Keynote Address

Christopher Edley Jr
Berkeley Law

Follow this and additional works at: https://scholarship.law.berkeley.edu/facpubs
Part of the Law Commons

Recommended Citation
KEYNOTE ADDRESS

Christopher Edley, Jr.*

I am working for Obama—although, my wife is working for Hillary—and I had entirely too much coffee at a fundraising dinner last night, and I couldn’t sleep, and I knew that the best way to really irritate my wife was to try to get Gore’s endorsement for Obama. So, I’m awake in the middle of the night trying to think—I’ve been emailing Gore back and forth—trying to figure out, what would just seal the deal? So, I cooked up this idea for a cabinet-level climate change czar, and I thought that Gore would like it. But I was lying there awake, and I’m thinking, no, wait a minute, I shouldn’t be thinking about this, I should be thinking about what I’m going to say in Palo Alto tomorrow. And it suddenly occurred to me that it’s the same problem. In other words, if you step back and you ask, why are we so screwed up on these two big challenges—improving schools for the neediest kids and climate change—there are actually some interesting parallels about why, as a governance matter, it seems so difficult to come to grips with this thing.

Think about global climate change as a challenge. California wants to do this, Kazakhstan wants to do that—what’s a person to do? And similarly, what do we have, fifteen-thousand school districts around the country? This tradition of localism, and yet we have these national ambitions for what quality ought to be, for what equity ought to be. Figuring out who’s in charge and how to coordinate all of this—it is tough, it’s multisector. Whenever you gather a group of educators and ask the question, What do we do about improving the education for the neediest, the only thing everybody can agree upon is, the real solution lies somewhere out there, outside this room. It’s a housing problem, or it’s an income problem, or it’s a jobs problem, or it’s a health care problem, or it’s a hunger problem. But it’s certainly not, at least, something that we as educators can solve all by ourselves.

That multisectoral quality of the problem obviously complicates coming to grips with it, and is often used as an excuse. But more than anything else, I

* Dean, Honorable William J. Orrick Chair and Professor, and co-director of the Chief Justice Earl Warren Institute for Race, Ethnicity and Diversity. Dean Edley was a White House aid to Presidents Carter and Clinton focusing on a wide range of domestic and economic policy issues. He was recently a member of the bipartisan National Commission on the No Child Left Behind Act, and is on the Advisory Board for national Programs at the Bill & Melinda Gates Foundation.
think that we’re not going to make substantial headway without, as Al Gore would say about climate change, recognizing that it’s a moral imperative. He would say the fate of the planet is at stake with climate change. Of course, with education reform we can say that not just the fates of the dreams of individual kids are at stake, but ultimately the prosperity and security and character of our nation are at stake. This is about a lot more than policy plumbing. It’s about finding and following moral leadership on this issue.

Let me suggest a set of headlines or difficulties that I see us having to grapple with as we think about these issues in the years ahead. The first one I call “Appomattox Redux.” I call it that because it’s helpful sometimes to remember that there was this Civil War—I vaguely recall that the North won—and that one of the holdings, as a lawyer would say, of the Civil War is that we are a nation, and we are a strong nation, able to mount and enforce national aspirations, as a national community. In many respects that’s what the post-Civil War amendments to the Constitution stand for. But in the education context, localism, this invention of the first half of the nineteenth century, still reigns supreme, by and large. Indeed, the role for states, much less the federal government, is an invention of just the last generation and a half.

To many of us, I think, from a civil rights perspective, the claim that education choices and standards and aspirations should be defined in a strictly local way runs in the face of nation-building and national identity. This is compounded by the fact that, of course, with respect to race, many of us came of age at a time when it was the national government, and national norms, through courts or through legislation, that were pressing forward the boundaries of racial justice, over and against the difficult local politics of racial subordination. So there’s a fundamental tension between the localism of much of the education ethos on the one hand, and the national aspirations for justice that are so familiar to the civil rights movement.

Now, what are the possibilities for reconciling these two? It’s tough, because so long as we hold on to this frame of localism, then the federal government is basically relegated to the business of threats and bribes to induce state and local actors to do things. Those are the same strategies I use with my six-year-old. And if you don’t have a hefty checking account and sufficient overdraft privileges, then in offering the bribes it’s hard to put enough money on the table to make a difference. Nevertheless we try. The regulatory strategies—the more command-and-control kind of strategies—obviously come to the fore as an alternative, raising the ugly specter of so-called unfunded mandates that I’ll talk about a little bit later.

