

RISA GOLUBOFF: Thanks so much for being here, Kimberly. So I thought-- could you start just by telling us about how this case, *Rodriguez*, how it began?

KIMBERLY ROBINSON: So the case began with a parent who was concerned about the education they were receiving in a district called Edgewood. And so in Edgewood, this district was receiving less funding than a neighboring district called Alamo Heights.

So the parents got together and said that this should be a violation of the federal constitution. And we're going to find a lawyer to go to court about it. So they ultimately sued the state of Texas, and argued that the disparity in funding violated the federal equal protection clause.

RISA GOLUBOFF: So can you give us a sense-- like, how big a gap was this? It was a big gap, right, between the funding that they were receiving and the funding the Alamo Heights district is receiving?

KIMBERLY ROBINSON: Yes. So it was a substantial gap. And it was a substantial gap because of how schools are funded. So schools are funded, as some people may not know, through, largely, property taxes. The local contribution is raised when you tax local property.

And so Edgewood had a fairly low property tax base. Neighboring districts such as Alamo Heights had a much higher property tax base. And so even though Edgewood would tax at a much higher rate, they yielded significantly less for their schools. And so their schools were significantly underfunded.

RISA GOLUBOFF: And what were the constitutional claims?

KIMBERLY ROBINSON: The focus of the case was twofold. So first, they tried to get the court to agree that wealth is a suspect class under the equal protection clause. And then second, they argued that there is a fundamental right to education.

LESLIE KENDRICK: Can you say a little bit more about wealth as a suspect class? What does it mean to be a suspect class?

KIMBERLY ROBINSON: So if something is a suspect class-- so, for example, one of the most well-recognized suspect classes is race. So generally, the court will say, if you base a decision on race, then a decision that the government makes based on race is subject to something called strict scrutiny.

And what that means is it's just the highest level of legal scrutiny that a court can give to what the government is doing. You have to show that you have a compelling government interest for taking action, and that the action is narrowly tailored to achieve that compelling interest.

And so it requires the government to look for alternatives to considering the suspect class, to make sure that they're not unduly burdening particular groups. So there's an entire body of case law that focuses on what strict scrutiny would mean. So what the families in Edgewood wanted was for the disparities based on wealth to get the court's highest scrutiny.

RISA GOLUBOFF: And did the court give it that scrutiny?

KIMBERLY ROBINSON: It did not. The federal district court ultimately did agree with the plaintiffs, but the US Supreme Court did not and rejected wealth as a suspect class.

RISA GOLUBOFF: And how did the argument about the right to an education go?

KIMBERLY ROBINSON: So the lower court agreed that there is a federal right to education. However, the United States Supreme Court ultimately held that there was not a federal right to education.

RISA GOLUBOFF: And does that-- I mean, when you think about a federal right to education, does the Constitution say, the federal Constitution say there is a right to an education, or that's located in the equal protection clause? What did that argument look like that they were trying to convince the court of?

KIMBERLY ROBINSON: So they were trying to convince the court that there was an implied right to education. So the Constitution does not mention education, and it does not include it as a federal congressional power. So it is not one of the enumerated powers.

However, what the plaintiffs were trying to convince the court was that there is a fundamental right to education that is implied in the rights to free speech and to vote. So what the court said is basically, the federal courts are not the place to decide these issues of funding disparity within the state. And they gave a number of reasons for that decision.

One of the reasons was that they did not want to interfere in what the states were doing. They wanted to leave the states to decide how education is funding. Second, they said that there are a number of issues that are deeply contested within the litigation, such as does money matter for education? And so because of that, they wanted to leave it to the educational experts and not judges how to decide that issue.

RISA GOLUBOFF: Does money matter?

KIMBERLY ROBINSON: There's been a lot of research about that issue. So social scientists at the time, and for decades after, were debating, does money matter? And that is something that was litigated heavily in the state courts, where litigation then moved after *Rodriguez* was decided. And the research consensus that now exists is that money spent well matters.

And so you might think, that can't be that much of a surprise. And did we need decades of research for that? But really, you had to establish a strong correlation between how funding is spent and the outcomes. And so there have been many studies that show there is a significant impact of funding on outcomes.

LESLIE KENDRICK: So you mentioned that after this case, some of these questions do move to state courts. Tell us a little bit about what the aftermath of *Rodriguez* looks like.

KIMBERLY ROBINSON: So there's been what a lot of scholars call waves of litigation after *Rodriguez*. So first, plaintiffs continue to focus on funding disparities. And so they focused on issues of one district having more funding than another district.

And those were called equity cases. Generally, there were some of those that were successful, but more often they were not successful. In part, because the courts really struggled with how much of a difference rises to the level of a violation of the state constitution.

