vague formulations of objectives, not specific and precise ones; (2) developing policies with respect to difficult subject matter often can best be accomplished by considering one concrete problem at a time, as an agency may do; [and] (3) subject matter calling for delegation is often highly controversial; the more specific the statement of legislative objectives the more difficult the achievement of a consensus that can be supported by a majority of each house and win the signature of the executive.

Id.

211. *See supra* notes 118-23 and accompanying text.
long as "clear, discernible standards" govern each agency. But if
the legislature fails to "clarify the relationships among governmental
departments" it may "open the way for confusion and denial of re-
 sponsibility"—the very type of arbitrary decisionmaking that trig-
gered the unlawful delegation doctrine.

When compliance with one set of regulations would mean viola-
tion of another, the day-care community would have a strong argu-
ment that the legislature's delegation of power to one or both agen-
cies was unlawful. The delegation doctrine requires "clear, dis-
cernible" standards to guide administrative discretion. Standards
cannot be clear and discernible if they engender divergent and con-
flicting regulatory actions. If, on the other hand, both agencies used
the same fire safety standards, or consistent ones, then there would
be no delegation problem, for the standards must have been clear
and discernible enough to prompt identical regulatory action.

4. Methods of Clarifying Which Powers Have Been Delegated
To Each Agency

a. Careful Legislative Drafting

It is easy to avoid the scenarios mentioned above—particularly
when the overlaps are limited to state agencies. Many state laws
governing day-care explicitly require cooperation among various
state agencies; others incorporate the standards promulgated by the
state fire marshal and/or building inspector into the day-care licens-
ing law. The basic point is for the legislature to be aware of regu-

212. See supra note 188.
214. See supra text accompanying note 188. Professor Davis urges that we move away
from the origins of the nondelegation doctrine, and recognize
The plain reality that legislative bodies often are not equipped . . . to do more
than to establish a legislative framework within which administrative discretion
must be left largely free. [T]he courts should continue their requirement of
meaningful standards, except that when the legislative body fails to prescribe the
required standards the administrators should be allowed to satisfy the require-
ment by prescribing them within a reasonable time.
While this article reflects the current judicial approach to nondelegation rather than Prof.
Davis' normative approach, the argument advanced herein about piecemeal delegation could be
accommodated in either one.
215. There may be a due process question about delegating overlapping authority to two
or more agencies. This question and other aspects of due process will be addressed in § IV.C.,
infra.
216. E.g., Ind. Code Ann. § 12-3-2-12 (West 1982) ("The state department of public
welfare shall be responsible for the development of adequate standards of child care, and after
latory overlaps, and to clarify the relationships among state agencies before confusion occurs. While such clarification will generally take the form of precise legislative drafting, along the lines of the statutes cited, there is another strategy—pre-emption—that is available to state legislatures when regulatory overlaps and inconsistencies occur among local agencies. This approach is especially appropriate when local zoning ordinances conflict with state regulatory efforts.

b. Pre-emption

As previously discussed, it is possible for local zoning ordinances to impede the operation of day-care facilities that have fully satisfied all licensing, fire safety, and sanitation codes. For example, day-care providers in Pennsylvania recently challenged a local zoning ordinance prohibiting group day-care homes that had been licensed by the state Department of Public Welfare. The ordinance did permit licensed family day-care homes. However, the state had ceased licensing family day-care during the litigation, so the net effect of the ordinance was to preclude all day-care facilities from residential zones. The court adjudicating the challenge to this zoning ordinance acknowledged that the plaintiffs had “reached an impasse.”

Zoning authority, like other types of regulatory authority, derives from the state police power. In the zoning context, police power is customarily delegated to cities and towns by state laws that prescribe standards for the local ordinances and procedures for their

consultation with the state board of health and state fire marshal shall make, prescribe, and publish such rules and regulations . . .”); IOWA CODE ANN. § 237A.12 (West Supp. 1984) (“Rules relating to fire safety and sanitation shall be promulgated under this chapter by the state fire marshal and the commissioner of public health respectively, in consultation with the department [of human services], and all rules shall be developed in consultation with the state day-care advisory committee.”); MONT. CODE ANN. § 53-4-505 (1983) (state fire marshal must “adopt and enforce rules for the protection of children in day care centers . . .” and the state Department of Health and Environmental Sciences must “adopt rules for the protection of children in day care centers from the health hazards of inadequate food preparation, poor nutrition, and communicable diseases.”). VA. CODE § 63.1-196.01 (1980) (coordinating licensing of certain child care centers with permits for summer camps).

217. See supra note 121.

218. See, e.g., Board of Comm’rs of Ross Township v. Harsch, 78 Pa. Commw. 395, 467 A.2d 1183 (1983). The converse of this situation also presents problems, i.e., when the state licensing agency requires zoning approval as a precondition for seeking a license. What the licensing agency is doing is “giving local zoning the force of state law”—which most day-care experts deplore. See Change Through Regulation, supra note 116, at 173.


220. See supra text accompanying notes 166-73.
adoption. But the state can limit or modify its delegation of zoning powers "on matters of general or statewide concern," by enacting a comprehensive regulatory scheme that pre-empts local ordinances.

Municipalities derive their power to regulate land use through zoning by a legislative grant of authority from the state. Municipal zoning ordinances and codes cannot override state law and policy or exceed the limitations and restrictions imposed by enabling or other legislation. Thus, a zoning code may not authorize what state law expressly forbids nor may it forbid what a state law expressly permits.

For ease of enforcement, comprehensive state regulatory schemes should contain explicit pre-emptive language. Alternatively, state laws can supersede local zoning ordinances simply by defining particular facilities as "residential uses" of property. In Michigan, for example, all state-licensed, residential child-care facilities with fewer than six children statutorily qualify as residential use. In Minnesota, family day-care homes are statutorily

221. State ex. rel. Ellis v. Liddle, 520 S.W.2d 644 (1975) (zoning ordinance, which is "in fact a legislative exercise of the delegated police power," must either be consonant with state law governing group juvenile detention homes or will be superseded by the state law).

222. Ocean House Corp. v. Permanent Rent Control Bd. of the City of Santa Monica, 147 Cal. App. 3d 395, 397, 195 Cal. Rptr. 147, 148 (1983) (state Community Care Facilities Act, which governs licensing of facilities for developmentally disabled, supersedes local rent control ordinance). See also Lancaster v. Municipal Court, 6 Cal. 3d 805, 807, 494 P.2d 681 (1972). In Georgia, however, the state constitution gives zoning power to local governments. Thus, while the legislature may not pre-empt, it may "establish procedures for the exercises of zoning power." Ga. Const. art. IX, § 2-4904 (1983).


224. E.g., CAL. WELF. & INST. CODE § 5120 (West Supp. 1984), which provides: It is the policy of this state . . . that the care and treatment of mental patients be provided in the local community. In order to achieve uniform statewide implementation of the policies of this act, it is necessary to establish the statewide policy that . . . no city or county shall discriminate in the enactment, enforcement, or administration of any zoning laws . . . between the use of property for the treatment of general hospital or nursing home patients and . . . the psychiatric care and treatment of patients.

Id.

This statute was upheld in City of Torrance v. Transitional Living Centers for Los Angeles, 30 Cal. 3d 516, 638 P.2d 1304, 179 Cal. Rptr. 901 (1982).

225. E.g., MICH. COMP. LAWS § 125.286 (West Supp. 1984), which provides: In order to implement the policy of this state that persons in need of community residential care shall not be excluded by zoning from the benefits of normal residential surrounding, a state-licensed residential facility providing supervision or care, or both, to 6 or less persons, shall be considered a residential use of property for the purposes of zoning and a permitted use in all residential zones . . . .

Id.

This provision was construed and upheld in Erickson v. Department of Social Serv., 108
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equivalent to private residences for zoning purposes. And in California, family day-care homes may not be treated differently from single-family residences for zoning and building code purposes.

When state statutes are not this explicit, courts still look to the "whole purpose and scope of the legislative scheme," and will find pre-emption if they discern a "statewide plan" that seeks to "insure continuity . . . under state law" and contains "both procedural and substantive" components. Less than explicit state laws may not lead to this result.

In Board of Commissioners of Ross Township v. Harsch, a Pennsylvania court declined to hold that the state licensing law pre-empted local zoning restrictions on day care. While it did find the particular ordinance violative of due process because it was exclusionary, the court nonetheless stated:

The Public Welfare Code has not pre-empted the field of day-care regulation to such an extent that the township cannot affect it by zoning limitations. Our review of the Public Welfare Code discloses neither specific language nor any inference that the legislature intended to so restrict the police power of municipalities in this area that they may not impose zoning restrictions on day-care centers.

