
RETHINKING REGULATION

Overseeing Performance in a Diversifying
Educational Ecosystem

Michael Q. McShane



ABOUT EDCHOICE

EdChoice is a nonprofit, nonpartisan organization dedicated to advancing full and unencumbered educational choice as the best pathway to successful lives and a stronger society. EdChoice believes that families, not bureaucrats, are best equipped to make K–12 schooling decisions for their children. The organization works at the state level to educate diverse audiences, train advocates and engage policymakers on the benefits of high-quality school choice programs. EdChoice is the intellectual legacy of Milton and Rose D. Friedman, who founded the organization in 1996 as the Friedman Foundation for Educational Choice.

MAY 2018

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INTRODUCTION

On January 30, 2017, President Donald Trump issued an executive order aimed at reducing the number of regulations the federal government administers. Borrowing from earlier efforts promoted by the United Kingdom’s Conservative Party,¹ he ordered that for each new regulation that any federal body wanted to propose, it would have to remove two existing regulations.² Deregulation has been high on the priority list for the Trump administration, so much so that the Brookings Institution has created a “Deregulation Tracker” to help people see what regulations have been removed and when.³

U.S. Secretary of Education Betsy DeVos has made deregulation a priority as well. In February 2017, the Department of Education rescinded changes that the Obama administration had made to Title IX related to the treatment of transgender students, arguing that an existing court injunction rendered the guidelines meaningless in practice.⁴ In October 2017, the Department of Education struck 72 regulatory documents related to special education (most of which were somehow still on the books even though they predated the most recent reauthorization of the Individuals with Disabilities Education Act).⁵ The Department is in the process of getting feedback on potential changes to federal regulation with respect to school discipline, as well.⁶

Too often, observers get lost in the total number of regulations—with those who like deregulation cheering with each passing regulation stricken from the books and those on the other end of the ideological spectrum lamenting the loss. This is a facile understanding of the role of regulation both in government bureaucracies and marketplaces.

Real deregulation is about much more than simply getting rid of regulations. It is about focusing the government on the things that it can do well. Government can take actions that prevent bad actors from hurting people. When possible, it should. But its power is limited, and it is essential

to know the point at which protection from harm becomes a barrier to innovation and improvement.

K–12 education in America is ripe for *real* deregulation. Each year, in statehouses around the country, more and more rules and expectations are placed on schools. Most seem innocuous. Perhaps a state wants every high schooler to learn CPR or wants a more accurate count of how many students are affected by a particular learning disability. But stacked on top of one another, and on top of all of the requirements that previous legislatures have passed, each new requirement leads to an incoherent and stultifying stack of paperwork that schools have to waste time and resources complying with. These legal requirements are then additionally larded up with rules written by state education agencies and policies drafted by states and local school districts. At the end of the game of telephone, educators are left with reams of expectations, often contradictory and burdensome in their reporting requirements, that they must meet or risk sanction by one of the hodgepodge of authorities that have jurisdiction over them.

As Rick Hess, Resident Scholar at the American Enterprise Institute, has written (specifically about Washington, but it could apply in large part to state capitals as well):

“Washington does not run schools—it only writes rules for schools, and those rules often do more to stymie educators than to help them. School systems are too complex and too removed from Washington’s grip for federal decisions to play out as intended. Well-intentioned federal policies often do more to fuel paper pushing, compliance, and burdensome reporting requirements than to help students.”⁷

As more and more cities and states diversify the educational options available to parents and students, creating magnet, open-enrollment, small school, career and technical, charter, and private school opportunities, educational choice markets need to become a part of the regulation conversation. Market forces—the ability to vote with one’s feet—

provide a powerful check on institutional power and thus intersect with regulations differently than in monopolies. Regulation of markets tends to be more about empowering individuals with information to level the playing field among different actors and preventing negative effects that are hidden from view. Overregulation can have a chilling effect on diversity and innovation. It can also supplant the decision-making power and authority of individuals in the marketplace that might know more about what is best for children than distant regulators and bureaucrats.

In the charter school sector, we already are seeing huge regulatory burdens for schools wishing to open, often requiring hundreds of pages of onerous assurances.⁸ In private school choice programs, some surmise that more burdensome regulatory frameworks keep out higher performing schools, dooming programs to underperformance.⁹ Refocusing regulatory efforts on trying to prevent harm, rather than forcing all schools to conform to a top-down vision of quality, would be a huge step in the right direction.

But deregulation does not have to be the sole province of school choice advocates or school choice skeptics—if we put educators first. People from across the ideological spectrum can come together to improve the jobs of teachers regardless of their schooling sector. If we want schools to become better environments for teachers to teach and students to learn, we have to take a hard look at the mountains of regulations that make educators’ lives more difficult. We have to separate out regulations that are helpful and worthwhile from those that are onerous and counterproductive. We have to have honest debates about the tradeoffs that regulations pose. Removing unnecessary regulations is not evil. Promulgating useless regulations is not good.

