

*Etched in Stone:
“Buy a Brick” Fundraisers in Schools and
the First Amendment*

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A. Introduction.

What do the Georgia Aquarium and Centennial Park have in common with several newly built schools in Georgia? They raise funds through “buy a brick” campaigns, asking people to pay money for the right to inscribe a message on a brick or tile which will become part of the permanent structure of the new facility. “You too can be a part of history (for a small fee)!”

This can be an excellent way for PTA’s, Boards, or other groups to raise money, particularly since school systems already face so many funding challenges. But legal dangers lurk. Any fundraising campaign must comport with the First Amendment to the U.S. Constitution. It cannot run afoul of the Establishment Clause limits placed on school systems, and it cannot violate the Free Speech rights of persons paying to inscribe messages.

B. Planning a Brick Fundraiser.

The planning for a “brick” fundraiser should be undertaken carefully. Issues of marketing, construction, logistics, price-setting, and financing will arise. The extent to which the

¹ This paper is submitted in connection with a seminar, “Leading Answers to Leading Questions,” presented by Hall Booth Smith & Slover, P.C., scheduled for March 22, 2006 at the Gwinnett Convention Center. The panel discussion is “First Amendment Issues Facing School Districts,” with panelists Gerry Weber, ACLU Georgia, George Weaver, Esq., Hollberg & Weaver, LLP, and Clem Doyle, Esq., Board Attorney for the Marietta City Schools.

content of inscribed messages will be restricted should also be addressed. Vulgar messages, for instance, merit restriction. Should messages which do not relate to the school or to individual names of students, parents, and staff members be restricted? What about religious messages? With respect to religious messages, should all, none, or some be excluded? How should the process of approving messages operate?

The answers to these questions, and even the way the questions are discussed, can expose a school system to a lawsuit alleging violations of Constitutional law. Brick cases are unique in Constitutional law. Typical First Amendment education issues (such as the posting of the Ten Commandments or the teaching of Intelligent Design) tend to involve the single issue of the Establishment Clause. Litigation can be avoided, in these instances, simply by taking down the Ten Commandments display or removing references to intelligent design from the curriculum. But with brick inscriptions, schools can get stuck between a rock (the Establishment Clause) and a hard place (Free Speech). Placing a brick with a religious message on campus might violate the Establishment Clause, but then again disallowing or removing it might violate the paying inscriber's Free Speech rights.

If a brick fundraiser is being considered in your school system, my advice is to get your Board Attorney involved to help you navigate these perilous constitutional waters. I have summarized a sampling of precedent cases. I also discuss some of the legal parameters which courts will utilize when deciding disputes in brick cases.

C. Some Precedent Cases With Illustrative Context.

Brick fundraisers have become especially popular within the last ten years, based on personal observation. Federal court disputes involving brick fundraisers have also exploded

within the last four years. More disputes are expected in the near future, and school systems need to prepare.

Federal courts show a clear pattern of determining outcomes in First Amendment cases, no on the basis of overarching rules but on the particular facts of the individual cases. It is, therefore, difficult to use precedent cases to predict likely outcomes. But that should not stop school districts from trying.

1) Demmon v. Loudoun County Public Schools, 342 F.Supp.2d 474 (E.D. Va. 2004).

The court held that free speech rights of parents were violated where the school removed bricks inscribed with a Latin cross. The court held that symbols were not school-sponsored speech; and that a walkway where the bricks were displayed constituted a designated or limited public forum and that the school engaged in prohibited “viewpoint discrimination.”

2) Seidman v. Paradise Valley Unified School District No. 69, 327 F.Supp.2d 1098 (D.

Ariz. 2004). The Court held that a school’s requirement for removal of the word “God” from the tile inscription “God Bless Quinn We Love You Mom and Dad” violated the Free Speech rights of parents. The court held that the inscriptions were school-sponsored speech that was part of the curriculum.