Second, they started to focus on state constitutions and adequacy litigation. And so adequacy litigation says each child should get an education to enable the child to achieve certain outcomes. And generally, those outcomes were defined by state-developed standards.

So those were the two types of litigation that came out. Often those cases and theories of litigation were merged into a single lawsuit. The adequacy suits were far more successful than the ones that emphasized equity.

LESLIE KENDRICK: So I'm just thinking, I grew up in Kentucky, and around 1990, the Kentucky educational system was declared unconstitutional under the state constitution. And that was a really big development within Kentucky. And I don't know-- I wasn't paying attention at the time, I don't know if that was an equity suit or inadequacy suit, but it was certainly it's a state constitutional suit that was about funding disparities in my part of Kentucky, in eastern Kentucky, this very underserved area with very low tax base and that is quite different from Lexington or Louisville

or more developed areas. And the idea was to try to provide more equalized funding. So I guess that was one of those suits that happened while I was in school.

**KIMBERLY
ROBINSON:**

Yeah. That's called the Rose decision. And actually, a number of courts around the country copied that decision. So the court in Rose really gave some very clear instructions about what education should be provided to all students in the state of Kentucky, and decided that the entire system should be struck down and the legislature should start again.

**LESLIE
KENDRICK:**

So from your standpoint as an educational expert, those types of cases, have they made a big impact in terms of the quality of education received? I got to say, as a student, I don't know that I could feel that much difference from eighth grade to ninth grade when this change happened. But what's the take from educational experts on that litigation?

**KIMBERLY
ROBINSON:**

So it takes quite a while for the legislature to redesign a system and then implement it. So it's not the kind of thing you're going to see grade to grade. However, the consensus is that litigation had a significant impact, but it hasn't ended the problem.

So the significant impact has been that in a number of states where litigation has been successful, they have started to reduce funding gaps in how schools are funded. However, still, significant funding gaps exist, such that you have continuing litigation about those funding gaps. Similarly, there has been successful adequacy litigation, where state courts have required the legislature to reexamine the education system and actually link the education system to the outcomes that are designed for the education system.

What's interesting about that is that many education systems have not been linked to the outcomes they're designed to achieve. Instead, what comes out in litigation about school funding is that often, the amount of funding that's provided is actually merely the product of political bargaining. It is not about how much it costs to educate kids successfully, it is merely the amount in the budget that's available for education, and then the lawmakers decide how to divide up that amount in the budget between the districts.

What the school funding litigation forced lawmakers to do when courts would order them to do so is to examine, what does it cost to educate children, and then design a funding system to provide that amount of funding. So that was a significant breakthrough. What hasn't happened, however, is that there is no uniformed mechanism in the country to address these disparities. And so you have some states where there is a robust right, and other states where a child goes to court, and the court says, this is entirely at the discretion of the legislature, and

we won't interfere.

RISA GOLUBOFF: And is that distinction because some states have a right to education in the Constitution and others don't, or they all have them, but for some, it's clearer what the Constitution requires, or is it about the political will? Where does that variety of state responses come from?

KIMBERLY ROBINSON: So the variety is really not in the state constitutions, because all the states guarantees some form of education. The adjectives that are used in the state constitutions vary. So some say thorough and efficient, some say high-quality, but it's in the state constitution at some point.

What differs is how the Supreme Court in each state defines it and defines those terms. So some courts will find thorough and efficient to mean a robust system of education, and others will say thorough and efficient is whatever the legislature says it is. And so you get a wide variety of rulings on what the exact same terms mean.

RISA GOLUBOFF: Are there patterns? Are there regions that read them similarly, or certain kinds of states, or is it really just kind of apparently random?

KIMBERLY ROBINSON: So that's a great question. It's not random. There definitely has to, however, be the political will to change the system.

So what you see is a number of states have had courts order the legislature to change the system, and the legislature will push back on the court. And so then the question is, what happens? Either the court will continue to push the legislature and start issuing things like fines to the legislature, or sometimes the courts will back off if they get significant political resistance to making reforms.

LESLIE KENDRICK: So you're suggesting that this patchwork state approach has not really solved the problem, for certain in states where this challenge hasn't been taken up, but even in states where it has been something that courts have dealt with, it's not really completely fixed the problem. And your forthcoming book is called *A Federal Right to Education*, So I wonder if you could say more about what you think the next steps are and how a federal right to education might figure in those.

KIMBERLY ROBINSON: Sure. So litigants, basically, who have been in state court have decided that state court is not going to get them to the results that they want. So we've had decades of litigation since *Rodriguez* where states are not fully implementing what state constitutions seem to guarantee.

