

# **The Failed Quest for Equal Educational Opportunity: Regulating Education the Way We Regulate Business**

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## **ABSTRACT**

The past half century has seen wave after wave of efforts across the U.S. through which regulatory reformers have sought to achieve equal educational opportunity in our elementary and secondary school system. In this Article, I show how these efforts map onto changing approaches to economic regulation in general. More precisely, those seeking to advance the rights of “discrete and insular minorities” to obtain true equal educational opportunities have deployed these quite varied regulatory strategies: “adversarial legalism,” “command and control regulation,” “deregulation and the unleashing of market competition,” “outcome-based regulation,” and “managerial regulation.” And, as with economic regulation in general, frustration with the seeming lack of success of one regulatory approach to education reform has repeatedly spawned a search for a new strategy.

This Article first describes a wide range of shortcomings in the U.S. elementary and secondary educational system in the 1960s. At a time when in many respects our K-12 education scheme could be viewed as a great success, many groups of pupils were being badly treated. The next five sections present strategies that reformers have deployed in efforts to achieve genuine educational opportunity for all students. On the ground—in our schools, as in our business world—these changes have not been anywhere nearly as successful as advocates hoped. The Article concludes with observations about how educational reform approaches over time have reflected competing visions of who should be in charge of assuring that all American school children are well educated. In the face of a fractured view of “who should decide” it is difficult to hold anyone accountable for regulatory failure.

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## I. THE 1960s AND 1970s: OUR TROUBLED SCHOOL SYSTEM

During the century starting at the end of the Civil War, education in the United States was a local matter.<sup>1</sup> In most places, local school districts operated public schools with hardly any interference by higher levels of government.<sup>2</sup> Locally elected boards of education typically levied taxes on local property wealth and used the proceeds to build facilities, hire teachers, and otherwise run their schools.<sup>3</sup>

The federal government played almost no role in the operation of public schools.<sup>4</sup> State governments primarily furnished financial support for local school districts – first based simply on how many students the districts were serving, and later based on how much financial help districts with low property wealth needed to boost their per pupil spending up to a state-specified minimum.<sup>5</sup> But, as a general matter, states provided this money without significant strings attached.<sup>6</sup>

In the two decades after World War II, some saw the locally-run U.S. public education system as achieving great success, and even now many count those years as halcyon times for public schooling in America.<sup>7</sup> They included the mass exodus of upwardly mobile families

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1. Claudia Goldin, *A Brief History of Education in the United States*, (Nat'l Bureau of Econ. Research, Historical Paper No. 119, 1999), <http://www.nber.org/papers/h0119.pdf> (discussing finance and curriculum-setting as mostly local and decentralized through the context of data collection).

2. *Id.* at 3-5.

3. See JOHN D. PULLIAM, *HISTORY OF EDUCATION IN AMERICA* 61 (Ray C. Phillips & Robert J. Stalcup eds., 3rd ed. 1982).

4. *Id.* at 193.

5. *Id.* at 136; Brendand Pelsue, *When it Comes to Education, the Federal Government is in Charge of...Um, What?*, HARVARD ED. MAGAZINE, (Fall 2017) <https://www.gse.harvard.edu/news/ed/17/08/when-it-comes-education-federal-government-charge-um-what> (“Before 1965, the 10th Amendment seemed to prevail over the 14th, and federal involvement in K–12 education was minimal.”).

6. Fred M. Shelley, *Local Control and Financing of Education: A Perspective from the American State Judiciary*, 13 POL. GEOGRAPHY 361, 364 (1994) (“By the early 20th century, the States became more active in exercising the initiative which they legally retained when forming local school districts. . . Increased State activity in the provision of public education was an outcome of the Progressive Era.”).

7. See, e.g., Catherine Rampell, *Actually, Public Education is Getting Better, Not Worse*, WASH. POST (Sept. 18, 2014), [https://www.washingtonpost.com/opinions/catherine-rampell-actually-public-education-is-getting-better-not-worse/2014/09/18/7c23b020-3f6a-11e4-9587-5dafd96295f0\\_story.html?utm\\_term=.160a451e44f2](https://www.washingtonpost.com/opinions/catherine-rampell-actually-public-education-is-getting-better-not-worse/2014/09/18/7c23b020-3f6a-11e4-9587-5dafd96295f0_story.html?utm_term=.160a451e44f2) (“The ‘30s, ‘40s, and ‘50s are often talked about as a golden age...”).

from the cities to the suburbs, the construction of numerous new suburban public schools, and rising high school graduation rates and post-secondary enrollments.<sup>8</sup> On closer examination, however, these conditions masked many problems that led to the subsequent regulatory reform efforts described here. Simply put, for many groups of students the system fell far short of providing anything like an equal educational opportunity.

First, of course, racial segregation was rampant not just in the South but in the North and West as well.<sup>9</sup> In addition to intentional segregation, white flight to suburbia and an array of intentionally discriminatory features in our housing system expanded the number of newly-segregated school districts.<sup>10</sup>

But African-American children were not the only ones given second-class treatment. In many places, students with mental and physical disabilities were permanently assigned to separate schools or classrooms that barely attended to their educational needs; some disabled children were excluded from schools altogether.<sup>11</sup> New immigrants were often treated just as badly. As reforms to immigration laws came into effect in 1965, more non-English-speaking children arrived from Latin America and Asia.<sup>12</sup> Many public schools simply

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8. Shelley, *supra* note 6 at 364-65; Becky Nicolaides & Andrew Wiese, *Suburbanization in the United States After 1945*, AMERICAN HISTORY (April, 26, 2017), <http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-64> (discussing suburbanization); Claudia Goldin, *America's Graduation from High School: The Evolution and Spread of Secondary Education in the Twentieth Century*, 58 J. OF ECONOMIC HIST. 345, 367 (1998) [https://scholar.harvard.edu/files/goldin/files/americas\\_graduation.pdf](https://scholar.harvard.edu/files/goldin/files/americas_graduation.pdf) (increasing graduation rates).

9. See *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 191 (1973).

10. See Michael A. Boozer et. al., *Race and School Quality Since Brown v. Board of Education*, BROOKINGS PAPERS ON ECON. ACTIVITY: MICROECONOMICS at 277 (1992), [https://www.brookings.edu/wp-content/uploads/1992/01/1992\\_bpeamicro\\_boozer.pdf](https://www.brookings.edu/wp-content/uploads/1992/01/1992_bpeamicro_boozer.pdf).

11. *Twenty-Five Years of Progress in Educating Children With Disabilities Through IDEA*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/policy/speced/leg/idea/history.html> (last visited Mar. 31, 2021).

12. *Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2025*, PEW RESEARCH CTR. (Sept. 28, 2015), <https://www.pewresearch.org/hispanic/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065/>; Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge From Latin America*, 38 *Population & Dev. Rev.* 1, 9 (July 30, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3407978/>.

relegated them to the back of classrooms led by monolingual English-speaking teachers who were not trained to teach them.<sup>13</sup> These pupils often may as well have been left on the playground.

Additionally, several Christian (essentially Protestant) faith practices permeated public schools in many parts of the country to the consternation of many families of minority faiths, including Catholics.<sup>14</sup> Most significantly, schools routinely led Protestant prayers in classrooms, at graduations, and before football games.<sup>15</sup>

Teachers and principals also exercised an almost unlimited discretion in controlling and disciplining children similar to that which parents have always had. Local officials suspended or expelled students from school without explanation.<sup>16</sup> Teachers and administrators were free to squelch student efforts to express unpopular political and other viewpoints in the same way that parents can control what their children say around the dinner table.<sup>17</sup> Disruptive and non-cooperative students were often subjected to corporal punishment.<sup>18</sup> Students and their parents often objected to government officials taking on this *parens patriae* role when they saw the power of school officials being unfairly exercised.<sup>19</sup>

Furthermore, school districts spent extremely different amounts per pupil depending on their local property tax wealth base.<sup>20</sup> And children from high-income households generally attained significantly higher levels of academic achievement and were far more likely to attend college compared to children in low-income families.<sup>21</sup>

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13. MARTHA MINOW, MAKING ALL THE DIFFERENCE 19–23 (1990); Stephen D. Sugarman & Ellen G. Widess, *Equal Protection for Non-English-Speaking School Children: Lau v. Nichols*, 62 CALIF. L. REV. 157, 158–161 (1974).

14. YUDOF ET AL., EDUCATION POLICY AND THE LAW 123 (1974).

15. *Id.*

16. *See Ingraham v. Wright*, 430 U. S. 651, 682 (1997).

17. *Id.*; *see also Goss v. Lopez*, 419 U.S. 565, 579 (1975).

18. *See Ingraham*, 430 U.S. at 682 (upholding the use of corporal punishment in public schools); *see also Goss*, 419 U.S. at 579.

19. *See Goss*, 419 U.S. at 593 (analogizing school discipline to parental discipline).

20. ARTHUR E. WISE, RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY 121–30 (1967); JOHN E. COONS, WILLIAM H. CLUNE & STEPHEN D. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 1–38 (1970).

21. *Id.*

In 1960, private K-12 schools were educating about thirteen percent of the nation's children.<sup>22</sup> These were predominately religious schools, and mostly Catholic.<sup>23</sup> The Catholic education system had been established in the 19th century around mass Catholic immigration and Protestant hostility towards Irish, Italian, and other newcomers.<sup>24</sup> But by the 1960s the Catholic school system was undergoing dramatic changes. Catholics began to have fewer children, reducing the demand for parochial education.<sup>25</sup> Simultaneously, Catholic families were moving out of inner cities in huge numbers, leaving many school buildings behind without enough local Catholic children to educate.<sup>26</sup> Many of these schools either closed or began to educate African-American Protestant children as a commitment to social justice (without the expectation of converting them to Catholicism).<sup>27</sup> But these schools were underfunded.<sup>28</sup> The U.S.—unusual among Western democracies—did not provide public funding for faith-based K-12 education.<sup>29</sup> And the sharp decline in the number of Catholics becoming nuns and priests meant that barely-paid Catholic school teachers were

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22. NAT'L CTR FOR EDUC. STATISTICS, 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT, at 37 tbl.9 (1993), <https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=93442>, [hereinafter NCES report].

23. Stephanie Ewert, *The Decline in Private School Enrollment 2* (U.S. Census Bureau, Soc., Econ., and Hous. Statistics Div., Working Paper No. FY12-117, 2013), [https://www.census.gov/content/dam/Census/library/working-papers/2013/acs/2013\\_Ewert\\_01.pdf](https://www.census.gov/content/dam/Census/library/working-papers/2013/acs/2013_Ewert_01.pdf).

24. Marvin Lazerson, *Understanding American Catholic Educational History*, 17 HIST. OF EDUC. QUARTERLY 297, 298 (1977).

25. MARK GRAY, CTR. FOR APPLIED RES. IN THE APOSTOLATE, HOLY CROSS MINISTRIES 3 (2015), <https://cara.georgetown.edu/staff/webpages/Catholic%20Families%20Demographics.pdf>.

26. See Ewert, *supra* note 23, at 2; Anthony P. Setari & R. Renee Setari, *Trends in Catholic School Minority Enrollment and Higher Education Entrance Over the Recession*, 19 J. OF CATHOLIC EDUC. 4 (2016).

27. Vernon C. Polite, *Getting the Job Done: African American Students and Catholic Schools*, 61 No. 2, J. OF NEGRO EDUC. 211 (1992); SETARI & SETARI, *supra* note 26, at 4.

