School Naming Rights and the First Amendment's Perfect Storm

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ABSTRACT

This Article uses public school naming rights as a lens through which to examine the conflicts between the tempestuous First Amendment categories of government speech, commercial speech, and forum analysis. Courts and scholars have noted the internal conflicts within these three categories, but have not yet explored the conflicts *between* them. As the growth of school naming rights shows, government sponsorship arrangements collapse the artificial divisions between the categories and demand a better understanding of their interactions. This Article represents a first attempt to bring coherence to 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 which paid $100,000 to help renovate it.[1] 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.

A closer look at these deals and the policies governing them suggests that school boards might inadvertently be steering themselves into troubled constitutional waters. Specifically, schools may find it increasingly hard to reject undesirable sponsors without running afoul of the First Amendment. Indeed, the sale of public school naming rights creates something of a perfect storm of First Amendment jurisprudence, uniquely positioned at the juncture of three particularly tempestuous areas of law: government speech, commercial speech, and schoolhouse speech (a brand 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 soon be increasingly difficult to ignore.

This Article represents a first attempt to analyze the First Amendment implications of school naming rights sales and the overlap and interaction between government speech, commercial speech, and schoolhouse speech (a type of forum analysis). Scholars have focused much attention on the characteristics which separate these three categories from fully protected speech,[2] but comparatively little

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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.

[2] Following Melville Nimmer's lead, many First Amendment scholars have employed "definitional balancing" or "categorical balancing" as a means 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* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942 & n.24 (1968); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L.

attention has been paid to the overlap and interactions between the categories themselves. The growth of public sponsorship deals such as school naming rights demand 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 regulations 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 clarifies – and in some cases attempts to define – the boundaries between categories of First Amendment law which up until now have led independent and troubled careers, but which contemporary developments have put on an inevitable and dramatic collision course.

Part I of the Paper gives an overview of 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 concerns that drive attempts to limit naming rights or exclude certain sponsors. Building on the practice and debate described in Part I, Part II describes the actual polices by which school boards have tried to claim control over naming rights arrangements. 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. This final Part uses naming rights as a tool to illuminate and clarify the tangled interactions among government speech, commercial speech, and school speech doctrine. Embracing a

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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 Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1500 & 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).

task that courts will soon have to face, this Part attempts to resolve some of the problematic overlaps between the categories' definitions and governing standards. It also argues that some of the border disputes between these three areas of First Amendment law may be impossible to resolve so long as the categories themselves begin from fundamentally different premises. Because government speech is defined and governed by speaker identity, commercial speech by the speech's content, and schoolhouse speech by the forum where it is delivered, their simultaneous application creates unprecedented and intractable problems.

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

While the naming rights debate has thus far been driven by concerns over policy and educational outcomes, the issues which animate that discussion – including sponsor identity, motivation, and message – are also necessary components of any First Amendment analysis.

A. The Growth of Schoolhouse Commercialism

Schoolhouse commercialism is growing in nearly all its forms, from exclusive pouring rights arrangements to sponsored classroom materials mixing advertising with educational messages.[3] One recent study found that schools receive $2.4 billion a year from corporate relationships,[4] more than the total 2003 educational expenditures of ten states and the District of Columbia.[5] The numbers for individual school districts can be simply staggering, rivaling the amounts of funding they

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[3] ALEX MOLNAR, CTR. FOR THE ANALYSIS OF COMMERCIALISM IN EDUC., SPONSORED SCHOOLS AND COMMERCIALIZED CLASSROOMS: SCHOOLHOUSE COMMERCIALIZING TRENDS IN THE 1990'S, 6-7 (1998) [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*, EDUCATIONAL LEADERSHIP MAGAZINE, 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).

[4] Molnar, *Cashing in on the Classroom*, *supra* note 3, at 79.

[5] 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.

receive from taxes and other public sources.[6]

Opponents of the practice bemoan public schools "selling out" to corporate sponsors,[7] and argue that children are particularly vulnerable to harmful advertising,[8] especially from junk food and soda companies marketing unhealthy snacks and sodas to a student population already struggling with obesity.[9] But despite occasional victories against such direct marketing, opponents of schoolhouse commercialism increasingly seem to be fighting a rearguard action. Occasionally, their battles 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.[10] The public outcry targeted both the heavy-handed suspension and the commercial interests it apparently served.[11]

B. 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. Naming rights, in fact, were 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.[12] In doing so, they followed –

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[6] *See, e.g.*, Izzy Gould, *What's in a Name? Extra Cash, Perhaps*, TAMPA TRIB., Dec. 21, 2004 (Sports), at 1.

[7] *See, e.g.*, Ruth Sheehan, *Too Late to Cry 'Sellout'*, NEWS AND OBSERVER (Raleigh, N.C.), Jan. 20, 2003, at B1.

[8] *See* Lini S. Kadaba, *Museums Embrace Corporate Sponsorship*, PHILADELPHIA INQ., Aug. 9, 2001.

[9] *See* THE HENRY J. KAISER FAMILY FOUND., THE ROLE OF MEDIA IN CHILDHOOD OBESITY (2004), http://www.kff.org/entmedia/upload/The-Role-of-Media-in-Childhood-Obesity.pdf.

[10] *See, e.g.*, Jingle Davis, *No Coke, Pepsi: Rebel Without a Pause*, ATLANTA CONSTITUTION, March 26, 1998, (Constitution Edition), at 1A; Guy Friddel, *Student's Act of Cola Defiance Was Refreshing*, VIRGINIAN-PILOT (Norfolk, Va.), Apr. 4, 1998, at 1B; Carl Hiassen, *Be True to Your School … and Its Cola*, CHARLESTON GAZETTE (Charleston, S.C.), Mar. 31, 1998, at 4A.

[11] *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.

[12] 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 to Pay for Lights*, SARASOTA HERALD-TRIB., (Sarasota,

sometimes explicitly[13] – in the footsteps of universities,[14] museums,[15] and professional sports teams,[16] all of which commonly emblazon the names of large sponsors on their buildings and facilities. Despite occasional controversies between the entities involved,[17] and some public opposition,[18] 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,[19] as well as naming rights to public libraries,[20] public stadiums, and office buildings.[21] By 2000, when Brooklawn signed its deal with Shop Rite, public schools seemed to be the only place where naming rights arrangements were not common.[22]

Fla.), Feb. 18, 2004, at C1.