And so scholars since *Rodriguez* have been arguing that there should be a federal right-- that there should be a federal right to education. However, now, we have litigation actually back in federal court, where litigants are saying, we can't get relief in state court, so we have to go back to federal court. So there are several theories that are being put forth in federal courts. But the basic idea is that every child in the United States should have some basic guarantee of a high-quality education.

LESLIE

KENDRICK:

With the folks who are bringing suits in courts-- I understand that there are a variety of different pending court suits in federal courts at this point-- what's the strategy with regard to *Rodriguez*? Is this a strategy that requires courts to over-- ultimately will require the Supreme Court to overrule *Rodriguez* to go forward, or are these claims that somehow try to work around *Rodriguez*? And what do you forecast or predict about this?

KIMBERLY

ROBINSON:

So mostly, the cases try to work around *Rodriguez*. They don't generally ask a federal court to overturn a case. First of all, they know that only the Supreme Court can do that. But second, it's just very hard to get the Supreme Court to overturn itself.

And so they come up with different theories for what a federal right to education guarantees. So for example, there's litigation in Detroit that says that children have a fundamental right to literacy. And so they explain what that right to literacy would entail, and that the children in Detroit are not being granted that education. So that doesn't require *Rodriguez* to be overruled. However, if it reaches the Supreme Court, the Supreme Court where likely speak to whether *Rodriguez* should be reaffirmed or overturned.

LESLIE

KENDRICK:

Do you see that as a potential risk of this strategy? Are there folks who are worried about this issue coming back to the Supreme Court?

KIMBERLY

ROBINSON:

There is quite a bit of concern. So when the litigation was begun, the assumption was that there would be a President Clinton in the White House, and that the court would look very different than it does now. And so there is some divide within the litigation community about taking this issue to the Supreme Court and doing some damage by reaffirming *Rodriguez* rather than waiting for a more opportune time before the court.

However, there are some litigants who I've talked to who say it can't get worse than it is now. We have a broken education system. And if the court merely says, we're willing to continue to tolerate a broken education system, then we know where the court stands on this. But some are optimistic that-- some are optimistic that even a conservative court will say the disparities

and low-quality of education that we have in some of our nation's schools fall below some constitutional minimum.

LESLIE

It's interesting that one theme here is kind of what governmental actors own this issue. And

KENDRICK:

there are federalism questions here about federal government versus state, and there are also separation of powers issues, it sounds like both on the federal level and the state level. Is this a place for the judiciary, or is this a place where the legislature?

And you have even some state courts, once *Rodriguez* has sort of sent this their way, they say, oh, no, no, no, that's not us. That's the state legislatures. And it seems like there's a really complicated matrix here of potential actors, and it has to be hard to know which ones to focus on. And it sounds like over time, it's become clear certain ones have been sort of more foreclosed, but even then, you have people coming back to federal court. And it seems like a long history of trying to figure out what governmental actors can provide redress, and governmental actors also working out what they think their responsibilities are.

KIMBERLY

Yes. And this is definitely one of the issues that the court in *Rodriguez* was focused on. It

ROBINSON:

really was concerned about stepping into the school funding debate and then having litigation in all 50 states. So one of the quotes from *Rodriguez* is very much about we can't imagine litigation that would have a bigger impact on federalism than a case that could end up with litigation against all 50 states happening.

And so the question is, what do we make of that? The fact that we have such broken systems of school funding and that you could end up with litigation all 50 states, is that evidence of a need to keep the issue in the states, or is that evidence of a need for there to be federal intervention? Because the states are neglecting the needs of particularly, poor and minority students in the states.

And so that's a issue that people disagree about. Many say, no, we should continue to allow the laboratory of the states to try and address this issue. However, what I argue in my work is that the laboratory of the states has failed to get us where we need to go, and are we going to continue to sacrifice generations of children at the altar of the laboratory of the states? I just think we should not do that.

RISA GOLUBOFF: And that's why the need for additional resources in low income school districts is, my sense, you correct me if I'm wrong, is why people talk in education about equity rather than equality.

Can you say a little bit about those two terms?

**KIMBERLY
ROBINSON:**

Absolutely. So equal education opportunities sort of used to be the phrase that was floated around in terms of ensuring that all children get access to the school building. So equal education opportunity was sort of born when we were focused on there being white schools and black schools.

However, once you began to open the schoolhouse doors, what we began to see is that even if you were in the same school building, you were not getting equal education opportunities. So we developed second tier systems of segregation, such as tracking, where you would have children in the same building, but they were getting very disparate education opportunities. And because of white flight, we now have districts in the same state where children are getting very different education opportunities. And so the goal of equity is to ensure that students who need additional resources receive it, as opposed to equality, which says that we all give children the same thing.

