

# Selling the Name on the Schoolhouse Gate

## The First Amendment and the Sale of Public School Naming Rights

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By Joseph Blocher

In the past five years, the sale of naming rights to public school events and facilities has grown from fodder for humor columnists into a nationwide, multimillion-dollar enterprise.<sup>1</sup> And although commercialism in schools is nothing new, granting naming rights to public school facilities in exchange for remuneration raises novel and difficult First Amendment problems that schools and their attorneys will find increasingly difficult to ignore.<sup>2</sup>

The basic First Amendment issue arises out of schools' understandable desire to choose the sponsors whose names will adorn their facilities or events. In the past, naming rights mostly involved "safe" sponsors like grocery stores and banks. But these days the first would-be sponsor to show up with a check may not be as innocuous as the local grocer. For example, to the many schools that have recently taken stands against the in-school sale of soft drinks and junk food as a way to address concerns about childhood obesity, Coca-Cola and Nestlé may be sponsors non grata.<sup>3</sup> Moreover,

experience in other areas of government sponsorship suggests that soft drink and candy companies are not the biggest threat. Other undesirable sponsors—including advocates of truly reprehensible political and social ideas—may be lurking, hoping, quite literally, to make a name for themselves through a school sponsorship deal.<sup>4</sup>

Unfortunately, simply saying "no" to these sponsors may be more difficult than school boards expect. The selection of named sponsors raises concerns that can lead straight from the schoolhouse to the courthouse: Once a school has one named sponsor, other would-be sponsors may be able to claim a First Amendment right to participate, just as would-be speakers have a constitutional right to participate in other government-created forums. Unfortunately, very few school board policies are currently attuned to this First Amendment concern, leaving schools that turn down a sponsor's offer open to charges of viewpoint and content discrimination and the very real possibility that they will have to accept sponsors whose products or message they oppose.

This article attempts to give schools and their attorneys a means to avoid those charges. It is intended as a guide for school boards and school attorneys trying to find their way through the maze of First Amendment law surrounding the sale of public school naming rights. Its purpose is not to advocate for or against any particular approach to naming rights; that decision is properly within the discretion of the school board, whose members face the unenviable task of balancing the need for funding with the myriad difficulties that naming rights arrangements inevitably raise. The more limited goal here is to help school boards maintain control

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1. Elizabeth Chang, "A School By Any Other Name Would Be . . . Richer," *Washington Post*, December 12, 1999; "So What's Next, Nike Elementary?" editorial, *Baton Rouge Advocate*, March 29, 1998; Anita Powell, "Round Rock ISD Looks to Sell Stadium Name," *Austin (Texas) American Statesman*, October 30, 2003.

2. Alex Molnar, *Sponsored Schools and Commercialized Classrooms: Schoolhouse Commercializing Trends in the 1990's*, 6–7, 26 (Center for the Analysis of Commercialism in Educ., 1998); see also Molnar, "Sixth Annual Report on Commercialism in Schools: Cashing in on the Classroom," *Educational Leadership Magazine*, December 2003–January 2004, 79, reporting a "marked increase" in six categories of schoolhouse commercialism from 2001–2002 to 2002–2003.

3. "Junk Food Ban Approved for Schools," *Chicago Tribune*, October 11, 2006, (Redeye edition); Seema Mehta, "Sorry, Cupcake, You're No Longer Welcome in Class: To Fight Student Obesity, Educators Opt for Celebratory Carrots and Books," *Los Angeles Times*, September 27, 2006 (Metro edition).

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4. See John K. Eason, "Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad," *U.C. Davis Law Review* 38, no. 2 (2005): 375, 387, 394–402 (discussing examples of "charitably inclined malfeasants whose names now adorn various charitable institutions or facilities across the nation"); Editorial, "County Should Have Rejected Nazis," *Portland Oregonian*, February 4, 2005 (Sunrise edition), reporting that the county, fearing lawsuits, allowed the American Nazi Party to adopt a stretch of highway.

over the names on their schools, whatever policies they endorse.<sup>5</sup>

The first part of the article outlines the policy considerations surrounding school naming rights sales. This brief overview demonstrates that while sales of school naming rights have become increasingly common, such sales raise difficult policy problems that may lead school officials to try to reject sponsors they see as particularly undesirable. The second part of the article explains how attempts to pick and choose among potential sponsors may run into constitutional obstacles and briefly describes the First Amendment categories implicated by such sales. It discusses the definition and governing standard of each category and suggests how school boards can best take advantage of those standards to defend against First Amendment challenges to sponsorship exclusions. The third, final part of the article suggests other ways forward, such as policy moves that may insulate schools from future sponsorship controversies.

### Policy Considerations: The Pros and Cons of Naming Rights Deals

The public school naming rights boom has been driven by two forces: schools' need for money and businesses' need for advertising.<sup>6</sup> For school administrators seeking to fill holes in their budgets, naming rights present a particularly attractive potential revenue stream. Unlike other forms of commercial sponsorship—such as exclusive pouring rights for soft drink manufacturers or sponsored educational materials—naming rights do not necessarily require schools to change their daily schedules or curricula. They are, in that sense, a “free” resource that every school possesses (even if some schools' names command a higher value on the market than others). Paul Vallas, chief executive of the Philadelphia public schools, is unabashed in his support for naming rights deals: “My approach is Leave No Dollar Behind. There are tremendous needs in this system, where 85 percent of the kids are below poverty level. I'm not uncomfortable with corporations giving us money and getting their names on things. As long as it's not inappropriate,

I don't see any downside.”<sup>7</sup> And indeed many school officials insist that there is no downside. A recent survey of North Carolina public school principals found that 73.9 percent “felt either mostly positive or somewhat positive about corporate sponsored events,” and 56.9 percent said they would maintain their relationships with corporate sponsors even if other funds were available to support the activities currently underwritten by sponsors.<sup>8</sup>

Nonetheless, school naming rights arrangements do implicate major policy concerns, the weight of which may cause schools to try to limit either the scope of sponsorship deals or the kinds of sponsors they deal with. Perhaps the easiest to reject are offers from “bad name” sponsors such as alcohol and tobacco companies or others whose products are considered inappropriate for children.<sup>9</sup> As one school board president said, “Look, no one is suggesting us contracting with Delilah's Den [a local gentleman's club]. We wouldn't consider a product tie-in. . . . But everyone uses food, so we contracted with a supermarket, a local supermarket. We're talking to local banks, people like that.”<sup>10</sup>

Questionable commercial sponsors, however, are not the only inappropriate possibility, and nightmare scenarios may be more likely than schools suspect. The first group to show up with a check may be a church, or a mosque, or the National Rifle Association, or the Gay & Lesbian Alliance Against Defamation, or some other group with a controversial identity or message that schools would rather avoid endorsing.

Even an apparently “good” sponsor may carry unforeseen but weighty baggage. In 1999 the Houston Astros sold the naming rights of their new stadium to Enron, whose CEO, Kenneth Lay, threw out the first pitch in the stadium. At first, this seemed to be an excellent deal for all the parties: the team received \$100 million, and the company (not to mention Lay himself) got the right to put its name on the franchise for thirty years. But just two years later, the company's spectacular collapse cost thousands of Houstonians their jobs and Lay faced charges for fraud and conspiracy.<sup>11</sup> Nor were the Astros the only recipients of Lay's problematic

5. The article does not address in any detail the complicated contractual issues surrounding naming rights deals. For more information on those problems, *see generally*, Robert H. Thornburg, Note, “Stadium Naming Rights: An Assessment of the Contract and Trademark Issues Inherent to Both Professional and Collegiate Stadiums,” *Virginia Sports and Entertainment Law Journal* 2, no. 2 (2003): 328; Debra E. Blum, “Donors Increasingly Use Legal Contracts to Stipulate Demands on Charities,” *Chronicle of Philanthropy*, March 21, 2002, 9.