28. SETARI & SETARI, *supra* note 26, at 4.

29. THE PEW FORUM ON RELIGION & PUB. LIFE, SHIFTING BOUNDARIES: THE ESTABLISHMENT CLAUSE AND GOVERNMENT FUNDING OF RELIGIOUS SCHOOLS AND OTHER FAITH-BASED ORGANIZATIONS (2009) (outlines *Everson* and *Allen* bound for providing school funding, some funding is available but only directed at students and not schools); Laura S. Underkuffler, *Public Funding for Religious Schools: Difficulties and Dangers in a Pluralistic Society*, 27 OXFORD REV. OF EDUC. 578 (2001); CHARLES L. GLENN, *THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES* (2002).

increasingly being replaced by teachers demanding regular salaries.<sup>30</sup> Plus, many Catholic families now living in mixed-faith suburban neighborhoods sent their children to public schools, making it difficult for suburban parishes to raise enough money to build new Catholic schools.<sup>31</sup> Therefore, many urban and suburban private schools suffered from lack of financial resources.

Given these circumstances, reformers seeking equal educational opportunity for all students sought dramatic changes in K-12 education, shifting many education policy decisions from local school districts to judges, state and national legislative and administrative bodies, and even private enterprise.

## II. “ADVERSARIAL LEGALISM”

Buoyed by the success of the NAACP Legal Defense Fund in deploying the judicial branch to attack racial segregation in public schools in *Brown v. Board of Education*<sup>32</sup> and subsequent lawsuits, idealistic school reformer lawyers in the 1960s and 1970s sought to address a wide range of what they viewed as undesirable aspects of K-12 schooling in America through litigation.<sup>33</sup> This resort to “adversarial legalism”—the use of courts to bring about desired policy changes—is a widespread American phenomenon, as Professor Robert Kagan so skillfully demonstrated in his 2001 book of this title.<sup>34</sup>

During this era, self-styled public interest groups of all types in the U.S. routinely went to judges for relief whether they sought to push change or block change.<sup>35</sup> Courts played an activist role largely unheard of outside America, influencing the expansion of U.S. ports, the regulation of steel companies, and the compensation of accident victims, to give but a few of the many instances of judicial activism that Kagan discusses.<sup>36</sup> In the realm of K-12 education, I was part of this

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30. Michael Lipka, *U.S. Nuns Face Shrinking Numbers and Tensions With the Vatican*, PEW RES. CTR. (Aug. 8, 2014), <https://www.pewresearch.org/fact-tank/2014/08/08/u-s-nuns-face-shrinking-numbers-and-tensions-with-the-vatican/>.

31. See Ewert, *supra* note 23, at 2.

32. 347 U.S. 483 (1954).

33. See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962); *Goss*, 419 U.S. at 565; *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

34. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

35. *Id.* at 6-17.

36. *Id.*

litigation-driven movement, and for a while we believed ours was the wisest regulatory strategy for reforming public education.

We quickly learned that at least some judges were sympathetic to our legal claims and willing to use their powers to order changes in the system. Group after group of students (and their parents) who were aggrieved by how local school districts treated them went to court.<sup>37</sup> And many were successful. School-led prayers were banished from public education.<sup>38</sup> Students were awarded both due process and free speech rights vis-a-vis public school officials.<sup>39</sup> Schools were ordered to seriously engage the educational needs of limited English-speaking pupils.<sup>40</sup> Children with disabilities won both procedural and substantive rights to educational opportunities.<sup>41</sup> And state supreme courts were receptive to lawsuits challenging the public school funding system for its perpetuation of wealth-based inequalities in spending from place to place.<sup>42</sup> At the same time, litigation was also favored by others who *opposed* various educational reforms. For example, lawyers successfully attacked efforts by legislatures in several states to financially bail out both Catholic schools and racially segregated all-white private schools in the South.<sup>43</sup> This litigation reached the U.S. Supreme Court in many key cases.<sup>44</sup> Hence, for a time at least, adversarial legalism seemed to dominate public school reform efforts at least as much as it did reform efforts in the health care industry, consumer products field, and the welfare and social security system.<sup>45</sup>

Despite many successful courtroom victories, however, progressives pursuing equal educational opportunity via the judiciary soon came up against certain realities. Perhaps most clearly, judges were more effective at striking down existing policies than they were at

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37. See *Engel*, 370 U.S. at 421.

38. *Id.*

39. See *Goss*, 419 U.S. at 565; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

40. See *Lau v. Nichols*, 414 U.S. 563 (1974).

41. See *Honig v. Doe*, 484 U.S. 305 (1998) (procedural due process); *Mills v. Bd. of Ed.*, 348 F. Supp. 866 (D.D.C. 1972); *Pa. Ass'n. for Retarded Children v. Commonwealth of Pa.*, 334 F. Supp. 1257 (E.D. Pa. 1971).

42. See *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

43. See *Yudof et al*, *supra* note 14, at 50-51. See also, *Lemon*, 403 U.S. at 602; *Norwood v. Harrison*, 413 U.S. 455 (1973).

44. See *Lemon*, 403 U.S. at 602; See also *Norwood*, 413 U.S. at 455.

45. See KAGAN, *supra* note 34, at 35-40.

ordering new initiatives. For example, courts could provide reasonably clear orders to squelch school-led prayers and end disciplinary practices that did not provide students with reasons for their punishment or opportunities to receive hearings.<sup>46</sup> Courts could also fairly easily tell whether local schools were complying with such orders.<sup>47</sup> But just how schools should treat children with disabilities and limited-English speaking children to satisfy their legal rights was and remains more opaque.<sup>48</sup> So, too, as state court judges determined that school finance mechanisms were failing to provide all pupils with an “adequate” education, exactly what funding arrangements would suffice remained elusive.<sup>49</sup> Even ending de jure school segregation turned out to be much more complex than perhaps initially envisioned.<sup>50</sup> Courts could quickly invalidate totally separate white and black schools, but found it hard to impose a remedy for this illegal arrangement that would actually achieve desegregated schools.<sup>51</sup>

It soon became clear that legislative responses were required on behalf of racial minorities, children with disabilities, limited English speakers, and those at the bottom of the school finance heap. Analysis began to show that the effectiveness of judicial decrees was often crucially dependent upon supportive political enactments.<sup>52</sup> Furthermore, while a few lawyers and scholars flirted for a while with the idea of lawsuits based on “educational malpractice,” these efforts

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46. See, e.g., *Engel*, 370 U.S. at 421.; *Goss*, 419 U.S. at 565.

47. *Brown*, 349 U.S. at 294; William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 651–52 (1982).

48. See Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, in EQUITY AND ADEQUACY IN EDUCATION AND FINANCE (Helen F. Ladd et al., eds., 1999).

49. See *id.*; see, e.g., *Edgewood I-IV* (777 S.W.2d 391, 804 S.W.2d 491, 826 S.W.2d 489, 917 S.W.2d 717); *West Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558 (Tex., 2003); *Neeley v. West Orange-Cov Consol. I.S.D.*, 176 S.W.3d 746 (Tex., 2005); YUDOF ET AL., *supra* note 14, at 859–863 (describing the back-and-forth litigation about school funding in Texas).

50. Michael R. Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2421–24 (2004); Sean F. Reardon et al., *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. OF POL’Y ANALYSIS AND MGMT. 876, 877 (2012) (detailing continued issues with de-segregation orders); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 349-54 (1991).

51. Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 285–98 (1972).

52. See ROSENBERG, *supra* note 50, at 49–54.



stalled.<sup>53</sup> The whole vision that reformers should look to courts to bring about increased and meaningful educational opportunities for low achieving students was increasingly seen as wishful thinking.

This pessimism was reinforced when it became clear that the U.S. Supreme Court was becoming considerably less receptive to litigation as a way to reform K-12 education than had initially been hoped. Perhaps most importantly, in 1973 it rejected the legal attack on local wealth-based school funding.<sup>54</sup> At the same time, it refused to order metropolitan school desegregation remedies in communities where historical racial segregation practices devolved into big city school districts with mostly all or nearly all minority schools.<sup>55</sup> In addition, the Court has become less sympathetic to student rights claims and more deferential to the exercise of discretion by school officials over the years,<sup>56</sup> and so too, it has been rather narrow in its interpretation of the rights of children with disabilities, giving considerable latitude to school officials to educate students with disabilities as they see fit.<sup>57</sup> The Court has also been relatively deferential to state legislatures in lawsuits that have raised issues concerning religion in schools – most importantly, upholding a Cleveland school voucher plan even though voucher recipients overwhelmingly go to faith-based schools.<sup>58</sup>

The role of adversarial legalism did not decrease only in the education sector. Across policy areas, the combination of limited judicial reach and reduced judicial reception pushed reformers to move to other forums.<sup>59</sup> This is particularly true for issues like welfare and housing policy where public interest lawyers had used litigation to advocate on behalf of the poor.<sup>60</sup> This is not to say that adversarial legalism is dead. For example, judges still appear to be in the thick of

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53. See Stephen D. Sugarman, *Accountability through the Courts*, 82 THE SCH. REV. 233, 241–43 (1974); John Elson, *Common Law Remedy for the Educational Harms caused by Incompetent or Careless Teaching*, 73 NW. U.L. REV. 641, 642–47 (1978–1979).

54. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 959 (1973).

55. See *Milliken v. Bradley*, 418 U.S. 717, 744–47 (1974).

56. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Morse v. Frederick*, 551 U.S. 393 (2007).

57. *Compare Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982) with *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

58. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

59. TOM BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS* 1–22 (2002).

60. *Id.*

the fight in some policy areas, such as environmental protection and pharmaceutical drug policy.<sup>61</sup> And, of late, the business community has been quite successful in getting courts to strike down legal requirements that they had failed to block through the ordinary political process by successfully invoking both the First Amendment's "free speech" clause and the "pre-emption" doctrine.<sup>62</sup>

So while litigation concerning K-12 education continues, adversarial legalism does not presently dominate policy reform efforts in the way it seemed to a half century ago.<sup>63</sup> Rather, it is a far less prominent regulatory mechanism functioning in the background of newer, bolder mechanisms of reform. Maybe lawyers harvested the low-hanging fruit early on, leaving more stubborn problems to be dealt with via other regulatory means.

### III. "COMMAND AND CONTROL REGULATION"

Both in response to judicial activism and independent from it, legislative leaders in the 1960s began to insert themselves more deeply into local school affairs with an eye to narrowing the achievement gap between able-bodied, English-speaking, white children, from wealthier families and a range of minority groups.<sup>64</sup> With many shortcomings of American public schools now identified, political entrepreneurs began to promote improvements that they, or experts they relied upon, argued would make our schools better—or at least better for those whom schools were then treating poorly.<sup>65</sup>

These reformers did not trust local schools simply to learn about their good ideas and proceed to embrace them voluntarily. Rather,

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61. *Id.*

62. See Stephen D. Sugarman, *Compelling Products Sellers to Transmit Government Public Health Message*, 29 J. OF L. AND POL. 1, 2–4 (2014); STEPHEN D. SUGARMAN, *United States*, in REGULATION TOBACCO, ALCOHOL, AND UNHEALTHY FOODS (Tania Voon et al., eds, 2014).

63. See *Williams v. California*, 764 F.3d 1002 (9th Cir. 2014); Stephen Sawchuk, *Do Students Have a 'Right to Read' in California? So Argues this Lawsuit*, EDUC. WEEK: READING AND LITERACY (Dec. 5, 2017), [http://blogs.edweek.org/edweek/curriculum/2017/12/is\\_literacy\\_a\\_guaranteed\\_right.html](http://blogs.edweek.org/edweek/curriculum/2017/12/is_literacy_a_guaranteed_right.html).

64. See Harvey Kantor, *Social Reform and the State: ESEA and the Federal Education Policy in the 1960s*, 100 AM. J. OF EDUC. 47, 47–49 (1991); see, e.g., Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. No. 89–10, 79 Stat. 27 (1965); *The Federal Role in Education*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/overview/fed/role.html>.