Deregulation is not new, nor is it exclusive to education or educational choice. In fact, two seminal works examining regulation were written 48 and 36 years ago, respectively. Alfred E. Kahn’s *The Economics of Regulation* set the standard for

analysis of both reasons for, and complications of, regulation (Kahn was lionized in his *New York Times* obituary as “The Chief Architect of Airline Deregulation”).¹⁰ This was expanded upon by now Supreme Court Justice Stephen Breyer in his 1982 tome *Regulation and its Reform* (called “the Bible of regulatory reform” by its publisher).¹¹ As it turns out, both of these volumes can shed light on contemporary questions around regulating education in America.

DEFINING SOME KEY TERMS

“Regulation” is a broad term. For economists, regulation has a very specific meaning: “requirements the government imposes on private firms and individuals to achieve government’s purposes.”¹² But regulations apply to public services as well. Like in the private sector, the government imposes requirements on schools, VA hospitals, the military and a range of other government actors to achieve its purposes.

Requirements on schools tend to take one of three forms. The broadest requirements are codified in *laws*, either at the state or local level. Legislators craft requirements that they would like to see from schools, from how they want spending reported to the grade levels when standardized tests should be administered. Executive branch agencies (like the U.S. Department of Education and state Departments of Education) also craft *rules* that schools must follow that are not explicitly codified in law. Usually, after a law is passed, a period of rulemaking takes place that operationalizes the sometimes-vague mandates legislators have passed and makes concrete the expectations that the state has for schools regarding how they report that they are meeting the requirements of the law. These rules are revisited over time to modify and update the requirements as legislatures are often poorly positioned to make fine-tuned adjustments after laws have been passed. Then states and local districts craft *policies* that further specify the expectations on schools.

So, for example, a *law* might mandate that schools in Missouri have to be in session for 180 days. The *rules* would specify what constitutes a day and how schools have to report to the state that they are meeting the requirement. The *policy* would be the actual calendar and schedule of the school or school district.

In some ways, from the perspective of educators, it is immaterial who created the requirements that prescribe their behavior and how that body did it. If educators have to have their school open for 180 days—whether prescribed by the state legislature or the state education agency—the school still has to be open for 180 days. But for the purpose of trying to rethink or reform regulation, each body’s goals, structure and deliberative process matters. Getting a law changed is different than getting a rule changed is different than getting a policy changed.

For the purpose of this paper, we are going to talk about the requirements placed on schools under the global term “regulation” whether those requirements are drafted legislatively, through a rulemaking process, or by policy. However, when we get to talking about reforming regulations, we will be more specific about the locus and nature of those particular requirements.

HISTORICAL JUSTIFICATIONS FOR REGULATION

Regulation is a part of government and a part of marketplaces. As Kahn argues, “no competitive markets are totally unregulated, and no public utilities are free of some elements of rivalry. The proper object of search, in each instance, is the best possible mixture of the two.”¹³ Breyer begins *Regulation and its Reforms* by listing the “historical justifications” for regulation, which overlap in large part with similar arguments Kahn makes in *The Economics of Regulation*. These include controlling for monopoly power, compensating for spillover effects, rent control, and others.

Eight justifications merit mention, as they are often offered by observers of education policy as reasons to regulate traditional public schools or educational choice programs. I threw in a ninth for fun:

Control of Monopoly Power. Control of monopoly power is “the most traditional and persistent rationale for governmental regulation.”¹⁴ School districts act as geographic monopolies, with all of the children within established boundaries attending residentially assigned schools (provided that they do not have some kind of choice-based transfer program). As a result, normal market forces cannot act as a check on the power of schools, so regulations are drafted to manage their behavior.

Compensating for Spillovers (Externalities). Spillover affects attend to the “true cost to society” of a given good or service.¹⁵ If a factory pollutes when creating an aluminum can, the cost is more than the 5 cents that the beer company pays for it—all people who live downstream from the factory “pay” in reduced quality of life. Spillover effects play a role in education because we all live downstream from schools. If children emerge from school unable to read or write, or are unable to participate in our democracy, they are not the only ones who suffer. We all do.

Inadequate Information. As Breyer states, “for a competitive market to function well, buyers must have sufficient information to evaluate competing products.” There is always a temptation for the producers of any product to skew the information that they present toward the positive. Producers can also hide ingredients in food or steps in processes in ways that consumers might not be able to discern, but that could be harmful. Kahn calls this, in a more impolitic fashion, “buyer ignorance.” Insofar as families have a choice where they send their children to school, either in formal school choice programs or the more traditional form of buying a house in the catchment zone of a good school, adequate information is a necessary part of the

decision-making process. It is also important for community stakeholders to know what is going on in schools, since they are the people who ultimately pay for them.

Unequal Bargaining Power. Just like large sellers in markets can crowd out small sellers, wealthier or more powerful families could push out poorer and less powerful families, either by driving up housing costs in desirable school districts or gaming school choice systems. Kahn refers to the potential for “discriminatory” pricing, which is “not merely unfair, but injurious to disadvantaged customers.”¹⁶ Those with less power in the marketplace could be harmed when more competition (again of the traditional school-choice-by-mortgage or in newer forms of school choice policies) is introduced.