3) Anderson v. Mexico Academy and Central School, 186 F.Supp.2d 193 (N.D. N.Y.

2002) (remanded by unpublished decision). The Court held that the private school (on private property) likely committed viewpoint discrimination against parents by permitting a “God Bless You” brick but restricting other Christian based messages. Beyond this central holding, the Court’s reasoning was bizarre. The parents ultimately lost their request for a preliminary injunction in light of the school’s defense that it violated Free Speech because it was trying to

comply with the Establishment Clause. The Court left the odd implication that a school can violate one constitutional provision as long as it did so while attempting to comply with another.

4) Fleming v. Jefferson County School District R-1, 298 F.3d 918 (10th Cir. 2002). The Court held that the school could enforce its guidelines barring religious symbols in a tile painting and installation project as part of a reconstruction of the school where the Columbine shootings occurred, since those symbols were reasonably related to legitimate pedagogical concerns. The expressions were school-sponsored speech in a nonpublic forum, and this Court held that viewpoint discrimination was not barred by the notable Hazelwood² Supreme Court case (which set the standard that schools may exercise editorial control over school-sponsored speech as long as its actions are reasonably related to legitimate pedagogical concerns).

5) Tong v. Chicago Park District, 316 F.Supp.2d 645 (N.D. Ill. 2004). The Court held that a public park engaged in impermissible viewpoint discrimination when it rejected the brick inscription “Jesus is the cornerstone,” given the expansive view of appropriate commemorative messages as shown by other messages that were approved. The court admonished the park for not having a clearer policy for accepting and rejecting inscriptions.

* * *

It appears that “brick” cases may have yet to be decided within the Eleventh Circuit (which encompasses Georgia, Florida, and Alabama). There are, however, other recent cases which have dealt with related issues of the Establishment Clause or Free Speech, which might give us clues about how brick cases might be handled here in the Eleventh Circuit:

² Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

1) Selman v. Cobb County School District, 2005 W.L. 83829 (N.D. Ga. 2005) (currently on appeal to the Eleventh Circuit Court). The Court held that evolution disclaimer stickers placed in science textbooks violated the Establishment Clause.

2) King v. Richmond County, Georgia, 331 F.3d 1271 (11th Cir. 2003). The Court held that the superior court clerk's seal does not violate the Establishment Clause. The seal in question, containing an outline of the Ten Commandments, a sword, and the name of the court, was used solely to authenticate documents.

3) Bannon v. School District of Palm Beach County, 387 F.3d 1208 (11th Cir. 2004). The Court held that a school's censoring of religious words and symbols on a mural painted for a school beautification project did not violate free speech rights. The Court held that the school never created a public forum, the murals were school-sponsored speech, and the school's actions were reasonably related to a legitimate pedagogical objective.

D. What does the Establishment Clause require of a brick fundraiser?

The cases I have presented here illustrate some of the challenges faced by school systems. Now let me summarize the legal tests for the Establishment Clause and Free Speech, which will be applied in a brick fundraiser dispute. The Establishment Clause of the First Amendment of the U.S. Constitution provides as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."³ The

³ U.S. Const. Amend. I. In the recent Cobb County evolution sticker case, the District Judge detailed how the Eleventh Circuit and Supreme Court approach Establishment Clause challenges, and the portion of this memorandum pertaining to Establishment Clause precedent case law relies on this analysis. See Selman v. Cobb County School District, 2005 W.L. 83829 (N.D. Ga. 2005) (on appeal).

prohibition against the establishment of religion applies to the states through the Fourteenth Amendment.⁴

Federal Courts afford considerable discretion to local school boards in operating public schools, but will intervene where an Establishment Clause violation has occurred.⁵ The federal courts look primarily at the factual context when making this determination. The courts will, therefore, examine questions such as: What government action caused the display to be placed on public property? What is the wording of the message? Were restrictions placed on the kind of messages that were allowed to be displayed? Would a reasonable bystander think that religion was being endorsed? In the opinion of many observers, courts tend to rule on Establishment Clause cases based on their own subjective view of the proper answers to these types of factual questions.

To determine whether the message on a brick violates the Establishment Clause, Supreme Court and Eleventh Circuit precedent direct the Court to apply the three-pronged test articulated in the “Lemon” case.⁶ Under the Lemon test, a government-sponsored message violates the Establishment Clause of the First Amendment if (1) it does not have a secular purpose, (2) its principal or primary effect advances or inhibits religion, or (3) it creates an excessive entanglement of the government with religion.⁷ If the government-sponsored action or message fails to meet any of these three prongs, then the challenge under the Establishment Clause succeeds.⁸

⁴ King v. Richmond County, 331 F.3d 1271, 1275 (11th Cir. 2003) (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

⁵ See Selman (citing several Supreme Court cases).

⁶ Lemon v. Kurtzman, 403 U.S. 602 (1971). See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Glassroth v. Moore, 335 F.3d 1282, 1295-96 (11th Cir. 2003); Selman, 2005 W.L. 83829.

⁷ Lemon, 403 U.S. at 612-13; Selman, 2005 W.L. 83829 at p. 11.

⁸ Glassroth, 335 F.3d at 1295.

The second and third prongs have been held to be interrelated, and the Eleventh Circuit has combined these prongs into a single “effect” inquiry.⁹ The Courts have held that the Lemon test is more a useful method of inquiry than a bright-line rule, as each challenge calls for line-drawing based on a fact-specific, case-by-case analysis.

1. Did the school district’s action have a secular purpose?

The first prong asks whether the Board’s actual purpose is to endorse or disapprove of religion. The purpose must be clearly secular. It need not be exclusively secular, but cannot be preeminently religious.¹⁰

2. Does the principal or primary effect either advance or inhibit religion, and is excessive government entanglement fostered?

The “effect” test, which incorporates the second and third prongs of Lemon, asks if the brick in effect conveys a message of endorsement or disapproval of religion to an informed, reasonable observer.¹¹ Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. The informed, reasonable observer is someone who personifies the community ideal of disinterested, reasonable behavior and is familiar with the origins and context of the government-sponsored message at issue and the history of the community where the message is displayed.¹²

E. Would the school system’s restriction of a particular inscription constitute a violation of the Free Speech rights of the person requesting the inscription?

⁹ Selman, 2005 W.L. 83829 at p. 12.

¹⁰ Id. at 13 (citations omitted).

¹¹ Id. at 19 (citations omitted).

¹² Id. at 19.

To determine if the restriction of speech on government property is allowed, an analysis must first be conducted to determine what kind of “forum” exists on the government property at issue. For First Amendment purposes, there are three kinds of government property: (1) traditional public forums, (2) designated public forums, and (3) nonpublic forums.¹³

Traditional Public Forum. Traditional public forums do not include public schools, but rather include streets and parks that are used for purposes of assembly, communicating thoughts among citizens, and discussing public questions.¹⁴

Designated (Limited) Public Forum. A school creates a designated public forum when “school authorities have by policy or practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations.”¹⁵

Nonpublic Forum. If a school retains “editorial” control over a forum, it is nonpublic.¹⁶ Generally, in nonpublic forums, the government can regulate expression as long as its regulations “are reasonable in light of the purpose served by the forum and are viewpoint neutral.”¹⁷ In school settings, however, the Eleventh Circuit Court looks to what it calls a more “refined” analysis based on the identity of the speaker and the nature of the expression.¹⁸ The categories of speech within this “refined” analysis include vulgar expression, pure student expression, government expression, and school-sponsored expression.

¹³ Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45-46 (1983).

¹⁴ See Hazelwood, 484 U.S. at 267; Bannon v. School District of Palm Beach County, 387 F.3d 1208 (11th Cir. 2004).