6. Izzy Gould, “What's in a Name? Extra Cash, Perhaps,” *Tampa Tribune*, December 21, 2004 (Sports), 1; Molnar, *Sponsored Schools*, 10, noting that “[t]he justification for the sponsorship agreements most often used by educators is the need for money.”

7. Quoted in Tamar Lewin, “In Public Schools, the Name Game As a Donor Lure,” *New York Times*, January 26, 2006.

8. Joseph Di Bona et al., “Commercialism in North Carolina High Schools: A Survey of Principals' Perceptions,” *Peabody Journal of Education* 78, no. 2 (2003): 41, 52, 56, 58.

9. *See, e.g.*, Mark Zaloudek, “Should Donors Get to Name Public Schools?” *Sarasota Herald-Tribune*, March 21, 2005, reporting that Philadelphia public schools refuse naming rights deals with alcohol or tobacco companies.

10. Robert Strauss, “Education: P.S. (Your Name Here),” *New York Times*, December 16, 2001 (*New Jersey Weekly*).

11. The naming rights were later resold to Minute Maid, a subsidiary of Coca-Cola, which paid \$100 million for twenty-eight years of naming rights.

largesse. He also donated \$1.1 million to his alma mater, the University of Missouri, to endow the Kenneth L. Lay Chair in Economics. When the company collapsed and Lay's own business ethics were called into serious question, the university was left with a major problem—and a still-unfilled professorship—which it has yet to resolve.<sup>12</sup> Other, equally uncomfortable examples are not hard to find.

Finally, as noted above, many people oppose commercial deals that expose students to products like sugary or fatty snack foods, which may lead many schools to avoid naming rights deals with their purveyors.<sup>13</sup> And, as the heated battles over commercial activity in schools have demonstrated, even when the products themselves are unobjectionable, many people oppose naming rights deals on the grounds that schools that accept them are “selling out” to commercial sponsors and cheapening the “honor bestowed on long-time public servants and civic leaders when a facility is named for them.”<sup>14</sup> Opponents also argue that such deals expose vulnerable children to advertising that they are unable to filter out and interfere with the schools' core educational missions.<sup>15</sup> Even when naming rights avoid these pitfalls, they can implicate other broad policy concerns; they might threaten interschool equity by channeling money to schools in affluent areas where students and their parents have more disposable income to spend on the sponsor's products.<sup>16</sup> Finally, some critics have alleged that the sale of naming rights privatizes civic responsibility, making schools dependent on corporate dollars and making taxpayers less likely to vote for school funding measures.<sup>17</sup>

12. As reported by MSNBC on May 26, 2006, “Lay's Alma Mater Struggles with Donation: Seeks 'Alternative Use' for Stock Profits Instead of Economics Position.”

13. See Henry J. Kaiser Family Foundation, Issue Brief, “The Role of Media in Childhood Obesity” (October 2004), [www.kff.org/entmedia/entmedia022404pkg.cfm](http://www.kff.org/entmedia/entmedia022404pkg.cfm).

14. See, e.g., Ruth Sheehan, “Too Late to Cry ‘Sellout,’” *Raleigh News and Observer*, January 20, 2003; Larry King, “The World-Herald's Priority Is What Best Serves the Readers,” *Omaha World Herald*, August 10, 2003, explaining the newspaper's decision to call a convention center by its popular name despite a recent sale of naming rights.

15. Citizens' Campaign for Commercial-Free Schools, “What's Wrong with Commercializing the Public Schools?” (undated), [www.scn.org/cccs/arguments.html](http://www.scn.org/cccs/arguments.html) (last visited August 16, 2007). See also Eason, “Private Motive and Perpetual Conditions in Charitable Naming Gifts,” 399.

16. See Randy Krebs, “Our View: Schools Should Think before Entering Deal for Naming Rights,” *St. Cloud (Minn.) Times*, July 19, 2005, noting that a technology company was focusing its school sponsorship efforts on “the nation's wealthiest school districts.”

17. Christine McDonald, “Got Cash? Buy School Name: To Ease Tight Budgets, Plymouth-Canton, Others Ponder Sale of Naming Rights to Buildings, Events,” *Detroit News*, June 27, 2005; ERIC Clearinghouse for Educational Management, “Business Partnerships with Schools,” *Policy Report No. 2* (Fall 2001): 10.

As these competing policy concerns illustrate, school boards who choose to engage in naming rights deals are often caught between the need to secure funding and the need to assuage citizens' concerns about the scope and content of the deals. School administrators (and their attorneys) will probably attempt to navigate these difficult straits by limiting the kinds of sponsors to whom they will sell naming rights, rejecting sponsors whose identities, products, or messages they do not endorse. But, although this could be a wise policy, it is one the First Amendment might foreclose.

### The Relevance of the First Amendment

Rejecting a would-be sponsor is not as simple as refusing to cash its check. Lurking in discussions of government sponsorship deals is a set of First Amendment concerns that could force schools to accept naming rights deals with sponsors they want to avoid. Specifically, the First Amendment may limit schools' ability to reject sponsors based on their identity or message. School naming rights are undoubtedly a form of “speech,” even if the precise message and speaker are somewhat unclear. Indeed, courts have already recognized a First Amendment right to participate in similar government sponsorship programs, suggesting that would-be school sponsors could also find traction for their claims.

The horror stories from these government sponsorship cases should send shivers down the spine of any school board attorney. In a recent string of cases, the Ku Klux Klan tried to become an acknowledged sponsor of a public radio station in Missouri and sought to get its name on Adopt-a-Highway signs across the country.<sup>18</sup> Predictably, the government officials responsible for these programs refused to accept the Klan's offer of participation. And, perhaps just as predictably, the Klan has repeatedly sued on First Amendment grounds. While it has not been successful in all its challenges, it did win the right to adopt a stretch of Missouri roadway—perhaps a portent of the ultimate nightmare for schools.<sup>19</sup>

18. *Knights of the Ku Klux Klan v. Curators of the University of Missouri*, 203 F.3d 1085, 1094 (8th Cir. 2000); *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000).

19. *Cuffley* was decided on Equal Protection grounds, but the court specifically noted that “[w]hether this claim arises under the Equal Protection Clause or the First Amendment, it is clear that the State may not deny access to the Adopt-A-Highway program based on the applicant's views.” *Id.* at 760 n.3. But see *Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) (holding that the state's reason for denying the Klan's application to adopt a portion of highway outside a public housing project was reasonable and viewpoint neutral because the state sought to prevent the Klan from intimidating residents and frustrating a federal desegregation order).