65. See, Kantor *supra* note 64, at 50.

activists sought to impose their reforms through an array of higher-level policy changes.<sup>66</sup> Sometimes reformers got legislative bodies (or administrative agencies) simply to make demands on local educational agencies; other times, they managed to get funds appropriated which carried with them various requirements on local behavior.<sup>67</sup>

This strategy reflects the typical “command and control” approach to regulation that we have seen, and in many arenas continue to see, across the regulatory landscape in the realms of public utilities, the environment, workplace safety, and more. The underlying idea behind command and control regulation is that certain professional experts employed by government know what best serves the public interest and that those being regulated cannot be trusted to embrace these “best practices” without being ordered to do so.

This approach saw explosive growth during the Nixon presidency when Congress created or gave vast new powers to a large number of somewhat influential federal agencies. In short order, the EPA, CPSC, OSHA, and the like were added to the alphabet soup of earlier bodies that were already engaged in command and control strategies, like the SEC, FDA, ICC, and so on.<sup>68</sup> These agencies employed the same two well-worn legal tools just noted – both “sticks” (making direct demands on regulated entities) and “carrots” (attaching conditions to the provision of money).<sup>69</sup>

In the education field, the carrot-based regulatory controls came to be termed “categorical grants,” and they quickly multiplied.<sup>70</sup> Soon, in return for cash, Washington and the states were demanding all sorts of changes from local school districts. In particular, the federal government became deeply involved in addressing problems faced by three groups of students: minority students, low-income students, and

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66. *See id.*

67. *See* S. BAILEY & E. MOSHER, *ESEA: THE OFFICE OF EDUCATION ADMINISTERS A LAW* (1968) (discussing shift in emphasis to funding with federally set standards).

68. *See* CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 24–29 (1990).

69. *See id.* at 29–31.

70. *See* BAILEY & MOSHER, *supra* note 67, at 891; Matthew Lynch, *Understanding Federal Funding Part I: 3 Types of School Funding*, *THE EDVOCATE* (Sept. 18, 2016), <https://www.theedadvocate.org/understanding-federal-funding-part-3-types-school-funding/>.

special education students.<sup>71</sup> In the race area, although some desegregation dollars were appropriated, funding was not a major federal strategy.<sup>72</sup> Rather, provisions of the 1964 Civil Rights Act empowered (and ordered) federal officials to hasten compliance with the *Brown v. Board* case.<sup>73</sup> And it seems clear that, though courts remained involved, it was the Civil Rights Act and activism by federal officials in Washington that finally broke the back of the “massive resistance” to school desegregation in the South.<sup>74</sup> After hardly any progress in the decade after *Brown*, with federal bureaucrats now involved, many districts found themselves reaching administrative settlements to govern their new school assignment (and construction) policies.<sup>75</sup>

Then, in 1965, the federal government agreed to put significant dollars into K-12 education for the first time through Title I of the Elementary and Secondary Education Act.<sup>76</sup> Schools were to use these funds to focus on the needs of children from low-income homes.<sup>77</sup> But congressional leaders and federal agencies did not trust school districts and their local schools to voluntarily use the new money to do the desired thing. The core fear was that districts and schools would find a way to treat this money as “general aid” and spend it as they would any infusion of new revenues—likely not on the needs of their poorest students. Hence, legislators attached elaborate accounting and reporting features (“maintenance of effort” requirements) to the law to ensure that districts and schools truly spent the federal funding on new services for the target group of pupils, and did not substitute the new funds for money they were already spending on these children, thereby converting the new funds into general aid through the back door after all (or, even

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71. See Kantor, *supra* note 64; *Impact of Civil Rights Laws*, U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS (Jan. 1999); see Sunstein, *supra* note 68, at 48; U.S. DEP’T. OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA, 4–9 (2010); Edwin W. Martin et. al., *The Legislative and Litigation History of Special Education*, 6 THE FUTURE OF CHILDREN: SPECIAL EDUCATION FOR STUDENTS WITH DISABILITIES 25, 26 (1996).

72. See Yudof et al., *supra* note 14, at 446.

73. See *id.*

74. See, Goodman, *supra* note 51, at 94–100.

75. *Id.*

76. *Id.* at 97–100; 20 U.S.C. § 6301 *et. seq.*

77. See 20 U.S.C. § 6301.

worse from the viewpoint of school improvement activists, giving the money back to local taxpayers through reduced property taxes).<sup>78</sup>

In 1975, federal legislation brought about a great leap forward for children with disabilities as well, even though litigation on their behalf may have initially led the way.<sup>79</sup> Money was appropriated to help fund the extra costs required to deal fairly with special needs students.<sup>80</sup> But, here too, substantial conditions were attached to these carrots. Children with disabilities were assured a presumed right to be in “mainstream” classrooms with special education supplements.<sup>81</sup> Individual children and their parents were entitled to annual hearings that would determine the appropriate “individual educational plan” (“IEP”) for them for the coming year.<sup>82</sup> And if public schools could not satisfactorily provide appropriate educational services for special needs children, parents could insist upon the public payment of their private school tuition.<sup>83</sup>

Again, given the way that local public schools had previously treated children with disabilities, advocates on their behalf and political leaders who championed the legislation did not trust schools to simply do what Congress wanted with these new appropriations.<sup>84</sup> Rather, as with Title I funding for children from low-income households, the new federal law regarding special education students insisted that schools meet strict conditions in return for taking the money. And a complex web of record-keeping and reporting requirements allowed the experts in Washington to have some confidence that local schools and districts were complying with the regime.<sup>85</sup>

Although often less money (or even no money) was involved, this pattern of tight regulation born out of a distrust of local officials was

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78. See 20 U.S.C. § 6321; *Local Education Agency (LEA) Maintenance of Effort (MOE) Organizer*, CNTR FOR IDEA FISCAL REPORTING, <https://cifw.wested.org/resources/leamoe/organizer/expend-consequences/> (accessed Nov. 2, 2018).

79. See Rosenberg, *supra* note 52, at 5.

80. See NAT'L COUNCIL ON DISABILITY, *BROKEN PROMISES: THE UNDERFUNDING OF IDEA* 9 (2018).

81. See Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. OF PA. L. REV. 789, 789–90, 792–94 (2006); Mitchell L. Yell et al., *Developing Legally Correct and Educationally Appropriate Programs for Students with Autism Spectrum Disorders*, 18 FOCUS ON AUTISM AND OTHER DEVELOPMENTAL DISABILITIES 182, 183 (2003).

82. See Colker, *supra* note 81, at 796; Yell et al., *supra* note 81, at 184.

83. See Yell et al., *supra* note 81, at 186.

84. See YUDOF ET AL, *supra* note 14, at 3–4, 725–26.

85. See 20 U.S.C. § 1416.

repeated at both the federal and state level in many other areas, including, for example, to deal with “bilingual” education.<sup>86</sup>

But by 1983, critics were loudly sounding alarm bells that the American education system *as a whole* was not the success that so many had assumed it was.<sup>87</sup> That is, its failings were by no means limited to our poor, minority, and disabled children. When test scores in the U.S. were compared with those in other countries, even many of the newer and much vaunted suburban (and often mostly or all-white) public schools were not doing nearly as well as civic and political leaders hoped.<sup>88</sup> “A Nation at Risk” captured this alarm vividly.<sup>89</sup> From the perspective of these reformers, moving everyone up to a state’s average achievement level simply would not suffice.<sup>90</sup>

At the same time, researchers were expressing skepticism as to whether the federal Title I program was actually accomplishing much beyond serving as a “jobs creation” program for residents of inner cities.<sup>91</sup> Special education and limited English speaking students were treated much better in many places, but now families with “regular” children began to complain that too much money was being diverted to special-needs children. Moreover, even those championing the needs of disabled and limited English-speaking pupils sometimes fundamentally disagreed about the appropriate educational strategy for them.<sup>92</sup> For example, was the core goal regarding limited English speakers to make them appropriately fluent in English or was it equally to preserve their bilingual, and perhaps bicultural, circumstances? And, as for children with substantial disabilities, was “mainstreaming” feasible or even desirable as compared with enriched separate classrooms or even separate but caring schools?

Meanwhile, local school districts and schools were increasingly criticizing the blizzard of regulatory requirements imposed from above

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86. See YUDOF, *supra* note 14, at 665–66.

87. See NAT’L COMM. ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983).

88. See Edward B. Fiske, *Commission on Education Warns Tide of Mediocrity Imperils U.S.*, N.Y. TIMES (Apr. 27, 1983), <https://www.nytimes.com/1983/04/27/us/commission-on-education-warns-tide-of-mediocrity-imperils-us.html>.

89. See *id.*

90. See *id.*

91. Patrick McGuinn, *Schooling the State: ESEA and the Evolution of the U.S. Department of Education*, 1 RUSSELL SAGE FOUND. J. OF THE SOC. SCI. 77, 81–85 (2015), <https://muse.jhu.edu/article/605401/pdf>.

92. McGuinn, *supra* note 91, at 82; see, e.g., Colker, *supra* note 81, 825–35.

as paralyzing and requiring more paperwork than substantive change. And many said that detailed reporting requirements often forced schools to implement reforms other than their first-choice. In other places, local officials largely ignored external requirements on the grounds that those demanding change had not invested enough in enforcement mechanisms and that current requirements would be replaced if they waited long enough. This cynicism was sometimes justified on the ground that empirical research failed to show that command and control regulation of our public schools was making a positive difference.<sup>93</sup>

As I will explain in the next sections, as other regulatory approaches have been subsequently embraced, command and control regulation of local schools and districts has in some cases been replaced while in others merely supplemented. Put differently, as with adversarial legalism, disappointing mechanisms are not necessarily abandoned but are often relegated to a decreased role. After all, those invested in command and control regimes are often unwilling to acknowledge their shortcomings and are often able to prevent their demise using interest group politics.

#### **IV. “DEREGULATION AND THE UNLEASHING OF MARKET COMPETITION”**

So, educators, policy reformers, and public figures began to challenge K-12 command and control regulation, just as the business community began to vigorously contest federal and state command and control regulation in areas to which it was subject, such as transportation, workplace safety, and dietary supplements. A push for deregulation, and reliance instead on market competition, followed. Initially, some pressed for a return to an earlier era of “local control,” responding to community revolts against “school bussing” remedies that were being adopted to undo school segregation. More generally, under the banner of states’ rights and federalism, advocates described the conditions attached to federal funding of K-12 education as unduly restrictive and bureaucratic. The new push for local control also helped sink the adversarial legalism approach to school funding that involved the U.S. Supreme Court.

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93. See, e.g., NAT’L COMM’N ON EXCELLENCE IN EDUC., *supra* note 87.

Advocacy on behalf of local control was by no means limited to conservatives. Indeed, going back to the 1960s, “community control” had been the mantra of various local political voices on the Left who felt that inner city minority children were not getting a fair shake in big city school districts.<sup>94</sup> For these reformers, the strategy of moving *up* the political chain to guarantee better treatment of marginalized children may have been a mistake.<sup>95</sup> Rather, maybe the problem would have been better attacked by further localizing control down to the level of schools or small groups of local schools, especially in large urban areas.<sup>96</sup>

At the same time, some outsiders began to paint the entire American K-12 school system as unwisely and inappropriately monopolistic.<sup>97</sup> Put differently, public schools in many ways had captive audiences. Families not interested in private religious schools and unable to afford the cost of private non-faith-based schools normally sent their children to the public schools they were told to use – with no real choice in the matter.<sup>98</sup> They could, of course, move to a different address, if they could afford that. And surely some families put the quality of local public schools high on their list of criteria when selecting where to live. But once a family bought a house (or signed a new apartment rental agreement), they would have found it difficult to move again if their children’s schooling did not turn out as they hoped. Moreover, moving was especially risky for low-income families once they found any sort of housing stability. Plus, of course, the really good public schools were in high-income suburbs where even middle class families, much less working class and poor families, could not afford to live.<sup>99</sup> And these “really good” schools firmly closed their doors to out-of-district pupils (even if they had empty seats in their classrooms). Essentially, the

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94. Gordon L. Berry, *Education in Inner-City Schools: The Community Challenge*, 3 J. OF BLACK STUD. 315, 322–23 (1973), <https://www.jstor.org/stable/pdf/2783789.pdf?refreqid=excelsior%3A50ff15aea54bf0ce7f5cd3d4698fd291>.

