

When Failure Is Success in  
Constitutional Litigation:  
**TALES FROM  
THE TRENCHES**  
with Kurt Vonnegut and  
Other American Icons

Tristan L. Duncan | Shook, Hardy & Bacon L.L.P.

March 31, 2016 | Duke Law School

# The Graduation Gift: Sufficient Failure



May 1, 1984

Dear Tris,

I'm advised by your mother that, in lieu of a gift or cash as a graduation present, you would prefer a few words of inspiration from us.

Money is easier. Nonetheless, I'll give it a try.

# Dad's Rules of Failure

## **Rule One:**

Never attempt anything that you know at the outset is petty shameful or malicious.

## **Rule Two:**

If you fail in an honest enterprise, always forgive yourself. That's difficult to do if you've already broken Rule One.

## **Rule Three:**

Don't just forgive yourself. Congratulate yourself for reaching beyond your grasp. How else can your grasp be measured?

## **Rule Four:**

Never suffer failure alone.

People who only share good times are just companions, not friends.

# Dad's Final Advice

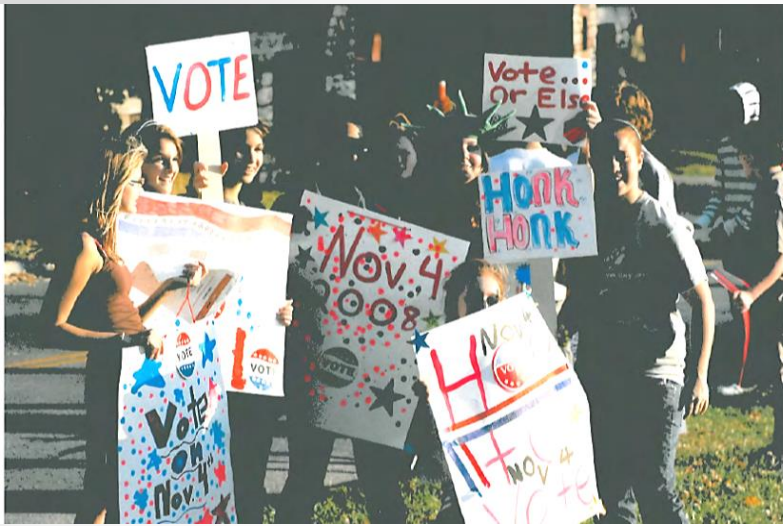
“So, someday when one of your best efforts has blown up in your face, when it appears that you’ve really botched it big, give me a kind thought and say,

“OK, Dad, that one’s for you!”

# FAST FORWARD TO 2004

• • •

The PTA Meeting Regarding  
School Funding Crisis



# CIVIC VIRTUE AND CIVIC REPUBLICANISM



# Federalism Values

## “The federal structure:

- allows local policies ‘more sensitive to the diverse needs of a heterogeneous society,’
- permits ‘innovation and experimentation,’
- enables greater citizen ‘involvement in democratic processes[.]’”

— *Bond v. U.S.*, 131 S. Ct. 2355, 2364 (2011)

# The 2004 PTA Meeting with School Officials

Q: What can we do to help fight the school funding crisis?

A: Nothing. It's **illegal** to spend more money on your children's education. The cap on the "local option budget" **prohibits** raising more local funds to offset the budget short-fall.





# The Eureka Moment

• • •

*Rodriguez FN. 107*

# The Eureka Moment

Rodriguez fn 107

[ Footnote 107 ] MR. JUSTICE WHITE suggests in his dissent that the Texas system violates **the Equal Protection Clause** because the means it has selected to effectuate its interest in local autonomy fail to guarantee complete freedom of choice to every district. He places special emphasis on the statutory provision that establishes a **maximum rate** of \$1.50 per \$100 valuation at which a local school district may tax for school maintenance. Tex. Educ. Code Ann. 20.04 (d) (1972). The maintenance rate in Edgewood when this case was litigated in the District Court was \$.55 per \$100, barely one-third of the allowable rate. (The tax rate of \$1.05 per \$100, see supra, at 12, is the equalized [411 U.S. 1, 51] rate for maintenance and for the retirement of bonds.) Appellees do not claim that the **ceiling** presently bars **desired tax increases** in Edgewood or in any other Texas district. Therefore, **the constitutionality of that statutory provision is not before us and must await litigation in a case in which it is properly presented.** Cf. Hargrave v. Kirk, 313 F. Supp. 944 (MD Fla. 1970), vacated, 401 U.S. 476 (1971). - See more at: <http://caselaw.findlaw.com/us-supreme-court/411/1.html#f107>

# *Kirk v. Hargrave*

“The legislature says to a county, “You may not raise your own taxes to improve your own school system, even though that is what the voters of your county want to do.” We have searched **in vain** for some legitimate state end for the discriminatory treatment ....

— 313 F. Supp. 944, 948 (M.D. Fla. 1970)

# Vonnegut and Harrison

...

# Harrison Bergeron

THE YEAR WAS 2081, and everybody was finally equal. They weren't only equal before God and the law. They were equal every which way. Nobody was smarter than anybody else. Nobody was better looking than anybody else. Nobody was stronger or quicker than anybody else. All this equality was due to the 211<sup>th</sup>, 212<sup>th</sup>, and 213<sup>th</sup> Amendments to the Constitution, and to the unceasing vigilance of agents of the United States Handicapper General.

Kurt Vonnegut, Jr. 1961

# (Handi)-Capping Excellence

“And George, while his intelligence was way above normal, had a little mental handicap radio in his ear. He was required by law to wear it at all times. It was tuned to a government transmitter. Every twenty seconds or so, the transmitter would send out some sharp noise to keep people like George from taking **unfair advantage** of their brains.”

- *Harrison Bergeron*, by Kurt Vonnegut, 1961

LAWRENCE

# JOURNAL-WORLD<sup>®</sup>

THURSDAY • MAY 5 • 2005

www.ljworld.com

## Vonnegut: Lawyers could use literary lesson

Famous author drawn into debate over school finance

By Scott Rothschild

strotschild@ljworld.com

**TOPEKA** — When the Kansas Supreme Court takes up the school finance case next week, it might well ponder a futuristic story from the 1960s by science fiction satirist Kurt Vonnegut.

Attorneys representing students from the Shawnee Mission district say the story "Harrison Bergeron" shows that a world of forced equality would be a nightmare, so unequal funding of public schools is OK.

Their legal brief says capping local taxes on schools was unconstitutional, and they cited the 1961 story, which depicts a future society where everyone is made equal by forcing impediments on anyone who is better.

"Nobody was smarter than anybody else," the attorneys quoted Vonnegut as writing. "Nobody was better looking than anybody else.

But in a telephone interview



Author Kurt Vonnegut is perhaps best known for his classic novel "Slaughterhouse Five" — set both during the World War II bombing of Dresden, Germany, and in an outer-space zoo. His numerous novels use science fiction and humor to satirize modern society.

## Vonnegut says attorneys may have misinterpreted story

CONTINUED FROM PAGE 1A

Wednesday, Vonnegut told the Journal-World that the students' attorneys may have misinterpreted his story.

"It's about intelligence and talent, and wealth is not a demonstration of either one," said Vonnegut, 82, of New York. He said he wouldn't want schoolchildren deprived of a quality education because they were poor.

"Kansas is apparently handicapping schoolchildren, no matter how gifted and talented, with lousy educations if their parents are poor," he said.

### Latest chapter

The debate over Vonnegut's story was the latest chapter in the school finance lawsuit before the Kansas Supreme Court.

The court has ruled that the \$2.7 billion in school funding is inadequate and distributed unfairly. The Legislature has approved a \$142 million increase and allowed local districts to raise property taxes nearly \$500 million more.

Critics say the increase is not enough and the local property tax options will widen the disparity between wealthy and poor districts. The court will hear oral arguments on the new legislation Wednesday.

Attorneys representing 40 students from the Shawnee Mission school district in Johnson County filed a brief supporting the Legislature's new law, and went further, saying there should be no limit on how much local districts could raise in taxes for local schools.

"It's about intelligence and talent, and wealth is not a demonstration of either one."

— Author Kurt Vonnegut, on "Harrison Bergeron"

Any attempt to cap local taxes for schools is unconstitutional, they argue, "because it impermissibly infringes on individual liberty and related fundamental rights and usurps local school board authority to supplement public education over and above the suitable level."

The attorneys included in their brief the Vonnegut story, which takes place in the year 2081 "and everybody was finally equal."

"Nobody was stronger or quicker than anybody else. All this equality was due to the 211th, 212th, and 213th Amendments to the Constitution, and to the unceasing vigilance of agents of the United States Handicapper General," the story says.

In the story, smart people have to wear radios that emit distracting noises, pretty people must wear hideous masks, and athletic people are weighed down with bags of birdshot.

Tristan Duncan, an attorney representing the Shawnee Mission students, said the Handicapper General was like the state putting a cap on how much local schools can spend on students, which "restricts free will and the pursuit of excellence."

But Vonnegut said the Handicapper General would be the one hurting poor students by depriving funds to their schools.

### Rupe weighs in

Alan Rupe, an attorney representing plaintiff school districts on the opposing side, said the Shawnee Mission brief was "well-written" but that he disagreed that local districts should be allowed to raise as much as they want.

"I would classify this as the Johnson County viewpoint of the world," Rupe said. "This kind of viewpoint exists when there is not adequate funding for all schools," he said.

Rupe said that he didn't oppose the use of some local taxes for schools, but that under the current system local taxes were used for essentials in schools and that was not fair to poor districts that couldn't raise much in local taxes.

"We don't want to cut off any mountain tops. We want to raise the valleys so kids in poor areas come up to the mountain tops," he said.

Rupe said he hadn't read the Vonnegut story but remembered reading his work in college.

"I'm glad," Rupe said, "to see someone is quoting Kurt Vonnegut."

Vonnegut said he didn't mind the story being used in the lawsuit.

"The story is quite well-known," he said. "It's taught a lot in high school."

— Staff writer Scott Rothschild can be reached at 785-354-4222.



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May 10, 2005

Via Facsimile 212-688-8739

Mr. Kurt Vonnegut

Re: *Ryan Montoy, et al. v. State of Kansas, et al.* No. 04-92032-S; District  
Court Case No. 99 C 1738 (*Amicus Curiae* School Finance Brief)

Dear Mr. Vonnegut:

Therefore, I am very much interested in your thoughts on the applicability of "Harrison Bergeron" to the constitutionality of the Kansas School Finance Formula, and in particular, one component of that formula, the "cap on the local option budget." Should you agree with our interpretation, we will be vindicated, and I will have a delightful conversation with Mr. Rothschild. Should you disagree, then I have a proposal for you. I propose that you and I engage in a public debate on the proper role of equality and liberty in public education in the Lawrence Journal World by writing either together or separately a "letter to the editor." In our "letter to the editor," we would invite the Court of Public Opinion to be the judge on whose interpretation is correct. I think our friendly debate could excite the public's imagination, bring much needed attention to the real issues in public education, and demonstrate how the individual can triumph over the state in our modern mass society - - - irrespective of who wins the debate. I look forward to your response.

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Very truly yours,

STINSON MORRISON HECKER LLP



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cc: Donald C. Farber, Esq.

TLD/pm

DTMDOCS 1190317v1



# Vonnegut: “Putty in Your Hands”

05/11/2005 09:16 2126888739

JILL KREMENTZ

PAGE 01

In regard to my phone interview with your reporter Scott Rothschild, which had to do with my story “Harrison Bergeron” and its involvement in recent litigation anent Ryan Montoy et al. vs State of Kansas:

Mr. Rothschild gave me no clear idea of what the case was about, which I now know to be actions by the legislature as preposterous to me as any lampoon I ever wrote. My story mocks the idea of legally eliminating envy by outlawing excellence, which is precisely what the legislature means to do in the public schools, by putting a cap on local spending on them. Should it prevail, it will be possible for me to say there are no longer any truly excellent public schools in all of Kansas. Talk about a level playing field!

May I say to those who know my story, which ends in the execution of an enviably gifted student by a Handicapper General: We have always had Handicapper Generals among us, empowered by envy, Mark Chapman, who shot John Lennon, and Lee Harvey Oswald, who shot John F. Kennedy, to name but two.

Kurt Vonnegut

DEAR SOCCER MOM -

I AM PUTTY IN YOUR HANDS. I AWAIT YOUR INSTRUCTIONS AS TO HOW I COULD IMPROVE THIS TO YOUR ADVANTAGE.

# Unpublished Letter to the Editor

228 E 48 NYC 10017 May 12 2005

Letter to the Editor  
Lawrence Journal World

In regard to your May 5 2005 piece "Vonnegut: Lawyers could use a literary

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Kurt Vonnegut

# Fast Forward to 2010:

• • •

The 2<sup>nd</sup> Funding Crisis and  
*Petrella v. Brownback* filed December 10, 2010



# Petrella

## KEY FACTS

- SMSD is in the bottom 5% of state aid of all districts in the state.
- SMSD is in the bottom 25% of all districts of total funding (federal, state, local sources) for classroom instruction.
- State Defendants admitted: “SMSD receives *less* aid per student than *most* other school districts.”
- To achieve equality SMSD would need approximately 50% more revenue.
- The SMSD **voters** have never rejected an education funding increase and have passed ballot petitions by wide margins.

# The Crossroads

- **Demographic:** 116% increase in minorities, economically disadvantaged, and English Language Learners.
- **Geographic:** Topeka, Kansas (*Brown*), Kansas City, Missouri (*Jenkins*)
- **Historic:** *Brown, Jenkins, Seattle Schools, Schuette*

# Jenkins

“a proper respect for the integrity and function of **local** government institutions. Especially is this true where, as here, those institutions are **ready, willing**, and – **but for the operation of state law curtailing their powers** – **able** to remedy the deprivation of constitutional rights themselves.”

— *Jenkins v. Missouri*, 495 U.S. 33 (1990)

# First Amendment Dynamic for Civic Discourse *and* Action

Freedom embraces the right, indeed the duty, to engage in a **rational, civic discourse** in order to determine how best to form a **consensus** to shape the destiny of the Nation and its people. These “***First Amendment dynamics***” would be disserved if this Court were to say that the question here at issue is beyond the capacity of the **voters to debate and then to determine.**

*Id.* (emphasis added).

*Schuette v. Coalition to Defend Affirmative Action*  
134 S. Ct. 1623, 1637 (2014)





# What Makes the *Petrella* Case Extraordinary

- Not a school funding *floor* case, but a *ceiling* case.
- This case does not involve:
  - passing the buck,
  - political paralysis or dysfunction
  - white flight.

Rather, it involves a community of citizens **ready, willing** and **able** to engage in **civic self-sacrifice** for the betterment of their community's school children's educational needs and to **voluntarily help integrate** an increasingly diverse student population. But the State of Kansas stops them cold.

# Little “Free” Library vs Public School Library

**LEGAL**



**ILLEGAL**



Why the difference?  
Is the difference constitutional?

# Petrella

## DOCTRINE

- **Equal Protection:**
  - *Rodriguez* fn 107 and *Kirk v. Hargrave*
- **Substantive Due Process**
  - Liberty Interests and Childrearing Rights
  - Property Rights
  - Voting Rights
- **First Amendment**
  - Money as Speech
  - Education as Speech

# Initial Victory: 10<sup>th</sup> Circuit's 2011 Decision

“[A]s we have made clear, Appellants’ [school children] alleged injury, while flowing from the [spending] cap, was not ‘the inability of the [school] district to raise unlimited funds,’ but rather the alleged **unequal treatment** (manifested in, among other things, lower per pupil funding) that prevented them from even attempting to **level the playing field.**”

— *Petrella v. Brownback*,  
October 18, 2012 Opinion pp. 16-17

# Rodriguez Distinguished

- Positive versus Negative Rights Distinctions;
- Instrumental versus Textualist Analysis;
- Comprehensive versus Surgical Relief.

# Rodriguez: Negative vs Positive Rights

“The Court has long afforded zealous protection against unjustifiable *governmental interference* with the individual’s right to speak and to vote. Yet, we have never presumed to possess either the ability or the authority to *guarantee* to the citizenry the most effective speech or the most informed electoral choice ... These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference.”

411 U.S. 1, 35-36 (1973)

*Rodriguez:*

# Negative vs Positive Rights

The education spending cap is an “unwarranted governmental interference” from which SMSD Citizens wish to be “freed.”

Education as Speech  
or Education as Welfare  
Legislation

Is Education  
speech or isn't it?



# Strict Scrutiny v. Rationality Review

- If education is “speech,” as its:
  - dictionary definition,
  - ordinary meaning, and
  - Supreme Court precedent

all suggest, then Strict Scrutiny applies.

# Education as Speech: Dictionary Definition

“Educate” is defined as:

**“to develop mentally . . . esp.,  
by instruction . . . to provide  
with information; inform . . .  
to persuade . . . syn., see teach.”**

— Merriam Webster’s  
Collegiate dictionary (11<sup>th</sup> Edition)

# First Amendment and Education as “Speech”

- “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”

*Shelton v. Tucker*, 364 U.S. 479, 487 (1960)

- *Shelton*: the law was struck BECAUSE “teachers AND STUDENTS must ALWAYS remain FREE to INQUIRE, to STUDY, and to EVALUATE”
- *Keyshian*: the law was struck BECAUSE ‘it risked **chilling** academic freedom to **communicate ideas in the classroom**’
- *See also Barnette* (1943), *Sweezy* (1957), *Kleindienst* (1972) (Free Speech Clause protects right to read and hear; right to receive information and ideas).

# Education as Speech Line of Cases – 10<sup>th</sup> Cir

## **THE RATIONALE:**

“Each of these cases recognize that the First Amendment protects speech in the education context.”

*Meyer, Pierce:*  
Child-Rearing and  
Education Rights

...

# *Pierce v. Society of Sisters* *and Meyer v. Nebraska*

As long ago as 1923, the Supreme Court held that the “liberty” protected by the Due Process Clause includes the right of parents “to control the **education** of their own.” Two years later, in *Pierce v. Society of Sisters*, the Court again held that the “liberty of parents and guardians” includes the right “to direct the ... education of children under their control.”

# Contracting “Spectrum of Available Knowledge” Is Off-Limits

“By *Pierce v. Society of Sisters, supra*, the right to educate one’s children as one chooses is made applicable to the states by the force of the First and Fourteenth Amendments. By *Meyer v. State of Nebraska, supra*, the same dignity is given to the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.”

— *Griswold v. Connecticut*, 381 U.S. 4789, 482 (1965)

# *Meyer, Pierce, and Obergefell*

“A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and *education* (citing *Meyer* and *Pierce*).”

— *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015)



# Rodriguez, Meyer, and Pierce

*Petrella* is an education and expressive rights suit, like *Meyer* and *Pierce*, where all that is sought is the removal of an unwarranted state-created obstacle (the Cap) to plaintiffs' educational opportunity.

# *Kitchen vs Petrella*

Why did the 10<sup>th</sup> Circuit Court of Appeals see *Kitchen* as a logical extension of *Pierce* and *Meyer* BUT *Petrella* as a “Kitchen Sink”?

# Campaign Finance vs School Finance

...

# Doctrinal Incoherence Regarding Speech-related Spending Caps

- Campaign Finance Caps = strict scrutiny
- Education Finance Caps = rationality review
  - Why the difference?

# Money as Speech Line of Cases

## – 10<sup>th</sup> Cir. Agreement

- **Speaker Identity Discrimination:** “The First Amendment disfavors suppression of political speech based upon the **speaker’s identity**, including their wealth” citing *Citizens United*.
- **Heightened Scrutiny Applies:** “Laws that restrict speech based on a speaker’s identity are subject to some form of heightened scrutiny.”

# Purpose of Spending Caps

- To ensure “Equity.”
- To “help equalize the ability of districts with lower property wealth to *raise* money through use of the LOB [local funding].”

# Equity: A “Leveling” Justification (i.e. Handi-capping)

“[T]he concept that government may **restrict** the speech of some elements of our society in order to **enhance** the relative voice of others is wholly foreign to the First Amendment . . . .”

*Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam);  
See generally *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 741-42 (2008);  
*First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.30 (1978).

# The Guiding Principle for Speech

“[W]hen it comes to such speech, the guiding principle is **freedom** ... Not whatever the State may view as **fair.**”

- *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*,  
131 S. Ct. 2806, 2826 (2011)



# Equality vs Equity - Irreconcilability

- *Brown*: “The Supreme Court has explained that ‘the opportunity of an education . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms.’”

vs

- *Montoy and Gannon*: “Equity does **not** require the legislature to provide **equal funding** for each student or school district . . . . What is required is an **equitable and fair distribution** of funding to provide an opportunity for every student to obtain a **suitable** education.”

# Kansas Constitution's Education Article

- Kansas Legislature is required to provide:
  - “suitable finance for public education”
- What does **suitable** mean?
- Suitable = “Appropriate”
  - “The standard most comparable to the Kansas requirement of ‘suitable’ funding is ... appropriate.”

- *U.S.D. 229 v. State*, 256 Kan. 232, 256 (1994)

○ Suitable = “Appropriate” = Tautology

# Coming Full Circle

...

What the Bench, Bar and Legal Academy  
Can Learn From One Another

# Disconnect Between Legal Scholarship and the Work of Practitioners ...

“Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of *Immanuel Kant* on evidentiary approaches in 18th Century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, *but isn’t of much help to the bar.*”

[http://www.abajournal.com/news/article/law\\_prof\\_responds\\_after\\_chief\\_justice\\_roberts\\_disses\\_legal\\_scholarship/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/news/article/law_prof_responds_after_chief_justice_roberts_disses_legal_scholarship/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email)

# ... or Opportunity to Improve the Theory and Practice of Law

Hey, Chief Justice Roberts:

“Tyranny of Kant” is what  
I remember most from Law School.

# Professor Laurence H. Tribe:

...

His Insights on Success and Failure in  
Constitutional Litigation

# Professor Tribe and *Petrella*

- Professor Tribe as co-counsel
  - Carl M. Loeb University Professor and Professor of Constitutional Law at Harvard Law School since 1968;
  - “Liberal Legal Lion”
  - Taught constitutional law to Present Obama and Chief Justice Roberts
  - Argued over 30 cases before Supreme Court
  - 2009 Senior Counselor for Access to Justice in the U.S. Justice Department

# Professor Tribe on Success and Failure in Constitutional Litigation

## Kansas City High School Student

Q.: Which case victory that you argued in front of the Supreme Court are you most proud of today?

## Professor Tribe

A: Well, it's a great question. But actually, **the case I'm proudest of is a defeat, not a victory.**

-- (<https://www.youtube.com/watch?v=Ptg2w8RXN38>) and on the Johnson County First Amendment Foundation's website (at <http://jcfaf.org/red-curtains-video/>); at about 54:55 in the video.



# Professor Tribe:

## “Proudest of That Loss”

“In 1986, a guy named Michael Hardwick had been arrested for intimate activity with his boyfriend, in private, perfectly consenting, and under the laws of Georgia (which was involved at the time), that was a crime.... although I knew that the composition of the Court at the time made it hopeless, we could not win a claim that the Constitution prevented Georgia from outlawing certain consensual acts in private. But I *also* knew that we would likely get a dissent or two, and that those dissents would eventually become the law.

So, I lost 5 to 4 in this case, called *Bowers v. Hardwick* in 1986. And I kept telling my students, year in and year out, just wait, it won't be too long before the Court overrules it. It *was* a while—17 years. But in *Lawrence v. Texas*, ...the Court overruled *Bowers*. And in *Bowers*, my focus was:

it didn't matter exactly what Michael Hardwick was doing in his bedroom, in private. It was nobody's business. The question was, what was *Georgia* doing in his bedroom?

So, **I am proudest of that loss**—although I'm pretty proud of some of the wins, too!”



The Tricks and Traps  
of Building a (Pro Bono)  
Constitutional Litigation Practice

...

# The Tricks

- Assemble a like-minded team.
- Strike balance between paying and non-paying clients.
- Coalition-build.

# The Traps

- Be Prepared to
  - Lose the nice office,
  - Take a pay cut,
  - Be maligned in the press.

BUT ....

# Conclusion

When failure happens,  
give me a kind thought and say:

“Ok, Tristan, that one’s for you!”

Thank you!

Questions