**LESLIE
KENDRICK:**

So your policy proposals focus around the conclusion you said earlier, the states have had a chance to experiment, and their experimentation has failed to address this issue. And we know where the court-- where the Supreme Court stands, although maybe that changes. There are litigants who are working on that.

Your focus is on Congress. But your approach is one that's slightly more incremental. Could you say a little bit more about how that works in practice, and how it might lead us toward educational equity?

**KIMBERLY
ROBINSON:**

Sure. So I actually think that the court could have a significant role in addressing these issues. However, I think Congress has been overlooked as an actor who could move these issues forward.

So the incremental approach that I recommend is that we look at how to define a federal right to education, and then have, initially, a pilot program, and then a program tied to Title I, which is funding for low income children, that would sort of test out the best model for a federal right to education. The idea being that in education, you have this wide array of actors who are all kind of intersecting trying to run the education system, and because of the complex nature of the system, you don't want to simply come in with a mandate that can end up having adverse and negative incentives. And so the goal that I put forward in my work is that the federal government should step in with kind of an incremental approach that builds on the laboratory

of the states as partners to design what every child in the United States should be entitled to.

And then once we build some national consensus about that, then adopting legislation that would embrace a definition that has been tested in some way in the states. And so this would help to get buy-in, help to build political will, because it's something that's done incrementally as opposed to No Child Left Behind, which was this dramatic increase in the federal role without a lot of research and testing behind the components of the law itself. And so we had a big backlash against the federal government being involved in education because there were so many mistakes and errors in the law.

RISA GOLUBOFF: So it's incremental, it's collaborative, and it's evidence-based?

KIMBERLY Yes.

ROBINSON:

LESLIE And can you tell us a little bit more about what it would actually look like? So there's a pilot
KENDRICK: program, and would there be kind of different conceptions of a right to education being tested in different localities or states? How would that work? How would there be a kind of organically-developed conception of a right of education?

KIMBERLY So it could work in several ways. So one, there can be several federal definitions that are
ROBINSON: being tested. Two, states could suggest that their definition actually is the one that should be adopted in broader jurisdictions, and sort of showing how our definition is meeting the needs of disadvantaged students, disabled students, English language learners, sort of ensuring that the diverse array of students in the state are achieving at high levels. And so the idea would be, we are going to look at how our education model in our state is functioning in ways that addresses the needs of all students, and we think that this model would be one that would work in other states.

LESLIE So picking up on whatever successes there have been through a state-based model and
KENDRICK: trying to box those out a little bit, to broaden them and to expand their reach.

KIMBERLY Yes, exactly. So encouraging other states to consider adopting models that have been
ROBINSON: successful in other states. So that's certainly one way to do it.

So you would have, basically, federal funding to incentivize states to adopt this model. So states don't like changing their school funding models. A lot of times in litigation, it will come

out that this legislature hasn't revisited the model in decades. And so they don't necessarily want to change them. So part of what we need are federal incentives to say, let's take a fresh look at school funding and think about how to change it.

RISA GOLUBOFF: So we're almost 50 years from *Rodriguez*. What's your prediction? How much longer is it going to take until you know you're satisfied or there's a sort of consensus that most American children, regardless of income, regardless of where they live, are getting an education that is appropriate to-- that they should be getting, that they're entitled to?

KIMBERLY ROBINSON: You know, honestly, I think it's going to take a fairly significant crisis in our country for people to realize we need to invest more in education. In other words, as we see our education system in rankings slip further and further behind other developed nations, as we perhaps experience further economic recession and we look at the causes of that, that we haven't educated our children well to fill jobs that are existing and that are being developed that require strong backgrounds in STEM and other important skills, then I think we'll realize, oh, the ways that we neglected education actually have some significant impact. Part of the problem with why we don't get education reform is people think about education reform as affecting other people's children. In other words, the people in power, many times, lawmakers, middle class and upper class families don't immediately feel the effect of having really poorly funded schools for low income and minority communities.

However, I think that there is a day of reckoning that will start to occur, and that we're already feeling in many ways that we pay for it in our criminal justice system, we pay for it in additional health care costs, we pay for it in additional social welfare programs. And I think the more that we start to bear those costs, the more people will start to see that, OK, we could have invested x in education, but now we're having to invest x times 5 into the criminal justice system because we didn't have a good education system. So I think it's partly just understanding that we have to address this broken system or we're going-- we're going to pay for it at the beginning, or we're going to pay for it later in life. So I don't know how long that will take. But certainly, I think we're long overdue for a national conversation about it.

RISA GOLUBOFF: Thank you for having that conversation with us here today, Kimberly.

LESLIE Thank you.

KENDRICK:

KIMBERLY Thank you. Thanks for having me.

ROBINSON: