

## ARTICLES

**School Naming Rights and the First Amendment's Perfect Storm**

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*In the past five years, public schools across the country have begun to explore a new avenue of fundraising: selling naming rights to school facilities. The popularity and monetary value of these sales, however, only highlight the importance of the First Amendment concerns they raise. This Article uses school naming rights as a lens through which to examine the conflicts between government speech, commercial speech, and forum analysis, three categories of First Amendment analysis that are simultaneously and problematically implicated by school naming rights sales. Courts and scholars have long noted the internal ambiguities within these three categories, but have not yet explored the sometimes irreconcilable conflicts among them. As the growth of school naming rights shows, government sponsorship arrangements collapse many of the artificial divisions between the First Amendment's categories and demonstrate the need for a better understanding of the categories' interactions. This Article identifies—and attempts to resolve—some of the border disputes between these poorly defined and increasingly important areas of First Amendment law.*

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#### INTRODUCTION

Like many public school administrators, Brooklawn School Board President Bruce Darrow was stuck in a bind. His schools needed renovations, but his budget was already stretched to the breaking point. Where most administrators might have gone to the county or state government to ask for more funding, however, Darrow hit on what seemed like a novel solution: He decided to sell the naming rights to the elementary school gym. Darrow found a sponsor almost immediately, and Brooklawn's elementary students now play dodgeball in the newly refurbished ShopRite of Brooklawn Center, named for the grocery store that paid \$100,000 to help remodel it.<sup>1</sup> School boards across the country soon followed Brooklawn's lead, entering into naming rights deals whose combined value now stretches into the hundreds of millions of dollars.

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1. Tamar Lewin, *In Public Schools, The Name Game as a Donor Lure*, N.Y. TIMES, Jan. 26, 2006, at A1; Robert Strauss, *Education; P.S. (Your Name Here)*, N.Y. TIMES, Dec. 16, 2001, § 14 (New Jersey Weekly), at 6.

Even holding aside policy concerns, a closer look at these deals suggests that school boards might inadvertently be steering themselves into troubled constitutional waters. Specifically, schools might find it increasingly hard to reject undesirable sponsors—“bad name” sponsors, or those marketing undesirable products, for example—without running afoul of the First Amendment. Indeed, the sale of public school naming rights creates something of a constitutional perfect storm, uniquely positioned at the intersection of three particularly tempestuous areas of First Amendment law: government speech, commercial speech, and schoolhouse speech (a kind of forum analysis). Courts and scholars have not yet acknowledged the shadow cast by this ominous storm. But as school sponsorship deals become commonplace, it will be increasingly difficult to ignore.

This Article represents a first attempt to analyze the First Amendment implications of school naming rights sales and the overlaps and interactions between government speech, commercial speech, and schoolhouse speech. Scholars have focused much attention on the characteristics that separate these three categories from fully protected speech,<sup>2</sup> but comparatively little scholarship has addressed the boundaries and interactions among the categories themselves.<sup>3</sup> The growth

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2. Following Melville Nimmer’s lead, many First Amendment scholars have employed “definitional balancing” or “categorical balancing” as a method for “defining which forms of speech are to be regarded as ‘speech’ within the meaning of the first amendment.” Melville B. Nimmer, *The Right To Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942 & n.24 (1968); see Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 & n.3 (1987); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1138 n.175 (2005); see also John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1500–01 & n.74 (1975) (describing a “categorization” approach). See generally Norman T. Deutsch, *Professor Nimmer Meets Professor Schauer (and Others): An Analysis of “Definitional Balancing” as a Methodology for Determining the “Visible Boundaries of the First Amendment,”* 39 AKRON L. REV. 483 (2006) (examining “definitional balancing” as a method for separating protected and unprotected speech).

3. Perhaps the most thorough and nuanced work exploring the First Amendment’s boundaries—both external and internal—is that of Frederick Schauer. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1765 (2004) [hereinafter Schauer, *The Boundaries of the First Amendment*] (“The history of the First Amendment is the history of its boundaries.”); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981) (exploring the use of categories and subcategories in First Amendment methodology).

As part of his efforts to clarify the First Amendment’s boundaries, Schauer has described a theory of the “institutional First Amendment,” which would “recognize the difference between the institutional press and the lone pamphleteer, between the Internet and an adult theater, between libraries and medical clinics, and between the National Endowment for the Arts and the National Institutes of Health.” Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1260 (2005) [hereinafter Schauer, *Towards an Institutional First Amendment*]; see also Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1999). Although I do not address the “institutional First Amendment” in any detail here, the basic thrust of this Article—that school naming rights illuminate problematic interactions among three areas of First Amendment law—can easily be reconciled with an institutional approach. Indeed, the discussion here suggests that these First Amendment border disputes arise because of a new confluence of institutional actors: schools and naming rights sponsors. For a more recent effort to address the strengths and potential weaknesses of institutional tailoring, see generally Scott A. Moss, *Prisoners and Students and Workers—Oh, My! A*

of public sponsorship deals such as school naming rights demands a better understanding of these interactions. In an attempt to meet that need, this Article creates a framework to analyze school naming rights specifically, and government speech, commercial speech, and schoolhouse speech more generally. The purpose of the Article is not to advocate for or against regulation of public school naming rights, but rather to illuminate paths through the problematic thicket of constitutional issues those regulations inevitably raise. In doing so, it tries to clarify the boundaries between three previously independent categories of First Amendment law that contemporary developments have put on an inevitable collision course.

This collision will probably manifest itself in the form of First Amendment challenges filed by would-be sponsors who argue that their rejection by a school amounts to impermissible viewpoint discrimination and a violation of their First Amendment rights. Given the financial value of school naming rights deals on the one hand, and the strength of the opposition to those deals on the other, sponsors and schools will likely wage pitched battles over the scope and meaning of the First Amendment. These battles will raise important constitutional questions that do not admit of easy answers.

Despite the First Amendment's straightforward language—"Congress shall make no law . . . abridging the freedom of speech"<sup>4</sup>—the Amendment grants varying protection to speech depending on the speaker, the message, and the forum where the speech is delivered.<sup>5</sup> As a result, courts recognize separate categories of speech within the First Amendment's coverage, each of which receives a different level of protection.<sup>6</sup> Government speech, commercial speech, and schoolhouse speech, all of which are implicated in school naming rights sales, are among the most volatile and controversial of these categories. All three are subject to different and sometimes ill-defined definitions and standards. School naming rights arrangements highlight the practical difficulty of applying these definitions and standards. When a school sells the naming rights to its facilities, who is the "speaker"? Is it the school on which the name is emblazoned, or the person or entity to whom the name belongs? And moreover, what is the message being delivered? Is it a simple "thank you" to a benefactor,

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*Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. (forthcoming 2007).

4. U.S. CONST. amend. I.

5. Many scholars have called for a more evenhanded application of the Amendment in particular categories. *See, e.g.*, Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1384 (2001) (arguing that "there is no basis or need for any special form of privilege or immunity for government speech"); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990); William 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?*, 51 EMORY L.J. 1513, 1554 (2002) [hereinafter Van Alstyne, *Power of Government*].

6. Schauer, *The Boundaries of the First Amendment*, *supra* note 3, at 1769–74 (distinguishing between "coverage" and "protection" under the First Amendment).

or a commercial advertising pitch? If the latter, is it the school or the sponsor who is pushing the sponsor's products? Even if those questions could be easily resolved, they would leave the difficult problem of the forum: What does it matter that these naming rights deals take place on public school grounds? And perhaps most difficult of all, how are courts to resolve all of these questions at once? This swirl of questions draws together the cloudy jurisprudence surrounding government speech, commercial speech, and schoolhouse speech, creating the constitutional "storm" described here.

Part I of this Article describes recent trends in schoolhouse commercialism, explaining how the growth of commercialism in schools throughout the 1980s and 1990s led directly to the more recent practice of selling naming rights. Because the categorization of "speech" for First Amendment purposes depends on both the identity of the speaker and the content and purpose of the message the speaker delivers, this Part explores not only the shape of naming rights arrangements but also the motivations behind them. It concludes by identifying the reasons why schools might want to limit naming rights or exclude certain sponsors. Building on the practice and debate described in Part I, Part II describes the actual policy approaches schools have used to try to control their names. Though diverse in their approaches, these policies are uniformly blind to the First Amendment problems they raise. It appears, in fact, that most naming rights sales are made without reference to any written policy whatsoever, putting school boards in a calamitously weak position to defend against the First Amendment challenges they will inevitably face. Part III builds the constitutional framework to assess these challenges. This final Part uses naming rights as a tool to illuminate and clarify the tangled interactions among the government speech, commercial speech, and schoolhouse speech doctrines. Embracing a task that courts will soon have to perform, this Part attempts to resolve some of the problematic interactions between the categories' definitions and governing standards. It also argues that some of the overlaps among these three areas of First Amendment law may be impossible to resolve, because the categories themselves begin from fundamentally different premises. Although the First Amendment is traditionally conceived as being divided by content alone,<sup>7</sup> the three subcategories addressed here actually divide themselves by somewhat different metrics: government speech is defined and governed by the speaker's identity, commercial speech by the speech's content, and schoolhouse speech by the forum in which it is delivered. The simultaneous application of these fundamentally different inquiries causes the border disputes this Article attempts to resolve.

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7. Schauer, *Towards an Institutional First Amendment*, *supra* note 3, at 1256 ("Traditionally, the First Amendment has been subdivided on the basis of the content of the communication.").

## I. FROM SPONSORSHIP TO NAMING RIGHTS: TRENDS AND ISSUES IN SCHOOLHOUSE COMMERCIALISM

While the debate over school naming rights has thus far been driven by concerns over policy and educational outcomes, the issues that animate that policy discussion—including sponsor identity, motivation, and message—are also necessary components of any First Amendment analysis. This first Part gives a brief overview of the arguments for and against commerce in school naming rights.

### A. THE GROWTH OF SCHOOLHOUSE COMMERCIALISM

Schoolhouse commercialism is growing in nearly all its forms, from exclusive pouring rights arrangements to sponsored classroom materials that mix advertising with educational messages.<sup>8</sup> One recent study found that schools receive \$2.4 billion a year from corporate relationships,<sup>9</sup> more than the total 2003 educational expenditures of twelve states and the District of Columbia.<sup>10</sup> The numbers for individual school districts can be staggering, rivaling the amounts of funding they receive from taxes and other public sources.<sup>11</sup>

Opponents of schoolhouse commercialism bemoan what they see as public schools “selling out” to corporate sponsors,<sup>12</sup> and argue that children are particularly vulnerable to harmful advertising.<sup>13</sup> The most common targets of these arguments are food and soda companies that market unhealthy snacks and sodas to a student population already struggling with childhood obesity.<sup>14</sup> Attempts to limit such marketing raise a host of difficult legal issues, however,<sup>15</sup> and in any case, schools may find it difficult to forego the funds they receive

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8. ALEX MOLNAR, EDUC. POL’Y STUDIES LAB., SPONSORED SCHOOLS AND COMMERCIALIZED CLASSROOMS: SCHOOLHOUSE COMMERCIALIZING TRENDS IN THE 1990’S, at 6–7 (1998), available at <http://eps1.asu.edu/ceru/Annual%20reports/cace-98-01.pdf> [hereinafter MOLNAR, SPONSORED SCHOOLS]; *id.* at 26 (“The evidence presented in this report suggests that the 1990’s have become the decade of sponsored schools and commercialized classrooms.”); see also Alex Molnar, *Sixth Annual Report on Commercialism in Schools: Cashing in on the Classroom*, EDUC. LEADERSHIP, Dec. 2003–Jan. 2004, at 79, 79 [hereinafter Molnar, *Cashing in on the Classroom*] (reporting “marked increase” in six categories of schoolhouse commercialism from 2001–2002 to 2002–2003).

9. Molnar, *Cashing in on the Classroom*, *supra* note 8, at 79.

10. George A. Clowes, *Just the Facts: Teacher Salaries and Education Spending*, SCHOOL REFORM NEWS, May 1, 2004, available at <http://www.heartland.org/Article.cfm?artId=14818>.

11. See, e.g., Izzy Gould, *What’s in a Name? Extra Cash, Perhaps*, TAMPA TRIB., Dec. 21, 2004 (Sports), at 1 (noting that Pasco County, Florida’s athletic budget for its nine high schools in 2003–2004 was approximately \$1,218,627, a budget that was nearly equal to the annual value of its ten year, \$13 million deal with Pepsi to only sell Pepsi products in Pasco County schools).

12. See, e.g., Ruth Sheehan, *Too Late to Cry ‘Sellout’*, NEWS AND OBSERVER (Raleigh, N.C.), Jan. 20, 2003, at B1.

13. See Lini S. Kadaba, *Museums Embrace Corporate Sponsorship*, PHILA. INQ., Aug. 9, 2001 (Domestic News).

14. See THE HENRY J. KAISER FAMILY FOUND., THE ROLE OF MEDIA IN CHILDHOOD OBESITY 4–9 (2004), available at <http://www.kff.org/entmedia/upload/The-Role-of-Media-in-Childhood-Obesity.pdf>.

15. See generally Edward L. Palmer & Lisa Sofio, *Food and Beverage Marketing to Children in School*, 39 LOY. L.A. L. REV. 33 (2006); Michele Simon, *Food Marketing to Children and the Law: An*

from commercial sponsors. Although opponents of schoolhouse commercialism still claim occasional victories (generally by convincing schools to avoid certain direct marketing), they increasingly seem to be fighting a rearguard action. Nevertheless, the commitment of the anti-commercial forces appears undiminished, and battles still make headlines. In perhaps the best-known example, Greenbrier High School in Evans, Georgia, sparked a national firestorm of criticism when it suspended a student for wearing a Pepsi T-shirt to a Coke-sponsored rally.<sup>16</sup> The public outcry targeted both the heavy-handed suspension and the commercial interests it apparently served,<sup>17</sup> suggesting that schoolhouse commercialism is still controversial, no matter how widespread it has become.

### 1. The New and Growing Market: Selling Naming Rights to School Facilities

Despite this bitter opposition, commercial activity in schools was well-entrenched by the end of the 1990s.<sup>18</sup> Naming rights, in fact, was one of the few areas of commercial activity that did not experience growth. But as school leaders sat on the sidelines, contemplating their own tight budgets and watching millions of corporate dollars flow to other entities through naming rights arrangements, it became almost inevitable that they would join the game.<sup>19</sup> In doing so, they followed—sometimes explicitly<sup>20</sup>—in the footsteps of universities,<sup>21</sup> museums,<sup>22</sup> and professional sports teams,<sup>23</sup> all of which commonly emblazon sponsors' names on their buildings and facilities. Despite occasional

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*Introduction*, 39 LOY. L.A. L. REV. 1 (2006); Lisa M. Spenny, Comment, *Commercialism in New York Public Schools: State Versus Local Control*, 5 ALB. L.J. SCI. & TECH. 339 (1996).

16. See, e.g., Jingle Davis, *No Coke, Pepsi: Rebel Without a Pause*, ATLANTA J-CONST., Mar. 26, 1998, at 1A; Guy Friddell, *Student's Act of Cola Defiance Was Refreshing*, VIRGINIAN-PILOT (Norfolk, Va.), Apr. 4, 1998, at B1; Carl Hiassen, Editorial, *Be True to Your School . . . and Its Cola*, CHARLESTON GAZETTE (Charleston, W.V.), Mar. 31, 1998, at 4A.

17. See, e.g., Editorial, *Pepsi T-Shirt Wasn't a Huge Crime*, OMAHA WORLD HERALD, Mar. 29, 1998, at 20A; Barry Saunders, *OK, Class—Line Up, Dress Right, and Salute the Image*, NEWS AND OBSERVER (Raleigh, N.C.), Mar. 28, 1998, at A19.

18. Even the National School Boards Association now invites corporate sponsors to “carve out a special place in the minds of school board members and administrators [through] special sponsorship opportunities.” Nat’l Sch. Bds. Ass’n, Corporate Sponsorship Opportunities with NSBA Conferences & Meetings, <http://www.nsba.org/site/page.asp?TRACKID=&CID=190&DID=5557> (last visited June 3, 2007).

19. As one school fundraiser commented after being told that his high school was only the second in the country to negotiate a naming rights deal, “We thought everyone did this. I thought this was a fairly routine thing. We’re pioneers, I guess.” Chris Anderson, *Naming Rights Pay for Lights*, SARASOTA HERALD-TRIB., (Sarasota, Fla.), Feb. 18, 2004, at C1.

20. Sue Kiesewetter, *The Name Game; Sale of Naming Rights for Sports Facilities in Schools; Includes Tips on Selling Naming Rights*, SCH. PLANNING & MGMT., Aug. 1998, at 29; Jason Spencer, *What's in a Name? Lots of Cash, HISD Hopes; District Ponders a Proposal to Sell Naming Rights for Football Stadiums*, HOUSTON CHRON., Jan. 21, 2005, at A-01.

21. See Dan Voelpel, *Pay the Price and It's (Your Name Here) Stadium; The Modern Advertising Trend of Selling Rights to Sports Facilities Has Trickled Down to High Schools, for Better or Worse*, NEWS TRIB., (Tacoma, Wash.), May 22, 2005, at D01.

22. See Kadaba, *supra* note 13.

23. See, e.g., Cindy Brovsky, *Stadium Naming Rights Are Usually a Package Deal*, DENVER POST, Oct. 29, 2000, at A04. For an interesting reversal of the normal practice described in this Article, see

controversies between the entities involved,<sup>24</sup> and some public opposition,<sup>25</sup> these arrangements have generally been considered successful. Indeed, local governments have increasingly tried to mimic private deals by selling advertising space on city buses and police cars,<sup>26</sup> as well as naming rights to public libraries,<sup>27</sup> public stadiums, and office buildings.<sup>28</sup> By 2000, when Brooklawn signed its deal with ShopRite, public schools seemed to be the only places where naming rights arrangements were not common.<sup>29</sup>

But within a few months of the Brooklawn deal,<sup>30</sup> dozens—if not hundreds—of public schools had signed naming rights deals,<sup>31</sup> most of them involving football stadiums and other athletic facilities.<sup>32</sup> Schools soon expanded the menu, selling off naming rights to libraries,<sup>33</sup> hallways,<sup>34</sup> and other facilities. The sale of school naming rights has now become something of a professional enterprise. In Texas, school districts have sent written solicitations

Goldie Blumenstyk, *U. of Phoenix Buys Naming Rights to a Pro-Football Stadium*, CHRON. OF HIGHER EDUC., Oct. 6, 2006, at 30.

24. Many of these disputes center on contractual issues not addressed in any detail here. See also John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375, 402–03 (2005) (describing common conflicts in charitable naming arrangements, and proposing state law solutions). For more information, see generally Debra E. Blum, *Donors Increasingly Use Legal Contracts to Stipulate Demands on Charities*, CHRON. PHILANTHROPY, Mar. 21, 2002, at 9; Robert H. Thornburg, Note, *Stadium Naming Rights: An Assessment of the Contract and Trademark Issues Inherent to Both Professional and Collegiate Stadiums*, 2 VA. SPORTS & ENT. L.J. 328 (2003).

25. See, e.g., Cindy Brovsky, *Stadium Name May Be Ignored*, DENVER POST, Jan. 26, 2001 (noting public opposition to re-naming Mile High Stadium as Invesco Field at Mile High); Vincent P. Bzdek, *The Ad Subtractors, Making a Difference*, WASH. POST, July 29, 2003, at C09 (describing activities of Commercial Alert, a group that seeks “[t]o stop advertisers from commandeering every last nook and cranny of American culture”).

26. Jason Bradley Kay, *What Is a Good Name Worth? Local Government Sponsorships and the First Amendment*, POPULAR GOV'T, Fall 2003, at 30, 30, 35.

27. *Name Games Question*, DALLAS MORNING NEWS, July 9, 2005, at 8B (reporting mixed public response to a plan to sell naming rights to city library).

28. Kay, *supra* note 26, at 30.

29. Molnar's 1998 report cited “Appropriation of Space” as a small and shrinking category of commercial activity in schools. MOLNAR, SPONSORED SCHOOLS, *supra* note 8, at 28.

30. See Lewin, *supra* note 1; Strauss, *supra* note 1. Brooklawn's deal is generally recognized as the first of its kind. John Kellmayer, *Is It Wrong To Sell Naming Rights? No; It Brings Money to Schools*, AM. TEACHER, Mar. 2002, [http://www.aft.org/pubs-reports/american\\_teacher/mar02/speakout.html](http://www.aft.org/pubs-reports/american_teacher/mar02/speakout.html) (last visited Apr. 2, 2007); Bill Pennington, *Reading, Writing, and Corporate Sponsorships*, N.Y. TIMES, Oct. 18, 2004, (Sports), at 1.