Moral Hazard. When the person who uses a good doesn’t have to pay for it, there is little incentive to care about controlling costs or promoting efficiency. Insofar as government pays entirely for a child’s education (in the traditional public school system or in some choice systems thus far designed), there is a risk of ever-escalating costs because parents are not directly bearing them and have no reason to try to keep them down.

Paternalism. Rightly or wrongly, regulation has been historically justified on paternalistic grounds—the argument being that there are some choices that folks simply should not be allowed to make. As Breyer puts it, “distrust of the ability of the purchaser to choose may be based on the alleged inability of the lay person to evaluate the information ... or the belief that, although the information could be accurately evaluated by the lay person, irrational human tendencies prevent this.”¹⁷ This is not an uncommon view in some education circles, that even with good information, parents will make “bad” choices and should be prevented from being able to.

Scarcity. If there is a shortage in the marketplace (whether that is not enough bread or not enough good schools), there will be calls for government regulation to apportion the good in question in the fairest way possible. Regulations to prevent price gouging would be a form of scarcity regulation. In a world with not enough great schools to go around, regulations are drafted to ensure that they are spread as equitably as possible.

Cream Skimming. Kahn uses this term to describe the tendency for competitors to only serve lucrative markets.¹⁸ This has a serious risk in education, if we fear that some students are more costly to educate than others and yet subsidies are set at uniform levels. All the incentives are aligned for schools to serve less expensive students, and students with special needs or from challenging backgrounds might be left out.

Honorable mention: ***Excessive Competition.*** Breyer raises the historical justification of excessive competition that undergirded things like airline and trucking regulations in the middle of the last century. Oddly enough, some of the same (long since debunked) rationales for this type of regulation appear in discussions of school choice markets today. Fears of “predatory pricing” schools that might come in and undercut traditional options, only to disappear after they’ve fleeced the taxpayer, are rampant in the debate about school choice programs. Breyer handles these claims adroitly: “It seems unlikely that predatory pricing will ever justify regulation. In fact, regulation can make predatory pricing easier, since it often provides the barriers to entry necessary for a predatory pricer to succeed.”¹⁹

These are the potential reasons for regulating schooling, both traditional systems and systems of school choice. Next, we must turn to the actual process of drafting and implementing regulations. Even with strong justification, regulations can fall short of their goals.

THE REGULATORY PROCESS

After dispensing with the justifications for regulation, Breyer moves on to the process of regulation itself. While much of the discussion pertains to areas with little connection to education, he does explore several areas that have implications for education. These include standard-setting and individualized screening, and his lessons for regulators ring true for those hoping to better regulate schools.

Standard Setting

To illustrate the standard-setting process, Breyer tells the story of the National Highway Traffic Safety Administration's (NHTSA) efforts in the 1960s and 1970s to make cars safer. NHTSA set standards for head restraints, brakes, seat belts, tires, bumpers, and fuel economy that dramatically changed how cars were made.

In formulating standards, Breyer states that regulators must ask four questions:²⁰

- 1. *Should the standard aim directly at the evil targeted by the regulatory program or at a surrogate?*** Automotive regulations are trying to mitigate the ultimate evil of death and injury, but since they cannot do that directly, they aim at the surrogate of decreasing accidents.
- 2. *What degree of specificity should the standard embody?*** Regulators have to balance simplicity and complexity, as well as ease of enforcement with collateral damage.
- 3. *Should there be a performance standard or a design standard?*** Regulators must decide if they are concerned with what a product looks like or how the product performs.
- 4. *Should the agency adopt a technology-forcing standard?*** If current technology cannot meet the demands for safety or

performance that regulators want, they must decide if it is worth it to use regulators to push for technological innovations to meet their standards.

In this case, the vast majority of regulations emerge during a rulemaking process; that is, after laws are passed but before policies are created. This mirrors much of the standard-setting in the education realm, which is completed predominately by state Departments of Education. As with automotive standards, state Departments of Education usually enlist an array of stakeholders to help them draft standards for schools, working with educators, teacher preparation programs, researchers, civic groups and the like to draft and revise standards for what students are supposed to know, how teachers are supposed to be prepared and much else. The questions that automotive safety regulators had to ask themselves parallel many of the questions that state Departments of Education need to ask themselves.

Some notes on these questions are important here.

First, this whole process is political. While we might think that disinterested regulators are pouring through crash-test results to come up with these requirements, in the end, the process to create regulations heavily involved the auto industry and reflected their preferences. The natural consequence of a government agency drafting regulations is that the agency will feel political pressure. The same is true with drafting educational standards. The stakeholders contributing to conversations have their own motivations and reflect those in the advice that they give. To be sure, being political is not in and of itself a bad thing. Open lines of communication between regulators and those they are regulating are important. This is just to say that this is not a process of disinterested experts arriving at these decisions as a result of some kind of scientific process. There is some horse-trading going on.