95. *See id.* at 323–25.

96. *Id.*

97. *See, e.g.*, Christopher Jencks, *Is the Public School Obsolete?*, NAT’L AFF. 18, 23–27 (1966),

<https://www.nationalaffairs.com/storage/app/uploads/public/58e/1a4/9f7/58e1a49f73584658973268.pdf>.

98. *See id.* at 23.

99. *See id.* at 18–21.



American school system was decidedly *not* governed by the principle of “school choice.”

Hence, just as efforts were then underway to deregulate, say, the airline industry, reformers driven by similar ideology sought to deregulate the schooling industry. These reformers quickly noted that “choice” was replacing command and control when it came to the way the federal government was responding to the food and medical needs of the poor.<sup>100</sup> Instead of low-income people with nutritional needs having to go to centers where officials handed out federally-owned food commodities, and for their medical needs to county hospitals staffed by public employees, Congress radically changed the game with the adoption of the Food Stamps and Medicaid programs (as well as Medicare).<sup>101</sup> Government would provide the money to help the poor (and the retired), but the private sector would provide the services, and beneficiaries of the federal programs would have choice as to which providers of the relevant goods and services they would patronize.<sup>102</sup>

Before long, this way of thinking spread to K-12 schools in a variety of ways. Most narrowly, school districts began to offer more school choice opportunities within their localities.<sup>103</sup> They created magnet and alternative schools in substantial number to which families could apply rather than be assigned (often to encourage racial integration, but also to retain otherwise mobile families in the community).<sup>104</sup> Some school districts opened up their public schools to those living in other districts, including students whose high schools did not offer a desired advance placement course or whose parents were employed in the local community and wanted the convenience of having their children attend

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100. *See id.* at 27.

101. *See A Short History of SNAP*, U.S. DEPT. OF AGRIC., <https://www.fns.usda.gov/snap/short-history-snap> (last visited Jan. 4, 2019); CTRS. FOR MEDICARE & MEDICAID SERVS., *CMS's Program History*, <https://www.cms.gov/About-CMS/Agency-information/History/> (last visited Jan. 5, 2019).

102. *Policy Basics: Introduction to Medicaid*, CTR. ON BUDGET AND POL'Y PRIORITIES, <https://www.cbpp.org/research/health/policy-basics-introduction-to-medicaid> (last updated April 14, 2020).

103. *See* MINOW, *supra* note 13, at 24–25.

104. *See id.* at 34–38.

near where they worked rather than lived.<sup>105</sup> In a few places, school districts entirely abandoned the idea of neighborhood school assignments and instead adopted a school choice scheme, albeit usually a “controlled choice” plan designed to assure racial and/or socioeconomic diversity among schools.<sup>106</sup> The idea that families should have a central role in determining how and where their children were educated was also reflected in the role given to parents of children with disabilities in determining their annual individual education plans, as noted above.<sup>107</sup>

But at the same time, pressures for much more extensive “deregulation” of education were growing. During the 1960s, reformers advanced strategies to create more school choice that generally imagined a far greater role for the private sector, led in part by the conservative Nobel-prize-winning economist Milton Friedman and in part by progressive reformers on the Left who cared most about low-income families.<sup>108</sup> The most dramatic of these deregulatory visions called for “vouchers” as the way to fund schooling.<sup>109</sup> Friedman favored closing down all public schools and replacing them with an entirely private school system, a most unlikely change in a world where large swaths of the American public were quite delighted with their local public schools (especially in the well-off suburbs).<sup>110</sup> Others, including me, pushed for “education by choice” in ways designed primarily to help low-income families achieve a much wider range of school opportunities for their children, including both more private school choice and more public school choice.<sup>111</sup> Some of our “choice”

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105. Linda Darling-Hammond et al., *Expanding High-Quality Educational Options for All Students: How States Can Create a System of Schools Worth Choosing* 4, LEARNING POL’Y INST. (Dec. 2017), [https://learningpolicyinstitute.org/sites/default/files/product-files/Expanding\\_High%20Quality\\_Options\\_REPORT.pdf](https://learningpolicyinstitute.org/sites/default/files/product-files/Expanding_High%20Quality_Options_REPORT.pdf).

106. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch., Dist. No. 1*, 551 U.S. 701 (2007).

107. See *Honig v. Doe*, 484 U.S. 305, 305 (1988); *Mills v. Bd. of Educ. of the D.C.*, 348 F. Supp. 866, 866 (D.D.C. 1972).

108. See MINOW, *supra* note 13, at 30; see also COONS ET. AL., *supra* note 20 (arguing in favor of increased school choice); Milton Friedman, *The Role of Government in Education, in ECON. AND THE PUB. INTEREST* (Robert Solo, ed., 1955).

109. See MINOW, *supra* note 13, at 30.

110. See Friedman, *supra* note 108.

111. See COONS ET. AL., *supra* note 20.

proposals were especially aimed at promoting racial integration or the education of limited English speaking children.<sup>112</sup>

The push for government-funded private school choice was supported by at least some of those in the parochial school sector. The Catholic K-12 school system, although shrinking, faced serious financial crises as noted earlier.<sup>113</sup> Many church leaders did not publicly favor vouchers because they feared public endorsement risked political and judicial opposition, and such a program would directly benefit the church.<sup>114</sup> During this same time families of other faiths all across the nation, especially evangelical Christians, were building up their own faith-based school networks, although often on financial shoestrings. While some of their leaders opposed any government funding fearing the government interference it might bring, others were eager for the sort of financial support provided to faith-based schools in so many other nations.<sup>115</sup>

In recent decades, while this idea of “school choice” has taken hold, it has not turned out in the way that we reformers initially envisioned. While a number of states (and the District of Columbia) now have “school voucher,” “tax credit,” “educational savings account,” and other plans in place that facilitate the attendance of lower-income children in private, usually faith-based, schools. Altogether, these programs presently account for a trivial share of the overall K-12 market.

The development of charter schools is much more robust. Charter schools exist in about forty states and already educate more than 5% of American schoolchildren (and substantially more than that in communities where these reforms have been concentrated).<sup>116</sup> Charter schools are, on the whole, run by private innovators.<sup>117</sup> And the non-

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112. *See id.*

113. Lipka, *supra* note 30 (discussing the decline of the Catholic K-12 school system from half the size it was in 1965 with data); NAT’L CTR. FOR EDUC. STAT., *supra* note 22.

114. Stephanie Banchemo & Jennifer Levitz, *Vouchers Breathe New Life into Shrinking Catholic Schools*, WALL ST. J. (June 14, 2012), <https://www.wsj.com/articles/SB10001424052702304821304577440763188839928>.

115. *See Why Faith Leaders Oppose Vouchers*, NAT’L COAL. FOR PUB. EDUC., <https://static1.squarespace.com/static/582f7c15f7e0ab3a3c7fb141/t/588a64be3e00bea4964b2713/1485464767141/Faith+Leaders+TPs.pdf> (last viewed April 1, 2021).

116. *Public Charter School Enrollment*, NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., [https://nces.ed.gov/programs/coe/indicator\\_cgb.asp](https://nces.ed.gov/programs/coe/indicator_cgb.asp) (last updated May 2020).

117. *See id.*

profit organizations that formally run them often have contracts with private for-profit school management organizations that run the schools in practice.<sup>118</sup> There are now several regional and national charter school networks and organizations that have operations in more than one state, and often many states.<sup>119</sup>

Charter schools are generally subject to certain criteria as a condition of the substantial public funding they receive: they must admit pretty much anyone who applies, using a lottery if demand exceeds seats available; they may not charge tuition (and must rely instead on a combination of public funding, which is often less than that provided to conventional public schools, and other sources of funds such as non-profit philanthropic groups that support the charter school idea); and their pupils must take certain standardized tests, the results of which the schools must report.<sup>120</sup>

These schools are typically called “public charter schools,” which makes some sense given their public funding, public regulation of admissions, and oversight by a public school-chartering body, most often the local school district in which they are physically located (although in several states other bodies are active in chartering schools, including public universities).<sup>121</sup> But in major respects, charter schools are, at their core, private schools. They are controlled by private parties outside of the local school system and are generally free from the command and control rules governing much of the conventional public-school sector.<sup>122</sup>

These days, charter schools are opposed by teacher unions, primarily because charter school teachers tend to choose not to join a union.<sup>123</sup> But the unions are joined by others who complain that charter schools divert funds from conventional public schools thereby harming needy children.<sup>124</sup> To the extent that they also divert children from

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118. *See id.*

119. James L. Woodworth et al., *Charter Management Organizations 2017*, CTR. FOR RES. ON EDUC. OUTCOMES 1-3 (2017).

120. *See, e.g.*, CALIFORNIA CHARTER SCHOOLS ASSOCIATION, DEVELOPING ADMISSIONS AND ENROLLMENT POLICIES FOR YOUR CHARTER SCHOOL (2014).

121. *About Charter Schools*, NAT’L ALL. FOR PUB. CHARTER SCH., <https://www.publiccharters.org/about-charter-schools>; *see also* MINOW, *supra* note 13.

122. *See Public Charter School Enrollment*, *supra* note 116.

123. Sandra Vergari, *The Politics of Charter Schools*, 21 EDUC. POL’Y 15, 28–29, Jan. 1, 2007).

124. *See id.* at 21–24.

public schools, this objection is met with the observation that public schools need less money if they have fewer children to educate.<sup>125</sup> And at the state level it is frequently the case that the cost to the public of funding charter schools is less than the associated reduction in appropriations for public schools, thereby netting a small financial gain to taxpayers.<sup>126</sup>

At the district and school level, whether the marginal savings from lost pupils is more or less than the resulting loss in state funding depends on local circumstances. In the short run, the loss of a few children from each grade to a local charter school costs the school revenue without obvious opportunities for offsetting savings.<sup>127</sup> On the other hand, charter schools that can find and fund their own physical spaces are a financial boon to the local district if a new expensive school would otherwise have to be built to accommodate an upswing in schoolchildren. But many charter schools wind up being located in existing public-school spaces that would otherwise be unused because of the loss of public-school enrollment to charter schools. Indeed, some public schools have had to close in direct response to an increase in charter schools because they no longer have enough pupils to reach the economies of scale the local school district views as necessary.<sup>128</sup>

Of course, if public schools are losing pupils to charter schools because of poor performance, their restructuring could eventually become a plus educationally. Still, restructuring is often not the first choice option of many parents who most want to keep their local public school in operation regardless of how few pupils it has enrolled and perhaps regardless of how poorly its students appear to perform on standardized tests.

A different objection to charter schools is that their student populations may well not reflect those of the public schools in their midst. Despite the formal rule that charter schools are open to all who apply, critics point out that, in practice, it is the more informed and

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125. *See id.* at 25–26.

126. *See id.* at 24–25.

127. JOHN ERICSON ET AL., THE IMPACT OF CHARTER SCHOOLS ON SCHOOL DISTRICTS: A REPORT ON THE NATIONAL STUDY OF CHARTER SCHOOLS 10 (U.S. Dep't Of Educ. 2001).