The decision suggests that the Public Welfare Code could have been more explicit about pre-empting local zoning initiatives by defining family day-care as a residential use, and day-care centers as "essential community services" rather than commercial uses. As it

226. E.g., MINN. STAT. ANN. § 245.812(3) (West Supp. 1985), which provides: "A licensed residential facility serving six or fewer persons or a licensed day care facility serving twelve or fewer persons shall be considered a permitted single family residential use of property for the purposes of zoning." A similar statute, requiring that group homes for the mentally retarded be treated as private residence, was recently upheld by the state supreme court. Costley v. Caromin House, Inc., 315 N.W.2 21 (1982). Minnesota's Attorney General cites Costley in ruling that the state could define foster care and family day care as residential uses. See supra note 223.
228. Ocean House Corp. v. Permanent Rent Control Board of Santa Monica, 147 Cal. App. 3d at 396-97, 195 Cal. Rptr. at 148-49. This case held that California's Community Care Facilities Act pre-empted a local rent control ordinance. The same act, CAL. HEALTH & SAFETY CODE § 1527 (West Supp. 1984), also governs day care licensing.
230. Id.
231. See Change Through Regulation, supra note 116, at 182. An alternative would be to define family day care as a "home occupation" that would be permissible under any zoning ordinance providing for such a use in residential zones. See, e.g., Schofield v. Zoning Bd. of Adjustment of Township of Dennis, 169 N.J. Super. 150, 404 A.2d 357 (1979) (family day
was, the court handed regulatory discretion back to local zoning authorities, and merely invited the state legislature to pre-empt it explicitly.

If either party had invoked the unlawful delegation doctrine, it is possible that the Pennsylvania court could have issued an order to the state legislature rather than a mere invitation. The court might well have concluded that this piecemeal delegation of police powers was unlawful, because it produced two agencies in blatant conflict with each other and two mutually exclusive regulatory schemes. Such a ruling would have imposed a more exacting obligation on the state legislature, since both the day-care licensing act and state zoning law would need amending.

Including pre-emptive language in state day-care regulatory codes should not be undertaken lightly. The drafting must be precise; the legislative history must be clear; and the state legislature must understand that it is destroying the possibility of flexible responses to local conditions. Nonetheless, pre-emption does represent one method of overcoming piecemeal regulation, and it has become increasingly common in legislation governing community-based mental care is considered a home occupation under local ordinance, but not operation of a day-care center). However, this drafting alternative is less desirable than defining family day care as a residential use. Recently, family-day care homes have been challenged for violating "residential use" deed restrictions, and the better view is that family day care is a residential use, whose business attributes are "merely incidental to the provider's primary purpose of living in the home. See, e.g., Beverly Island Ass'n v. Zinger, 317 N.W.2d 611 (1982) (family day care not barred by restrictive covenant in deed, since it satisfied "residential purpose" of deed restriction); Berry v. Hemlepp, 460 S.W.2d 352 (1970) (day-care center caring for 15-25 children violated deed restriction on residential use).

Pressure to call family day care a "home occupation" probably comes from the insurance industry. Most insurers consider family day care to be a "business pursuit" that will trigger an exclusionary clause in homeowners' policies; thus, the policies will not cover accidents or injuries that occur in the course of the family day-care. See, e.g., State Farm Fire & Casualty Co. v. Moore, 103 Ill. App.3d 250, 430 N.E.2d 641 (1981); but see Camden Fire Insurance Ass'n. v. Johnson, 294 S.E.2d 116 (W. Va. 1982) (unlicensed provider who is not always paid for caring for neighbor children, and who does not advertise, is not engaged in "business pursuit"); Robinson v. Utica Mutual Ins. Co., 585 S.W.2d 593 (Tenn. 1979) (whether family day care is a business pursuit is question of fact, and insurer cannot prevail as matter of summary judgment).

232. For an example of the close judicial scrutiny accorded the statutory language and legislative history of pre-emptions, see City of Torrance v. Transitional Living Centers for Los Angeles, 30 Cal. 3d 516, 638 P.2d 1304, 179 Cal. Rptr. 901 (1982), see also supra note 224.

233. In the absence of statewide pre-emption, local zoning ordinances are difficult to challenge, even when they adversely affect disadvantaged population groups. Cf. Cleburne Living Center v. City of Cleburne, Texas, 726 F.2d 191 (5th Cir. 1984), en banc denied, 735 F.2d 832, aff'd in part, 53 U.S.L.W. 5022 (July 1, 1985) (affirming the Fifth Circuit holding that zoning ordinances prohibiting group homes for mentally retarded in city's "apartment house district" violated the equal protection clause under a loose standard of review).
health facilities.\textsuperscript{234} Thus, policymakers who conclude that pre-emption is an appropriate strategy for day-care regulation can look to a related field for model statutes and guidance.

D. Day-Care Regulation and the Due Process Clause

The delegation doctrine is not the only constitutional standard that day-care regulation must satisfy. Even if a state legislature has lawfully delegated its police powers to one or more agencies, the statute must comport with due process, as must the rules and regulations thereafter promulgated by the agencies. Due process concepts apply both to the substantive regulatory provisions of a statute or regulation, and to the procedural safeguards contained within any regulatory scheme.\textsuperscript{235} This section begins with an examination of substantive due process considerations in day-care regulation, and concludes with a look at the procedural due process issues.

1. Substantive Due Process Considerations

In raising substantive due process issues, it is possible to challenge a statute in combination with its regulations,\textsuperscript{236} a statute by itself,\textsuperscript{237} or a regulation by itself.\textsuperscript{238} In general, the same approach to substantive due process applies to all three challenges. Most substantive due process claims allege that a regulation (or statute, or combination thereof) is "arbitrary and unreasonable."\textsuperscript{239} If it is found to

\textsuperscript{234} See supra notes 223-36 and accompanying text.
\textsuperscript{235} E.g., Stiner v. Califano, 438 F. Supp. 796 (W. D. Okla. 1977) (Title XX child care provision and FIDCR staffing ratios were not arbitrary and capricious, and did not violate parents’ or providers’ due process rights); Farrington v. Tokushige, 273 U.S. 284 (1926) (state overregulation of foreign language schools in Hawaii violated parents’ liberty interest in directing their children’s education).
\textsuperscript{236} Meyer v. Nebraska, 262 U.S. 390 (1923) (state law prohibiting teaching “in any language other than English” violated parents’ Fifth Amendment liberty interest in choosing appropriate instruction for their children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state law requiring all children to attend public school violates parents’ liberty interest in directing “the upbringing and education” of their children); Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955) (state law requiring everyone fitting eyeglasses to be licensed did not violate liberty interest of opticians).
\textsuperscript{237} Johnson v. Department of Social Servs., 123 Cal. App. 3d 878, 177 Cal. Rptr. 49 (1981) (regulation prohibiting corporal punishment in day-care facilities did not violate parents’ liberty interest in controlling the care and upbringing of their children).
\textsuperscript{239} Substantive requirements are the standards and criteria which day-care facilities must satisfy in order to be allowed to operate—such as adult/child ratios, sanitation requirements, fire safety precautions, fingerprinting of teachers, etc. They differ from the procedural requirements of day-care regulation (also subject to due process scrutiny), which involve such things as appeals from agency decision, complaint procedures for parents, and the manner in
be so, and if the arbitrariness infringes upon a liberty or property interest protected by the due process clause, then a court may invalidate the state's action.

However, one legal theory applies only to challenge of a regulation itself. This alternate theory prohibits a regulation from exceeding the mandate of the statute it implements.\(^{240}\) It has been used to invalidate agency regulations that conflict with an explicit statutory provision,\(^ {241}\) as well as regulations that undermine the general purpose of a statute.\(^ {242}\) This theory has occasionally been invoked in cases challenging day-care regulations, in addition to the more usual due process claims.\(^ {243}\)

a. **The Need For a Liberty of Property Interest**

To trigger due process scrutiny for day-care regulation, providers and consumers of day care must allege infringement of the requisite liberty or property interests in the facilities they operate.\(^ {244}\) Parents of children in day care also have due process rights, which are in the realm of "liberty" interests. These "liberty interests" have been elaborated in the course of fifty years of constitutional adjudication.