[13] Sue Kiesewetter, *The Name Game; Sale of Naming Rights for Sports Facilities in Schools; Includes Tips on Selling Naming Rights*, SCHOOL PLANNING AND MANAGEMENT, 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*, THE HOUSTON CHRON., Jan. 21, 2005, (Star Edition), at A-01.

[14] *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*, THE NEWS TRIBUNE, (Tacoma, Wash.), May 22, 2005, at D01.

[15] Kadaba, *supra* note 8.

[16] *See, e.g.*, Cindy Brovsky, *Stadium Naming Rights Are Usually a Package Deal*, THE DENVER POST, Oct. 29, 2000, (2d Ed.), at A-04. In an interesting reversal of the normal practice described in this Article, see Goldie Blumenstyk, *U. of Phoenix Buys Naming Rights to a Pro-Football Stadium*, CHRON. OF HIGHER ED., Oct. 6, 2006, at 30.

[17] Many of these disputes center on contractual issues which are not addressed in any detail here. For more information, see generally 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); Debra E. Blum, *Donors Increasingly Use Legal Contracts to Stipulate Demands on Charities*, CHRON. PHILANTHROPY, Mar. 21, 2002, at 9; *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).

[18] *See, e.g.*, Cindy Brovsky, *We'll Call it Mile High*, DENVER POST, Aug. 8, 2001; Vincent P. Bzdek, *The Ad Subtractors, Making a Difference*, WASH. POST, July 29, 2003, at C09.

[19] 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.

[20] *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).

[21] Kay, *supra* note 19, at 30.

[22] Molnar's 1998 report cited "Appropriation of Space" as a small and shrinking category of commercial activity in schools. Molnar, *Sponsored Schools*, *supra* note 3, at 28.

Within a few months of the Brooklawn deal,[23] dozens – if not hundreds – of public schools were entering into naming rights arrangements,[24] most of them involving football stadiums and other athletic facilities.[25] But 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."[26] Three years earlier, they would have been right.

Over time, however, the sale of school naming rights has become something of a professional enterprise. In Texas, school districts sent written solicitations to local and national businesses offering naming rights to school stadiums.[27] Although most of the early naming rights arrangements were for athletic fields, schools soon began selling off naming rights to libraries,[28] hallways[29] and other facilities. Many public schools began to imitate universities[30] by openly soliciting naming rights deals and announcing a menu of prices for naming rights to various school facilities: $1 million for a building, $25,000 for a classroom, and so on.[31] In just a few short years, the sale of public

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[23] Lewin, *supra* note 1; Strauss, *supra* note 1. Some reports indicate that naming rights were sold as early as 1995, but Brooklawn's deal is generally recognized as the first. *See, e.g.*, Kiesewetter, *supra* note 13.

[24] ALEX MOLNAR, COMMERCIALISM IN EDUC. RESEARCH UNIT, THE FIFTH ANNUAL REPORT ON TRENDS IN SCHOOLHOUSE COMMERCIALISM: WHAT'S IN A NAME? THE CORPORATE BRANDING OF AMERICA'S SCHOOLS 7 (2002) [hereinafter MOLNAR, WHAT'S IN A NAME?] (reporting dramatic increase in news citations of naming rights sales).

[25] Lewin, *supra* note 1.

[26] Jeff Donaldson, *Some Schools Mull Sale of Naming Rights to Raise Funds*, THE DESERT SUN (Palm Springs, Cal.), Feb. 4, 2003, at 1B.

[27] Anita Powell, *Round Rock ISD Looks to Sell Stadium Name*, AUSTIN AMERICAN STATESMAN (Austin, Tex.), Oct. 30, 2003; Spencer, *supra* note 13.

[28] Geoff Mulvihill, *N.J. School Sells Naming Rights to Raise Money*, AM. MKTG ASS'N MKTG NEWS TM, May 15, 2004, (Nation), at 7.

[29] *Roundtable: Voting Rights, Treason, School Names* (NPR Radio Broadcast, July 20, 2006) (reporting sales in a Wisconsin school district).

[30] 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*, UNIV. OF N. MEX. BD. OF REGENTS, POLICY MANUAL, 2.11: NAMING UNIVERSITY FACILITIES, SPACES, ENDOWMENTS, AND PROGRAMS, *available at* http://www.unm.edu/~brpm/r211.htm (last visited Aug. 7, 2006); N.C. STATE UNIV., POLICY 03.00.2: CRITERIA AND PROCEDURES FOR NAMING FACILITIES AND PROGRAMS, *available at* http://www.ncsu.edu/policies/alumni_dev/POL03.002.php (last visited July 13, 2006).

[31] Lewin, *supra* note 1; *see also* Leif Strickland, *Extra Credit for School Donors; For the Right Amount, HP Will Make You a Big Name on Campus*, DALLAS MORNING

school naming rights had developed from fodder for humor columnists[32] into a multi-million dollar industry that involves schools, students, and sponsors nationwide.

C. 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.[33] Given these somewhat mixed messages, it can be difficult to determine whether public school naming rights deals should be described as a commercial transaction, a charitable donation, or even some kind of educational or political speech.

For school administrators, at least, the motivation for selling naming rights is relatively straightforward: money.[34] 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 change their daily routines or curricula.[35] 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 85 percent of the kids are below poverty level. I'm not uncomfortable with corporations giving us money and getting their names on things. As long as it's not inappropriate, I don't see any downside."[36]

NEWS, Feb. 27, 2002, at 1A (listing asking prices for school facilities in Texas' Highland Park school district); Lisa Marie Pane, *School Raises Funds by Selling Name Rights*, DESERET NEWS (Salt Lake City, UT), Aug. 10, 2001, at A10 (listing prices for school facilities in Newport, Rhode Island).

[32] 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?*, THE ADVOCATE (Baton Rouge, La.), March 29, 1998, at 16B.

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

[34] Gould, *supra* note 6; MOLNAR, SPONSORED SCHOOLS, *supra* note 3, at 10 ("The justification for the sponsorship agreements most often used by educators is the need for money.").

[35] See *infra* note 127 and accompanying text for discussion of whether a school's name can be considered part of its "curriculum."

[36] 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. OF EDUC. 41, 56 (2003) (reporting high school principals' positive impressions of corporate sponsored events).