Second, this whole process is ideological. Fundamentally, drafting regulations requires staking a position on acceptable levels of risk. There is no hard-and-fast standard as to how much risk is acceptable or at what point risk/reward tradeoffs should be made. Ultimately, regulators have to pick the positions with which they are most comfortable. It is a judgment call. Now, again, there is nothing inherently wrong with judgment calls, but we should be clear that reasonable people can disagree on where the line should be drawn.

Third, as Kahn argues, the role of regulators in standards setting is “essentially a negative one.” What can regulators actually do when it comes to standards? Kahn writes that their role is “formulating minimal standards and using periodic inspections to see that they are met; investigating customer complaints and issuing orders when service has been obviously poor, when management or subordinates have been blatantly inefficient or unfair, or when it wishes to insist that the companies take on or retain unremunerative business.”²¹ When it comes to delivering quality services, that is still firmly under the control of the entity working in the marketplace, and standards can only do so much to ensure that things are *good*, as opposed to just *not terrible*.

Fourth, as Breyer puts it, “the notions of ‘performance’ and ‘design’ standards tend to converge.”²² Standards can be written in such a way that only certain products are able to meet them. Breyer uses the example of bumpers. The types of crash test expectations that the NHTSA set for bumpers could not be met by metal bumpers, which were prevalent at the time. The fact that so-called “soft-face” bumpers were also lighter (and thus more fuel-efficient) and less expensive to make was surely only a coincidence. In education, the same can occur. If states set standards that Algebra must be taught in eighth grade or that students have to demonstrate their knowledge of two-digit multiplication by drawing a picture of the process, they are forcing schools to design their operation and their pedagogy in a particular way.

Fifth, technology-forcing can backfire. Breyer gives the example of interlocking truck brakes, which NHTSA required as a part of their regulatory process. The industry was not ready to make them and created bad brakes (some bus brakes actually released when the bus came to a stop) or brakes that mechanics had no idea how to maintain. In education, online, computer-based testing is a good example of technology-forcing, and a reminder that it doesn’t always work well. While there were high hopes for the two Common Core-aligned testing consortia to deliver high-quality, computer-based assessments for students across the country, they ran into numerous problems in both design and implementation.

Finally, regulations can have anticompetitive effects. Breyer argues that the costs of compliance with regulations can present barriers to entry for new firms and new products. Insofar as those regulations are created by incumbents, established firms can use regulations to crowd out their competition. Regulations also can freeze technology at levels that satisfy regulators, thwarting innovation for envelope-pushing products and services. Regulatory capture is a real risk.

Regulatory capture occurs when a business or interest group uses regulators to stifle their competition. Take, for example, the issue of occupational licensing. Individuals or organizations that want to increase their profits lobby regulators to raise the barriers to entry for potential competition. This is why, in nine states, one must be licensed to be a music therapist, which requires that a potential music therapist obtain “a bachelor’s degree or higher from an AMTA (American Music Therapy Association)-approved music therapy program, complete 1,200 hours of clinical training, pass the \$325 examination for board certification, pay various fees to the state, attain 18 years of age, and pass a criminal background check.”²³ This restricts the number of people who can be music therapists and drives up the wages of incumbent music therapists (with little to no evidence that these practices increase safety or quality).

Regulatory capture in education is already large and only growing. Teacher licensure is a form of regulatory capture. Incumbent interests fought tooth and nail against “alternative certification” programs that allowed potential teachers to bypass expensive teacher preparation programs. Teacher certification is an onerous process in many states and is not linked to producing higher quality teachers.²⁴ Educational choice programs can encounter similar risks, with incumbent schools lobbying to restrict who can gain access to public dollars thus directly limiting their competition while potentially limiting the options available to children who might need them.

Individualized Screening

One alternative process to standards-driven regulations is to try to screen potential firms on a case-by-case basis. The best illustration of this form of regulatory approach is the Food and Drug Administration (FDA), which screens new drugs that want to come on the market. They do this to mitigate risk and to build trust in products offered in the marketplace so that people will actually buy them. This individualized approach solves many of the problems of standard-setting, but, as one might imagine, introduces some new ones along the way.

Mitigating risk is incredibly important. A new drug that harms people instead of helping them is a serious problem. A new school that would fail to educate children is one, as well. Because of this, regulators tend to be much more concerned with false positives (incorrectly identifying something as good when it is actually bad) than false negatives (incorrectly identifying something as bad when it is actually good). In their minds, it is better to hold a high bar and prevent bad drugs (or schools) from coming into existence even if that means that on occasion a good drug (or school) is denied.

The problem is that we aren’t great at identifying and quantifying risk. Almost all activities carry some risk (Breyer notes the example of visiting the Grand Canyon: It’s beautiful! But you can fall in!)

and we have to balance those risks out with the rewards that the product or service offers. Also, when estimating risk, we have to compare the risks of new products with the likely alternatives that people will otherwise choose. For example, there was a great deal of consternation around the regulation of artificial sweeteners after some studies showed that saccharine increased incidence of bladder cancer in rats.²⁵ It was never found to do so in humans, but regulators dithered, afraid of the consequences of this very low probability event. While they did so, millions of American continued to consume food and beverages with huge amounts of sugar, leading to obesity and susceptibility to health risks far more pressing, and affecting people at a vastly higher rate than the risk posed by some artificial sweeteners. Had there been a connection found in humans, clearly regulators should have stepped in. But, putting the animal trial evidence on one side of the ledger and the mass consumption of sugar on the other would have helped regulators be more effective in mitigating actual harm.