The second major problem, which I term “Plessy v. Ferguson” After All,” is simply a reference to the fact that, notwithstanding Brown v. Board of Education overturning the separate but equal doctrine, we are in a situation in

1. 163 U.S. 537 (1896).
which we have increasing levels of racial and economic segregation in our public schools. That, combined with localism—district lines, the extremely limited extent of interdistrict pupil assignments, et cetera, means that we have now almost a de facto Jim Crow reasserting itself and posing, it seems to me, extraordinary challenges. Indeed, I would say, perhaps provocatively, that this insistent localism is a form of nouveau Jim Crow, both in terms of demography and economics. The solutions? Extraordinarily un-promising, especially if one retains this commitment to local control with some—sometimes slight, sometimes strong—overlay of state authority.

Third problem: “Bull Connor’s Dead.” There’s a certain amount of ethical exhaustion, or racial exhaustion, in the American public. I had someone say to me this morning that part of Barack Obama’s appeal to many white voters is that he doesn’t talk all that much about race, and that produces a comfort level with his candidacy that is helping to propel him politically. The racial exhaustion of the American people is especially acute when it comes to the issue of identifying and attacking continuing problems of discrimination. All the social science evidence in the world about continuing patterns of discrimination—by which I mean not just disparities, but rank disparate treatment, unfair treatment—all the social science evidence in the world is still not going to persuade the average audience that prejudice is alive and all too well in our society. We don’t have the visible symbol of a Bull Connor and the snarling dogs and the redneck official with racial animus dripping from his or her lips. At least, we don’t have it very often. Which means, I think, that even as we continue to press the antidiscrimination paradigm as best we can, it is important to recognize that that strategy must be complemented with a strategy that pulls on different impulses, that appeals to different ethical imperatives. I’m not saying, “Abandon it”; I’m saying, “Complement it.” And in particular I’d say that because of Bull Connor’s death, we’re in dire need of overcoming the radical secularization of the civil rights movement that occurred after Martin Luther King, Jr. was murdered forty years ago this evening. It is not enough to pursue this fight with the detailed policy plumbing that I live for. A different and broader set of tools must be brought to bear.

One of them, of course, is science. But here what is striking to me about this—and boy, Al Gore would not like this argument—is that I actually suspect that part of the predicate for moving forward on these issues is to let science take a back seat to hope. Here’s what I mean.

When NCLB\(^3\) was being considered, virtually every card-carrying education researcher said, “Oh, don’t do it! There’s no way we can get all children up to any level of proficiency before the next millennium. Can’t be done. We don’t know how to do it. We don’t have enough experiments that show effect sizes that’ll be meaningful enough. Besides the intergroup versus

the intragroup . . . , and if you look at Finland . . . , and besides in Kazakhstan
they can’t . . . .” Right? And so every card-carrying education researcher said it
can’t be done. But if you go into a room of black parents unhappy with their
schools, and you tell them that we’re going to try to move all kids to
proficiency and we’re going to take twelve years to do it, they would say,
“Twelve years? My kid’s just going to be in fourth grade once! Just once!”

If you go into a room full of concerned parents and say, “Don’t worry. If a
school fails to make adequate yearly progress for five or six years in a row,
then we’re going to step in and reconstitute the school and do something really
dramatic”—that parent’s going to say, “Five or six years? Wait a minute; I’ve
only got two kids. If I had thirteen kids maybe that would kind of be on average
maybe not so bad, but I’ve only got two kids.”

The prescription for patience that’s rooted in the science is deeply at odds
with the moral passion and the urgency that I think is required to move us off
the dime. This is hard, especially for those of us who feel committed to science
but feel at least as strongly committed to progress. It may be that the answer
here is to let the science be in charge of pointing us in the right direction, but
not necessarily controlling how hard we step on the accelerator. Because the
scientists will always say, “Let’s do some more research, and look, just because
it worked in Schenectady doesn’t mean it’ll work in East L.A.” And they’re
right. They’re right. But we can’t wait for perfect knowledge. Somebody’s
going to get elected; they’re going to come into office January 20; they’re
going to want to know what to do; and their whole program is not going to be,
More randomized controlled experiments! I can promise you that. For better or
worse.

But having said that, research is a civil rights issue. The distinguished
journalist John Merrow told me a couple weeks ago that the entire budget for R
and D for education in the United States is less than the Harts pet products
company spends on research per year. And yet we’re here talking about how
education is a fundamental right. There’s a long way between where we are and
where we need to go.

There are lots of ways to think about the impetus for reform. And I take the
idea of a right as the piercing beacon that guides the reform agenda. Think
about these three broad strategies conceptually: First, there’s the idea that we
can provide incentives of some sort—economic, political, reputational—and
that will drive educators. Mind you, the other field that I spend a lot of time on
is administrative law, so, from my point of view, the education sector is an
industry. It’s got complicated issues, but it’s just a big industry. How do we
regulate this industry to make it do a better job at what it’s supposed to be
doing? How do we regulate this industry so that we don’t have dropout
factories destroying dreams in the middle of major urban school districts? How
do we regulate this industry so that it’s not producing toxic byproducts and so
that in fact it is producing the kind of equity and the kind of achievement …
you get the idea. So from my point of view this is a regulatory problem. And
one regulatory strategy—one family of regulatory strategies—has to do with incentives.