There are not yet any reported cases of sponsors suing schools to force their names onto school facilities. This is most likely a reflection of the fact that school naming rights policies have not been around long enough to give rise to such cases. They are all but inevitable in the future as naming rights policies become more common and the stakes on both sides rise. But although First Amendment litigation over school naming rights seems inevitable, neither the outcome of that litigation nor even the First Amendment standards that will govern it is quite so clear. Despite the simplicity of the First Amendment's language—"Congress shall make no law . . . abridging the freedom of Speech"<sup>20</sup>—it accords different levels of protection to different kinds of speech, depending on the speaker, the message, and where the speech occurs.<sup>21</sup> As a result, there are a variety of different First Amendment tests governing different forms of speech, including sponsorship deals like school naming rights.

Unfortunately, school naming rights do not easily fit within any one of these tests, as it is difficult to establish who is "speaking" through a paid naming rights arrangement, what that speaker is saying, and in what forum the speech takes place. The overview below considers the three areas of First Amendment law that appear to be most relevant to school naming rights: government speech, commercial speech, and forum analysis. For each category, the discussion identifies the scope of the category (i.e., the definition that a naming rights deal would have to satisfy to fall within its scope); describes the governing standard (the hurdle a school would have to clear to regulate the naming rights); and, finally, offers suggestions of ways school attorneys can best take advantage of the category.

## GOVERNMENT SPEECH

Government speech is an ill-defined and somewhat controversial constitutional category that, despite its uncertain

origins, has a fair amount of common sense appeal.<sup>22</sup> In essence, it recognizes that the government (schools and school boards for the purposes of this article) can at times be a "speaker" and that when the government speaks it is generally entitled to say what it wants.

### *Definition of government speech*

The Supreme Court has never established a specific definition of *government speech*, but the development of the doctrine suggests the concerns and characteristics that shaped it. The category of government speech, such as it is, arose in a series of cases involving government subsidies to private actors. The seminal case is *Rust v. Sullivan*,<sup>23</sup> in which the Supreme Court upheld Title X of the Public Health Services Act, which withholds government funds from clinics that provide information about abortion. Rejecting the clinics' First Amendment challenge, the Court held that "[t]he government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."<sup>24</sup>

Subsequent cases applying *Rust* have confirmed that the government may "speak" through its support of private actors. Thus, in *Rosenberger v. Rector and Visitors of the University of Virginia*, the Supreme Court held that that a public university could not refuse to fund student publications that expressed belief in a deity.<sup>25</sup> And in *Legal Services Corp. v. Velazquez*, the Court again read *Rust* as protecting the government's right to engage in viewpoint discrimination when it speaks on its own behalf, but *not* when it subsidizes private speakers.<sup>26</sup> The relevant question in all cases

22. Note, "The Curious Relationship between the Compelled Speech and Government Speech Doctrines," *Harvard Law Review* 117, no. 7 (2004): 2411, 2432 ("The government speech line of cases remains the ugly stepchild of First Amendment doctrine."). The pioneering work arguing for greater recognition of government as a creator of speech, and not just its regulator, is Mark G. Yudof, *When Government Speaks: Politics, Law, and Government Expression in America* (Berkeley, Calif., 1983).

23. 500 U.S. 173 (1991). Earlier cases implicitly reached the conclusion that *Rust* eventually adopted. See, e.g., *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1044 (5th Cir. 1982) (en banc).

24. *Rust*, 500 U.S. at 193.

25. 515 U.S. 819 (1995). Although scholars tend to identify *Rosenberger* as a pillar of government speech doctrine, the Court actually approached the case through the lens of forum analysis. *Id.* at 829–31.

26. *Velazquez*, 531 U.S. 533 (2001) (overturning statute providing government funding for public interest lawyers on condition that they not challenge welfare policy). See also *Commonwealth v. Davis*, 39 N.E. 113 (1895) (Holmes, J.), *aff'd sub nom Davis v. Massachusetts*, 167 U.S. 43, 47 (1897) ("For the legislature absolutely or conditionally to forbid public speaking in a highway or public

20. U.S. CONST. amend. 1.

21. Many scholars have called for a more evenhanded application of the amendment. See, e.g., Randall P. Bezanson and William G. Buss, "The Many Faces of Government Speech," *Iowa Law Review* 86 (2001): 1377, 1384 (2001) (arguing that "there is no basis or need for any special form of privilege or immunity for government speech"); Alex Kozinski and Stuart Banner, "Who's Afraid of Commercial Speech?" *Virginia Law Review* 76 (1990): 627 (arguing that commercial speech should be entitled to full First Amendment protection); William V. Van Alstyne, "To What Extent Does the Power of Government to Determine the Boundaries and Conditions of Lawful Commerce Permit Government to Declare Who May Advertise and Who May Not?" *Emory Law Journal* 51 (2002): 1513, 1554 (2002) ("[F]rom one quite reasonable view one might well argue (as will be done here) that there is far less reason in this area ('commerce') than in others (e.g., 'politics?') to depart from strict scrutiny review.").

appears to be whether the message sent can properly be characterized as the government's.<sup>27</sup>

### ***The standard governing government speech***

*Rust* and its progeny made it clear that when the government speaks, it may control its own message—it may select its viewpoint or content—without running afoul of the First Amendment. In the context of naming rights, this suggests that, to the degree that naming rights are “government speech,” schools may pick and choose among sponsors based on their message and viewpoint.

The most subtle distinction—one that courts and scholars have struggled mightily to identify and apply—is between situations in which the government gives support to private speakers to deliver the government's message and those in which it subsidizes private speakers with their own messages. In the latter case, as in *Velazquez*, the government may not engage in viewpoint discrimination.

### ***Characterizing naming rights as government speech***

Government speech, because it gives schools the ability to express a viewpoint, is obviously a desirable category from the schools' perspective. It allows them to exercise broad control over the names on their buildings, irrespective of sponsors' own purported free speech claims. As the analysis above makes clear, the relevant question in any government speech analysis is whether the message is the government's. So long as naming rights are seen as a form of government speech—that is, so long as they deliver the government's message—schools have wide discretion to limit the deals they accept.

Schools hoping to put their naming rights in the government speech category would do well to “claim” their names. There are many ways to do so; the simplest is to limit the type and number of sponsors who are allowed to participate in a naming rights program in the first place. If in the past a school or school district has essentially opened its doors to all would-be sponsors without scrutinizing their messages or identities, it will find it exceedingly difficult to claim in future cases that the choice of a name is its own act of speech.<sup>28</sup> Thus, a school that exerts control over its naming

rights in the present will increase the control it can exert in the future.

An even better way to “claim” the school's name is through written policies and consistent practices that treat the name as part of the school's message or curriculum. Some policies state specifically that the school's name sends an important message about the school.<sup>29</sup> Other naming policies explicitly recognize, as the Newton Conover school board has done, that “naming or renaming a facility [is] a significant endeavor since the name of a facility can reflect upon the students, staff, school district and community.”<sup>30</sup> Courts are especially solicitous of restrictions on “speech” at school when they are presented as necessary to advance the school's curricular and educational needs (which themselves seem to be a form of speech). Schools whose naming rights policies suggest the curricular value of naming rights will thus prove especially successful at earning the “government speech” tag. For example, Rochester, New York, has a naming rights policy that explicitly connects the naming of schools to the schools' educational mission.

This policy is based upon the belief that it is important that the students and public know of the many contributions of many Rochester leaders of the past and other national heroes, and that this knowledge can be more strongly imprinted through classroom discussion and projects related to school names.<sup>31</sup>

Even though courts have more often considered school curricula under the rubric of forum analysis (discussed below) than as government speech, the lesson for school boards and their attorneys is the same: Claiming the message as the school's own is the best way to control it.