In a 1977 decision on the rights of foster parents, the Supreme Court stated:

"It is of course true that 'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process

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\(^{240}\) E.g., Cooper v. Swoap, 11 Cal. 3d 856, 524 P.2d 97, 115 Cal. Rptr. 1 (1974) (state welfare regulation was incompatible with governing statutory provisions and therefore invalid). See also B. Schwartz, ADMINISTRATIVE LAW 153-55 (1984).


\(^{242}\) E.g., Atkins v. Michigan Dep't of Social Servs., 92 Mich. App. 313, 284 N.W.2d 794 (1979) (an administrative rule requiring all residents of family day-care home to be "of responsible character" does not conflict with statute requiring the licensing regulations be limited to scrutiny of "persons directly responsible for the care and welfare of the children served by the home").

\(^{243}\) Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 (1936) (even if rule is within agency's delegated authority, it may be invalid if arbitrary or unreasonable).

\(^{244}\) Cf Atkins, 92 Mich. App. 313, 284 N.W.2d 784 (1979) (hearing to review day-care license was a violation of due process because plaintiff not present); Stiner v. Califano, 438 F. Supp. at 796 (W.D. Okla 1977) (federal staffing ratios of day-care centers did not deny due process rights of operators); Bennett v. Arizona State Bd. of Public Welfare, 95 Ariz. 170, 388 P.2d 166 (1964) (statute which denied day-care license without hearing denied due process); Cavanaugh v. State of Colo. Dep't of Social Servs., 644 P.2d 1 (1982) (statute for licensing day-care centers was valid use of legislative powers).
Clause of the Fourteenth Amendment." This principle had its origin in Supreme Court cases from the 1920's, which held that parents had a right to educate their children in schools of their choice and in subjects they deemed important. In those cases, due process "liberty" was found to mean

[N]ot merely freedom from bodily restraint but also the right . . . to acquire useful knowledge, to marry, establish a home, and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by freemen.

Subsequent decisions elaborated on this liberty interest in connection with natural fathers' custody rights, laws requiring sterilization of criminals, use of contraceptives by married couples, and compulsory education laws. In the latter case, the Supreme Court reaffirmed that:

[T]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents . . . is now established beyond debate as an enduring American tradition.

The strong language of these decisions, as well as the range of liberty interests they encompass, support the conclusion that "parenting, with its concomitant decisions on rearing, care and education, is a fundamental right of personal liberty and any infringement thereof assumes constitutional dimensions."

Parental liberty interests do not, however, insulate all decisions about day-care from state regulation. One state court acknowledged parenting as a fundamental right, but held that it was "personal in nature" and could not be delegated to third parties. "When parents delegate to third parties those decisions regarding child rearing, care, discipline and education, such delegation does not carry with it the

252. Id. at 232.
constitutional protections inherent in the right of the parents."\textsuperscript{254}

Another court\textsuperscript{255} was "not convinced" that the \textit{Meyer/Pierce} line of cases\textsuperscript{256} even applied to parents who were challenging daycare regulations. However, even if one concedes that parental choices about daycare fall within this fundamental right of personal liberty, it is doubtful whether parents could ever show that state regulatory measures were unreasonable enough to violate due process.

\hspace{1cm} b. \textit{The Arbitrary and Unreasonable Standard}

"Arbitrary and unreasonable" has proven to be a difficult standard for challengers to satisfy. Even if a court finds credible evidence that a particular requirement is unnecessary and causes hardship, the requirement may not violate due process. As long as "there is some showing in the Government's proof to support the administrative judgment," the requirement will probably be held valid.\textsuperscript{257} A district court that evaluated a due process challenge to FIDCR\textsuperscript{258} staffing ratios stated the test as follows:

\begin{quote}
The regulations must be presumed to be constitutional and may be set aside only if no grounds can be conceived to justify them. (citations omitted) The courts do not substitute their social and economic beliefs for the judgment of legislative bodies (citations omitted) . . . . In conclusion, we cannot say that the staffing regulation "manifests a patently arbitrary classification, utterly lacking in rational justification . . . ." (citations omitted).\textsuperscript{259}
\end{quote}

This language accurately reflects the Supreme Court's current approach to substantive due process adjudication.\textsuperscript{260} The approach cloaks legislative and administrative decisions with a presumption of constitutionality, making it very difficult to show that a substantive

\textsuperscript{254} Johnson v. California Dep't of Social Servs., 123 Cal. App. 3d at 886, 177 Cal. Rptr. at 53.
\textsuperscript{256} \textit{See supra} text accompanying note 246.
\textsuperscript{258} \textit{See supra} text accompanying note 66.
\textsuperscript{259} Stiner v. Califano, 438 F. Supp. 796, 802 (W.D. Okla. 1977). The court reached this conclusion even though it found persuasive evidence that fees would increase dramatically; parents would no longer be able to afford the day care that they previously used; mothers would have to stop working and remain at home with children; and existing safety precautions, and fire evacuation plans "tended to show that the staffing requirements are unnecessary and unreasonable." \textit{Id.} at 801.
requirement is so unreasonable as to violate due process. Moreover, a close examination of substantive day-care requirements indicates that most are quite reasonable.

In general, statutory provisions about day-care facilities govern health and safety requirements, such as staff-child ratios, staff qualifications, and square footage requirements for indoor and outdoor spaces in day-care centers. Most regulatory provisions merely flesh out the statutory mandates in greater detail.

The substantive regulatory provisions are by no means uniform; state-to-state variations may be quite significant. But the due process doctrine does not require uniformity. Only if a particular regulation is "patently arbitrary" or "utterly lacking in rational justification," is it likely to be invalidated on substantive due process grounds. As long as a credible rationale exists for a particular requirement, it will probably survive a substantive due process challenge.

In the final analysis, the only substantive due process challenge that might prevail in the day-care context is one based on the theory that a regulation conflicts with its statutory mandate, or exceeds the

261. See supra note 206; see also Collins, "Child Care and the States: The Comparative Licensing Study," YOUNG CHILDREN 3 (July 1983); TDHR Report, supra note 136, at 22-30.

262. E.g., HAWAII ADMIN. CODE § 17-892-19; 102 CODE OF MASS. REGS. 7.01(14); KAN. ADMIN. REGS. § 28-4-117 (requiring day-care centers to keep records with medical information, immunization history, and emergency phone numbers; ILL. ADMIN. CODE § 407.20; TEX. ADMIN. CODE § 81.431; MICH. ADMIN. CODE R. 400.5209; 102 CODE OF MASS. REGS. 7.01(20) (requiring day-care centers to have a specified number of toilets based on the number of children in the facility; ILL. ADMIN. CODE § 407.21; 102 CODE OF MASS. REGS. 7.01 (requiring day-care centers to separate infants and toddlers from older children); CAL. ADMIN. CODE tit. 22 R. 81075.2; TEX. ADMIN. CODE § 81.418-420; HAWAII ADMIN. CODE § 17-892-21; NEW MEXICO ADMIN. CODE § 911-3; KAN. ADMIN. REGS. § 28-4-118 (requiring day-care centers to exclude sick children, and isolate those who become sick during the day from others); ILLS. ADMIN. CODE § 407.22; MICH. ADMIN. CODE R. 400.5205; TEXAS ADMIN. CODE § 81.423; HAWAII ADMIN. CODE § 17-892-36 (requiring that food be refrigerated, or "stored under sanitary and safe conditions;" KAN. ADMIN. REGS. § 28-4-116; ILL. ADMIN. CODE § 407.17-21; MICH. ADMIN. CODE R.400.5106; CAL. ADMIN. CODE tit. 22, R. 8117.2 (requiring that regular outdoor play be provided).

263. E.g., A recent survey of minimum standards for day-care centers in California, Florida, Illinois, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, Pennsylvania, and Texas showed that the square footage requirements for indoor space ranged from 20 to 40 square feet per child; and from 45 to 80 square feet of outdoor space. The same survey showed a similar range of staff/child ratios: some states required one adult for every four infants, while others allowed one adult for every eight; and some states required one adult for every ten four-year-olds, while others required one adult for every twenty. TDHR REPORT, supra note 136, at 24-26.

scope of that mandate. Generic substantive due process attacks, such as those invalidating state and federal legislation during the Lochner era, now seem destined to founder on the exacting standard of arbitrariness and unreasonableness.

