

relegated them to the back of classrooms led by monolingual English-speaking teachers who were not trained to teach them.¹³ 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.¹⁴ Most significantly, schools routinely led Protestant prayers in classrooms, at graduations, and before football games.¹⁵

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.¹⁶ 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.¹⁷ Disruptive and non-cooperative students were often subjected to corporal punishment.¹⁸ 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.¹⁹

Furthermore, school districts spent extremely different amounts per pupil depending on their local property tax wealth base.²⁰ 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.²¹

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.²² These were predominately religious schools, and mostly Catholic.²³ The Catholic education system had been established in the 19th century around mass Catholic immigration and Protestant hostility towards Irish, Italian, and other newcomers.²⁴ But by the 1960s the Catholic school system was undergoing dramatic changes. Catholics began to have fewer children, reducing the demand for parochial education.²⁵ Simultaneously, Catholic families were moving out of inner cities in huge numbers, leaving many school buildings behind without enough local Catholic children to educate.²⁶ 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).²⁷ But these schools were underfunded.²⁸ The U.S.—unusual among Western democracies—did not provide public funding for faith-based K-12 education.²⁹ And the sharp decline in the number of Catholics becoming nuns and priests meant that barely-paid Catholic school teachers were

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.

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).

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

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.¹¹³ 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.¹¹⁴ 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.¹¹⁵

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).¹¹⁶ Charter schools are, on the whole, run by private innovators.¹¹⁷ And the non-

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 (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.¹¹⁸ There are now several regional and national charter school networks and organizations that have operations in more than one state, and often many states.¹¹⁹

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.¹²⁰

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).¹²¹ 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.¹²²

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

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.

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.¹⁴⁰ 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.¹⁴¹

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

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.¹⁴² 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.¹⁴³ 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

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).

learning primarily to be good test-takers.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰

Yet even with these perverse responses, schools still failed to achieve the gains Congress demanded.¹⁶¹ 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.¹⁶² 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.¹⁶³ This regime seemed to be working well, and apparently achieved environmental gains via several auto brands.¹⁶⁴ VW cars sold

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.¹⁶⁵ But clever detective work done outside the EPA revealed that their emissions were in fact enormously higher than the allowable amounts.¹⁶⁶ 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.¹⁶⁷

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.¹⁶⁸ And I am confident that large retailers like Walmart would be creative in meeting their reduced sugar target.¹⁶⁹ 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.

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.¹⁷⁰ The majority of federal food inspectors serve the USDA, which has traditionally placed an inspector in every slaughterhouse to observe meat handling practices.¹⁷¹ The result has been that FDA inspectors only occasionally reviewed other food growers and processors.¹⁷²

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.¹⁷³ 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.¹⁷⁴ 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.¹⁷⁵ Indeed, many food poisonings are never actually traced to a specific source.¹⁷⁶

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.¹⁷⁷ The new law is meant to

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>.

funding to reduce their financial burdens and expand educational services at those schools.²²⁷ 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.²²⁸

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.²²⁹ 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.²³⁰ 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.²³¹ Local schools and school districts today are clearly less entitled than they were fifty years ago to run their operations as they see fit.²³² But this approach begins to return power to school districts, albeit with some outside regulation.²³³

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

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.²³⁴ The education of children with disabilities is much improved, but hardly satisfies their families.²³⁵ 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.²³⁶ 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.²³⁷ 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.²³⁸ 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.²³⁹

Overall, K-12 students in the U.S. continue to exhibit mediocre performance in cross-country comparisons.²⁴⁰ 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.²⁴¹ 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.²⁴²

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

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.