It is also possible that naming rights might be characterized as government speech because they amount to a government endorsement of the named sponsor. Inasmuch as a school, by allowing a corporate or other sponsor to put its name on school facilities, is effectively sending an

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park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in the house.”) *But see* *Hague v. CIO*, 307 U.S. 496, 515 (1939).

27. “The Curious Relationship between the Compelled Speech and Government Speech Doctrines,” 2412 (“[P]laintiffs have uniformly been willing to accept *Rust*'s definition of the battlefield: that is, the only question to be answered is the factual one of who is speaking.”).

28. Indeed, a school in this situation may have already inadvertently created a public forum—described in more detail below—and thus have lost control over sponsorship almost entirely.

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29. See, e.g., Carteret County (N.C.) Pub. School System, Regulation FF, “Naming School Facilities” (revised January 2006): “The naming or renaming of a school or the creation of a commemorative or memorial is a matter deserving the thoughtful attention of the Board of Education,” [www.cartercountyschools.org/hr/Facilities%20Development.pdf](http://www.cartercountyschools.org/hr/Facilities%20Development.pdf); Cobb County (Ga.) School District, Administrative Rule FF, “Naming of School Facilities” (revised December 8, 2005): “The Cobb County School District . . . recognizes that the official names of its facilities are vital to their public image,” [www.cobbk12.org/centraloffice/adminrules/F\\_Rules/Rule%20FF.htm](http://www.cobbk12.org/centraloffice/adminrules/F_Rules/Rule%20FF.htm).

30. Newton Conover (N.C.) Board of Education, Policy 7302, “Naming School Facilities,” [www.nccs.k12.nc.us/Policy/Policy7000.doc](http://www.nccs.k12.nc.us/Policy/Policy7000.doc).

31. Rochester City School Board, Policy Manual 7500, “Naming New Facilities” (revised August 20, 1998), [www.rcsdk12.org/BOE/PM/PM%20pdfs/7000/7500%20Naming%20Facilities.pdf](http://www.rcsdk12.org/BOE/PM/PM%20pdfs/7000/7500%20Naming%20Facilities.pdf).

approving message about the sponsor—“This sponsor is upstanding enough for us to associate ourselves with it”—the choice of sponsors must also be considered a form of government speech.<sup>32</sup> In many ways this situation is analogous to that of public broadcasters such as National Public Radio, whose editorial decisions have been characterized as a form of speech.<sup>33</sup>

This article does not address in any detail one final variant on the government speech inquiry: the possibility that school naming rights arrangements might give rise to a *compelled speech* claim by students who object to the name they are forced to carry around on their transcripts or uniforms. Student opposition to schoolhouse commercialism has already made headlines—perhaps most famously when a high school student was suspended for wearing a Pepsi shirt to a “Coke Day” rally—demonstrating that some students see sponsorship as important enough to oppose.<sup>34</sup> The Supreme Court has already ruled in prior student speech cases that there is no constitutionally significant difference between compelled speech and compelled silence.<sup>35</sup> Creative First Amendment lawyers may therefore challenge school naming rights arrangements based on compelled-speech grounds as well.

#### COMMERCIAL SPEECH

Of course, schools are not the only potential speakers implicated by school naming rights arrangements. Indeed, many observers might consider the sponsor—the organization that pays to have its name placed on the building—as

the speaker. The message that sponsor would most likely send is a commercial one; that is, one encouraging people to purchase its products or services. And, in a somewhat unpredictable line of cases, the Supreme Court has gradually extended First Amendment protection to this kind of commercial speech while refusing to settle on a single definition for the category. This section attempts to sketch the boundaries of commercial speech and explain the standard that governs it.

The law of commercial speech has recently been defined by two, apparently competing but actually complementary, trends: (1) a progressive narrowing of the category of commercial speech, and (2) a progressive strengthening of the protections accorded to it. The combined effect of these trends is to increase the protections available for seemingly commercial speech. Such protection can be achieved either by entirely avoiding the commercial label—the best way to protect commercial speech, after all, is to not label it as such—or by requiring the government regulating commercial speech to carry a heavy justificatory burden.

#### *The contracting definition of commercial speech*

The Court has never decided on a single definition of *commercial speech*, although it has invoked various factors and ad hoc tests.<sup>36</sup> Perhaps the first effort was Justice Blackmun’s opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Council*, which suggested that “commercial speech” is speech that does “no more than propose a commercial transaction.”<sup>37</sup> Later opinions tended to follow this approach, giving full First Amendment protection (by *not* classifying their messages as commercial speech) to a variety of “mixed” cases involving both commercial and noncommercial messages.<sup>38</sup>

32. See *Knights of KKK and Nathan Robb v. Arkansas State Highway & Transp. Dep’t*, 807 F. Supp. 1427, 1436 (W.D. Ark. 1992) (“If nothing else, they, by picking up or having their members or employees pick up litter, thus keeping their adopted portion of the highway beautiful and litter free, are saying or hoping to say to the travelling public by actions and deeds, and through the signs constructed by the State of Arkansas, that they are ‘good’ and environmentally conscious, and thus good citizens and politically and socially correct.”); *Knights of the KKK v. Curators of the University of Missouri* [—St. Louis], 203 F.3d 1085, 1093 (8th Cir. 2000) (“KWMU’s underwriting acknowledgments constitute governmental speech on the part of UMSL.”).

33. In *Arkansas Educational Television Commission v. Forbes*, for example, the Court found that “when a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.” 523 U.S. 666, 674 (1998); see also *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 585–86 (1998) (finding that viewpoint neutrality is not required in selection of art exhibits for public funding).

34. See, e.g., Jingle Davis, “No Coke, Pepsi: Rebel without a Pause,” *Atlanta Constitution*, March 26, 1998 (Constitution edition); Barry Saunders, “OK, Class—Line Up, Dress Right, and Salute the Image,” *Raleigh News and Observer*, March 28, 1998.

35. E.g., *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that the First Amendment’s guarantees “include both the right to speak freely and the right to refrain from speaking at all”).

36. Scholars attribute this imprecision to the inherent difficulties of classifying commercial speech. See, e.g., Nat Stern, “In Defense of the Imprecise Definition of Commercial Speech,” *Maryland. Law Review* 58, no. 1 (1999): 55, 146 (“The Supreme Court’s inability to encase commercial speech within unwavering definitional boundaries is not the product of ineptitude, but rather the unavoidable incident of commercial speech’s position at the blurry crossroads of expressive and economic activity.”); Robert Post, “The Constitutional Status of Commercial Speech,” *UCLA Law Review* 48 (October 2000): 1, 7 (“The impossibility of uniquely identifying the attributes of commercial speech has been much noted.”).

37. 425 U.S. 748, 762 (1976) (citing *Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations*, 413 U.S. 376, 385 (1976)); see also Thomas C. Goldstein, “*Nike v. Kasky* and the Definition of ‘Commercial Speech,’” in *Cato Supreme Court Review, 2002–2003*, ed. James L. Swanson (Washington, D.C.: Cato Institute), 72, referring to Blackmun’s as the “most often-repeated” definition of commercial speech the Court has offered.