31. ALEX MOLNAR, EDUC. POL'Y STUDIES LAB., WHAT'S IN A NAME? THE CORPORATE BRANDING OF AMERICA'S SCHOOLS: THE FIFTH ANNUAL REPORT ON TRENDS IN SCHOOLHOUSE COMMERCIALISM 7 (2002) [hereinafter MOLNAR, WHAT'S IN A NAME?] (reporting dramatic increase in news citations of naming rights sales following Brooklawn deal).

32. Lewin, *supra* note 1.

33. See Geoff Mulvihill, *N.J. School Sells Naming Rights to Raise Money*, MKTG. NEWS, May 15, 2004, at 7.

34. *Roundtable: Voting Rights, Treason, School Names* (NPR radio broadcast June 27, 2006) (reporting sales in a Wisconsin school district).



to local and national businesses offering naming rights to school stadiums.<sup>35</sup> Many public schools have begun to imitate universities<sup>36</sup> by openly soliciting naming rights deals and announcing asking prices for various school facilities: \$1 million for a building, \$25,000 for a classroom, and so on.<sup>37</sup> In just a few short years, the sale of public school naming rights had developed from fodder for humor columnists<sup>38</sup> into a multi-million dollar industry that involves schools, students, and sponsors nationwide. Even years after the practice had become commonplace, many people continued to regard naming rights deals with considerable suspicion. In California, when school boards responded to 2003 state budget cuts by openly considering naming rights arrangements, local newspapers called the move “unprecedented” and “radical.”<sup>39</sup> Three years earlier, they would have been right.

## 2. Funding, Charity, and Commerce: Motivations Behind the Sale and Purchase of School Naming Rights

Two inexorable forces have driven the spread of naming rights arrangements: schools’ need for funding, and companies’ desire for advertising.<sup>40</sup> Given these mixed motivations, it is difficult to classify public school naming rights deals as commercial transactions, charitable donations, or even some kind of educational or political speech.

For school administrators, at least, the motivation for selling naming rights is relatively straightforward: money.<sup>41</sup> Naming rights are a relatively plentiful and valuable asset that every school possesses. And unlike corporate-sponsored educational materials, naming rights do not necessarily require schools to

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35. See Anita Powell, *For Sale: Round Rock ISD Looks To Sell Stadium Name*, AUSTIN AM.–STATESMAN (Austin, Tex.), Oct. 30, 2003, at A1; Spencer, *supra* note 20.

36. Universities often have elaborate and specific naming rights policies which address the criteria for naming school facilities, including the amounts which must be donated and the methods by which donors will be selected. See, e.g., N.C. STATE UNIV. BD. OF TRS., POLICIES, REGULATIONS, AND RULES, Policy 03.00.2 (1994) (amended 2005), available at [http://www.ncsu.edu/policies/alumni\\_dev/pdf/POL03.00.2.doc](http://www.ncsu.edu/policies/alumni_dev/pdf/POL03.00.2.doc); UNIV. OF N.M. POL’Y OFFICE, UNIV. OF N.M. BD. OF REGENTS POLICY MANUAL § 2.11 (1995) (amended 2001 & 2005), available at <http://www.unm.edu/brpm/r211.htm>.

37. See Lewin, *supra* note 1; see also Lisa Marie Pane, *School Raises Funds by Selling Name Rights*, DESERET NEWS (Salt Lake City, Utah), Aug. 10, 2001, at A10 (listing prices for school facilities in Newport, Rhode Island); Leif Strickland, *Extra Credit for School Donors; For the Right Amount, HP Will Make You a Big Name on Campus*, DALLAS MORNING NEWS, Feb. 27, 2002, at 1A (listing asking prices for school facilities in Texas’ Highland Park school district).

38. Elizabeth Chang, *A School by Any Other Name Would Be . . . Richer*, WASH. POST, Dec. 12, 1999, at B05; Editorial, *So What’s Next, Nike Elementary?*, ADVOCATE (Baton Rouge, La.), Mar. 29, 1998, at 16B.

39. Jeff Donaldson, *Some Schools Mull Sale of Naming Rights To Raise Funds*, DESERT SUN (Palm Springs, Cal.), Feb. 4, 2003, at 1B.

40. Judy Keen, *Wis. Schools Find Corporate Sponsors; Cafeterias, Gyms, More Renamed To Nab Easy Cash*, USA TODAY, July 28, 2006, at 3A.

41. MOLNAR, SPONSORED SCHOOLS, *supra* note 8, at 10 (“The justification for the sponsorship agreements most often used by educators is the need for money.”); see also Gould, *supra* note 11.

change their daily routines or curricula.<sup>42</sup> Faced with the prospect of this “free money,” school administrators may find it impossible—and unnecessary—to resist. 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 eighty-five 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>43</sup>

Although school administrators’ reasoning may be straightforward, purchasers’ motivations are somewhat more nuanced, involving a complex mixture of private and public interest.<sup>44</sup> Nearly all naming rights purchasers are companies and other for-profit entities,<sup>45</sup> and many insist that their purchases are motivated by a desire to “be part of the community. . . . If we get some recognition from it, more power to it.”<sup>46</sup>

But it seems implausible that corporate purchasers of naming rights are motivated purely by altruism.<sup>47</sup> Corporate directors, after all, have fiduciary duties to improve the company’s bottom line, not to pursue philanthropy.<sup>48</sup> Scholars, courts, and executives themselves have all described corporate chari-

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42. See *infra* text accompanying note 147 for discussion of whether a school’s name can be considered part of its “curriculum.”

43. Lewin, *supra* note 1; see also Joseph Di Bona et al., *Commercialism in North Carolina High Schools: A Survey of Principals’ Perceptions*, 78 PEABODY J. EDUC. 41, 56 (2003) (reporting high school principals’ positive impressions of corporate sponsored events).

44. See UNIV. OF OR. EDUC. RES. INFO. CTR., *Business Partnerships with Schools*, POL’Y REP., Fall 2001, at 1 (quoting a Verizon manager as saying that the company’s “commitment to education is driven by its responsibility as a good corporate citizen and by the understanding that today’s students will be tomorrow’s employees, consumers, regulators, and neighbors”). For an interesting attempt to classify corporate involvement with school reform according to the motivations of the corporations involved, see Roslyn Arlin Mickelson, *International Business Machinations: A Case Study of Corporate Involvement in Local Education Reform*, 100 TCHRS. C. REC. 476, 491–96 (1999), available at <http://www.uncc.edu/rmicklsln/images/corporate.pdf>.

45. Research for this Article revealed only two examples of public high school facilities named after individual, non-corporate financial donors. Alan Schmadtke, *Stadium Naming Is Big Business: Corporate Money Is Dictating the Names of College and Even High School Facilities*, ORLANDO SENTINEL, May 25, 2006, at D1.

46. Christine MacDonald, *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, at 1A (quoting president of a company that had donated \$25,000 for a playground).

47. See Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 572–85 (arguing that altruism “is an insufficient explanation for gift-giving behavior” generally, and exploring other rationales such as trust and status enhancement).

48. In the seminal corporate philanthropy case, the Delaware Court of Chancery “conclude[d] that the test to be applied in passing on the validity of a gift such as the one here in issue is that of reasonableness, a test in which the provisions of the Internal Revenue Code pertaining to charitable gifts by corporations furnish a helpful guide.” *Theodora Holding Corp. v. Henderson*, 257 A.2d 398, 405 (Del. Ch. 1969). Even so, nearly all states have passed statutes allowing corporations to make charitable donations even without demonstrating their value to the company. See Jill E. Fisch, *Teaching Corporate Governance Through Shareholder Litigation*, 34 GA. L. REV. 745, 765 (2000).

table contributions as creating financial benefits for the contributor.<sup>49</sup> As one petitioner recently argued to the United States Supreme Court in a First Amendment case: “[A]ll corporate speech is, and should be, uttered in the interest of benefiting the corporation in the eyes of potential consumers.”<sup>50</sup> The fact that sponsors ask for naming rights, as opposed to simply making anonymous or restriction-free donations,<sup>51</sup> suggests that the naming rights themselves are intended to serve, at least in part, as advertising, just like naming rights to professional sports stadiums. There is nothing pernicious about companies pursuing profit in this way.<sup>52</sup> But because advertising and other forms of “commercial” speech are entitled to a different level of protection than other kinds of speech, a sponsor’s profit-seeking motive may be relevant for First Amendment purposes.

Moreover, many corporate sponsors proudly embrace the naming rights-as-advertising theory. After paying \$504,000 to rename a Tacoma high school football stadium after his Chevrolet dealership, Jerry Yoder made the point quite clearly: “If people went to that stadium . . . , and it said Riverside Ford Stadium, where do you think people would go to buy their cars? What if it said Korum Ford?”<sup>53</sup> Yoder’s business partner at Sunset Chevrolet added, “It’s hard to measure . . . , but we think we’re getting more than our money’s worth.”<sup>54</sup> Even opponents of naming rights arrangements agree with that assessment of naming rights’ effectiveness.<sup>55</sup> Although the opportunity to expose those children to a corporate brand throughout every school day may not immediately result in an upswing of sales for a particular product, corporate donors know that such exposure can over time generate feelings of familiarity, goodwill, and even loyalty toward the company and its products.

School administrators might not care why a particular sponsor chooses to purchase naming rights, so long as its check clears. But although a corporate sponsor’s commercial motives may not affect the value of its dollars, they do

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49. Faith Stevelman Kahn, *Pandora’s Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 662 & n.362 (1997).

50. Brief for Arthur W. Page Society et al. as Amici Curiae Supporting Petitioners at 19, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 835090.

51. See MOLNAR, WHAT’S IN A NAME?, *supra* note 31, at 2.

52. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001) (“All thoughtful people believe that corporate enterprise should be organized and operated to serve the interests of society as a whole, and that the interests of shareholders deserve no greater weight in this social calculus than do the interests of any other members of society. The point is simply that now, as a consequence of both logic and experience, there is convergence on a consensus that the best means to this end (that is, the pursuit of aggregate social welfare) is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests.”).

53. Voelpel, *supra* note 21.

54. *Id.*; see also Keen, *supra* note 40; MOLNAR, WHAT’S IN A NAME?, *supra* note 31, at 16.

55. See Lewin, *supra* note 1; see also Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech*, 10 LEWIS & CLARK L. REV. 367, 374 (2006) (“When a newspaper carries a company’s ‘message’ it is better than any advertising because it is both free and more credible to the public than it would be coming directly from the company.”).

shape the First Amendment protections to which it is entitled, as section III.B describes. They also add fuel to the criticism that naming rights deals are simply another form of schoolhouse commercialism that distracts from schools' primary educational missions. The following section describes this and other criticisms advanced against school naming rights.

### 3. Concerns Raised by the Sale of Naming Rights

The spread of naming rights arrangements, like the schoolhouse commercialism that helped spawn them, has inspired skepticism and even strong opposition. Perhaps the most immediately apparent concern is the possibility of a "bad name" sponsor putting its name on the side of a public school.<sup>56</sup> Would-be sponsors whose products (such as alcohol or cigarettes) are considered inappropriate for children are clear candidates for this categorization, and many school administrators have already stated that they will not seek or accept deals with such sponsors.<sup>57</sup> And although it may seem unlikely that a truly villainous character would maliciously bid on the right to name a public school, nightmare scenarios might be more likely than school boards suspect.<sup>58</sup> To take just one example from an analogous area of government sponsorship, the Ku Klux Klan recently attempted to become an acknowledged sponsor of a Missouri public radio station<sup>59</sup> and a stretch of Missouri road as part of the Adopt-A-Highway program.<sup>60</sup> Both times the Klan was predictably rejected by the responsible state agency, and both times it mounted a constitutional challenge. And although the Klan lost its claim against the public radio station, it won the right to be included in Missouri's Adopt-A-Highway program,<sup>61</sup> much to the horror of the program's directors.

Nor are state agencies the only parties who have been burned by bad sponsorship deals. Horror stories from the world of private sponsorship suggest that concerns about "bad name" sponsors are quite real. Even a seemingly

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56. See Kay, *supra* note 26, at 30 (internal citation omitted). See generally Eason, *supra* note 24.

57. See, e.g., Strauss, *supra* note 1.

58. See Eason, *supra* note 24, at 387–88, 394–402 (discussing specific examples of "charitably inclined malfeasants whose names now adorn various charitable institutions or facilities across the nation"); John Kass, *If This Group Is Involved, It's a Really Bad Sign*, CHI. TRIB., Apr. 14, 2005, at C2 (reporting National Man-Boy Love Association's adoption of a highway in Illinois); Editorial, *County Should Have Rejected Nazis*, OREGONIAN (Portland, Or.), Feb. 4, 2005, at B10 (reporting that county, fearing lawsuits, allowed American Nazi Party to adopt a stretch of highway).

59. See *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1809, 1094 (8th Cir. 2000).

60. *Cuffley v. Mickes*, 208 F.3d 702, 705 (8th Cir. 2000).

61. *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 706 n.3. But see *Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075, 1079–81 (5th Cir. 1995) (holding that 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, since the state sought to prevent the Klan from intimidating residents and frustrating a federal desegregation order).

harmless naming rights arrangement can go sour when a sponsor's business or personal conduct is later called into question. Baseball fans remember that in 1999, the Houston Astros' new major league ballpark was christened Enron Field, after the energy giant paid \$100 million for 30 years of naming rights. Two years later, Enron CEO Ken Lay was a disgraced and widely reviled figure, the company itself was in the middle of a catastrophic bankruptcy that cost thousands of Astros-loving Houstonians their jobs, and the Astros were scrambling to buy out the remainder of the naming rights contract for \$2.1 million.<sup>62</sup> Lay and Enron are by no means the only high-profile donors whose naming rights deals have caused financial and image problems for donees.<sup>63</sup>

Of course, the "bad name" scenario is not the only objection to naming rights, and may not even be the most serious. Echoing decades-old arguments against schoolhouse commercialism, opponents of school naming rights deals argue that emblazoning corporate names on public school facilities demeans the schools,<sup>64</sup> "cheapens the honor bestowed on long-time public servants and civic leaders when a facility is named for them,"<sup>65</sup> and interferes with schools' primary mission of educating students.<sup>66</sup> These critics bolster their arguments with evidence suggesting that younger children are cognitively incapable of recognizing advertising for what it is,<sup>67</sup> and are thus particularly susceptible to seeing a company's name on their school as an endorsement of the company and a part of their educational experience.<sup>68</sup> The Children's Museum of Cleveland received a dramatic illustration of this point after selling its naming rights to a local hospital. As the museum's executive director reported, "We had little children getting off school buses and hanging onto the post outside afraid to

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62. The rights were later re-sold to Minute Maid, a subsidiary of Coca-Cola, which reportedly paid \$170 million for twenty-eight years of naming rights. See Clay Robinson, *Please, Let's Not End Up with Any 'McParks' in Texas*, HOUS. CHRON., Aug. 6, 2006, (Outlook), at 3; see also Lay's Alma Mater Struggles with Donation: Seeks 'Alternative Use' for Stock Profits Instead of Economics Chair Position, MSNBC.COM, May 26, 2006, <http://www.msnbc.msn.com/id/12992280>.

63. See, e.g., Shannon Allen, *Jubilee Hall*, SETON HALL MAG., Nov. 1, 2005, available at [http://www.shu.edu/news/magazine/2005-fall-static/2005\\_fall\\_hallmark5.html](http://www.shu.edu/news/magazine/2005-fall-static/2005_fall_hallmark5.html) (reporting that "Seton Hall has removed the name of L. Dennis Kozlowski from" one of its buildings); Jeffrey N. Gangemi, *Heard on Campus: Tyco Conviction Leads to Renaming*, BUS. WK. ONLINE, Sept. 25, 2005, [http://www.businessweek.com/bschools/content/sep2005/bs20050925\\_7716.htm](http://www.businessweek.com/bschools/content/sep2005/bs20050925_7716.htm) (reporting same); John R. Wilke et al., *Scrushy May Be Indicted Today*, WALL ST. J., Nov. 4, 2003, at A3 (noting Richard M. Scrushy's "alleged role in a massive accounting fraud at the company he founded" and also noting that his "name adorns roads, buildings, schools and athletic fields" throughout Alabama).

64. Strickland, *supra* note 37 (quoting a school board member as saying that selling naming rights would "cheapen" the school district).

65. Larry King, *The World-Herald's Priority Is What Best Serves the Readers*, OMAHA WORLD HERALD (Omaha, Neb.), Aug. 10, 2003, at 11b (explaining newspaper's decision to call a convention center by its popular name despite a recent sale of naming rights); see also Mark Zaloudek, *Should Donors Get To Name Public Schools?*, SARASOTA HERALD-TRIB. (Sarasota, Fla.), Mar. 21, 2005, at E1.

66. CITIZENS' CAMPAIGN FOR COMMERCIAL-FREE SCHOOLS, WHAT'S WRONG WITH COMMERCIALIZING THE PUBLIC SCHOOLS?, available at <http://www.scn.org/cccs/arguments.html> (last visited July 21, 2006); see also Eason, *supra* note 24, at 399.

67. Kadaba, *supra* note 13.

68. See Spencer, *supra* note 20.

come in because they thought they had to get shots . . . .”<sup>69</sup>

Even putting aside this set of advertising-related concerns, naming rights deals might raise unexpected but difficult issues related to the problem they are supposed to solve: funding. Naming rights arrangements can potentially threaten inter-school equality, since schools with a more “marketable” student body—most likely schools situated in affluent areas—are likely to draw the most attention from would-be corporate donors.<sup>70</sup> Though public schools are not obligated by the U.S. Constitution to maintain districtwide equality,<sup>71</sup> school administrators may nonetheless be concerned that naming rights sales will exaggerate pre-existing resource disparities. On the other hand, some see the sale of naming rights as a means to *correct* disparities between schools.<sup>72</sup> Schools facing tight budget restrictions—for example, schools in areas without a strong tax base—may see naming rights deals as a creative way to raise additional funds.

Even if naming rights deals do not increase these funding gaps, some critics allege that they will, in the long run, hurt school funding across the board. Those critics argue that the sale of naming rights privatizes civic responsibility<sup>73</sup> and makes taxpayers *less* likely to vote for school funding measures in the future.<sup>74</sup> And as the stories of Enron, Tyco, and several dot-coms<sup>75</sup> show, private sponsors may not be as financially dependable as they seem.<sup>76</sup>

The concerns described in this Part are for the most part matters of policy, and the Constitution does not require school boards to address them in any one particular way. Some school boards will strictly limit the sponsors they will accept and the deals they enter into. Others will deny all corporate sponsorship of school activities and facilities.<sup>77</sup> Most will probably chart a middle course, limiting naming rights but not banning them, and allowing some sponsors while

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69. Kadaba, *supra* note 13.

70. See Randy Krebs, *Our View: Schools Should Think Before Entering Deal for Naming Rights*, ST. CLOUD TIMES (St. Cloud, Minn.), July 19, 2005, at 5B (noting that interest in naming rights was focused on one of city’s larger, more affluent schools, and asking whether such deals “could . . . foster segregation by economics”).

71. See *San Antonio v. Rodriguez*, 411 U.S. 1, 54–55 (1973) (rejecting Equal Protection challenge to system of school finance based on local property taxes).

72. See Kiesewetter, *supra* note 20 (citing a public school official as saying, “All too often private donations go to private schools—the Notre Dames and Harvards. Those donations only affect a small number of people and have very little impact on the local community.”).

73. MacDonald, *supra* note 46 (quoting education advocacy association director opposed to commercialism as saying “it then says to taxpayers they no longer have responsibility for the public schools”).

74. UNIV. OF OR. EDUC. RES. INFO. CTR., *supra* note 44, at 10.

75. Thornburg, *supra* note 24, at 333.

76. MOLNAR, SPONSORED SCHOOLS, *supra* note 8, at 8.

77. In June 1999, in direct response to concerns about commercialism in schools, San Francisco passed the “Commercial-Free Schools Act” to set limits on in-school advertising. *San Francisco Passes the Commercial-Free Schools Act*, NOT FOR SALE (Ctr. for Commercial-Free Pub. Educ., Oakland, Ca.), Spring 2000, at 1, available at <http://www.ibiblio.org/commercialfree/newsletters/nl300.pdf>.

rejecting others.<sup>78</sup> But because naming rights deals are so valuable, not all of these would-be sponsors will take a rejection lying down. Some are likely to mount First Amendment challenges to their exclusion. These challenges will shift the focus back to schools to show a legitimate reason for rejecting the sponsor. Perhaps the best way to do this is by reference to a pre-existing written policy. The following Part sketches the contours of the most common policy approaches to naming rights, concluding that school boards have not yet addressed—nor even truly acknowledged—the First Amendment implications of naming rights.