Although school administrators' reasoning may be straightforward, purchasers' motivations are somewhat more complex, involving a complicated mixture of private and public interest.[37] Nearly all naming rights purchasers are companies and other for-profit entities,[38] 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."[39]

But it seems implausible that corporate purchasers of naming rights are motivated purely by altruism.[40] Corporate directors, after all, have fiduciary duties to improve the company's bottom line, not to pursue philanthropy.[41] As one petitioner recently argued to the United States Supreme Court in a First Amendment case: "All corporate speech is, and should be, uttered in the interest of benefiting the corporation in the eyes of potential consumers."[42] The fact that sponsors ask for

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[37] *Business Partnerships with Schools*, POLICY REPORT, 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 R.A. Mickelson, *International Business Machinations: A Case Study of Corporate Involvement in Local Education Reform*, 100 TEACHERS COLLEGE RECORD 476, 491-96 (1999), http://www.uncc.edu/rmicklsn/images/corporate.pdf.

[38] 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.

[39] Christine McDonald, *Got Cash? Buy School Name; To Ease Tight Budgets, Plymouth-Canton, Others Ponder Sale of Naming Rights to Buildings, Events*, THE DETROIT NEWS, June 27, 2005, at 1A (quoting president of a company that had donated $25,000 for a playground).

[40] *See* Eric A. Posner, *Law and Society & Law and Economics: Common Ground, Irreconcilable Differences, New Directions: Altruism, Status, and Trust in the Law of Gifts and Gratuitous* Promises, 1997 WIS. L. REV 572, 572-85 (arguing that altruism "is an insufficient explanation for gift-giving behavior" generally, and exploring other rationales such as trust and status enhancement).

[41] In the seminal corporate philanthropy case, the Delaware Court of Chancery "[c]onclude[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 (1969). Even so, nearly all states have passed statutes allowing corporations to make charitable donations even without demonstrating their value to the company. Jill E. Fisch, *Fundamental Themes in Business Law Education: Teaching Corporate Governance Through Shareholder Litigation*, 34 GA. L. REV. 745, 765 (2000).

[42] Brief for Arthur W. Page Soc'y et al. as Amici Curiae Supporting Petitioners, Nike v. Kasky, 539 U.S. 654 (No. 02-575), at 19.

naming rights, as opposed to simply making an anonymous or restriction-free donation,[43] suggests that the naming rights themselves are intended to serve as advertising, just like the naming rights to professional sports stadiums.

Although many corporate sponsors insist on the philanthropy explanation, others' public statements lend support to 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 to go buy their cars? What if it said Korum Ford?"[44] 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."[45] Even opponents of naming rights arrangements agree with that.[46] 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 towards the company and its products.

Of course, 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 shape the First Amendment protections to which it is entitled, as described in Part III. They also add fuel to critics who allege that naming rights deals are simply another form of insidious schoolhouse commercialism.

D. 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 with an open naming policy is the possibility of a "bad name" sponsor

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[43] MOLNAR, WHAT'S IN A NAME?, *supra* note 24, at 2.

[44] Voelpel, *supra* note 14.

[45] *Id.*; *see also* Keen, *supra* note 33; Molnar, WHAT'S IN A NAME?, *supra* note 24, at 16.

[46] 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.").

emblazoning its name on the side of a public school.[47] Would-be sponsors who sell products considered inappropriate for children are clear candidates for this categorization, and indeed many school administrators have already stated that they will not seek or accept such deals.[48] And although it may seem unlikely that a truly villainous character would maliciously bid on the right to name a public school, nightmare scenarios are more likely than school boards might suspect.[49] To take just one example, the Ku Klux Klan recently attempted to become an acknowledged sponsor of a Missouri public radio station[50] and a stretch of Missouri road as part of the "Adopt a Highway" program.[51] 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, much to the horror of the program's directors.[52]

Horror stories from the world of private sponsorship suggest that concerns about "bad name" sponsors are quite real. Even a seemingly harmless naming rights arrangement can go sour when a sponsor's business or personal conduct is later called into question. High profile examples are not hard to find. Baseball fans remember that in 1999, Houston's 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

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[47] Kay, *supra* note 19, at 30 (internal citation omitted). *See generally* Eason, *supra* note 17.

[48] *See, e.g.*, Strauss, *supra* note 1.

[49] *See*, Eason, *supra* note 17, at 387, 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*, THE OREGONIAN (Portland, Or.), Feb. 4, 2005, (Sunrise Edition), at B10 (reporting that county, fearing lawsuits, allowed American Nazi Party to adopt a stretch of highway).

[50] *See* Knights of the Ku Klux Klan v. Curators of the University of Missouri, 203 F.3d 1085, 1094 (8th Cir. 2000).

[51] Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000).

[52] *Cuffley* was decided on Equal Protection grounds, but the court specifically noted that "[w]hether this claim arises under the Equal Protection Clause or the First Amendment, it is clear that the State may not deny access to the Adopt-A-Highway program based on the applicant's views." *Id.* at 760 n.3. *But see* Texas v. Knights of the Ku Klux Klan, 58 F.3d 1075 (5th Cir. 1995) (holding that 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).

figure, the company itself was in the middle of a catastrophic bankruptcy that cost thousands of Houstonians their jobs, and the Astros were scrambling to buy out the remainder of the naming rights contract for $2.1 million.[53] Lay and Enron are by no means the only high-profile donors whose naming rights deals have caused financial and image problems for donees.[54]

Of course, the "bad name" scenario is not the only objection to naming rights, and may not even be the most serious. Echoing the anti-commercialism arguments made throughout the 1990s, opponents of school naming rights deals argue that emblazoning corporate names on public school facilities demeans the schools,[55] "cheapens the honor bestowed on long-time public servants and civic leaders when a facility is named for them,"[56] and interferes with schools' primary mission of educating students.[57] These critics bolster their arguments with evidence suggesting that younger children are cognitively incapable of recognizing advertising for what it is,[58] 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.[59] The Children's Museum of Cleveland received a dramatic illustration of this point after it sold its naming rights to a local hospital.

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[53] The rights were later re-sold to Minute Maid, a subsidiary of Coca Cola, which paid $100 million for 28 years of naming rights. *See also Lay's Alma Mater Struggles With Donation: Seeks 'Alternative Use' for Stock Profits Instead of Economics Position*, MSNBC.Com, May 26, 2006, http://www.msnbc.msn.com/id/12992280/.