38. E.g., *Riley v. National Federation of the Blind*, 487 U.S. 781, 789, 798 (1988).

The current prevailing definition of commercial speech is essentially a non-test established by the Supreme Court in *Bolger v. Youngs Drug Products Corp.* In that case, the Court upheld the “‘common-sense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.”<sup>39</sup> The Court has continued to use this approach while acknowledging its imprecision.<sup>40</sup>

Commercial speech law is currently in a state of flux, and the Supreme Court has recently indicated that it may be considering a bit of housecleaning. In 2004 the California Supreme Court decided *Kasky v. Nike*,<sup>41</sup> a case arising from a private citizen’s criticism of the Nike Corporation for allegedly engaging in sweatshop abuse in its overseas factories. The criticism itself was undoubtedly fully protected, noncommercial speech. Nike responded to it with “editorial advertisements,” press releases, and letters to newspapers and universities.<sup>42</sup> One of the issues in the case was whether these publicized responses were commercial speech.

The California Supreme Court found that they were, because (1) the speaker (Nike) was likely to be engaged in commerce, (2) the intended audience were actual or potential buyers, and (3) the actual message made representations of fact about Nike’s business operations, products, or services.<sup>43</sup> The decision caused enormous controversy in the academic community, where scholars were almost unanimous in their condemnation and their calls for the U.S. Supreme Court to intervene.<sup>44</sup> The Court did, granting certiorari and arousing hope that it might use the opportunity to establish a clear definition of commercial speech. But the Court then dismissed the writ of certiorari (over dissents from Justices Kennedy and Breyer), thus leaving commercial speech itself ill-defined.<sup>45</sup>

39. *Bolger*, 463 U.S. 60, 64 (1983) (citing *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978)).

40. *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 765 (1993) (“[A]mbiguities may exist at the margins of the category of commercial speech.”); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (acknowledging “the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category”).

41. *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), *cert. granted*, 537 U.S. 1099, and *cert. dismissed*, 539 U.S. 564 (2003).

42. Goldstein, “*Nike v. Kasky*,” 65.

43. *Kasky*, 45 P.3d at 258; 315, *see also Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557, 563 n.5 (1980) (differentiating between “direct comments on public issues” and statements about public policy “made only in the context of commercial transactions”).

44. *See, e.g.*, Ronald K.L. Collins and David M. Skover, “The Landmark Free-Speech Case That Wasn’t: The *Nike v. Kasky* Story,” *Case Western Reserve Law Review* 54 (Summer 2004): 965; Goldstein, “*Nike v. Kasky*.”

45. *Kasky*, 539 U.S. 654, 665 (2003).

### ***Expanding protections for commercial speech***

For most of this history, commercial speech received no First Amendment protection at all.<sup>46</sup> But beginning with *Virginia State Board of Pharmacy v. Virginia Citizens Council*, the Supreme Court began to recognize commercial speech (even basic advertising) as a form of speech entitled to some First Amendment protection, albeit not the same level of protection accorded to “pure” speech.<sup>47</sup>

Governmental restrictions on commercial speech are now governed by a four-part test created by the Supreme Court in *Central Hudson Gas & Electric v. Public Service Commission*. The first part of the test asks whether the speech being regulated “concerns lawful activity and [is not] misleading.”<sup>48</sup> If the speech fails this initial inquiry, it receives no First Amendment protection at all.<sup>49</sup> If it passes, the second prong then assesses whether the government interest in the speech is “substantial.”<sup>50</sup> The third asks whether the regulation directly advances the governmental interest asserted; and the fourth, and final, prong measures the breadth of the regulation to see if it is more extensive than is necessary to serve the stated interest.<sup>51</sup> Though the second and third prongs are comparatively easy for a regulation to meet,<sup>52</sup> the final prong has become an increasingly sizeable obstacle.<sup>53</sup>

*Central Hudson* endures as a test, but its application has not always been even-handed. In *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, the Supreme Court held that Puerto Rico could ban all outdoor advertising of casinos.<sup>54</sup> But more recently, in *44 Liquormart*, the Court

46. *Valentine v. Christensen*, 316 U.S. 52 (1942) (upholding constitutionality of a municipal ordinance forbidding distribution of printed handbills for commercial advertising in the streets, even though half of the handbill was devoted to a nominally political protest).

47. *Virginia State Board*, 425 U.S. 748, 762 (1976).

48. *Central Hudson*, 447 U.S. 557, 566 (1980).

49. *Hoffman Estates v. Flipside*, 455 U.S. 489 (1982) (holding that the government may entirely ban commercial speech that proposes illegal transactions); *Friedman v. Rogers*, 440 U.S. 1 (1979) (upholding statute prohibiting the practice of optometry under misleading names).

50. *Central Hudson*, 447 U.S. at 566.

51. *Id.*

52. The Court has upheld as valid government interests the promotion of energy conservation, *id.* at 566; the prevention of drunkenness, *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996); and the protection of public safety in the context of compounded drugs, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002).

53. *See, e.g.*, *Central Hudson*, 447 U.S. at 569–72. *See also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001) (citing *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), and striking down state restriction on tobacco advertising).

54. 478 U.S. 328, 344 (1986) (“In short, we conclude that the statute and regulations at issue in this case, as construed by the Superior Court, pass muster under each prong of the *Central*

held that a complete ban on price advertising of liquor failed both the third and fourth prongs of *Central Hudson*.<sup>55</sup>

In summary, at the same time as it has trimmed the definition of commercial speech—thus leaving other, seemingly commercial speech in the full protection of the First Amendment—the Supreme Court has also expanded the protections given to speech it still categorizes as commercial.<sup>56</sup>

### ***Naming rights as commercial speech: A second-best option***

Although government speech is, from the schools' perspective, the most desirable category for naming rights—carrying with it almost unlimited power to select and reject sponsors—the commercial speech category also has its advantages. In spite of the increasing protection given to commercial speech—and its increasingly narrow definition—schools that can successfully characterize their naming rights arrangements as the sponsors' commercial speech will retain some power to reject sponsors under the *Central Hudson* test.

Naturally, the best way for schools to argue that naming rights are commercial speech is to highlight the various indicia of advertising and commercialism contemplated in *Bolger*. So, for example, the label “Phil Knight High School” might not be considered commercial speech, even though the Nike Corporation (which Phil Knight founded) paid for the naming rights. But “Nike Gymnasium” would present a closer question, since use of the company's name—particularly in conjunction with a place and activities where its products are used—is more suggestive of commercial intent, which is a relevant consideration under *Bolger* and even more so under the controversial *Kasky* test. Similarly, if the trademark Nike swoosh and the words “Just Do It” were part of the sponsorship arrangement, the arrangement would be seen as even more commercial.

This line of argument may seem somewhat odd, given that schools (faced with the anticommmercialism sentiment described above) probably would not otherwise stress the commercial nature of their naming rights arrangements. Most would prefer—for public relations purposes, at least—to characterize them as charitable contributions. And, just as ironically, sponsors might find that the weight of their arguments against characterizing naming rights as government speech actually pushes them toward the commercial

speech category, where they are still entitled to at least some limited protections. Thus in terms of the legal category of commercial speech, the incentives are somewhat reversed: schools are better served when naming rights are categorized as commercial because they retain greater authority to regulate them, whereas sponsors have a correspondingly larger incentive to stress the noncommercial aspects of the deals because they receive more First Amendment protection under the “pure” noncommercial category.