## II. POLICY AND PRACTICE

Written naming rights policies provide schools with ready-made—and, if the policies are well-written, viewpoint-neutral—reasons to exclude undesirable sponsors. Although this may not be a perfect antidote to all First Amendment challenges,<sup>79</sup> it does insulate school boards against charges of viewpoint discrimination, which are probably the strongest First Amendment charges they will face. Conversely, a total lack of policy, or a failure to follow a policy once it is in place, may inadvertently create a “public forum” in which schools’ power to limit sponsors is extremely limited.<sup>80</sup>

Despite these potential benefits, few school boards have policies governing the sale of naming rights. Most facility-naming policies reflect the “traditional” method of naming schools after community leaders or geographic features. Very few address the selection of paying sponsors, or do so only in cursory fashion.<sup>81</sup> In short, the spread of naming rights arrangements has not found an accurate—nor even approximate—reflection in school board policies. This massive and growing gap is troubling both as a matter of policy and as a matter of constitutional law.

For constitutional purposes, the most disturbing aspect of the practice-policy gap is that it apparently reflects the belief that a school board can sell naming rights without reference to any written policy at all.<sup>82</sup> If nothing else, it is clear

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78. See, e.g., CITIZENS’ CAMPAIGN FOR COMMERCIAL-FREE SCHOOLS, CORPORATIONS LOSE BATTLE FOR SEATTLE SCHOOLS (Nov. 21, 2001), available at <http://epsl.asu.edu/ceru/Articles/CERU-0111-60-OWI.doc> (last visited June 10, 2007).

79. See Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 79–100 (2004) (discussing the constitutionality of various content limitations, including those—such as “no public controversy” policies and religion-based policies—which fare poorly against First Amendment challenges).

80. See also *infra* notes 257–59 and accompanying text.

81. Though no complete survey of naming rights policies is yet available, only 44.3% of 174 public school principals in a recent North Carolina survey reported having a policy in place for dealing with commercialism in schools. Di Bona et al., *supra* note 43, at 49.

82. Don Hunter, *Assembly Alters Naming Policy; Public Places: Emphasis on the Deceased When It Comes to City Parks, Facilities*, ANCHORAGE DAILY NEWS, June 21, 2006, at B1 (reporting that the Anchorage Assembly recently considered and then specifically *eliminated* guidelines which would have given guidance to the sale of naming rights to corporate or private investors, despite recognizing that the practice does occur).

that schools acting outside of an established policy framework expose themselves to First Amendment challenges. By this measure, many schools have already dropped their best constitutional defenses. Moreover, simply creating policies to fill the practice-policy gap is not enough. In order to shield a school board from First Amendment challenges, a policy must also be followed once it is put into place.<sup>83</sup>

To date, the closest that many school boards have come to an actual naming rights policy is a public promise to avoid “bad” sponsors. Struggling to identify the lines he would and would not cross in choosing sponsors, Brooklawn School Board President Bruce Darrow 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>84</sup> Following Darrow’s shaky example, few school boards have been able to articulate clear standards by which to select sponsors.<sup>85</sup> One school administrator attempted to explain his preference for Comcast as a sponsor by saying, “Comcast is public in nature. What they do is related to what we do. And a lot of our events are televised out of that building. There’s a good synergy with us.”<sup>86</sup> Without written policies to guide them, school administrators are limited to such vague statements of preference.

Part of the problem may be a simple policy lag, as school boards struggle to update their written rules to reflect current practice. Indeed, until the sale of naming rights became prevalent in recent years, schools were generally named after geographic or other area-specific features,<sup>87</sup> or historical figures such as U.S. Presidents. Prior to 2000, nearly all school board policies were based on this model, which left no room for sponsorships or other commercial naming rights deals. The only significant deviations were those policies which called for

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83. See *Planned Parenthood Ass’n v. Chicago Transit Auth.*, 767 F.2d 1225, 1229–32 (7th Cir. 1985); *E. Timor Action Network v. New York*, 71 F. Supp. 2d 334, 338–40 (S.D.N.Y. 1999); *Nat’l Abortion Fed’n v. Metro. Atlanta Rapid Transit Auth.*, 112 F. Supp. 2d 1320, 1326 (N.D. Ga. 2000). Some courts have found that the lack of practical oversight over a particular policy was sufficient to create a limited public forum for free speech. See, e.g., *Christ’s Bride Ministries, Inc. v. Southeastern Pa. Transit Auth.*, 148 F.3d 242, 251 (3d Cir. 1998); see also Frayda S. Bluestein, *A Funny Thing Happened on the Way to the Forum: Free Speech Issues with Government Websites* 5 (Sept. 2001) (unpublished manuscript, on file with author) (citing cases); Dolan, *supra* note 79, at 81 (“[W]here a municipality imposes no selective system of controls and has a history of allowing a broad range of speech in its advertising forums, courts will find a designated forum and apply strict scrutiny to invalidate all rejections of proposed speech.”) (internal citations omitted).

84. Strauss, *supra* note 1.

85. *But see* Zaloudek, *supra* note 65 (reporting that Philadelphia schools refuse naming rights deals with alcohol or tobacco companies).

86. Schmadtke, *supra* note 45.

87. See, e.g., DURHAM (N.C.) PUB. SCH., DPS DISTRICT POLICIES, Policy No. 6090 (1993) (revised 1999), available at [http://www.dpsnc.net/index.php?option=com\\_kb&Itemid=1&page=articles&articleid=205](http://www.dpsnc.net/index.php?option=com_kb&Itemid=1&page=articles&articleid=205) (“New schools built in the Durham Public Schools normally will be named after townships, regions, or community characteristics.”).



community nomination or the creation of a naming committee.<sup>88</sup> But this democratic variant was almost certainly not intended to enable corporate naming deals, since it is unlikely that schools hoping to sell naming rights would try to do so through a process requiring community nomination of sponsors. Such a process—nomination of potential buyers, followed by negotiations between the nominees and the school—would be unwieldy at best.

Nevertheless, modern naming rights arrangements can directly trace their lineage to certain elements of the traditional policies and their democratic cousins. Specifically, some traditional-style policies allow facilities to be named after specific (even living) individuals who have made some significant “contribution” to the school or community.<sup>89</sup> Although these policies usually refer only to “persons” or “individuals” and are silent with regard to companies and other entities,<sup>90</sup> they implicitly acknowledge that the names of schools and school facilities could be used to reward contributors to the school. By doing so, they set the stage for the evolution of a more modern policy approach.

Many modern policies, clearly drawing on the “contribution” variant of the traditional model, specifically acknowledge that a financial donation to the

88. *See, e.g.*, BELLINGHAM (WASH.) SCH. DIST. 501 BD. OF SCH. DIRS., SCHOOL BOARD POLICIES AND PROCEDURES, Policy No. 9250 (1995), available at <http://www.bham.wednet.edu/policies/9250Policy.htm>; ROCHESTER (N.Y.) CITY SCH. DIST. BD. OF EDUC., POLICY MANUAL, Policy No. 7500-R (1998), available at <http://www.fcsdk12.org/BOE/PM/PM%20pdfs/7000/7500%20Naming%20Facilities.pdf>; BUNCOMBE COUNTY (N.C.) BD. OF EDUC., DISTRICT POLICIES, Policy No. 535 (1992), available at <http://www.buncombe.k12.nc.us/9651052316140357/lib/9651052316140357/Policies/Business%20Non%20Instructional%20500/535.pdf>; ANNE ARUNDEL COUNTY (MD.) PUBLIC SCHOOLS BD. OF EDUC., BOARD POLICIES AND ADMINISTRATIVE REGULATIONS, Policy No. 706 (1965) (revised 1989), available at [http://www.aacps.org/aacps/boe/board/newpolicy/Sections/section\\_700/adminreg706.pdf](http://www.aacps.org/aacps/boe/board/newpolicy/Sections/section_700/adminreg706.pdf) (providing for a naming committee); BROCKPORT (KY.) CENT. SCH. DIST. BD. OF EDUC., BOARD POLICIES, Policy No. 5850, NAMING SCHOOL FACILITIES (1990) (revised 1990, 1994, 2000, 2004), available at <http://brockport.k12.ny.us/policies.cfm?pid=151>.

89. *See, e.g.*, SHENANDOAH COUNTY (VA.) PUB. SCH. SCH. BD., POLICY MANUAL, § F: NAMING SCHOOL FACILITIES (1997), available at <http://www.shenandoah.k12.va.us/pdf/policymanual/Sec%20F%2005-06.pdf>; HERMISTON (OR.) SCH. DIST. 8, ONLINE POLICY MANUAL: NAMING SCHOOL FACILITIES (1994) (revised 2005), available at <http://policy.osba.org/hermiston/F/FF%20D1.pdf>; EL PASO INDEP. SCH. DIST. BD. OF TRS., ALERT POLICIES: NAMING SCHOOLS, OTHER FACILITIES, AND FUNCTION AREAS (2006), available at [http://www.episd.org/Board/docs/policyalerts/alertpolicies/05-2006\\_alertpolicies/CWLocal.pdf](http://www.episd.org/Board/docs/policyalerts/alertpolicies/05-2006_alertpolicies/CWLocal.pdf); OXNARD (CAL.) UNION HIGH SCH. DIST. SCH. BD., BOARD POLICIES, Policy No. 7310 (1993) (revised 1993, 1994, 2004), available at <http://www.ouhsd.k12.ca.us/FLS/Policies/7000/b-p7310.pdf>; TORRANCE (CAL.) UNIFIED SCH. DIST. BD. OF EDUC., BOARD POLICIES, Policy No. 7310 (2001), available at <http://www.tusd.org/pages/supt/BdPolicy/7000.pdf>; JONESBORO (ARK.) PUB. SCH. DIST., JPS APPROVED POLICIES, Job Code FF: NAMING OF SCHOOL FACILITIES (2002), available at <http://170.211.100.4/policy/FF.html>.

90. CARTERET COUNTY (N.C.) PUB. SCH. SYS. BD. OF EDUC., POLICY MANUAL, Policy FF (revised 2006), available at <http://www.carteretcountyschools.org/hr/PolicyManual/facilitiesdev/FF.doc>; SAINT LOUIS (MO.) BD. OF EDUC., BOARD POLICIES AND ADMINISTRATIVE REGULATIONS, Policy No. 7600 (2001), available at [http://www.slps.org/Board\\_Education/policies/7600.htm](http://www.slps.org/Board_Education/policies/7600.htm). *But see* MONONA GROVE (WIS.) SCH. DIST. BD. OF EDUC., BOARD POLICIES, Policy No. 940 (2003), available at [http://www.mgsd.k12.wi.us/locations/districtoffice/school\\_board/Policies/900/940.pdf](http://www.mgsd.k12.wi.us/locations/districtoffice/school_board/Policies/900/940.pdf) (allowing new facilities “to be named after an individual or entity if the individual or entity is considered a major contributor to the Monona Grove School District”).

school system could satisfy the “contribution” requirement<sup>91</sup> and override otherwise applicable naming rules.<sup>92</sup> In effect, these policies simply broaden the meaning of “contribution.” In addition to redefining contribution, some also incorporate the democratic elements of the traditional model, such as nominations and other community input.<sup>93</sup> In smaller ways, too, policy changes have paved the way for naming rights sales. For example, many modern policies differentiate between school facilities and the “areas within” them,<sup>94</sup> often allowing the sale of naming rights to the latter, but not the former.<sup>95</sup> On the other hand, a small subset of policies apparently recognize the prevalence of the modern approach and take the opposite tack, creating a blanket ban on the naming of school facilities after donors or commercial enterprises.<sup>96</sup> Finally, some policies essentially open the door for named sponsors while reserving a specific process for rescinding that name under circumstances such as the sponsor’s conviction for a felony or crime involving moral turpitude.<sup>97</sup> Al-

91. VOLUSIA COUNTY (FLA.) SCH. DIST. SCH. BD., SCHOOL BOARD POLICIES, Policy No. 610 (2004), available at <http://www.volusia.k12.fl.us/legalservices/610.pdf>; HAW. BD. OF EDUC., BOE POLICIES, Policy No. 6750 (1971) (amended 1979, 2005), available at <http://lilinode.k12.hi.us/STATE/BOE/POL1.NSF/85255a0a0010ae82852555340060479d/df3ede666ef58dd30a2566a3008371be?OpenDocument> (“School facilities may be named to honor major benefactors whose significant contributions benefit the school, school-community, or public education.”)

92. PERRYSBURG (OHIO), BYLAWS & POLICIES, Policy No. 7110, available at <http://www.neola.com/perrysburg-oh/search/policies/po7110.htm>; COLUMBIA (MO.) SCH. DIST. NO. 93 BD. OF EDUC., POLICIES AND REGULATIONS, Policy FF (1997) (revised 2006), available at <http://www.columbia.k12.mo.us/policies/FF-S.pdf>.

93. See, e.g., COBB COUNTY (GA.) SCH. DIST. BD. OF EDUC., COBB COUNTY SCHOOL DISTRICT ADMINISTRATIVE RULES, Administrative Rule FF (1969) (revised 1983, 1984, 1988, 1991, 1995, 1999, 2004, 2005), available at [http://www.cobbk12.org/centraloffice/adminrules/F\\_Rules/Rule%20FF.htm](http://www.cobbk12.org/centraloffice/adminrules/F_Rules/Rule%20FF.htm); FAIRFAX COUNTY (VA.) PUB. SCH. SCH. BD., POLICIES, NOTICES, AND REGULATIONS, Policy No. 8170.1 (1987) (revised 2004), available at <http://www.fcps.edu/Directives/P8170.pdf>; FALLS CHURCH CITY (VA.) PUB. SCH. SCH. BD., BOARD POLICIES, Policy No. 4.25 (2006), available at <http://www.fcps.k12.va.us/html/facilitiespolicies/4.25r.pdf>.

94. See, e.g., COBB COUNTY (GA.) SCH. DIST., *supra* note 93.

95. See, e.g., SCH. DIST. OF PHILA. BD. OF EDUC., SCHOOL DISTRICT OF PHILADELPHIA POLICIES, Policy No. 712 (1987) (revised 1994), available at <http://www.phila.k12.pa.us/offices/administration/policies/712.html>; SCH. DIST. OF WAUKESHA (WIS.) SCH. BD., DISTRICT POLICIES, Policy No. 9600G (1990) (2000), available at <http://www.waukesha.k12.wi.us/Library/lcumming/9600g.pdf>. But see BROCKTON (MASS.) PUB. SCH., SCHOOL COMMITTEE POLICY MANUAL, Policy FF (2003), available at [http://www.brocktonpublicschools.com/administration/policy\\_manual/ff.html](http://www.brocktonpublicschools.com/administration/policy_manual/ff.html) (“It is the policy of the Brockton School Committee not to name a part or area of a building facility, grounds, or parts thereof, once the building, facility, grounds or parts thereof has been named for another individual person.”).

96. LOUDOUN COUNTY (VA.) PUB. SCH. SCH. BD., SCHOOL BOARD BYLAWS, Bylaw § 2-33 (2004), available at <http://www.loudoun.k12.va.us/50975518115039/lib/50975518115039/Chapter%202/2-33.pdf>; VENTURA (CAL.) UNIFIED SCH. DIST. BD. OF EDUC., BOARD POLICY, Policy No. 7511 (1992), available at <http://www.ventura.k12.ca.us/legalcounsel/id927.htm>.

97. The author’s search found only one policy that allowed for *rescinding* a name, and even then the policy applied only in “extraordinary circumstances” including a situation where the sponsor has been convicted of “a felony, a crime involving moral turpitude, or [has] participated in any other disreputable behavior which would have a negative reflection or would bring discredit upon district students or staff.” CLARK COUNTY (NEV.) SCH. DIST. BD. OF TRS., POLICIES & REGULATIONS, Policy No. 7223 (2004), available at <http://ccsd.net/directory/pol-reg/pdf/7223P.pdf>; see also TENN. BD. OF REGENTS, POLICIES AND REGULATIONS, Policy No. 4:02:05:01 (1992), available at

though subtle, these policy changes effectively allow—or, more accurately, acknowledge—a sea change in the way schools are named.

But even though some recently amended policies recognize and allow the sale of naming rights, the vast majority do not. The gap between practice and policy, it seems, remains wide. Many school boards have apparently interpreted a lack of policy as an implicit authorization, and have engaged in naming rights deals so long as their own policies do not specifically prohibit them.<sup>98</sup> Perhaps the most common situation, however, involves districts whose policies allow schools and school facilities to be named after those who have made a “contribution” to the school or community. Some school boards might argue that, even independent of such a revision, the contribution model is broad enough to encompass financial donors. Few “contribution” policies support such a reading, however, as most of them were clearly drawn up to honor long-serving school employees or public servants. In fact, most “contribution” policies refer only to “individuals”<sup>99</sup> and often specifically exclude living or non-retired persons.<sup>100</sup> Nearly all contemplate recognition of contributions to the “public welfare,”<sup>101</sup> rather than the public fisc. Paid naming rights arrangements fit awkwardly, if at all, into this model.

The First Amendment looms large in this gap between naming rights policy and practice. The policy review in this Part suggests that local school boards, like other government actors before them,<sup>102</sup> may be wandering inadvertently into a First Amendment thicket. The following Part illuminates potential paths through it.

### III. A FIRST AMENDMENT FRAMEWORK FOR SCHOOL NAMING RIGHTS

Although school board officials generally see naming rights as a policy issue

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lines/business\_policies/4-02-05-01.htm (“[N]o building may bear the name of an individual convicted of a felony.”).

98. See, e.g., Dave Aeikens, *St. Cloud District Debates Playground Sponsorship, Names*, ST. CLOUD TIMES (St. Cloud, Minn.), July 9, 2005, at 1A (quoting school board chairman as saying, “I’m not against the policy. What I’m against is losing the money because we don’t have time to do the policy. If we can get this done and not lose the money, if it triggers adopting a policy, great, but let’s not lose the money.”).

99. PITT COUNTY (N.C.) SCH. BD. OF EDUC., BOARD POLICIES AND PROCEDURES, Policy No. 5.401 (revised 1993) (reviewed 2005), available at [http://www.pitt.k12.nc.us/boe/files/5/5.401\\_Naming\\_Schools\\_and\\_Ancillary\\_Facilities.doc](http://www.pitt.k12.nc.us/boe/files/5/5.401_Naming_Schools_and_Ancillary_Facilities.doc); FAIRFAX COUNTY (VA.) PUB. SCH. SCH. BD., POLICIES, NOTICES, AND DIRECTIVES, Regulation No. 8170.3 (2004), available at <http://www.fcps.edu/Directives/R8170.pdf>.

100. See JEFFCO (COLO.) PUB. SCH. BD. OF EDUC., DISTRICT POLICY, Policy FF (1997) (revised 2005), available at <http://jeffcoweb.jeffco.k12.co.us/board/policies/ff.html> (requiring “outstanding service,” rather than a particular “contribution,” for an individual’s name to be considered).

101. See MILWAUKEE (WIS.) PUB. SCH. BD. OF GOVERNANCE, ADMINISTRATIVE POLICIES OF THE MILWAUKEE PUBLIC SCHOOLS, Policy No. 5.01(1986) (revised 1995, 2000, 2003, 2006), available at [http://www2.milwaukee.k12.wi.us/governance/rulespol/policies/PDF/CH05/5\\_01.pdf](http://www2.milwaukee.k12.wi.us/governance/rulespol/policies/PDF/CH05/5_01.pdf).

102. See Irene Segal Ayers, *What Rudy Hasn’t Taken Credit For: First Amendment Limits on Regulation of Advertising on Government Property*, 42 ARIZ. L. REV. 607, 627–37 (2000) (describing “the ongoing muddle of public forum doctrine and commercial/noncommercial distinctions” in cases involving advertising on government property).

rather than a legal matter,<sup>103</sup> the regulation of naming rights deals raises problems that go far beyond the schoolhouse. As recounted in Part II, current policies give school boards few guidelines for selecting sponsors. This leaves school boards open to charges of viewpoint and content discrimination when they reject would-be sponsors.<sup>104</sup> First Amendment-based challenges are all but inevitable.

