Selling the Name on the Schoolhouse Gate

The First Amendment and the Sale of Public School Naming Rights

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.1 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.2

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 up with a check may not be as innocuous as the local grocer. To address concerns about childhood obesity, Coca-Cola and Nestlé may be sponsors non grata.3 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.4

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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over the names on their schools, whatever policies they endorse.\textsuperscript{5}

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.\textsuperscript{6} 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.”\textsuperscript{7} 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.\textsuperscript{8}

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.\textsuperscript{9} 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.”\textsuperscript{10}

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.\textsuperscript{11} Nor were the Astros the only recipients of Lay’s problematic


\textsuperscript{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.”

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


\textsuperscript{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.


\textsuperscript{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. 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. 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.” 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. 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. 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.

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. 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.


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.”


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”—it accords different levels of protection to different kinds of speech, depending on the speaker, the message, and where the speech occurs. 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. 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*, 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.”

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. And in *Legal Services Corp. v. Velázquez*, 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. The relevant question in all cases

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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.27

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.28 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.29 Other naming 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.31

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
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.32 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.33

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.34 The Supreme Court has already ruled in prior student speech cases that there is no constitutionally significant difference between compelled speech and compelled silence.35 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.36 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." 37 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.38

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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) ("KW MU'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).


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.").


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.\(^{39}\) The Court has continued to use this approach while acknowledging its imprecision.\(^{40}\)

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,\(^{41}\) 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.\(^{42}\) 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.\(^{43}\) 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.\(^{44}\) 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.\(^{45}\)


\(^{43}\) 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”).


Expanding protections for commercial speech

For most of this history, commercial speech received no First Amendment protection at all.\(^{46}\) 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.\(^{47}\)

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.”\(^{48}\) If the speech fails this initial inquiry, it receives no First Amendment protection at all.\(^{49}\) If it passes, the second prong then assesses whether the government interest in the speech is “substantial.”\(^{50}\) 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.\(^{51}\) Though the second and third prongs are comparatively easy for a regulation to meet,\(^{52}\) the final prong has become an increasingly sizeable obstacle.\(^{53}\)

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.\(^{54}\) 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).


\(^{48}\) 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).


\(^{54}\) 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.  

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.  

**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 anti-commercialism 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.

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.

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.

56. 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, #
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.” 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.61

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.62

**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 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.63

Traditional public forums are areas “which the State has opened for use by the public as a place for expressive activity.”64 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.65 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.66

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

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.”68 In other words, the First Amendment does not prohibit the viewpoint-neutral exclusion of speakers who would hinder the purpose of the nonpublic forum.69 A naming rights policy might create a nonpublic forum by simply failing to provide for a sponsor’s expressive activity.70

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.71 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.”72

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 environment.”73 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.”74 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.75 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.76

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.77 Lamb’s Chapel can probably be explained as a product of the Court’s solicitousness of 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).
71. 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).
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. Sometimes they rely on community nominations and voting to select names for buildings or facilities. 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. 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.

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. Some school boards 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; and religious organizations might do so if a policy excludes them. 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 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.

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 (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/namchi535ar.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.”
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. 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.

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 disputes 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. 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.

**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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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).