[54] *See e.g.*, Shannon Allen, *Jubilee Hall*, SETON HALL MAGAZINE, Nov. 1, 2005, *available at* http://www.shu.edu/news/magazine/2005-fall-static/2005_fall_hallmark5.html; Jeffrey N. Gangemi, *Tyco Conviction Leads to Renaming*, BUS. WEEK ONLINE, Sept. 25, 2005, http://www.businessweek.com/bschools/content/sep2005/bs20050925_7716.htm; John R. Wilke & Chad Terhune, *Scrushy May Be Indicted Today*, WALL ST. J., Nov. 4, 2003, at A3; Rick Wills, *Naming Rights Issue on Table*, PITTSBURGH TRIB. REV., Sept. 19, 2004.

[55] Strickland, *supra* note 31 (quoting a school board member as saying that selling naming rights would "cheapen" the school district).

[56] Larry King, *The World-Herald's Priority is What Best Serves the Readers*, OMAHA WORLD HERALD (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-TRIBUNE (Florida), Mar. 21, 2005, at E1.

[57] CITIZENS' CAMPAIGN FOR COMMERCIAL-FREE SCHOOLS, WHAT'S WRONG WITH COMMERCIALIZING THE PUBLIC SCHOOLS? (undated) *available at* http://www.scn.org/cccs/arguments.html (last visited July 21, 2006); *see also* Eason, *supra* note 17, at 399.

[58] Kabada, *supra* note 8.

[59] Spencer, *supra* note 13.

As the museum's executive director reported, "We had little children getting off school buses and hanging onto the post outside afraid to come in because they thought they had to get their shots."[60]

Even putting aside this set of advertising-related concerns, naming rights deals raise unexpected but difficult issues related to the problem they are supposed to solve: funding. Naming rights arrangements can threaten inter-school equity, 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.[61] Though public schools are not obligated by the U.S. Constitution to maintain districtwide equity,[62] school administrators may nonetheless be concerned that naming rights sales will exaggerate pre-existing resource disparities.[63] And 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[64] and makes taxpayers *less* likely to vote for school funding measures in the future.[65] As responsibility for public school funding moves to the private sector and schools become more and more dependent on corporate dollars to make ends meet, schools may find their own budgets and operations subject to the financial health of corporate sponsors.[66] And as the stories of Enron, Tyco, and hundreds of dot-coms[67] show, this can be a tenuous position indeed.

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.[68] Others will

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[60] Kadaba, *supra* note 8.

[61] *See* Randy Krebs, *Our View: Schools Should Think Before Entering Deal for Naming Rights*, ST. CLOUD TIMES (Minn.), July 19, 2005, at 5B (noting that a technology company was focusing its school sponsorship efforts on "the nation's wealthiest school districts").

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

[63] On the other hand, some see the sale of naming rights as a means to *correcting* disparities between public and private institutions. *See*, Kiesewetter, *supra* note 13 (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.").

[64] McDonald, *supra* note 39.

[65] *Business Partnerships with Schools*, *supra* note 37, at 10.

[66] Molnar, *Sponsored Schools*, *supra* note 3, at 8.

[67] Thornburg, *supra* note 17, at 333.

[68] Some schools have apparently achieved this by limiting not the sponsors, but the

deny all corporate sponsorship of school activities and facilities.[69] Most will probably chart a middle course, seeking to limit naming rights but not ban them.[70] But although no specific course of action is constitutionally mandated, some may be constitutionally prohibited. The following Section 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

Despite the prevalence of naming rights arrangements and the weighty concerns they raise, few school boards have policies governing their sale. 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.[71] 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.

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."[72] Following

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facilities they put up for sale. McDonald, *supra* note 39.

[69] 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. CTR. FOR COMMERCIAL-FREE PUB. EDUC., SAN FRANCISCO PASSES THE COMMERCIAL-FREE SCHOOLS ACT, NOT FOR SALE (Spring 2000), *available at* http://www.ibiblio.org/commercialfree/newsletters/n1300_1.html (last visited July 12, 2006).

[70] *See, e.g.*, CITIZENS' CAMPAIGN FOR COMMERCIAL-FREE SCHOOLS, CORPORATIONS LOSE BATTLE FOR SEATTLE SCHOOLS (Nov. 21, 2001), *available at* http://www.asu.edu/educ/epsl/CERU/Articles/CERU-0111-060OWI.doc (last visited July 12, 2006).

[71] 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 36, at 49.

[72] Strauss, *supra* note 1.

Darrow's shaky example, few school boards have been able to articulate the standards they use to select sponsors.[73] 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."[74] 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,[75] or historical figures such as US 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 community nomination or the creation of a naming committee.[76] This democratic variant was almost certainly not intended to enable corporate naming deals, however, and in any case would be an unwieldy tool for doing so.

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[73] *See, e.g.*, Zaloudek, *supra* note 56 (reporting that Philadelphia schools refuse naming rights deals with alcohol or tobacco companies). Even Brooklawn's articulated standard, which seems uncontroversial as a matter of policy, may be constitutionally questionable. *See* Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 83 (2004) ("While a 'commercial ads only' policy does block most speech against public policy, it is an open question whether governments can further exclude a subset of such speech, typically alcohol and tobacco ads, where promoting such products contravenes the administration's values.") (internal citation omitted).

[74] Schmadtke, *supra* note 38; *see also id.*

[75] *See, e.g.*, BELLINGHAM (WASH.) SCH. DIST., ADMINISTRATIVE PROCEDURE 501: NAMING OF NEW SCHOOLS/FACILITIES (adopted Oct. 26, 1995), *available at* http://www.bham.wednet.edu/policies/9250Policy.htm; DURHAM (N.C.) PUB. SCH., REGULATION 6090: NAMING PUBLIC SCHOOLS, *available at* http://www.dspnc.net (search "6090") (revised 1999).

