Developments in U.S. Education Law and Policy

Goodwin Liu

I am very honored to be here this afternoon as a guest of Daito Bunka Law School and your distinguished dean Mr. Koji Ono. I bring you a warm greeting from Boalt Hall School of Law at UC Berkeley, where we have enjoyed for many years the beneficial relationship with your law school. I thank you for your hospitality and for your interest in my lecture today.

At Boalt Hall, my principal areas of teaching and research are constitutional law and U.S. education law and policy. I am interested in these areas because they lie at the dynamic intersection of law, public policy, politics, and social values. Today I would like to offer you an overview of current developments in U.S. education law and policy, especially as it concerns equality of opportunity.

My lecture will begin with some background to acquaint you with the unique features of the American educational system. I will then discuss developments in the law of equal educational opportunity since the U.S. Supreme Court's famous 1954 decision in *Brown v. Board of Education.* Next I will examine the goal of equal educational opportunity through the evolution of federal education policy in recent decades, which has opened new and interesting possibilities for governance and organization of the U.S. educational system. I will then identify what I believe to be the main questions and tensions at the forefront of American education policy for the foreseeable future.

In providing you this account, my lecture may sound factual or descriptive in its tone, but it is of course my own interpretation of the current situation and its historical context. Other scholars may disagree with my interpretation. This is no surprise, and I hope you will find that my lecture raises as many questions as it answers.

Finally, Dean Ono has asked me to offer some thoughts on American legal education. Although I have been a law professor only a few years, I am happy to share with you my observations of the key challenges facing our system of legal education, including the challenges we face specifically at Boalt. Perhaps my observations will provide some useful points of comparison with legal education in Japan.

I. Key Features of the U.S. Education System

Like other industrialized nations, the United States has a well-developed system of public education from kindergarten through the twelfth grade. Public education also extends to the college and university level in the form of institutions like UC Berkeley. Although there are many interesting legal and policy issues associated with American higher education, I plan to focus today on primary and secondary schools. There are many ways to describe the U.S. public school system. I find it useful to describe the system in terms of three key features: decentralization, diversity, and inequality.

First, from the beginning of its historical development, the American education system has been highly decentralized in its governance, administration, and sites of policymaking. There are nearly

100,000 schools in the United States, 15,000 school districts, 50 state departments of education, and one federal department of education. These levels do not exist in a strict bureaucratic hierarchy; instead, each level of administration has significant policymaking authority. Thus it is misleading to speak of the American education system as if it were a single coherent "system" as you have in Japan.

The reality is that the American "system" has historically been a collection of decentralized policy-making units, with multiple sites of democratic authority even within a single layer of government. For example, each school district is typically governed by an elected school board and by an appointed superintendent, each of whom may have different policy priorities. At the state level, the head of the state department of education may be elected separately from the state governor, as in California, and this also carries potential for conflict in setting education priorities.

The decentralization of the American system is thought to have two main virtues. First, decentralization of educational policymaking fosters public support for local schools, on the theory that people are more likely to finance and participate in institutions over which they have some control. Second, decentralization enables innovation and experimentation in curriculum, teaching, and other aspects of educational practice. Education is regarded as a service with no single perfect technology of production. Instead, it seems important to tailor practice to local circumstances and to resist approaches that assume "one size fits all."

Yet the main drawbacks of decentralization are equally apparent. First, it is very difficult to achieve coherence and sustainability in education policy. With multiple actors making policy at multiple levels, it is not easy to chart a set of priorities and then implement them continuously over several years. The result is a tendency of schools and school districts to try new education fads, to change direction with undue frequency, or to adopt a superficial, short-term perspective on problems that require deep, long-term solutions. Second, although decentralization facilitates variation, it also produces inequality. Some communities have greater resources than others to educate their children, and without a central mechanism to ensure equity, such inequalities will persist unchecked. I will say more about this in a moment.

In addition to decentralization, a second principal feature of the U.S. educational system is the remarkable diversity of students it serves. This diversity is an outgrowth of the historic commitment of public schools to be "common schools" that serve all children together—rich and poor, black and white, native and immigrant. Today, the student body of American public schools is 61% white, 17% black, 16% Latino, 4% Asian, and 1% Native American. One out of six children lives in poverty; one out of 11 has a physical or mental disability, and another one out of 11 has limited proficiency in the English language. By the middle of this century, there will be no ethnic majority in the public schools. In some states, including Texas and California, this is already true. California's enrollment is today 36% white, 9% black, 43% Latino, and 11% Asian. The heavily immigrant student population speaks

several dozen languages.