If a naming rights arrangement is classified as commercial speech, any regulations governing naming rights would very likely pass the four-prong test laid out in *Central Hudson*. The first prong of the test would probably be irrelevant, since most sponsors' names are presumably legal and not “misleading.” The second prong—requiring the government to show a substantial interest—would not present a major hurdle for schools, because they could assert that such regulations further the government's interest in education—one of the most “substantial” government interests of all.<sup>57</sup>

In addressing the third prong of *Central Hudson*—which asks whether the regulation at issue directly advances the government interest asserted—schools could rely on existing research about the negative impact of advertising and commercialism on students' ability to learn. The decades-old battles over commercialism in schools have produced ample information from which to draw.<sup>58</sup>

The fourth prong of *Central Hudson*—measuring the potential overbreadth of the regulation—might present a more significant obstacle. Prior to the Supreme Court's 1996 decision in *44 Liquormart*, overbreadth was almost impossible to establish, and the Court repeatedly upheld total bans on entire classes of advertisements.<sup>59</sup> In *44*

57. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (internal citations omitted) (“We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to ‘sustaining our political and cultural heritage’ with a fundamental role in maintaining the fabric of society.”).

58. See above, notes 15–20 and accompanying text. See also Seth Grossman, Comment, “Grand Theft Oreo: The Constitutionality of Advergame Regulation,” *Yale Law Journal* 115 (October 2005): 227, 234 (arguing that regulation of snack food “advergames” should pass the third prong of *Central Hudson* “so long as the government carefully and thoroughly compiles such evidence of the link between advergames and the health of children”).

59. Compare *Posadas*, 478 U.S. at 344 (holding that under *Central Hudson* it was “up to the legislature” to reduce gambling by suppressing in-state casino advertising rather than by applying some less speech-restrictive policy) with *44 Liquormart*, 517 U.S. at 509 (“Given our longstanding hostility to commercial speech regulation of this type, *Posadas* clearly erred in concluding that it was ‘up to the legislature’ to choose suppression over a less speech-restrictive policy.”). See also *Metromedia*, 453 U.S. at 508–13 (White, J., joined by Stewart, Marshall, and Powell, JJ) (finding that total ban on outdoor advertising passed all prongs of *Central Hudson*,

*Hudson* test. We therefore hold that the Supreme Court of Puerto Rico properly rejected appellant's First Amendment claim.”).

55. 517 U.S. at 505–08.

56. See Stern, “In Defense of the Imprecise Definition of Commercial Speech,” 72: “The splintered opinions in *44 Liquormart* should not obscure the fact that this decision heralded a more protective attitude toward commercial speech.”

*Liquormart*, however, the Court revived the fourth prong of *Central Hudson* by making it clear that even though the narrowness inquiry is less harsh than strict scrutiny, it nonetheless requires the state to shoulder a “heavy burden of justifying its complete ban on price advertising.”<sup>60</sup> To carry that burden, schools might turn back to the evidence they marshaled to meet the second prong. Although courts have yet to explicitly note a connection between the second and fourth prongs of *Central Hudson*, logic suggests that it might exist. For example, in the pre-*Central Hudson* case of *Ohralik v. Ohio State Bar Association*, the Supreme Court found that a broad ban preventing lawyers from soliciting clients in person was a permissible regulation of commercial speech, given the important governmental interest in protecting those solicited from undue pressure.<sup>61</sup>

Although the commercial speech inquiry is relatively fact-intensive and it is correspondingly difficult to generalize about whether the courts will consider a particular naming rights arrangement to be commercial speech, the discussion here has illuminated some general lessons. Generally, school attorneys hoping to argue that a particular naming rights deal falls within the commercial speech category (thus preserving the school’s broad authority to pick and choose among sponsors), would do well to stress its commercial aspects, including the identity of the sponsor and whether the intended audience (students, for example) are actual or potential buyers.<sup>62</sup>

## FORUM ANALYSIS

It is of course possible that schools or sponsors will characterize school naming rights as neither government speech nor commercial speech but as something else entirely: noncommercial speech on the part of the sponsors. After all, schools and sponsors often refer to such arrangements as charitable donations reciprocated by the school’s show of

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even though it failed on other First Amendment grounds); *44 Liquormart*, 517 U.S. at 508 (citing *Metromedia* for the proposition that “Our commercial speech cases recognize some room for the exercise of legislative judgment.”).

60. *44 Liquormart*, 517 U.S. at 516.

61. *Ohralik*, 436 U.S. 447, 468 (1978) (“Under our view of the State’s interest in averting harm by prohibiting solicitation in circumstances where it is likely to occur, the absence of explicit proof or findings of harm or injury is immaterial. The facts in this case . . . demonstrate the need for prophylactic regulation in furtherance of the State’s interest in protecting the lay public.”). *But see In re Primus*, 436 U.S. 412 (1978) (finding that an ACLU lawyer’s letter to a group of indigent political clients falls within the “generous zone of First Amendment protections reserved for associational freedoms” and that “[w]here political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterized government regulation of the conduct of commercial affairs”).

62. *Kasky*, 45 P.3d 243, 258 (Cal. 2002).

thanks (for example, a plaque displaying the donor’s name), making the exchange very similar to other noncommercial donor-donee relationships. If naming rights are characterized as this kind of noncommercial, nongovernmental speech, sponsors will be entitled to the full protection of the First Amendment and restrictions on their speech will have to meet the forum analysis tests governing pure speech.

## Defining the forum

For First Amendment purposes, there are three different forums—public forums, nonpublic forums, and limited public forums—and the power of the government to regulate pure speech depends on the forum in which the speech takes place.<sup>63</sup>

Traditional public forums are areas “which the State has opened for use by the public as a place for expressive activity.”<sup>64</sup> The government has little power to regulate speech in such forums. The only permissible restrictions are content-neutral time, place, and manner restrictions or content-based restrictions that are narrowly drawn to serve a compelling state interest.<sup>65</sup> Fortunately for school boards, naming rights policies are unlikely to create public forums. Nevertheless, if a school board were to fail to exercise control over its sponsors, it might find itself the unsuspecting custodian of a public forum.<sup>66</sup>

By contrast, in nonpublic forums such as military bases and the sidewalks outside post offices, the government has broad power to regulate speech.<sup>67</sup> Restrictions

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63. For the purposes of forum analysis, “place” includes not just physical property but even such channels of communications as intraschool mail systems. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 830 (1995) (“The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.”) (internal citations omitted); *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 801 (1985) (treating charitable contribution fund as property for purposes of forum analysis); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (describing forum analysis).

64. *Perry*, 460 U.S. at 45.

65. *Id.*; *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992) (upholding reasonable restrictions on distribution of religious literature and solicitation in an airport terminal, which is not a traditional public forum); *Cornelius*, 473 U.S. 788 (holding that Combined Federal Campaign created a nonpublic forum in which restrictions must be reasonable and that refusal to allow certain advocacy groups to participate in that forum abridged their First Amendment Rights).

66. *Brown v. Louisiana*, 383 U.S. 131 (1966) (holding that a silent vigil in a public library is protected, while a noisy and disruptive demonstration would not be); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (finding that students have a First Amendment-protected right to wear black armbands as a protest, unless they result in disruption of school).