Second, another strategy has to do with whether we can just get people to be better professionals and understand what it means to be a good professional. For example, here's a strategy: You've got all these racial disparities in medical treatment, this unequal treatment in health care. A strategy for fixing that problem in medicine—this is the one the docs love for dealing with it—is this: let's have a course in medical school on "cultural competence," and if we can just get them to be better doctors, then all of these disparities in cardiac treatment or pain alleviation, all of those things will disappear because these are enlightened people, and they want to do the right thing. All you have to do is just teach them, just tell them to do the right thing, and as professionals, they will do so.

So just take that same idea, transfer it to teachers and principals and school board members, and we've reformed education. Done, right? Just elevate professional norms, let's just polish those up a bit, and all of our problems will go away. You can tell I'm not too fond of that as a strategy. It's clearly one part of a strategy, but it can't possibly be the whole thing, although I should say it works perfectly well for the legal profession.

A third strategy is regulation of some sort. Legal rights, legal norms, and enforcement mechanisms and all that stuff. It may be that the regulatory strategy in turn uses incentive mechanisms or professional credentials or something like that as one of the tools, but the basic idea is that you're going regulate, not just exhort, not just incent, but regulate, command. It's a choice. It's a choice, which I like. But if we're going to have a right, what kind of right is it? A right about what? A right to what? And at the eighty-thousand-feet level, you have a couple of choices. Here are three. We could think of it in the traditional equal protection/antidiscrimination paradigm. Let's find a wrongdoer and stop her from doing the wrong thing. And we'll define what the wrong thing is in terms of this morally freighted idea of discrimination.

A second wrinkle is the sort of antisubordination idea, which says that the right is not simply about prohibiting unequal treatment, it's about correcting the legacy. Those of you who are students of constitutional law and history will recognize that Brown v. Board of Education could have been either of these, but shortly after adopted, quickly fell back to being the first—an anticlassification principle as opposed to an antisubordination principle. Hence, we have the conceptual possibility of reverse discrimination, which, of course if you were focusing on antisubordination would be a silly idea.

A third possibility, though, moves away from this morally freighted idea of discrimination completely—and I term this "no-fault regulation."

Here's the idea in a nutshell. You're driving down the street, and you see this smokestack. It's belching this greenish-grey gunk, and you see people standing by the side of the road kind of keeling over. You know something's wrong. The smokestack is creating a public health risk up-with-which-we-shall-
not-put. Now, what do we do? Do we start this big investigation and try to find the manager who intends to poison the neighborhood? No, we simply say, “We won’t permit that much brown gunk to come out; you’ve got to fix it, and here’s how much you have to fix it; and if you don’t fix it, you’re going to pay a penalty, and ultimately you’ll take the problem seriously.” In this strategy, it’s not that anybody is at fault; it’s just that we’re trying to change a behavior. We’ve established a standard; we’re not going to go into all the whys and wherefores of why you made the choice that you made to burn the products that you burned, or to compose the product the way you did. Just fix it. And do it now.

You could imagine a situation in which, in the context of education, the observation of the racial disparity—in discipline, in reading scores, in graduation rates—the observation of the disparity is itself a trigger for intervention, independent of any inquiry about fault. And certainly independent of any inquiry about racial animus, or even facts that might lead to an inference of racial animus. This is like what Title VI of the Civil Rights Act of 1964 does. This is a completely different strategy—and obviously I’m foreshadowing here the regulatory ideas underlying the civil rights elements of NCLB. But having said that, I don’t want to shortchange the excruciatingly challenging business of defining the education right in some detail.

Here are just a couple of the dimensions that are relevant to that definition. Now what I want to emphasize for those of you who are academics—and you know who you are—is that from the perspective of a policymaker, I’m for a right to education. What does that mean? Because it’s more than research-based prescription; it’s going from the prescription to the policy-engineering, and from there, obviously, to the advocacy. But the legislative staffer wants to know, how do I redraft Section 1101(b)(3)(7) of NCLB in order to make English language learner instruction more effective? Tell me what to write. Not just the exhortation, but make it precise. So you’ve got to go through all of these choices. And each one of them, and I won’t belabor this, but each of these choices is both a plumbing problem and, if you scratch your head and think about it, it’s about values, and it’s about aspirations, and it’s about a choice, a tough social policy choice about what you think really matters.