[76] *See, e.g.*, BELLINGHAM SCH. DIST., *supra* note 75; ROCHESTER (N.Y.) CITY SCH. BD., POLICY MANUAL: NAMING FACILITIES REGULATION 7500-R (adopted Aug. 20, 1998) *available at* http://www.rcsdk12.org/BOE/PM/PM%20pdfs/7000/7500%20Naming%20Facilities.pdf (same); BUNCOMBE COUNTY (N.C.) BD. OF EDUC., POLICY # 535 (adopted Dec. 9, 1993) *available at* http://www.buncombe.k12.nc.us/modules/Downloads/files/namschl535ar.pdf; BD. OF EDUC. OF ARUNDEL COUNTY (MD.), POLICY # 706 (revised Nov. 20, 1989), *available at* http://www.aacps.org/aacps/boe/board/newpolicy/Sections/section_700/adminreg706.pdf (providing for a naming committee); BROCKPORT (KY.) CENTRAL SCH. DIST., POLICY 5850, NAMING SCHOOL FACILITIES, (revised Apr. 20, 2004) *available at* http://brockport.k12.ny.us/policies.cfm?pid=151.

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.[77] Although these policies usually refer only to "persons" or "individuals" and are silent with regard to companies and other entities,[78] 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 school system could satisfy the "contribution" requirement[79] and override otherwise applicable naming rules.[80] In

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[77] *See, e.g.*, SHENANDOAH COUNTY (VA.) PUB. SCH., NAMING SCHOOL FACILITIES (adopted Jan. 14, 1997) *available at* http://www.shenandoah.k12.va.us/pdf/policymanual/Sec%20F%2005-06.pdf; HERMISTON (OR.) SCH. DIST., POLICY 8R: NAMING OF SCHOOL FACILITIES, ORS 332.107 (revised Apr. 5, 2005), available at http://policy.osba.org/hermiston/F/FF%20D1.PDF; EL PASO INDEP. SCH. DIST., POLICY 071902: NAMING SCHOOLS, OTHER FACILITIES, AND FUNCTION AREAS (adopted May 23, 2006), *available at* http://www.episd.org/Board/docs/policyalerts/alertpolicies/05-2006_alertpolicies/CWLocal.pdf; OXNARD (CAL.) UNION HIGH SCH. DIST. BD., POLICY 7310: NAMING EXISTING SCHOOL FACILITIES, (revised July 14, 2004) *available at* http://www.ouhsd.k12.ca.us/FLS/Policies/7000/b-p7310.pdf; TORRANCE (CAL.) UNIFIED SCH. DIST. BD., POLICY 7310: NAMING EXISTING SCHOOL FACILITIES, (adopted June 4, 2001) (same) *available at* http://www.tusd.org/pages/supt/BdPolicy/7000%20Torrance.pdf; JONESBORO (ARK.) PUB. SCH. DIST., JOB CODE FF: NAMING OF SCHOOL FACILITIES, (adopted June 11, 2002) *available at* http://www.jps.k12.ar.us/Policy/FF.html.

[78] CARTERET COUNTY (N.C.) PUB. SCH. SYS., REGULATION FF: NAMING SCHOOL FACILITIES (revised Jan. 2006), *available at* http://www.carteretcountyschools.org/hr/Facilities%20Development.pdf; SAINT LOUIS BD. OF EDUC., POLICY 7600: NAMING OF SCHOOL FACILITIES (adopted July 24, 2001), *available at* http://www.slps.org/Board_Education/policies/7600.htm. *But see* MONONA GROVE (WIS.) SCH. DIST., BOARD POLICY 940: NAMING SCHOOL FACILITIES (approved July 8, 2003), available at 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.").

[79] VOLUSIA COUNTY (FLA.) SCH. DIST., POLICY 610 (effective Aug. 10, 2004); HAW. BD. OF EDUC., POLICY 6750: NAMING OF SCHOOLS AND SCHOOL FACILITIES (amended Nov. 17, 2005), *available at* http://lilinote.k12.hi.us/STATE/BOE/POL1.NSF ("School facilities may be named to honor major benefactors whose significant contributions benefit the school, school-community, or public education.")

[80] PERRYSBURG (OHIO), POLICY 7110: NAMING SCHOOL FACILITIES, *available at*

effect, they 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.[81] 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,[82] often allowing the sale of naming rights to the latter, but not the former.[83] 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 bar on the naming of school facilities after donors or commercial enterprises.[84] 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.[85] Although subtle, these policy changes

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http://www.neola.com/perrysburg-oh/search/policities/po7110.htm (last visited July 13, 2006); COLUMBIA (MO.) SCH. DIST. NO. 93, POLICY FF: NAMING OF SCHOOL FACILITIES, (revised Feb. 13, 2006) *available at* http://www.columbia.k12.mo.us/policies/FF-S.pdf.

[81] *See, e.g.*, COBB COUNTY (GA.) SCH. DIST., ADMINISTRATIVE RULE FF: NAMING OF SCHOOL FACILITIES (revised Dec. 8, 2005), *available at* http://www.cobbk12.org/centraloffice/adminrules/F_Rules/Rule%20FF.htm; FAIRFAX COUNTY (VA.) SCHOOL BOARD, POLICY 8170.1: NAMING SCHOOL FACILITIES AND DEDICATING AREAS OF SCHOOL FACILITIES OR GROUNDS, (revised May 14, 2004) *available at* http://www.fcps.edu/Directives/P8170.pdf; FALLS CHURCH CITY (VA.) PUBLIC SCHOOLS, REGULATION 4.25: NAMING OF SPECIFIC AREAS OF SCHOOL FACILITIES (adopted Jan 10, 2006), *available at* http://www.fccps.k12.va.us/html/facilitiespolicies/4.25r.pdf (same).

[82] *See, e.g.*, COBB COUNTY, *supra* note 81.

[83] *See, e.g.*, SCH. DIST. OF PHILADELPHIA, POLICY 712: NAMING OF SCHOOL DISTRICT PROPERTIES (revised Feb. 22, 1994), *available at* http://www.phila.k12.pa.us/offices/administration/policies/712.html; SCH. DIST. OF WAUKESHA (WIS.), POLICY 9600G: GUIDELINES FOR NAMING OF SCHOOLS, FACILITIES AND PROPERTIES (amended Oct. 11, 2000), *available at* http://www.waukesha.k12.wi.us/Library/lcumming/9600g.pdf. *But see* BROCKTON (MASS.) PUB. SCH., COMMITTEE POLICY FF: NAMING SCHOOL BUILDINGS AND FACILITIES, 2 (approved Jan. 21, 2003), *available at* 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.").

[84] LOUDOUN COUNTY (VA.) SCH. BD., BYLAW 2-33: NAMING RIGHTS FOR SCHOOL FACILITIES AND PROGRAMS (adopted May 25, 2004), *available at* http://www.loudoun.k12.va.us/50975518115039/lib/50975518115039/Chapter%202/2-33.pdf; VENTURA (CAL.) UNIFIED SCH. DIST., BOARD POLICY 7511: NAMING OF SCHOOL FACILITY, § 2.2 (adopted Oct. 27, 1992), *available at* http://www.ventura.k12.ca.us/legalcounsel/id927.htm.

[85] The author's search found only one policy which allowed for *rescinding* a name,

effectively allow – or, more accurately, acknowledge – a sea change in 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, is wide and growing. Many school boards have apparently interpreted the policies' silence as an implicit authorization, and have engaged in naming rights deals where their own policies do not specifically prohibit them.[86] 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"[87] and often specifically exclude living or non-retired persons.[88] Nearly all contemplate recognition of contributions to the "public welfare,"[89] 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. For constitutional purposes, the most disturbing aspect of the practice-policy gap is that it apparently reflects

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and even then the policy applied only "in extraordinary circumstances" including the sponsor being convicted of "a felony or of a crime involving moral turpitude" or whose "name has become associated with violent activity." CLARK COUNTY (NEV.) SCH. DIST., POLICY 7223: NAMING OF EDUCATIONAL FACILITIES (revised April 22, 2004), *available at* http://ccsd.net/directory/pol-reg/pdf/7223P.pdf; TENN. BD. OF REGENTS, POLICY 4:02:05:01: NAMING BUILDINGS AND FACILITIES AND BUILDING PLAQUES (Sept. 18, 1992), *available at* http://www.tbr.state.tn.us/policies_guidelines/business_policies/4-02-5-01.htm.

[86] *See, e.g.*, Brandon Keat, *Schools Gain Interest in Name Game*, PITTSBURGH TRIB. REV., Apr. 12, 2006 (describing a sale of school naming rights and noting that "Mt. Lebanon School District has a rights policy, but it does not address corporate sponsorship.").

[87] PITT COUNTY (N.C.) BD. OF EDUC., POLICY 5.401: NAMING SCHOOLS AND ANCILLARY FACILITIES (reviewed Oct. 2005), *available at* http://www.pitt.k12.nc.us/boe/files/5/5.401_Naming_Schools_and_Ancillary_Facilities.doc; FAIRFAX COUNTY (VA.) PUBLIC SCHOOLS REGULATION 8170.3, IV (effective July 19, 2004), *available at* http://www.fcps.edu/Directives/R8170.pdf.

[88] JEFFCO (COLO.) PUB. SCH., POLICY FF: NAMING OF SCHOOL FACILITIES (revised Jan. 25, 2005), *available at* http://jeffcoweb.jeffco.k12.co.us/board/policies/ff.html.

[89] MILWAUKEE PUB. SCH., ADMINISTRATIVE POLICY 5.01: FACILITIES, 6(A) NAMING SCHOOL FACILITIES (revised Mar. 30, 2006), *available at* http://www2.milwaukee.k12.wi.us/governance/rulespol/policies/PDF/CH05/5_01.pdf.

the belief that a school board can sell naming rights without any reference to any policy at all.[90] If nothing else, it is clear that acting outside of an established policy framework exposes school boards to First Amendment challenges and simultaneously strips away their best defenses.[91]

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.[92] And as the discussion above indicates, school boards have thus far not been particularly scrupulous about following their own written rules. The policy review in this Part suggests that local school boards, like other government actors before them,[93] may be inadvertently wandering into a First Amendment thicket. The following Part illuminates potential paths through it.

III. A NEW FIRST AMENDMENT FRAMEWORK

Although school board officials generally see naming rights as a

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[90] 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).

[91] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co., 463 U.S. 29 (1983) (applying "arbitrary and capricious" standard to agency action and finding that National Highway Traffic Safety Administration failed to provide sufficient reasons for its decision to abandon passive restraint requirements)

[92] Courts in a number of First Amendment cases have found that the lack of practical oversight over a particular policy was sufficient to create a public forum for free speech. Christ's Bride Ministries, Inc. v. SEPTA, 148 F.3d 242, 251 (3d Cir. 1998), *cert. denied* 525 U.S. 1068 (1999); Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Authority, 767 F.2d 1225, 1232 (7th Cir. 1985); s*ee also*, E. Timor Action Network v. New York, 71 F. Supp. 2d 334, 338-40 (S.D.N.Y. 1999); Nat'l Abortion Rts. Fed'n v. Metro. Atlanta Rapid Transit Auth., 112 F. Supp. 2d 1320, 1326 (N.D.Ga. 2000); AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth., 42 F.3d 1, 24-25 (1st Cir. 1994); *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); Dolan, *supra* note 73, 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).

[93] 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, 623-24 (2000).

policy issue rather than a legal matter,[94] 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, thus leaving them open to charges of viewpoint and content discrimination.[95] First Amendment-based challenges from excluded sponsors seem all but inevitable.

These challenges will raise important constitutional questions that do not admit of easy answers. Despite the First Amendment's seemingly clear language – "Congress shall make no law … abridging the freedom of Speech"[96] – courts have interpreted it as giving different levels of protections to different kinds of speech depending on the speaker, the message, and the forum where it is delivered.[97] As a result, different categories of speech receive different levels of protection. 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 varying and sometimes ill-defined tests both in terms of their definitions and the standards to which they are held. 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, 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

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[94] 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.").

[95] 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 Broadcasting, Inc. v. Metro. Sports Facilities Comm'n, 797 F.2d 552 (8th Cir. 1986).

[96] U.S. CONST. amend. 1.

[97] Many scholars have called for a more evenhanded application of the Amendment. *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*].

leave the difficult problem of the forum: What does it matter that these naming rights deals take place on 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 speech in schools. This final Part uses school naming rights as a lens through which to examine these three areas of First Amendment law, in an attempt to clarify their elusive meanings by sketching the ill-defined and sometimes porous boundaries between them. It points out connections and overlaps where they exist, and argues that the boundaries between these three categories can never be resolved 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 school itself. As the naming polices 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 acknowledgement 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, then their sponsorship decisions may be considered "government speech." This Section assesses the government speech standard and applies it to the issue of school naming rights.