67. *Greer v. Spock*, 424 U.S. 828, 838 (1976); *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (suggesting existence of nonpublic forum but ultimately resolving case on other grounds).

are acceptable, even if based on subject matter or speaker identity, so long as they are “reasonable in light of the purpose served by the forum and are viewpoint neutral.”<sup>68</sup> In other words, the First Amendment does not prohibit the viewpoint-neutral exclusion of speakers who would hinder the purpose of the nonpublic forum.<sup>69</sup> A naming rights policy might create a nonpublic forum by simply failing to provide for a sponsor’s expressive activity.<sup>70</sup>

The most likely forum categorization for naming rights policies, however, is the *limited public forum*, a slightly amorphous category that courts have identified as existing when the government opens a forum for expressive activity and intentionally makes it “generally available” to a certain class of speakers.<sup>71</sup> In limited forums, the government can restrict speech based on subject matter and speaker identity, but the restrictions themselves must nonetheless be “narrowly tailored to serve a significant government interest while leaving open ample alternatives.”<sup>72</sup>

Within the broad category of the limited public forum, the Supreme Court has applied an especially deferential standard to regulations on speech in schools, recognizing that First Amendment claims must be considered “in light of the special characteristics of the school environ-

ment.”<sup>73</sup> The two leading cases—familiar to any school attorney—are *Tinker v. Des Moines Independent Community School* and *Hazelwood School District v. Kuhlmeier*. In *Tinker*, the Court held that “[n]either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>74</sup> The Court found that a school’s prohibition on antiwar armbands violated the First Amendment and that the school’s fear of possible disturbance caused by the armbands was not enough, by itself, to justify the ban. *Hazelwood*, however, confirmed that in certain situations a school can restrict student speech, particularly when the speech would otherwise interfere with the educational mission of the school. *Hazelwood* thus stands for the proposition that materials to which students might be exposed can be regulated in some circumstances, especially for curricular purposes.<sup>75</sup> Importantly for the present discussion, *Hazelwood* appears to encompass other means of expression—presumably including school names themselves—that bear the imprimatur of the school.<sup>76</sup>

The application of forum analysis does appear to depend somewhat on the speaker’s identity, at least when the speech is religious. In *Lamb’s Chapel v. Center Moriches Union Free School District*, the Supreme Court held that after-school use of school property created a limited forum but nonetheless struck down as viewpoint discrimination a school’s ban on after-school religious activities.<sup>77</sup> *Lamb’s Chapel* can probably be explained as a product of the Court’s solicitude for religious freedom. It suggests that religious sponsors represent a “viewpoint” rather than a “subject matter” and thus that regulations restricting their speech are bound to fail.

## The Way Forward

Naturally, it is difficult to predict the legal results of still-unfiled cases challenging nonexistent naming rights policies. Indeed, the most important take-home point of this article is that schools must be aware of the First Amend-

68. *Perry*, 460 U.S. at 49.

69. This fact of course raises the possibility that government actors might try to justify as “viewpoint-neutral” an otherwise invalid viewpoint-based restriction by pointing instead to the disruptive reaction caused by expression of that viewpoint. A school board, for example, might reject a controversial sponsor based on disruption that opposition to the sponsor would create. In the words of one court, though, “the First Amendment knows no heckler’s veto.” *Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004) (holding that possible dangerous public reaction is insufficient rationale to bar the Ku Klux Klan from the Adopt a Highway Program).

70. See *DeLoretto v. Downy Unified Sch. Dist.*, 196 F.3d 958, 968–69 (9th Cir. 1999) (inferring and upholding existence of a “commercial only” policy that created a nonpublic forum in a school that had only ever accepted commercial advertisements and later refused to post the Ten Commandments); Mary Jean Dolan, “The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech,” *Hastings Constitutional Law Quarterly* 31 (Winter 2004): 71, 126 (“In choosing sponsors and partners, government does not intend to open a forum for private speech, but rather to obtain assistance to leverage its own ability to act.”).

71. See, generally, Ronnie J. Fischer, “‘What’s in a Name?: An Attempt to Resolve the ‘Analytic Ambiguity’ of the Designated and Limited Public Fora,” *Dickinson Law Review* 107 (Winter 2003): 639; *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 678–79.

72. *Perry*, 460 U.S. at 49; *Mainstream Loudoun v. Bd. of Trustees of Library*, 24 F. Supp. 2d 552, 562 (E.D. Va. 1998) (enjoining, on First Amendment grounds, library trustees from enforcing policy on Internet sexual harassment prohibiting access to certain content-based categories of Internet publications).

73. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker*, 393 U.S. at 506).

74. *Tinker*, 393 U.S. at 506.

75. 484 U.S. at 261. This point regarding curriculum obviously raises a parallel with the earlier discussion of naming rights as curricula (see n. 31 and accompanying text above), which cast their curricular value as indicative of government speech. Nevertheless, as Bezanson and Buss write, *Hazelwood* “did not rest on a clearly defined idea of government speech,” but rather “on doctrines premised on government’s role as regulator.” Randall P. Bezanson and William G. Buss, “The Many Faces of Government Speech,” 86 *Iowa Law Review* 86 (August 2001): 1377, 1418. See also *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (holding that a school need not tolerate student speech that interferes with its “basic educational mission”).

76. 484 U.S. at 269.

77. 508 U.S. 384, 392–94 (1993).

ment implications of naming rights—an awareness that few schools have demonstrated thus far. How schools can address those concerns—balancing the competing policy considerations for and against naming rights without running afoul of the First Amendment—is a matter for the sound discretion of individual school boards and their attorneys. Nevertheless, some general observations and recommendations are possible.

### THE NEED FOR POLICIES

By far the most troubling trend in school naming rights is the degree to which schools seem to be operating without reference to any written policies whatsoever. Unlike universities, which generally have well-researched and very specific policies governing sales of naming rights, most school board policies refer only in general terms to naming schools after landmarks or historical figures.<sup>78</sup> Sometimes they rely on community nominations and voting to select names for buildings or facilities.<sup>79</sup> The closest most school boards come to recognizing sales of naming rights are policies allowing school facilities to be named after individuals who have made “contributions” to the schools or community.<sup>80</sup> Even then, it is clear from their wording and application that most of these policies were drafted to recognize nonfinancial contributions such as long-standing service. Some school boards—including a few in North Carolina—do have policies recognizing the possibility of exchanging naming rights for remuneration, but the vast majority apparently do not.<sup>81</sup>

This lack of a pre-existing policy raises constitutional red flags, primarily because it opens school boards up to charges that they have rejected a particular sponsor based on disapproval of that sponsor’s viewpoint.<sup>82</sup> Some school

officials may not believe that having a naming rights policy is important. Nonetheless, a pre-existing, written policy gives a school something to point to when claiming that a decision to reject a sponsor was driven by larger policy concerns, not by animus for the sponsor’s viewpoint. A policy could even be as simple as the following statement: “In light of the need to protect student health and encourage healthy eating, Carolina County schools will not enter into naming rights arrangements with companies that sell soft drinks.” A would-be sponsor might argue that it does not fall within the policy’s scope, but it would find it much harder to claim viewpoint discrimination if other, similar sponsors are also excluded.