¹⁵ There is some confusion among different federal courts regarding the relationship between “designated” public forums and “limited” public forums. They should be synonymous. See Goulart v. Meadows, 345 F.3d 239, 249 (4th Cir. 2003). Some courts, however, have treated “limited” public forums as distinct, requiring different levels of scrutiny. See Anderson v. Mexico Academy and Central School, 186 F. Supp.2d 193, 203-04 (N.D.N.Y. 2002) (discussing 2nd Cir. Cases) (remanded by unpublished decision).

¹⁶ Bannon.

¹⁷ Id., citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

¹⁸ Id.

School-sponsored expression occurs when “students, parents, and members of the public might reasonably perceive [expressive activities] to bear the imprimatur of the school.”¹⁹ Under the continued “refined” analysis, the Eleventh Circuit Court holds that schools may censor student expression as long as their actions are reasonably related to legitimate pedagogical concerns.²⁰ If a court finds an expression to be school-sponsored, the expression may be censored on the basis of content, but not viewpoint.²¹

The Eleventh Circuit has held that Hazelwood controls only school-sponsored expression that occurs in the context of a “curricular” activity. To be considered “curricular,” expressive activities need not occur in a traditional classroom setting. Instead, expressive activities are curricular as long as they are merely (1) supervised by faculty members, and (2) designed to impart particular knowledge or skills to student participants and audiences.²²

F. Board Policy and Georgia Law.

A school district should review its board policy manual to see if there any policies which bear upon the issue of fundraisers.²³ Also check for policies relating to religious expression. It is likely that your board will not have a policy which imparts direct guidance for a brick fundraising campaign.

¹⁹ Id., citing Hazelwood, 484 U.S. at 271-73.

²⁰ Id.

²¹ Bannon (interpreting Hazelwood and upholding Searcey v. Harris, 888 F.2d 1314, 1325 (11th Cir. 1989)). There is a split in the Circuits on this point. See Demmon v. Loudoun County Public Schools, 279 F.Supp.2d 689, 694 n. 3 (E.D. Va. 2003). Other Circuit Courts have pointed out that this rule makes little sense, since for all intents and purposes it means that the “nonpublic forum” analysis must be used even after a finding of a limited public forum. See Fleming v. Jefferson County School District R-1, 298 F.3d 918, 926 (10th Cir. 2002). In Fleming, the Tenth Circuit singled out the Eleventh Circuit for criticism, stating that the Eleventh Circuit’s conclusion in Searcey that viewpoint neutrality is required seems contrary to the emphasis that the Hazelwood Court placed on the uniqueness of the public school setting and the deference with which it viewed decisions made by educators. Id. at 928.

²² Id.

²³ If your school board follows the GSBA codification method, you might find such a policy in the “JK” chapter.

It is well understood that brick cases involve competing notions of First Amendment rights under the U.S. Constitution, with considerations of Free Speech rights on the one hand, and the Establishment Clause requirements on the other. It does not appear that the Georgia Constitution's Bill of Rights would require a higher level of scrutiny than the U.S. Constitution's Bill of Rights with respect to analysis of the federal Free Speech or Establishment Clause claims. There do not appear to be many cases discussing the dynamic between the Georgia and U.S. Bill of Rights and whether, in comparable situations, Georgia might have higher constitutional hurdles.²⁴

²⁴ See Ga. Const. Art I, § 1, ¶ 3 ("Each person has the natural and inalienable right to worship God, each according to the dictates of that person's own conscience; and no human authority should, in any case, control or interfere with such right of conscience"); Art. I, § 1, ¶ 4 ("No inhabitant of this state shall be molested in person or property or be prohibited from holding any public office or trust on account of religious opinions; but the right of religion shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state."); Art. I, § 1, ¶ 4 ("No inhabitant of this state shall be molested in person or property or be prohibited from holding any public office or trust on account of religious opinions; but the right of freedom of religion shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.")