Also, in many cases, benefits are “intangible or difficult to measure.”²⁶ Breyer gives the examples of “the physical vitality of the population, better eating habits, lower-cost food, animal drugs that lower farming costs” as factors that are either a step removed from the process regulators are hoping to regulate or are related to the process but difficult to measure.²⁷ How do they get factored into any kind of cost/benefit analysis?

Charter school authorization gives a good example of individual screening (and its challenges) in K–12 education. State legislatures and education agencies draft rules about what charter schools are and are not allowed to do, but they primarily empower organizations called authorizers to manage the schools themselves. Potential school operators apply to an authorizer for the opportunity to open and serve children, and authorizers have the power to both open and close charter schools under their oversight.

These authorizers draft their own rafts of rules and regulations for potential applicants as well as

existing schools. In some cases, the applications stretch into the hundreds of pages.²⁸ The problem is that it is very difficult for authorizers to know ahead of time what schools will succeed and what schools will fail. They are bad at quantifying risk. According to research from New Orleans, scores that authorizers gave potential schools did not correlate with the performance of their students.²⁹ And that is just on short-term test score gains. We do not know conclusively the relationship between short-term test score gains and long-term life outcomes, particularly in school choice programs.³⁰

Onerous application requirements paired with lack of connection between those requirements and quality schools ratchets up the risk of false negatives. Who knows how many potential school operators, who would have run great schools, were denied applications or were scared off by the process. That harm is impossible to quantify but should give all of us pause as we think about individualized screening as a tool for regulating schools.

REFORMING REGULATIONS

Schools are not automobiles or home loans or sugary drinks. They are deeply human institutions that cope with factors outside of their control and attempt to do what humans have debated about and struggled to accomplish since time immemorial: educate children. As a result, the lessons of regulating other sectors will inevitably fall short of a perfect, one-to-one connection with schooling. That said, there are some connections that are worth making and contemplating. If we want to improve the ways that we regulate schools, policymakers can take several concrete steps.

Step 1: Reform the Standard-Setting Process

It's hard to draft regulations without setting standards. In order to set regulations on fuel

economy, NHTSA had to set standards of how efficient they wanted cars to be. In order to set regulations on the design of bumpers or restraint systems, they had to set standards for the types of impacts cars needed to be able to withstand. Even these relatively straightforward standards were incredibly difficult to set. Competing conceptions of appropriate levels of risk, tradeoffs between efficiency and performance, and a host of other issues made coming up with standards for automotive safety and economy costly and time-consuming.

Standard-setting in education is even more difficult. At a fundamental level, we simply don't agree on what students are supposed to learn and when. At various times, different groups—from the National Council of Teachers of Mathematics to individual states to multi-state consortia—have gotten together to determine content standards for K–12 students. This, as it turns out, is not a scientific process. It generally involves getting community stakeholders together, putting them in a room and having them hash out what they think kids should know.³¹ In schools controlled by democratic processes that are supposed to reflect the needs, desires, and values of local communities, this is not inherently a bad thing. But it is important to note that these standards don't come down from on high on stone tablets carved by God. Citizens and families of good will can disagree as to whether or not these standards are appropriate or rigorous enough for schools and children.

We also struggle to accurately measure those standards. What does it mean to demonstrate “proficiency” in a subject? What about “mastery”? Again, these definitions are typically determined non-scientifically, with panels of stakeholders looking at the results of standardized tests sometimes only loosely aligned to the standards and determining what cut score denotes proficiency. Often, the debate revolves around not what score demonstrates the desired level of knowledge, but what percentage of students will pass or fail and the political repercussion of those cutoff points.³² What's more, as Tom Loveless of

the Brookings Institution has argued for years, between-state variation in the perceived “quality” or “rigor” of standards has no relationship with student achievement.³³ If that’s not enough, there is reason to believe that school accountability grades are sensitive to the types of information that regulators choose to include or not include, and including different outcome variables changes results for a substantial number of schools.³⁴

This seems like an awfully thin reed upon which to rest serious, consequential decisions about which schools should be able to open or should be forced to close. What if, for example, a school pursues a curriculum that is not aligned to state standards? What if they think that Algebra is best taught in the ninth grade, instead of the eighth grade. Students taking state tests in eighth grade will tank, but that doesn’t mean they will not get the requisite material by the time they graduate. To my knowledge, there is not a consensus as to when Algebra is best taught, so why force schools to decide?

There is a popular phrase in conservative political discourse: “Complexity is a subsidy.” It means that convoluted regulations benefit larger, richer, incumbent organizations because they have the capacity and resources to comply with regulations in ways that smaller, poorer, upstart organizations cannot. This bleeds into schooling. More established charter school networks, for example, have teams of people to complete complex applications and submit them to the various charter authorizing bodies. Forcing small private schools to prove that they follow every jot and tiddle of the education code in order to receive any students with state funding effectively eliminates them from participating. Similarly, smaller school districts don’t have the staff resources to keep up with all of the demands, particularly when administrators are often tasked with everything from making sure the furnace is working to chalking the football field. Some might argue that if they can’t comply, they shouldn’t get the funds, but that very attitude subsidizes the status quo, stifles innovation and erects barriers between children and the schools that might be able to serve them better.

So what can be done about this?

State education agencies should draft fewer, simpler standards

By my count, first graders in Missouri have 112 individual English Language Arts standards they are supposed to meet by the end of the school year.³⁵ Missouri only requires that schools are in session for 174 days, meaning that there is one ELA standard for every one and a half days of school. As a former English teacher, this seems excessive.

States should have a small set of expectations for schools that are clearly communicated, measured directly and reported simply. Any principal, teacher, or parent should be able to parse the results. When it comes to authorizing new schools to participate in choice programs, criteria should be straightforward, and it shouldn’t take a specialized body or a multi-hundred page application to convey the necessary information.

The simplest way to accomplish this is to cut down the number of standards to just the most important ones. But another could be a shift from defining a set of standards for every single grade to a cumulative set of standards that students should meet by the end of major transition points in their education (say at fourth grade, eighth grade, and 12th grade). Even if states wanted to keep a coherent set of K–12 standards, perhaps they might require less frequent testing. Prior to No Child Left Behind, taking standardized tests every year was the exception, not the norm, and even high-performing states like Massachusetts only tested in fourth, eighth, and 10th grades.³⁶

With respect to the regulations on new schools hoping to open and participate in school choice programs, authorizers and state agencies should keep requirements simple and straightforward. They should take into account the total number of hours that a potential school must exert to comply with the paperwork and then ask themselves,

“Could an individual or small group of educators meet these requirements while teaching full time?” If the answer is, “No,” they are probably asking too much and stacking the deck against smaller operators who might be closer to the community or better positioned to serve children.

State education agencies should allow multiple assessments of student learning

If states still want to test students every year, there are multiple psychometrically-validated standardized tests that can give teachers, parents and community members valuable and actionable information about how students are performing in school. Whether it is the Iowa Test of Basic Skills, the TerraNova, the NWEA, or the SAT-10, tens of millions of children have taken these tests. They are nationally norm-referenced so everyone involved can know not just how students are scoring in relation to the students in their state, but to the students all around the country.

Schools should be free to use these tests as a tool to measure how well they are educating their students.

It is true that these tests are norm-referenced, and not based on the particular state standards that states have drafted with their individual expectations for student knowledge. But the tradeoff in national comparability, ease of administration and freedom for educators to find the assessment that they think best reflects what they are doing in their classroom could very well be worth it. If schools really value those standards, they can use the state’s tests. But it is also true that nationally normed tests reflect a broader consensus about what students should know beyond the handpicked groups of stakeholders that form the backbone of the state standard-writing process. Schools should have the option to choose those as well.

Step 2: Focus on the Worst Actors

Breyer writes “[r]egulators ought to aim at the worst cases and, in attacking such cases, they should strive for simplicity.”³⁷ *Regulation and its Reforms* is full of examples where regulators strived for perfection, like the dent-free bumper or the artificial sweetener with zero health risks. In so searching, they weeded out potentially helpful solutions and wasted time, energy and resources attempting to reach an impossible standard. Given the negotiation that takes place in the standards-setting process, the imperfection in the measurement of the outcomes that regulators value and the potential anti-competitive and anti-innovative effects of regulation, focusing on trying to eliminate the worst cases and most dangerous products would accomplish almost all of the regulators’ mandate with the fewest downside risks.

One of the reasons that educational regulation has become so complex is that it attempts to respond to every potential act of malfeasance or nonfeasance. The problem, of course, is that even with pages upon pages of code, volume upon volume of rules, and mountains of paperwork attesting that codes are being adhered to, schools inevitably fail to educate children, or, in worse and extreme cases, actively harm them.

Political scientists like James Q. Wilson and educationalists like Richard Elmore have documented the myriad problems with central authorities attempting to directly influence the operations of schools.³⁸ District, state, and federal officials are far removed from the daily actions that take place in the classroom and have limited ability to impose their will. They can write laws and policies, and they can require paperwork that attests that those laws and policies are being followed, but to actually ensure that students are getting the best education possible is next to impossible.

Put simply, regulations cannot ensure that all schools will be of “high quality.”

So what can policymakers do?

State legislatures should convene panels of educators, researchers, and community members to complete a thorough review of existing regulations

State education codes have become laden with rules and reporting requirements far outside the scope of what is necessary. Before promulgating any new rules, existing rules should be thoroughly examined, and unnecessary, duplicative, and needlessly onerous regulations and requirements should be deleted.

A state-based, blue-ribbon commission on school regulation could be a unifying force. It would be created by the state legislature and complete a report to them outlining the regulations that need to go. It could then work with the state education agency itself to implement the recommendations.