128. *See id.* at 10–11.

motivated parents who apply.<sup>129</sup> They note that this selection effect, combined with ways that charter schools engage in recruitment efforts, can yield unrepresentative student bodies.<sup>130</sup> So, too, it is frequently claimed that charter schools push out pupils who behave and perform in ways that would not have resulted in their exclusion from public schools (although public schools themselves are often accused of inappropriately suspending and expelling difficult children).<sup>131</sup> These concerns can make it difficult to compare charter schools and traditional public schools.

This claimed difference between charter school and public-school student bodies should not be exaggerated, however. After all, parents who transfer their children to charter schools are likely to be ones who believe that their children's former public schools were failing them.<sup>132</sup> Put differently, parents who care a lot about the education of their children and who are well satisfied with how they are doing at local public schools are not likely to flee. This suggests that charter schools are not simply skimming off the "cream of the crop." Nonetheless, without a parental advocate with the necessary information, time, and attention, some children who might benefit considerably from charter schools can be left behind.

Still, one of the arguments for charter schools is that the risk of lost enrollment will prompt public schools that are otherwise free from any threat of competition to take their roles more seriously, thereby

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129. The Times Editorial Board, *Editorial: The Bias Inherent in Some Charter Schools' Admissions Process*, L.A. TIMES (Aug. 10, 2016), <https://www.latimes.com/opinion/editorials/la-ed-charter-application-20160808-snap-story.html>.

130. Jon Valant & Jane Arnold Lincove, *The Barriers That Make Charter Schools Inaccessible to Disadvantaged Families*, THE BROOKINGS INST. (Mar. 16, 2018), <https://www.brookings.edu/blog/brown-center-chalkboard/2018/03/16/the-barriers-that-make-charter-schools-inaccessible-to-disadvantaged-families/>.

131. DANIEL J. LOSEN ET AL., THE CIVIL RIGHTS PROJECT, CHARTER SCHOOLS, CIVIL RIGHTS AND SCHOOL DISCIPLINE: A COMPREHENSIVE REVIEW 6–9 (March 2016), *available at* [http://www.schooldisciplinedata.org/ccrr/docs/Charter\\_School\\_Report\\_2016.pdf](http://www.schooldisciplinedata.org/ccrr/docs/Charter_School_Report_2016.pdf); CAL. CHARTER SCH. ASS'N, DISCIPLINE PROCEDURES FOR STUDENTS IN CHARTER SCHOOLS: FREQUENTLY ASKED QUESTIONS (2014), *available at* <http://library.ccsa.org/CCSADisciplinePoliciesandProceduresFAQ.pdf>.

132. Joshua Bald, *What Motivates Families to Choose a Charter School?* (June 2016) (unpublished Ed.D. dissertation, University of Oregon) (on file with University of Oregon Libraries, University of Oregon).

improving the outcomes for children “left behind.”<sup>133</sup> There is scattered evidence supporting this effect, although it would be wrong to insist that charter schools have already caused a large improvement in public school performance.<sup>134</sup>

What is most important to many reformers, however, is how well children learn in charter schools as compared with how they would have done in regular public schools. On this matter, research findings often conflict. It seems fair to say that some charter schools are excellent and serve their students very well.<sup>135</sup> For those pupils, charter schools appear to be a positive reform strategy. KIPP schools and Green Dot schools are examples of charter school networks that are located in many districts and are often cited as well performing.<sup>136</sup>

On the other hand, some charter schools are failures as measured by their test scores, such that their pupils probably would have achieved better test results if they had remained in their local public school (even if that is not good either). In more vigilant jurisdictions, those bodies that authorize charter schools will put pressure on such schools to improve or lose their charter.<sup>137</sup>

Worse still are many charter schools that have been incredibly mismanaged or that have engaged in what amounts to fraud on their pupils, and that deserve to have their charters promptly revoked.<sup>138</sup> It has taken charter school authorizers a while, however, to get up to speed in effectively monitoring and then terminating such schools (or at least putting them on probation with a short leash).<sup>139</sup>

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133. Valerie Strauss, *Do Traditional Public Schs. Benefit from Charter Competition?*, WASH. POST (Aug. 28, 2017), <https://www.washingtonpost.com/news/answer-sheet/wp/2017/08/28/do-traditional-public-schools-benefit-from-charter-competition/>.

134. Sarah A. Cordes, *In Pursuit of the Common Good: The Spillover Effects of Charter School. on Public School Students in New York City*, EDUC. FIN. AND POL’Y (2018).

135. Devora H. Davis & Margaret E. Raymond, *Choices for Studying Choice: Assessing Charter School Effectiveness Using Two Quasi-Experimental Methods*, 31 ECON. OF EDUC. REV. 225 (2012) (suggesting only 19% of public schools outperformed local public schools).

136. Ranae Stetson, *Common Traits of Successful U.S. Charter Schools*, CHILDHOOD EDUC. (2013).

137. Frederick M. Hess, *The Political Challenge of Charter School Regulation*, PHI DELTA KAPPAN (March 2004).

138. CTR. FOR POPULAR DEMOCRACY & ALL. TO RECLAIM OUR SCH., *THE TIP OF THE ICEBERG: CHARTER SCHOOL VULNERABILITIES TO WASTE, FRAUD, AND ABUSE* 3–5 (2015).

139. *See id.* at 6–8.

One reason charter school authorizers may be slow to act is that many parents choose charter schools for reasons other than their children's educational attainment as measured by standardized tests. Parents may measure educational attainment through a variety of other factors, including pupil safety, potential friendships, co-curricular opportunities, likelihood of graduation and potentially college entrance, geographic convenience, avoidance of gang membership, the child's personal psychological growth, or the values taught at the school. Closing down low achieving schools that families have selected could thus be wrongheaded. Of course, parents might be ill-informed about what is really going on at the charter school they have picked, and might make a different choice were they to know better. Hence, a key role for charter school authorizers may be to insist on transparency along many dimensions.

In any event, while charter schools and the choice they represent reflect a significant move in the direction of deregulation and the unleashing of market competition in pursuit of greater equal educational opportunity in our K-12 school system, reformers have hardly been content to rely upon this strategy alone. One reason for this is that conventional public schools still serve the overwhelming majority of our nation's youth.<sup>140</sup> So, despite complaints that charter schools are "destroying" the public schools, including a barrage of criticism of President Trump's Secretary of Education Betsy DeVos for her strong support of charter schools and school vouchers, this market orientation approach to school reform remains at present at least something of a side show.<sup>141</sup>

It is also worth noting that the opposition to charter schools and vouchers does not appear to be an opposition to school choice altogether. After all, one does not hear charter school critics objecting

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140. See *Public Charter School Enrollment*, *supra* note 116 (establishing that 6% of public school students are enrolled at charter schools); COUNCIL FOR AM. PRIVATE EDUC., FACTS AND STUDIES, *available at* <http://www.capenet.org/facts.html> (noting that 10% of students are enrolled in private school); NAT'L CTR. FOR EDUC. STAT., FAST FACTS, *available at* <https://nces.ed.gov/fastfacts/display.asp?id=372> (stating that 3.3 million students are expected to graduate from public high school and only 400,000 are expected to graduate from private high schools in 2018–19).

141. Conor P. Williams, *Betsy DeVos Loves Charter Schools. That's Bad for Charter Schools.*, N.Y. TIMES (June 2, 2018), <https://www.nytimes.com/2018/06/02/opinion/sunday/betsy-devos-charter-schools-trump.html>.



to the large role parents are invited to play in deciding how their children with disabilities are to be treated, or in some districts what sort of instruction their limited English-speaking children will receive. Similarly, magnet and alternative schools within the public-school sector do not attract the complaints levied against charter schools and school voucher plans. This suggests that the hostility to the latter is, for many, an ideological hostility to private enterprise operating schools and to faith-based schools gaining public funding regardless of whether or not those schools predominantly serve minority children from low-income households who would probably be attending racially isolated public schools if these private options were not available to them.

## V. “OUTCOME-BASED REGULATION”

The U.S. has embraced an approach typically called “outcome-based” or “performance-based” regulation when it comes to, say, the number of miles per gallon (m.p.g.) of fuel an automobile must go.<sup>142</sup> This regulatory strategy intentionally foregoes the dictatorial nature of command and control regulation. And while it relies on the private market to bring about the desired outcome (in our example, higher miles per gallon), it is not a strategy designed centrally to unleash competition on that dimension. The latter strategy would, perhaps, simply require new car dealers to post the m.p.g. of their vehicles or offer and count on consumers to shop for higher m.p.g. models to save on gas money.

Instead, by actually demanding ever-increasing m.p.g. for regulated vehicles, the government is counting on the private sector to use its expertise to achieve a federally determined social objective.<sup>143</sup> The theory here is that auto companies may well know better than federal regulators or members of Congress how to make vehicles that will get more miles per gallon (or how to sell an array of vehicles in a pattern that yields more miles per gallon on average, for example more small cars with efficient and less powerful engines and fewer gas-guzzling

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142. *See* The Safer Affordable Fuel-Efficient Vehicles Final Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020) (to be codified at 40 C.F.R. pt. 86,600).

143. HOLLY DOREMUS ET AL., ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES, AND READINGS 705–707 (6th ed., 2012).

SUVs).<sup>144</sup> And with respect to average m.p.g. outcomes, this program has been enormously effective.<sup>145</sup>

A similar approach has been embraced to deal with climate change in some parts of the U.S. and the world. Rather than telling carbon dioxide polluters precisely what to do to reduce the amount of carbon they are emitting into the atmosphere (for example, what sorts of scrubbers they must attach to power plant smokestacks), governments are requiring firms to have permits to emit carbon dioxide and then limit the number of permits available.<sup>146</sup> This gives companies an incentive to figure out how to successfully carry on their business with reduced emissions. Rather than a command and control approach in which government experts would tell companies precisely how they must reduce their emissions, this outcome-based approach allows firms to figure out the most efficient ways to achieve that social goal. Moreover, these plans are designed so that permits disproportionately gravitate to firms that can most efficiently achieve the desired reduction of carbon dioxide emissions.<sup>147</sup>

This regulatory strategy of outcome-based regulation caught on, at least for a while, for K-12 schools as well. During the Bush II Administration, national leadership sought to supplant Title I's command and control approach with outcome-based regulation.<sup>148</sup>

The underlying idea was fairly simple. The federal government would insist upon better school outcomes but leave it to local educational agencies (essentially school districts) to figure out how to achieve improved results, especially for the children from low-income families targeted by Title I funding.<sup>149</sup> Basically, the federal administration told school districts that their schools with concentrations of low-income students (Title I schools) had to make Adequate Yearly Progress in improving student test scores to reduce the gap between pupil outcomes in Title I schools and other schools.<sup>150</sup>

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144. *See id.* at 706–07.

145. *See id.*

146. ENVTL. DEF. FUND, CALIFORNIA'S CAP-AND-TRADE PROGRAM STEP BY STEP (n.d.).

147. Daniel A. Farber, *Emissions Trading and Social Justice* 2–5 (U.C., Berkeley, Berkeley Program in Law and Econ., Working Paper, 2011).

148. Kenneth Wong & Gail Sunderman, *Education Accountability as a Presidential Priority: No Child Left Behind and the Bush Presidency*, 37 PUBLIUS 333, 337–39 (2007).