The final Part of this Article explores the constitutional implications of those challenges. It uses school naming rights to explore the doctrines of government speech, commercial speech, and schoolhouse speech, in an attempt to clarify their elusive meanings—and their relationships to each other—by sketching the ill-defined and sometimes porous boundaries between them. It points out connections and overlaps where they exist, and argues that the border disputes between these three categories can never be ignored so long as each of them is focused not just on a different answer, but on a different question.

A. SCHOOL NAMING RIGHTS AS GOVERNMENT SPEECH: SPEAKER-BASED CLASSIFICATION

When sorting through the potential “speakers” involved in public school naming rights deals, the natural place to start is with the schools themselves. As the naming policies described above demonstrate, many school boards see the selection of a school’s name as an important opportunity to send a message about the school or the community. Indeed, naming policies exist specifically because school boards want to control that message, whether it is acknowledgment of a community leader or simply recognition of a community landmark or feature. That motivation applies with equal force when selecting or rejecting paid sponsors. School boards might want to avoid “bad” sponsors because in effect they are watching their own mouths, and do not want to send a bad message to their students. If school boards are the ones actually “speaking” for the purposes of the First Amendment, their sponsor selection decisions may be considered “government speech,” a classification that gives schools broad discretion to pick and choose sponsors.

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103. D. Russakoff, *Finding the Wrongs in Naming Rights; School Gym Sponsorship Sparks Furor*, WASH. POST, Dec. 16, 2001, at A3 (quoting school board director of corporate development as saying, “We’re not violating their [students’] rights. We’re getting them a gym.”).

104. On the other hand, “proprietary” regulations on naming rights deals—restrictions that require contracts of a certain length, or provide deals on a first-come first-served basis, are likely to be upheld. *See, e.g.*, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (finding that a city acting in its proprietary capacity could make reasonable choices concerning the type of advertising displayed in its public transit vehicles); *Hubbard Broad., Inc. v. Metro. Sports Facilities Comm’n*, 797 F.2d 552, 556 (8th Cir. 1986) (holding that City acted as proprietor by selling “advertising space on government property in order to generate revenue” and therefore did not create a public forum).

## 1. Defining and Regulating Government Speech

Government speech has a complicated family tree.<sup>105</sup> It generally traces its lineage to a series of cases involving “subsidized” speech, which introduced the proposition that the government can effectively “speak” through its relationships with private actors.<sup>106</sup> The seminal case is *Rust v. Sullivan*,<sup>107</sup> in which the Supreme Court rejected a constitutional challenge to Title X of the Public Health Services Act.<sup>108</sup> Title X was passed by Congress to “provide[] federal funding for family-planning services” but it withheld government funds from services that provided abortions,<sup>109</sup> a condition that the services said violated their First Amendment rights. Finding that the provision was not facially invalid, 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>110</sup> *Rust* thus suggested both a broad definition of government speech—including situations where the government “speaks” by paying private actors—and a generous standard to govern it: When speaking, even through a private actor, the government did not need to be viewpoint neutral.

The Court revisited *Rust* just a few years later in *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>111</sup> holding that a public university could not refuse to fund certain student publications that expressed belief in a deity.<sup>112</sup> On its face, *Rosenberger* seemed contrary to *Rust*’s grant of broad governmental “speaking” authority. Both cases involved First Amendment challenges by private actors whose activities the government had refused to fund.<sup>113</sup> But

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105. Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2432 (2004) (“The government speech line of cases remains the ugly stepchild of First Amendment doctrine.”). The First Amendment’s family portrait has often been painted in such unflattering terms. See, e.g., William Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1635 (1996) (“[T]he Supreme Court is generally of the view—and has been for twenty years—that commercial speech is not some kind of orphan left out in the cold under the First Amendment.”).

106. The pioneering work arguing for greater recognition of government as a creator of speech, and not just as regulator of it, is MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983).

107. 500 U.S. 173 (1991).

108. *Id.* at 203. Earlier cases implicitly reached the conclusion that *Rust* eventually adopted. See, e.g., *Muir v. Ala. Educ. Television Comm’n*, 688 F.2d 1033, 1044 (5th Cir. 1982) (en banc).

109. *Rust*, 500 U.S. at 179. Based on this limitation, some have described *Rust* as a constitutional conditions case rather than a government speech case. See, e.g., Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 169 (1996).

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

111. 515 U.S. 819 (1995).

112. *Id.* at 845–46. Although scholars tend to identify *Rosenberger* as a pillar of the government speech doctrine, the Court actually approached the case through the lens of forum analysis. See *id.* at 829–31. This Article addresses public forum analysis in more detail in section III.C.

113. See also *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998) (upholding, against a viewpoint discrimination challenge, NEA grant-making procedures that funded some constitutionally protected activities but not others).

whereas *Rust* denied the challenge, citing the broad discretion of the government as a speaker, *Rosenberger* found that the refusal to fund student publications was *not* government speech, and thus not entitled to the same deference. Justice Kennedy, citing *Rust*, wrote in *Rosenberger* that a state may regulate the content of speech when it is the speaker or when it enlists private entities to convey its message, but that it cannot discriminate on the basis of viewpoint when subsidizing private speakers delivering their *own* messages.<sup>114</sup> The key difference between *Rust* and *Rosenberger*, then, lay in understanding whose message was really at issue. In *Rust*, the government enlisted private actors to deliver a governmental message, whereas in *Rosenberger* it attempted to discourage certain private viewpoints.<sup>115</sup> Justice Kennedy repeated this distinction in *Legal Services Corp. v. Velazquez*,<sup>116</sup> again reading *Rust* as protecting the government's right to engage in viewpoint discrimination when it speaks, but not when it subsidizes private speakers.<sup>117</sup> The rationale behind this rule derives from basic democratic principles: "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."<sup>118</sup> Extrapolating to the naming rights context, one might say that the "government speech" of school board officials who enter into objectionable naming rights deals can always be checked at the next school board election.<sup>119</sup>

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114. See *Rosenberger*, 515 U.S. at 833; see also *Latino Officers Ass'n v. New York*, 196 F.3d 458, 468 (2d Cir. 1999) (noting, in dicta, that "the government may regulate its own expression in ways that would be unconstitutional were a private party the speaker").

115. Later cases suggest, but do not hold, that the religious content of the disputed speech was behind the Court's determination in *Rosenberger*. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111–12 (2001) ("[W]e reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.").

116. 531 U.S. 533 (2001).

117. See *id.* at 548–49 (overturning statute which provided government funding for public interest lawyers on the condition that the lawyers not challenge welfare policy); see also *Commonwealth v. Davis*, 39 N.E. 113 (Mass. 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 park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."). But see *Hague v. CIO*, 307 U.S. 496, 515 (1939) ("We have no occasion to determine whether . . . the Davis Case was rightly decided . . . . Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

118. *Velazquez*, 531 U.S. at 541–42 (quoting *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)); see also *Johanns v. Livestock Mktg Ass'n*, 544 U.S. 550, 563 (2005).

119. Of course this solution is imperfect, because naming rights contracts are unlikely to respect the local election cycle, and the ultimate decisions about naming rights deals—at least small ones—might be made by unelected school officials like school principals. Nevertheless, courts have emphasized the importance of "accountability" in government speech cases. *Southworth*, 529 U.S. at 235; see *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 675 (1998) (noting that broadcasters can be held "accountable" for the editorial decisions they make); see also Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35 (2003) (emphasizing importance of government accountability and the existence of an identifiable message).

The tenuous distinctions drawn in *Rust* and *Rosenberger* left many scratching their heads about what constitutes government speech,<sup>120</sup> and courts have struggled mightily to identify it.<sup>121</sup> Scholars, too, acknowledge that *Rust* and *Rosenberger*'s subsidized speech analysis does not fit easily into any particular First Amendment framework. As Robert Post pithily notes,

Subsidized speech challenges two fundamental assumptions of ordinary First Amendment doctrine. It renders uncertain the status of speakers, forcing us to determine whether speakers should be characterized as independent participants in the formation of public opinion or instead as instrumentalities of the government. And it renders uncertain the status of government action, forcing us to determine whether subsidies should be characterized as government regulations imposed on persons or instead as a form of government participation in the marketplace of ideas.<sup>122</sup>

As a result, the subsidized speech cases do not provide a particularly good indication of how courts will treat government speech challenges in school naming rights and other sponsorship cases.<sup>123</sup> *Rosenberger* indicates that the relevant inquiry is whether the message in any particular case is the government's, even if it is delivered by a private speaker. In the case of public school naming rights, however, identifying the "message" sent by a school's name raises complicated issues of language and meaning that admit no easy answers.

Courts' faltering attempts to apply government speech analysis to message-bearing license plates illustrate the challenge. License plates have been one of the most hotly contested areas of "government speech" ever since the Supreme Court held in *Wooley v. Maynard*<sup>124</sup> that New Hampshire could not require people to display the state motto—"Live Free or Die"—on their license plates.<sup>125</sup>

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120. Bezanson & Buss, *supra* note 5, at 1382 ("More fundamentally, the *Rust-Rosenberger* distinction relied upon in *Velazquez* doesn't work because it rests on an incoherent theoretical premise, and lacks a clear understanding of government speech under the Constitution."); Note, *supra* note 105, at 2417–18.

121. As Justice Scalia noted in his *Velazquez* dissent, "If the private doctors' confidential advice to their patients at issue in *Rust* constituted 'government speech,' it is hard to imagine what subsidized speech would *not* be government speech. . . . Even respondents agree that 'the true speaker in *Rust* was not the government, but the doctor.'" 531 U.S. at 554 (Scalia, J., dissenting).

122. Post, *supra* note 109, at 152.

123. William T. Mayton, "Buying-Up Speech": *Active Government and the Terms of the First and Fourteenth Amendments*, 3 WM. & MARY BILL RTS. J. 373, 376 (1994) ("[T]he decisions seem incoherent, a medley of misplaced epigrams (such as 'no duty to subsidize a right') and dubious psychological speculations (such as when choice becomes coercion).") (internal citation omitted).

124. 430 U.S. 705 (1977).

125. *See id.* at 706–07, 717. Specialty license plates have been the subject of an extensive First Amendment literature ever since *Wooley*. The discussion here is intended only to reflect recent developments. For a more complete, though now somewhat outdated, discussion, see Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419 (2001); *see also* Jacobs, *supra* note 119, at 98 ("The correct conclusion is that, as currently run, both vanity and specialty programs are private speech forums. Neither constitutes legitimate government speech because both accountability and an identifiable message are lacking.").

And in a recent series of cases involving factually similar First Amendment challenges to specialty license plates, Courts of Appeals have come to sharply divergent conclusions about whether such plates represent government speech and if they do, whether they violate the Constitution. Courts' inability to settle on a definition for government speech in this context—or on a standard governing that speech even when it has been identified—hints at the difficulty of applying government speech doctrine to school naming rights arrangements or any other type of government involvement with speech.

In *Planned Parenthood of South Carolina Inc. v. Rose*,<sup>126</sup> a panel of the Fourth Circuit agreed on a two sentence long holding affirming the district court's judgment that South Carolina's "Choose Life" plate violated the First Amendment, but found little other common ground. The three-judge panel issued three separate opinions regarding why, and how, government speech was implicated by the plate. Judges Michael and Luttig both found that the speech involved was "neither purely government speech nor purely private speech, but a mixture of the two"<sup>127</sup>—what Judge Luttig called "hybrid" speech.<sup>128</sup> Both judges acknowledged that the Supreme Court has not yet "recognized" that speech can be simultaneously governmental and private.<sup>129</sup> Following the issuance of the splintered panel opinion, and for the second time in two years, the entire Fourth Circuit voted on whether to hear a government speech license plate case en banc. And for the second time, by a close vote, it ultimately decided not to.<sup>130</sup> Judge Shedd, dissenting from the denial of rehearing, rejected the "hybrid" speech argument Judges Michael and Luttig advanced, and opined that the "license plate is properly characterized as government speech, not private speech, and is therefore permissible under the First Amendment."<sup>131</sup>

Two years later, the Sixth Circuit considered a First Amendment challenge to what it called a "nearly identical" license plate program,<sup>132</sup> but reached an opposite result. Echoing Judge Shedd, the court found that Tennessee's "Choose Life" plates were a "government-crafted message,"<sup>133</sup> which was *not* subject to

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126. 361 F.3d 786, 799–800 (4th Cir. 2004). In another license plate case two years prior, the Fourth Circuit struck down a state restriction prohibiting display of the Confederate flag, finding that it was intended to suppress the viewpoint of the Sons of Confederate Veterans, who were pushing for the plate. *See Sons of Confederate Veterans Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 623 (4th Cir. 2002).

127. *See Planned Parenthood of S.C. Inc.*, 361 F.3d at 794; *id.* at 799 (describing the plates as "mixed speech").

128. *Id.* at 800 (Luttig, J., concurring).

129. *See id.* at 795 (opinion of Michael, J.); *id.* at 800 (Luttig, J., concurring).

130. *Planned Parenthood of S.C. Inc. v. Rose*, 373 F.3d 580, 581 (4th Cir. 2004) (denying rehearing en banc); *see also Sons of Confederate Veterans Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 305 F.3d 241 (4th Cir. 2002) (denying rehearing en banc).

131. *Planned Parenthood of S.C. Inc.*, 373 F.3d at 587 (Shedd, J., dissenting from denial of rehearing en banc).

132. *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 380 (6th Cir. 2006).

133. *Id.* at 375–77.



a requirement of viewpoint neutrality.<sup>134</sup> The Sixth Circuit based its opinion largely on the Supreme Court's decision in *Johanns v. Livestock Marketing Association*,<sup>135</sup> which the Sixth Circuit judges read as standing "for the proposition that when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes."<sup>136</sup>

The divergent classifications in the license plate cases demonstrate the difficulty of classifying state-affiliated messages and establishing a standard to govern them.<sup>137</sup> Both Circuits ultimately identified the government as the speaker (at least partially) albeit based on different tests. But whereas the only thing that the three Fourth Circuit judges could agree on was that the plates represented impermissible viewpoint discrimination, the Sixth Circuit—noting its disagreement with the Fourth<sup>138</sup>—upheld Tennessee's nearly identical license plate program. The circuits' inability to agree on the definition of government speech or the appropriate level of "protection" to which such speech is entitled, even in cases that were nearly identical, illustrates quite clearly the continuing confusion surrounding the government speech doctrine.<sup>139</sup>

School naming rights cases and other examples of government sponsorship may give courts an opportunity to either clarify the tenuous distinction between government and private speech or follow the Fourth Circuit approach and acknowledge the possibility of "hybrid" speech. Such a clarification of government speech's domain may enable courts to better explain the standard that governs it. Even smoothing out these wrinkles in the doctrine, however, will not absolve courts from the difficult, fact-intensive task of identifying government speech in the first place.

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134. *Id.* at 377–80.

135. 544 U.S. 550 (2005).

136. *Bredesen*, 441 F.3d at 375 (internal citation omitted).

137. *See id.* at 380 n.1 (Martin, J., concurring in part and dissenting in part) ("Perhaps of some interest, when this opinion is filed, at least three circuits (4th, 5th, and 6th) will have spoken on the issue, reaching at least three different conclusions, via at least sixteen separate opinions.")

138. *Id.* at 380.

139. Nor are the Fourth and Sixth Circuits the only courts to face down the license-plates-as-government-speech question. In *Henderson v. Stalder*, the District Court for the Eastern District of Louisiana preliminarily enjoined Louisiana from producing a "Choose Life" license plate specifically approved by the Louisiana legislature. 112 F. Supp. 2d 589, 602 (E.D. La. 2000), *rev'd on other grounds*, 287 F.3d 374 (5th Cir. 2002) (finding lack of standing). The court considered the license plate to be government speech, but ruled that such speech must be viewpoint neutral, blending (without comment) government speech and forum analysis, thus implicitly recognizing an overlap discussed at greater length in section III.C.3 of this Article. *See id.* at 598.

On appeal, a panel of the Fifth Circuit found that the Tax Injunction Act barred jurisdiction, and vacated the district court's injunction against the "Choose Life" plates, noting in dicta "our disagreement that the injunction obtained by Keeler is constitutionally appropriate." *Henderson v. Stalder*, 407 F.3d 351, 359 (5th Cir. 2005). Eight judges dissented from denial of rehearing en banc. *Henderson v. Stalder*, 434 F.3d 352 (2005).

## 2. Identifying the Speaker and Message of School Naming Rights

Though the standard *governing* government speech is itself ill-defined,<sup>140</sup> the confusion it causes pales in comparison to the bewildering task of identifying government speech. *Rust* and *Rosenberger* make it clear that the most important question is determining whether the government is the one conveying the message, even if that message is actually delivered by a private agent.<sup>141</sup> The simplicity of the question, however, obscures the difficulty of its application.

The very idea that sponsorship deals could implicate government speech raises complex and controversial questions regarding the characterization of speech and sponsorship, and the relationship between private actors and the government. If commercial buyers of naming rights seek to profit from the deals—as common sense and sponsors’ own statements suggest<sup>142</sup>—then it seems reasonable to assume that they are paying the schools to send a particular message. They are, in other words, buying the government’s endorsement. If true, this makes naming rights arrangements look like a form of government speech: Whether paid or not, the government’s endorsement *is* the message. On the other hand, such a broad characterization of government speech would potentially subject all private speakers who use school facilities to the “government speech” standard outlined above.<sup>143</sup> If paying for use of a government facility—whether to place one’s name on it, or to use it more actively—is the equivalent of buying the government’s endorsement, then even after-school programs would generally fall into the category of government speech.<sup>144</sup> This would in turn allow schools (the governmental unit doing the speaking) to pick and choose which groups can use the facilities, simply by claiming that the selection of participants is itself government speech.

The case law does not provide a single answer to this thorny problem, but it does suggest interesting and perhaps illuminating questions. At first glance, school naming rights present almost the reverse scenario from the major

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140. Cf. Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373, 386 (1983) (reviewing MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983)) (“A definitive answer to the questions that government speech presents would require definitive conclusions about the effects of communication in general and about the philosophical purposes and underpinnings of the first amendment.”).

141. Note, *supra* note 105, at 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.”).

142. See *supra* notes 45–54 and accompanying text.

143. Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconditional Conditions on “Equal Access” for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 703 (1996) (“A private speaker in a government-created limited public forum is not the government.”).

144. See *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (rejecting government speech characterization and holding that “an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices.”); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (“[T]he existence of a Government ‘subsidy,’ in the form of Government-owned property, does not justify the restriction of speech” in traditional public forums.).

government speech cases like *Rust* and *Rosenberger*. Those cases involved government subsidies given or denied to private actors attempting to voice certain messages (in *Rust*, the government's; in *Rosenberger*, their own). Naming rights arrangements, by contrast, can be characterized as public entities (schools) accepting private money in exchange for using the government's voice to promote the private speaker's message. This is essentially a "reverse subsidy"—instead of money flowing from the government to a private speaker, the money flows from a private actor to the government speaker. That may be fine as far as it goes, but it does not answer the primary question behind *Rust* and *Rosenberger*: *Whose* "message" does a school's name deliver?<sup>145</sup> If the message is the government's, then school names can properly be considered government speech. And that theory is only plausible if one can reasonably imagine *what* message the government might be sending through the names of public schools. At least two possibilities stand out.

The first potential message schools might send through their names is one about the school itself or the community in which it is based. Specifically, schools might use their names to either associate themselves with or extol the virtues of a historical figure (for example, George Washington High) or to reaffirm their attachment to a certain community (for example, Durham High). The same rationale, of course, applies to school facilities such as stadiums (for example, Steve Turner Stadium, named after a popular coach). This theory of school names seems to be borne out at least partially by the wording of naming policies themselves, many of which specifically recognize that a school's name sends an important message about the school.<sup>146</sup> In fact, school board policies sometimes describe school names as not just a matter of public image, but as part of the curriculum. To take just one 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>147</sup>

Other naming policies explicitly recognize that "[t]he name of a public school or public school facility should be an appropriate representation and reflection

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145. See Note, *supra* note 105, at 2412.

146. COBB COUNTY (GA.) SCH. DIST. BD. OF EDUC., *supra* note 93 ("The Cobb County School District (District) recognizes that the official names of its facilities are vital to their public image."); see also CARTERET COUNTY (N.C.) PUB. SCH. SYS. BD. OF EDUC., *supra* note 90 ("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.")

