THE WIRE AND ALTERNATIVE STORIES OF LAW AND INEQUALITY

ROBERT C. POWER*

INTRODUCTION

The Wire was a dramatic television series that examined the connections among crime, law enforcement, government, and business in contemporary Baltimore, Maryland. It was among the most critically praised television series of all time and continues to garner substantial academic attention in the form of scholarly articles, academic conferences, and university courses. One aspect

* Professor, Widener University School of Law. A.B., Brown University; J.D., Northwestern University Law School. Professor Power thanks Alexander Meiklejohn and John Dernbach for their comments on an earlier draft of this Article. He also thanks Lucas Csvelak, Andrea Nappi, Gabor Ovari, Ed Sonnenberg, and Brent Johnson for research assistance.

1. Substantial information about the series is available at HBO.COM, http://www.hbo.com/the-wire/episodes#/the-wire/index.html [hereinafter Wire HBO site]. This site contains detailed summaries of each episode. Subsequent references to specific episodes in this Article refer to the season, followed by the number of the episode counting from the beginning of season one, and then the name of the episode. For example, the first episode of season four, which introduces the four boys who serve as protagonists in season four, is The Wire: Boys of Summer (HBO television broadcast Sept. 10, 2006) [hereinafter Episode 4-38, Boys of Summer].


that has intrigued legal academics is that the series contained numerous depictions of law. These include examples of legally questionable searches, evidentiary issues, interrogations, and professional responsibility problems. Some of the most memorable legal aspects involve various forms of inequality.

The executive producer and moving force behind The Wire was David Simon. The series was Simon’s third foray into crime and society in Baltimore.


5. See Drake Bennett, This Will Be on the Midterm. You Feel Me?, SLATE (Mar. 24, 2010, 7:08 AM), http://www.slate.com/articles/arts/culturebox/2010/03/this_will_be_on_the_midterm_you_feel_me.html (discussing courses related to The Wire at Harvard, University of California—Berkeley, Duke, and Middlebury and providing links for courses at several other universities).


7. See Wire IMDB site, supra note 1.

He describes *The Wire* as illustrating the existence of “two Americas—separate, unequally, and no longer even acknowledging each other except on the barest cultural terms.”9 His flip suggestion of a remedy for the increasing segregation of rich from poor is to undo the last thirty-five years, apparently referring to the aggressive capitalism that has increased the gap between the wealthy and the underclass since the mid-1970s.10

In law, we would have to go back at least that far. In the 1960s, progressives and other supporters of economic reform worked to equalize society by increasing public services for the poor. Some groups worked for the enactment of legislation, such as the laws that were part of President Lyndon Johnson’s “Great Society.”11 Others attempted to use the Equal Protection Clause to create a more balanced society, building on *Brown v. Board of Education*12 to require that state and local governments distribute funds equitably to finance public education. That attempt failed in *San Antonio Independent School District v.*...
Rodríguez, a 1973 Supreme Court decision that ended the expansion of equal protection. The Court employed an abstract legal construct—the standard of review—concluding that state and local government decisions about public education (and by implication, other public services) are subject only to the highly deferential rational basis test. The result has been a general abdication of judicial oversight of public services to mandate equality. What had been judicial activism became judicial passivism, and arguably judicial abdication.

Neither of those trips back in time is going to occur, not only because of the space-time continuum, but also because the politics of today are different from the politics of the 1960s, and courts seem even more committed today to a deferential stance than they were in the 1970s. There are ways to correct some of the inequalities of today, however. They would require legal tinkering in some instances, but it would be tinkering that is consistent with existing doctrine. They would also require some more substantial legal course corrections, but those would largely be in areas of state law, which can usually be reformed more readily than federal law.

_The Wire_ reveals much about the unequal society of the 2000s. The show presents an unparalleled, contemporary visual portrayal of an economically distressed U.S. city. The series is clearly fiction, with parts of the plot wholly unrealistic, but the show portrays societal problems with a high degree of honesty. It stands in contrast to the Court’s decision in _Rodríguez_. While that decision was based on an evidentiary record, and there is no reason to question the validity of the facts analyzed by the courts, the Supreme Court’s decision is remarkable for its failure to understand some of the implications of those facts. It is factual, but it leaves out some truths that are sometimes best explored through fiction.

This Article examines _The Wire_ for what it says about inequality in the United States today and what society can do to bring about greater equality. Part I identifies several themes explored over the five seasons of the series—the failure of law enforcement in the inner city, the harsh life and inadequate education of impoverished children in such areas, and Baltimore as an example of inefficient and corrupt city government. Part II reviews the _Rodríguez_ case to consider the extent to which it defined the nature and scope of the Fourteenth Amendment’s Equal Protection Clause in terms of funding and providing public services. Part III returns to _The Wire’s_ three themes to describe in detail how the stories depicted in the series stand as examples of inequality that are particularly corrosive to society. Part IV returns to law, with seven sections identifying possible responses to the unequal society portrayed in the series. The first is a form of alternative history where the muscular equal protection doctrine as prescribed by the Warren Court is left intact. The second considers an option left open by _Rodríguez_: a constitutional right to an “adequate minimum” level of

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14. _Id. at 30-31_.
15. _Id. at 40_.
16. _Id. at 44-53_.

government service. The third suggests a different reaction to Rodriguez, a greater reliance on principles from the 1982 decision in Plyler v. Doe. The fourth again draws on history to consider the principle that “rough equality” remains a constitutional requirement. The fifth section considers whether disparate impacts in the quality of various public services between the inner cities and wealthier communities are legally significant. The sixth and seventh sections explore alternative paths to greater legal protection of equality, state constitutional law, and legislative or common law remedies. The conclusion argues that The Wire reveals the need for legal reform, and the seven alternative approaches to action leave open the possibility of legal reform notwithstanding Rodriguez. Like The Wire, however, the Article recognizes that happy endings are rare and ephemeral. Even if the Court had ruled differently in Rodriguez, it is likely that the Baltimore of today would still be poor, dangerous, under-educated, and badly governed. Law can only do so much to equalize things. But it is necessary to try.

I. THE WIRE: EQUALITY THEMES AND A DISCLAIMER

A. Inequalities Seen in The Wire’s Baltimore

On its face, The Wire was a classic one-hour police procedural drama set in Baltimore that focused on a special detective unit of the city’s police department and several drug gangs on the city’s west side. While the show always emphasized the conflict between the police and the gangs, seasons two through five added secondary plots that provided different perspectives of the crime story. The series addressed many law-related topics, some overtly, some almost inadvertently. Several topics related to equality. The three that still carry the most resonance several years after the last episode aired are the inequalities of law enforcement, public education in the drug-controlled inner city, and the failure of urban government.

One of the major themes of The Wire was that conventional law enforcement and public protection from crime do not exist in neighborhoods where drug dealing takes place. Throughout the show’s five seasons, we see examples of the failure of the police to protect residents or maintain order on Baltimore’s west side. The police are ineffective, patrolling the area intermittently and making occasional drug raids, but neither preventing crime nor connecting with the residents other than as targets or informants. The racial aspect is

18. The series ran five seasons over a six-year span. Season one focused on a police investigation of a gang of heroin dealers. Season two addressed the decline of unions and blue collar labor; season three focused on city politics; season four addressed children and public education; season five considered the state of daily newspapers. See Wire IMDB site, supra note 1 (episodes by season); Wire HBO site, supra note 1 (select About the Show). Margaret Talbot includes Simon’s summary of the seasonal themes in her New Yorker article. Talbot, supra note 9, at 150-52.
underplayed—African-American officers are generally as inept at policing the community as white officers—although most of the public, both drug dealers and law-abiding residents, are African-American.

Several short scenes from one episode in season four show the state of law enforcement in west Baltimore. At his height as a drug lord, teenager Marlo Stanfield reveals himself to be a petty shoplifter by stealing candy from a convenience store.\(^{19}\) The theft is plainly unnecessary, as Stanfield is certainly one of the wealthiest participants in the local drug trade. But, for whatever reason, he prefers to take these small items without paying anything. A security guard spots the theft. He knows who Stanfield is but nevertheless confronts him to complain that Stanfield is disrespecting the guard, although he admits to Stanfield that he doesn’t dare press charges. Several scenes later, Stanfield’s enforcers are watching the guard. By the end of the episode, the enforcers have murdered the guard for the crime of talking to their boss, hidden his body in a boarded-up building, and taken his badge as a trophy. These simple events illustrate several aspects of the inequality of inner-city life. First, the convenience store has to hire security guards; it is dangerous to operate a retail business in west Baltimore. Second, the police have no role here. They are not brought in to investigate the disappearance of the security guard, even though Stanfield is one of their high profile targets, and people in the community must know about his confrontation with the guard. It is unlikely that the police will ever solve the guard’s murder, and they might never know that he had disappeared.\(^{20}\) This is the state of relations between the police and the public. Third, viewers perceive how different all this is from their own world. How many of our neighborhood convenience stores have security guards? In *The Wire*, as in the real world, many city police resources are committed to “red ball investigations” devoted to solving violent crimes that occur in wealthy neighborhoods or threaten the tourism industry,\(^{21}\) and cable television provides

\(^{19}\) *The Wire: Refugees* (HBO television broadcast Oct. 1, 2006) [hereinafter Episode 4-41, *Refugees*].

\(^{20}\) The bodies hidden in the boarded-up houses are a major part of the plot in seasons four and five. We first learn that Stanfield’s gang is hiding the bodies of its victims in condemned, boarded-up houses. Episode 4-38, *Boys of Summer*, supra note 1. The police are baffled that apparently there are no drug-related murders in the area. *The Wire: Home Rooms* (HBO television broadcast Sept. 24, 2006) [hereinafter Episode 4-40, *Home Rooms*]. When the investigative unit first realizes that an unknown number of boarded-up houses contain murder victims, the police department struggles to minimize the public relations consequences through means such as delaying the searches of houses and then declaring the murders the responsibility of previous mayoral and police administrations. See, e.g., *The Wire: That’s Got His Own* (HBO television broadcast Dec. 3, 2006) [hereinafter Episode 4-49, *That’s Got His Own*]; *The Wire: Final Grades* (HBO television broadcast Dec. 10, 2006) [hereinafter Episode 4-50, *Final Grades*]. “Law enforcement” against the drug gangs seems more likely to occur from characters such as Omar Little, a vigilante who robs drug dealers. See Alafair S. Burke, *I Got the Shotgun: Reflections on The Wire, Prosecutors, and Omar Little*, 8 OHIO ST. J. CRIM. L. 447, 450 (2011).

\(^{21}\) The term “red ball” is a Baltimore police term for a high profile, high priority
blanket news coverage of murders and kidnappings of photogenic white children. Meanwhile, the homicide rates in the black neighborhoods of Baltimore and similar cities are stratospheric, yet too many murders are casually investigated and rarely solved.

The series sends similar messages repeatedly over its five seasons: those who live in areas controlled by drug gangs get less law enforcement or other police protection than those fortunate enough to live in wealthier, and generally whiter, parts of the city or the suburbs. The lack of law enforcement and the constant drug traffic outside one’s home makes life one long siege, like living in a war zone.

Season four focused on the lives of four eighth grade boys in west Baltimore. The drug trade remains the central plot, but it is now seen through the eyes of those boys—Namond Brice, Randy Wagstaff, Michael Lee, and Dukie Weems.

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23. See infra notes 346, 377 and accompanying text for statistical information on crime in Baltimore. One of the telling aspects of season five was how clueless the public and even Baltimore Sun reporters were about the crime world of Baltimore. Drug gang leader Joseph “Proposition Joe” Stewart and Omar Little were murdered but went unrecognized and were omitted from the Baltimore Sun’s obituaries. Episode 5-58, Clarifications, supra note 21. They were just more two more dead Black men. Id.

24. This is addressed early in the series when three members of the special police unit that drives the plot (later named the Major Crimes Unit) get drunk and make a late night raid at “the towers,” a housing project where the Barksdale gang sells drugs. The Wire: The Detail (HBO television broadcast June 9, 2002) [hereinafter Episode 1-2, The Detail]. What begins as a threatening show of police authority turns into police violence and mob retribution. Id. The burden of living in a neighborhood in which armed thugs on both sides of the law roam is a repeated theme throughout the series. It is a more frightening inequality of life than the more mundane aspects of living as a member of a minority group in this country, such as finding it harder to get a job or being stared at in upscale establishments (both of which are also addressed in the series).

25. Episode 4-38, Boys of Summer, supra note 1 (introducing the four boys). See generally Georgia Christgau, “These Are Not Your Children”: The Wire’s Eighth Graders and Their Fate
Namond is the son of Wee-Bey, an enforcer for the Barksdale gang who is now in prison. Randy is a charming entrepreneur who lives with a devoted foster mother known as Miss Anna. Michael is a highly intelligent boy who resists the drug gangs and directs his energies to protecting his younger brother, Bug, from his abusive father. Dukie is bright and interested in school but is the only functioning member of a family of addicts.26

The season opens during the summer but soon moves to the beginning of the school year at Edward Tilghman Middle School, when the boys meet their new teacher, Mr. Pryzbylewski, or “Prez.”27 The classroom is a challenge for Prez, as it would be for anyone. Some children want to learn, but others act out or otherwise disrupt their classes.28 One girl slashes another with a razor during class.29 Over a series of episodes, we see Prez making progress in reaching students who want to learn, such as Randy and Dukie.30 But it takes a lot to get eighth graders to concentrate in an environment in which thirteen-year-olds can identify a type of gun by the sound of its shot.31 By the end of the school year, Prez is clearly a better teacher than he was at the beginning, but his job remains a daily struggle. The classes are overcrowded, many of the teachers are uninspired, and there is little discipline.32 The message is that there are not enough good teachers and that many of the good ones have lost the confidence, energy, or strength to make a difference to their students. Teachers are pressured to teach to standardized proficiency tests, even when students show interest in learning more important things.33 By the end of season five, three of the boys


26. The episodes from seasons four and five detailing the experiences of the four boys are discussed in Part III.B, infra, primarily in the text accompanying notes 152-74.

27. Prez served in the Special Investigations Unit, Episode 1-2, The Detail, supra note 24, through The Wire: Slapstick (HBO television broadcast Nov. 21, 2004) [hereinafter Episode 3-34, Slapstick], before being fired from the police department after a series of ill-considered events, culminating in his killing a fellow officer while responding to a police call.

28. Episode 1-2, The Detail, supra note 24; Episode, 3-34, Slapstick, supra note 27.

29. Episode 4-40, Home Rooms, supra note 20. The slashed girl will be scarred for life; her attacker will be placed in a juvenile facility. Id. But there are silver linings according to those around her—the victim was not HIV-Positive, and the juvenile facility is not much worse than the group home in which the attacker had already been living. Episode 4-41, Refugees, supra note 19.

30. See infra note 145.


32. See The Wire: Soft Eyes (HBO television broadcast Sept. 17, 2006) [hereinafter Episode 4-39, Soft Eyes]; Episode 4-41, Refugees, supra note 19; The Wire: Know Your Place (HBO television broadcast Nov. 12, 2006) [hereinafter Episode 4-46, Know Your Place].

33. See The Wire: Corner Boys (HBO television broadcast Nov. 5, 2006) [hereinafter Episode 4-45, Corner Boys]. Prez is angry at being required to teach to the test and resists, and he is warned that the students have to improve their test scores or the state will take over. He gives in and starts
face bleak futures, and only one remains in school.

*The Wire* presents a picture of the police, drug gangs, and schools all operating in the setting of a dysfunctional city. Too many public employees, from elected officials to beat cops, are corrupt. Even more often, honest employees are influenced by the perverse cost/benefit analysis of public service in such a failed city to overlook malfeasance, to engage in fruitless busy work, and to discourage devoted public servants from making a positive difference. *The Wire* is anything but an ordinary television series, but it does present one traditional crime show theme: a small group of honest and hard-working detectives can bring down a drug gang despite a multitude of obstacles. Of course, in most television crime shows, at the end of each forty-two-minute episode, the good guys celebrate as the bad guys go to jail. In *The Wire*, at the end of five seasons, the good guys have brought down one gang, but many of the police officers, including all of the leaders, are forced to resign or are reassigned to dead-end jobs, and the bad guys are just replaced by more bad guys.

**B. An Introductory Caveat**

*The Wire* is not a documentary, although some scholarly commentaries have emphasized its “truth,” sometimes interpreting its failure to follow certain dramatic conventions as proof of realism. It would be a mistake to take it as rote teaching for the test and realizes that all of his progress reaching the students appears to have been lost. Episode 4-46, *Know Your Place*, supra note 32. By the next episode, he has found his solution; when observed by the administration, he dutifully teaches the test material, but as soon as they leave, he returns to the problems that engaged his students. *The Wire: Misgivings* (HBO television broadcast Nov. 19, 2006) [hereinafter Episode 4-47, *Misgivings*].

34. The episodes illustrating the pervasive corruption of government and commercial development in Baltimore are addressed in Part III.C, infra, primarily from notes 209-16.

35. These episodes are also references in Part III.C, primarily from note 219-23.


realistic in all respects, even with “names changed to protect the innocent.” The episodes end with a boilerplate disclaimer: “The characters and events depicted in this motion picture are fictional. Any similarity to actual persons, living or dead, is purely coincidental.” The series includes many realistic characters and confronts numerous social issues rarely addressed in popular fiction. Most of its lessons lie in the themes and conflicts rather than in the specifics.

Moreover, in many details, the realism is underplayed rather than exaggerated. For example, the series depicts very few instances of sexual violence. Simon and the other writers wanted viewers to be able to relate to some of the gang members as somewhat sympathetic characters and felt this would be impossible if viewers connected those characters to sexual violence. For another example, a practical and seemingly trivial fact is that viewers cannot smell the bodies or the garbage on the streets of gangland Baltimore. The physical surroundings look dirty and are disheveled, but in our television rooms, the air smells just as good as it does during sitcoms and cooking shows. At the
other end of the realism scale are some exaggerated characters and actions.\textsuperscript{41} The most notable is Omar Little, the almost superhuman armed robber who targets drug gangs.\textsuperscript{42} Omar fulfills several dramatic purposes (he’s gay, he’s hot, he’s funny, he’s excellent with firearms), but he also reminds us that most of the victims of crime in drug-infested urban neighborhoods are African-Americans, that criminals prey on each other, and that sometimes it is hard to separate the good guys from the bad guys.

The stories are melodramatic and necessarily telescoped in time, but they serve their purpose in revealing some truths about life in west Baltimore. There is little law enforcement, children sometimes become part of the drug trade against their wishes, it is hard to get a good education, and city government appears to be stone stupid. Simon can be criticized for romanticizing drug gangsters and characterizing most police officers as inept. At the end of the series, however, many of the officers have succeeded on some level, in their personal lives, if not in their work.\textsuperscript{43} But almost all members of the drug gangs are dead or in prison.\textsuperscript{44} That may be the most important lesson for the young people of west Baltimore.

II. AN EMPTY GUARANTEE OF EQUAL PROTECTION

Several of the inequalities revealed by \textit{The Wire} support the need for a more aggressive application of the Equal Protection Clause. The failure of law enforcement to protect inner-city neighborhoods as well as it protects commercial centers and higher income areas, and the manifest problems of inner-city public schools and city governments, appear to be candidates for constitutional

\begin{itemize}
  \item \textsuperscript{41} E.g., Episode 5-51, \textit{More with Less}, supra note 6 (tricking a suspect into thinking that he is failing a polygraph examination). Simon refers to this as an “old trick.” \textsc{Simon, Homicide}, supra note 8, at 204.
  \item \textsuperscript{42} Omar is an armed robber who kills and maims to steal money from drug gangs but not innocent people. He follows “a code,” one the central themes of the series. \textit{See}, e.g., Burke, supra note 20, at 450. Omar is the favorite character of many people, including President Obama. \textit{See} \textsc{J. Patrick Coolican, Obama Goes Gloves Off, Head-On}, \textsc{Las Vegas Sun} (Jan. 14, 2008, 2:00 AM), http://www.lasvegassun.com/news/2008/jan/14/obama-gloves-off; \textit{see also} \textsc{Kathleen LeBesco, “Gots to Get Got”: Social Justice and Audience Response to Omar Little, in Urban Decay, supra note 1, at 217.}
  \item \textsuperscript{43} Freamon and McNulty, despite being recently fired from the police department, seem happy in their home lives as the series ends. Episode 5-60, -30-, supra note 36. Daniels also appears to be happy in his new work as a criminal defense attorney. \textit{Id.}
  \item \textsuperscript{44} Most of the prominently featured gang members from season one are dead, including D’Angelo Barksdale, \textit{The Wire: All Prologue} (HBO television broadcast July 6, 2003) [hereinafter Episode 2-19, \textit{All Prologue}]; Stringer Bell, \textit{The Wire: Middle Ground}, (HBO television broadcast Dec. 12, 2004) [hereinafter Episode 3-36, \textit{Middle Ground}]; and Bodie Broadus, Episode 4-50, \textit{Final Grades}, supra note 20. Others are in prison, including Avon Barksdale, Episode 3-37, \textit{Mission Accomplished}, supra note 36, and Wee-Bey Brice, last seen in the prison yard with Stanfield enforcer Chris Partlow in Episode 5-60, -30-, supra note 36.
\end{itemize}
oversight and correction.

If a resident of Baltimore, or perhaps a student at the Edward J. Tilghman Middle School, were to seek an attorney to raise a constitutional claim based on facts such as those depicted in *The Wire*, however, the attorney would find the caselaw extremely discouraging. The U.S. Supreme Court cases since the 1970s have generally not supported such claims.\(^{45}\) The dearth in applicable case law suggests that the promise of equal protection is illusory.

The dominant decision on the topic of equal protection under the law, regardless of socio-economic status, is *San Antonio Independent School District v. Rodriguez*.\(^{46}\) The U.S. Supreme Court in *Rodriguez* was presented with an equal protection challenge to education funding.\(^{47}\) Like most other states, Texas funded elementary and secondary public education largely through local *ad valorem* property taxes.\(^{48}\) Despite allocating additional state appropriations to decrease variations in funding levels among school districts, substantial funding differences remained. Residents of the poorest school district in the San Antonio area brought a class action challenging the state funding system.\(^{49}\) The plaintiffs showed that despite highly burdensome local property taxes, per pupil spending in that district was only a little more than half that of the spending in the most affluent district in the area, even after the state adjustments.\(^{50}\) Evidence at trial established that the plaintiffs’ district was largely Mexican-American and that the comparison school district, which was far better funded, was “predominantly ‘Anglo.’”\(^{51}\) Thus, the plaintiffs seemed to have reasonable arguments that education funds in Texas were allocated on the basis of wealth and in an ethnically discriminatory manner.

Classifications based on race or ethnic origin were then, and remain today, the paradigmatic suspect classifications, which must survive strict scrutiny in order to withstand an equal protection challenge.\(^{52}\) The first sentence of the majority opinion in *Rodriguez* states, “This suit attacking the Texas system of financing public education was initiated by Mexican-American parents whose children attend the elementary and secondary schools in the Edgewood


\(^{46}\) *Id.*; see generally PAUL A. SRACIC, *SAN ANTONIO V. RODRIGUEZ AND THE PURSUIT OF EQUAL EDUCATION* (Peter C. Hoffer & N. E. H. Hull eds., 2006).

\(^{47}\) See *Rodriguez*, 411 U.S. at 6-16.

\(^{48}\) *Id.* at 1, 6-7. Paul Sracic’s book on the *Rodriguez* case provides a detailed historical analysis of Texas school funding. SRACIC, supra note 46, at 13-15.

\(^{49}\) *Rodriguez*, 411 U.S. at 5.

\(^{50}\) *Id.* The district in which the plaintiffs resided spent $356 per pupil per year. *Id.* at 12. The comparison school district spent $594, despite a substantially lower tax rate. *Id.* at 12-13. Sracic provides an explanation of the impact of such funding differences on school programs. SRACIC, supra note 46, at 46-54. The event that apparently triggered the suit was a walkout by high school students over the inadequate facilities in their school. *Id.* at 20.


Independent School District, an urban school district in San Antonio, Texas.53 Viewed in the light of discrimination against an ethnic group, Rodriguez seemed likely to apply strict scrutiny.

The plaintiffs had an additional argument for strict scrutiny review: the fundamental rights or interests strand of equal protection. In a series of cases, the Supreme Court had used strict scrutiny to review classifications that denied a fundamental right or interest (or made its exercise more burdensome).54 Other precedents indicated that public elementary and secondary education was one of the most important government services,55 which bolstered the argument that discrimination in government support of public education was discrimination in providing a fundamental right. These arguments succeeded before a three-judge district court in Rodriguez.56 The arguments did not, however, convince a majority of the Supreme Court on appeal. In a 5-4 decision that exhaustively considered the theory and application of the equal protection doctrine, the Court upheld the Texas financing scheme (and by implication, those of most other states) against equal protection challenges.57 Justice Powell wrote the majority opinion. He had substantial experience and interest in public education,58 which gave him an appreciation of the complexities of both school funding and potential remedies.59 His opinion had the effect of cutting off the expansion of

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58. *See* SRACIC, *supra* note 46, at 64. Justice Powell was highly knowledgeable about public education from his service on the Richmond, Virginia School Board and the Virginia Board of Education. *Id.* Professor Sracic concludes that Justice Powell’s background left him suspicious of the basis of the suit and concerned about the effect of a decision upholding the lower court ruling. *Id.* at 66-68. Powell purportedly believed the plaintiffs’ theory would undercut the traditionally local system of public education in this country, for which he had great affection, and in the end would require centralization and equalization of school administration and funding. *Id.* at 65-67, 112. Justice Powell apparently became an advocate within the Court for attacking the lower court decision and its equal protection theory, both before oral argument and during the Court’s deliberations. *Id.* at 68-72, 96-101.
59. According to Sracic, remedies issues dominated the Court’s consideration of the case. *Id.* at 59, 75, 78, 84-86, 90-92. Advocates for the plaintiffs tried to defuse concerns that local control would end by supporting a plan generally called “power equalizing.” Somewhat oversimplified, the plan would allow poorer districts to obtain state funding to make up for fiscal shortfalls caused by their lower tax valuations. At least in theory, this would allow local control without penalizing wealthy districts for providing extra funds to their schools. *Id.* at 16-18. This
both suspect classification and fundamental rights analysis.

First, the Court refused to treat the funding scheme as ethnic discrimination. There was no definable disfavored class, ethnic or otherwise. The majority concluded that neither Mexican-Americans nor the poor were subject to discrimination in funding. Rather, those who lived in some school districts fared better than those who lived in others, and the Court was unwilling to recognize the relevance of the fact that the districts that fared better were those with both higher incomes and higher proportions of “Anglo” residents. The fact that poverty and Mexican-American heritage were linked to lower district property values, and therefore to lower school funding, was not a matter of government policy and was therefore treated as irrelevant.

The Court found it important that there was no absolute denial of a government benefit. Relative inequalities are hard to evaluate, and the Court suggested that the rigid strict scrutiny model would be an inappropriate vehicle for considering such factors. In the majority’s view, the bottom line was that the class discriminated against could not be defined in a way that would bring it within traditionally suspect criteria; in short, it was too “large, diverse, and amorphous . . . , unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts.”

There were certainly reasons to question the majority’s conclusion on this point. Texas maintained a racially segregated public education system prior to court-ordered desegregation after Brown, and some school districts had separated white from Mexican-American students. In addition, many school district lines reflected state-enforced deed restrictions that preserved relatively wealthy neighborhoods as “Anglo,” thereby negating the Court’s assumption that the plaintiffs had simply chosen not to live in the wealthier school districts.

is the theory, set out in JOHN E. COONS ET AL., PRIVATE WEALTH AND PUBLIC EDUCATION (1970), which was developed in parallel California litigation.

60. Rodriguez, 411 U.S. at 55.
61. Id. at 54.
62. See id. at 18-21, 22-23 (discussing problems in defining the class discriminated against because of a lack of proof that “any class fairly definable as indigent” is harmed). The Court challenged the assertion “that the poorest families are . . . necessarily clustered in the poorest property districts,” citing a study of Connecticut housing patterns. Id. at 23.
63. Id. at 57-58.
64. Id. at 23-25. As there is necessarily some governmental funding of public schools, the question presented in Rodriguez was not a fairly simple “is it constitutional” question, but instead a more complicated “how much is required to be constitutional” question.
65. Id. at 40-44.
66. Id. at 28. This language followed a brief examination of a different theory—that there is a direct correlation between district wealth and education spending. Id. at 25-29. The Court acknowledged the theoretical potential of this theory and related arguments but found the evidence inadequate. Id. at 25-27 & n.64.
67. Sracic, supra note 46, at 12.
68. Id. at 11-13. Other than the somewhat amorphous ethnic school assignments, the primary
The plaintiffs’ fundamental rights argument seemed stronger, but it also failed to persuade the Court.69 As noted above, in a series of cases, the Court had used strict scrutiny to review classifications that burdened a fundamental right or interest while other cases emphasized the importance of education in our society.70 The majority acknowledged that it had concluded in Brown v. Board of Education that education is central to society and then asserted its own belief in the societal importance of public education.71 The Court drew a distinction, however, between the importance of a governmental function and its status as a constitutionally protected fundamental right.72 The point was underscored in several different ways; textual recognition in the Constitution’s protection is what matters, not importance in contemporary society.73 To the majority, education was not explicitly or implicitly protected under the Constitution.74 The majority opinion accordingly reviewed the Texas funding scheme using the rational basis test.75 Concluding that local taxation was a typical and well-established method of providing many public services, and failing to see any invidious discrimination in its application, the Court upheld the Texas school financing structure and effectively ended attempts to use the Constitution as a basis for achieving equality in public services.76 The Court did suggest a possible basis for a constitutional claim in extremely nebulous terms when it stated that “some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of” First Amendment or voting rights.77

way in which ethnic segregation occurred was through white flight. Id. at 11. In San Antonio, the plaintiffs’ school district had once been predominantly non-Hispanic white. Id. Most moved away, an option not realistically available to most Mexican-Americans due to housing costs and deed restrictions in white suburban neighborhoods. Id.
69. See Rodriguez, 411 U.S. at 39.
70. See supra text accompanying notes 54-55.
72. Id. at 30-31.
73. Id. at 30 (“[I]mportance of a service performed by the state does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.”); id. at 32-33 (citing Lindsey v. Nomet, 405 U.S. 56 (1972); Dandridge v. Williams, 397 U.S. 471 (1970)). This was in several respects more devastating to the plaintiffs’ case than the holding on suspect classification. The attempt to define the class was necessarily limited by the state’s funding structure, and that was based on “school district” rather than race or ethnic background. See id. at 9-10. As the Court pointed out, the poorer school districts actually received more state funding than the wealthier ones; it was the additional local funding in the wealthy districts that gave them larger per pupil expenditures. See id. at 14 (“Alamo Heights, because of its relative wealth, was required to contribute out of its local property tax collections approximately $100 per pupil, or about 20% of its foundation grant. Edgewood, on the other hand, paid only $8.46 per pupil, which is about 2.4% of its grant.”).
74. Id. at 35.
75. Id. at 40, 44.
76. Id. at 44-55.
77. Id. at 36.
However, the Court rejected this basis as inapplicable in *Rodriguez*.\(^{78}\)

While education is not mentioned as a right in the Constitution, it seemed to many observers, including four dissenting justices,\(^{79}\) and presumably to majorities in several prior Supreme Court decisions,\(^{80}\) to be an obvious unenumerated right in an era in which the Court was thought still to be open to expanding that category. The analysis and result in *Rodriguez* have, therefore, been harshly criticized over the years,\(^{81}\) but the Court has never given any indication that it would reconsider the matter. Harvard Law Professor Laurence Tribe has questioned the Court’s purported rationale for deferential review of classifications related to wealth.\(^{82}\) To rebut the Court’s assumptions about indigency and inequality, he quotes Justice Blackmun’s unusually poetic recognition of the significance of poverty in the constitutional order: “[T]here truly is another world ‘out there,’ the existence of which the Court . . . either chooses to ignore or fears to recognize; the cancer of poverty will continue to grow, and the lot of the poorest among us, once again, and still, is not to be bettered.”\(^{83}\) Justice Blackmun wrote this seven years after joining the five-justice majority opinion in *Rodriguez*. One wonders whether *Rodriguez* might have been decided differently if Justice Blackmun had reached this understanding a

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78. *Id.* at 36-37. University of Texas law professor Charles Wright, who was defending the state’s funding structure, made a concession along these lines at oral argument. SRACIC, *supra* note 46, at 85.

79. Strong dissents were written by Justices Brennan, White, and Marshall. The most strident was by Justice Marshall. *Rodriguez*, 411 U.S. at 70-133 (Marshall, J., dissenting). He emphasized the fact that, contrary to the majority’s claims, the decision constituted a major shift in the Court’s treatment of both education and poverty. *Id.* at 70-71. Perhaps most importantly, he argued that the Court had retreated from positions it had taken under equal protection long before *Brown* in which it held that equality in educational opportunity is a primary duty of government. *Id.* at 116-17. It is hard to read Justice Powell’s opinion and then Justice Marshall’s opinion and believe that they address the same case. Justice Stewart wrote a concurring opinion in which he agreed with the majority that no suspect classification had been identified, and that the Texas funding scheme satisfied rational basis scrutiny. *Id.* at 59-62 (Stewart, J., concurring). He did, however, describe the funding scheme as “chaotic and unjust.” *Id.* at 59.

80. See *supra* notes 70-73 and accompanying text.


83. *Id.* at 1659 (alterations in original) (quoting Harris v. McRae, 448 U.S. 297, 348-49 (1980) (Blackmun, J., dissenting)). Tribe notes that the Court failed to recognize that wealth is contemporary society’s stand-in for power. *Id.* He concludes that the *Rodriguez* decision was based on “unarticulated premises.” *Id.* at 1667 n.12. These might be understandable concerns about remedies, fear of open-ended judicial oversight of administrative decisions, or simply a change in Court membership.
few years earlier. 84

Two other cases that would make the Baltimore plaintiff’s case more difficult are Washington v. Davis 85 and DeShaney v. Winnebago County Department of Social Services. 86 Washington added to the plaintiff’s burden of proof in equal protection cases. The plaintiffs challenged promotion and hiring policies of the District of Columbia Police Department as racially discriminatory. 87 By the time the case reached the Supreme Court, it focused on the validity of a written test used to determine eligibility for employment as a police officer. 88 African-Americans generally performed less well than whites on the test, and the D.C. Circuit held that this disproportionate impact established a prima facie case of unconstitutional racial discrimination. 89 The Supreme Court reversed, holding that disparate impact is not enough; there must be proof of a racially discriminatory purpose. 90 The Court acknowledged that disparate impact evidence is relevant, but it found no evidence that the test had been chosen with the purpose or objective of disadvantaging African-American employment candidates. 91 The significance of Washington v. Davis may not have been immediately apparent, perhaps because no justice disagreed with the central holding that purposeful discrimination is a necessary component of an equal protection claim. In the long term, however, the case has proven to be an enormous obstacle to equal protection claims because, while disparate impact is commonplace and often easy to prove, evidence of intention is usually hard to find. This seems especially true in the post-Brown v. Board of Education world in which “everyone knows” that racial bias is in disrepute and must therefore be hidden at all costs. Despite a flood of legal commentary attacking its reasoning

84. As shown in the next section, it would also likely have been decided differently if it had come to the Court before the retirements of Chief Justice Warren and Justice Fortas.
87. Washington, 426 U.S. at 232. Because the District of Columbia is part of the federal government, the case was decided under the equal protection component of the Fifth Amendment’s Due Process Clause rather than the Equal Protection Clause as such. Id. at 239; see generally Bolling v. Sharpe, 347 U.S. 497 (1954).
89. Id. at 236-37, 241.
90. Id. at 240-48. Justice Stevens agreed with the majority, accepting the requirement of purposeful discrimination but wrote separately to note that “the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds.” Id. at 253 (Stevens, J., concurring). Justice Brennan in dissent similarly did not challenge the underlying principle that purposeful discrimination is a required element of an equal protection claim but wrote to disagree with the Court’s approval of the D.C. employment test and the District’s practices under federal employment laws. Id. at 257-70 (Brennan, J., dissenting).
91. Id. at 242, 246 (majority opinion).
and outcome, Washington, like Rodriguez, is now well established law.92 Unlike the others, DeShaney v. Winnebago County Department of Social Services,93 was a due process case. The suit was brought by the mother of Joshua DeShaney, a young boy who was severely beaten by his father on numerous occasions, culminating in life-threatening injuries that left Joshua permanently disabled.94 County child welfare officials had been well aware of the violence in the DeShaney household before the final beating, having received reports from child protection officers, police officers responding to domestic disturbances, and emergency room personnel.95 Instead of taking action to remove Joshua from his father's custody or otherwise exercising government power to protect the child, various state officials worked out voluntary agreements that “allowed” Joshua to remain in family custody, with the father receiving counseling and other services.96 The plaintiff’s theory was that the state had a due process obligation to protect Joshua, who could not protect himself.97 Governmental liability was a stretch, as all previous federal cases permitting recovery under this theory had involved plaintiffs in a custodial setting, and thereby under the official guardianship of a government agency.98 DeShaney lost at every level.99 The
Supreme Court issued a strong ruling that emphasized governmental theory: the Constitution is primarily a negative restraint on government, preventing it from harming, but not requiring that it help, members of the public. The Court’s description of the facts deemed the largely passive conduct of the state agencies as a sad, but inevitable, fact of life, suggesting a potential state tort remedy. The Court added that the government does not, however, have a constitutional duty to enforce its own laws to protect people from private actors such as Joshua’s abusive father.

Together these three cases erect a serious obstacle to any sort of federal constitutional challenge to governmental failures such as those dramatized in The Wire. Rodriguez imposes a demanding standard of review, Washington limits the effect of statistical evidence, and DeShaney seems to block an alternative route to judicial relief from the Due Process Clause. The laws may not be enforced, the schools may be deficient, people may be terribly injured, and most of those disadvantaged may be African-American, but those are just sad facts of life, not constitutional violations.