149. U.S. DEP'T OF EDUC., EXECUTIVE SUMMARY: THE NO CHILD LEFT BEHIND ACT OF 2001 (2002).

150. *Id.*

Moreover, the regime required that schools show gains for all racial and ethnic groups (at least where a minimum number of pupils from a relevant group attended the school), to be sure that achievement gains were not concentrated in white children. By producing a much larger group of well-educated high school graduates, more young people would go to college and produce a substantially better educated workforce.<sup>151</sup> Taken together, this new regulatory strategy, enacted in 2001, was termed “No Child Left Behind” (“NCLB”).<sup>152</sup>

This approach was bipartisan and appealed to federalism values as well. To be sure, the national government was setting policy goals, but its experts were not telling schools how to achieve them.<sup>153</sup> The assumption underlying the plan was that schools and districts would more efficiently figure out how to do better if freed from previous regulation and left more on their own.<sup>154</sup> Hence, while reformers were still filing some lawsuits to force educational change, some command and control provisions remained in place, and outspoken advocates of school choice were still slowly racking up legislative and policy changes they favored, suddenly it looked—for a short while—as if a new, bipartisan regime could be embraced.

Alas, NCLB failed. Target schools did not achieve the expected yearly progress.<sup>155</sup> Worse, the federal government had encouraged schools to over-concentrate on the wrong metrics. Schooling is about more than reading and math, yet droves of public schools closed down other valuable parts of the curriculum, like music and art education, to concentrate on English and math test scores.<sup>156</sup> Plus, the regime ignored the notion that higher standardized test score results in reading and math might well not reflect the ultimately desired educational gains.<sup>157</sup> In fact, getting children to do better on tests does not necessarily mean they are actually learning more about the subject matter, but may instead be

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151. Alyson Klein, *No Child Left Behind: An Overview*, EDUC. WEEK (Apr. 10, 2015), <https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04>.

152. See Wong & Sunderman, *supra* note 148, at 343–46.

153. See *id.*

154. *Id.*

155. Roslyn Mickelson et al., *How (and Why) NCLB Failed to Close the Achievement Gap: Evidence from North Carolina, 1998-2004*, 3 ECI INTERDISC. J. FOR LEGAL AND SOC. POL'Y 1 (2013).

156. See *id.* at 4–5.

157. See *id.* at 3–6.

learning primarily to be good test-takers.<sup>158</sup> Many schools turned way too much of the school year over to test preparation. School officials in many places even cheated, responding to pressure to achieve higher test scores.<sup>159</sup> School officials cheated by showing teachers tests in advance to share with their students, making lower-achieving students stay home on test day, changing student answers, misgrading students tests to show better results than were actually attained.<sup>160</sup>

Yet even with these perverse responses, schools still failed to achieve the gains Congress demanded.<sup>161</sup> In response, some states sought to mollify the public by adopting much more modest goals and easier-to-pass tests. Giving states a strong voice in outcome standards turned out to be politically necessary to fend off fears that NCLB would lead to the type of national uniform school curriculum that marks many other nations.<sup>162</sup> With religious, ideological, pedagogical, and other intense battles raging over the substance and the classroom delivery of K-12 education in the U.S., a federal takeover via funding conditions was strongly resisted.

The problems with NCLB are a good lesson for those promoting “outcome-based regulation” of business. Insisting that workplaces become safer and leaving it to employers to figure out how to do that may sound like a good idea. But unless the right safety outcome can be defined, measured, and not seriously scammed, the same failures of NCLB may result.

Indeed, the recent Volkswagen (VW) diesel car scandal demonstrates the risks of this approach. Under the Clean Air Act, the EPA has established nitrogen oxides emission standards for diesel fuel vehicles.<sup>163</sup> This regime seemed to be working well, and apparently achieved environmental gains via several auto brands.<sup>164</sup> VW cars sold

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158. *See id.* at 1, 3, 6–7.

159. *See, e.g., id.* at 6.

160. W. James Popham, *Educator Cheating on No Child Left Behind Tests*, EDUC. WEEK (Apr. 18, 2006), <https://www.edweek.org/teaching-learning/opinion-educator-cheating-on-no-child-left-behind-tests/2006/04>.

161. *See* Mickelson et al., *supra* note 155, at 6–7.

162. Elizabeth Davidson et al., *Fifty Ways to Leave a Child Behind: Idiosyncrasies and Discrepancies in States' Implementation of NCLB*, EDUC. RESEARCHER 347, 350–56 (2015).

163. *Diesel Fuel Standards*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/diesel-fuel-standards>.

164. DOREMUS ET AL., *supra* note 143, at 705–07.

in the U.S. also appeared to meet these standards.<sup>165</sup> But clever detective work done outside the EPA revealed that their emissions were in fact enormously higher than the allowable amounts.<sup>166</sup> This was the result of a deliberate computer programming scam by which the vehicles would register lower emissions during laboratory testing than they would genuinely emit during actual driving.<sup>167</sup>

But outcome-based regulation can work. For example, I have proposed various schemes designed to improve the American diet by requiring food retailers to reduce, say, the aggregate amount of added sugar in the products they sell. Assuming we can agree on the socially desired outcome, I believe that the sophistication of modern bar code technology could make for reliable monitoring.<sup>168</sup> And I am confident that large retailers like Walmart would be creative in meeting their reduced sugar target.<sup>169</sup> Still, for K-12 education, outcome-based regulation has been left behind.

## VI. “MANAGEMENT-BASED REGULATION”

With the failure of NCLB, yet another regulatory approach has been embraced—management-based regulation, which like the other regulatory strategies so far discussed has its business world counterpart. The U.S. food safety system is reasonably strong but could be better. It is estimated that millions of Americans suffer from mild food poisoning each year, more than 100,000 of whom are sicker and need hospital stays, and more than 2,000 of whom die from the illness. While a substantial share of these poisonings arise from improper home food handling, enterprises in the food chain are also responsible for many of the poisonings.

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165. Russell Hotten, *Volkswagen: The scandal explained*, BBC (Dec. 10, 2015), <https://www.bbc.com/news/business-34324772>.

166. Guilbert Gates, *How Volkswagen's 'Defeat Devices' Worked*, N.Y. Times (Mar. 16, 2017), <https://www.nytimes.com/interactive/2015/business/international/vw-diesel-emissions-scandal-explained.html>.

167. *Id.*

168. Stephen D. Sugarman, *The Case for Performance-Based Regulation of Food and Beverage Retailers*, THE REG. REV. (Feb. 10, 2014), available at <https://www.theregreview.org/2014/02/10/10-sugarman-performance-based-regulation/>.

169. *Id.*

Responsibility for food safety regulation has for a long time been divided between the USDA, which is centrally responsible for most meat regulation, and the FDA, which is responsible for the remainder and lion's share of the food supply.<sup>170</sup> The majority of federal food inspectors serve the USDA, which has traditionally placed an inspector in every slaughterhouse to observe meat handling practices.<sup>171</sup> The result has been that FDA inspectors only occasionally reviewed other food growers and processors.<sup>172</sup>

The Food Safety Modernization Act (FSMA) of 2011 adopted a new strategy for the FDA that relies upon "management-based regulation." The Act rejects a solely command and control approach which would have prescribed precisely what food safety practices farmers were to adopt.<sup>173</sup> But it also rejects outcome-based regulation which would have ratcheted down the number of food poisonings permitted to each participant in the food chain, leaving firms to figure out how to meet these targets.<sup>174</sup> One reason for not using outcome-based regulation with respect to food safety is that poisonings attributable to specific food handlers are too rare for the FDA to generate a sensible target for each player.<sup>175</sup> Indeed, many food poisonings are never actually traced to a specific source.<sup>176</sup>

Management-based regulation adopts something of an in-between approach. Food processors must adopt their own food safety plan and document their compliance with that plan.<sup>177</sup> The new law is meant to

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170. *Compare About the U.S. Department of Agriculture*, U.S. DEP'T. OF AGRIC., <https://www.usda.gov/our-agency/about-usda> (last accessed March 9, 2021) with *What We Do*, U.S. FOOD AND DRUG ADMIN., <https://www.fda.gov/about-fda/what-we-do> (last accessed March 9, 2021).

171. *Slaughterhouse Inspection 101*, U.S. DEPT. OF AGRIC., <https://ask.usda.gov/s/article/Is-all-meat-and-poultry-inspected> (Jul. 17, 2019).

172. DEPT. OF HEALTH AND HUMAN SERVICES, OFF. OF THE INSPECTOR GEN., OEI-02-14-00420, CHALLENGES REMAIN IN FDA'S INSPECTIONS OF DOMESTIC FOOD FACILITIES, 8-17 (Sept. 2017), <https://oig.hhs.gov/oei/reports/oei-02-14-00420.pdf>.

173. Food Safety Modernization Act, 124 Stat. 3885, P.L. 111-353 (2011).

174. *Id.*

175. John A. Painter et al., *Attribution of Foodborne Illnesses, Hospitalizations, and Deaths to Commodities by using Outbreak Data, United States, 1998-2008*, 19 EMERGING INFECTIOUS DISEASES 407, 407, 410-14 (2013).

176. *Id.*

177. Shaun Kennedy et al., *General Overview of the Food Safety Modernization Act*, FOOD POL'Y RES. CTR., UNIV. OF MINN. (June 2014), available at <https://conservancy.umn.edu/bitstream/handle/11299/170088/FPRC%20Issue%20Brief%20Food%20Safety%20Modernization%20Act%2010%202014.pdf;sequence=1>.

get the regulated firms to apply a systems approach to prevention and the assumption is that firms will use the Hazard Analysis and Critical Control Points (HACCP) methodology used in other industries.<sup>178</sup> Helping develop and implement the best, up-to-date food safety plans are third party auditors who are widespread throughout the food chain.<sup>179</sup> They are to provide food producers with advice and private auditing reviews to help them move in the direction of best food handling practices.<sup>180</sup> Federal inspectors will then arrive on the premises and examine the firm's compliance with its own plan.<sup>181</sup> Though they can make suggestions as to how to improve the firm's plan, responsibility for an effective plan lies with the firm. This approach also includes a back-up feature. If the firm and/or auditors find that the plan is not working well because people are getting sick from the way the enterprise handles food, the firm must make good-faith adjustments to the plan designed to improve food safety outcomes.<sup>182</sup>

Put differently, while management-based regulation is centrally concerned with outcomes, the bite of the regulation does not actually turn on measured outcomes but instead on the adoption of sensible procedures to achieve them. Experts realize that complete food safety at the grower/producer level is impossible, and in any case would add considerably and undesirably to the cost of food. But improved safety is viewed as clearly possible with the right procedures.

The FDA has been slow to implement the new regulatory regime. In its official documents it has clearly shifted its focus from responding to foodborne illnesses to prevention.<sup>183</sup> Perhaps the most important area for new FDA regulation concerns growing produce. It has taken ten years for the FDA to begin regulating produce, and its biggest decision

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178. *Id.*

179. *Third-Party Audits and FSMA* FOOD AND DRUG ADMIN., <https://www.fda.gov/food/food-safety-modernization-act-fsma/third-party-audits-and-fsma> (accessed May 10, 2019).

180. *Id.*

181. *Id.*

182. See Kennedy et al., *supra* note 177.

183. *Food Safety Modernization Act (FSMA)*, U.S. FOOD AND DRUG ADMIN., <https://www.fda.gov/food/guidance-regulation-food-and-dietary-supplements/food-safety-modernization-act-fsma> (accessed December 21, 2020).

has been to delegate most ground-level regulation to state agencies.<sup>184</sup> These arrangements are just going in place and it will be some time before we can see if they improve food safety in fact. 2019 and 2020 were, alas, years of several romaine lettuce-related foodborne illness outbreaks.<sup>185</sup>

The Food Safety Modernization Act went into force in 2011, and soon thereafter education reformers turned to management-based regulation in an effort to improve our school system. California's revised school funding scheme and the federal replacement of NCLB are two good examples of this.<sup>186</sup>

In California, a combination of school finance litigation beginning in the late 1960s and a taxpayer revolt in 1978 against high property tax rates imposed by local districts resulted in a political compromise: by the 1980s, most districts across the state had obtained a reasonably uniform amount of core funding per pupil.<sup>187</sup> Layered on top, however, were a dazzling array of supplemental or "categorical" funds provided both by the state and, as already noted, the federal government.<sup>188</sup>

Soon, there was widespread consensus that this arrangement was not working well. As the school funding limits precipitated by the taxpayer revolt kicked in, and immigration swelled the school age population, California public schools sank from being among the better funded to among the least.<sup>189</sup> Many local districts and schools were finding the

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184. Dann Flynn, *Letter From The Editor: The Dirt on Your Boots Round Table*, FOOD SAFETY NEWS (Nov. 1, 2020), <https://www.foodsafetynews.com/2020/11/letter-from-the-editor-the-dirt-on-your-boots-round-table/> (accessed December 21, 2020).

185. *See generally* Coral Beach, *Another E. Coli Outbreak Linked to Romaine; Illnesses Span 6 States*, FOOD SAFETY NEWS (Nov. 10, 2020), <https://www.foodsafetynews.com/2020/11/another-e-coli-outbreak-linked-to-romaine-illnesses-span-6-states/>; News Desk, *Fecal Material from Nearby Feedlots Likely Cause of Romaine Outbreaks*, FOOD SAFETY NEWS (May 21, 2020), <https://www.foodsafetynews.com/2020/05/fecal-material-from-nearby-feedlots-likely-cause-of-romaine-outbreaks/>; Dan Flynn, *E. Coli Outbreaks May Be Over, But Without A Source Or Root Cause For The Romaine Problem*, FOOD SAFETY NEWS (Jan. 17, 2020), <https://www.foodsafetynews.com/2020/01/e-coli-outbreaks-may-be-over-but-without-a-source-or-root-cause-for-the-romaine-problem/>.

186. 20 U.S.C. § 6301 *et seq.*; Patrick Murphy & Jennifer Paluch, *Just the Facts: Financing California's Public Schools*, PUB. POL'Y INST. OF CAL. (Nov. 2018), <https://www.ppic.org/publication/financing-californias-public-schools/>.

187. *See* Serrano v. Priest, 487 P.2d 1241 (Cal. 1971).

188. Murphy & Paluch; *supra* note 186.

189. Andrew Gumbel, *California Schools Were Once the Nation's Envy. What Went Wrong?*, THE GUARDIAN (June 19, 2019),



categorical funding requirements exasperating—the regime required schools to drain resources doing paperwork, forced them to adopt less desirable stand-alone programs to avoid being charged with improperly spending categorical funds, prevented them from implementing school improvement measures they believed would work better, and sometimes required what seemed to be inconsistent and even conflicting changes.<sup>190</sup> Yet each of the categorical programs had its own narrow set of sponsors and supporters making it difficult to dislodge.<sup>191</sup>

Finally, in 2014, during Jerry Brown’s second stint as Governor, a coalition reached agreement on a dramatic change. Virtually all of the state categorical school aid programs were abolished (apart from a few that matched federal special aid to low-income and disabled children).<sup>192</sup> Instead, the state now provides funding to school districts not based simply on how many children they enroll, but on a “weighted” school pupil count that gives extra weight to children who are English language learners, come from low-income households, or are in foster care.<sup>193</sup> Because the drafters of the new plan saw such children as requiring greater spending, even more weight is given when schools have high concentrations of students in these categories.<sup>194</sup> This side of the equation is known as the Local Control Funding Formula (LCFF).<sup>195</sup>

But schools are not simply assured of their weighted pupil funding allocation. They are required in turn to adopt a three-year Local Control Accountability Plan (LCAP), updated annually, designed to assure improving outcomes for the children whose circumstances entitle the district to more funding.<sup>196</sup> Schools must then file these plans with the state, and undertake and submit evaluations that help determine whether

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<https://www.theguardian.com/education/2019/jan/19/california-school-funding-los-angeles-strike-what-went-wrong>.

190. See Michael W. Kirst, *Evolution of California State School Finance with Implications from Other States*, STAN. INST. FOR RES. ON EDUC. POL’Y & PRAC. 5–7 (2006), <https://cepa.stanford.edu/sites/default/files/3-Kirst%283-07%29.pdf>.

191. See *id.*

192. *Local Control Funding Formula Overview*, CALIF. DEP’T OF EDUC., <https://www.cde.ca.gov/FG/aa/lc/lcffoverview.asp> (accessed May 10, 2019) [hereinafter *Local Control Funding Formula Overview*].

193. *Id.*

194. *Id.*

195. *Id.*

196. *Local Control and Accountability Plan*, CALIF. DEP’T OF EDUC., <https://www.cde.ca.gov/re/lc/> (accessed May 12, 2019).

the plans' goals are being achieved.<sup>197</sup> If not, then they must formulate new plans that promise to be more effective. Over time, districts might learn from each other as to which strategies work best.

California has not been completely hands off as to what is to be included in a district's LCAP. Rather, according to the California State Parent-Teacher Association it has set out a minimum of eight goals that the plans need to address: 1) providing all students access to fully credentialed teachers, instructional materials that align with state standards, and safe facilities; 2) implementing of California's academic standards, including the Common Core State Standards in English language arts and math, Next Generation Science Standards, and English language development, history social science, visual and performing arts, health education and physical education standards; 3) parent involvement and participation, so that the local community is engaged in educational programs and related decision-making processes; 4) improving student achievement and outcomes along multiple measures, including test scores, English proficiency and college and career preparedness; 5) supporting student engagement, including whether student attendance; 6) highlighting school climate and connectedness through a variety of factors, such as suspension and expulsion rates; 7) ensuring all students have access to classes that prepare them for college and careers, regardless of what school they attend or where they live; and 8) measuring other important student outcomes related to required areas of study, including physical education and the arts.<sup>198</sup> But these goals are fairly flexible and say nothing about how districts are supposed to achieve them, which among them to prioritize, or how much of their budget to spend on each. That is left to local control.<sup>199</sup> In my view, this scheme well reflects the management-based regulation approach that is now in place in food safety and other realms.

It is too early to know much about how well California's embrace of management-based regulation of its public schools is working. For one thing, the new financial approach not only gathered up all of the

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197. *Id.*

198. *Local Indicators*, CALIF. DEP'T OF EDUC., <https://www.cde.ca.gov/ta/ac/cm/localindicators.asp> (accessed April 2, 2021); *Local Control and Accountability Plan (LCAP)*, CALIF. STATE PARENT-TEACHER ASSN., <http://downloads.capta.org/edu/e-school-finance/LCAP.pdf> (accessed May 11, 2019).

199. *See id.*

abolished categorical funds into a single lump to be distributed without the former strings, but added substantial sums on top.<sup>200</sup> One important research finding, based on three years of operations, suggests that the increase in funding has had an overall substantial positive impact on school outcomes—especially in graduation rates and test scores in math.<sup>201</sup> This research makes clear that any outcome may well be difficult to attribute to managerial regulation, especially because other reform efforts have not been fully abandoned. But, in due course, we ought to be able to learn whether districts are actually meeting their described goals and, when they are not, what revisions they are making in their plans in hopes of doing better—to say nothing about what eventually will happen to schools and districts that fail to reach these goals.

Although there have been some controversies, it looks like the school system is broadly complying with the new regulatory regime, widely consulting with relevant stakeholders, and being transparent about the system's goals.<sup>202</sup> A good example of an LCAP of one California middle school in Elk Grove shows both the complex process that officials went through in adopting the plan and the highly detailed goals the school has adopted, seemingly as part of the unified school district's overall LCAP.<sup>203</sup>

What happens if the goals are not met? Ultimately the State Superintendent of Instruction, after a lot more procedure, can intervene in the operation of schools to varying degrees.<sup>204</sup>

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200. *Local Control Funding Formula Overview*, *supra* note 192.

201. Rucket Jackson, et al., *The Effects of School Spending on Educational & Economic Outcomes: Evidence from School Finance Reforms*, QUARTERLY J. OF ECON. 131 (1) 157–218 (2015).

202. Public Advocates, a public interest law firm, has been closely monitoring the Los Angeles Unified School District and has pressed it and the relevant state authorities to adjust the LCAP process. See *Local Control Accountability Plans*, PUB. ADVOCATES, <https://www.publicadvocates.org/our-work/education/access-quality-education/school-funding-and-accountability/local-control-accountability-plans/> (accessed Dec. 21, 2020).

203. *Local Control Accountability Plan (LCAP) 2019–2020*, KATHERINE L. ALBIANI MIDDLE SCH., ELK GROVE UNIFIED SCH. DIST., <http://www.egusd.net/wp-content/uploads/2019/10/405-Local-Control-Accountability-Plan-LCAP-2019-2020-Katherine-L.-Albiani-Middle-School-MS.pdf> (accessed Dec. 21, 2020).

204. *Local Control and Accountability Plans*, CALIF. ASS'N OF SCH. PSYCHOLOGISTS, <https://www.casponline.org/pdfs/pdfs/LCAP%20Requirements%20Explained.pdf> (accessed December 21, 2020).

But there is little experience so far with how the failure to achieve initial goals is being treated. If nothing else, the pandemic has created turmoil in the public schools and the legislature has postponed ongoing LCAP due dates.<sup>205</sup> In Oakland, California, for example, the school district will not adopt LCAP for the 2020-21 school year but instead has adopted a special one-year plan dealing with the current crisis and plans to adopt a new three-year LCAP for the years 2021-24 in the future.<sup>206</sup>

Soon after California embraced this management-based approach, the federal government did something similar with Title I of the Elementary and Secondary Education Act.<sup>207</sup> In December 2015, during the Obama Administration, a congressional coalition replaced NCLB with the Every Student Succeeds Act (ESSA).<sup>208</sup> Despite the ambition suggested by the new act's name, it is even less demanding than NCLB was in insisting that "every" child succeeds.<sup>209</sup> Specifically, the program abandoned NCLB's specific demands of proven "adequate yearly progress" in attaining higher educational achievement and closing the gap in test outcomes among ethnic and racial groups.<sup>210</sup> The Obama administration had already abandoned these requirements in practice, routinely granting states waivers.<sup>211</sup> But the administration demanded other specific changes in return for a waiver, often including the promotion of charter schools.<sup>212</sup>

Like California's LCFF and LCAP regime, the ESSA's strategy is to set broad national goals, insist that states adopt their own more specific goals and a plan to achieve them, and give states and localities

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205. *Learning Continuity and Attendance Plan*, CAL. DEP'T. OF EDUC., <https://www.cde.ca.gov/re/lc/learningcontattendplan.asp> (accessed December 21, 2020).

206. *Learning Continuity And Attendance Plan (LCP)*, OAKLAND UNIFIED SCH. DIST., <https://www.ousd.org/domain/3262#calendar14056/20201221/month> (accessed December 21, 2020).

207. Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified as 20 U.S.C. §§ 1001 *et seq.*).

208. *Every Student Succeeds Act*, U.S. DEP'T OF EDUC., <https://www.ed.gov/essa> (accessed May 12, 2019).

209. Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CAL. L. REV. 1331-35 (2017).

210. *Adequate Yearly Progress (AYP)*, CAL. DEP'T OF EDUC., (Dec. 27, 2018), <https://www.cde.ca.gov/re/pr/ayp.asp>.

211. Michele McNeil & Alyson Klein, *Obama Offers Waivers from Key Provisions of NCLB*, EDUC. WEEK (Sept. 27, 2011) [https://www.edweek.org/ew/articles/2011/09/28/05waiver\\_ep.h31.html](https://www.edweek.org/ew/articles/2011/09/28/05waiver_ep.h31.html).