1. Defining and Regulating Government Speech

Government speech as a First Amendment concept has a complicated family tree.[98] It evolved in a series of cases involving

[98] 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 family picture has often been painted in such stark terms. *See, e.g.*, William Van Alstyne, *Remembering Melville Nimmer: Some*

"subsidized" speech, which introduced the proposition that the government can effectively "speak" through its relationships with private actors.[99] The seminal case is *Rust v. Sullivan*, in which the Supreme Court rejected a constitutional challenge to Title X of the Public Health Services Act.[100] That provision would have withheld government funds from family planning services that provided abortions,[101] a condition which 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."[102] *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 and limited *Rust* just a few years later in *Rosenberger v. Rector and Visitors of the University of Virginia*, holding that a public university could not refuse to fund student publications which expressed belief in a deity.[103] On its face, *Rosenberger* seemed contrary to *Rust*'s grant of broad governmental authority. Both cases involved First Amendment challenges by private actors whose activities the government had refused to fund.[104] But whereas *Rust* denied the

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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.").

[99] 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).

[100] 500 U.S. 173 (1991). Earlier cases implicitly reached the conclusion that *Rust* eventually adopted. *See, e.g.*, Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1044 (5th Cir. 1982) (en banc).

[101] 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).

[102] 500 U.S. at 193.

[103] 515 U.S. 819 (1995). Although scholars tend to identify *Rosenberger* as a pillar of government speech doctrine, the Court actually approached *Rosenberger* through the lens of forum analysis. *Id.* at 829-831. This Article addresses public forum analysis in more detail in Part III.C.

[104] *See also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (upholding, against a viewpoint discrimination challenge, NEA grant-making procedures which funded some constitutionally protected activities but not others).

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.[105] 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 its own message, whereas in *Rosenberger* it attempted to discourage certain private viewpoints.[106] Justice Kennedy repeated this distinction in *Legal Services Corp. v. Velazquez*, again reading *Rust* as protecting the government's right to engage in viewpoint discrimination when it speaks, but not when subsidizes private speakers.[107] The rationale behind this rule derives from basic democratic principles: "When the government speaks, for example to promote its own policies or advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."[108] 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.[109]

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[105] *Rosenberger*, 515 U.S. at 833. 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"), *cert denied*, 528 U.S. 1159 (2000).

[106] Later cases suggested, but did not hold, that the religious content of the disputed speech was behind the Court's determination in *Rosenberger*. Good News Club v. Milford Cent. Sch., 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.").

[107] 531 U.S. 533 (2001) (overturning statute which provided government funding for public interest lawyers on the condition that the lawyers not challenge welfare policy); s*ee also* Commonwealth v. Davis, 39 N.E. 113 (1895) (Holmes, J.), *aff'd sub nom.* Davis v. Massachusetts, 167 U.S. 43, 47 (1897) ("For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in the house."). *But see* Hague v. CIO, 307 U.S. 496, 515 (1939).

[108] *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* Johann v. Livestock Marketing Ass'n, 544 U.S. 550, 563-64 (2005).

[109] Of course this solution is imperfect, since 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

The tenuous distinctions drawn in *Rust* and *Rosenberger* left many scratching their heads about what constitutes government speech,[110] and courts have struggled mightily to identify it.[111] 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.[112]

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.[113] *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.

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principals.

[110] Bezanson & Buss, *supra* note 97, 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, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, *supra* note 98.

[111] 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).

[112] Post, *Subsidized Speech*, *supra* note 101, at 152.

[113] 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).

Courts' attempts to apply government speech analysis to message-bearing license plates illustrate the point. In twin cases involving factually similar First Amendment challenges to specialty license plates, federal district courts came to opposite conclusions about whether such plates represent government speech. In *Sons of Confederate Veterans v. Holcomb*, the district court struck down on First Amendment grounds a legislative prohibition on logo-bearing license plates, finding that the prohibition was targeted specifically against displays of the confederate flag, and that as such it violated the free speech of the *sponsor*, not the government.[114] By contrast, *Henderson v. Stalder* invalidated on First Amendment grounds a license plate specifically approved by the Louisiana legislature which read "Choose life."[115] In *Henderson*, the court considered the license plate to be government speech, and ruled that such speech must be viewpoint neutral.[116]

The divergent classifications in the license plate cases illustrate the difficulty of classifying state-affiliated messages as government speech or not. They also illuminate one of the complicated interactions between the standards that apply to government speech as opposed to other forms of speech: Although the license plate cases identified different speakers, they applied similar standards and reached the same results. *Henderson*, finding government speech, required that it be made in a viewpoint neutral manner.[117] *Holcomb*, finding private speech, required any regulations on that speech to be viewpoint neutral.[118] The simple answer to that apparent conflict may be that *Henderson* mis-applied *Rust* by ignoring its holding that the government can engage in viewpoint discrimination when it is the speaker. It might also be that the *Henderson* and *Holcomb* courts intuited the same result – that license plates should be viewpoint-neutral – and simply took different routes to reach it.

School naming rights cases and other examples of government sponsorship may give courts an opportunity to clarify that tenuous distinction and explain whether "viewpoint neutral" is in fact the same standard when applied to government speech as to regulations on private speech. Even smoothing out this wrinkle in the doctrine, however, will not absolve courts from the difficult task of identifying government

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[114] 129 F. Supp. 2d 941, 945 (W.D. Va. 2001).

[115] 112 F. Supp. 2d 589 (E.D. La. 2000); *rev'd on other grounds*, 287 F.3d 374 (5th Cir. 2002) (finding lack of standing).

[116] The court's analysis blended, without comment, government speech and forum analysis, thus implicitly recognizing an overlap discussed at greater length in Subsection III.C.3. *See* 112 F. Supp. 2d at 598.

[117] *Id.*

[118] 129 F. Supp. 2d at 945.

speech when it occurs.

2. Identifying the Speaker and Message of School Naming Rights

Though the standard *governing* government speech is itself ill-defined,[119] the confusion it causes pales in comparison to the bewildering task of identifying government speech in the first place. *Rust* and *Rosenberger* make it clear that the most important question is determining whether the government itself is the one with the message, even if that message is actually delivered by a private agent.[120] The simplicity of the question, however, obscures the difficulty of its application.[121]

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[122] – then it seems reasonable to assume that they are paying the schools to send a particular message. They are, in other

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[119] *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.").

[120] Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, *supra* note 98, 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.").