Here’s just a snippet of this broad challenge of doing the policy engineering the right way. For example, just think about this: Are we talking about a right that’s framed in terms of adequacy or in terms of equity? Take your pick, but whichever one, you’ve got to figure out what the metric is, what’s your measure for it, and you’ve got to figure out what’s the standard, that is, when will your adequacy or equity norm have been violated? What kind of evidence, what kinds of facts, would constitute a violation? You have to think about that, and you have to think about what the tolerance—or wiggle room—would be. Okay, say I want equality in the distribution of highly qualified teachers, so we don’t have all the highly qualified teachers going to the middle-class white schools and all of the less qualified teachers going to the
Title I schools, right? A couple of us were lobbying to get that into NCLB, and we succeeded. But you’re never in practice going to get that distribution exactly right, so how do you turn that aspiration into something that’s concrete enough that folks charged with obeying or enforcing the norm know what they’re supposed to do? All of this is tough business, but that’s what we ultimately have to do just to make the idea of a right plausible in a sophisticated policy discussion.

Now for a little bit on No Child Left Behind. Here’s a little bit of what I would characterize as some of the civil rightsy stuff that’s in No Child Left Behind, that leads me to feel that the statute—notwithstanding its many, many, many, many, many flaws—is one of the most important pieces of civil rights legislation in the last generation. A lot of it sort of came into the legislative process as if a train were moving down the track, and people who cared about social justice issues were kind of trying to jump on the train and have a little bit of an impact on its direction. So the idea was that there’s tons of testing; it’s coming out the wazoo. What can we do? We can’t stop it, but what can we do to try to steer it so that there are fewer abuses than there might otherwise be, or how can we say something about graduation rates so that the incentive that we feared—that testing would lead to higher dropout rates—gets balanced in the system hydraulically with pressure on the schools to pay attention to dropout rates? That’s the way civil rights advocates were thinking during congressional negotiations, and we can talk about the extent to which we only managed to get a quarter of a loaf in those discussions.

But what I’m trying to sketch for you is the sense that NCLB presented and, when it’s reauthorized, will again present opportunities for incremental progress at defining a right to education. Because if we can come back and say with even more clarity and sharpness what we mean by adequacy for these kids, and what we mean by equality in resources or outcomes for these kids, then we are, by the statutory and regulatory process, beginning to flesh out the content of a subconstitutional right to education.

Now, there’s no constitutional right to breathe clean air. We have no right to have the government provide us with drinkable water. But we have a statutory framework and a political culture that have really come to make people feel as though that is your right as an American. When we hear about communities in the Central Valley of California or along the southern border of Texas that don’t have drinkable water, we think, “That’s just wrong. That’s just wrong. Society is failing those communities.”

It’s not because they have a formal right, it’s because we’ve come to believe, without the Constitution being explicit, that these claims or entitlements or interests are part of what defines our community and, indeed, identity. Similarly, we have an opportunity over time, without amending the federal Constitution, to slowly build a statutory/regulatory/political/moral conception of education as a fundamental right. What I would say is that the research community and the civil rights community need to collaborate. We
ought to figure out what the list of things is that would do the best job of advancing over the years this idea of education as fundamental right. The prescriptions ought to be based in research, but where the research is lacking, we ought to be prepared to take a leap of hope.

Go back to the pollution example. The day, metaphorically, the Clean Air Act was adopted in 1970, all the automakers in Detroit, and all the electric utility companies said, "This is just a disaster. This will end the world as we know it. We don't have the technology to clean up the air this way. It will bankrupt us." But there was a leap of hope that we could do it anyway, and that by having high aspirations, we could drive the technology. We would drive investments, we would drive innovation, and in fact, change would happen.

It's worked pretty well—not without repeatedly tweaking the statutory framework, but it's working pretty well. We're in that same day with respect to education, but we're not doing it very well. But it's the same iterative process of aspiration dragging along the science as well as the practice. And I think that's what we need to be about.

Let me just say in conclusion that while this talk has been primarily about the plumbing as I call it, that's just because that's who I am. My concern and the reason that Gary Orfield and I started the Civil Rights Project at Harvard, which he has now moved to UCLA, and the reason that I've started the Chief Justice Warren Institute at Berkeley Law, is the sense that the civil rights community does not have as much intellectual capital for waging these battles as it needs—that whether the issue is how to amend No Child Left Behind, or how to redesign school finance in California, if the representatives of these communities are not at the table with ideas, then we're very unlikely to get the results that we need. My challenge to all of you in academia is that you don't have to be advocates to make a difference, but you do have to be prepared to try to appreciate the struggle in which the advocates are engaged, and harness your excellence so that with them, you'll be vigorously engaged in what is surely the most important civil rights issue of our day.