212. *Id.*

great flexibility in meeting their goals.<sup>213</sup> Under the ESSA, the goals adopted by states and local educational authorities must at least address test results, English-language proficiency, and graduation rates.<sup>214</sup> Additionally, schools must aim to close gaps between the furthest-behind groups and other students.<sup>215</sup> States are required to intervene in their worst performing school districts (measured by their test scores and/or graduation rates), but the nature of the intervention is left largely to states to sort out.<sup>216</sup>

Put simply, the ESSA's whole thrust is to give states and local districts considerably more flexibility in attacking agreed-upon shortcomings in our education system. Rather than specific outcomes of the sort NCLB demanded, the federal government has shifted to demanding primarily that jurisdictions adopt certain *procedures* to improve educational outcomes, especially for low-income and non-English-speaking students who are not succeeding in school. This approach is emblematic of management-based regulation.

Because of the similarities between the California LCAP requirement and the requirements of the ESSA, California school districts seeking funds from both programs are to file a supplement to their LCAP and then a consolidated form as a way to satisfy the federal reporting requirements.<sup>217</sup>

As with California's approach to LCAP, it is too early to tell what difference this Title I flexibility will make in both how schools spend their federal (and other) dollars and how well they improve educational outcomes. Only when we see clear examples of success and failure in reaching the newly adopted goals can we assess these policy changes.

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213. Black, *supra* note 209224, at 1331–33.

214. Alyson Klein, *The Every Student Succeeds Act: An ESSA Overview*, EDUC. WEEK (Mar. 31, 2016), <https://www.edweek.org/ew/issues/every-student-succeeds-act/index.html>.

215. *Id.*

216. *Id.*

217. *Instructions: LCAP Federal Addendum Certification*, CAL. DEP'T OF EDUC., <https://www.cde.ca.gov/fg/aa/co/ca18sinslcapfac.asp> (accessed Dec. 21, 2020).

## VII. OBSERVATIONS

The main thrust of this Article has been to show that over the past fifty years, K-12 education reforms have followed roughly the same paths as our strategies in regulating business.

In this concluding section, I offer two derivative observations: 1) just as complete deregulation is unlikely in the business sector, it also remains unlikely in the education sector; and 2) the search for the most effective mechanism for regulating K-12 education comes down to a decision about who should be in charge.

## VIII. WHY “COMPLETE DEREGULATION” IS UNLIKELY

Many critics of traditional command and control regulation of business prefer complete deregulation. They claim that regulation imposes deadweight costs on business, often demands that businesses meet conflicting obligations, and fails to achieve its goals. Other frequent critiques are that regulators are likely to be captured by the interests they are supposedly regulating, or that the regulatory bureaucracy will further the interests of its leaders and employees rather than those of the public it should be serving. And strategies proposed and adopted to minimize these two risks have both costs and other disadvantages.

But total deregulation in favor of competition has been rare. Far more common is the modification of command-and-control regulation with new regulatory modes. As we have seen, this has been the regulatory history of K-12 education.<sup>218</sup>

Change has been merely incremental partly because many of the core reasons supporting regulation remain. Regulatory remedies are classically justified with respect to business when problems arise from *market failures*.<sup>219</sup> For example, regulation may be desirable where there is a monopoly (or a cartel) delivering the relevant goods or services, where delivery of the relevant goods and services results in negative externalities that are not captured in the costs (or profits) of the providers, where information asymmetries exist between the providers and consumers, and where unfair discrimination exists against

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218. See, e.g., Every Student Succeeds Act, 20 U.S.C. §§ 1001 *et seq.*

219. See generally, LEE S. FRIEDMAN, THE MICROECONOMICS OF PUBLIC POLICY ANALYSIS (Princeton University Press 2002).

consumers, employees, or other market participants. All these features continue in some areas of the business world as well as the education system as I have illustrated throughout this Article.

Local public education has many of the features that have led to regulation of business, although I have been emphasizing the failure of the education system to bring about true equal educational opportunity for minority group children variously described. Given this failure, it should thus not be surprising that state and federal officials have sought to regulate the delivery of education. Plus, effective schooling not only benefits individual students but society as a whole through a better-informed voting public and a more highly skilled workforce. What, then, is the most promising regulatory regime for education?

## IX. WHO SHOULD BE IN CHARGE?

Each of the alternative regulatory approaches I have described in this essay rests upon a different assumption about who ultimately should be in charge of schooling.

### A. Local school boards.

These bodies were in charge for decades up until the 1960s when the torrent of regulation described in this Article began.<sup>220</sup>

### B. Judges.

Adversarial legalism sought to put judges in charge. Drawing on constitutional norms and/or strong statutory principles, reform advocates brought lawsuits designed to wrest power away from local school officials. This regulatory approach turned out to be most effective when the courts were asked to order those officials to stop doing something illegal.<sup>221</sup> But when courts attempted to order education officials to affirmatively do something new, things got stickier.<sup>222</sup> After all, if local school officials did not comply, the courts' last resort was to close down the schools, hardly an attractive remedy

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220. *See supra* Section I.

221. *See supra* Section II.

222. *Id.*

when judges were trying to force schools to better serve the students on whose behalf the litigation was brought.

### C. Professional experts at the federal and state level.

The waves of categorical programs adopted by states and Congress starting in the 1960s aimed at shifting power from local educational agencies to higher levels of government.<sup>223</sup> Especially in large urban school districts serving substantial numbers of students, *school-level* people (parents, community leaders and teachers) had growing doubts that local school board members and professionals in the central office were paying enough attention to them.<sup>224</sup> So, Congress, state legislatures, and education departments at the state and federal level stepped in, shifting power from the hands of local school boards to key legislators and state or federal education policy bureaucrats.

But, with rapid technological advances and innovation, providers threatened to outpace central government regulators in determining which educational policies would be best.

### D. Families.

Some outside reformers wanted to break this log-jam by turning education into a competitive market analogous to the markets for food or health care, which of course was not the remedy for excessive command and control regulation that local school officials wanted. This school choice strategy may be seen as seeking to place the private sector in charge of education.<sup>225</sup> But while some school choice supporters are driven by an ideological commitment to a free market economy, many are family-choice advocates primarily wanting to put families in charge of schooling and empower households of all means (not just financially well-off families) to provide the sort of education they want for their children.<sup>226</sup> For them, any *efficiency* gain in educational services is but a secondary goal.

At the same time, many advocates of public funding of private schools are already using private schools and are thus looking to public

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223. See *supra* Section III.

224. *Id.*

225. See *supra* Section IV.

226. *Id.*



funding to reduce their financial burdens and expand educational services at those schools.<sup>227</sup> These mixed motives among supporters of school vouchers, educational tax credits, and the like produce different versions of choice policies.

Although the “choice” norm has attracted increasing support, the two boldest measures for empowering family choice in education—charter schools and school vouchers (and their analogous variations)—have not yet made a large impact on the overall K-12 education system.<sup>228</sup>

### **E. A federal-local partnership with centrally established performance goals.**

While outcomes-based regulation relies on local providers to do the work, this regulatory strategy continues the command and control approach, with those on top setting the schools’ targets.<sup>229</sup> Put differently, NCLB was meant to be a kind of partnership in which the federal government was the “senior” partner providing guidance and local schools and districts were the “junior” partners who were to do all the work.<sup>230</sup> Not surprisingly, NCLB turned out to be better in theory than in practice.

### **F. A return to local school district control?**

Today, we have begun to embrace what I see as potentially promising versions of management-based regulation at both the federal and state levels.<sup>231</sup> Local schools and school districts today are clearly less entitled than they were fifty years ago to run their operations as they see fit.<sup>232</sup> But this approach begins to return power to school districts, albeit with some outside regulation.<sup>233</sup>

The unwillingness to fully trust local control reflects the fact that big problems with education in the 1960s and 70s have not really been

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227. *Id.*

228. *Id.*

229. *See supra* Section V.

230. *Id.*

231. *See supra* Section VI.

232. *Id.*

233. *Id.*

solved. Formal racial segregation (de jure segregation) is over, but racial separation (de facto segregation) remains deeply entrenched based on the practical reality of racial separation in housing.<sup>234</sup> The education of children with disabilities is much improved, but hardly satisfies their families.<sup>235</sup> So, too, schools deal better with non-English-speaking children, yet in many places there are more and more of these children to educate, and for all too long way too many of them remain functionally illiterate in English.<sup>236</sup> The funding of schools across districts is much fairer in most states than it was, yet there are reasons to doubt that school funding formulae in most places actually fairly allocate dollars based upon educational need.<sup>237</sup> Although religion is much less intrusive in public schools, private non-Catholic faith-based schools are growing in their number and role, especially among working class or poor families many of whom press for more public funding.<sup>238</sup> And while minorities have gained political power and key leadership roles in many urban school districts, in so many of our cities better educational results have continued to elude them.<sup>239</sup>

Overall, K-12 students in the U.S. continue to exhibit mediocre performance in cross-country comparisons.<sup>240</sup> In nations like South Korea and Finland, family culture seems more strongly committed to educational achievement (at least that sort of achievement attainable via rote learning). In South Korea, pupils attend classes for many more hours a week and more weeks a year than in the U.S.<sup>241</sup> Finland is a much more culturally homogeneous place with much less income inequality than in the U.S., differences that the U.S. seems unlikely to shrink significantly in the years to come.<sup>242</sup>

In sum, our system today is one in which local schools and districts, judges, professional experts, families, and more distant political leaders

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234. See Goodman, *supra* note 51, at 285–98.

235. See *supra* Section II.

236. See *supra* Sections II & VI.

237. See *supra* Sections II & VI.

238. See *supra* Sections I & II.

239. See *supra* Sections III, V–VI.

240. Drew DeSilver, *U.S. Students' Acad. Achievement Still Lags that of their Peers in Many Other Countries*, PEW RESEARCH CTR.: FACT TANK NEWS IN THE NOS. (Feb. 15, 2017), <https://www.pewresearch.org/fact-tank/2017/02/15/u-s-students-internationally-math-science/>.

241. See Reeta Chakrabarti, *South Korea's Schools: Long Days, High Results*, BRITISH BROAD. CHANNEL (Dec. 2, 2013), <https://www.bbc.com/news/education-25187993>.

242. See Robert G. Kaiser, *Why Can't We be More Like Finland?*, THE SEATTLE TIMES (Sept. 25, 2005), <https://www.seattletimes.com/opinion/why-cant-we-be-more-like-finland/>.

share in their control over K-12 schooling, each often zealously seeking to retain what power they have acquired. In this situation, local school-level personnel often drag their feet when faced with new mandates, confident that the latest “fad” will soon pass or in some way be overtaken. In a world of such fractured control over K-12 education, it is difficult to hold any specific actor responsible for failing to achieve true equal educational opportunity.

### **G. Students themselves?**

As our society faces rapid changes in the nature of our adult workforce and continued growth in individualized computer-based learning at all ages, the model of what and how youths need to learn to become productive citizens and workers could soon change. With the greater intrusion of disruptive technology into the educational sphere, perhaps the whole idea of going to schools and sitting in classrooms with the same fellow students for more than a dozen years will soon be obsolete. Our experience with the pandemic has provided something of a natural experiment along these lines, but this is not meant to include the widespread use of remote education directed by teachers.

Teenagers, at least, may increasingly be in charge of their own education, ready or not. Whether change in this direction can possibly improve the educational experience of the various minority groups described in this Article remains to be seen. In any event, in a world with new delivery systems for K-12 education, we can also expect some new approaches to its regulation, approaches that will likely parallel new regulatory techniques being tried in other parts of the economy.