Often, advocates of traditional public schools argue that if they were freed from the same regulations that charter schools are, they would be able to perform just as well as they do. They deserve a chance to prove themselves right. If there are needless or duplicative regulations on traditional public schools that prevent them from meeting kids’ needs, everyone should cheer their deletion. Too often choice supporters and choice opponents are pitted against each other in these legislative and regulatory battles; they don’t have to be.

This process should be repeated at regular intervals.

State education agencies should focus on creating “90/10 regulations”

Rather than trying to make good schools great, or even average schools good, states can focus their

energy on keeping out the worst actors. As Breyer argues, it’s easy to get 90 percent of pollution out of a river, but it’s hard to get the last 10 percent out.³⁹ Regulators should look for the types of rules that will keep out that 90 percent of pollution of education systems: the worst actors. Inevitably, less bad, (but still bad!) actors will slip through the cracks, but (a) they won’t be the worst actors; (b) they will be competing against much better-equipped foes that will not be laden with burdensome regulations; and (c) the more simple and focused approach will be more effective at screening out actors who definitely need to be weeded out than today’s current process, which in focusing time, energy, and resources on trying to not just prevent bad actors but ensuring that all are of “high quality,” lets bad actors through.

This places harm reduction, not micromanagement, at the core of regulators’ jobs. Currently, resources are misallocated to micromanagement. Reallocating those resources to harm reduction should reduce more harm.

State education agencies should leverage screens paired with interventions

Breyer writes that “regulation is a crude weapon of governmental intervention—a blunderbuss, not a rifle.”⁴⁰ Unfortunately, overbroad regulations risk catching good actors up in the web designed to catch bad actors, which can in turn thwart innovation and improvement. When metrics are crude and accountability systems are mechanistic, mistakes can get made or schools can change their behavior in unproductive ways to avoid getting caught up in the web. Metrics work best when paired with human judgment. Humans can be the rifle, separating out borderline cases and making fine-tuned decisions.

Several years ago, Doug Harris of Tulane University floated an argument with respect to evaluating teachers based on valued-added models that

could be extrapolated to school accountability and regulation:

“Value-added measures could become the educational equivalent of screening tests. They are generally inexpensive and somewhat inaccurate. As in medicine, a value-added score, combined with some additional information, should lead us to engage in additional classroom observations to identify truly low-performing teachers and to provide feedback to help those teachers improve. If all else fails, within a reasonable amount of time, after continued observation, administrators could counsel the teacher out or pursue a formal dismissal procedure.”⁴¹

States could reorient their education agencies to combine low-cost, straightforward screens for quality (like data on growing or declining enrollment, teacher turnover and basic test scores), with more robust outreach to schools to find out what is actually going on. Perhaps this would look like Great Britain’s Ofsted, a system of school inspections that uses test scores as a screen for what schools to give greater scrutiny, but then digs deeper and leverages human judgment.

Step 3: Carrots Before Sticks

What does it mean to look upon regulation as a “last resort,” as Breyer suggests? The straightforward way is simply to allow markets to function. Insofar as policymakers would like to see particular outcomes, they should use incentives to try to shape results. If you have a particular set of children that are high need, providing increased funding for them would push providers to want to serve them more. If a district identifies the need for a new CTE program, offering to build a building or provide equipment to an organization that will come in and provide would accomplish the same thing.

Giving families the power of that funding would put them in the driver’s seat to find the best option

for their child. If that doesn’t work, then the state should come in with regulations. Unfortunately, this is not how we currently look at market construction in education. In fact, we do the very opposite. Education regulators say, “we cannot have a market until we have drafted a substantial set of regulations.” This flies in the face of much of what we’ve learned about how regulations work well.

What does this look like in practice?

State legislatures should fund students so as to avoid adverse selection

There is a clear potential problem of adverse selection in school choice systems (a manifestation of one of the historical justifications for regulation raised by both Breyer and Kahn). If every child gets the same amount of money in the form of a voucher, charter school allotment, or education savings account (ESA) balance, but we believe that they cost different amounts to educate, schools will be incentivized to serve students who are less expensive to educate. If the cost to educate a student exceeds the government subsidy, it will be less likely for a school to want to serve them.

One way to fix this problem is via regulation. (This approach uses regulation as a first resort.) Schools can be—and in many places are—required to serve all comers for the cost of the voucher and can be excluded from participating in the program if they refuse to comply. This risks pushing away schools who are not acting out of malice but simply are not financially able to cope with higher-need students.

Why not give more expensive-to-educate students more money? As we see in the case of vouchers for students with special needs, schools will serve students with profound and expensive disabilities if they can afford to do so. Such an understanding could be extended to low-income students, students who are not native English speakers and other categories of students whom we can reasonably assume are more expensive to educate. Filling

a flexible-use spending account with a varying amount of money based on student needs would help ensure that that student's parents would have power in the marketplace to find an educational option that works for him or her.