As you can imagine, this diversity presents both interesting opportunities as well as serious challenges for the public schools. The ideal of the common school as "the great equalizer" of society has always existed more as theory than as fact, due in no small part to the way decentralization of authority, sanctioned by law, has entitled wealthy communities to create and protect educational privilege. The resulting inequality has many dimensions. Materially, there are wide differences in the amount of money spent per pupil in schools across the nation. In addition, black, Latino, and poor students are racially and socioeconomically isolated from their more advantaged white peers. They are more likely to be taught by teachers with less experience and less training in their subject matters. On average, black and Latino twelfth graders read and do math at the level of white eighth graders. Poor children trail their middle-class peers by a similarly wide margin. These disparities are referred to collectively as the "achievement gap."

II. Law and Equal Educational Opportunity

For the past 50 years, disparities in educational opportunity have been the central preoccupation of American education law. The most significant point of reference is the U.S. Supreme Court's 1954 decision in *Brown v. Board of Education* ending racial segregation in public schools. For many decades, this practice of local and state school officials had consigned black, Latino, and some Chinese children to dramatically inferior schools, socially and culturally isolated from the mainstream of society. In prohibiting segregation, the *Brown* decision interposed federal constitutional standards and judicial authority to displace the traditional discretion of states and school districts.

But the legacy of *Brown* in public education has been mixed at best and disappointing at worst. From the beginning, the basic holding of *Brown* was fiercely resisted by state and local authorities, who developed a multitude of ways to continue the practice of segregation without explicitly adopting it as policy. For an entire decade after *Brown*, the public schools remained as segregated as they were in 1954. Only after 1964 did the situation improve, when Congress and the executive branch began to use administration regulations to compel local districts to integrate their schools.

In addition to resistance, *Brown*'s success was limited by ambiguity concerning the scope of the decision itself. *Brown* required schools to end their policies of segregation. But did it require schools to go further and adopt affirmative policies of integration? The question was important because in many school districts, a combination of fear, habit, and residential segregation kept minority children apart from their white peers, even after the end of legalized segregation. During the late 1960s and 1970s, the federal courts were willing to order remedies that required school districts to ensure racial balance in their schools, even if it meant transporting students some distance away from their homes. Al-

though some communities complied without incident, in many places the judicial orders spawned additional resistance. White families seeking to avoid integration moved farther and farther away from minority communities in urban areas and established new suburban school districts beyond the reach of court-ordered desegregation. Today, predominantly white middle-class suburban schools maintain significant educational advantages over the urban schools attended by predominantly minority and poor children.

Thus *Brown*, to many observers, reveals the *limitations* of federal judicial intervention in bringing about equal educational opportunity at a practical level. Nevertheless, *Brown* motivated a variety of legislative and judicial efforts to improve equality in education beyond the context of racial integration. These efforts have benefited girls, children with disabilities, linguistic minorities, immigrants, and other historically marginalized groups.

The limited success of *Brown* in changing the social composition of public schools caused some reformers to focus on *material* inequality in the educational system. Vast differences in school funding have historically resulted from the commitment to decentralized governance. Until the 1980s, the majority of funds supporting public schools came from local sources, primarily the local property tax. State funds supplied around one-third of education funding, while the federal government has always provided a very small share, less than 10%. The heavy reliance on local taxation meant that different communities had very different capacities to support education. Some wealthy districts could raise more than twice as much money per pupil as poor districts, applying less than half the tax rate. As a result, poor children were, and still are today, often found in poor schools.

This system of local school finance was challenged under the U.S. Constitution in a 1973 Supreme Court case called *Rodriguez*. The issue presented a direct conflict between equality of opportunity and the freedom of parents and local communities to devote more money to the education of their children through local taxation. In a five-to-four decision, with multiple opinions covering more than 130 pages, the Supreme Court upheld this system of school finance, describing it as unfair but not unconstitutional. Although the legal reasoning is quite extensive, I believe there is a sense that the Court reached its conclusion less out of a conviction that the clearly unequal finance system was consistent with the Constitution and more out of concern that the Court, as a *judicial* not policymaking institution, could do nothing about it. In its opinion, the Court worried about its own lack of expertise in matters of local finance and expressed reluctance to disturb the education funding systems in virtually every state without a clear, better, and workable alternative.