Of course, a poorly drafted policy could itself raise First Amendment concerns. Commercial entities might, for example, challenge a policy that excludes all or some commercial sponsors,<sup>83</sup> and religious organizations might do so if a policy excludes them.<sup>84</sup> But even if they are not a fail-safe defense, pre-existing naming rights policies undoubtedly carry substantial advantages.

### FOLLOWING POLICIES

Simply drawing up a policy governing school naming rights sales is not enough. To safeguard against First Amendment challenges, a policy must be followed scrupulously once it is put in place, a simple enough prescription that governmental actors in other areas have had difficulty following—often with disastrous results for the government.<sup>85</sup>

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lack of clear, specific, narrowly drafted government standards or policies that are consistently enforced has often been the problem in these advertising-on-government-property cases.”)

83. Mary Jean Dolan, “The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech,” *Hastings Constitutional Law Quarterly* 31 (Winter 2004), 83 (“While a ‘commercial ads only’ policy does block most speech against public policy, it is an open question whether governments can further exclude a subset of such speech, typically alcohol and tobacco ads, where promoting such products contravenes the administration’s values” (internal citation omitted)).

84. *Lamb’s Chapel*, 508 U.S. at 394.

85. Courts in a number of First Amendment cases have found that the lack of practical oversight over a policy was sufficient to create a public forum for free speech. *See, e.g.*, *Christ’s Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 251 (3d Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999) (“In effect, SEPTA’s reservation of the right to reject any ad for any reason does not conclusively show that it intended to keep the forum closed.”); *Planned Parenthood Ass’n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1232 (7th Cir. 1985) (finding that the city had created a limited public forum—despite its policy banning “immoral, vulgar, or disreputable” ads—because in practice it failed to distinguish among advertisers); *AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1, 24–25 (1st Cir. 1994) (finding that it was “exceedingly difficult to say whether the MBTA designated the interiors of its cars as public fora,” since there was little evidence in the record about past practice with regard to ad

78. *See, e.g.*, Durham (N.C.) Public Schools, Regulation 6090, “Naming Public Schools” (revised 1999): “New schools built in the Durham Public Schools normally will be named after townships, regions, or community characteristics.” Available at [www.dspnc.net](http://www.dspnc.net) (search “6090”).

79. *See, e.g.*, Buncombe County Board of Education, Policy # 535 (adopted December 9, 1993), which allows individuals to propose names to the superintendent, who must obtain the Board of Education’s “informal approval.” Available at [www.buncombe.k12.nc.us/modules/Downloads/files/namschl535ar.pdf](http://www.buncombe.k12.nc.us/modules/Downloads/files/namschl535ar.pdf).

80. *See, e.g.*, Shenandoah County (Va.) Public Schools, “Naming School Facilities” (adopted January 14, 1997), [www.shenandoah.k12.va.us/pdf/policymanual/Sec%20F%2005-06.pdf](http://www.shenandoah.k12.va.us/pdf/policymanual/Sec%20F%2005-06.pdf).

81. *See, e.g.*, the policy of the Carteret County (N.C.) Public School System (revised January 2006), which notes that “[i]ndividual buildings, rooms or areas within buildings, or other structure on school campuses may be named in memory or honor of . . . [a]n individual who has helped students succeed through significant financial contribution or the donation of personal property.”

82. Irene Segal Ayers, “What Rudy Hasn’t Taken Credit For: First Amendment Limits on Regulation of Advertising on Government Property,” *Arizona Law Review* 42, no. 1 (2000): 607, 623–24 (“The

In other areas of sponsorship and public-private participation, courts have repeatedly upheld First Amendment challenges on the grounds that the government—by failing to police a supposed forum—has (perhaps inadvertently) created a public forum where restrictions on speech are nearly impossible to justify.<sup>86</sup> The lesson for school boards is clear: once a naming rights policy is put in place, schools must be careful to follow its terms.

### THE CONTENT OF THE POLICY

A myriad of options are available to school boards preparing to adopt policies on the sale of naming rights. Many school boards across the country have already opened their doors to commercial sponsors; others have barred commercial sponsorship altogether; and still others have attempted to chart a middle course.<sup>87</sup>

The ultimate content of a naming rights policy—what it says about which sponsors it will and will not accept—is a decision that can only be made by school boards themselves. The Constitution does not mandate any particular decision, and schools are generally free to draw up policies as they see fit, subject to the First Amendment restrictions set out above. School officials that adopt a commercial sponsors-only policy—in an attempt, perhaps, to exclude religious sponsors—would be wise to familiarize themselves with commercial speech doctrine, since most sponsor dis-

putes fall under that rubric. As discussed above, challenges to regulation of commercial speech often rise or fall on the importance of the government interest asserted. School boards and their attorneys would therefore also be well-advised to gather evidence about the government interests served by their restrictions (or, better yet, state them in their policies). Schools choosing to exercise more control over their naming rights arrangements—perhaps in an attempt to win the coveted “government speech” designation—would do well to make it clear in their written policies that they consider their schools’ names to be important forms of expression in their own right.<sup>88</sup> Even if this kind of language does not by itself create government speech, it may have the added benefit of pushing naming rights into the same arena as the limited public forum cases that have upheld schools’ right to regulate speech for curricular purposes.<sup>89</sup>

### Conclusion

So far, there are no reported cases of would-be sponsors challenging their exclusion from a school’s naming rights policy. If school boards are attentive to the concerns raised in this article, that happy state of affairs may very well continue. More likely, however, some disgruntled sponsor will seek constitutional redress, as would-be sponsors in so many other areas of government sponsorship have done. Sponsors’ successes in those cases suggest that they may succeed, even in the school naming rights arena, and that schools could be forced to accept naming rights deals from unsavory commercial or political groups. This article has attempted to describe the First Amendment standards implicated by school naming rights deals so that schools and their attorneys can formulate policies that guard against that possibility. ■

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selection); *see also* Frayda S. Bluestein, “A Funny Thing Happened on the Way to the Forum: Free Speech Issues with Government Websites” (unpublished manuscript on file with author, September 2001), 5.

86. The only acceptable regulations on speech in a public forum are time, place, and manner restrictions that are viewpoint neutral, or content-based restrictions that are narrowly drawn to serve a significant government purpose. *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981).

87. *See, e.g.*, Carteret County (N.C.) Public School System (*see above*, note 81); Center for Commercial-Free Public Education, “San Francisco Passes the Commercial-Free Schools Act, Not for Sale” (Spring 2000), [www.ibiblio.org/commercialfree/newsletters/n1300\\_1.html](http://www.ibiblio.org/commercialfree/newsletters/n1300_1.html) (last visited July 12, 2006); Citizens’ Campaign for Commercial-Free Schools, “Corporations Lose Battle for Seattle Schools,” (November 21, 2001), [www.asu.edu/educ/epspl/CERU/Articles/CERU-0111-060OWI.doc](http://www.asu.edu/educ/epspl/CERU/Articles/CERU-0111-060OWI.doc) (last visited July 12, 2006).

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88. *See, e.g.*, Rochester City School Board, Policy Manual 75000, “Naming New Facilities” (revised August 20, 1998), referring to the curricular value of naming rights. Available at [www.rcsdk12.org/BOE/PM/PM%20pdfs/7000/7500%20Naming%20Facilities.pdf](http://www.rcsdk12.org/BOE/PM/PM%20pdfs/7000/7500%20Naming%20Facilities.pdf).

89. *See, e.g.*, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988).