147. ROCHESTER (N.Y.) CITY SCH. DIST. BD. OF EDUC., *supra* note 88.

of the school or school-community.”<sup>148</sup> These policies strongly suggest that the districts that drafted them have not only recognized the existence of the message sent through their schools’ names, but have actually claimed the message as their own. Extrapolating to the naming rights context, school boards might plausibly argue that the schools’ names represent government speech even where they are named after private actors. Nobody thinks that naming a school “Jefferson High” is an act of speech by the deceased president or his estate, after all. Indeed, *Rust* demonstrates that the government is still the speaker even when it hires a private actor (a named sponsor, for example) to deliver its message. The Court’s recent decision in *Garcetti v. Ceballos*<sup>149</sup> implicitly reaffirmed this reading of the government speech doctrine. In *Garcetti*, the Court held that statements made by public officials pursuant to their official duties are not protected by the First Amendment.<sup>150</sup> If using a private actor’s voice to proclaim the government’s message constitutes government speech, it is difficult to imagine how using that private actor’s name would be any different.

The second potential government message sent by a school’s name is an *endorsement* of the person or entity after whom the school is named.<sup>151</sup> This, of course, is the kind of message that corporate sponsors clearly hope the school will send.<sup>152</sup> Although it shades somewhat into simple “advertising,” the “endorsement” reading actually seems to fit well with the Supreme Court’s prior treatment of government speech. As recounted above, government speech as a First Amendment concept essentially evolved from cases involving subsidies to private speakers. The implicit endorsement given to sponsors of school facilities could be seen as just such a “subsidy,” and—as the dollar value of naming rights contracts suggests—a valuable one at that. The fact that the government gives such endorsements pursuant to paid contracts does not necessarily change the analysis. Indeed, courts in two recent cases found that government acknowledgment of financial sponsors constituted government speech.<sup>153</sup> Neither case,

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148. HAW. BD. OF EDUC., *supra* note 91; *see also* NEWTON-CONOVER (N.C.) CITY SCH. BD. OF EDUC., NCCS POLICY, Policy No. 7302 (2000), available at <http://www.nccs.k12.nc.us/Policy/Policy7000.doc>. (“[N]aming or renaming a facility [is] a significant endeavor since the name of a facility can reflect upon the students, staff, school district and community.”).

149. 126 S. Ct. 1951 (2006).

150. *Id.* at 1960.

151. Establishment Clause jurisprudence offers an analogue to this “endorsement” theory. *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968). But because religious speech raises thorny complications beyond the scope of this Article, I do not rely on those cases here.

152. *See* *ACLU of Tenn. v. Bredsen*, 441 F.3d 370, 376 (6th Cir. 2006) (“[T]here is no reason to doubt that a group’s ability to secure a specialty [license] plate amounts to state approval.”); *Jacobs*, *supra* note 119, at 91 (“Unquestionably, groups are motivated to participate in the [Adopt-A-Highway] program because of the acknowledgement that they will receive. But that motivation does not mean that it is the groups that are speaking.”).

153. *Wells v. City and County of Denver*, 257 F.3d 1132, 1140 (10th Cir. 2001) (“In the plaintiffs’ view . . . the plain language of the sign demonstrates that it is a message *from*—not *to*—the sponsors, and they assert that they are equally entitled to communicate their message from within the fence. We

however, identified the theory behind its determination.

Some cases and commentators have suggested that courts attempting to apply or justify such an “endorsement” approach should consider whether those receiving the message would recognize it as the government’s.<sup>154</sup> And although many courts have suggested that they would favor such a test,<sup>155</sup> the Supreme Court all but foreclosed that approach in *Johanns v. Livestock Marketing Association*,<sup>156</sup> which involved a First Amendment challenge to the compelled contributions required by the Beef Promotion and Research Act (“BPRA”). The Court held that the government could characterize the advertisements paid for by the BPRA as “government speech” even if a reasonable observer might not understand that the government was speaking.<sup>157</sup> Some scholars have called for a more observer-centered jurisprudence,<sup>158</sup> but their proposed solution—requiring the government to identify itself when speaking<sup>159</sup>—does not obviate the need to ask difficult questions. If anything, an observer-focused approach further highlights the tenuousness of the distinction between government endorsement of speakers espousing the government’s position (which is government speech, according to *Rust*), and government endorsement of private speakers with their own messages (which is not government speech, according to *Rosenberger*). Does the name on a school really send a government message of endorsement? Or is it simply the equivalent of allowing a private sponsor to use the school as a billboard? If it is the latter, is that acquiescence enough to constitute an endorsement, especially when the sponsor has paid for the privilege?

The answer to the last question, perhaps surprisingly, may turn out to be yes, so long as the school board (that is, the government) played an active role in selecting the sponsor. In prior cases, courts have interpreted selection and presentation of programming and broadcasting as a kind of speech. In *Arkansas*

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conclude that the sign is Denver’s speech, not that of the listed corporations.”); *Knights of the KKK v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093 (8th Cir. 2000).

154. *See* *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 578 (2005) (Souter, J., dissenting) (“It means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message, let alone if it is affirmatively concealed from them.”); *see also* *Bezanson & Buss*, *supra* note 5, at 1384 (arguing that “government speech should be limited to purposeful action by government, expressing its own distinct message, *which is understood by those who receive it to be the government’s message.*”) (emphasis added); *Dolan*, *supra* note 79, at 74–75 (“Where an affiliation resembles a partnership, *so that the public will perceive government approval of a sponsor’s message*, government should retain control over selection and the government speech analysis should apply.”) (emphasis added); *id.* at 123 (“What should be essential to the reasonable observer is both the nature of the affiliation and the government’s relationship overall to the speakers in the program or venue.”).

155. *Dolan*, *supra* note 79, at 118.

156. 544 U.S. 550 (2005).

157. *Id.* at 563–64. *But see id.* at 564 n.7 (“If a viewer would identify the speech as *respondents’*, however, the analysis would be different.”).

158. Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 988, 1051 (2005).

159. *Id.* at 1052–54.

*Educational Television Commission v. Forbes*,<sup>160</sup> for example, the Supreme Court found that “[w]hen a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.”<sup>161</sup> Like the selection of an artist for a show or a political candidate for a televised debate—both of which are usually made pursuant to a policy and a history of active control—a school board’s choice of named sponsors could amount to government speech.<sup>162</sup>

### 3. School Naming Rights as Compelled Speech

Government speech essentially operates as an “exception” to the First Amendment, allowing the government to say what it wants even when speaking through private mouthpieces. But what of those mouthpieces? Do they have a First Amendment right to keep quiet when they disagree with the government’s message? Perhaps the real driving force behind objections to school naming rights will be private actors’ objection to being enlisted, by the government, as endorsers of a sponsor whose message or viewpoint they find odious. Students, teachers, coaches, and others associated with a school may object that naming rights deals force *them* to convey the government’s message, and thus that *their* free speech rights are being threatened.

The Supreme Court has held that there is no constitutionally significant difference between compelled silence and compelled speech,<sup>163</sup> and it has suggested that a particular speech act may be subject to scrutiny as compelled speech even if it is classified as government speech.<sup>164</sup> Indeed, students have successfully challenged particular school requirements on exactly those grounds. In *West Virginia Board of Education v. Barnette*,<sup>165</sup> the Court invalidated a state law requiring public school students to salute and pledge allegiance to the flag, holding that that the law required an affirmation of belief<sup>166</sup> and thus violated the First Amendment. Justice Jackson held for the Court:

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160. 523 U.S. 666 (1998).

161. *Id.* at 674; *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). Randall Bezanson has suggested that “*Forbes* may be the first decision expressly acknowledging the First Amendment significance of government’s role as a speaker.” Randall P. Bezanson, *The Government Speech Forum: Forbes and Finley and Government Speech Selection Judgments*, 83 IOWA L. REV. 953, 961 (1998) (footnoted omitted).

162. *See* Dolan, *supra* note 79, at 110 (“To show government speech, a municipality must show that it has actively screened each potential private speaker and allowed only those which the administrators conclude further program goals.”) (internal citations omitted).

163. *Riley v. Nat’l Fed’n for the Blind*, 487 U.S. 781, 796–97 (1988); *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”).

164. *See Wooley*, 430 U.S. at 717.

165. 319 U.S. 624 (1943). *But see* Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 469, 473–75 (1995) (suggesting that if reasonable observers would understand the action as being compelled, it would not be not expressive and not truly “speech”).

166. *Barnette*, 319 U.S. at 633.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.<sup>167</sup>

A school's name may not be freighted with quite the same political and social import as the pledge of allegiance or the flag, but it is easy to imagine that a sponsor's identity could be just as controversial. As the debate about school-house commercialism and the 'Coke Day' incident demonstrates,<sup>168</sup> many students consider corporate branding to be a matter of considerable political and social import, and they are willing to speak out against it. A student who strongly opposed a particular corporate sponsor might argue that being forced to acknowledge or support that sponsor amounted to a compelled acknowledgment or endorsement of the sponsor on the *student's* part, since she must not only attend the named facility but also endorse the sponsor by displaying its name on her diploma,<sup>169</sup> school uniform, or sports jersey.<sup>170</sup> Since students have a qualified First Amendment right to wear black armbands to school,<sup>171</sup> they might also have a First Amendment right *not* to wear sponsor-endorsed shirts or jerseys.

But there are also signals to the contrary. In *Wooley*, then-Justice Rehnquist wrote in dissent that a person seeking to invoke a compelled speech claim must show that the state "place[s] the citizen in the position of either apparently or actually 'asserting as true' the message."<sup>172</sup> Thirty years later, Chief Justice Roberts picked up this thread and wove it into the Court's unanimous opinion in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*<sup>173</sup> That decision upheld the Solomon Amendment, which provides that an entire educational institution will lose federal funds if any part of the institution denies military recruiters the same access given to other kinds of recruiters. The Court held that the Solomon Amendment, unlike the laws at issue in *Barnette* and *Wooley*, "does not dictate the content of the speech at all, which is only 'compelled' if, and to the extent, the school provides such speech for other recruiters."<sup>174</sup>

Although it is impossible to accurately predict how any particular naming rights policy will be categorized, the framework described here does identify

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167. *Id.* at 642.

168. See *supra* notes 12–17.

169. Lynn Hicks, *College Sees Dollar Signs on Its Sign*, USA TODAY, Aug. 1, 2007, at 1A ("A college diploma could soon come with a corporate name.")

170. Bruce Darrow, the Brooklawn School Board President who led the initial naming rights drive, said in 2004, "It's the wave of the future. I'm looking into selling advertising on the children's basketball uniforms." Pennington, *supra* note 30.

171. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

172. *Wooley v. Maynard*, 430 U.S. 705, 721 (1977) (Rehnquist, J., dissenting).

173. 547 U.S. 47 (2006).

174. *Id.* at 1308.

some of the factors on which courts are likely to rely. The single most important factor will probably be the degree of control that school boards exert over their names. As in the programming-selection cases like *Forbes*, an active role in sponsor selection—especially when done pursuant to a written policy—is the easiest way for a school board to claim ownership over the message sent by its schools’ names. Boards that actively select sponsors and tightly control the presentation of their names are most likely to be characterized as government speakers. This is potentially a bad result for would-be sponsors, because it gives school boards wide discretion to reject sponsors based even on the “viewpoint” those sponsors express. Sponsors are thus likely to counter the government speech characterization by arguing that naming rights are their own private speech—whether commercial or otherwise—and thus entitled to heightened protection. The following section considers the viability of that argument.

B. SCHOOL NAMING RIGHTS AS COMMERCIAL SPEECH: CONTENT-BASED CLASSIFICATION

Whereas the government speech standard appears to apply with equal force regardless of what kind of speech the government engages in,<sup>175</sup> private actors’ speech is regulated by a variety of different standards depending on the content of the speech,<sup>176</sup> rather than just the identity of the speaker.<sup>177</sup> In the school naming rights context, the most prominent non-governmental speakers are the sponsors themselves, most of whom are businesses. The content of their speech is often “commercial.” And in an unsteady and somewhat unpredictable line of cases, the Supreme Court has held that restrictions on commercial speech are subject to a form of intermediate scrutiny. This section describes the ill-defined category of commercial speech and the protections to which it is entitled, then assesses whether school naming rights fit into that category. In doing so, the discussion highlights some of the problematic border disputes between commercial speech, government speech, and forum analysis.

1. The Definition and Protection of Commercial Speech

Over the past few decades, the Supreme Court has created and expanded First Amendment protection for commercial speech in two ways: First, by narrowing its definition—thus leaving more seemingly commercial speech in the fully protected realm of pure speech—and second, by imposing more significant restrictions on government attempts to regulate commercial speech. This section addresses each of those developments in turn.

Although the Supreme Court has never articulated a definition of “commer-

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175. See subsection III.C.3 for a discussion of government-commercial speech.

176. The following section on forum analysis addresses the relevance of the speaker’s *location*.

177. Of course, a speaker’s identity may be relevant for determining the content of its speech. Commercial entities are to some degree presumed to engage in commercial speech, but not necessarily exclusively so. See *supra* notes 47–50 and accompanying text and *infra* notes 202 & 236 and accompanying text.



cial speech,” neither has it bemoaned the lack of one.<sup>178</sup> Instead, the Court has “recited various descriptions, indicia, and disclaimers without settling upon a precise and comprehensive definition.”<sup>179</sup> In one of the first and best-recognized attempts to impose order on the category, Justice Blackmun suggested in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*<sup>180</sup> that commercial speech is that which does “no more than propose a commercial transaction.”<sup>181</sup> Blackmun’s formulation covered such obviously commercial messages as price bulletins and coupons, but seemed to exclude the vast majority of actual advertising, which generally does more than simply “propose a commercial transaction.” How, for example, would a court classify an advertisement for a July 4th sale, if it included both price information and patriotic images and messages? Rather than disentangle commercial components from their noncommercial cousins, subsequent cases tended to extend full First Amendment protection to such “mixed-motives” speech.<sup>182</sup> This approach generally followed Blackmun’s formulation, which regarded as commercial only that which was exclusively so. The mixed-message/full protection approach also preserved the existence of the commercial speech category while simultaneously extending full First Amendment protection to a wide range of commercially tinged speech. In *Riley v. National Federation of the Blind*,<sup>183</sup> for example, the Supreme Court held that a North Carolina statute governing solicitation of charitable contributions was an unconstitutional restriction on noncommercial speech.<sup>184</sup> That the speakers in the case—professional fundraisers—sought money for their organizations and themselves did not, the Court found, render their speech “commercial.” Instead, the Court held that where the component parts of a single speech act are “inextricably intertwined,” courts cannot “parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical.”<sup>185</sup> The Court thus treated mixed-message speech as fully protected expression,<sup>186</sup> suggesting that the addition of a partially noncommercial message can

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178. Some scholars attribute this imprecision to the inherent difficulties of classifying commercial speech. See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 7 (2000); Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 146 (1999).

179. Stern, *supra* note 178, at 56; see also Piety, *supra* note 55, at 381.

180. 425 U.S. 748 (1976).

181. *Id.* at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1976)); see also Thomas C. Goldstein, *Nike v. Kasky and the Definition of “Commercial Speech”*, 2003 CATO SUP. CT. REV. 63, 72 (referring to this as the “most often-repeated” definition of commercial speech the Court has offered).

182. See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating on First Amendment grounds an ordinance and license tax on evangelists, and finding that the “sale” of religious literature does not turn evangelism into commercial speech).

183. 487 U.S. 781 (1988).

184. *Id.* at 789, 798.

185. *Id.* at 796.

186. *Id.*

remove speech from the commercial category. But the Court revisited and limited *Riley* just one year later in *Board of Trustees of the State University of New York v. Fox*,<sup>187</sup> saying that the commercial and protected speech in *Riley* “was ‘inextricably intertwined’ because the state law *required* it to be included.”<sup>188</sup> *Fox*, by contrast, involved a university’s attempts to ban on-campus Tupperware parties. Opponents of the ban cited *Riley* and argued that the Tupperware parties involved “inextricably intertwined” messages, since they “touch[ed] on other subjects . . . such as how to be financially responsible and how to run an efficient home.”<sup>189</sup> The Court rejected this contention, saying that “[n]o law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares.”<sup>190</sup> *Riley* and *Fox* thus reinforce, albeit from different angles, the basic point that the best way to protect a particular act of “commercial” speech is not to classify it as such.

This broad protection for “mixed-message” speech has massive practical import, because very little modern commercial advertising falls into the “purely” commercial approach Justice Blackmun envisioned in *Virginia Pharmacy*. Today, traditional “product identification” advertising is vanishingly rare. Indeed, “[a] great deal—perhaps even almost all—corporate advertising expression does not have anything at all to do with the transmission of information. It has rather to do with the creation of emotional associations, especially associations that will help induce a favorable, and even a desirous, attitude towards the product in question.”<sup>191</sup> But while advertising itself has changed greatly over the years, the commercial speech doctrine remains faithfully wedded to outdated indicia of commercialism such as product placement and price information. Those factors, which essentially echo Justice Blackmun’s *Virginia Pharmacy* definition, are increasingly divorced from what most companies (not to mention potential consumers) consider to be advertising. If the definition of commercial speech remains so limited, not only will naming rights fall outside of its realm, but its defenders will find themselves manning the ramparts of an increasingly empty castle.

The Supreme Court’s solicitous approach to mixed messages has greatly

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187. 492 U.S. 469 (1989).

188. *Id.* at 474.

189. *Id.*

190. *Id.*; see also *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 & n.5 (1980) (refusing to grant full free speech protection to speech simply because it “links a product to a current public debate”); *N.Y. Magazine v. Metro. Transit Auth.*, 987 F. Supp. 254, 262 & n.4 (S.D.N.Y. 1997) (denying full protection and finding that, although a *New York Magazine* ad “inextricably intertwined” its political and commercial messages, the former was simply representative of the kind of commentary the magazine was selling), *vacated in part by N.Y. Magazine v. Metro Transit Auth.*, 136 F.3d 123 (1998).

191. ROGER A. SHINER, *FREEDOM OF COMMERCIAL EXPRESSION* 308 (2003); see also Piety, *supra* note 55, at 371; Scot Silverglate, Comment, *Subliminal Perception and the First Amendment: Yelling Fire in a Crowded Mind?*, 44 U. MIAMI L. REV. 1243, 1261 n.153 (1990) (citing VANCE PACKARD, *THE HIDDEN PERSUADERS* 7–8 (1957) (quoting Louis Cheskin)).

narrowed the scope of commercial speech, but the category is not yet entirely empty. In fact, the Court has come to rely on a case-by-case, factor-driven approach that occasionally extends the boundaries of commercial speech in unexpected ways. The Court's ad hoc approach traces back to *Bolger v. Youngs Drug Products Corp.*,<sup>192</sup> which arose when the United States Postal Service barred a manufacturer, seller, and distributor of contraceptives from sending unsolicited mailings to individuals. The Court found that its case law had recognized "'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>193</sup> Applying that "common sense" approach, the Court found that the pamphlets were commercial speech not because of the economic motivation behind them, nor because they referenced specific products, nor even because the parties *agreed* that they were advertisements, but rather due to a combination of all three factors.<sup>194</sup> In spite of its "mixed-messages" jurisprudence, the Court found that "[t]he mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public issues such as venereal disease and family planning."<sup>195</sup>

The Court's steadfast commitment to *Bolger's* ad hoc approach has led to confusion and occasional controversy. Indeed, the Court itself has repeatedly noted that its jurisprudence does not lead to predictable answers.<sup>196</sup> Controversy over commercial speech bubbled to the surface most recently in *Kasky v. Nike*,<sup>197</sup> a California Supreme Court case on which the United States Supreme Court granted, and then controversially dismissed, certiorari.<sup>198</sup> Responding to allegations that it abused workers in overseas sweatshops, Nike published a series of "editorial advertisements," press releases, and letters sent to newspapers and universities.<sup>199</sup> Mark Kasky, a private citizen, alleged that this information campaign contained false and misleading statements made "with knowledge or reckless disregard of the laws of California prohibiting false and misleading statements,"<sup>200</sup> and that Nike could not claim the full protection of the First Amendment. The California Supreme Court agreed, finding that the "public relations" statements Nike made denying any illegal or unsafe working conditions in its factories were commercial speech entitled only to lessened First

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192. 463 U.S. 60 (1983).

193. *Id.* at 64 (quoting *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 455–56 (1978)).

194. *Id.* at 67–68.