The *Rodriguez* decision largely eliminated the possibility of court-ordered constitutional protection against unequal school funding. Since 1973, advocates for disadvantaged children have turned their attention to the state courts, relying on the protections of each state's own constitution. This shift from federal to state litigation has been somewhat successful. Unlike the federal Constitution, state constitutions typically include explicit language establishing the government's duty to provide educa-

tion. In approximately half of the 50 states, state supreme courts have interpreted state constitutions to invalidate unequal systems of school finance. This type of litigation remains active in many states today.

Interestingly, the shift from federal to state courts has been accompanied by a shift in the conceptual framework defining the educational obligation that the state owes to its schoolchildren. Whereas the *Rodriguez* litigation was based on a principle of *equality*, the most recent state court litigations have invoked the concept of *adequacy*. The idea of adequacy suggests that the state is required to provide some minimum level of education to everyone, while allowing communities, if they are willing and able, to provide better education above that minimum level. The emphasis on adequacy instead of equality is understood to have three important advantages.

First, it enables litigants to focus attention on the worst conditions in the public education system —*i.e.*, dysfunctional schools that clearly fail to provide an education that could reasonably be called adequate. Second, because adequacy, in contrast to equality, does not imply a significant leveling of the educational advantages enjoyed by more wealthy families, it is a less threatening and more politically achievable objective. Third, the concept of adequacy has some basis in the text of state constitutional provisions that address education.

But the shift from equality to adequacy has potential weaknesses too. Adequacy is inherently difficult to define, and there is a worry that the standard will be defined too low by state courts and legislatures. In addition, adequacy does not guarantee fairness in competition for employment, higher education, or other arenas where the relative not absolute quality of educational preparation is a relevant factor. An adequate education may enable all children to obtain employment, but the best jobs will still go to those with the greatest educational advantages. In other words, adequacy is a retreat from strict equality of opportunity.

There is some evidence that school finance litigation in state courts has reduced funding disparities between school districts within some states, mainly by raising the spending of the poorest districts while leaving the wealthiest districts unchanged. However, massive funding disparities still persist *across* states; indeed, variation in school spending from state to state is far greater than variation within states. Moreover, there is not yet strong evidence that funding reforms have improved student achievement. The basic question of whether spending additional money on public schools will improve educational outcomes continues to be vigorously debated by education researchers in the United States. The emerging view seems to be that additional money by itself is not a complete solution; it must be coupled with efforts to improve efficiency and accountability in how the money is spent.

Ⅲ. The Evolution of Federal Education Policy

The concept of accountability has become quite prominent in American education policy over the past two decades. This is a major development that is changing the governance and orientation of policy in public education, with important implications for the three features of the system I mentioned at the beginning: decentralization, diversity, and inequality.

To observers who are familiar with nationalized systems of education as in France or here in Japan, it may be surprising to learn that American public schools have historically been unguided by any national or even state-level standards defining what students must learn and how well they must learn it. These decisions have traditionally been left to local discretion and policymaking. Without centralized standards, there is no framework to test students and hold schools accountable for their performance. Interestingly, the lack of standards has not meant that American schools teach dramatically different things from place to place. Informal mechanisms of standard-setting, such as college entrance requirements and widely used textbooks, generate some uniformity in educational practice even without formal standards. But from a governance perspective, the absence of official standards is an obstacle to creating meaningful systems of school accountability. It is hard to hold students accountable without first establishing what they are accountable for.

This began to change in the 1980s as a result of three factors. The first was an emerging awareness of the mediocre standing of American student achievement in international comparisons of math and science. The concern was forcefully stated in a highly publicized 1983 report called *A Nation at Risk*, which characterized neglect of the American education system as "an act of unilateral disarmament." As the analogy suggests, the concern about international competitiveness was motivated in part by mid-1980s Cold War ideology.

Second, and related, the American business community, feeling the increasing pressure of global competition, voiced the need for better-educated workers able to adapt to the emerging technology- and information-based economy. Business leaders insisted that public schools adopt a stronger "results orientation" consistent with the values of private enterprise.