State legislatures and education agencies should regulate second

Rather than attempting to create a regulatory framework for a system of schools that does not yet exist, states should allow schools to start to operate, learn what is working and what is not and then draft rules and regulations to proscribe behavior.

With respect to adverse selection, it is only after we try and solve this problem via changes in funding that we should resort to regulation. Maybe even with more money, schools will still need to be required to serve certain students. But that most likely would be a much smaller pool of schools and students, just those left behind after changes in subsidies. That is a more manageable problem to solve.

Step 4: Respect the Hidden Benefits of Innovation

One of the lessons learned by those hoping to regulate artificial sweeteners is that absent them, folks tend to eat and drink incredibly unhealthy stuff. Rather than asking the question "Is this artificial sweetener harmful?" the better question would have been "Is this artificial sweetener more or less harmful than what people would otherwise use to sweeten their food and drinks?" Taking risk down to zero is impossible. Moving in the right direction can save lives.

The same is true in education. Frequently, when a new charter school wants to open or a new school choice proposal is being debated, the standard by which potential new schools are judged is

incredibly high. Charter school applications often require what appear to be contingency plans for every possible issue, even those that appear infrequently.⁴² There is also an expectation from some corners that every charter school should be "above average."⁴³ Regulators and policymakers are trying to remove all risk. This is impossible.

A better question for regulators to ask is, "Would this school be better than the likely alternatives for the students that will attend it?" The schools students currently attend have not removed all risk. They struggle, just like any human endeavor does. In fact, they experiment as well. Traditional public schools try new reading curricula, put tablets in classrooms, change schedules and class lengths and calendars all the time. The difference is that students are often parts of these experiments without their consent. Maybe families don't want every child in the classroom to have a tablet. Maybe they like longer (or shorter) classes. If they are forced into attending their residentially assigned school where these experiments are taking place, they have to go along with them.

It is also important to ask the question "What is the risk of us not doing this?" Denying a school that has the potential to be good represents a real harm, though a hidden one. We simply will never know the good that could have happened absent regulators' actions. We can wish that harm away, or pretend it isn't there, but it is.

So what can we do about this?

Regulators at the state and local level can be more honest about the tradeoffs inherent in their work

Regulations are rarely entirely good or entirely bad. More often they simply present tradeoffs between competing desires. The desire for innovation is balanced against the desire for safety and security. The desire for change is balanced against the desire for stability. The discussion and debate around

regulating schools would be much better served if those involved were more honest about this. Every regulation has an upside and a downside that needs a full hearing.

Regulators at the state and local level can place higher value on hidden benefits

New policies, programs, and schools represent an opportunity for innovation and diversity. Innovation and diversity are hard to quantify. Sure, we can count different types of school models and see the overall makeup of a given city or state's system of schools, but it's much harder to know at any level of depth what new and different things are happening within the four walls of a new school.

In statistics, models include an error term as the last variable. That is to say, researchers collect a series of variables that they think explain a phenomenon, but then they include an allowance for all of the other things they aren't able to measure. The same should be true when tallying up the various positives and negatives of a school. Some of the things we care about cannot be measured but should still be taken into account. If charter school authorizers, teacher evaluators, school accountability systems, or other tools of measurement and evaluation are guided by specific rubrics that only include that which can be counted, these things will be left out. All of these systems need to make space for subjective, human judgments of quality, the only tool we have to measure the intangibles.

CONCLUSION

Regulating government bureaucracies and markets is not new. The lessons learned from those efforts are not new either. Unfortunately, it appears that few of those lessons have trickled into education policy, where regulation is used before better options are exhausted; regulations are impossibly

complex; regulations are tasked to do the job of a rifle even though they function like a blunderbuss; performance standards are allowed to be perceived as design-neutral; and likely alternatives are not considered when drafting regulations. The list goes on and on.

It would be wise for regulators and their cheerleaders to reflect on Fredrich Hayek's 1974 Nobel Prize acceptance speech, "The Pretense of Knowledge." He argued:

"If man is not to do more harm than good in his efforts to improve the social order, he will have to learn that in this, as in all other fields where essential complexity of an organized kind prevails, he cannot acquire the full knowledge which would make mastery of the events possible. He will therefore have to use what knowledge he can achieve, not to shape the results as the craftsman shapes his handiwork, but rather to cultivate a growth by providing the appropriate environment, in the manner in which the gardener does this for his plants."⁴⁴

Are regulators acting as craftsmen (and craftswomen) or as gardeners? I think we know the answer to that. Perhaps a better question is, how can they act more like gardeners?

The world of education policy, and school choice policy in particular, needs to rethink regulation. Regulations need to simplify. They need to do a job that they can actually accomplish. They need to focus on the right targets. Unless and until that happens, they will stand in the way of meaningful educational improvement.

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ACKNOWLEDGMENTS

Thanks to Andy Smarick and Brian Kisida who reviewed an early draft of this paper. Thanks also to Paul DiPerna, Robert Enlow, and Jennifer Wagner for their edits and suggestions throughout the drafting process. Thanks to Katie Brooks for diligent copyediting and Jacob Vinson for laying out the report.

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