This outcome means that agencies will not be pestered by court challenges every time they issue substantive day-care regulations, and thereby means that the laudable goal of administrative efficiency is served. But the outcome also means that burdensome or ill-considered regulations may be imposed on the day-care community, with little chance of invalidation on substantive grounds. Providers and consumers of day care are therefore dependent on the good faith and sense of public accountability of the regulatory agency or agencies, and the balance of power rests clearly with the latter.

In light of the situation described above, the requirements of procedural due process assume greater significance as protective mechanisms for the day-care community. Regulatory challenges based upon procedural due process may have a greater likelihood of success, as will be discussed in the next section.

2. Procedural Due Process Considerations

Legal challenges based on substantive due process would be aimed at regulatory standards that are issued by legislative or administrative bodies. But regulatory efforts encompass much more than the promulgation of standards. They include numerous procedures, such as:

(a) granting, denying, and revoking permission to operate;
(b) issuing sanctions, short of revocation, against facilities that violate the standards;
(c) devising rules and substantive standards;
(d) inspecting day-care facilities to verify compliance with those standards; and
(e) handling consumer (parent) complaints about regulated facilities.

265. E.g., Atkins v. Michigan Dep't of Social Servs., 92 Mich. App. 313 (1979) (which confronted this theory, and held that the regulation was not in conflict with the statute).

266. This epithet takes its name from the case of Lochner v. New York, 198 U.S. 45 (1905), which overturned a state law establishing a 60-hour work week for bakery employees, because the law's means did not have a real and substantial relationship to its ends. The case highlights the "strict and skeptical means-end analysis" used by the Supreme Court from the early 1900's until 1937, when the landmark decision in West Coast Hotel v. Parrish, 300 U.S. 379 (1937) signalled the end of this analytic approach. See generally L. Tribe, AMERICAN CONSTITUTIONAL LAW 427-55 (1978).
Like substantive standards, these procedures must be reasonable and not arbitrary, so that they comport with due process. However, the criteria for determining arbitrariness tend to be more precise for procedural provisions than for substantive ones. Therefore, courts seem more willing to invalidate state regulatory schemes if they have procedural gaps than if their substantive components are challenged.  

a. Procedures for Granting, Denying, or Revoking Day-Care Licenses

Many state courts have adjudicated cases brought by day-care providers, challenging the procedures by which they were denied permission to operate.  

An Arizona court outlined the essential components of such procedures as follows:

Petitioner must be given notice of time and place of hearing, a reasonable definite statement of the grounds for denial of her application, the right to produce witnesses in her own behalf, the right to examine witnesses who testify against her and a full consideration and a fair determination according to the evidence by the body before whom the hearing is had.

Another court added the requirement that “the order denying a license must set forth in full the facts upon which the decision of the board was based.”  

Formal hearings and formal findings are not essential, nor must a reviewing court always be bound by the findings reached by an administrative tribunal, but the procedure must nonetheless “conform to recognized standards of fairness and a record must be made which permits a review of the action of the

267. See L. Tribe, American Constitutional Law 537-38 (1978). Professor Tribe painstakingly traces recent Supreme Court decisions that demonstrate “greater willingness to overturn legislative decisions on matters of procedure than on questions of substance.” While he ultimately concludes that “the Court must move toward more deference on matters of procedure or less deference on matters of substance,” it is clear that neither the U.S. Supreme Court, nor the state courts with which this article is primarily concerned, have done so.


Such "recognized standards" are now codified by many states in administrative procedure acts (APA's) that bind all agencies performing adjudicative functions. Some day-care regulatory schemes incorporate by reference the provisions of the state APA. If an agency does not satisfy the pertinent act, a court will remand the matter back to the agency for another hearing.

Other regulatory schemes include the details of administrative hearings and subsequent judicial review, in the text of the day-care licensing statute. Still others statutorily require notice and hearing but leave the details of the hearing procedure to the rulemaking au-

273. MONT. CODE ANN. § 2-4-102 (West 1982); CAL. GOV'T. CODE § 11500 (West 1980); FLA. STAT. § 120.50 (West 1982); LA. REV. STAT. § 46.107 (West 1982); OR. REV. STAT. § 183.310-500 (1983); MICH. COMP. LAWS ANN. § 24.201 et. seq. (West 1981).
274. *E.g.* CAL. HEALTH & SAFETY CODE § 1551 (West 1979); COLO. REV. STAT. § 26-6-108(3); FLA. STAT. § 402.310(2) (West 1983); LA. REV. STAT. ANN. § 46:1407 (West 1982); MICH. COMP. LAWS ANN. § 722.121(4).
276. *E.g.*, MD. ANN. CODE art. 88A, §§22-26 (Michie 1979); GA. CODE ANN. § 99-214(f)(g) and (h) (1981); ALA. CODE § 38-7-9 (1975); CONN. GEN. STAT. ANN. § 19-43F (West 1977). Connecticut has a particularly well-drafted provision:

Any applicant denied a license to operate a child day-care center shall be given written notice by registered mail by the commissioner of health stating the reasons for such denial. The applicant may, within fifteen days of the date of the mailing of said notice, make a request in writing by registered mail directed to the commissioner of health for a hearing on said denial. The commissioner of health shall notify the applicant in writing within ten days of the receipt of the request of the place and date of hearing which hearing shall be held not less than thirty days from the date of mailing of the notice. The hearing may be conducted by the commissioner or by a hearing officer appointed by the commissioner in writing. The applicant shall be entitled to be represented by counsel and a transcript of the hearing shall be made. If the hearing is conducted by a hearing officer, he shall state his findings and make a recommendation to the commissioner on the issue of denial of the license. The commissioner, based upon said findings and recommendation of the hearing officer, or after a hearing conducted by him, shall render a decision in writing denying the application for the license or granting the license in accordance with the regulations adopted under sections 19-43b to 19-43i, inclusive. A copy of such decision shall be sent by registered mail to the applicant. An applicant aggrieved by such decision may appeal to the superior court as provided in section 19-43j.


Timetables and procedural details are not identical. Most states have 30-day notice provisions, *e.g.*, S.C. CODE ANN. § 20-7-2760 (1982); OKLA. STAT. ANN. tit. 10 § 407 (West 1982); IDAHO CODE ANN. § 39-1212 (Bobbs-Merrill 1983). But once an agency decision is rendered, aggrieved parties in Oklahoma and Idaho have 10 days to appeal to court, while those in South Carolina get 30 days, and those in Illinois are directed to the state APA for judicial review of agency decisions. ILL. REV. STAT. § 2227 (1983).
authority of licensing agency.\textsuperscript{277}

Even where regulatory schemes are silent as to the relevant administrative procedure, courts rely upon the doctrine of procedural due process itself to mandate notice and an opportunity for hearing.\textsuperscript{278} Virtually all states currently regulating day-care make such provisions. When an agency fails to comply with the appropriate procedural requirements, it must re-adjudicate the matter.\textsuperscript{279}

Due process safeguards protect the agency as well as the aggrieved parties. Day-care providers who do not avail themselves of hearing procedures under their state regulatory schemes are in a poor position to litigate the agency's decision subsequently.\textsuperscript{280}

Because procedural challenges are so time-consuming, many states have implemented a system of "provisional licensing" that expedites the process without depriving any party of the safeguards enumerated above. Under this system, a state agency has discretion to grant a temporary permit, for six months or longer,\textsuperscript{281} to a facility "that does not meet all standards of the department, if the facility or applicant is attempting to meet the minimum standards."\textsuperscript{282} Provisional licensing represents a creative approach to problems of delay that arise when agencies take their due process obligations seriously.

\textsuperscript{277} MONT. CODE ANN. § 53-4-513 (1983) (The annotation to this provision cross-references the Montana Administrative Procedure Act, however, which suggests that the licensing agency's hearing rules must conform to it); HAWAII REV. STAT. § 346-22 (1976); IOWA CODE ANN. § 237A.8 (West 1969).

\textsuperscript{278} E.g., Rydd v. Kansas State Bd. of Health, 202 Kan. 721, 451 P.2d 239, 245 (1969) ("This result we reach is in harmony with the broad remedial purpose sought by the proposed Revised Model State Administrative Procedure Act and the Federal Administrative Procedure Act, although neither has application in Kansas.")

\textsuperscript{279} E.g., Reynolds v. Oregon Children's Serv. Div., 29 Or. App. 381, 563 P.2d 767 (1977) (revocation of day-care license did not satisfy Oregon APA).

\textsuperscript{280} E.g., Rupert v. Washington Dep't of Soc. & Health Serv., 89 Wash 2d. 698, 574 P.2d 1187 (1978) (providers cannot raise constitutional challenge to agency's inspection authority if they fail to appeal hearing examiner's order that their day-care center be inspected); Cavanaugh v. Colorado Dep't of Soc. Serv., 644 P.2d 1 (Colo. 1982)reh'g denied, 460 U.S. 1104 (1983) (civil contempt was appropriate against day-care operator who continued to care for children after state agency revoked her license; she should have appealed revocation).

\textsuperscript{281} E.g., MONT. CODE ANN. § 53-4-509 (1983) (six months, nonrenewable); COLO. REV. STAT. § 26-6-104(3) (1973) (six months, renewable up to two years); ALA. CODE § 38-7-5 (West 1975) (six months); FLA. STAT. ANN. § 402.309 (West 1973) (one year maximum) (six months, nonrenewable); CAL. HEALTH & SAFETY CODE § 1525.5 (West 1979) (six months, nonrenewable) GA. REV. STAT. § 99-214(d) (1981) (up to one year); S.D. COMP. LAWS ANN. § 26-6-12 (1984).

\textsuperscript{282} MONT. CODE ANN. § 53-4-509 (1983). California's statute is more specific than most; it requires that facilities be in "substantial compliance" with minimum standards, and that "all applicable fire clearances and criminal record clearances" be completed before a provisional license is issued. CAL. HEALTH & SAFETY CODE § 1525.5 (1983).
b. Procedures for Sanctioning Violators

When a state agency sanctions a licensed facility for being out of compliance with substantive regulations, a broader range of penalties would be useful.\textsuperscript{283} The most common sanctions—license revocation, injunctive relief, civil contempt,\textsuperscript{284} and criminal liability—involves full-fledged adversary proceedings.\textsuperscript{285} Certain intermediate sanctions, like fines, may also require notice and some type of hearing. Administrative hearings, however, are less costly and time-consuming than litigation,\textsuperscript{286} and can undergo further streamlining without sacrificing due process guarantees.\textsuperscript{287} Moreover, other plausible intermediate sanctions may not require notice and a hearing, particularly if these sanctions can be characterized as within an agency's "supervising" authority rather than its adjudicative authority.\textsuperscript{288}

\textsuperscript{283} See supra text accompanying notes 148-54.

\textsuperscript{284} Civil contempt against violators of injunctions can trigger due process concerns above and beyond the usual ones surrounding civil litigation. See, e.g., Cavanaugh v. Colorado Dep't of Social Servs., 644 P.2d 1, 6 (Colo. 1982), rehe'g denied, 460 U.S. 1104 (1983), wherein the plaintiff day-care operator claimed that since contempt was "criminal in nature," she "was entitled to a jury trial and the other due process rights accorded one charged . . . with a criminal offense." The court rejected this claim, holding that Colorado's code of civil procedure controlled the contempt proceedings, and finding that "the appellant was accorded all of the due process protections required in a civil contempt proceeding."

\textsuperscript{285} Injunctive relief requires litigation pursuant to codes of civil procedure, which may be why most states regard injunctive actions to be brought by seasoned litigators in the attorney general's office rather than seasoned administrative lawyers in the regulatory agency. See supra note 51 and accompanying text. Criminal liability for violating day-care regulatory provisions can only by imposed after a trial that satisfies all the provisions of the Bill of Rights that have been "incorporated" into the 14th Amendment and applied to the states via the due process clause. These include:

[T]he fourth amendment rights to be free of unreasonable search and seizure and to exclude from criminal trials evidence illegally seized; the fifth amendment rights to be free of compelled self-incrimination and double jeopardy; the sixth amendment rights to counsel, to a speedy and public trial before a jury, to . . . confront opposing witnesses, and to compulsory process for the purpose of obtaining favorable witnesses; and the eighth amendment right to be free of cruel and unusual punishments.

L. Tribe, American Constitutional Law § 11-2, at 567-68 (1978) [citations omitted].

\textsuperscript{286} TDHR Report, supra note 136, at 13-14.

\textsuperscript{287} Texas' Dep't. of Human Resources is seeking legislation to streamline its administrative adjudications and reduce costs, while still complying with due process requirements. Among the legislative proposals are: reducing the size of the appeal board from five members to three, and altering slightly the timetables for notice and appeal of agency decisions. Telephone interview with TDHR legal counsel Marina Henderson (Dec. 20, 1984).

\textsuperscript{288} See generally K. C. Davis, Administrative Law Treatise (1900):

The supervising power is the power to achieve regulatory objectives without formal action. It is a concomitant of, and outgrowth from, and a substitute for the prosecuting power. In the most effective regulatory agencies, perhaps nine-
Such measures might include (1) identifying specific types of complaints that will trigger additional, immediate inspections; (2) issuing a press release whenever such complaints are received; (3) notifying all parents whose children are in a facility that is the subject of such complaints; and (4) performing an immediate inspection of any facility that is the subject of such a complaint, or making referrals to other agencies that might perform such inspections, like the fire marshal, building inspector, or child welfare authorities.¹

These lesser penalties would not prevent an agency from later invoking stronger sanctions, nor would they prevent the aggrieved party from insisting on the full panoply of due process safeguards in such proceedings. Lesser penalties merely expedite the enforcement process and obviate the need for more severe sanctions, just as provisional licensing expedites the application process and obviates the need for outright license denials.² Both provisional licensing and a broader range of sanctions are consistent with the mandate of procedural due process and enhance the efficiency of regulatory agencies in overseeing day-care.

c. Due Process in Non-Adjudicative Agency Procedures

Agencies must also conduct their non-adjudicative procedures in accordance with the due process clause. Such procedures include rulemaking, inspecting regulated facilities, and handling consumer complaints. The specifics of procedural due process differ from function to function, but the basic requirement of notice to the affected parties, and an opportunity for them to be heard, undergirds each one.

i. Administrative Rulemaking

Administrative law commentator, K.C. Davis, maintains that:

The procedure of administrative rulemaking is . . . one of the greatest inventions of modern government . . . . The usual procedure is that prescribed by the [federal] Administrative Procedure Act, the central feature of which is publishing proposed

tenths or more of the desired results are produced through exertion of the supervising power, for enforcement through adjudication is obviously wasteful and cumbersome as compared with enforcement through supervision.

Id.


²⁹⁰  See supra note 282 and accompanying text.
rules and inviting interested parties to make written comments. Anyone and everyone is allowed to express himself and to call attention to the impact of various possible policies on his business, activity, or interest. The agency’s staff sifts and summarizes the presentations and presents its own studies. The procedure is both fair and efficient. Much experience proves that it usually works beautifully.291

This rulemaking procedure should govern day-care regulation. Many statutes incorporate by reference the rulemaking and “fair hearing” provisions of their state APA’s.292 Other states have chosen to spell out rulemaking procedures in their day-care regulatory statutes.293

In either situation, two things are generally required before day-care standards can be promulgated: (1) public notice of all proposed standards (and revisions), including “either the express terms or an informative summary of the proposed action;” and (2) an opportunity for interested parties “to present statements, arguments, or contentions in writing, with or without opportunity to present the same orally.”294 Regulations issued in the absence of such a process often are subject to invalidation for failure to comply with state

292. ARIZ. REV. STAT. ANN. 1973 § 36-883B (West Supp. 1975-84); COLO. REV. STAT. § 26-6-106(1); ILL. ANN. STAT. ch. 23, § 2217(a) (Smith-Hurd 1984-85); MINN. STAT. ANN. § 245.802 (West Supp. 1984); MASS. GEN. LAWS ANN. ch. 28A, § 10 (c) (West 1981).
293. E.g., IDAHO CODE § 39-1212 (1977), which provides:
   The board of health and welfare or its representative shall hold a public hearing at Boise, Idaho, at which interested agencies may appear and protest any rule or regulation and subsequent amendments thereto promulgated by the board, pursuant to the authority of this act. Notice of hearing, together with a copy of the proposed rules and regulations shall be sent to all known agencies which would be affected by any rule or regulation so promulgated within thirty (30) days prior to the date of hearing.
   Protestants may appear at the hearing and voice objections to the action proposed to be taken by the board and may introduce evidence and call witnesses in support of such objections. The board or its representatives shall give consideration to the protests and objections and render a written decision thereon determining whether the proposed action will apply to all agencies rendering care and service and will be of substantial benefit to the care and protection of children expressed in the legislative policy of this act as opposed to any economic loss and damage to the child which may be sustained by the protestants. . .

Id.

Notwithstanding this detail, it would seem more efficient to incorporate a state APA into the day-care regulatory statute.
APA's. Public participation can occur at various stages of the rulemaking process. The general aim is to accord interested persons an opportunity to participate in rule formulation." Most "APA" litigation involves defects in the promulgation phase — when proposed rules already exist and are being subject to public notice and commentary. But it is in the earlier formulation phase that day-care regulators are taking the most creative steps to meet their due process obligations.

Many statutes regulating day-care actually list the groups and individuals who must participate with the state agency in formulating day-care standards. Even states that only require advice and assistance from "persons representative of the various types of child care facilities," or "consultation with the department of health, the department of education, and the fire marshal," still go well beyond general APA requirements. Such provisions reinforce a sense of accountability to the public, and minimize the likelihood of dissen- sion at the promulgation phase of rulemaking.

295. E.g., Costa v. Sunn, 642 P.2d 530 (Hawaii 1982) (revised family day-care regulations were invalidated because Dep't of Social Servs. did not comply with state APA in notic- ing proposed rule changes); see also In re Rules and Regulations, 195 N.E.2d 112 (Ohio Ct. App. 1963) (single newspaper notice of public hearing on child care regulations, one month in advance did not comply with Ohio APA, so regulations were struck down).

296. Paulson, supra note 9, at 15 (quoting COLO. REV. STAT. ANN. § 119-8-6 (Supp. 1967)).

297. OKLA. STAT. ANN. tit. 10, § 404 (West 1966) (requiring committees of representatives of child-care facilities to prepare standards and regulations, and prohibiting such regulations from being "made, prescribed, or published until after consultation with the Department of Health and Education, and the State Bureau or Investigation or other agency performing the duties of State Fire Marshal. . ."); MASS. GEN. LAWS ANN. Ch. 28A, § 10(c) (West 1981) (requiring the Office for Children to promulgate rules only after consulting with "the executive offices of educational affairs, manpower affairs, public safety, communities and development, and the departments of youth services, mental health, public health and public welfare"); MICH. COMP. LAWS § 722.112(2)(1-2) (requiring an ad hoc committee for each type of regulated child care organization, composed of representatives of the departments of public health, education, mental health, state police, and fire marshal, as well as parents and child-care facilities affected by the act); ARIZ. REV. STAT. ANN. § 36-883(E) (Supp. 1975-84) (requiring consultation with "agencies and organizations that are knowledgeable about the provision of day care services to children" including the department of economic security; department of education; state fire marshal; league of cities and towns; citizen groups; and day-care advisory board).

298. ILL. ANN. STAT. ch. 22, § 17 (Smith-Hurd 1968); ALA. CODE § 38-7-7 (1975).


300. Most APA's address the formulation stage by authorizing interested persons to petition an agency for the issuance, amendment, or repeal of a rule. E.g., COLO. REV. STAT. § 26-6-106 (1982); OHIO REV. CODE ANN. § 119.03(A) (Page 1981).

301. See supra notes 139-42 and accompanying text; see also Paulsen, supra note 9, at 14-15.
d. Procedures for Inspecting Day-Care Facilities and Handling Consumer Complaints

One commentator noted that "A licensing law is unenforceable without authorization for the administrative agency to verify that minimum standards are met. This requires that the right of entry, inspection, and investigation be delegated to the agency." Virtually all day-care regulatory statutes authorize state agencies to conduct inspections both prior to and following the grant of a license. Some provide for inspections "at any reasonable time." Others provide for inspection "during the hours of operation." Many authorize the regulatory agency to inspect "as often as it deems necessary or desirable." A few statutes allow inspections "at any time."

Most do not allude to any notice requirement, implying instead that day-care licensees and applicants simply waive any entitlement to notice as a condition of licensing. Similarly, most statutes do not explicitly mention that inspections by licensing representatives may be conducted in response to complaints, but most regulatory agencies presume that they have authority to make such visits.

The ostensible purpose of "supervisory" inspections of day-care facilities is to insure that they continue to meet minimum regulatory standards. Social welfare commentators have traditionally argued

302. Licensing of Child Care, supra note 9, at 13.
308. A few statutes provide separate authority to investigate complaints or alleged violations. E.g., S.C. Code Ann. § 20-7-2870 (Law Co-op 1983); Wis. Stat. Ann. § 48-74 (West 1979); Tenn. Code Ann. § 14-10-120 (Michie 1980). The careful drafting in Texas' licensing statute, which requires an inspection when a complaint is received, and also prescribes that notice be given the provider in such circumstances, is the exception and not the rule. Tex. Hum. Res. Code § 42.044(c) (Vernon 1980).
309. E.g., Idaho Code Ann. § 39-1217 (Bobbs Merrill 1977) (visits are "[f]or the
that broad investigative authority for agencies is justified by their "supervising powers," which are different from—and less fettered by due process than—their "prosecuting powers."\(^8\)

But regulatory agencies are often acting under both sets of powers when conducting administrative inspections. They may be seeking to identify facilities that need technical assistance,\(^9\) but they may also find facilities that merit sanctions for noncompliance. Moreover, when agencies respond to complaints, they are clearly acting as "law enforcement" entities whose inspections may lead to adversary proceedings. Not surprisingly, most providers view all administrative inspections with suspicion and dread.

One of the key issues confronting day-care regulators is whether their broad investigative authority is constitutional.\(^10\) The issue involves not only due process concepts, but also Fourth Amendment doctrine, which prohibits unreasonable searches and seizures. "Reasonableness" in the Fourth Amendment context means the need for a pre-inspection warrant, obtained from a neutral magistrate.\(^11\)

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\(^8\) Binder & Class, supra note 205, at 7 ("continuing supervision is a method of forestalling costly and time-consuming revocation action, and in well-established agencies it is assumed that supervision is a part of the overall licensing process.") Administrative inspections need not always be preceded by notice. See, e.g., CAL. CIV. PROC. CODE §§ 1822.51, 1822.56 (1985); Payton v. New York, 445 U.S. 573 (1980) (inspections without notice are permissible if an impartial magistrate grants a warrant). And under the federal APA, agency inspections may sometimes supplant the need for the formal trial-type hearings usually prescribed by that act. See, e.g., U.S.C.A. § 554(a)(3).

\(^9\) Even when statutes emphasize the technical assistance role by authorizing education, training, and informal consultation to day-care providers, such services are generally provided only "on request." E.g., S.C. CODE ANN. § 20-7-2890 (Law. Coop. 1983) ("The Department shall offer consultation through employed staff or other qualified persons to assist a potential applicant, an applicant or registered operator in meeting and maintaining the suggested standards for family day-care homes"); CAL. HEALTH & SAFETY CODE § 1510 (West 1979) ("The state department may provide consulting services upon request to any community care facility to assist in the identification or correction of deficiencies and in the upgrading of the quality of care . . . ."); TEX. HUM. RES. CODE § 42.047 (Vernon 1980) ("The department shall offer consultation to potential applicants, applicants, and license and certification holders . . . ."); MONT. CODE ANN. § 53-4-513(5) (1983) ("Upon request, the department shall give consultation to every licensee and registrant who desires to upgrade the services of his program."); FLA. STAT. ANN. § 402.314 (West 1973) ("The department shall provide consultation services, technical assistance, and in-service training, when requested and as available to operators, licensees, and applicants to help improve programs and facilities for child care . . . ."); MICH. COMP. LAWS ANN. § 722.101 (West Supp. 1984).

\(^10\) Prof. Paulsen suggested in 1968 that the "broad investigative powers" of day-care regulatory agencies might be unconstitutional. Paulsen, The Licensing of Child-Care Facilities—A Look at the Law. 21 ALA. L. REV. 1, 18-19 (1968).

\(^11\) At one time, all administrative inspections were considered exempt from the war-
Searches may be conducted without warrants when a regulated business has specifically consented to the search, or when the evidence gathered by the inspector is in "plain view" from roadways or other public areas.

In addition, warrantless searches have been upheld in a few closely regulated industries, but the Supreme Court has made clear that the range of such industries is extremely narrow. Industries are not "closely regulated" merely because their businesses must be licensed, nor can an industry be presumed to agree, as part of the licensing process, to regulatory inspections without notice. "Closely regulated industries" are the exception and not the rule. They must have "such a history of government oversight that no reasonable expectation of privacy ... could exist for a proprietor ... [who] has voluntarily chosen to subject himself to a full arsenal of governmental regulations."

Despite these stringent criteria, virtually all current day-care regulatory schemes envision unannounced, warrantless inspections of day-care facilities. Thus far, only California has faced a constitutional challenge to its warrantless searches of day-care facilities, in a case involving surprise inspections of family day-care homes. The federal district court adjudicating this challenge rendered an exhaustive and well-reasoned opinion concluding that family day-care was not a "pervasively regulated industry."

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rant requirement. See, e.g., Frank v. Maryland, 359 U.S. 360 (1959) (health inspector did not need warrant to search for rats if authorizing statute required inspector to identify himself and conduct inspections during normal business hours). This view was rejected in two 1967 decisions, which required warrants for administrative searches of apartment buildings, Camara v. Municipal Court, 387 U.S. 523 (1967), and commercial warehouses,see v. Seattle, 387 U.S. 541. The Court recognized that inspections are necessary to enforcement of health and sanitary standards, and that the criminal law concept of probable cause was probably inapplicable to these administrative searches. Instead, administrative warrants could issue when "reasonable legislative or administrative standards for conducting an area inspection are satisfied," and these standards would vary according to the nature of different regulatory programs. Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978). Camara, 387 U.S. at 538.


318. Id.

319. See supra notes 310-11.


321. Id. The court based its conclusion on a painstaking analysis of pertinent Supreme
exhaustive opinion, the Ninth Circuit recently reversed the district court in part, concluding that family day-care is pervasively regulated, and that California's inspection program, "in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant."  

There are significant areas of agreement in the two decisions. Both recognize the family day-care provider's strong privacy interest, the state's vital interest in protecting children, and the need—dictated by the Fourth Amendment—for reasonable inspections. But the Court of Appeals opinion dwells much more on the concern about child abuse that has heightened in the time since the district court rendered its decision. Such concern, along with great deference to the state's police power and parens patriae interests appear to have led the Court of Appeals to seek out an exception to the Fourth Amendment warrant requirement.

While this litigation will not end the controversy, it may prompt some states to opt for very broad inspection authority. However, even the Ninth Circuit did not approve "general searches at any time of any place providing care and supervision of children." Reasonable restrictions on the time and scope of regulatory

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Court doctrine, the plethora of lower court cases decided since Barlow's, and the state's asserted interest in warrantless inspections.

322. The Court of Appeals found that family day-care homes are "heavily regulated" and that the family day-care provider "cannot help but be aware that he or she 'will be subject to effective inspection' (citation)." 756 F.2d 713 (9th Cir. 1985).

323. See, e.g., Rush v. Obledo, 517 F. Supp. at 912-916; 756 F.2d 713 (9th Cir. 1985).

324. 756 F.2d 713.

The majority of children receiving care in family day-care homes are under five years of age and some are as young as six days old. The California Legislature was plainly aware that such children, away from their parents, need the special protection of the state and that the interest, health, and safety of children are of paramount importance in our society. Parents who use day care, especially low-income parents who must place their children in affordable day care while they work, must be assured that strict monitoring of health and safety conditions will keep their children safe.

Recognizing the magnitude of abuses in child day-care facilities are susceptible to easy concealment, such as over-capacity, lack of supervision, accessibility to poisonous chemicals or firearms, open pools, hazardous stairwells, and sexual or physical abuse, the Legislature could reasonably determine that a system of warrantless inspection is necessary in this case.

Id.

325. E.g., S.C. CODE ANN. § 20-7-2990 (Law. Co-op 1983), which before amended by Act 303 (1984), mandated 24-hour notice for all agency visits except in cases involving complaints. The next act removes the notice requirement.

326. Rush v. Obledo, 756 F.2d 713 (9th Cir. 1985):

In determining the sufficiency of this regulation, we note that the regulation restricts the areas to be searched to those where the children have access, and

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inspections are constitutionally mandated, and any scheme providing for inspections without warrants or notice to the day-care facility would seem vulnerable.

Thus, it would be prudent for state legislatures to re-evaluate the inspection authority they have granted regulatory agencies, and for the agencies to determine whether their inspection programs are sufficiently limited and precise. Existing statutes may be easily amended to build in a presumption of notice for all supervisory inspections, while retaining—as a last resort—the option of unannounced visits. Policymakers will have to decide for themselves whether to consider day care a “closely regulated industry” or not, but it would seem a progressive decision to require a pre-inspection warrant for unannounced inspections. The standards for such administrative warrants are not as exacting as those applicable to criminal searches, and could be straightforwardly written into a regulatory statute. The spirit of the Fourth Amendment would be well served by such a legislative decision, as would the policy of distinguishing between an agency’s technical assistance role and its law enforcement role.

limits the hours at which searches may be conducted to those during which family day care takes place. This statute, as limited by this regulation, is thus sufficiently precise and restrictive so as to preclude general searches by state officials.

Id.

327. Whether or not the statute requires notice and/or warrants, agency regulations can be drafted to require them. The only example of such a regulation encountered by this author in the course of researching this article was the one at issue in Rush v. Obledo, CAL. ADMIN. CODE tit. 22, § 88030.

328. E.g., TEX. HUM. RES. CODE § 42.044(c) (Vernon 1980) which provides, when an inspection is triggered by a complaint, that: “The division representative must notify the facility’s director or authorized representative . . . and report in writing the results of the investigation to the director’s authorized representative.” Although this statute does not incorporate a warrant requirement, it does go farther than most in meeting the constitutional objections that might be leveled by day-care providers.

329. The law is clear that administrative warrants do not require “specific evidence of an existing violation.” Camara v. Municipal Court, 387 U.S. 523, 539-40 (1967); See v. Seattle, 387 U.S. 541 (1967). Receipt of a consumer complaint would probably be sufficient, as would allegations that a particular facility had declined an agency’s notice monitoring visit.

330. A good example of a policy that recognizes these distinctions may be found in the TDHR REPORT, supra note 136. This report recommended that the licensing program designate “specialized complaint investigators” who would be separate and distinct from the staff who assist day-care providers in attaining and maintaining their licenses. The report noted:

There are positives and negatives to having specialized complaint investigators. The positives include having a person investigating who has had no previous regular contact with the facility and who can presumably bring a more open mind to the question of whether there are violations; licensing representatives who conduct investigative skills; and specialized licensing representatives will
E. Day-Care Regulation and The Equal Protection Clause

"Police power" entitles state government to regulate day care. The exercise of police power is limited by the unlawful delegation doctrine and the constitutional requirements of due process. Another major limit exists on state government's use of police power to regulate day care—the guarantee of "equal protection of the laws." Like the concept of due process, equal protection derives from the United States Constitution, and has an analog in virtually every state constitution. The essence of its guarantee is that legislative and administrative classifications must be "reasonable," and not "affect two or more similarly situated groups in an unequal manner."

Whenever legislatures and agencies act, they use classifications. Examples of such classifications in day-care regulation include regulating nonsectarian private facilities, while exempting parochial and public ones; distinguishing regulations of family day-care from center-based care; prohibiting corporal punishment in day-care facilities but not in schools; and exempting church-based day care from licensing requirements.

Equal protection doctrine does not forbid these classifications and distinctions, but it does require that they be rationally related to some legitimate state purpose. This standard, against which most

establish better rapport and communication with their counterparts in protective services . . . .

Id.

The ultimate conclusion, however, was that separating the "complaint investigators" from the other licensing workers led to a fairer and more efficient process.

331. U.S. CONST. amend. XIV § 1: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."


334. E.g., Milwaukee Montessori School v. Percy, 473 F. Supp. 1358 (E. D. Wis. 1979) (no rational basis for distinguishing between private nonsectarian day care providers and private sectarian ones); see also Ivy League School, Inc. v. Department of Institutions and Agencies of N.J., 155 N.J. Super. 56, 38 A.2d 381 (1977) (apparent exemption of public and church-based day-care facilities—which would have violated equal protection—was misleading because in fact all facilities had to abide by the regulation in question).


337. "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so
day-care classifications will be measured, is called the minimum scrutiny or "rational relation" standard of equal protection review.\(^{338}\) It is a "loose" standard because courts premise that the challenged classification satisfies equal protection, and will only invalidate the classification upon a showing of arbitrariness similar to what is required for substantive due process violations.\(^{339}\)

While there are some classifications that trigger more exacting judicial scrutiny, they do not tend to arise in day-care regulatory schemes. Classifications based on race or alienage, for example, have come to be viewed as "suspect."\(^{340}\) Legislative or regulatory provisions using "suspect classifications" are subject to the "strict standard" of equal protection review rather than minimum scrutiny. Under the strict standard of review, classifications must serve a compelling governmental interest that cannot be achieved by any other means; if they fail to meet this test, the classifications are invalid under the equal protection clause.\(^{341}\)

The same strict standard of review applies when classifications affect certain "fundamental interests," such as the right to vote,\(^{342}\) and the right to travel interstate.\(^{343}\) An intermediate standard of review applies to gender-based classifications,\(^{344}\) but again, these are unlikely in the context of day-care regulatory schemes.

The only day-care classifications likely to trigger strict scrutiny are those exempting church-based day-care programs from regulation. Such exemptions reflect state deference to the First Amendment right of free exercise of religion. Because this right involves a "fun-
damental interest," the strict standard of equal protection review applies. Some courts have recently invalidated religious exemptions on equal protection grounds.\textsuperscript{345}

Conceivably, parents might argue that the right to raise children as one sees fit is a "fundamental interest" for equal protection purposes, just as it is a fundamental right of personal liberty for due process purposes.\textsuperscript{346} Using such a theory, parents could attempt to challenge, on equal protection grounds, almost any day-care classification with which they disagree, and insist that the court subject the classification to the strict scrutiny test.

However, this approach would probably be rejected by the federal courts, which have resisted efforts to extend the fundamental interest concept to housing,\textsuperscript{347} education,\textsuperscript{348} and welfare.\textsuperscript{349} Moreover, while some state courts have moved beyond federal constitutional doctrine in construing their state equal protection clauses,\textsuperscript{350} most would not welcome an obligation to use strict scrutiny every time a dissatisfied parent challenged a day-care regulation.\textsuperscript{351} Some allegation of invidious discrimination or First Amendment considerations would probably be required before state or federal courts subject day-care regulations to strict scrutiny.

Indeed, aside from litigation about religious exemptions, the loose standard of equal protection review has been the tool for evaluating day-care regulatory schemes, and most classifications have accordingly survived. In California, for example, an appellate court rejected an equal protection challenge to corporal punishment rules which treated day-care facilities differently from schools. The court

\textsuperscript{345} See supra note 146. In states that have deliberately chosen not to grant a religious exemption, the licensing schemes are also being challenged for violating the first amendment. These challenges have been uniformly rejected by the courts. See, e.g., Roloff Evangelistic Enterprises v. Texas, 556 S.W.2d 856 (Tex. Ct. Civ. App., 1977); State of Texas v. Corpus Christi People's Baptist Church, 683 S.W.2d 692 (Tex. S.Ct. 1984); Kansas v. Heart Ministries, Inc., 607 P.2d 1102 (S.Ct. Kan. 1980); c.f. Corpus Christi People's Baptist Church, Inc. v. Texas Dep't Human Resources, 481 F. Supp. 1101 (S.D. Tex. 1979).

\textsuperscript{346} See supra text accompanying notes 246-47.

\textsuperscript{347} Lindsey v. Normet, 405 U.S. 56, 74 (1972).


\textsuperscript{350} See generally Symposium Issue on State Constitutional Law, 63 Tex. L. Rev. (June 1985).

\textsuperscript{351} Courts would probably elevate parens patriae and the police power to the stature of "compelling state interests," in order to uphold the state regulation. The result would be similar to the judicial treatment of substantive due process claims based upon parental child-rearing rights. See supra notes 235-37.
held that "the two groups are not 'similarly situated'"—a conclusion that will apply to many groups in the day-care community.

Valid distinctions exist between family day-care facilities and day-care centers. The same is true as between proprietary day-care facilities and programs operated by the public schools; and government-subsidized care and all other day-care programs, whether proprietary or nonprofit. As long as regulators can articulate rational bases for distinguishing among various types of facilities, it is reasonable to conclude that the groups are not similarly situated. Thus, regulatory efforts distinguishing the regulation of day care from other community care facilities (and/or schools), as urged in Section III, supra, present no equal protection problems. Nor do regulatory approaches distinguishing family day-care from center-based care.

However, distinguishing proprietaries from nonprofit day-care facilities may be vulnerable under the equal protection clause. Two courts have adjudicated equal protection challenges to statutes with similar classifications. Both found constitutional flaws, even under the minimum scrutiny standard of review. In Milwaukee Montessori School v. Percy, a private school challenged Wisconsin's exemption of public and parochial day-care facilities from licensing requirements. In striking down this exemption, the federal district court noted that the overall objective of licensing "is the protection of the health and welfare of children cared for in a day-care setting. There is no apparent reason, however, for distinguishing private nonsectarian from private sectarian schools in terms of the care given by them to the children."

While it might be possible to draft regulatory provisions that permissibly distinguish between profitmaking and nonprofit facili-

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352. Johnson v. Department of Social Servs., 123 Cal. App. 3d. 878, 177 Cal. Rptr. 49 (1981), citing In re Eric J. 25 Cal. 3d 522 (1979); In re Roger S., 19 Cal. 3d 921 (1977). While this conclusion technically ended the court's equal protection analysis, the opinion went on to address the plaintiffs' substantive due process claims in terms that appeared to equate equal protection and due process doctrines. The ultimate ruling made clear that there was nothing arbitrary about prohibiting corporal punishment in day care, and that the state had a rational purpose for such a regulation. Id.
353. See supra note 2.
356. In Yellow Duck Nursery the New Jersey court wrote similar words about a comparable exemption, although it found no equal protection violation because in practice, the exemption facilities were subject to identical regulation. 155 N.J. Super. 56, 382 A.2d 381 (1977).
ties, the words quoted above would seem to apply with equal force to most such provisions. The main criterion on which proprietaries and nonprofits are not similarly situated is a financial one—the former seek to make money from their day-care operations. While this fact may be relevant to the Internal Revenue Service and corporate boards of directors, it has no legal bearing on the health and safety mandate of day-care regulators.

Thus, policymakers faced with pressure to distinguish between proprietary and nonprofit day-care centers have a strong constitutional basis for resisting. Under the equal protection clause, the two types of facilities are probably “similarly situated.” Even with voluminous factual support and creative legal argument, such a regulatory distinction seems destined for equal protection litigation and invalidation.

However, aside from proprietary/nonprofit distinctions, and religious exemptions, the equal protection clause is unlikely to hinder many day-care regulatory choices. The doctrine is useful primarily as a safeguard against patently arbitrary classifications. If legislative and agency officials understand the doctrine, it can enhance their regulatory drafting and eliminate the possibility of subsequent constitutional challenges in court.

V. Conclusion

This article concurs with the federal Department of Health and Human Services’ statement that “no single set of standards can be applied practically to all the unique child-care situations found among the states.” Nevertheless, it remains important for every state to look closely at its existing approach to day-care regulation, and to consider revisions that might enhance efficiency as well as accountability to day-care consumers and providers.

This article has attempted to provide regulatory officials and members of the day-care community with a better understanding of current regulatory issues by canvassing the history of day-care regulation (Section II). The article also examined the array of policy questions currently being urged upon regulatory officials (Section

357. The federal court in Milwaukee Montessori Schools v. Percy noted, in dicta that the classification “makes no reference to profit as opposed to non-profit institutions,” even though the state argued that this distinction was at the heart of its classification. 473 F. Supp. at 1359-60.

358. U.S. DEP’T. OF HEALTH AND HUMAN SERVS., MODEL CHILD CARE STANDARDS ACT—A GUIDANCE TO STATES TO PREVENT CHILD ABUSE IN DAY CARE FACILITIES 3 (January 1985).
III). Finally, the article also explored at some length the fundamental doctrines of administrative and constitutional law that govern regulatory officials (Section IV).

While no attempt was made to propose a single solution to any of the regulatory issues, existing statutes and regulations that addressed them in a salutary fashion were extensively cited. Moreover, every effort was made to clarify the source—and import—of the legal rights and responsibilities of both the regulators and the day-care community. Readers should at least comprehend the need for precisely drawn and rational regulatory provisions; clear and efficient delegation of regulatory authority to state and local agencies; and procedures that incorporate fairness and notice to all concerned parties. The forum is now open for others to propose specific solutions.