III. The Wire and Pervasive Inequalities

The form and unusual scope of The Wire allow viewers to learn about life in west Baltimore at a fairly slow pace. Viewers can perceive relationships among the major aspects of inner-city life and reach their own conclusions over time, much as they can while reading a complex novel. Much is necessarily left out. The role of religion, for example, is touched on only tangentially. But on

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100. DeShaney, 489 U.S. at 196, 199-201.

101. Id. at 195 (discussing negative restraint); id. at 201-03 (discussing tort remedies). The dissenter saw a different set of rules. As Justice Blackmun put it at oral argument and in his opinion, “[p]oor Joshua,” emphasizing that the personal tragedy had been lost in the technical arguments over details and legal nit-picking. Id. at 212-13 (Blackmun, J., dissenting). Government had failed, and there was a demonstrable and profound injury as a result; under our system damages are available for such deprivations. Id. at 211-13 (Brennan, J., dissenting). In later interviews, Justice Blackmun explained his dramatic comments during oral argument as intended to emphasize the human consequences of technical legal rules. Curry, supra note 94, at 121.

102. DeShaney, 489 U.S. at 201-02.

103. See, e.g., Episode 4-41, Refugees, supra note 19; The Wire: Margin of Error (HBO television broadcast Oct. 15, 2006) [hereinafter Episode 4-43, Margin of Error]; Episode 4-46, Know Your Place, supra note 32; The Wire: A New Day (HBO television broadcast Nov. 26, 2006)
balance, the experience of watching the stories unfold over five seasons allows the viewer to experience the environment of Baltimore drug neighborhoods more deeply than is feasible using other media. This section discusses the three major “inequalities” *The Wire* presented to its viewers.

### A. No Law Enforcement in the Inner City

The first episode begins with a murder prosecution that fails because an eyewitness changes her testimony due to fear or intimidation and swears in court that the defendant was not the killer; the episode ends with the murder of the one eyewitness who truthfully identified the defendant.  

Later episodes underscore this message, addressing the “no snitching” culture in several contexts.  

Snitching violates the code of the neighborhood. The message is delivered in settings that can be at once trivial and chilling, such as a teenager’s announcement that the proper punishment for anyone who snitches on kids who spray paint graffiti on walls is “bam bam bam,” as he makes shooting gestures. The message against snitching is also conveyed in settings that are more dramatic

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Hereinafter Episode 4-48, *A New Day*. The most notable references to religious life are in connection with the mayoral campaign and the early days of Tommy Carcetti’s mayoral administration. These involve meetings, mostly off camera, with the Interdenominational Ministerial Alliance, a group of Black ministers who serve as a sounding board and vehicle for communicating with the African-American community.  

*Id.* A reference to religion that is both chilling and charming is the local gang practice of putting wars on hold on Sundays so that everyone can go to church. Episode 3-34, *Slapstick, supra* note 27.

104. Episode 1-1, *The Target, supra* note 38. The intimidated witness is later murdered. *The Wire: Cleaning Up* (HBO television broadcast Sept. 1, 2002) [hereinafter Episode 1-12, *Cleaning Up*]. That action served both to cut a loose end and to underscore a message to the community.

In the gang culture, she had cooperated at the grand jury stage and therefore deserved to die.


*Id.* Real life has intruded into this theme. “Stop snitching!” became a major cultural movement at roughly the same time as *The Wire*. Part of the movement was a rap DVD that included figures such as NBA player and Baltimorean Carmelo Anthony.  


and yet seem casual, just business-as-usual within the community, as when gang leaders quietly order the murder of fellow gang members suspected of informing to the police.\textsuperscript{107} The culture is not limited to internal discipline. Despite occasional talk of a code of using violence only against people “in the game,” we see the gangs enforcing their rules against “civilians”—the term for law-abiding residents used by both the police and the gangs.\textsuperscript{108} Randy, one of the four boys featured in season four, makes the mistake of telling a school administrator in the course of a school disciplinary investigation that he knows about a murder.\textsuperscript{109} He is pressured to cooperate with the police; his home is firebombed, and his foster mother murdered as a result.\textsuperscript{110} These events end Randy’s childhood and lead to an unhappy future in a dangerous group home.

Nor is the “no snitching” culture limited to career criminals. The longshoremen in the dockworkers union investigated in season two abide by the principle as well.\textsuperscript{111} The police code of silence is also explored. Loyalty to fellow officers repeatedly trumps proper law enforcement behavior and internal discipline. One who follows the code is Lieutenant Cedric Daniels, certainly one of the best and most honorable police officers in the series, who covers up a late night roust of a west Baltimore high-rise project by drunken officers under his command.\textsuperscript{112} Similarly, in season five, Detective William “Bunk” Moreland

\textsuperscript{107.} E.g., Episode 1-12, \textit{Cleaning Up}, supra note 104 (murder of Wallace); Episode 2-19, \textit{All Prologue}, supra note 44 (murder of D’Angelo Barksdale); Episode 4-47, \textit{Misgivings}, supra note 33 (murder of Little Kevin). \textit{See} Burke, supra note 20, at 449 (noting the dilemma faced by possible witnesses).

\textsuperscript{108.} Omar Little, a man with a code, justifies targeting the Barksdale gang by the fact that they murder civilians. Episode 2-19, \textit{All Prologue}, supra note 44.

\textsuperscript{109.} Randy’s story is also addressed briefly \textit{infra} notes 161-63 accompanying text. The dramatic effect of his story is heightened by the fact that the story was told in small segments over thirteen weeks, from Episode 4-38, \textit{The Boys of Summer}, supra note 1, where Randy inadvertently helps set up a murder victim, to Episode 4-50, \textit{Final Grades}, supra note 20, where he is moved to a group home and beaten as a snitch. One of the \textit{Ohio State Journal of Criminal Law} essays addresses Randy’s story. Sklansky, \textit{supra} note 37.

\textsuperscript{110.} \textit{See} sources listed \textit{supra} note 109.

\textsuperscript{111.} The checkers are described as good union members who will not cooperate with a police or grand jury investigation of crime on the city’s docks. \textit{The Wire}: \textit{Hard Cases} (HBO television broadcast June 22, 2003) [hereinafter Episode 2-17, \textit{Hard Cases}]; \textit{The Wire}: \textit{Undertow} (HBO television broadcast June 29, 2003).

\textsuperscript{112.} \textit{The Wire}: \textit{The Buys} (HBO television broadcast June 16, 2002) [hereinafter Episode 1-3, \textit{The Buys}]. The tower roust is the topic of Bennett Capers, \textit{Crime, Legitimacy, Our Criminal Network, and The Wire}, 8 \textit{Ohio St. J. Crim. L.} 459, 461-64 (2011), which is, in part, about the impact of police brutality on the way innocent residents in areas such as west Baltimore view the police. Daniels again covers up for McNulty and Freamon at the end of the series. Episode 5-59, \textit{Late Editions}, \textit{supra} note 6; Episode 5-60,\textit{ supra} note 36. Snitching, however, is sometimes a tool for advancement with the department. Daniels was the victim in season one, as Detective Carver was planted in his unit for the purpose of surreptitiously collecting information for the police commanders. Episode 1-13, \textit{Sentencing}, \textit{supra} note 105.
seethes for several weeks trying to investigate homicides while resources are redirected to phony homicide cases handled by Detective Jimmy McNulty. It never seems to occur to Moreland to report McNulty, who is both committing crimes and obstructing investigations of real homicides as part of his scheme to get additional resources for law enforcement. In the end, another officer reports McNulty, although the department’s leadership realizes it would be so embarrassed by a public revelation of McNulty’s scheme that it engages in its own cover-up.

It is no surprise that most people are unwilling to cooperate with police investigations. The drug trade operates openly in housing projects and on street corners. The leaders of the drug gangs are treated like local royalty and act like corporate executives to protect their businesses and to show their power. In some ways, the gangs replace social agencies, such as the Police Athletic League, in the community. Life in west Baltimore is generally miserable, with

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114. The plan is to gain additional resources by planting evidence suggesting that a serial killer is preying on the homeless. It begins in Episode 5-52, Unconfirmed Reports, supra note 105, and continues until Episode 5-59, Late Editions, supra note 6.

115. Moreland knows of the fraudulent investigation from Episode 5-52, Unconfirmed Reports, supra note 105. Detective Kima Greggs finally reports the matter to Daniels in Episode 5-59, Late Editions, supra note 6.

116. Most episodes, especially in seasons one and three, depict organized drug sales at these locations. E.g., Episode 1-3, The Buys, supra note 112; The Wire: Stray Rounds (HBO television broadcast Aug. 3, 2003) [hereinafter Episode 2-22, Stray Rounds]; The Wire: Homecoming (HBO television broadcast Oct. 31, 2004) [hereinafter Episode 3-31, Homecoming]; Episode 4-38, Boys of Summer, supra note 1. The most memorable example is a teen offering to sell heroin to Police Major Colvin at the window of his squad car while he is stopped at a red light. The Wire: Time After Time (HBO television broadcast Sept. 19, 2004) [hereinafter Episode 3-26, Time After Time].

117. See, e.g., Episode 1-3, The Buys, supra note 112 (depicting a lengthy discussion in which D’Angelo Barksdale teaches hoppers Wallace and Bodie about chess, explaining the roles of the various pieces, including the King and Queen, who operate much like the leader, Avon Barksdale, and his top assistant, Stringer Bell). The chess scene is addressed in several articles about The Wire, most notably in Susan A. Bandes, And All the Pieces Matter: Thoughts on The Wire and the Criminal Justice System, 8 OHIO ST. J. CRIM. L. 435, 436 (2011). See also Erika Johnson-Lewis, The More Things Change, the More They Stay the Same: Serial Narrative on The Wire, DARKMATTER (May 29, 2009), http://www.darkmatter101.org/site/2009/05/29/the-more-things-change-the-more-they-stay-the-same-serial-narrative-on-the-wire/ (discussing how kings don’t have to do much, queens get things done, pawns are expendable). The point is underscored later when Omar Little uses the classical line, “If you come at the king, you best not miss” to taunt one of Barksdale’s enforcers. The Wire: Lessons (HBO television broadcast July 28, 2002) [hereinafter Episode 1-8, Lessons].

118. Episode 1-2, The Detail, supra note 24 (gang members operating a pantry); The Wire: Game Day (HBO television broadcast Aug. 4, 2002) [hereinafter Episode 1-9, Game Day] (gang
little law enforcement and day-to-day rule by criminals. Most drug users spiral downwards, most drug gangsters eventually die or go to prison, and the local residents suffer what must seem like an occupation by the drug gangs.

Too often, police actions exhibit violent lawlessness. Suspects are viciously beaten on occasion. Two of the series’ heroes, Daniels and Major Howard “Bunny” Colvin, are themselves culpable, Daniels beating a murder suspect during an interrogation and Colvin telling officers to use violence to force drug dealers to move to the “free zone” he establishes. One uniformed officer represents the range of petty corruption committed by officers, such as stealing property from street kids and breaking the fingers of a juvenile car thief. Street sweeps and mass arrests are ordered without any apparent legal basis.

119. We observe the life of drug addicts throughout all five seasons through Bubbles, who is also a police informant. Bubbles joins up with two other addicts at different points, Johnny and Sherrod. Both die of overdoses. Episode 3-37, Mission Accomplished, supra note 36 (Johnny); Episode 4-49, That’s Got His Own, supra note 20 (Sherrod). We also hear horror stories about addiction at Narcotics Anonymous Meetings, e.g., Episode 5-52, Unconfirmed Reports, supra note 105; Episode 5-59, Late Editions, supra note 6; and the experiences of Michael and Dukie in season four. See infra text accompanying notes 163-74. The most dramatic example of police acting like an occupying army occurs in the roust at the towers, early in season one. Episode 1-3, The Buys, supra note 112. The episode involves a middle-of-the-night visit by drunk and violent police officers to one of the housing projects where the Barksdale gang operates. Id. The victims are the terrified civilians, who fight back when one of the officers, Prez, seriously injures a young boy. Id.

120. See, e.g., Episode 3-28, Dead Soldiers, supra note 6, where police officers beat a gang member who shot a police officer. Detective Kima Greggs twice beats suspects in the first few weeks of season one. Episode 1-3, The Buys, supra note 112; Episode 1-7, One Arrest, supra note 6.

121. See Episode 1-7, One Arrest, supra note 6 (Daniels beating gang enforcer Bird to get a confession); Episode 3-31, Homecoming, supra note 116 (Colvin ordering his officers to use violence against dealers who refuse to move their operations to Hamsterdam). Sergeant Carver is a more complicated character, moving from a fairly insensitive street cop to a thoughtful police manager over the five seasons. Nevertheless, even late in the series, he is using threats and violence to intimidate the public. Episode 4-46, Know Your Place, supra note 32.

122. The character who represents petty corruption on the streets is Officer Walker. In season four alone, he steals money Randy has earned from selling candy, Episode 4-39, Soft Eyes, supra note 32; arrests Omar Little, using excessive force and stealing his ring, Episode 4-43, Margin of Error, supra note 103; and breaks the fingers of a middle school student and expert car thief, Donut, after catching him, Episode 4-47, Misgivings, supra note 33.

123. See, e.g., Episode 2-22, Stray Rounds, supra note 116 (police shut down drug sales for a few days after an accidental shooting of a child); Episode 4-42, Alliances, supra note 31 (street sweeps of Stanfield’s crew); Episode 4-45, Corner Boys, supra note 33 (Herc and Dozerman stop
Much of season three revolves around “Hamsterdam,” an experiment in creating a narcotics “free zone”—an unofficial area where drug laws won’t be enforced, planned by district police commander Colvin.\textsuperscript{124} His intentions are good—allowing narcotics trafficking only in a largely abandoned neighborhood would free the residential areas of drug dealing and allow the public to walk the streets safely.\textsuperscript{125} Scenes show that this works to some degree. Crime drops in residential neighborhoods, and people can walk peaceably past corners that days earlier were open-air drug supermarkets.\textsuperscript{126} The Hamsterdam storyline explores a series of issues relating to drug legalization: community reactions, public health concerns, and the effects on the drug dealers and even the police themselves.\textsuperscript{127} Hamsterdam is a failure for political reasons, and Colvin loses his job.\textsuperscript{128} The clear message is that the police will continue to try to enforce the drug laws on the west side but will fail. On occasion they will irritate the drug gangs and jail and harass Stanfield, warning him it will continue every day until he returns a police surveillance camera); Episode 4-47, Misgivings, supra note 33 (Commissioner Burrell orders New York style “lifestyle” arrests).

\begin{itemize}
\item \textsuperscript{124} Episode 3-28, Dead Soldiers, supra note 6, through The Wire: Reformation (HBO television broadcast Nov. 28, 2004) [hereinafter Episode 3-35, Reformation].
\item \textsuperscript{125} Episode 3-28, Dead Soldiers, supra note 6.
\item \textsuperscript{126} This is shown by scenes of residents safely walking down streets that were drug supermarkets a few days earlier. The Wire: Moral Midgery (HBO television broadcast Nov. 14, 2004)[hereinafter Episode 3-33, Moral Midgery]. See also Episode 3-35, Reformation, supra note 124 (letters from community leaders on the improvement in community life in west Baltimore since opening Hamsterdam). On the other hand, Hamsterdam is frightening and a magnet for violent criminals as well as drug users. See Episode 3-31, Homecoming, supra note 116; Episode, 3-37, Mission Accomplished, supra note 36.
\item The Hamsterdam story is integrated into one about “CompStat.” CompStat was made an important part of modern police practices by New York City Police Commissioner William J. Bratton in 1994. See DAVID WEISBURD ET AL., THE GROWTH OF COMPSTAT IN AMERICAN POLICING, POLICE FOUNDATION REPORTS (Apr. 2004), available at http://lapdonline.org/inside_the_lapd/pdf_view/6247. In essence it is a system to collect crime data and to use it strategically to reallocate resources more effectively. Id. In The Wire’s Baltimore, CompStat is used for the department leadership to bully supervisors into providing better—i.e., lower—crime statistics. See, e.g., Episode 3-26, Time After Time, supra note 116 (ordering units to report lower annual homicide total and felony rate for the year). CompStat data confirmed lower crimes rates in the western district, where Hamsterdam was located. The Wire: Back Burners (HBO television broadcast Nov. 7, 2004) [hereinafter Episode 3-32, Back Burners]; Episode 3-35, Reformation, supra note 124.
\item Episodes that highlight the ramifications and side effects of the drug free zones include The Wire: Straight and True (HBO television broadcast Oct. 17, 2004) [hereinafter Episode 3-30, Straight and True] (police take addicts to Hamsterdam to buy drugs); Episode 3-32, Back Burners, supra note 126 (young gang members have no more income because there is no more need for them to work for the dealers); Episode 3-35, Reformation, supra note 124 (Colvin reveals strong community support for the program); Episode 3-37, Mission Accomplished, supra note 36 (drug free zones become a political issue in mayoral campaign).
\item \textsuperscript{127} Episode 3-37, Mission Accomplished, supra note 36.
\end{itemize}
some of their leaders, but this just allows others to take their places.\footnote{See, e.g., Episode 5-60, \textit{-30-}, supra note 36. The replacement of one cog with another is a central theme in the series. The chess analogy appears again, with pawns easily sacrificed because they are easy to replace. By the end of the series, most figures have stepped up, down, or out, and have been replaced by another. The Barksdale gang is mostly dead or in prison, replaced by the Stanfield gang, which may itself be about to disappear. \textit{Id.} Omar Little is replaced by Michael Lee. \textit{Id.} The members of the police leadership have moved on to more lucrative positions or retired, with the major protagonists replaced by junior officers. Acting Commissioner Rawls becomes Superintendent of the State Police. Episode 5-60, \textit{-30-}, supra note 36. Acting Commissioner Daniels resigns. \textit{Id.} Sergeant Carver is promoted to lieutenant. \textit{Id.} Detective Sydnor is promoted to sergeant and takes over leadership of the special investigations unit. \textit{Id.}} Drug dealing will continue, and without some form of legalization, government cannot engage in public health and safety measures that might make living in the area a little safer for the residents (and perhaps even for the drug users).\footnote{Hamsterdam may have made the other neighborhoods safer, but the area itself was a hell-on-earth. \textit{See, e.g.,} Episode 3-33, \textit{Moral Midgetry}, supra note 126 (armed robberies); Episode 3-34, \textit{Slapstick}, supra note 27 (murder). When the community leader known as “the Deacon” learns of the experiment, he chastises Colvin for failing to consider the public health aspects, such as providing needle exchanges and drug intake facilities for addicts. Episode 3-33, \textit{Moral Midgetry}, supra note 126. The importance of considering the pros and cons of such a change in drug law enforcement is underscored by the casting of Baltimore Mayor Kurt Schmoke, an advocate for decriminalization, as a public health worker. Episode 3-36, \textit{Middle Ground}, supra note 44.} Smart police officers realize that they are not really doing much to deal with the drug trade.\footnote{For the most part, officers simply observe drug trafficking, occasionally stopping dealers or operating police car sirens to run them off a corner for awhile. The attitude is illustrated in Episode 4-38, \textit{Boys of Summer}, supra note 1, where now uniformed Officer McNulty stops at one of the west Baltimore drug corners and tells the dealer to be off that corner the next time he drives by it.} The west side declines even further compared to wealthier parts of the city, where criminal laws are enforced and the streets are safe to walk.