Third, among civil rights groups and advocates for disadvantaged children, there was increasing concern that the achievement gap remained too wide. As a result of social interventions in the 1960s and 1970s, the gap had narrowed significantly between 1970 and the mid-1980s. But by the late 1980s, the progress had stalled. In the early 1990s, black and Latino students were reading and doing math and science at a level one-half to one full standard deviation below the level of white students. The confluence of these factors produced strong political momentum to define clear educational goals at a national level and to hold schools accountable for achieving those goals. This reform agenda is often referred to as "standards-based reform." What is interesting is that standards-based reform is an agenda with both liberal and conservative support. Liberals are interested in uniform standards

with accountability to ensure that disadvantaged groups are not shortchanged by low expectations in the public schools. Conservatives like it because it promises a greater attention to results in public education, with economic benefits in the form of increased productivity and competitiveness.

On the other hand, some liberals and some conservatives are skeptical of the approach. Some conservatives worry that standard-setting inevitably involves greater centralization of education policy, thereby weakening local control. And some liberals are concerned that the new *results* orientation diverts policy attention away from inequalities in *resources*. They fear that poor educational performance by disadvantaged groups, as measured against uniform standards, will be interpreted not as an indication of unequal or inadequate resources, but instead as confirmation that poor or minority children are simply incapable of learning or have inferior ability.

For now, however, it appears that the supporters of standards-based reform have the upper hand. In 1990, the first President Bush, together with the governors of all 50 states, developed the first-ever set of "national education goals." In 1994, President Clinton continued the agenda by signing legislation to help states develop standards in reading, math, and science, as well as assessment and accountability systems to implement the standards. Most recently, in 2002, the current President Bush signed new legislation called "No Child Left Behind" requiring states, as a condition of receiving federal money, to adopt reading, math, and science standards defining what each child should know and how well they should know it.

Moreover, under the No Child Left Behind legislation, states must test students against the standards every year from grade 3 to grade 8 and once more between grades 10 and 12. Every school is assigned annual performance targets. Failure to meet the targets triggers remedial intervention and support by district or state officials. Repeated failure to meet targets leads to punitive consequences, including dismissal of the teachers or the principal, or closing the school entirely. The central innovation in the statute is the requirement that schools establish and meet performance targets for every major subgroup of students enrolled, not just for all students taken as a broad average. The subgroups are defined by race, ethnicity, poverty, physical or mental disability, and limited proficiency in the English language. The objective is to ensure that schools evaluate, and are held accountable for, the performance of every subgroup—with the ultimate goal of closing achievement gaps and bringing all students to a uniform standard of academic proficiency.

This legislation is, in my view, a positive step forward in bringing coherence and improving equity in the American education system. In some ways, however, the legislation does not go far enough. Academic standards remain the prerogative of states to determine exclusively, without federal direction. This means that standards can and do vary significantly from state to state. Yet there is no reason why we should not expect American schoolchildren to learn reading, math, and science to a uniform *national* standard of proficiency. The development of national standards and suitable assessments remains a policy imperative. Further, we cannot hope to educate American children to high

national standards without remedying the vast disparities in school resources from state to state. And the federal government cannot do this if it continues to contribute only 10% of every dollar spent on education nationwide. Equality and adequacy of opportunity require a more substantial federal role in school finance.

Ⅳ. The Challenges Ahead

As the new program of accountability evolves, three questions appear on the horizon of education policy. First, what accommodation will be reached between the historic decentralization of the education system and the increasing centralization of standards-based reform? It is important to note that, in addition to standards, the most powerful concept in education policy debate over the past two decades is *choice*. Proponents of choice argue that efficiency and accountability are best achieved by putting greater control of education directly into the hands of parents, primarily by enabling them to choose which school they want their children to attend instead of having the government assign children to specific schools. Thus, one prominent idea is to have the government provide each child with a voucher redeemable at any school, including private or religious schools. This, as you might imagine, is very controversial. I mention the concept of choice to show that there remains a deep tension between centralization and decentralization in U.S. education policy. In many ways, it reflects the classic tension in public policy between market-driven versus regulatory reform.

Second, will equal educational opportunity continue to be a fundamental aspiration of the U.S. education system? Despite the common rhetoric of equal opportunity, there is no straightforward practical case to be made, in terms of international competitiveness, for truly educating *all* children to a high standard. One could imagine that the United States will remain an economic and military superpower by affording a high-quality education only to a small subset of children. Indeed, this is exactly what we have been doing for the past several decades. It is possible that the social costs of unequal opportunity—in terms of crime, joblessness, or welfare payments—will eventually become severe enough to motivate greater equality. But for the foreseeable future, a genuine commitment to equal opportunity will likely rest not on practical considerations, but on more basic notions of justice and fairness.

Finally, what is the purpose of education? Or, more to the point, what should be the purpose of education? The current standards movement appears to be motivated by a mix of concerns, with national economic imperatives perhaps the leading factor. Less prominent in the policy debate is the idea that education should cultivate civic virtue, personal development, and human dignity. Where public policy decides to place its emphasis has far-reaching implications for curriculum, assessment, governance, and the organization of schools. Moreover, because public schools have always been a direct reflection of social values, the purpose of education goes to the heart of defining who belongs to

our society and what it means to be American.

V. A Few Thoughts on American Legal Education

Dean Ono has asked me to provide a few thoughts on American legal education. I must caution that my observations are limited by my exposure to only a small subset of elite law schools. The institutions I know the most about are Yale, where I studied, and Boalt, where I teach. I will, however, try to offer a more general perspective.

Four issues have seemed especially important in the limited time I have spent in academia. The first is the relevance of legal education to the practice of law. It is perhaps a common assumption in the United States that the primary function of law schools is to train lawyers. But a few casual observations are enough to raise some doubts about this view. For one thing, the faculties at top schools are not generally populated by people with extensive experience in legal practice. Many have never practiced at all. Moreover, there is a noticeable trend, at least at Boalt, of increasing academic specialization. This is reflected in the high frequency with which entry-level faculty candidates are now equipped with Ph.D.'s in other disciplines, especially quantitative social sciences.

This trend toward greater academic specialization may be exciting from a scholarly perspective. But what is its effect on the training of lawyers? I often hear complaints from alumni, judges, and practicing lawyers that the legal academy is engaged in problems that have no relevance to the real-world practice of law. Some of this sentiment simply reflects a difference of professional culture. But there is, in my view, a grain of truth in it. It is enough to make me believe that we have to be vigilant about the gap between academia and practice.

A second and related issue is the content and organization of the curriculum. Boalt, like most other schools, requires its students to take the traditional subjects: torts, contracts, property, criminal law, civil procedure, and constitutional law. But we do not require students to engage in clinical work or to undertake interdisciplinary studies. This seems somewhat odd because one of the most important roles of lawyers in society is to function not as a technician, but as a general problem-solver using a broad range of knowledge and skills. We do a good job training students with respect to legal reasoning. But the best lawyers do not fulfill their potential by exercising just one muscle. They are instead all-around athletes, and we ought to consider whether the curriculum prepares our students to play this role.

Third, the affordability of top-quality legal education presents a special concern for Boalt. Over the past five years, tuition at Boalt has doubled, from around $12,000 to well over $24,000 for California residents. For out-of-state residents, tuition is over $33,000. In contrast to our peer institutions, Boalt draws a relatively large share of students who grew up middle-class or even poor. Many are from

immigrants families; many are the first in their families to attend law school or even to graduate from college. Having studied at Yale, where the vast majority of students are well-off, I have been impressed with the upward mobility and genuine opportunity that UC Berkeley provides. But this mission of broad access to elite public education has been endangered by persistent budget cuts and disinvestment by the state of California.

The fiscal environment requires new models of financing legal education in order to sustain broad access. One critical reform must be an increase in the funds we raise from alumni, who historically have not donated much money to Boalt on the assumption that they already support Boalt by paying taxes. More and more, Boalt will have to emulate its private competitors in establishing among its students and alumni a responsibility of private stewardship for the institution from one generation to the next. Ironically, this "privatization" is essential to maintain the distinctive *public* mission of Boalt Hall as a beacon of opportunity and social mobility.

Finally, the internationalization of legal norms and legal culture is an unmistakable trend affecting almost every area of legal scholarship. The use of foreign authority in American constitutional law is a judicial practice that has been very controversial in recent years. The U.S. Supreme Court has cited foreign authority in cases limiting the death penalty and invalidating criminal laws against homosexual sodomy, among others. The resistance to this practice is difficult for me to grasp, since the United States can hardly claim to have a monopoly on wise solutions to common legal problems faced by constitutional democracies around the world.

But here is where law schools can make a difference, since legal education plays an influential role in shaping legal culture and professional norms. If law schools incorporate more and more international dimensions to the study of law, then our students will take with them this broader perspective. The idea is not unlike the philosophy behind foreign exchange or "year abroad" programs offered by many American colleges. Law schools should also reflect the pedagogical perspective that we can learn much about ourselves if we learn much about others. For this reason, I am delighted to share my perspectives with you today and to continue this beneficial relationship between your distinguished institution, Daito Bunka School of Law, and Boalt Hall at UC Berkeley.