195. *Id.* (footnote omitted).

196. *See, e.g.*, *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"); *Edenfield v. Fane*, 507 U.S. 761, 765 (1993) ("[A]mbiguities may exist at the margins of the category of commercial speech."); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) ("[S]ubject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech . . .").

197. 45 P.3d 243 (Cal. 2002), *cert. granted*, 537 U.S. 1099, *cert. dismissed*, 539 U.S. 654 (2003).

198. *Id.*

199. Goldstein, *supra* note 181, at 65.

200. *Kasky*, 45 P.3d at 248.

Amendment protection.<sup>201</sup> The court justified this determination on three major grounds. First, it found that the speaker, Nike, was engaged in commerce.<sup>202</sup> Second, the court held that the intended audience was likely to be actual or potential buyers.<sup>203</sup> And finally, the court found that the factual message conveyed was commercial in character in that it made representations of fact about Nike's business operations, products, or services.<sup>204</sup> The California court's framework set off a firestorm of academic and popular debate, most of it negative, and all of it calling for clarification from the United States Supreme Court.<sup>205</sup> The Court granted cert, heard oral argument, and then—as First Amendment scholars waited anxiously—dismissed cert as improvidently granted, sparking written dissents from Justices Kennedy<sup>206</sup> and Breyer<sup>207</sup> and dooming commercial speech to the same twilight of ill-definition it has endured since its birth.<sup>208</sup> The *Bolger* rule (or lack thereof) thus seems to be the prevailing “standard” for defining what is and is not commercial speech.

Just as the debate over commercial speech's definition has continued without resolution up until the present day, so too has its standard of protection fluctuated over the years. Under the rule of 1942's *Valentine v. Christensen*,<sup>209</sup> purveyors of commercial speech could not count on any First Amendment protection whatsoever, even when they mixed their commercial messages with “political” ones.<sup>210</sup> In 1976, however, the Court set the stage for an entirely new analysis, striking down a Virginia statute that forbade pharmacists from publishing prescription drug prices. In *Virginia Pharmacy*, the opinion in which Justice Blackmun ventured a definition of commercial speech, the Court held for the first time that “speech which does ‘no more than propose a commercial transac-

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201. *Id.* at 315; *see also* *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 n.5 (1980) (declaring difference between “direct comments on public issues” and statements about public policy “made only in the context of commercial transactions”). *See generally* Piety, *supra* note 55.

202. *Kasky*, 45 P.3d at 258.

203. *Id.*

204. *Id.*

205. *See, e.g.*, Erwin Chemerinsky & Catherine Fisk, *What Is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RES. L. REV. 1143 (2004); Ronald K.L. Collins & David M. Skover, *The Landmark Free-Speech Case That Wasn't: The Nike v. Kasky Story*, 54 CASE W. RES. L. REV. 965 (2004); J. Wesley Earnhardt, *Nike, Inc. v. Kasky: A Golden Opportunity To Define Commercial Speech—Why Wouldn't the Supreme Court Finally “Just Do It™”?*, 82 N.C. L. REV. 797 (2004); Goldstein, *supra* note 181; Robert M. O'Neil, *Nike v. Kasky—What Might Have Been . . .*, 54 CASE W. RES. L. REV. 1259 (2004).

206. *Nike Inc. v. Kasky*, 539 U.S. 654, 665 (2003) (Kennedy, J., dissenting from dismissal of certiorari).

207. *Id.* (Breyer, J., dissenting from dismissal of certiorari)

208. *See generally* Collins & Skover, *supra* note 205; Samuel A. Terilli, *Nike v. Kasky and the Running-but-Going-Nowhere Commercial Speech Debate*, 10 COMM. L. & POL'Y 383 (2005).

209. 316 U.S. 52 (1942).

210. *Id.* at 54–55 (upholding constitutionality of municipal ordinance forbidding distribution of printed handbills for commercial advertising in the streets, even though half of the handbill in question was devoted to a nominally political protest). *Valentine* predated the mixed-message cases discussed above.

tion” is not “so removed from any ‘exposition of ideas,’ and from ‘truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government’” that it should be completely without protection.<sup>211</sup> The Court emphasized potential patients’ need to access information about drug prices,<sup>212</sup> finding that even if an advertiser’s motives were purely economic, his speech was entitled to some level of protection.<sup>213</sup>

Having established in *Virginia Pharmacy* that commercial speech is covered by the First Amendment, the Court established a four-step analysis to test restrictions on commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>214</sup> The first prong of that test asks whether the speech at issue “concerns lawful activity and [is not] misleading.”<sup>215</sup> If the speech fails this initial inquiry, it receives no First Amendment protection at all.<sup>216</sup> If it passes, then the second prong assesses whether the government’s interest is “substantial.”<sup>217</sup> The third prong asks whether the regulation directly advances the government interest asserted,<sup>218</sup> and the fourth and final prong measures the breadth of the regulation to see if it is more extensive than necessary to serve the stated interest.<sup>219</sup> Though the second and third prongs are relatively simple for a government regulation to meet,<sup>220</sup> the final prong has become an increasingly significant obstacle. In *Central Hudson* itself, the Court struck down the challenged regulation—which would have completely banned all promotional activity by electric utility companies as contrary to a national policy of conserving energy—as being more extensive than necessary.<sup>221</sup> The Court’s more recent jurisprudence, however, has clarified that the fourth prong of *Central Hudson* allows the government some leeway in its regulations. In *Fox*, the Court held that a regulation on commercial speech

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211. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (internal citations omitted).

212. *Id.* at 754–56, 763–65.

213. *Id.* at 762.

214. 447 U.S. 557, 566 (1980).

215. *Id.* at 566.

216. *Hoffman Estates v. Flipside*, 455 U.S. 489, 504–05 (1982) (holding that the government may entirely ban commercial speech that proposes illegal transactions); *Friedman v. Rogers*, 440 U.S. 1, 15–16 (1979) (upholding statute prohibiting the practice of optometry under misleading names); see also Jeffrey Lefstin, Note, *Does the First Amendment Bar Cancellation of REDSKINS?*, 52 STAN. L. REV. 665, 691 (2000) (exploring whether the trademark REDSKINS constitutes commercial speech).

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

218. *Id.*

219. *Id.*

220. The Court has upheld as valid government interests the promotion of energy conservation, *Central Hudson*, 447 U.S. at 568, the prevention of drunkenness, *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484 (1996), and the protection of public safety from the dangers of compounded drugs, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002). See also *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (applying *Central Hudson* and finding that Florida Bar rules prohibiting lawyers from using direct mail to solicit personal injury clients within thirty days of their injury easily met the first three prongs and more narrowly met the fourth as well).

221. 447 U.S. at 569–72.

need not be the least restrictive measure available, so long as it is a “fit that is not necessarily perfect, but reasonable” between means and ends.<sup>222</sup>

*Central Hudson* has endured as a test, though its application has been uneven.<sup>223</sup> Many early cases suggested that the nominal protection accorded to commercial speech was essentially illusory. In a splintered opinion in *Metromedia, Inc. v. San Diego*,<sup>224</sup> four Justices found that San Diego’s complete ban on all outdoor advertising display signs met the requirements for regulating commercial speech because it “directly advance[d]” governmental interests and was not overbroad.<sup>225</sup> Five years later, the Court’s protection of commercial speech “undoubtedly reached its nadir”<sup>226</sup> in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.<sup>227</sup> In *Posadas*, the Court upheld Puerto Rico’s flat prohibition on advertising about casinos.<sup>228</sup> Writing for the Court, then-Justice Rehnquist suggested that since Puerto Rico could ban casino gambling altogether, it was also entitled to restrict gambling advertisements.<sup>229</sup> *Posadas* led a short and troubled life, however, and was repudiated in 1996 by *44 Liquormart, Inc. v. Rhode Island*.<sup>230</sup> In *44 Liquormart*, the Court held that a complete ban on price advertising for liquor violated the First Amendment because it failed both the third and fourth prongs of *Central Hudson*: It did not materially advance the state’s interest, and in any case was more extensive than necessary.<sup>231</sup> Justice Stevens wrote in his plurality opinion that “when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.”<sup>232</sup> Thus, *44 Liquormart* signaled a new and increasingly protective era

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222. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. at 469, 480 (1989); *see also Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995) (holding that a regulation barring solicitation to prospective personal injury clients is not overbroad simply because it fails to distinguish between degrees of injury); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001) (citing *Florida Bar* and striking down state restriction on tobacco advertising).

223. Post, *supra* note 178, at 5 (“The fundamental flaw in contemporary commercial speech doctrine, however, is that its primary doctrinal standard, the so-called *Central Hudson* test, is so vague and abstract as to fail entirely to express any specific constitutional values.”).

224. 453 U.S. 490 (1981).

225. *Id.* at 508–13 (plurality opinion) (striking down the regulation on other First Amendment grounds).

226. Stern, *supra* note 178, at 65.

227. 478 U.S. 328 (1986).

228. *Id.* at 344 (“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 Hudson* test. We therefore hold that the Supreme Court of Puerto Rico properly rejected appellant’s First Amendment claim.”).

229. *Id.* at 346. Students of Chief Justice Rehnquist’s jurisprudence might note the shades of his “bitter with the sweet” jurisprudence, first and most famously articulated in *Arnett v. Kennedy*, 416 U.S. 134, 153–54 (1974). Rehnquist nevertheless concluded in *Posadas* that the commercial speech at issue “concern[ed] a lawful activity and [was] not misleading or fraudulent.” *Posadas*, 478 U.S. at 340–41.

230. 517 U.S. 484 (1996).

231. *Id.* at 505–08.

232. *Id.* at 501.

of commercial speech doctrine.<sup>233</sup> Having restricted the definition of commercial speech—thus giving *full* First Amendment protection to more business-related speech—the Court has also increased the protections accorded to commercial speech.<sup>234</sup>

## 2. Naming Rights to Public School Facilities as Commercial Speech

Although commercial speech doctrine is in a state of flux, with both the definition and the standard changing greatly in the last ten years, it is nonetheless clearly implicated in the regulation of naming rights arrangements.

The initial question, of course, is whether naming rights to public school facilities (or indeed any other government sponsorship arrangement) can properly be considered “commercial” speech. The ad hoc test described in *Bolger*—and which the Court declined to clarify in *Kasky*—makes this a nearly impossible question to answer in the abstract, aside from a few predictions about how courts will approach the question. Courts are likely to look to the sponsor’s motivations and identity, and the actual placement or use of the sponsor’s name or logo in the school. For example, an individual’s name—even one like Ken Lay’s which is closely connected to a company’s—would probably be classified as noncommercial speech, since it does not specifically identify a product being sold. On the other hand, a company—or even individual, such as Calvin Klein—which shares a name with the product it sells would be in a more questionable position. The analysis gets even more complicated when one considers the impact of logos, which contribute to the commercial character of a naming rights deal.<sup>235</sup> Thus, naming rights to Nike High School might be classified as noncommercial speech, but if the Nike “Swoosh” logo were added, or if the name were affixed to an athletic facility where Nike products are used, the effect would undoubtedly be commercial.<sup>236</sup>

Nike and other would-be sponsors, however, might argue that commercial speech, unlike government speech, is not a category whose boundaries are defined by the identity of the speaker alone. *Bolger* may not provide a single, overarching test for classifying commercial speech, but it does suggest that courts must consider the speaker’s message, audience and motivations as

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233. See *Developments in the Law—Corporations and Society*, 117 HARV. L. REV. 2169, 2275–82 (2004); Stern, *supra* note 178, at 72 (“The splintered opinions in *44 Liquormart* should not obscure the fact that this decision heralded a more protective attitude toward commercial speech.”).

234. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); see also Note, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836, 2854 (2005); Stern, *supra* note 178, at 58.

235. Note, *supra* note 234, at 2849 (“Despite their expressive characteristics and similarities to both commercial speech and expressive conduct, exterior product designs currently do not receive any First Amendment protection.”).

236. See *id.* at 2839 n.14.

well.<sup>237</sup> Balancing these factors is no easy task. As discussed above,<sup>238</sup> most sponsors enter into school naming rights deals at least partially for commercial purposes. Indeed, naming rights deals are in many ways perfectly representative of modern advertising, which is less concerned with making explicit claims about products (as envisioned by Justice Blackmun's formulation in *Virginia Pharmacy*) than with creating positive associations in the minds of potential consumers. Scholars of advertising have long recognized that "[s]ponsorship is an integral part of modern marketing, which seeks to integrate commercial products into all aspects of social interactions, creating cultural icons and symbols."<sup>239</sup>

Naming rights cases would, however, offer courts an intriguing opportunity to suggest a new framework for adjudicating "mixed-message" speech. Such "mixed" speech is becoming increasingly common, as corporations enter into naming rights deals and other public relations actions that are intended to help the company's bottom line commercially, but could also very easily be described as political or even charitable.<sup>240</sup> The dispute over Nike's speech in *Kasky* illustrates the point and the context quite clearly,<sup>241</sup> and highlights the difficult questions courts face when resolving mixed-motive speech cases. Will courts continue to classify each act of speech as completely commercial or noncommercial, or can a single act of speech be broken down into separate messages that are governed by different standards? Or, even more interestingly, will courts begin recognizing "hybrid" commercial speech, as some judges have done with regard to government speech?<sup>242</sup>

In the naming rights context, answering this question could lead to very interesting results. A court might find, for example, that a corporate donor's gift to a school is charitable noncommercial speech entitled to full First Amendment protection, but that emblazoning the donor's name on the side of the building is commercial speech, or even, as suggested in section III.A, government speech.

After the detail-dependent classification question is resolved, the next ques-

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237. Nor would motivation alone be sufficient. Even if we "assume that the advertiser's interest is a purely economic one" that fact alone "hardly disqualifies him from protection under the First Amendment." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council Inc.*, 425 U.S. 748, 762 (1976).

238. See *supra* notes 47–55 and accompanying text.

239. STACY SAETTA & JIM MOSHER, PAC. INST. FOR RESEARCH AND EVALUATION, CAN A LOCAL ORDINANCE LIMIT ALCOHOL SPONSORSHIP AND ADVERTISING? AN INTRODUCTION 1, available at <http://camy.org/action/pdf/SponsorshipOrdinanceSummary.pdf>.

240. See generally *Piety*, *supra* note 55, at 373–74, 400–10.

241. Nike essentially argued that its statements fell well outside of even a broad definition of commercial speech, and additionally suggested that the definition of commercial speech might be limited to speech that "addresses the qualities of a product as such (like its price, availability, or suitability)" and appears in an "advertisement" or "product label." Brief for the Petitioners at 21, *Nike v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 898993; see also *id.*, at 6, 24, 27, 30, 35–36 (suggesting that commercial speech is narrowly defined). *Kasky*'s response echoed the California Supreme Court opinion, arguing *inter alia* that Nike's statements provided consumers with information to aid their buying decisions, and was intended to induce purchases of Nike products. Brief for Respondent at 29–35, *Nike v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 1844849.

242. *Id.* at 800 (Luttig, J., concurring) (describing the license plates as "hybrid" speech).



tion will be whether school boards' attempts to regulate naming rights pass *Central Hudson's* four-prong test. The first prong is unlikely to be relevant, since sponsors' messages are generally neither illegal nor misleading. School boards should also be able to easily meet the second prong by showing that the government's interest in regulating naming rights is derived from its "substantial" interest in public education.<sup>243</sup> As in recent cases such as *44 Liquormart*, the real action in the application of *Central Hudson* would likely come at the third and fourth prongs. The third prong asks whether the regulation at issue directly advances the government interest asserted. In order to pass this prong of the test, a school board would be well-served to revisit the decades-old battles over commercialism in schools, and the reams of information it generated regarding the effect of advertising on children and commercialism's impact on schools' educational missions.<sup>244</sup> Doing so would emphasize the connection between commercial naming rights and schools' educational missions, and show how naming rights regulations could directly advance the government's interest in education.

The fourth prong—overbreadth, which doomed the regulation at issue in *Central Hudson*—will also be particularly relevant in naming rights cases. Prior to *44 Liquormart*, overbreadth was almost impossible to establish, as the Supreme Court repeatedly upheld total bans on entire classes of advertisements.<sup>245</sup> But *44 Liquormart* revitalized the fourth prong of *Central Hudson*, making it clear that even if the narrowness inquiry is not as harsh as strict scrutiny, it nonetheless requires the state to carry a "heavy burden."<sup>246</sup> In shouldering that burden, the government would do well to connect *Central Hudson's* second and fourth prongs, by arguing that the strength of the governmental interest in educating children is so strong (a second prong issue) that even a large degree of overbreadth is permissible (a fourth prong issue).

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243. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) ("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.") (internal citation omitted).

244. See *supra* notes 12–17 and accompanying text; see also Seth Grossman, Comment, *Grand Theft Ore: The Constitutionality of Advergame Regulation*, 115 YALE L.J. 227, 234 (2005) (arguing that regulations 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").

245. Compare *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 344 (1986) (holding that under *Central Hudson* it was "up to the legislature" to choose to reduce gambling by suppressing in-state casino advertising instead of some less speech-restrictive policy), with *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509 (1996) ("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 Inc v. San Diego*, 453 U.S. 490, 507–14 (1981) (plurality opinion) (finding that total ban on outdoor advertising passed all prongs of *Central Hudson*, even though it failed on other First Amendment grounds); *44 Liquormart*, 517 U.S. at 508 (citing *Metromedia* for the proposition that "[o]ur commercial speech cases recognize some room for the exercise of legislative judgment.").

246. *44 Liquormart*, 517 U.S. at 516.

Although courts have not explicitly acknowledged any such connection between the second and fourth prongs of *Central Hudson*, a close reading of commercial speech cases suggests that it might exist. To take just one example, in the pre-*Central Hudson* case of *Ohralik v. Ohio State Bar Association*,<sup>247</sup> the Supreme Court upheld a broad prophylactic ban on lawyers' in-person solicitation of clients based in part on the importance of the governmental interest in preventing solicitees' duress.<sup>248</sup> If anything, *Central Hudson* seems to have strengthened this "weighing" approach. Indeed, in *San Francisco Arts & Athletics v. United States Olympic Commission*,<sup>249</sup> the Court specifically noted that both the *Central Hudson* test and "the test for a time, place or manner restriction under *O'Brien* require a balance between the governmental interest and the magnitude of the speech restriction."<sup>250</sup>

### C. SCHOOL NAMING RIGHTS AS SCHOOLHOUSE SPEECH: FORUM-BASED CLASSIFICATION

The previous two sections have considered naming rights as government speech and as commercial speech. There is, however, at least one more possibility: That naming rights constitute *noncommercial* speech on the part of the sponsors. Indeed, many sponsors and schools insist that naming rights arrangements are simply charitable donations accompanied by an expression of gratitude, an essentially noncommercial act. Such speech is generally entitled to the full protections of the First Amendment, with certain very limited exceptions.<sup>251</sup> However, even this "pure" speech can be validly regulated based upon the "forum" where it is made. In the case of school naming rights, which take place in the unique forum of public schools, that analysis can be deceptively complicated. When considered alongside the commercial speech and government speech approaches described above, it becomes even more so, because forum analysis begins by focusing on the location of a speech act, rather than on the speaker or the content involved.

#### 1. Defining the Forum

The acceptability of a government regulation on "pure" speech depends on

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247. 436 U.S. 447 (1978).

248. *Id.* at 468; *see also* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 635 (1995) (upholding Florida bar association's prohibition on lawyers sending written solicitations to prospective personal injury clients within thirty days of an accident). *But see In re Primus*, 436 U.S. 412, 431, 434 (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.").

249. 483 U.S. 522 (1987).

250. *Id.* at 537 n.16 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)).

251. These exceptions include obscenity, *Miller v. California*, 413 U.S. 15, 23 (1973), and "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), neither of which are likely to be implicated by naming rights arrangements.

the characterization of the “forum”<sup>252</sup> where the speech is made.<sup>253</sup> The First Amendment recognizes three such forums—the public forum, the nonpublic forum, and the limited public forum. Although most schools and school-related forums fall into the latter category, there are no clear definitional lines between the forums themselves.<sup>254</sup> This lack of a boundary makes it difficult to predict how courts will characterize the “forum” created by naming rights arrangements,<sup>255</sup> but it is clear that their determination will turn on a fact-intensive review of the particular policy or decision at issue.<sup>256</sup>

Traditional public forums include areas such as public parks and streets “which the state has opened for use by the public as a place for expressive activity.”<sup>257</sup> Regulations of speech in such forums are subject to strict scrutiny, and the only acceptable restrictions are those on time, place, and manner, or those based on content-based restrictions which are narrowly drawn to serve a compelling state interest.<sup>258</sup> Fortunately for school boards, naming rights poli-

252. For the purposes of forum analysis, “place” includes not just physical property but even channels of communications such as an intraschool mail system. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983); see also *Rosenberger v. Rector and Visitor of the Univ. of Va.*, 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. & Educ. Fund*, 473 U.S. 788, 800–01 (1985) (treating charitable contribution fund as property for purposes of forum analysis). The forum created by school naming rights deals thus includes not just the walls of a school, but the “name” of the school in a more metaphysical sense.

253. *Perry*, 460 U.S. at 46 (describing forum analysis).

254. Lefstin, *supra* note 216, at 706 (“The line between ‘general access’ designated public fora and ‘selective access’ nonpublic fora may be difficult to discern . . .”).

255. *Compare Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075, 1078 (5th Cir. 1995) (finding that a state Adopt-A-Highway program did not create a public forum), *with Cuffley v. Mickes*, 208 F.3d 702, 706 (8th Cir. 2000) (declining to reach forum analysis, but holding 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.”). See also Jacobs, *supra* note 119, at 90–91 (criticizing the use of forum analysis in Adopt-A-Highway cases and arguing that a government speech characterization would be more appropriate); Suzanne Stone Montgomery, Note, *When the Klan Adopts A-Highway: The Weaknesses of the Public Forum Doctrine Exposed*, 77 Wash. U. L.Q. 557, 558 (1999) (“[F]our different federal courts, confronted with three substantially similar programs, approached the public forum doctrine in five different ways.”) (internal citations omitted).

256. See *Cornelius*, 473 U.S. at 809.

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

258. *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981); see also *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (upholding reasonable restrictions on the distribution of religious literature and solicitation in an airport terminal, which is not a traditional public forum); *Cornelius*, 473 U.S. at 805–13 (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 did not abridge their First Amendment rights); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 297–98 (1984) (upholding prohibition on sleep-in demonstration in a park that did not generally allow overnight camping); *Police Dept. v. Mosley*, 408 U.S. 92 (1972) (striking down ordinance which prohibited labor-related picketing outside of a high school); *Cox v. Louisiana*, 379 U.S. 536, 558 (1965) (overturning civil rights activist’s convictions for disturbing the peace, obstructing a public passage, and picketing outside a courthouse); *Niemotko v. Maryland*, 340 U.S. 268, 274, 284 (1951) (reversing disorderly conduct convictions where petitioner was convicted for having spoken about religion in a public park without a permit but the permit-granting process was entirely discretionary).

cies are unlikely to create public forums, although it is possible that an “open” public naming rights policy—one which accepts all sponsors with no mechanism for oversight and no regulations—might do so. A school board that in practice failed to exercise control over its sponsors might also inadvertently create a public forum.<sup>259</sup> Indeed, the Supreme Court has repeatedly recognized that the way in which a forum is used in turn shapes the amount of free speech regulation allowed there.<sup>260</sup> Schools and other government entities that throw open their doors to sponsors—either in practice or by the terms of their policies—risk finding themselves the managers of a public forum, and thus with little power to pick and choose between sponsors.

On the opposite end of the spectrum, the government has broad discretion to regulate speech in *nonpublic* forums such as military bases<sup>261</sup> and the sidewalks outside post offices.<sup>262</sup> Regulations on speech in such nonpublic forums are acceptable so long as they are “reasonable in light of the purpose served by the forum and are viewpoint neutral.”<sup>263</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>264</sup> A naming rights policy might create a nonpublic forum if it did not manifest any intent to create a means of expressive activity for the sponsors.<sup>265</sup>

## 2. Schools as Limited Forums

Although it is possible that naming rights policies would be classified as

259. See *supra* notes 83–102 and sources cited therein.

260. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 487–88 (1988) (applying narrow reading and upholding ordinance prohibiting picketing “before or about” any residence or dwelling); *Grayned v. Rockford*, 408 U.S. 104, 121 (1972) (upholding an ordinance prohibiting disruptive noisemaking adjacent to school); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (finding that students have a First Amendment right to wear black armbands as protest, unless it results in disruption in the school); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (holding that a silent vigil in a public library is protected, while a noisy and disruptive demonstration might not be).

261. *Greer v. Spock*, 424 U.S. 828, 838 (1976).

262. *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (suggesting existence of nonpublic forum, but ultimately resolving case on other grounds).

263. *Cornelius*, 473 U.S. at 806; see also *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 (1983) (“The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.”).

264. 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 the expression of that viewpoint. A school board, for example, might reject a controversial sponsor based on the 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) (quoting *Lewis v. Wilson*, 253 F.3d 1077, 1081–82 (8th Cir. 2001)) (holding that possible dangerous public reaction is insufficient rationale to bar the Ku Klux Klan from the Adopt-A-Highway program); see also *Brown*, 383 U.S. at 133 n.1.

265. See *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 968–69 (9th Cir. 1999) (inferring and upholding existence of a “commercial only” policy that created a nonpublic forum where school had only ever accepted commercial advertisements and later refused to post the Ten Commandments); Dolan, *supra* note 79, at 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.”).

either public or nonpublic forums, public schools themselves are generally regarded as a unique kind of “limited” forum,<sup>266</sup> and it is likely that their naming rights policies will be similarly categorized. Courts have not settled on a particular definition of a “limited forum,”<sup>267</sup> but such a forum is generally thought to exist where the government opens its property for expressive activity and intends<sup>268</sup> to make it “generally available” to a class of speakers.<sup>269</sup> The intent requirement is important,<sup>270</sup> and demonstrates the legal relevance of the motivations and concerns discussed in Part II of this Article.<sup>271</sup> In any case, once a limited forum has been opened, its lawful boundaries must be respected,<sup>272</sup> and a form of modified strict scrutiny governs regulations of speech within it. Restrictions based on subject matter and speaker identity are acceptable,<sup>273</sup> but must nonetheless be “narrowly tailored to serve a significant

266. *Hazelwood Sch. Dist. v. Kuhlmeir*, 484 U.S. 260, 266 (1988).

267. See generally Ronnie J. Fischer, “What’s in a Name?”: *An Attempt To Resolve the “Analytic Ambiguity” of the Designated and Limited Public Fora*, 107 DICK. L. REV. 639 (2003).

268. *Cornelius*, 473 U.S. at 802 (“The government does not create a public forum by inaction or by permitting limited discourse, but only by *intentionally* opening a nontraditional forum for public discourse.”) (emphasis added); *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (“We have held that ‘the government does not create a public forum by . . . *permitting* limited discourse, but only by *intentionally* opening a nontraditional forum for public discourse.’ *Cornelius*, 473 U.S. at 802 (emphasis added).”) *But see* Int’l Soc’y for Krishna Consciousness, Inc. v. Lee 505 U.S. 672, 697–700 (Kennedy, J., concurring) (objecting to the majority’s focus on government intent, and arguing that forum status should be based on objective physical characteristics of the property).

269. *Widmar v. Vincent*, 454 U.S. 263, 264 (1981).

270. See, e.g., *Cornelius*, 473 U.S. at 802; *Kokinda*, 497 U.S. at 730. This focus on *intent* in identifying limited forums contrasts with the public forum analysis described above, which focused instead on the *actual* control exercised by the government. See, e.g., *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998) (“[T]raditional public fora are open for expressive activity regardless of the government’s intent.”); *Planned Parenthood of Southern Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 822 (9th Cir. 1991) (“*Hazelwood* teaches that school facilities may be deemed to be public forums only if school authorities have ‘by policy or by practice’ opened those facilities ‘for indiscriminate use by the general public,’ or by some segment of the public, such as student organizations.” (internal citations omitted)); *Planned Parenthood Ass’n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1232 (7th Cir. 1985) (finding that “the CTA advertising system has become a public forum” because “CTA maintains no system of control over the advertisements it accepts for posting on its system other than the general contractual directive to Winston to refuse vulgar, immoral, or disreputable advertising. Access to CTA’s advertising system, then, is virtually guaranteed to anyone willing to pay the fee.”).

271. Although I do not pursue the argument here, the focus on government intent in creating particular forums may be roughly analogous to the government speech inquiry’s focus on identifying the government’s underlying voice.

272. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). There is obviously something of a bootstrapping issue here in that the classification of the forum, which in turn determines the acceptability of restrictions on speech, is defined in part by the existence of prior restrictions on speech in the forum. Though somewhat confusing, this is less troubling when one considers that the existence of an *ex ante* policy regulating speech generally gives a baseline by which to judge whether any new regulation or limitation is targeted at a particular speaker or message.

273. *Perry Educ. Ass’n v. Perry Educators’ Ass’n*, 460 U.S. 37, 49 (1983).

government interest while leaving open ample alternatives.”<sup>274</sup>

Schools and school-related activities have traditionally been treated as uniquely limited forums.<sup>275</sup> Indeed, the Court has specifically recognized in its leading schoolhouse free speech cases that First Amendment claims must be considered “in light of the special characteristics of the school environment.”<sup>276</sup> School administrators are thus given some constrained discretion to regulate speech in school. The Supreme Court sketched the contours of that discretion in *Tinker v. Des Moines Independent Community School District*,<sup>277</sup> *Bethel School District No. 403 v. Fraser*,<sup>278</sup> and *Hazelwood School District v. Kuhlmeier*.<sup>279</sup> In *Tinker*, the Court famously ruled that “[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”<sup>280</sup> and that the fear of possible disturbance caused by students’ anti-war armbands was by itself insufficient to constitutionally justify a school’s viewpoint discrimination in prohibiting the armbands.<sup>281</sup> The implicit acknowledgment that the First Amendment rights of students in public schools “are not automatically coextensive with the rights of adults in other settings” was confirmed in *Fraser*, which held that a school need not tolerate student speech that interferes with its “basic educational mission.”<sup>282</sup> Specifically, the Court held in *Fraser* that a student could be subject to discipline for delivering a “sexually explicit” speech at a school assembly, because the school was entitled to “disassociate itself” from the speech in order to demonstrate that its sexually explicit content was “wholly inconsistent with the ‘fundamental values’ of public school education.”<sup>283</sup> Two years later, *Hazelwood* elaborated and clarified *Tinker* and *Fraser*. In *Hazelwood*, a high school principal removed two controversial articles from the school newspaper on the grounds that the students who wrote them had not mastered certain requirements of the journalism curriculum, and that the articles would threaten both the privacy of other

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274. *Mainstream Loudoun v. Bd. of Trs. of Library*, 24 F. Supp. 2d 552, 562 (E.D.Va 1998) (enjoining, on First Amendment grounds, board of library trustees from enforcing policy on Internet sexual harassment that prohibited access to certain content-based categories of Internet publications).

275. Whether schoolhouse speech represents a different category of speech entirely is an interesting possibility, but one which I set aside in an attempt to keep this already complicated topic within reasonable bounds. Even *Rosenberger* essentially became a forum analysis case after the Court found no government speech. See *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 112 (2001) (“[W]e reaffirm our holdings in *Lamb’s Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.”).

276. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

277. 393 U.S. 503 (1969).

278. 478 U.S. 675 (1986).

279. 484 U.S. 260 (1988).

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

281. *Id.* at 509.

282. *Fraser*, 478 U.S. at 685.

283. *Id.* at 685–86.

students and the legal, moral, and ethical obligations of the writers.<sup>284</sup> The Court found that “we cannot reject as unreasonable Principal Reynolds’ conclusion that neither the pregnancy article nor the divorce article was suitable for publication” and therefore held that “no violation of First Amendment rights occurred.”<sup>285</sup> *Hazelwood* may thus cast some light on the regulation of naming rights, by holding that materials to which students might be exposed can be regulated in some circumstances, especially for curricular purposes.<sup>286</sup> The case’s reach extends beyond school newspapers, to include other means of expression which bear the “imprimatur” of the school.<sup>287</sup>

This past June, the Supreme Court handed down its fourth major school speech decision, *Morse v. Frederick*,<sup>288</sup> which revisited and endorsed the limited forum analysis of *Tinker*, *Fraser*, and *Hazelwood*. In *Morse*, a splintered Court ruled that a high school principal did not run afoul of the First Amendment by confiscating a banner reading “BONG HiTS 4 JESUS” and disciplining a student who refused to take it down himself.<sup>289</sup> The actual holding of the case was quite narrow. Invoking the importance of student safety, it upheld schools’ power to limit speech that reasonably appears to encourage illegal drug use, as opposed to advocating decriminalization, or opposing the war on drugs, or any other social or political commentary.<sup>290</sup> The Court’s decision did not appear to rest clearly on any of its previous three school speech cases, but it did confirm that schools are a uniquely limited kind of limited public forum.

Even though the Court’s schoolhouse speech cases give the government some power to regulate speech in schools, such regulations are not immune from attack. In *Lamb’s Chapel v. Center Moriches Union Free School District*,<sup>291</sup> the Supreme Court found that after-school use of school property created a limited forum,<sup>292</sup> and that banning all religious activities from that forum constituted *viewpoint* discrimination<sup>293</sup> rather than the kind of subject matter regulations that are acceptable in a limited forum. Applied to the context of naming rights,

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284. *Hazelwood Sch. Dist. v. Kuhlmeir*, 484 U.S. 260, 276 (1988).

285. *Id.*

286. *Id.* at 261. This point regarding curriculum obviously raises a parallel with the earlier discussion of naming rights as curricula, *supra* notes 147–148 and accompanying text, which cast their curricular value as indicative of government speech. Nevertheless, Bezanson and Buss note that *Hazelwood* “did not rest on a clearly defined idea of government speech” but rather “on doctrines premised on government’s role as regulator.” Bezanson & Buss, *supra* note 5, at 1418.

287. *Hazelwood*, 484 U.S. at 271.

288. 127 S. Ct. 2618 (2007).

289. *Id.* at 2622.

290. *Id.* at 2636 (Alito, J., concurring) (“I join the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as the wisdom of the war on drugs or of legalizing marijuana for medicinal use.”) (quotation marks and internal citation omitted).

291. 508 U.S. 384 (1993).

292. *Id.* at 390–93.

293. *Id.* at 394.

*Lamb's Chapel* obviously raises the question of whether school boards, having opened a limited forum by accepting some naming rights deals, could legitimately reject all religious (or undesirable for other reasons) sponsors without running afoul of the First Amendment.<sup>294</sup> There is no clear answer to that question. It seems reasonable to assume that *Lamb's Chapel* was based in part on the Court's solicitousness of religious freedom, since in *Metromedia* (a commercial speech case) the Court upheld a complete ban on all outdoor commercial billboard advertising in San Diego.<sup>295</sup> The fact that schools—which are certainly more “limited” forums than the city of San Diego—cannot ban religious groups from their facilities is most easily explained by reference to the content of the speech involved in both cases.

As *Lamb's Chapel* and the discussion of commercial speech in the following subsection illustrate, attempts to apply limited public forum analysis to naming rights arrangements can be further complicated by the kind of speech such naming rights are thought to constitute. The logic of *Lamb's Chapel* suggests that religious sponsors represent a “viewpoint” rather than a “subject matter” and thus that regulations on their speech are bound to fail.<sup>296</sup> But even holding that issue aside for the moment, unresolved wrinkles in the doctrine complicate any attempts to assess naming rights arrangements as limited forums. A closer reading of *Hazelwood's* intent-based forum analysis in fact suggests that the Court's approval of the school's restrictions was based specifically on its concern for the school's curricular “forum,” not the separate *noncurricular* forum created by advertising in a school newspaper.<sup>297</sup> This suggests that

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294. This Article does not address the related, interesting, and potentially mind-bending questions raised by churches and other religious organizations' participation in naming rights deals. Some churches have already engaged in such deals as sellers. See *Naming Rights Are Up for Bid on Monastery*, DESERET-MORNING NEWS (Salt Lake City, UT), Aug. 2, 2003, at E02 (reporting that a group of Benedictine monks planned to auction off naming rights to a church building, monastery, and bell towers, and that “[i]f marketing the buildings is a success, future auctions will sell naming rights to choir books, stained glass windows and church pews”). Given that religious organizations already often use schools as meeting places—thus giving rise to the issues addressed in *Lamb's Chapel*—it is possible that a wealthy religious group might seek to sponsor a classroom or other school facility. Such a case would implicate various other provisions in the First Amendment, which have already been addressed to some degree by the Court in similar contexts. See, e.g., *Pinette v. Capitol Square Review and Advisory Bd.*, 515 U.S. 753 (1995) (holding that the Establishment Clause does not justify the government's refusal to allow public display of a cross by a private group in a public park pursuant to an equal access policy); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (invalidating on Free Speech and Free Press grounds an attempt by the University of Virginia to limit the amount of school funds given to student publications based on religious viewpoint).

295. *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

296. Of course, it is possible that the apparently content neutral policy in *Lamb's Chapel* was in fact simply a front for viewpoint discrimination against particular religious speakers. And as noted earlier, the Court will not countenance regulations that are a façade for viewpoint discrimination. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 812–13 (1985) (suggesting that on remand, respondents could pursue a determination of whether the challenged regulations were a pretext for viewpoint discrimination).

297. See, e.g., *Recent Case, Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, 105 HARV. L. REV. 597, 602 (1991).



schools have more regulatory authority over naming rights deals when those deals have some kind of curricular value. And as discussed above, some school board naming policies specifically acknowledge the educational function of a school's name.<sup>298</sup> But as the commercial speech discussion and the concerns raised in Part II of this Article illustrate, sponsors may indeed have advertising in mind when they enter into naming rights arrangements. Somewhat counter-intuitively then, the degree to which a court finds that a named sponsor is motivated by advertising and profit may correspondingly *limit* a school's power to regulate that sponsor's message in a limited forum. Of course, as with government speech, sponsors who play up their own economic motives in order to avoid the government speech or schoolhouse speech label may unwittingly find themselves classified as commercial speakers, stripped of full First Amendment protection. Sponsors trying to avoid one undesirable area of First Amendment law—government speech—may thus end up arguing their way into yet another—commercial speech. The following subsection explores in more detail the ramifications of this overlap.

### 3. Layering the Problem: The Intersection of Government Speech, Commercial Speech, and Schoolhouse Speech

The analysis up until this point has tried to sketch out the boundaries between the doctrines of commercial speech, government speech, and schoolhouse speech, noting along the way that these borders are porous, hard to identify, and sometimes disputed. This final subsection attempts to shed light on what happens in the territory claimed by all three categories. The discussion also tries to show that resolving the disputes between the categories might be impossible under current doctrine, because they begin with fundamentally different inquiries that yield non-exclusive answers.

The interaction between government speech and commercial speech is illustrative. As described in more detail above, commercial speech receives an entirely different standard of protection than “pure” speech, while government speech is treated like a categorical exception to the First Amendment. Courts have generally treated commercial and government speech as exclusive categories,<sup>299</sup> but public school naming rights arrangements make it hard to maintain that distinction. Courts might classify school naming rights as government speech, as commercial speech, or—perhaps most intriguing of all—acknowledge the overlap between the two categories and attempt to reconcile the definitions and standards that govern them.

As described above, the standard First Amendment prohibition on viewpoint

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298. See *supra* notes 147–148 and accompanying text.

299. See, e.g., *Goetz v. Glickman*, 149 F.3d 1131, 1138 (10th Cir. 1998) (agreeing with the Secretary of the Department of Agriculture that an assessment required by the Beef Promotion Act “is ‘government speech’ (as opposed to commercial speech) and there are no First Amendment restrictions on ‘government speech’”).

discrimination does not apply to government speech. But commercial speech doctrine does prohibit viewpoint discrimination, allowing regulations only to the degree that they directly advance a substantial government interest and are no more extensive than necessary to serve that interest.<sup>300</sup> In cases of “commercial” government speech, where both standards are simultaneously implicated, which would control? It is certainly plausible that commercial speech remains just that, even if the government is the speaker. But on the other hand, the Court has suggested that “commercial” speech by a religiously affiliated speaker is entitled to some heightened level of protection.<sup>301</sup> Indeed, the core of government speech doctrine—that the relevant question is whose message is being delivered, not who delivers it—seems to support the commercial-religious analogy. Approaching the question from the perspective of government speech only confirms this result. For while *Rust* and its progeny demonstrate that private actors can deliver government speech, they also seem to imply the corollary: If the focus is on the message, not the messenger, then just as non-government actors are not precluded from delivering government speech, the government is not necessarily limited to it. The sponsorship scenario thus opens up the possibility of the government delivering a private party’s commercial message. The growing prevalence of sponsorship deals and other public-private partnerships has made this possibility increasingly hard to ignore. What remains unclear, however, is which standard—government speech or commercial speech—should govern. If both standards were applied simultaneously, it seems clear that the government speech standard would trump the more speech-protective commercial speech standard,<sup>302</sup> thus giving the government the same broad power to control government-commercial speech as it has over all other government speech. Indeed, it is difficult to imagine that the government would be *more* limited when engaged in government speech with commercial content than it would be when making government speech with political content, such as the speech involved in *Rust*.

One of the implicit difficulties in this government-commercial analysis is that government speech analysis focuses on the *speaker* behind the message, whereas commercial speech analysis employs a multi-factored approach that essentially considers the *content* of the message. These are separate questions, and may

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300. See *supra* subsection III.B.1.

301. In *Murdock v. Pennsylvania*, the Supreme Court found that Jehovah’s Witnesses’ door-to-door proselytizing and distribution of literature—some of which was available for purchase—was religious speech rather than commercial speech. 319 U.S. 105, 108–11 (1943). This was a crucial holding for the Jehovah’s Witnesses, since commercial speech received no protection whatsoever at the time. The opinion noted that not all religious activity is protected by the First Amendment, *id.* at 109–10, but that distribution of religious literature for purchase was no more a “commercial” venture than passing the collection plate in church. *Id.* at 111; see also *Jamison v. Texas*, 318 U.S. 413, 414–18 (1943); *Largent v. Texas*, 318 U.S. 418, 422 (1943).

302. Compare *supra* notes 217–233 and accompanying text (describing the commercial speech standard), with *supra* notes 105–123 and accompanying text (describing the government speech standard).

result in overlapping answers: Speech can simultaneously meet both tests, thus qualifying for two different kinds of protection. The preceding discussion suggested how a court might resolve the overlapping standards of these categories. It did not, however, suggest how courts can resolve the definitional overlap between the two. In many ways that is an even thornier question. If courts were to borrow the speaker-based approach they use to differentiate between governmental and nongovernmental speech, they would likely find the vast majority of public school naming rights deals to be commercial speech, since the private speakers involved are usually corporations attempting to profit from the arrangement. One might find support for this view, ironically enough, in the school boards' own statements. The discussion in section III.A suggested that school boards might reject "bad" sponsors so that they themselves can avoid *sending* a bad message. But schools' opposition to certain naming rights deals, like public opposition to schoolhouse commercialism, seems to be primarily driven by a desire to avoid *exposing* students to a bad message. When posed that way, the motivation for naming rights regulations seems to implicitly recognize that the school itself is not the speaker, but instead is trying to limit the speech of a private speaker, such as an advertiser pushing unhealthy snacks or a sponsor with a controversial message. Though the difference may seem subtle, it makes all the difference for First Amendment analysis, because it acknowledges that the government is not trying to watch its own mouth, but rather monitor someone else's.

The overlap between government speech and commercial speech is all the more interesting because so many of the recent cases addressing "government speech" actually involve messages that appear to be commercial on their face. The Supreme Court's decision in *Johanns*—which upheld a federal statute that requires beef producers to pay an assessment which is in turn used to fund generic beef advertising<sup>303</sup>—exemplifies the trend. In *Johanns*, the Court was confronted with a *form* of speech (advertisements) that appeared on its face to be the kind of obviously commercial speech that would fall even within Justice Blackmun's limited *Virginia Pharmacy* definition of commercial speech. The Court nevertheless found that the beef advertisements were government speech, and that the government could be held accountable for that speech by the ballot, but not by the First Amendment. The Court's opinion seems to signal that speaker identity (at least when the speaker is the government) trumps speech content (at least when the content is commercial).<sup>304</sup>

Whatever the resolution of this border dispute between government speech and commercial speech, courts will still be left facing thorny problems concerning how the forum analysis associated with schoolhouse speech interacts with

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303. *Johanns v. Livestock Mkt. Ass'n*, 544 U.S. 550, 567 (2005).

304. For an argument that government speech doctrine should be rendered inapplicable to such commercial speech, see Daniel A. Dvorak, Note, *Forced Commercial Speech and the Government Speech Doctrine: Discerning and Reducing the Uncertainty Following Johanns v. Livestock Marketing Association*, 32 J. CORP. L. 429, 442–43 (2007).

both commercial speech and government speech.<sup>305</sup> Some of these interactions are likely to be more problematic than others. In a nonpublic forum, it is probably irrelevant whether or not speech is classified as commercial, since the government's broad regulatory authority in a nonpublic forum would seem to encompass both commercial and noncommercial speech. In a nonpublic forum, regulations on speech—even pure political speech—are governed by a kind of rational basis review and are acceptable so long as they are viewpoint neutral and reasonable in light of the purpose served by the forum.<sup>306</sup> Restrictions on commercial speech, by contrast, are subject to a stricter scrutiny under which they are constitutional only to the degree that they directly advance a substantial government interest and are no more extensive than necessary to serve the stated interest.<sup>307</sup> Holding aside the characterization of the forum, this standard seems to preserve some level of protection for commercial speech. But the commercial speech test has only been tested in public forums, where no stricter *forum*-based test governs. In a nonpublic forum, where even pure political speech is susceptible to broad government regulation, the commercial speech standard is unlikely to trump the basic nonpublic forum test.

At the opposite end of the spectrum, if a court finds that a naming rights policy creates a *public* forum, the government will be stripped of nearly any power to regulate the speech and speakers within it. In such a case, the government (the school board, that is) would be well-served to characterize the “speech” at issue as commercial. If successful, such a characterization would at least allow regulation of speech under the modified strict scrutiny standard contemplated in *Central Hudson*. Rather than being limited to strictly scrutinized, content-neutral restrictions,<sup>308</sup> schools could regulate naming rights to the degree that their regulations directly advanced a substantial government interest and were no more extensive than necessary to serve the stated interest.<sup>309</sup> School administrators seeking to limit naming rights arrangements could thus reclaim some of the regulatory authority they would otherwise forego under public forum analysis, so long as they demonstrated that the regulations at issue advanced the substantial government interest in education and were not overly extensive for that purpose.<sup>310</sup>

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305. See also Ayers, *supra* note 102, at 623–24 (criticizing the Court for failing to resolve apparent conflict between forum analysis and commercial speech doctrine in the context of public transit ads); *id.* at 627–37 (exploring the “ongoing muddle of public forum doctrine and commercial/noncommercial speech distinctions”); Bezanson & Buss, *supra* note 5, at 1428–32 (criticizing the Court’s attempts to draw a boundary between public forum analysis and government speech); Stern, *supra* note 178, at 113–15 (discussing the emergence of subsections within commercial speech law).

306. See *supra* notes 263–65 and accompanying text (describing the standard governing speech in a nonpublic forum).

307. See *supra* notes 214–22 and accompanying text (describing the *Central Hudson* test).

308. See *supra* note 258 and accompanying text.

309. This is, of course, the *Central Hudson* test. See *supra* notes 214–22 and accompanying text.

310. See *supra* notes 243–50 and accompanying text (applying *Central Hudson* test to public school naming rights).

Some courts have noted the similarities between the constitutional tests for restrictions on commercial speech and content-neutral time, place, and manner restrictions.<sup>311</sup> But on closer examination, commercial speech and public forum analysis are very uneasy bedfellows.<sup>312</sup> In a public forum, the government is prohibited from making “content-based” restrictions.<sup>313</sup> But in the context of commercial speech, literally every regulation is content-based. Indeed, the entire category is *defined* based on its commercial content (at least to the degree that it is defined at all).<sup>314</sup> This potential complication may simply be a matter of semantics, at least for those who would argue that the whole point of commercial speech doctrine is to carve out an exception to the “content-neutral” requirement generally applicable to free speech regulations. And as one commentator has noted, “[t]he only consistently successful method of excluding divisive public speech from a limited public forum has been ‘commercial only’ policies.”<sup>315</sup> This suggests that courts themselves are comfortable with policies that exclude speech from certain forums based on its content. Even so, it highlights a tension between pure speech, which is not regulable based on content, and commercial speech, which is defined by and regulable precisely because of its content.

One of the most interesting interactions—one that will become increasingly important as government sponsorship deals proliferate—occurs where the standards governing regulations of commercial speech meet those governing regulations in “limited” public forums. Both allow for some regulation of speech, subject to a modified form of strict scrutiny. And in the particular context addressed by this Article—the regulation of school naming rights arrangements—it seems very likely that in any given situation both standards might simultaneously be applicable.<sup>316</sup> This would give the government the power to implement regulations for the limited forums which are “narrowly tailored to serve a significant government interest” and which discriminate with regard to

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311. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (noting that the tests are “substantially similar”) (internal citation omitted); *Moser v. FCC*, 46 F.3d 970, 973 (9th Cir. 1995) (describing the tests as “essentially identical”).

312. Note, *supra* note 234, at 2838 (“[A]lthough commercial speech and expressive conduct are both hybrid speech evaluated under similar four-part intermediate scrutiny tests, the actual levels of review applied to restrictions on these types of speech have diverged in recent years, with protection for commercial speech moving toward strict scrutiny and protection for expressive conduct drifting toward rational basis review.”).

313. See *supra* note 258 and accompanying text.

314. See *supra* notes 196–213 (describing lack of a workable definition of commercial speech).

315. *Dolan*, *supra* note 79, at 73; see also *Children of the Rosary v. Phoenix*, 154 F.3d 972, 976–78 (9th Cir. 1998) (categorizing city bus ad spaces as a nonpublic forum based on the city’s prohibition of noncommercial advertising); *Ayers*, *supra* note 102, at 627.

316. Indeed, some courts have noted the issue of commercial speech in public school forums. In *Dawson v. East Side Union High School District*, the California Court of Appeals found that the commercial and political messages of Channel One (a television program broadcast in some public schools) were not “inextricably intertwined” and that the state could constitutionally regulate them differently. 34 Cal. Rptr. 2d 108, 118–19 (Cal. Ct. App. 1994). The case did not, however, note the connection between forum analysis and commercial speech doctrine.

subject matter but not content or viewpoint (the limited forum standard), and *also* the power to regulate commercial speech to the degree that such regulations would directly advance a substantial government interest and are no more extensive than necessary to serve the stated interest (the commercial speech standard).

On their faces, it is unclear which of these two standards is more accommodating. The commercial speech test may give the government increased leeway, since it requires only a “substantial” (rather than “significant”) government interest. But in the context of school naming rights, it seems unlikely that the importance of the governmental interest is the hurdle on which any regulation would fall—a school board would presumably assert that education is its interest, and education has been recognized as one of the most important governmental interests of all.<sup>317</sup> It is certainly both “substantial” and “significant.” Thus, the real difference may turn on the narrowness of the regulations allowable under the commercial speech and limited public forum analyses, respectively. The commercial speech test seems more restrictive, since it allows only regulations that “are no more extensive than necessary to serve the stated interest,” rather than the perhaps more accommodating “narrowly tailored” regulations available in the limited public forum. However, as *Fox* and other cases have explicitly stated, the fourth prong of *Central Hudson*—requiring regulations to be “no more extensive than necessary”—demands only a “fit that is not necessarily perfect, but *reasonable*” between the “ends and the means.”<sup>318</sup> Thus it seems that the commercial speech standard might actually give school boards more leeway than the limited public forum standard in regulating naming rights arrangements. In the (likely) event that a court finds both standards applicable, it could thus decide the case based solely on commercial speech. Put another way, even if a school naming rights policy creates a public forum, if the speech in that forum is commercial it will be entitled to even less protection than “pure” speech in a limited forum.

Finally, there are also complicated overlaps between government speech and forum analysis.<sup>319</sup> And again, the categories’ definitions seem to collapse on each other while nevertheless pointing to different legal conclusions. In the government speech cases, the government may regulate speakers that it has chosen to deliver its message.<sup>320</sup> In a limited forum, however, the government

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317. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (describing education as having a “pivotal” and “fundamental” role).

318. *Bd. of Trs. of State Univ. of N.Y.*, 492 U.S. 469, 480 (1989) (emphasis added) (finding that a university’s rule prohibiting commercial enterprises from operating in campus facilities was not a per se violation of *Central Hudson*); *see also Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 633 (1995) (holding that a regulation barring solicitation to prospective personal injury clients is not overbroad simply because it fails to distinguish between degrees of injury); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001) (citing *Florida Bar* and striking down state restriction on tobacco advertising).

319. *Dolan*, *supra* note 79, at 72 (“The limited public forum test and the government speech approaches are on a collision course.”).

320. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

may *not* regulate speakers based on the fact that they espouse views with which the government disagrees. Conceptually, this is a slippery distinction. Essentially it means that the government can regulate private speakers so long as it agrees with them *enough* that it can claim they are actually delivering the government's own message, but it cannot control those with whom it disagrees.<sup>321</sup> The broader the government's message, then, the more private mouthpieces it supposedly speaks through, and the broader the government's power to regulate them.<sup>322</sup> But perhaps, as Bezanson suggests, government subsidy for speech "is not enough to transform private speech into government speech, controllable by government as to content," especially where those content controls are unrelated to "government's valid expressive purposes."<sup>323</sup>

Of all the overlapping categories discussed in this Article, this overlap between government speech and forum analysis has received the most attention from scholars<sup>324</sup> and even some courts.<sup>325</sup> Generally it has arisen in the context

321. An interesting question, not addressed here, is how a publicly subsidized private speaker can disclaim his role as a government mouthpiece. For example, a sponsor might enter into a naming rights deal, only to find the deal classified as government speech by a court. The sponsor, fearing the loss of control that comes with this classification, may want to "reclaim" its voice. It is unclear, in the naming rights context, how it could do so.

On this point it is worth noting that at least three Justices have acknowledged the possibility of government disclaimers in determining government endorsement. *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 782 (1995) (O'Connor, J., concurring); *id.* at 793–94 (Souter, J., concurring); *id.* at 818 (Ginsburg, J., dissenting).

322. Note, *supra* note 105, at 2412 ("The unsettling potential result of this doctrinal framework is that, with few obvious limitations, the government could essentially buy out large amounts of private speech simply by funding private enterprises.").

323. Bezanson, *supra* note 161, at 993–94.

324. *See, e.g.*, Bezanson, *supra* note 161 at 954 ("If speech selection is itself a form of protected expression under the First Amendment, is it equally so when the government is the selector? The answer, it turns out, might just be 'Yes.'"); Dolan, *supra* note 79, at 73 (discussing "special public purpose forums" which consist of "projects or programs where government has a subjective expressive purpose that includes particular values and is carried out through selection of private speakers").

Others have described variants on this how-much-does-the-government-agree argument. Cass Sunstein, for example, suggests that government speech is less constitutionally problematic where it advances a widely shared, nonpartisan goal such as celebrating democracy. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 229–32 (1993). Responding directly to Sunstein, Abner Greene has explored the ramifications of Sunstein's argument and the distinction between "the settled and the unsettled" in government speech and other areas of law. *See* Abner S. Greene, *Government Speech on Unsettled Issues*, 69 *FORDHAM L. REV.* 1667 (2001).

Courts have acknowledged—though not fully explained—this distinction in government speech cases. Concurring with the denial of rehearing en banc in *Planned Parenthood of South Carolina*, Judge Wilkinson noted:

This is a presidential election year. May a state issue plates touting one candidate, but not another? It is one thing for states to use license plates to celebrate birds and butterflies, military service, historical events and scenic vistas. It is quite another for the state to privilege private speech on one side—and one side only—of a fundamental moral, religious, or political controversy.

*Planned Parenthood of S.C. Inc v. Rose*, 373 F.3d 580, 581 (4th Cir. 2004) (Wilkinson, J., concurring in denial of rehearing). The Sixth Circuit answered these questions, though without referring directly to Judge Wilkinson's opinion: "Of course the unstated distinction is that the 'Choose Life' message is

of “speech selection” cases such as *Arkansas Educational Television Commission v. Forbes*<sup>326</sup> and *National Endowment for the Arts v. Finley*,<sup>327</sup> both of which involved the government’s power to “speak” by choosing which private speakers are allowed to voice their opinions in a particular forum. By blessing the government’s ability to act as an “editor” allowing or rejecting certain political candidates or artists from participating in government-supported programs, *Forbes* and *Finley* implicitly expanded the role of the government as a “speaker” at the expense of the government’s role as a regulator of speech. In fact, under the editing-as-speaking approach taken in *Forbes* and *Finley*, the government may “speak” through private mouthpieces even when it does *not* agree with each of the private speakers it selects, so long as it selects and presents an array of viewpoints that, taken together, advance the government’s viewpoint.<sup>328</sup> Because the government is greatly circumscribed when acting as a regulator, and has great discretion when acting as a speaker, the shift is subtle as a matter of description but massive as a matter of law.

#### CONCLUSION

This Article is intended not as a roadmap—the terrain it describes is for the most part still unexplored—but rather as a compass for scholars, school boards, sponsors, and courts faced with the difficult but inevitable task of orienting themselves in this uncharted area of constitutional law. Although the discussion here has addressed future cases brought by hypothetical sponsors challenging yet-nonexistent school board decisions, it has also illuminated a series of very real concerns with the coherence of current First Amendment doctrine. As Parts I and II describe, the sale of naming rights to public school facilities is growing increasingly popular and increasingly controversial. And as Part III indicates, that trend directly implicates some of the most problematic and volatile categories of free speech. The coming wave of school naming rights cases, which will probably crest in the next few years, will provide courts with an ideal tool with which to explain and clarify those categories. No matter which of the speech

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highly controversial. . . . Such a distinction, however, is entirely indefensible as a matter of First Amendment law, however much it might properly motivate Tennessee as a matter of policy.” *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 379 (6th Cir. 2006) (emphasis omitted).

325. *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786, 795 (4th Cir. 2004) (Michael, J., writing separately) (“Although the Supreme Court has not yet recognized that speech can be governmental and private at the same time, its decisions on government speech and viewpoint discrimination provide instruction on whether the State’s viewpoint discrimination in the license plate forum can stand.”); *id.* at 800 (Luttig, J., concurring) (“[S]ome speech acts constitute both private and government speech, notwithstanding that the Supreme Court of the United States had not [in 2002] (and as yet has not) recognized that a single communicative event may be both private speech and government speech.”).

326. 523 U.S. 666 (1998) (upholding the power of a public television station to exclude a ballot-qualified candidate from a televised public debate because the debate was a nonpublic forum).

327. 524 U.S. 569, 572 (1998) (upholding NEA’s power to deny grants to artists based in part on a consideration of “‘decency and respect’ for the diverse beliefs and values of the American public”).

328. *See Jacobs, supra* note 119, at 70.



categories and standards described in Part III governs a particular naming rights arrangement, school boards and other governmental entities driven by the concerns laid out in Part I must address the gaping holes in policy and practice described in Part II.

Why do government speech, commercial speech, and forum analysis make such uneasy bedfellows, and what does that say about the First Amendment? This Article argues that the three categories trace their origins to fundamentally different inquiries: Government speech is defined by speaker *identity*; commercial speech essentially by the speech's *content*; and forum analysis by the speech's *location*. Assessing which is better-suited for governing naming rights is as impossible as the proverbial weighing of a pound of nails against the color orange. Because the categories arose in response to different questions, establishing boundaries between them is not a simple matter of remapping existing geography. Fully differentiating between government speech and commercial speech, for example, will always be impossible so long as the former is defined by speaker identity and the latter by content. The categories simply fail to exclude each other. If a governmental unit advertises a product or makes some other clearly commercial statement—as schools arguably do in the naming rights context—how should its speech be categorized? This question could perhaps be answered in part if commercial speech doctrine were to adopt the reasoning of the *Kasky* court and classify commercial speech as that coming from commercial entities. Courts patrolling the boundary between governmental and commercial speech would then only have to ask who or what was actually speaking in any given case. But cleaning up that boundary would not necessarily make courts' jobs any easier—how does one go about identifying “commercial speakers,” for example?—and in any case a move to a speaker-focused First Amendment jurisprudence would not mesh well with location-focused forum analysis.

Courts and scholars have thus far seemed content to leave these problematic areas of First Amendment law rife with confusion, apparently sanguine in the belief that they are relatively harmless so long as they are quarantined from each other. But by collapsing this artificial separation, public school naming rights demand a more comprehensive solution, one which acknowledges and attempts to resolve the border disputes between these tempestuous but increasingly important categories of speech.