Law enforcement and the criminal justice system depicted in \textit{The Wire} are unlike those in typical crime shows. While the officers of most police procedural television series secure convictions by the end of each hourly episode, the viewer rarely sees such tidy resolutions in \textit{The Wire}’s Baltimore. Cases take much longer—months or even years—to play out. Some cases are lost due to sloppy police work or a lack of sufficient evidence,\footnote{Poor police work resulted in a major raid on the Barksdale gang that failed to find the drug supply or cash house. \textit{Id.} In season four, the local children know long before the police that Stanfield’s enforcers are hiding the bodies of murder victims in boarded-up houses. Episode 4-42, \textit{Alliances}, supra note 31. \textit{See also} supra text accompanying note 18.} and victories are likely to result in minor offenders pleading guilty to protect gang leaders, sometimes as part of corrupt deals or some version of “no snitching.”\footnote{In season one, low ranking Barksdale gang figures refuse to implicate higher-ups and, as a result, get longer prison sentences} One gang member just walks
out of a juvenile detention facility and later receives probation on charges of assaulting a police officer from a lenient judge, based on his attorney’s promise that he will change his ways. Successful gang leaders are smart enough to frustrate hard working and effective investigators.

The key motivator for most police officers appears to be careerism—the desire to advance through the ranks. In theory, advancement should be closely related to success in making high profile cases against the worst offenders. But high profile cases are risky, and failure to make a high profile case is costlier to a career than success is beneficial. The safe approach is to provide “stats”—lots of easy cases that are quantifiable.

When good stats are not available, the police department leadership “juke the stats”—manipulate them to provide more favorable results. Good stats serve senior officers and political figures who wish to show that the police department is making clear progress. Thus, the police commissioner and his close advisors tell detectives they want “buy and bust” cases—easy prosecutions against street dealers—and make it clear that

than the gang’s leader, Avon Barksdale. In season five, O-Dog, a minor Stanfield gang member, falsely pleads guilty to homicides committed by Stanfield’s main enforcers Chris and Snoop. Episode 5-59, Late Editions, supra note 6. In the final episode, prosecutors and defense attorney Maurice Levy reach a corrupt deal. In order to avoid revealing an illegal wiretap, the State’s Attorney agrees not to prosecute Levy for corrupting the grand jury prosecutor or Stanfield for leading his drug gang; in exchange, much of the Stanfield gang pleads guilty to drug trafficking.

Episode 5-60, supra note 36.


135. Episode 1-13, Sentencing, supra note 105. Avon Barksdale makes a very favorable plea deal at the conclusion of season one after his gang members refuse to testify against him. Id. By early in season two, he has arranged to have drugs planted on a corrupt prison guard and then makes a deal for early release in exchange for testifying against the guard. Episode 2-17, Hard Cases, supra note 111.

136. This is both cause and effect of CompStat. If the police department is going to be judged by statistics, it will engage in practices that provide good statistics. Thus, Police Commissioner Burrell and Commander Rawls instruct the special unit in season one to go for “buy and bust” cases, the easiest and quickest way to get a conviction on the books. See infra text accompanying note 205. On the other hand, long, complex investigations often result in fewer convictions and are, therefore, less attractive to a statistics-oriented department. Of course the defendants in “buy and bust” cases are usually minor and easily replaced offenders; the defendants in complex cases are likely to be gang leaders, influential politicians, or business leaders.

137. See, e.g., Episode 3-26, Time After Time, supra note 116; Episode 3-28, Dead Soldiers, supra note 6; Episode 5-52, Unconfirmed Reports, supra note 105. “Juking the stats” also relates to CompStat. With pressure to lower crime rates, savvy bureaucratic police supervisors learn to lower the classifications of reported crimes, such as from attempted murder to assault. This gives the illusion of an improvement in the crime rate. The phrase has made its way into broader usage. E.g., Darren Bush & Jessica Peterson, Juking the Stats: The Gaming of Law School Rankings and How to Stop It, 45 CONN. L. REV. (forthcoming 2013); Austin Meek, Juking the Stats, CJONLINE (July 19, 2011, 11:57 AM), http://cjonline.com/blog-post/austin-meek/2011-07-19/juking-stats.
there will be no support for any effort to work up the chain from the street dealers to the criminal leadership. Perhaps the most depressing aspect of a series focused on murders, drug deals, bribery-permeated business and politics, and human trafficking, is that the best way to reach the pinnacle of the police bureaucracy seems to be to do everything possible to obstruct hard-working police officers who are trying to solve crimes and catch criminals.

B. The Failure of Education

The children and schools in west Baltimore that the series depicts are not part of the American educational system that the Supreme Court had in mind in Rodriguez. Season four of The Wire is a slow trip from one unhappy event to another. We learn about two categories of children—the corner kids, who disobey their parents and hang out on corners, and the stoop kids, who obey and stay at home. The season reminds us that children do not always get to choose their category.

As noted in Part I, we learn about eighth graders in west Baltimore, largely through the experiences of a former police officer and new teacher, Prez. On the first day of school, he and the other new teachers hear talk about their job that emphasizes the wild nature of the students. The teachers, much like the police officers we met in earlier seasons, think of their workplace as enemy territory.

138. See infra note 205.
140. The explanation is provided in Episode 4-40, Home Rooms, supra note 20, where former police commander Major Colvin discusses how to differentiate the two groups as part of a special program in the middle school. See infra note 146. It is related to the decision that they need to reach the children long before they turn eighteen; thus, the program was placed in a middle school rather than a high school. See SHAVON, LYNN & BRYAN, Sorting out the Bad Apples: Public Schools and the Code of the Street on Season 4 of The Wire, UNIV. OF MICH. DEP’T BEHAVIORAL SCI., at 5 (2009), available at www.casl.umd.umich.edu/fileadmin/template/casl/files/MeetingOfMinds/files/Behavioral_Health_Science_and_HR/Sorting_out_the_bad_apples_-_granger.pdf. This part of the story was presumably structured by Ed Burns, who like Prez, left the Baltimore Police Department to teach in its public schools. Potter & Marshall, in URBAN DECAY, supra note 1, at 10-11.
141. Episode 4-38, Boys of Summer, supra note 1, juxtaposes scenes of teacher training and a police briefing to illustrate that the school administration’s perception of the children is very similar to law enforcement’s perception of criminals in west Baltimore.
142. See, e.g., Episode 4-39, Soft Eyes, supra note 32; Episode 4-41, Refugees, supra note 19. The adversary relationship is underscored when a student steals a teacher’s car. Episode 4-46, Know Your Place, supra note 32. In a more sympathetic interpretation of the culture, a fellow teacher tells Prez that the children are so traumatized that the only day they can concentrate is Wednesday because they are two days removed from living a full day in an atmosphere more hazardous than the school. Episode 4-41, Refugees, supra note 19. The Wire seems to try to downplay any racial context for this animosity. Most of the children are African-Americans, but the teachers and police officers they interact with are racially diverse.
Many believe the job is impossible and are just putting in time for a paycheck and a pension. Prez epitomizes the self-conscious helplessness of many middle class whites in the inner city when he is rescued from hellish classroom situations on two occasions. He will become a much better teacher as the year proceeds, but he plainly finds himself in an alien and largely hostile environment.

Much of season four concerns a special program sponsored by a university grant that takes high-risk corner kids out of regular classrooms. Dramatically, the grant program introduces Namond Brice to Colvin, who is working for the program after his forced retirement from the police department in the wake of Hamsterdam; thematically, it explores the problems inner-city children face relating to a traditional curriculum. We learn, along with Colvin and the other adult participants, that many of the children are too traumatized by life to concentrate on their studies or to see any value in learning their coursework. They act out as a result, harming everyone’s chance to learn. Separating the high-risk students seems to work, and the result is better learning for both those in the special group and those in “general population.” Yet there is substantial opposition because the project involves a form of tracking, and it is ended after a few months.

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143. E.g., Episode 4-38, Boys of Summer, supra note 1; Episode 4-39, Soft Eyes, supra note 32; Episode 4-45, Corner Boys, supra note 33.

144. Episode 4-40, Home Rooms, supra note 20. The first occurs on the first day of school, when the students test Prez by stealing hall and bus passes and ignore his seating chart. Id. The second occurs after the slashing incident addressed supra note 29 and accompanying text.

145. Over a series of episodes, Prez is shown figuring out how to motivate many of his students. He becomes more restrictive, bringing more discipline to the class, Episode 4-42, Alliances, supra note 31, uses cards and dice to teach math, gets access to computers inexplicably locked away, The Wire: Unto Others (HBO television broadcast Oct. 29, 2006) [hereinafter Episode 4-44, Unto Others], and breaks the class down into small groups for projects, Episode 4-46, Know Your Place, supra note 32.

146. Episode 4-40, Home Rooms, supra note 20. Colvin helps University of Maryland researchers create a special class for high-risk students and then works with the program, more as a counselor than as a teacher. Episode 4-44, Unto Others, supra note 145; Episode 4-45, Corner Boys, supra note 33. The series depicts the bureaucratic steps to obtain approvals from various levels of the school administration. Episode 4-41, Refugees, supra note 19; Episode 4-42, Alliances, supra note 31.

147. E.g., Episode 4-42, Alliances, supra note 31; Episode 4-45, Corner Boys, supra note 33.

148. Episode 4-41, Refugees, supra note 19; Episode 4-45, Corner Boys, supra note 33.

149. Episode 4-45, Corner Boys, supra note 33 through Episode 4-47, Misgivings, supra note 33. One reason Prez’s classes are going better seems to be that the most difficult students have been removed from his class. Id. Many of the difficult students also seem to prosper, with individual attention and class discussions more relevant to how they expect to live.

150. Namond christens the group “solitary” and distinguishes it from the regular classes, “gen pop,” using standard prison terminology. Episode 4-43, Margin of Error, supra note 103.

151. Episode 4-41, Refugees, supra note 19. The special class becomes a victim of an upcoming city election. Id. The following issues led to the program’s ultimate demise: teachers
Namond, Randy Wagstaff, Michael Lee, and Dukie Weems begin season four as children who spend much of their time together enjoying the end of summer hanging around west Baltimore. By the end of season five, they seem much older and are each separated from their former lives, three of them in dire circumstances. Each story illustrates a common outcome for children growing up in a drug neighborhood. Namond begins the season working for the Barksdale gang, as his father did before going to prison, but it is plain that his heart is not in it. His mother, De’Londa, presses him to spend more time and energy selling drugs at the corner. When he is arrested, he is terrified to go through the juvenile holding process, nicknamed “baby booking,” because he fears a beating from members of east side gangs, but his mother cannot be found to secure his release. Sergeant Carver, and later Colvin, take care of him. Colvin and Namond develop a close relationship that culminates when Colvin meets with Namond’s imprisoned father, Wee-Bey, to ask that he and De’Londa allow Colvin and his wife to raise the boy. Wee-Bey agrees; Namond is not cut out for the drug business, and he can have a better future with a normal upbringing. We last see Namond about a year after moving to the Colvin’s house, happy and excited after participating in a school debate program.

152. Episode 4-38, Boys of Summer, supra note 1; Episode 4-39, Soft Eyes, supra note 32.
153. Episode 5-60, supra note 36.
154. See, e.g., Episode 4-38, Boys of Summer, supra note 1. Namond asks to get off work early to go pigeon shooting with others and is caught reading a comic book instead of taking care of his drug sales. Id. He later tries to get permission to have Michael sell Namond’s share of the drugs to earn money for school. Episode 4-39, Soft Eyes, supra note 32.
155. Episode 4-43, Margin of Error, supra note 103. After the Barksdale gang, by then seriously in decline, stops providing support to Namond’s family, his mother pushes him to sell more product. Id. She takes Namond to Bodie, Namond’s corner boss, and demands that he get his own package to sell and later returns to Bodie to complain that Namond’s share of the profits is too small. Episode 4-45, Corner Boys, supra note 33.
156. Episode 4-47, Misgivings, supra note 33.
157. Id. Carver arrests Namond. He lets Namond sleep in police station overnight. Id. When Namond’s mother still cannot be located the next day, Colvin comes to the station and takes Namond into his personal custody and then to his home. Id. When Namond’s mother learns of Colvin’s intervention, she becomes upset that Namond wasn’t sent to baby booking. Id.
158. Episode 4-50, Final Grades, supra note 20.
159. Id. Wee-Bey convinces De’Londa to let Namond live with Colvin. Id. The final scene with Namond in season four shows him comfortable in a middle class environment, happily waving to Donut, who drives by the Colvin house in a presumably stolen car. Id.
160. Episode 5-59, Late Editions, supra note 6.
Namond’s story is the only happy one of the four. Randy is the boy who provided information about a murder during a school investigation and ends up losing his foster mother to a bomb and becoming hardened in a group home.\footnote{161. See supra text accompanying note 109.} Randy appears to have dropped out of school after eighth grade,\footnote{162. See Episode 4-40, Home Rooms, supra note 20. Early in season four, Randy is shown sneaking into several different lunch periods to sell candy to fellow students.} and he is no longer the charmer with a big smile who sold candy out of a backpack during lunch periods and who wanted to grow up to own his own store.\footnote{163. See Episode 4-42, Alliances, supra note 31. Later, he talks of wanting to own a store someday. In one of the last happy parts of his story, he wins at dice and credits the probability theory he learned in Prez’s class. Episode 4-46, Know Your Place, supra note 32.} 

Michael is the most complicated of the four boys. He begins season four wanting to avoid the drug business, earning only enough for necessary support for his young brother, Bug.\footnote{164. See, e.g., Episode 4-42, Alliances, supra note 31. Gang leader Marlo Stanfield recognizes Michael’s intelligence and ability and works to win him over.\footnote{165. See, e.g., Episode 4-42, Alliances, supra note 31. Stanfield has Partlow take Michael for a walk to try to recruit him and to offer cash.} Marlo finally gets the opportunity when Bug’s abusive father is released from prison and returns to live with Michael, Bug, and their drug-addicted mother.\footnote{166. See, e.g., Episode 4-42, Alliances, supra note 31. Stanfield has Partlow take Michael for a walk to try to recruit him and to offer cash.} Michael protects Bug as much as he can but soon turns to Stanfield for help.\footnote{167. See, e.g., Episode 4-42, Alliances, supra note 31. Stanfield has Partlow take Michael for a walk to try to recruit him and to offer cash.} Marlo sends his enforcer Chris Partlow to kill the father, and Michael, in return, becomes an enforcer for the gang and also runs his own drug corner.\footnote{168. See, e.g., Episode 4-42, Alliances, supra note 31. Stanfield has Partlow take Michael for a walk to try to recruit him and to offer cash.} 

Dukie’s story is the saddest. As season four begins, he is desperately poor, filthy, and underfed as the only functioning member of a family of addicts.\footnote{169. See, e.g., Episode 4-40, Home Rooms, supra note 20; Episode 4-42, Alliances, supra note 31. Classmates consistently shun Dukie because of his odor. Id.} Prez tries to help him and succeeds to a degree, motivating him in the classroom and making it possible for him to shower and change into clean clothes in the locker room before school.\footnote{170. See, e.g., Episode 4-40, Home Rooms, supra note 20; Episode 4-42, Alliances, supra note 31. The school tries to help Dukie as well.}
school policy to move mid-year from Prez’s middle school class to high school.\textsuperscript{171} He is beaten his first day in high school and leaves, apparently forever.\textsuperscript{172} He works for a time selling drugs for Michael, but he lacks the toughness necessary for the business and is beaten regularly.\textsuperscript{173} He ends season five homeless and using heroin.\textsuperscript{174}

Long before we meet the four boys in season four, \textit{The Wire} shows how young children get involved in the drug trade. We get a sense of the life of “hoppers,” the Baltimore term for the children who live in the midst of the drug trade.\textsuperscript{175} We see how they are used as legal cover by the drug dealers, handling the merchandise so that in the event of a police raid, no adult facing a long prison sentence is in physical possession of any narcotics.\textsuperscript{176} We meet and become engaged by Wallace, a teenager who is raising several younger children in an abandoned apartment, fixing their meals and helping them with their homework.\textsuperscript{177} Wallace wants out of the drug business and is murdered by his friends on orders from higher-ups who fear he is informing on the gang.\textsuperscript{178}

Assistant Principal Donnelly provides Dukie with school uniforms at the beginning of the year. Episode 4-39, \textit{Soft Eyes}, supra note 32.

\textsuperscript{171} Episode 4-48, \textit{A New Day}, supra note 103.

\textsuperscript{172} Episode 4-50, \textit{Final Grades}, supra note 20.

\textsuperscript{173} See id. (selling drugs on the corner); Episode 5-51, \textit{More with Less}, supra note 6 (cannot handle corner and is intimidated by other drug sellers); Episode 5-57, \textit{Took}, supra note 21 (cannot find a job because he is too young); Episode 5-58, \textit{Clarifications}, supra note 21 (scrounging scrap metal for cash).

\textsuperscript{174} Episode 5-60, -30-, supra note 36.

\textsuperscript{175} Jacob Weisberg, \textit{The Wire on Fire}, SLATE (Sept. 13, 2006, 5:44 PM), http://www.slate.com/articles/news_and_politics/the_big_idea/2006/09/the_wire_on_fire.html (explaining the term “hoppers”). From the beginning, the series depicts youngsters selling drugs, with more examples in seasons three (focusing on the street action) and four (focusing on the children).

\textsuperscript{176} See, e.g., Episode 4-45, \textit{Corner Boys}, supra note 33. Namond’s mother scolds him for bringing drugs home after a day on the corner instead of having a hopper take care of it. \textit{Id.} Namond later hires the eight-year-old Kenard to keep the drugs for him. \textit{Id.} This is sadly something out of “Drug Dealing 101” by now, as it is simply a matter of adult drug dealers facing mandatory prison sentences giving the riskiest jobs to children, who face only juvenile justice if arrested. Jacob V. Lamar, \textit{Kids Who Sell Crack}, \textit{TIME}, June 24, 2001 (Magazine), http://www.time.com/time/magazine/article/0,9171,149199,00.html (nine- and ten-year-olds start as lookouts, move up to work as runners, and then, because young teens are not subject to the mandatory prison terms applicable to adult offenders, as dealers); see also Susan Leviton et al., \textit{African-American Youth: Drug Trafficking and the Justice System}, 93 \textit{PEDIATRICS} 1078, 1078-84 (1994).

\textsuperscript{177} Episode 1-6, \textit{The Wire}, supra note 134; Episode 1-8, \textit{Lessons}, supra note 117.

\textsuperscript{178} See Episode 1-9, \textit{Game Day}, supra note 118 (Wallace tells Avon Barksdale he wants to go back to school); Episode 1-12, \textit{Cleaning Up}, supra note 104 (Wallace is murdered by fellow young gang members Bodie and Poot).
Several children commit murders; others witness them. We are regularly reminded, however, that they are still children.

It is plain that the educational system has failed these children. Simon paints a picture that transcends stereotypes of a largely unresponsive educational bureaucracy. Assistant Principal Marcia Donnelly is a good example. She appears to be an astute and caring administrator. She provides clothing to Dukie at the beginning of the school year, seems to be fair and shows an even temperament in dealing with disciplinary matters, and tries to support the special program for the corner kids. On the other hand, she appears to be responsible for computers, updated textbooks, and other educational items being locked away and unused in school storage. She also manages the school attendance records. We see her hiring community-based truancy officers to track down and bring absent students to school. The truancy program turns out to be just another game. Once a student has attended school one day in a calendar month, he or she qualifies the school for that month’s per capita state

179. See, e.g., Episode 4-50, Final Grades, supra note 20 (Michael kills an unnamed drug seller); Episode 5-59, Late Editions, supra note 6 (Stanfield enforcer Snoop Pearson); Episode 5-58, Clarifications, supra note 21 (Kennard kills Omar). One storyline of season five involves Kima Greggs, a major crimes detective trying to help a child who has witnessed a double homicide. Episode 5-54, Transitions, supra note 113.

180. See, e.g., Episode 4-46, Know Your Place, supra note 32 (drug sellers sitting around on a corner talking about Sponge Bob Square Pants); Episode 5-53, Not for Attribution, supra note 105 (Michael, Dukie, and Bug take a trip to Six Flags Amusement Park); Episode 5-54, Transitions, supra note 113 (Kenard plays a trick on the police by placing a paper bag where police can legally seize it; they do and discover it contains dog feces).

181. See, e.g., Episode 4-43, Margin of Error, supra note 103; Episode 4-44, Unto Others, supra note 145. This is evident in her dealings with Randy in the series of incidents that led up to his cooperating with the police. Id.

182. Episode 4-42, Alliances, supra note 31. She is the only person savvy enough to warn the project team that the principal is the only person who will ever thank them for their work, and they need to protect the principal from central administration politics. Id. Later she goes against the grain to defend the program and tries to keep it in the school. Episode 4-48, A New Day, supra note 103.

183. See Episode 4-44, Unto Others, supra note 145. She also discouraged Prez from fighting so hard for Dukie, Episode 4-49, That’s Got His Own, supra note 20, and tells the teachers to teach to the standardized tests, Episode 4-46, Know Your Place, supra note 32.

184. Episode 4-41, Refugees, supra note 19.

185. Id. The school uses the custodial budget to fund the truancy officers. Id. Thus, one cost of trying to improve attendance is decreased maintenance at the school. We see the attendance scam through the eyes of Dennis “Cutty” Wise, who returns to the west side after a prison term for crimes committed while in the Barksdale gang. Episode 3-26, Time After Time, supra note 116. He becomes one of the truancy officers, and we see him work with the best intentions and a modicum of success until he discovers the scam and is unwilling to continue. Episode 4-41, Refugees, supra note 19; Episode 4-44, Unto Others, supra note 145.
aid.  Thus, there is no need to try to bring that student back to school until the following month, so the truancy program largely operates only at the beginning of every month. The school, just like the police department, jukes the stats.

In the end, we see the schools contributing very little to the welfare of the local community. There are, of course, students who succeed and become the police officers and professionals who populate the law enforcement side of The Wire. That is not what viewers see; instead they see another way in which the government has failed the people of inner-city Baltimore. Namond, who got out of the inner city, seems to get on track to get a good education and a good job. The three who stayed behind are already lost, and their lives are in danger.

C. The City That Doesn’t Work

The last of the governmental failures depicted in The Wire is municipal government generally. The theme is revealed most clearly through self-interested public employees and corruption of the political system. Examples of the former include police officers who prefer the appearance of success to the hard work of making important cases, and who rise through the ranks using subtle blackmail against supervisors and ham-fisted oversight of junior officers. The police department is presented as a failure of organization and management. Corruption is rife elsewhere in government. Numerous public officials, including Clarence Royce, the mayor during the first several seasons, are criminally corrupt, accepting illegal payments. Others, including his successor Tommy Carcetti, are politically corrupt. Carcetti makes decisions he knows are against the city’s interests in order to further his personal ambitions for statewide office. The city is enveloped by an atmosphere of failure related to poverty, a lack of adequate revenue, and the power of wealthy developers out for personal enrichment at the expense of the city, its citizens, and apparently even the drug gangs.

186. Episode 4-41, Refugees, supra note 19.
187. Id.
188. Episode 4-46, Know Your Place, supra note 32. Prez reaches this conclusion in regards to teaching to the test. Id. It is equally true of the attendance game.
189. Acting Police Commissioners Daniels and Burrell attended Baltimore public schools. Episode 4-50, Final Grades, supra note 20 (discussing Daniels); Episode 5-54, Transitions, supra note 113 (discussing Burrell).
190. Episode 5-59, Late Editions, supra note 6.
192. See infra text accompanying notes 206-19.
194. E.g., Episode 4-41, Refugees, supra note 19 (disguised payoffs to Mayor Royce); see also infra text accompanying notes 211, 222.
195. See infra text accompanying notes 227-29.
One of the causes of failure of law enforcement in west Baltimore is the extraordinary failure of the police department to function effectively. While he may have taken broad artistic liberties, David Simon has better credentials than most fiction writers to comment on this subject, having spent months working with the police department’s homicide unit about a decade before beginning *The Wire*.\(^{196}\) Much of the department’s leadership appears more interested in self-promotion than in crime control. Major, then Colonel, then Acting Commissioner Bill Rawls appears to act largely to scuttle good police work by others, as does District Commander, then Deputy Commissioner, then Commissioner Stan Valchek. We meet Rawls in the first episode, in which he is forced to create a special investigations unit because of pressure that a judge exerts on the police commissioner.\(^{197}\) Rawls staffs the unit with the department’s worst collection of alcoholics, near-retirees, and all-around misfits.\(^{198}\) This pattern is repeated as similar units are constituted in later seasons.\(^{199}\) Valchek manifests his police expertise by pressing the department to investigate Frank Sobotka, secretary-treasurer of the local Stevedores’ Union, because of a personal rivalry about providing stained glass windows to the church he and Sobotka both attend.\(^{200}\) Valchek orders his officers to ticket cars at the union meeting hall and claims to be able to fix the sergeant’s exam.\(^{201}\) Ervin Burrell, who serves as acting police commissioner for much of the series, is a consummate bureaucratic politician. He keeps a file that apparently reveals corruption by Daniels and probably keeps files on other potential rivals within the force.\(^{202}\) In general, Burrell does an effective job of shirking responsibility

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196. *See generally* SIMON, HOMICIDE, supra note 8 (depicting the true story of Simon’s year as a “police intern” with Baltimore’s homicide unit); *see also* 10 Questions with David Simon, POL. & PROSE, http://www.politics-prose.com/10-questions/10-questions-david-simon (last visited Apr. 6, 2013).


198. *Id.*; Episode 1-2, *The Detail*, supra note 24. These low-performing officers are known as “humps” in department terminology.

199. *See, e.g., The Wire: Collateral Damage* (HBO television broadcast June 8, 2003) [hereinafter Episode 2-15, *Collateral Damage*]. In season two Rawls puts together a unit to investigate crime by Frank Sobotka and the Stevedores’ Union. *Id.* In the next episode, most of the unit is playing cards in the office. *The Wire: Hot Shots* (HBO television broadcast June 15, 2003). In season four, he appoints a terrible supervisor for the unit, Lieutenant Marrimow, leading to transfer requests from the competent detectives in the unit. Episode 4-40, *Home Rooms*, supra note 20. Their replacements include Thomas “Herc” Hauk and Kenneth Dozerman, who have blundered their way through police work for three seasons. Episode 4-41, *Refugees*, supra note 19. Herc’s negligence in a murder investigation is largely responsible for the hardships that occurred to Randy and his foster mother. *See supra* text accompanying notes 161-63.


201. *Id.* At no time during the series does Valchek appear to do any legitimate police work.

202. Episode 1-12, *Cleaning Up*, supra note 104. Early in the series Burrell threatens to leak Daniels’s personnel file unless he brings the Barksdale investigation to a close. *Id.* Later, when Mayor Royce tells Burrell he has to take the political heat for Hamsterdam, Burrell reminds the
for mistakes and recasting facts to implicate others. He and Rawls are an effective one-two punch for obstructing criminal investigations that carry potential political risks. For example, both work hard to prevent the special investigations unit from moving up the criminal hierarchy in their drug investigation of the Barksdale gang in season one. They want quick and easy “buy and bust” cases, followed by the prompt termination of electronic surveillance. The clear message is to limit the scope of the case. As the savvy detective Lester Freamon notes, “You follow drugs, you get drug addicts and drug dealers. But you start to follow the money, and you don’t know where the fuck it’s gonna take you.” In cases involving multiple homicides, the major objectives appear to be getting the investigations assigned to a different jurisdiction and working to avoid discovering additional victims. Investigators who solve important cases are reassigned to unpleasant duties as punishment.

mayor that he had known about the experiment for a period of time before it was shut down and expressed satisfaction at the resulting lower crime rate. Episode 3-37, Mission Accomplished, supra note 36. Burrell suggests that they place the blame on Colvin and that the mayor appoint Burrell to a full term as police commissioner. Id.

203. Id.

204. Ryan Brooks writes: “Burrell’s model not only threatens to let Avon Barksdale slip free, but also allows the politicians who accept his drug money to avoid prosecution. That is the real meaning of the ‘message’ Burrell sends to Daniels . . . .” Brooks, supra note 193, at 74.

205. See, e.g., Episode 1-2, The Detail, supra note 24. Early in season one, Burrell states that he hopes the Barksdale investigation fails. Id. Several episodes later Rawls orders that premature charges be filed on Barksdale, which would compromise the ongoing investigation. Episode 1-6, The Wire, supra note 134. In Episode 1-8, Lessons, supra note 117, the police commissioner demands that the Barksdale investigation be closed. Burrell pushes for immediate raids after the shooting of a police officer, which would end the Barksdale investigation as a practical matter. Burrell again orders an end to the investigation. The Wire: The Hunt (HBO television broadcast Aug. 18, 2002) [hereinafter Episode 1-11, The Hunt].

206. Episode 1-9, Game Day, supra note 118. See also Jason Read, Stringer Bell’s Lament: Violence and Legitimacy in Contemporary Capitalism, in URBAN DECAY, supra note 1, at 126.

207. See, e.g., Episode 2-15, Collateral Damage, supra note 199. In season two, a body found in the harbor leads to discovery of more in a container on the Baltimore docks. Id. Rawls’s main objective appears to be assigning jurisdictional responsibility to the Baltimore County Police rather than to the city police department. Id. Daniels shows a similar bureaucratic inclination to avoid taking on these cases, which will be difficult to solve. Episode 2-19, All Prologue, supra note 44. In season four the Stanfield gang hides the bodies of its murder victims in boarded-up houses in west Baltimore. Episode 4-49, That’s Got His Own, supra note 20. When Detective Freamon discovers the practice, the department’s leadership looks for ways to avoid opening the houses, which would result in an increase to the homicide rate. Id.

208. See, e.g., Episode 1-13, Sentencing, supra note 105. At the end of season one, McNulty is “rewarded” for his work on the Barksdale case with an assignment to the harbor unit, a job he had foolishly admitted to Rawls was the worst assignment he could receive. Id. Daniels, who proved himself to be exceptionally capable of leading the investigative unit in season one, is reassigned to work as a clerk in the evidence room. Episode 2-15, Collateral Damage, supra note 199.
Much as the four boys symbolize four potential futures for children growing up in drug neighborhoods, Maryland State Senator Clay Davis represents several different forms of criminal corruption. In season one, the unit discovers Davis’s driver taking thousands of dollars in cash from the Barksdale gang.209 In season two, Davis appears to be one of the politicians taking money from the Stevedores’ Union in order to get state support for a project that will increase commercial activity on Baltimore’s docks.210 Seasons three and four show a medley of corrupt acts, capped off when Davis accepts cash payoffs from both Democratic mayoral candidates.211 One story arc in season five concerns criminal charges brought by the state’s attorney against Davis for taking money from charitable organizations.212 Davis unquestionably took the money but is acquitted after making dramatic public claims of racism and disingenuous appeals to an inner-city jury skeptical of law enforcement.213 The Wire provides several other examples of clearly dishonest behavior, from police officers stealing cash from a drug bust,214 to a prosecutor selling grand jury information,215 to a mayor accepting cash from businessmen and developers in the form of fixed poker games.216

The series also highlights many of the challenges of contemporary city government. Housing projects, which represent a failed vision of urban reform and constitute both a breeding ground for crime and constant danger for inhabitants, blight west Baltimore. Much of season one takes place in the “towers” and the “pit,” low income housing projects where the Barksdale gang conducts much of its narcotics trade.217 The towers are demolished at the

209. Episode 1-8, Lessons, supra note 117.
210. Episode 2-19, All Prologue, supra note 44.
211. See Episode 4-43, Margin of Error, supra note 103. The Carcetti payment, which we see, appears to be a bribe. Id. Davis offers to split his support between incumbent Royce and challenger Carcetti for “walking around money” in an amount written on a slip of paper he hands Carcetti. Id. Carcetti agrees, and presumably Davis is paid. Id. Davis then endorses Royce anyway, with Carcetti and his campaign manager agreeing that Royce offered more. Id.

In season three, Davis takes a bribe from Barksdale’s second-in-command Stringer Bell. It appears to be another shakedown, as Bell doesn’t receive the development permits that Davis promised. Episode 3-31, Homecoming, supra note 116. When Bell complains, Davis offers him the school district’s contract for light bulbs, which appears to be a sham contract to get paid by the city for providing nothing. Episode 3-33, Moral Midgetry, supra note 126.

212. Episode 5-52, Unconfirmed Reports, supra note 105, through Episode 5-57, Took, supra note 21. Davis tries to get the police commissioner, mayor, and president of the city council to quash the case, to no avail. Id. Davis testifies at trial that he received the payments but gave all the cash back to community residents in dire straits.

214. See, e.g., Episode 1-11, The Hunt, supra note 205 (Here and Carver take cash in raid).
216. See Episode 4-41, Refugees, supra note 19.
217. Most of the episodes in season one contain scenes of drug sales at the pit. The towers are
beginning of season three, but there is little more than rhetoric to indicate that the demolition will improve the lives of the people of west Baltimore.\textsuperscript{218} When then-City Councilman Carcetti presses the mayor about Baltimore’s failure to fund protection for crime witnesses, the mayor points out that the money would have to come from other services, such as snow removal or trash pickup in Carcetti’s district.\textsuperscript{219} There is too little money for the police department—vehicles are often in disrepair, and cases are inadequately investigated because of personnel cuts and an inability to pay overtime.\textsuperscript{220} Money is spent in controversial ways, as illustrated by an angry discussion at a public hearing about why halfway houses seem to be built only in predominantly African-American neighborhoods.\textsuperscript{221} The wealth and power of developers is presented as a contrast to the poverty and impotence of the city and public.\textsuperscript{222} The developers destroy jobs at the docks, also Barksdale gang territory. \textit{E.g.}, Episode 1-1, \textit{The Target, supra} note 38. The towers are also the location of the drunken roust by three members of the special unit. Episode 1-2, \textit{The Detail, supra} note 24.

\textsuperscript{218} Episode 3-26, \textit{Time After Time, supra} note 116. Several of the scholarly articles in Potter and Marshall’s book of essays on \textit{The Wire} touch on the demolition as emblematic of the failure of urban planning in the era that built the towers and the failure of the present era to replace the communities that existed in such houses. \textit{See, e.g.}, David M. Alff, \textit{Yesterday’s Tomorrow Today: Baltimore and the Promise of Reform, in Urban Decay, supra} note 1, at 23; Elizabeth Bonjean, \textit{After the Towers Fell: Bodie Broadus and the Space of Memory, in Urban Decay, supra} note 1, at 162; Peter Clandfield, “We Ain’t Got No Yard”: Crime, Development, and Urban Environment,” \textit{in Urban Decay, supra} note 1, at 37.

\textsuperscript{219} Episode 3-32, \textit{Back Burners, supra} note 126.

\textsuperscript{220} The budget crisis is as hard on the police as on the schools. In \textit{The Wire: All Due Respect} (HBO television broadcast Sept. 26, 2004) [hereinafter Episode 3-27, \textit{All Due Respect}], the department cancels the next class at the police academy. In Episode 5-51, \textit{More with Less, supra} note 6, overtime becomes unavailable, and the investigation of abandoned houses to look for murder victims is placed on hold due to a lack of funds. In Episode 5-52, \textit{Unconfirmed Reports, supra} note 105, officers are working second jobs that get in the way of their police work and McNulty’s police vehicle breaks down. In Episode 5-56, \textit{The Dickensian Aspect, supra} note 6, budget cuts delay critical crime lab work that compromises investigations.

\textsuperscript{221} Episode 4-41, \textit{Refugees, supra} note 19.

\textsuperscript{222} \textit{See, e.g., The Wire: Amsterdam} (HBO television broadcast Oct. 10, 2004) (The episode was originally titled \textit{Amsterdam}, but this Article refers to “Hamsterdam” as depicted in the show.) (Stringer Bell meeting with Davis and a developer about Bell’s plans to move the Barksdale gang more heavily into property development); Episode 4-39, \textit{Soft Eyes, supra} note 32 (developers donate to Royce in exchange for rights of way and then complain to him when subpoenaed to testify); Episode 4-49, \textit{That’s Got His Own, supra} note 20 (developers under criminal investigation seek to win favor with Carcetti at a reception after his election); Episode 5-59, \textit{Late Editions, supra} note 6 (Davis tells Freamon that criminal defense attorneys provide the connection between drug money and politicians and developers); Episode 5-60, \textit{-30-, supra} note 36 (defense attorney Levy introduces Stanfield to developers and warns him they will “bleed” him). Through these occasional glimpses, viewers are meant to recognize that this is also the way the police and criminals see the developers—at a distance and protected from close scrutiny by tame politicians and other buffers.
launder drug money, and finance corrupt politicians. The money does not seem to do very much for Baltimore.

We see many of the city’s problems through the eyes of Tommy Carcetti, who builds mayoral campaign issues from the failings of Mayor Royce and then faces the city’s problems as mayor himself. At the beginning of his term, he spends a day traveling the city, identifying problems such as deserted cars on the streets and then calling city departments to demand prompt action. We then see him confront the intractable problems of the city. It is relatively easy to fix potholes but not so easy to remedy a $54 million budget shortfall for the city’s schools. The remedies are all unpalatable—raise taxes, cut spending on salaries or services, or seek a state bailout. With an eye on his political future, Carcetti is unwilling to humble himself publicly to get state help, so the city suffers. The new mayor devotes substantially more energy to following the advice of his national party leaders, who recommend that he get his name on “something big.” That something turns out to be the New Westport project, headed by one of the developers who bribed the previous mayor. By the end of the series, Carcetti demands that the police department manipulate statistics to show a 10% drop in crime. Crime, the schools, and the decline of the American city are all interrelated, and the poor and working class suffer.

IV. ALTERNATIVE STORIES ABOUT EQUAL PROTECTION

Rodriguez and the resulting narrow role for equal protection analysis of educational disparities was neither inevitable nor the only responsible legal

223. See supra notes 216, 222 and infra note 229 and accompanying text.
224. Episode 4-48, A New Day, supra note 103. Carcetti is shown reporting an abandoned car, a playground in dangerous condition, and a leaking hydrant, refusing to reveal any of the locations, thereby sending city crews on frantic work projects. Id.
225. Id.
226. Episode 4-49, That’s Got His Own, supra note 20.
227. Id. Carcetti travels to Annapolis, where the governor makes him wait. Id. Just as Carcetti is leaving, the governor is finally ready to meet with him. Id. The message is that taking money from the state will be very costly to Carcetti. A later discussion reveals that a state bailout would allow the schools to avoid layoffs but would also bring state control and an end to tenure for public school teachers, with a resulting war with the teachers union. Id. City Council President Campbell tells the mayor she will publicly attack whatever choice he makes. Id. In Episode 4-50, Final Grades, supra note 20, Carcetti rejects the state offer because he would be required to beg for a bailout at a press conference. He also realizes that if he takes the money, the suburban voters will never support him in a statewide election, but rationalizes that if he is elected governor he can help the city. Id. Carcetti is later elected governor, Episode 5-60, supra note 36, so he probably would believe the costs were worth it.
228. Episode 4-45, Corner Boys, supra note 33.
229. Episode 5-56, The Dickensian Aspect, supra note 6. This is probably the end of any possible revitalization of the port. See also Episode 2-19, All Prologue, supra note 44.
230. Episode 5-60, supra note 36.
approach to societal reform. This section evaluates seven different legal responses to problems such as those explored in The Wire.

A. The Warren Court

There was a time when this nation appeared to be taking a different road in the attempt to meet its aspirational claim that all persons are created equal. During the middle of the twentieth century, the U.S. Supreme Court interpreted the Constitution as requiring action to solve social problems rooted in inequality in several areas of the law. The best known area was segregated public education. In a series of cases brought by the National Association for the Advancement of Colored People (“NAACP”) Legal Defense Fund, the Supreme Court invalidated racially separate but theoretically equal systems of higher education on the ground that the separate systems were in fact far from equal.231 These cases, several of which involved law schools, revealed that at a minimum, the Equal Protection Clause requires states to provide equal educational opportunities to all students in public schools and universities. The culmination of these cases was Brown v. Board of Education,232 which invalidated racial segregation in public schooling as inherently violating equal protection.233

The Court decided Brown in Earl Warren’s first year as chief justice, which began a thorough revision of equal protection law. Segregated public facilities other than schools were soon invalidated as well.234 Numerous other cases revealed equally aggressive use of equal protection to remedy the ills of poverty and class, even where race was not at issue. For example, the Equal Protection Clause was held to create several rights for indigent criminal defendants, such as the right to appointed counsel on appeal and to a free transcript of the trial for use on appeal.235 These protections were not limited to criminal procedure. Based on the promise of Brown and a belief that the Constitution is a tool for improving

233. Id. at 495.
234. See e.g., Brown v. Louisiana, 383 U.S. 131, 142-43 (1966) (public library); Watson v. City of Memphis, 373 U.S. 526, 539 (1963) (parks and recreational facilities); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (municipal golf course), vacating 223 F.2d 93 (5th Cir. 1955). The same is true of cultural practices that implied a lower status for African-Americans, at least where reinforced by government action. E.g., Hamilton v. Alabama, 376 U.S. 650 (1964) (per curiam) (African-American witnesses referred to only by first name), rev’g Ex parte Hamilton, 156 So. 2d 926 (Ala. 1963).
the status of poor citizens, social activists and indigents who had been denied public services sought legal remedies in several cases. In *Shapiro v. Thompson*, the Court invalidated lengthy residency restrictions on qualification for state welfare benefits, reasoning that such restrictions prevented poor people from being able to choose where to live as a practical matter. Similarly, the Court required that filing fees be waived for indigents in divorce cases on the ground that the fees made it more burdensome for poor people to access the family courts. These rulings were founded on the notion of fundamental interests. Just as the Court had used strict scrutiny to review legislative classifications that disadvantage people based on race or ethnicity, the justices brought it to bear on classifications that denied or limited access to fundamental interests.

The Court used strong language in *Harper v. Virginia Board of Elections* in striking down poll taxes because they infringed on the fundamental right to vote, describing voting classifications based on wealth as “traditionally disfavored.” In *McDonald v. Board of Election Commissioners*, one of Chief Justice Warren’s last opinions for the Court, the majority opinion again emphasized the need for close judicial scrutiny “where lines are drawn on the basis of wealth or race.” In their book *The Wrong Side of the Tracks*, Charles Haar and Daniel Fessler write,

> At the noon of its ascendancy, “equal protection” had clearly emerged as an authorization for plaintiffs to bring the institutions of state and

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237. *Id.* at 638. *Shapiro* should provide substantial ammunition for revitalizing the Equal Protection Clause to respond to problems of poverty and race presented in *The Wire*.

238. Boddie v. Connecticut, 401 U.S. 371, 376-77, 380-83 (1971). This approach, however, was rejected in later cases presenting similar issues. *See, e.g.*, United States v. Kras, 409 U.S. 434, 442-43, 446, 450 (1973); Ortwein v. Schwab, 410 U.S. 656, 660-61 (1973) (per curiam). Professor Tribe analogizes *Boddie* to the criminal procedure cases, which also involve access to government services because of lack of funds. *See Tribe, supra* note 82. But it also could mean that this Court was more sensitive to the importance of the subject and the impact of lack of financial resources. Nevertheless, the Court ruled to the contrary in other cases without much attempt to distinguish the decisions other than formally. *E.g.*, *Kras*, 409 U.S. at 446; *Ortwein*, 410 U.S. at 658-59.

239. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). The origin can be seen in the *Carolene Products* footnote four, where the Court referred to the need for greater scrutiny for laws that infringe on constitutional rights. *Id*.


241. *Id.* at 670 ("[T]he right to vote is too precious, too fundamental to be so burdened or conditioned."). The Supreme Court also banned voting restrictions based on property ownership in local elections. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 633 (1969).


244. *Id.* at 807. The Court concluded that the classification at issue did not discriminate on the basis of wealth or race, and was therefore subject to less demanding review. *Id.* at 807-08.
local government before the courts and there make them answer for discrimination that segregated citizens on the basis of constitutionally suspect classifications, or adversely affected the fundamental personal interests of some citizens against those of others.245

Arthur Goldberg, who served on the Supreme Court for several years during this period, later described the Warren Court's thinking and motivation. He explained that the Court recognized that people in “racial ghettos and barrios, . . . our urban and rural poor, [and] the economic and socially deprived” held negative perceptions about the legal system.246 He also wrote that “[t]he future of our cities and their teeming populations is one of our most pressing domestic problems and is intertwined with racial and economic aspects.”247 Not long before Rodriguez, Justice Goldberg predicted that the Supreme Court would address the problem of disparities in the quality of education.248 Chief Justice Warren served only for about fifteen years, however, and while the Warren Court remains one of the most celebrated (and most criticized) Courts, there was little time to accomplish the revolution that both admirers and detractors associate with his leadership.

The membership of the Court changed significantly between the late 1960s, when the Court first established the fundamental interests rationale for strict scrutiny in Harper and asserted the need for careful scrutiny in order to protect the poor in McDonald and Shapiro, and 1973, when the Court decided Rodriguez. Two members of the majorities in the earlier decisions—Chief Justice Warren and Justice Abraham Fortas—left the Court, along with Justices Hugo Black and John Harlan (who did not generally favor the expansion of equal protection). All four new justices who joined the Court in the interim aligned with Justice Stewart to create the narrow 5-4 majority in Rodriguez.249 Thus, of all the justices on the Supreme Court during the 1960’s, when the Court routinely relied on the Equal Protection Clause to expand judicial protections and civil liberties, only one joined the majority opinion in Rodriguez. That was Justice Stewart, who wrote a narrow concurrence in Rodriguez in which he admitted that the Texas funding scheme was “chaotic and unjust.”250


246. Arthur J. Goldberg, Equal Justice: The Warren Era of the Supreme Court 27 (1971). He wrote that the Warren Court “encouraged [people] to believe that racial justice is actually attainable.” Id. at 23. He described the Court’s ambition to serve society, praising its “common sense willingness to deal with the hard and often unpleasant facts of contemporary life.” Id. at 31.

247. Id. at 30.

248. Id. at 31. The point is introduced by a reference to the Hawkins litigation discussed below. See infra notes 352-63 and accompanying text.


250. Id.
More than any other case, *Rodriguez* reflected the abrupt shift to constitutional retraction and deference to legislative classifications that still prevails today. This narrow view of equal protection (and other constitutional protections for the poor) was not inevitable. If the Warren Court’s approach toward equal protection had prevailed, courts would be more likely to use the Equal Protection Clause to attack problems such as those exposed in *The Wire*. The sorts of gross variations in law enforcement or education in Baltimore (and other urban areas) surely would fail under strict scrutiny. Perhaps more importantly, the principle of local control would not prevent judicially imposed reform efforts. Courts could require states to provide equal protection from crime in dangerous neighborhoods, to provide equal education to students in towns and cities with inadequate financial resources of their own, and to prevent local politicians from denying residents equal public services. However, the Warren Court’s approach did not prevail in *Rodriguez*. The remaining sections of this Article examine what other possibilities remain.

**B. The Half-Full/Half-Empty Notion of Minimal Protection**

The *Rodriguez* majority opinion suggested that the Constitution might guarantee a certain minimum level of educational services to all students. Partial credit for this notion belongs to Harvard Law Professor Frank Michelman, who published an important article, *On Protecting the Poor Through the Fourteenth Amendment*, as the Foreword to the *Harvard Law Review*’s issue on the 1968 Term of the Supreme Court.

A substantial portion of Michelman’s article rejects traditional suspect classification analysis for wealth discrimination cases, concluding that the Warren Court used “suspect classification” rhetoric when dealing with wealth inequalities only when the state action in question also related to a fundamental interest. Michelman argued that the appropriate constitutional response to poverty is to require that the government provide at least a minimum level of goods and services, arguing that persons “are entitled to have certain wants satisfied—certain existing needs filled—by government, free of any direct charge

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251. See id. at 56-59 (majority opinion).

252. Id. at 36-37. See supra text accompanying notes 71-72, 77.

253. Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969). He ambitiously suggests, in a fairly general way, rethinking the Warren Court’s equal protection decisions attempting to remedy disadvantages of poverty and to avoid reliance on equality principles. Id. at 10.

254. Id. at 19-33.

255. Id. at 21-22, 28. Michelman identifies benefits, harms, and complications from applying strict scrutiny to *de facto* wealth discrimination. Id.

256. Id. at 9-13. When inequality is used in the Supreme Court’s caselaw, “we can hardly avoid admitting that the injury consists more essentially of deprivation than of discrimination [and] that the cure accordingly lies more in provision than in equalization.” Id. at 13.
over and above the obligation to pay general taxes.”\textsuperscript{257} He found support in the Warren Court’s criminal procedure cases, where the remedies granted by the courts were adequate services, such as a competent attorney, rather than equal services, such as an attorney as good as one hired by a wealthy defendant.\textsuperscript{258} Michelman convincingly argued that equal protection terminology often sends courts off into unprofitable fact-finding and issue-identification.\textsuperscript{259} This is arguably what happened in \textit{Rodriguez}. Instead of examining whether the state provided an adequate education to all public school students, the Court went on a fruitless search for reasons to use strict scrutiny and, finding none, rubber-stamped a state funding scheme that may have deprived many students of a minimally adequate education.

Michelman contrasted equal protection theory with the approach he favored: “minimum protection against economic hazard,” which the Due Process Clauses, rather than Equal Protection Clause, would guarantee.\textsuperscript{260} He identified two major virtues of his minimum protection theory: it would declare invalid harmful practices approved under equality analysis, and it would require remedies that courts cannot readily grant.\textsuperscript{261} His analysis of \textit{Shapiro v. Thompson}\textsuperscript{262} illustrates these views—the Court twisted its analysis to identify the legal problem as inequality, while the real problem was lack of access to public assistance.\textsuperscript{263} An ironic result of reliance on equal protection in \textit{Shapiro} is that the rationale would require judicial approval of both lower but equal public benefit plans and very unequal systems among fifty states, as long as out-of-staters are permitted to move to, and promptly qualify for, benefits in more generous states. The article was provocative, as it was undoubtedly intended to be, but has not yet had the effect of convincing courts to mandate public services for the poor.\textsuperscript{264}

\textsuperscript{257} Id. He calls these “just wants.”

\textsuperscript{258} Id. at 25-27. He argues that the natural inclination to use the language of equal protection creates some logical and legal problems. Id. at 17-19. One problem is that logic would dictate that violations be remedied by enforcing actual equality, a result that was rejected in the criminal procedure cases. See also id. at 26.

\textsuperscript{259} Id. at 36-39.

\textsuperscript{260} Id. at 13. As he puts it later in the article, minimum protection “scans, not for inequalities, but for instances in which persons have important needs or interests which they are prevented from satisfying because of traits or predicaments not adopted by free and proximate choice.” Id. at 35. He summarizes some of the doctrinal developments of the Warren Court, drawing on the language of suspect classifications to explain a balancing of invidiousness and importance of interests. Id. at 34. This balancing rather than tripping decisional approach was rejected by the Court during this period. See, e.g., Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312-13 (1976) (per curiam).

\textsuperscript{261} Michelman, supra note 253, at 39. One reason this is a virtue is that it requires courts to direct legislatures to solve the deprivation rather than to do it themselves.


\textsuperscript{263} Id. at 640-47.

\textsuperscript{264} Michelman confronts the school finance issue later resolved in \textit{Rodriguez} largely through a discussion of \textit{McInnis v. Ogilvie}, 394 U.S. 322 (1969), a challenge to the Illinois school finance
Michelman’s Harvard colleague Laurence Tribe seems to reject this positive view of a right to a minimum level of service. In a section of his American Constitutional Law headed “Minimal Protection of the Laws,” Tribe describes the Court as determined to teach the result in *Rodriguez* and gives mock praise for the majority’s ability to manipulate precedents to give the result “surface plausibility.” He suggests, however, that the Court’s unnecessary dictum that the Constitution requires only a minimal or adequate level of service to be deemed equal has become clearly established. Tribe also challenges the *Rodriguez* majority for its purported deference to local control. He criticizes the Court for failing to understand that the local control it praised exists only for those school districts with a strong tax base. Poorer districts, such as the district involved in *Rodriguez*, lack local control because they are reliant on state funding for their basic educational program. The system, in effect, provides local control only to wealthy districts, undercutting the rationale that local control was the legitimate government objective for the funding scheme, which is required even under the Court’s rational basis approach.

A brief but important paragraph in Michelman’s article addresses the sorts of systemic problems illustrated in *The Wire*. Michelman suggests that the use of suspect class and accompanying terminology may be appropriate for cases of *de facto* wealth discrimination in “cases of unequal provision of municipal services to neighborhoods significantly segregated . . . by wealth or income.” Where services such as police and public health are inferior on the poor side of town, for example, the setting indicates “oppression and stigma, and may have a high invidiousness quotient, to the point where convincing justifications ought to be required to dispel one’s irrepressible suspicions.” Whether clearly established or a minor artifact of a compromise opinion, the notion of a guaranteed minimum standard is worth considering in a setting such as *The Wire*’s west Baltimore. There is a police presence, but law enforcement protection of the residents is so limited as to be inadequate under any test applied in the courts. Similarly, the Baltimore schools have some money to spend, but

system. Michelman, *supra* note 253, at 47-59. He canvasses several different ways to think about school finance problems, notably suggesting that the equal protection model is less flexible than some others in terms of relevant facts and remedies. *Id.* at 52-53.

265. TRIBE, *supra* note 82, at 1651. This section of Professor Tribe’s book is titled *Decline But Not Demise of Judicial Intervention on Behalf of the Poor: Minimal Protection of the Laws*. *Id.* at 1653-59.

266. *Id.* at 1653.

267. *Id.* at 1655. He notes that in *Ross v. Moffitt*, 417 U.S. 600 (1974), the Court followed the minimal access theory suggested in *Rodriguez*. *Id.* at 1647; see also *id.* at 1647-51.

268. TRIBE, *supra* note 82, at 1654-55.


270. *Id.* at 29. This discussion seems applicable to the Hawkins litigation, *see infra* notes 358-60, 363-64 and accompanying text, as well as to *The Wire*’s Baltimore.
state-fostered impediments to high quality education result in an undereducated population in the city. This would seem to make a reasonable case for inadequacy in fact under Professor Michelman’s approach.

This “adequate minimum” notion may be half-full (Michelman) or half-empty (Tribe), but it does suggest that Rodriguez leaves room for federal constitutional protection on behalf of residents of inner cities.

C. Require that Government Establish a Real Reasonable Basis

The Supreme Court surprised legal scholars and practitioners in Plyler v. Doe, another 5-4 decision dealing with Texas school funding. The state laws at issue denied state funding to educate children not lawfully admitted to the United States and allowed local school districts to deny those children’s enrollment in public schools. The majority opinion carefully followed Rodriguez on both suspect class and fundamental interest analysis and, therefore, did not use strict scrutiny. In using the rational basis test, however, it revived the Court’s careful weighing of interests due to the importance of education.

The majority repeatedly referred to the harms to society from having an underclass denied an adequate education, using phrases such as “enduring disability,” “inestimable toll,” “lifetime hardship,” and “stigma of illiteracy.” The Court accordingly struck the laws down, using a more demanding application of rational basis scrutiny, concluding that the importance of education required a greater counterweight than the general fiscal concerns identified by the state. The concluding paragraph hints at both a rationale for enhanced scrutiny and a standard more in line with intermediate scrutiny. Professor Tribe

272. Id. at 205.
273. Id. The majority opinion occasionally refers to the plaintiffs as the children of illegal aliens, although education was not denied to children of illegal aliens born in this country, as the state laws applied only to non-citizens. See id. at 205 n.1. The majority concluded that the alien children were entitled to the protection of the Equal Protection Clause, even though unlawfully present. Id. at 210-15.
274. Id. at 223.
275. Id. at 221-23 (citing many of the same cases referred to in Rodriguez, including Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Brown v. Bd. of Educ., 347 U.S. 483 (1954); and Meyer v. Nebraska, 262 U.S. 390 (1923)).
276. Plyler, 457 U.S. at 222 (disability, toll); id. at 223 (hardship, stigma).
277. Id. at 227-30. The Court disclaimed strict scrutiny, id. at 223, but found that the importance of education and the federal primacy in matters of immigration cautioned against giving great deference to the state. Id. at 221-26. In short order, the Court moved to a version of rational basis scrutiny that appears at least somewhat more demanding than the norm. See id. at 226 (citing Oyama v. California, 332 U.S. 633, 664-65 (1948)).
278. See id. at 230 (“If the State is to deny a discrete group of innocent children the free public education [it provides others], that denial must be justified by a showing that it furthers some substantial state interest.”). This language seems to bleed over toward a version of intermediate
suggests that the Court found that the facts presented a “not quite fundamental” right and a “not quite suspect” class and, therefore, made a rough compromise on something that in substance was intermediate scrutiny.279

In one way, Plyler was easier than Rodriguez. The classification denied education to a defined class instead of merely disadvantaging an amorphous group to some relative degree, a factor emphasized by Justice Blackmun in his concurring opinion.280 That fact eliminated the concerns expressed in Rodriguez about second guessing the state’s legislative policy judgments concerning the amount of public resources to provide for education,281 and at the same time prevented the Court from being able to approve the laws on an “adequate minimum” analysis. A close reading of the opinion suggests, however, a more emotional factor. The case focused on the children, rather than the parents, emphasizing that it was the parents and not the children who had chosen to enter the United States illegally.282 The plaintiffs in Rodriguez, on the other hand, were the parents who presumably had chosen the school districts in which they lived.283 Of course, in both cases, it was the children who would suffer from the parents’ actions, but this fact was emphasized only in Plyler. In any event, Plyler shone for a short time as false evidence that the Court would extend heightened scrutiny to education cases despite Rodriguez. Such hopes disappeared after the Court’s prolonged silence on the issue following the Plyler decision.284 Professor


279. Tribe, supra note 82, at 1551-53. He refers to this more searching analysis despite language of rational basis where factors are “in some sense ‘suspect.’” See generally id. at 1444-46. Professor Tribe describes Plyler as “more visceral than analytical.” Id. at 1657.

280. See Plyler, 457 U.S. at 232 (Blackmun, J., concurring).


282. Plyler, 457 U.S. at 237-38 (Powell, J., concurring). Justice Powell’s concurring opinion focused on the practical concerns of a serious problem of an unknown number of illegal aliens, many of whom will remain in the country, id. at 237-38, and a belief “that their children should not be left on the streets uneducated.” Id. at 238. He accordingly acquiesced in the use of heightened review. Id. at 238-39. Justice Brennan worked closely with Justice Powell to accommodate his views in the majority opinion. Seth Stern & Stephen Weriel, Justice Brennan: Liberal Champion 475 (2010).


284. Chief Justice Burger issued a dissenting opinion that is probably more typical of the Court’s response to such issues. Plyler, 457 U.S. at 242 (Burger, J., dissenting). It begins:

Were it our business to set the Nation’s social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education. I fully agree that it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language.

Id. This is reminiscent of Justice Powell’s final words in the majority opinion in Rodriguez:

We hardly need add that this Court’s action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And
Tribe nevertheless also finds in the decision a principle that a “state may not pursue policies which predictably create a permanent class of economically dispossessed and politically disadvantaged people.”285 If a state has a duty to avoid such policies, then it may also have a duty to try to prevent a permanent underclass.

Lawyers tend to over-generalize about the impact of tiers of review. We accept Gerald Gunther’s description of strict scrutiny as “‘strict’ in theory[,] fatal in fact”286 because it is both a memorable phrase in the classroom and usually correct. But just as there are strict scrutiny cases in which classifications are upheld, there are rational basis cases in which they are not.287 Plyler provides the best example of the latter, and it is directly applicable to problems such as those Baltimore experiences. The courts could use Plyler to require states and municipalities to explain and justify differences in public services. The tendency to rely on conclusory assertions such as “resource allocation” and “local priorities” represents a bad judicial habit picked up from uncritical reliance on Professor Gunther’s pithy comment. In Plyler, the Court found itself facing a harsh state policy decision that had the effect of denying any education to many blameless children.288 The Court could have reconsidered Rodriguez, limiting it to approval of local control in principle and leaving to lower courts the job of experimenting with guidelines and operating principles, but chose not to do so.289

The Court’s actual application of rational basis review, nevertheless, opened the door to meaningful judicial scrutiny of the real basis for governmental decisions. The courts use varying forms of rational basis review when they see fit, depending on the facts, as indicated by Plyler;290 such flexibility with the standard of review makes perfectly good sense when confronting the sort of

certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. Rodriguez, 411 U.S. at 58. This logically enough turns to the need for judicial deference to political policymaking. In this case, such deference is set out in the part of his opinion that states the traditional rational basis test, id. at 248, and finds it satisfied by the state’s fiscal concerns, id. at 248-53. This also follows Justice Stewart’s rationale from his Rodriguez concurrence, stating that the funding scheme is bad policy, but policy reserved for state determination and not federal court supervision. Rodriguez, 411 U.S. at 59 (Stewart, J., concurring).

285. Tribe, supra note 82, at 1658.
288. See Plyler, 457 U.S. at 226.
289. Id.
290. See also City of Cleburne, 473 U.S. at 446-47, and the other cases cited supra note 287. The role of more thorough review, despite formal use of rational basis analysis, is discussed in Justice Powell’s Plyler concurrence. Plyler, 457 U.S. at 237-41 (Powell, J., concurring).
systemic problems presented by The Wire. Police protection and public education are core government functions. Plyler, like many previous Supreme Court cases, recognized the critical importance of public education. Similarly, it does not take Supreme Court precedent to prove that effective law enforcement is necessary to a civilized society. In the drug neighborhoods of west Baltimore, the existing police and education services adversely affect a largely minority population and certainly disadvantage children, who are particularly vulnerable and, as in Plyler, are not responsible for the neighborhoods in which they live. Resource allocation decisions are necessarily subject to political and economic influences. Such influences are therefore not constitutionally prohibited, the resulting classifications may not be sufficiently “racial” to be suspect, and the interests may not be sufficiently “constitutional” to be fundamental for equal protection purposes. But there is no requirement of judicial abdication. The classifications deal with a “not-quite-fundamental right” and a “not-quite-suspect class,” as recognized by Professor Tribe. As in Plyler, courts should demand that state and local governments exercise constitutional leadership by making decisions reasonably related to protecting the public and educating children. Also, as in Plyler, courts should require that government prove that reasonable relationship, rather than revert to the lazy tradition of permitting government to rely on a nearly irrebuttable presumption under a rational basis standard of review. The stories from The Wire confirm our suspicions that, in some states and cities, the political branches are not doing their jobs either fairly or effectively and deserve no presumptions or deference.

D. Equal Protection Requires Rough Equality

One of the important constitutional principles that courts and lawyers seem to have forgotten in the post-Brown analysis of equal protection is that, before the Brown decision, everyone understood that the Constitution guaranteed a right to roughly equal facilities and services. Part of the legal cover or excuse for segregation was that the practice was permissible only because separate facilities and services could still be equal. Brown did not overrule this insistence on equality. As noted above, in the years leading up to Brown, the NAACP pressed cases demonstrating beyond a doubt that education was profoundly unequal in this country. Those cases did not mount a frontal challenge to “separate but equal,” but instead first demanded equality, and later demanded desegregation when equality was not forthcoming.

291. Id. at 221 (majority opinion).
292. Tribe, supra note 82, at 1551-53.
293. See Tolsdorf, supra note 81, at 671 (noting that Brown “never disparaged Plessy’s requirement for equality”).
294. See supra note 231 and accompanying text.
The Supreme Court’s opinion in *Sweatt v. Painter* is indicative of this strain of equal protection law. The *Sweatt* case challenged the legal education afforded to African-American students in Texas. The Court compared the facilities and other tangible characteristics of the University of Texas Law School, a national leader, to those at a newly formed law school for African-American law students. A unanimous Court concluded the following:

[W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior.

When the Court turned to intangible factors, its conclusion was the same: “[T]he University of Texas Law School possesses to a far greater degree those qualities [that] . . . make for greatness in a law school.” At no point did the Court suggest that this level of inequality is acceptable as long as the African-American law school provides a minimally adequate education or even one as good as the weakest accredited law school in the state. The requirement was substantial equality of the African-American law school to the state’s nationally renowned law school.

After *Brown*, the federal courts logically turned their attention from enforcing equality to requiring desegregation. As the Supreme Court has chosen not to interpret the Fourteenth Amendment to require unified school districts or to otherwise mandate integration of public education (or law enforcement) by overriding municipal boundaries, the old inequalities have returned—now as much or more in the form of wealth classifications as in race classifications. It is no answer to argue that this new segregation is societal rather than legal. The combination of rigid, government-imposed municipal and school district lines and local responsibility for most public services makes modern American Apartheid as poisonous as its historical antecedents. Local control and funding can be tolerated under the Constitution only if they maintain

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297. *Id.* at 631-32.
298. *Id.* at 632-33. At the time of the case, the University of Texas Law School was whites-only, had sixteen full-time faculty, a student body of 850, a library with 65,000 volumes, a law review, moot court facilities, scholarship funds, an Order of the Coif affiliation, and a distinguished alumni. *Id.* The new African-American law school had five full-time faculty, a student body of twenty-three, a library with 16,500 volumes, a practice court, legal aid association, and only one alumnus. *Id.* at 633.
299. *Id.* at 633-34.
300. *Id.* at 634. The Court mentioned faculty reputation, community involvement, and “traditions and prestige” among less quantifiable attributes important to determining equality in education. *Id.*
301. *Id.* at 633-34.
302. See generally supra note 295 and accompanying text.
something close to equal treatment, as education and law enforcement are fundamentally state duties under the Constitution. The parties and courts in Rodriguez arguably emphasized the wrong aspect of the equal protection guarantee by assuming that funding, rather than quality, was the issue.

The current quality of public services today, in cities such as Baltimore, resembles the pre-Brown era in some important respects. As The Wire demonstrates, urban neighborhoods suffer greatly and disproportionately from crime and poverty, and the inability of government to stem drug trafficking is both cause and effect. The lack of a satisfactory public education system, seemingly the one thing that Republicans and Democrats agree about, is central both to the disintegration of cities, as season four’s stories suggest, and the increasing separation of the poor from the rest of us. Differences in educational outcomes are profound. The best public schools tend to be in largely white suburbs; the worst, at least in terms of proficiency scores on standardized tests, tend to be inner-city schools with largely minority populations. It may be that the Supreme Court in Rodriguez was afraid of the ramifications of amorphous words such as “largely” and “tend,” as well as the fact that equal dollars alone cannot make all schools equal. But judicial enforcement of the actual constitutional requirement of equality need not mean imposing uniform statewide funding schemes or consolidating city and suburban law enforcement. It would simply mean that governments have an obligation to show that they provide at least a roughly equal level of public services throughout the state.

E. Courts Should Closely Examine Disparate Impacts

Washington v. Davis has been severely criticized since it was decided.

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303. See generally Tolsdorf, supra note 81 (emphasizing the need for equal treatment).
305. See supra note 140.
Professor Tribe states that “[t]he pseudo-scienter requirement that Washington v. Davis grafted onto the fourteenth amendment is . . . utterly alien to the basic concept of equal justice under law.” Tribe suggests that the Court may simply have concluded that the remedial obstacles in many such cases are too daunting and, therefore, attempted to avoid confronting those problems by finding no substantive violation.

Nevertheless, Washington v. Davis is not as severe a limitation on judicial consideration of disparate impact as is sometimes assumed. As discussed above, the case considered whether a specific written test for employment as a police officer violated equal protection, based solely on disparate test scores between white and African-American test-takers. The Court clearly stated, however, that disparate impact remained relevant. The obscurity of this point may be partly a consequence of the fact that the Court unanimously agreed that intentional discrimination is an element of an equal protection claim, and the plaintiffs had made no attempt to allege or prove intentional discrimination at trial. In cases challenging unequal treatment by government action as unjustified, disparate impact should be relevant to help prove that a classification is simply not reasonable enough to pass muster, even when lack of proof of discriminatory intent precludes use of strict scrutiny. In other words, disparate impact is relevant to whether there is a sufficient fit between ends and means. The approval of inferences from proof of disparate impact in statutory causes of action proves that a clear showing of disparate impact can be very convincing evidence.

309. Tribe, supra note 82, at 1519. This follows a discussion of race and non-race cases that he argues establish that Washington identified only one version of unequal protection. Id. at 1514. Tribe concludes that a key problem is the Court’s embrace of the “bigoted” or otherwise malevolent actor as the only meaningful factor in equal protection cases. Id. He notes that the Court has found it hard to identify “a racially motivated government” official who is still alive, suggesting that the Court largely sees racially discriminatory decisions as no longer a serious problem. Id. at 1509. He writes, “To a Court that often proceeds as if America has entered a brave, new, color-blind age, labeling post-Reconstruction southern leaders as racists must have been a relatively painless exercise in legal anthropology.” Id.

310. Id. at 1519. He notes that the Court feared that the disparate impact test “would threaten a whole panoply of socioeconomic and fiscal measures that inevitably burden the average poor black more than the average affluent white.” Id. This would also seem to be one of the concerns behind the analysis in Rodriguez. See supra Part II (discussing Rodriguez).

311. See supra Part II (discussing Washington).

312. Washington v. Davis, 426 U.S. 229, 242 (1976) (“[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. . . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”).

313. Id. at 235.

314. See supra Part IV.C (discussing Plyler).

A pre-\textit{Washington} decision that reveals the sort of governmental racism that is not sanctioned by official policies but is readily documented through statistical inference is \textit{Pennsylvania Human Relations Commission v. Chester Housing Authority}.$^{316}$ The Commission issued an order requiring the Authority to take affirmative steps to remedy racial segregation at four housing projects.$^{317}$ Two of the projects were overwhelmingly African-American, and two were overwhelmingly white.$^{318}$ The court upheld the administrative order, citing \textit{Turner v. Fouche},$^{319}$ a 1970 U.S. Supreme Court case allowing statistical inferences from similar facts.$^{320}$ The state court’s opinion included the following language from Justice Frankfurter’s concurring opinion in \textit{Cooper v. Aaron}$^{321}$:

\begin{quote}
Local customs, however, hardened by time, are not decreed in heaven. Habits and feelings they engender may be counteracted and moderated. Experience attests that such local habits and feelings will yield, gradually though this be, to law and education. And educational influences are exerted not only by explicit teachings. They vigorously flow from the fruitful exercise of the responsibility of those charged with political official power and from the almost unconsciously transforming actualities of living under law.$^{322}$
\end{quote}

A disinterested observer might see school funding schemes, public housing assignment practices, employment test selection, and urban law enforcement all in the same light, as actions similar to Justice Frankfurter’s “local customs” rooted in cultural habits and manifested in government decision-making. In order to prevent silent reaffirmation of such historical practices, classifications that reflect outdated social norms need to be subject to meaningful scrutiny. And if

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316. 327 A.2d 335 (Pa. 1974).

317.  \textit{Id.} at 336.

318.  \textit{Id.} at 337-38. Of the four housing projects, two were entirely African-American, with 346 and 385 residents, and one was entirely white, with 347 residents. \textit{Id.} app. A, at 347. The “integrated” project had 257 African-American residents and twenty white tenants. \textit{Id.} These facts are much like those described in \textit{Washington}—“very difficult to explain on nonracial grounds.” \textit{Washington}, 426 U.S. at 242. In fact, the Authority admitted that federal, state, and local policy had been to maintain racially segregated housing patterns through at least 1968. \textit{Pa. Human Relations Comm’n}, 327 A.2d at 338 n.15.

319. 396 U.S. 346 (1970). This was a challenge to the Georgia system of selecting members of school boards and juries. \textit{Id.} at 348. The statistics showed a substantial disparity based on race, with no other credible explanation from the officials responsible for administering the system. \textit{Id.} at 359-60.


that is not available under the Equal Protection Clause because of a narrow reading of Rodriguez, other legal avenues remain available for lawmakers and courts.

Unfortunately, Washington may sometimes be seen as judicial tolerance of “wink, wink, nudge, nudge” racial or economic discrimination. That is the essence of Professor Tribe’s criticism. The problems in Baltimore, however, have little to do with racist discrimination. For much of the city’s recent history, in fact, a majority of its civic leaders have been African-American, and whatever their failings, it is unlikely that racial animus towards the majority African-American population of Baltimore is one of them. Disparate educational outcomes and disparate crime rates are among the most obvious signs of terrible inequalities in such cities. Proof of such disparities, therefore, is one way to identify and target inequality. Washington v. Davis should not be interpreted to inhibit such inquiries.

F. State Constitutional Law

Most lawyers reflexively look to the federal Constitution for governing law and sometimes never think to look elsewhere. Rodriguez and a Supreme Court that is increasingly deferential to state authority make that an unwise approach. In this environment, state law may provide more help to parties seeking additional and more effective public services.

Rodriguez was decided after Serrano v. Priest (Serrano I), an equal protection case in the California state courts. In 1971, the California Supreme Court in effect invalidated a funding scheme that was similar in relevant respects to that of Texas. The Serrano I court concluded that the Warren Court’s equal protection decisions established that strict scrutiny was appropriate both because wealth classifications are suspect and because education is a fundamental right. The Serrano I court reasoned that the California funding scheme worked to

323. See Tribe, supra note 82, at 1509 (criticizing Washington).
325. 487 P.2d 1241 (Cal. 1971).
327. See Serrano I, 487 P.2d at 1244.
328. Id. at 1250-59.
guarantee that the amount of money spent on the education of any given student depended largely on the size of the tax base in the student’s school district.\footnote{Id. at 1252-53.} It rejected any requirement of purposeful discrimination, noting that the wealth classifications struck down by the Supreme Court were neutral on their face.\footnote{Id. at 1253-54.} This portion of the opinion identifies a flaw in the unthinking application of the \textit{Washington} principle to claims of systemic equal protection. The discrimination among school districts in the operation of the state funding scheme was intentional, even though there is no reason to believe it was done out of racial or ethnic animus. This is no different from the discrimination in the denials of equal protection in the fundamental interest area in both cases such as \textit{Harper}, see supra Part IV.A, and the criminal procedure cases, see supra Part IV.B.

The \textit{Serrano I} court based its ruling on both the federal and state constitutions, describing the relevant California provisions as imposing largely the same requirements as the Fourteenth Amendment.\footnote{Serrano I, 487 P.2d at 1249 n.11. The conclusion was based on Article I, Sections 11 and 21 of the state’s constitution, which had been interpreted “as ‘substantially the equivalent’ of the [E]qual [P]rotection [C]lause.” Id. (citing Dep’t of Mental Hygiene v. Kirchner, 400 P.2d 321 (Cal. 1965)).} Much of the opinion’s energy was devoted to the question of whether education was a fundamental right.\footnote{Id. at 1244 (discussing whether education is a fundamental right).} Canvassing the federal Supreme Court’s case law on both fundamental rights and education, the \textit{Serrano I} court concluded that education was unquestionably a fundamental right.\footnote{Id.} It referred to the “indispensable role” of education in modern society, focusing on both the importance of education in determining “economic and social success” and the “unique influence” of education on individual development in the civic sense.\footnote{Id. at 1255-56.} Recognizing the importance of education to the political process and to enumerated constitutional rights such as freedom of religion and speech, the court concluded that education is itself a constitutional right.\footnote{Id. at 1256-59. Given the period of this decision, it is likely that the California Supreme Court would characterize education as within the category of penumbral rights that had been identified by the Warren Court. \textit{See, e.g.}, Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (discussing penumbral constitutional rights).} With the combination of a suspect classification and a fundamental right, the court necessarily applied strict scrutiny, concluding that if the complaint’s allegations concerning the operation of the financing system were correct, the system would be unconstitutional.\footnote{Serrano, 487 P.2d at 1263. This was the standard approach in these type of cases. The technical operation of the funding scheme was largely undisputed, although some of the details and effects of implementation were uncertain before trial. Thus, the ruling on the appropriate standard of review was a good predictor of the final outcome, proving the general accuracy of Professor Gunther’s phrase. \textit{See supra} Part IV.C.} The court remanded for trial on the merits.

Given the opposite ruling in \textit{Rodriguez} and the California court’s casual
equivalence of federal and state equal protection requirements in *Serrano I*, it is remarkable that the issue did not return to the California Supreme Court until several years after *Rodriguez*, after a state trial court struck down the funding system on the merits. The California Supreme Court reaffirmed its earlier holding in what is known as *Serrano II*. It did so after an exhaustive analysis of the trial court’s findings and consideration of several new issues. Most importantly, however, the court stood by its decision that the California Constitution mandated strict scrutiny for such laws, explaining away the language in *Serrano I* that equated the federal and California equal protection requirements. The reasoning boiled down to conclusions that education is a fundamental right in California and that the California Supreme Court is the final arbiter of the California Constitution. As in *Serrano I*, such an unequal funding mechanism was unsatisfactory under strict scrutiny. It is plain, even without reading between the lines, that the majority in *Serrano II* concluded that the United States Supreme Court had erred in *Rodriguez*, perhaps disingenuously.

*Serrano II* was not an isolated or outlier ruling. Similar litigation was filed under state constitutional provisions in numerous states. While most initially followed the federal model and allowed unequal funding schemes, a significant

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337. See *Serrano v. Priest* (*Serrano II*), 557 P.2d 929 (Cal. 1977) (en banc) (affirming *Serrano I*).

338. *Id.*

339. *Id.* at 941-52.

340. *Id.* at 952.

341. *Id.* at 945-52. The suspect classification analysis was somewhat sketchy in both *Serrano* opinions. One can certainly read them as requiring both suspect classification and fundamental interest before strict scrutiny is applicable, but such a model would make relatively little sense, as the fundamental right determination alone should require strict scrutiny.

342. *Id.* at 952-53, 957-58. Two justices submitted dissents. Justice Richardson argued that specific constitutional provisions allowing largely local school funding prevailed over the more general “equal protection” provision. *Id.* at 958-63 (Richardson, J., dissenting). Justice Clark argued that the existing system worked well and that equalization might not be feasible, or even favorable, to the members of the public most in need. *Id.* at 964-70 (Clark, J., dissenting).

343. See *id.* at 951 n.44 (majority opinion). It states “We do not think it open to doubt that the *Rodriguez* majority had considerable difficulty accommodating its new approach to certain of its prior decisions, especially in the area of fundamental rights. Indeed, we share the curiosity of Justice Marshall,” who challenged the majority on the distinction between education and several “fundamental rights” found by the Court in other cases. *Id.*

number of states have found state constitutional flaws in those funding schemes.\textsuperscript{345} Most of the latter states contain cities with concentrated poverty and high crime rates.\textsuperscript{346} In at least some of the states, therefore, courts may be willing to use their state constitutional powers to oversee executive and administrative decisions deploying law enforcement resources and supervising education.

\textbf{G. Legislation or Common Law Intervention}

If constitutions prove unavailing, legislatures have authority to act under their police powers, and state courts retain common law powers to confront inequities such as those explored in \textit{The Wire}. The duty to provide services and the duty to serve all members of the public are both well established. The central question is really whether legislatures or courts should be the primary actors. Maryland is one of the states that chose not to find additional equality protections in its state constitution, at least for education.\textsuperscript{347} Maryland has, however, acted legislatively to provide additional funding for education generally, specifically for those districts facing the greatest challenges based on taxable wealth and historic dropout rates, such as Baltimore City.\textsuperscript{348} It did so by statute, as have several other states.\textsuperscript{349} Professor Michelman believed that the problems of indigency are best resolved when both branches work together.\textsuperscript{350} He saw a role for the courts in determining whether an “adequate minimum” was provided and a role for legislatures in providing remedies in response to court rulings.\textsuperscript{351}

A more intriguing possibility is to rely on the common law; that is the recommendation of Charles M. Haar and Daniel W. Fessler, who explore that possibility through a discussion of the facts of one of the landmark equal protection cases of the 1960s, \textit{Hawkins v. Town of Shaw}.\textsuperscript{352} The \textit{Hawkins} case was brought by African-American residents of Shaw, Mississippi, challenging the failure of the town to provide adequate or equal public services in a number

\begin{itemize}
\item \textsuperscript{345} See, e.g., cases cited supra note 344.
\item \textsuperscript{346} The most recent Statistical Abstract of the United States reports crime rates in the nation’s largest cities in 2008. Among the large cities with very high crime rates in equalized-funding states are Phoenix, Arizona; Newark, New Jersey; and Dallas, Houston, and San Antonio, Texas. See \textit{U.S. Census Bureau, Crime Rates by Type—Selected Large Cities: 2008 Table 305} (2011), available at http://www.census.gov/compendia/statab/2011/tables/11s0305.pdf.
\item \textsuperscript{348} Bridge to Excellence in Public Schools Act, 2002 Md. Laws ch. 288 (enacted through S.B. 856).
\item \textsuperscript{350} Michelman, \textit{supra} note 253, at 39.
\item \textsuperscript{351} See \textit{supra} text accompanying notes 256-57, 260-63.
\item \textsuperscript{352} See \textit{Haar & Fessler, supra} note 245, at 12-14, 28-43 (discussing Hawkins v. Town of Shaw, 303 F. Supp. 1162 (N.D. Miss. 1969), \textit{rev’d}, 437 F.2d 1286 (5th Cir. 1971)).
\end{itemize}
of respects.353 As in contemporary Baltimore, there was no de jure, legally mandated denial of equal services to African-Americans; as in Baltimore, the living conditions of the poor, mostly Black, section were deplorable, certainly in contrast to those prevailing in the majority, white, part of the town.354 Recent history was all too clear on the racial underpinnings of the civic decisions that led to such conditions, such as the sale of the town’s former all-white public school for one dollar for use as a segregated private school immediately after a court decree ended the segregated public school system.355 Federal District Judge Jack Weinstein described the situation in Hawkins as “a particularly poignant example of the misapplication of municipal resources.”356

The Hawkins case followed a complicated path. The plaintiffs alleged discrimination on the basis of both race and poverty.357 The district judge denied the claim, concluding that there was no constitutional right to equal or adequate municipal services.358 On appeal, the Fifth Circuit overturned the ruling, concluding that the record proved racial discrimination in public services.359 Haar and Fessler characterize the failure of the appellate court to consider the wealth discrimination claims as a lost opportunity, resulting in the case standing only for strict scrutiny in response to racial discrimination, a principle that was already well established by 1971.360

In the end, of course, both constitutional theories of the Hawkins case were weakened. The wealth discrimination argument, abandoned on appeal by the

353. See id. at 30-31, 38-39.
354. Id. at 28-29. The text and a map introduced at trial revealed that, in the 1960s, Shaw was highly segregated by race and that the neighborhoods received very different levels of public services, from sewer systems to street lights. Id. at 29. The district court and the appellate court had very different ideas about the nature and extent of the discrepancies. Compare Hawkins v. Town of Shaw (Hawkins I), 303 F. Supp. 1162, 1164-67 (N.D. Miss. 1969), rev’d, 437 F.2d 1286 (5th Cir. 1971), with Hawkins v. Town of Shaw (Hawkins II), 437 F.2d 1286, 1288-91 (5th Cir. 1971).
355. HAAR & FESSLER, supra note 245, at 12, 257 n.2.
357. Hawkins II, 437 F.2d at 1287-88. The racial basis of the lawsuit was obvious. The poverty claim was based on the recent decision in McDonald v. Board of Election Commissioners of Chicago, in which Chief Justice Warren stated that classifications drawn on the basis of “wealth or race . . . would independently render a classification highly suspect.” 394 U.S. 802, 807 (1969).
359. Hawkins II, 437 F.2d at 1292-93, affirmed on reh’g, 461 F.2d 1171 (5th Cir. 1972) (per curiam). The panel decision was modified by the court en banc, largely concerning remedial issues.
360. HAAR & FESSLER, supra note 245, at 41-43. The authors note, however, that even if a disappointment, worse was yet to come, as the Supreme Court under Chief Justice Warren Burger would be far less hospitable to discrimination claims than it had been under Chief Justice Earl Warren. See id. at 48-53.
litigants, would later fail in *Rodriguez*.

In addition, even the racial discrimination claim might not survive judicial scrutiny today, as indicated by a footnote in *Washington v. Davis* challenging the Fifth Circuit's reliance in *Hawkins* on statistical and inferential evidence to support its racial discrimination finding.

Haar and Fessler use *Shaw* to illustrate two aspects of the larger problem—the grave and undeniable deviation from equal provision of many public services and the increasing judicial unwillingness to use the equal protection doctrine to remedy that problem. They argue that the courts have long recognized a common law right to receive equal services and a correlative governmental duty to provide equal services, which should justify judicial action. The common law approach in effect allows courts to do whatever they can to remedy the problems. Critics rightly point out that structural litigation in which courts serve as long-term government managers creates problems of its own. But that means that most courts will be hesitant to step in prematurely, which is good, and quick to leave when no longer needed, which is even better. That is certainly better than the eternal failure of our cities.

The problems in Baltimore have many origins and are repeated across the country. Perhaps the most severe problems relate to relationships among race, poverty, and housing patterns, which are all evident in *The Wire*’s west Baltimore. This set of inter-related problems goes back at least to the days of

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362. 426 U.S. 229, 244 & n.12 (1976).

363. *See e.g., Hawkins II*, 437 F.2d at 1289 (street paving); *id.* at 1289-90 (street lights); *id.* at 1290 (sewers); *id.* at 1290-91 (surface water drainage); *id.* at 1291 (water mains, fire hydrants and traffic controls). The *Hawkins II* court admitted there was “no direct evidence” of intentional discrimination based on race, but found the racially discriminatory results sufficient to make the plaintiffs’ case. *Id.* at 1291-92. This was the conclusion that troubled the Supreme Court in *Washington v. Davis*. *See 426 U.S. 229, 244-45 & 244 n.12 (1976).* The Fifth Circuit’s apparent overstatement of the strength of the case in *Hawkins II* does not necessarily mean that inferences from statistical evidence can play no role in deciding cases in this area.


365. *Id.* at 15-20, 194-226.


Jim Crow laws, and in a former slave state such as Maryland, to slavery itself, much as it did in Shaw, Mississippi. As a result, it is sensible, good policy, and ultimately good politics, for legislatures and courts to use their respective powers to help solve the problems.

You can’t get out of poverty or even move out of west Baltimore, for that matter, without a good education, unless you are a drug dealer. And that should be enough to prove that the problems of west Baltimore are everyone’s problems.

CONCLUSION: MOVING TOWARD EQUALITY

The society depicted in The Wire is not the same as the one that the Rodriguez Supreme Court perceived when it adhered to rational basis scrutiny in education funding equal protection cases. It is more likely to be the society that the Warren Court perceived, a feral battleground in which the police and local government require close judicial regulation to protect the constitutional rights of the public and to help the poor succeed. The Warren Court’s willingness to question government action, to require credible justifications for government classifications, and to examine governmental decision-making in context is at least more responsive to the sort of complicated dynamics that are both cause and result of the failure of the modern inner city than the reflexive deference of rational basis review. No heightened standard of review can solve urban problems, but a more skeptical view of city governance than the one implied by Rodriguez would lead to more focus by the courts and others on those who live on the battleground of the drug war. Rodriguez epitomized the legal unrealism that too often describes the Supreme Court’s jurisprudence in the post-Warren Court years. The Warren Court’s aggressive judicial activism, however, would probably not work today. It might be too didactic, and we might see a nearly constant back and forth between courts (usually federal) and state and local governments concerning policy decisions and budgetary outlays, resulting in more of the sort of gridlock that already dominates national politics.

The answer is more likely to lie in small steps focused on individual circumstances, from the structure and responsiveness of local government to economic power and the gravity of deprivations of rights. Lack of adequate police protection and education to a large segment of the population, especially one defined in fact (if not in intent) by race, is an extremely grave deprivation; the location of recreational facilities or the management structure of public departments is not.

As Professor Michelman argues, consistent with Rodriguez, courts should


identify a constitutionally protected adequate minimum of public services.\textsuperscript{369} Notwithstanding cases such as \textit{DeShaney},\textsuperscript{370} which reject a private due process cause of action for failing to protect specific individuals,\textsuperscript{371} it is undeniable that government has a general police power obligation to protect all of its citizens. The two concepts are not inconsistent. It is reasonable to deny a private damages remedy for individual governmental failures and, at the same time, insist upon a general constitutional due process duty to provide minimal protection.

The reason this principle became bound up in equal protection law is that all states and local governments purport to protect and provide services, but the energy and success of their efforts differ widely. The courts have been wise to hesitate before interfering in policy judgments that result in the allocation of public services, but are wrong where hesitation in effect means automatic approval. Where, as in \textit{The Wire}’s Baltimore and much of modern urban America, those allocations deny a meaningful minimum right, the courts should step in. When cities lack the revenues to pay their creditors, states are quick to step in to ensure that debts are paid, even if it means supplanting local elected government.\textsuperscript{372} Regardless of motivation, it is discrimination when the states fail to take action to remedy a situation where one of their cities lacks the resources or will to enforce its laws, leaving the city’s residents terrorized by criminal gangs. Economic or racial discrimination or benefactor favoritism does not particularly matter; pervasive crime denies people the ability to walk their neighborhoods safely and makes it harder for them to move out of poverty. We pour extraordinary resources into a war on drugs, but as history proves and \textit{The Wire} dramatizes, we do not seem to be doing much to reduce drug use or associated crimes.\textsuperscript{373} Experiments such as legalization, as presented by the Hamsterdam episodes,\textsuperscript{374} may not solve the drug problem, but by changing the focus of the governmental response, they suggest that neighborhoods can at least become safer if there are adequate police resources to ensure public safety. Is it so much to ask that urban residents do not have to share the sidewalks outside

\textsuperscript{369} Michelman, \textit{supra} note 253, at 9.
\textsuperscript{371} \textit{Id.} at 202-03.

\textsuperscript{374} See \textit{supra} Part III.A.
their homes with open-air drug markets?

As the Rodriguez Court necessarily understood, much turns on support for public education. One hopeful sign is that there is a national dialogue on improving education for all children.375 The solution may not be about dollars, although there is probably no way to provide an excellent education without spending a great deal of money. Where an adequate minimum educational program is not being provided because of the incompetence of either legislators, budget officers, municipal officials, school administrators, or teachers, there is a denial of equal protection. Judicial declarations to that effect can co-exist with judicial acceptance of local policymaking and (largely) local funding. Rodriguez does not mean that local policymaking and control are automatically constitutional. It makes no sense to have constitutional requirements if they become meaningless affirmations of meager and unimaginative efforts to provide “equal” services. It is one thing to defer to policy choices about how to become more efficient or more productive; it is another thing to defer to the sort of inept and often corrupt policy choices that maintain failure. Debating whether education is a constitutional right or just a human right is just semantics. Where, as in The Wire’s Baltimore, and probably in many other cities and poor rural areas as well, education falls below minimal standards, local control cannot trump the right to education. The same is true when the city can no longer provide safe streets for its residents. Enforce the drug laws effectively, and the streets will be safer, or change the drug laws and turn existing anti-drug law enforcement efforts into protecting people on the streets and in their homes. Those are choices deserving of deference. In too many cities, drugs are openly sold in the streets; spending enormous resources on drug enforcement without reducing street sales makes no sense and deserves no deference. The answers to continued failure are not pretty—some form of federal or state intervention or judicial receivership—but those political and legal remedies exist because sometimes they are necessary.

The problems in Baltimore have little to do with racist discrimination. As implied in The Wire, the factors influencing poor city decisions are more likely to be economic self-interest, gaining political or bureaucratic power, and corruption (although the show portrays numerous well-intentioned civil servants and elected officials). The problems facing Baltimore include those of a changing national economic system that devalues labor and industry and tolerates increasing disparities in wealth.376 State decision-makers are largely responsible as well. Local governments provide most financial support for public education, but states play critical roles as well, as recognized in Rodriguez.377 Here the


376. This is Simon’s view. See David Simon, Two Americas, in THE WIRE RE-UP, supra note 1, at 260-66.

disparity between the largely white state government of Maryland and the largely African-American population of Baltimore is an appropriate reason for courts to examine the facts behind public policies with disparate racial or wealth impacts, especially decisions that disadvantage low income residents of crime-ridden areas. Listed below are recent statistics concerning crime and educational achievement in Baltimore and Maryland generally (the Maryland statistics include Baltimore results, which means that, in fact, the crime rates are even lower and graduation rates even higher in the rest of the state than the statewide figures indicate).

<table>
<thead>
<tr>
<th>Year</th>
<th>Violent Crime (per 100,000 residents)</th>
<th>Property Crime</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>Baltimore: 1589</td>
<td>4818</td>
</tr>
<tr>
<td></td>
<td>Maryland: 628</td>
<td>3516</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>High School Graduation Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009-10</td>
<td>Baltimore: 66 %</td>
</tr>
<tr>
<td></td>
<td>Maryland: 86.5 %</td>
</tr>
</tbody>
</table>

FBI Crime statistics for 2009 revealed that Baltimore had the fifth highest murder rate in the country.380

_The Wire_ does not solve any problems or decide any cases. It is not a social science text. It is social science fiction—issue fiction—in the tradition of Norris, Sinclair, and Dreiser.381 It offers new ways of thinking about problems and cases, and may, if we are lucky, inspire some people to improve conditions in their cities. Sometimes its lessons are didactic, but most succeed as both entertainment and editorial. Characterized as “Dickensian” to the point that Simon made fun of the description by titling one of the final episodes “The Dickensian Aspect,”382 _The Wire_ met the challenge of producing dramatic art that

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381. These naturalistic authors from the turn of the nineteenth century often wrote of the hardships caused by modernization associated with technological development. _The Wire_ also owes to Orwell’s portrayal of the Proles in _1984_. GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949). The term social science fiction applied to _The Wire_ comes from the academic conference in Leeds, United Kingdom, see Addley, supra note 4.

382. See, e.g., Amanda Ann Klein, “The Dickensian Aspect”: Melodrama, Viewer Engagement, and the Socially Conscious Text, in URBAN DECAY, supra note 1, at 177; see also Lynne Viti, “I Got the Shotgun, You Got the Briefcase”: Lawyering and Ethics, in URBAN DECAY, supra note 1, at 86 (describing defense attorney Levy as a “Dickensian villain”).
identifies and explains social problems in an entertaining format. Sometimes a spoonful of sugar helps the medicine go down.\footnote{Julie Andrews, A Spoonful of Sugar (Richard M. Sherman & Robert B. Sherman composers), in Mary Poppins (Walt Disney Productions 1964).} If the medicine takes, we will have a safer and healthier America.