[121] Many cases seem to have gone out of their way to avoid finding government speech. *See, e.g.*, *Southworth*, 529 U.S. at 234-35 (utilizing compelled speech framework to analyze mandatory student activity fees to fund private organizations engaging in political or ideological speech as a compelled speech claim, and noting that "the analysis likely would be altogether different" if the matter concerned speech by a university). Courts have, for example, generally rejected the "government speech" argument in a series of cases challenging mandatory assessments collected in agricultural industries to support generic advertising. Livestock Mktg Assoc. v. U.S. Dep't. of Agric., 335 F.3d 711 (8th Cir. 2003); Pelts & Skins, L.L.C. v. Jenkins, 259 F. Supp. 2d 482, 490 (M.D. La. 2003); *In re* Washington State Apple Adver. Comm'n, 257 F. Supp. 2d 1290, 1305 (E.D. Wa. 2003); Mich. Pork Producers v. Campaign for Family Farms, 229 F. Supp. 2d 772, 785-89 (W.D. Mich. 2002). *But see* Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000) (finding government speech where high school teachers, with approval of the principal, had created a bulletin board for materials related to Gay and Lesbian Awareness Month, proclaimed by the school board to promote tolerance, which included school district posters and other materials).

[122] *See supra* notes 38-45 and accompanying text.

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.[123] If paying for use of a government facility – whether to place one's name on it, or to use it actively – is the equivalent of buying a government endorsement which is itself "government speech," then even after-school programs would generally fall into the category.[124] 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 government speech cases such as *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 involving governmental units (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?[125] If the message is the government's, then school names can properly be considered government speech. That theory, in turn, 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

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[123] 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, 703-04 (1996) ("A private speaker in a government-created limited public forum is not the government.").

[124] *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.").

[125] *See* Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, *supra* note 98, at 2412.

based. Specifically, schools might use their names to either associate themselves with or extol the virtues of a historical figure (e.g., George Washington High) or to re-affirm their attachment to a certain community (e.g., Durham High). The same rationale, of course, applies to school facilities such as stadiums (e.g., 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.[126] 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.[127]

Other naming policies explicitly recognize that "[t]he name of a public school or public school facility should be an appropriate representation and reflection of the school or school-community."[128] These policies strongly suggest that the districts which drafted them have not only recognized the message sent through their schools' names, but 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

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[126] COBB COUNTY, *supra* note 81 ("The Cobb County School District (District) recognizes that the official names of its facilities are vital to their public image."); *see also* CARTERET COUNTY, *supra* note 78 ("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.").

[127] ROCHESTER CITY SCH. BD., POLICY MANUAL 75000, NAMING NEW FACILITIES (revised Aug. 20, 1998), *available at* http://www.rcsdk12.org/BOE/PM/PM%20pdfs/7000/7500%20Naming%20Facilities.pdf.

[128] HAW. BD. OF EDUC., *supra* note 79; *see also* NEWTON CONOVER (N.C.) BD. OF EDUC., POLICY 7302: NAMING SCHOOL FACILITIES, G.S. 115C-36, -47 (adopted Nov. 14, 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, statff, school district and community.").

Jefferson High is an act of speech by the deceased president or his estate, after all. Indeed, *Rust* seems to stand for the proposition that the government is still the speaker when it hires a private actor (here, the named sponsor) to deliver its message.[129] 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.[130] This, of course, is the kind of message corporate sponsors clearly hope the school will send. Indeed, 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 out of cases involving subsidies to private speakers.[131] 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 have found government speech in two recent cases involving government acknowledgment of financial sponsors.[132] Neither case, 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 employ a "reasonable observer"

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[129] The Court's recent decision in *Garcetti v. Ceballos*, 126 S. C.t 1951 (2006), 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.

[130] Establishment Clause jurisprudence obviously offers a relevant analogue to this "endorsement" theory. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 109 (1968). Because religious speech raises thorny complications beyond the scope of this Article, I do not rely on those cases here.

[131] 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).

[132] 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 conclude that the sign is Denver's speech, not that of the listed corporations."); *Knights of the KKK*, 203 F.3d at 1093.

test.[133] And although many courts have suggested that they would favor such a test,[134] the Supreme Court all but foreclosed that approach in *Johann v. Livestock Marketing Association*,[135] 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.[136] Some scholars have already decried the result in *Johann* and called again for an observer-centered jurisprudence,[137] but their proposed solution – requiring the government to identify itself when speaking[138] – does not obviate the need to ask difficult questions. If anything, it 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, 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 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 (i.e., 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 Educational Television Commission v.*

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[133] *See* Knights of KKK, et. al., v. Arkansas State Highway & Transp. Dep't, 807 F. Supp. 1427, 1436 (W.D. Ark. 1992); *see also* Bezanson & Buss, *supra* note 97, 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 73, 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.").

[134] Dolan, *supra* note 73, at 118.

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

[136] 544 U.S. 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.").

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

[138] *Id.*

Forbes, for example, the Court found that "when a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity."[139] 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 itself amount to government speech.[140]

This analogy, however, highlights yet another complication in the analysis: What happens when the government subsidizes *commercial* speakers?[141] As described in more detail in the following Section, commercial speech receives an entirely different standard of protection than "pure" speech. Courts have up until now treated commercial and government speech as exclusive categories, 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. This Section's discussion of government speech and the following Section's treatment of commercial speech address the first two possibilities. The third possibility, however, raises difficult and unanswered questions about the boundaries between government and commercial speech, and the appropriate standards governing each.

As described above, the standard First Amendment prohibition on viewpoint discrimination does not apply to government speech. But commercial speech doctrine – explored in more detail in the following section – 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.[142] 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

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[139] 523 U.S. 666, 674 (1998); s*ee also Finley*, 524 U.S. at 585-86 (1998) (finding that viewpoint neutrality is not required in selection of art exhibits for public funding).

[140] Dolan, *supra* note 73, at 110 (citations omitted).

[141] The same problem does not arise under the first potential reading of the government message – that the school's name sends a message about the school itself – because government speech is the only feasible categorization for that kind of message.

[142] See *infra* Part III.B.1.

entitled to some heightened level of protection.[143] 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. *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 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,[144] thus giving the government 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*.

3. School Naming Rights as Compelled Speech

The Supreme Court has held that there is no constitutionally significant difference between compelled speech and compelled silence,[145] and has suggested that a particular speech act may still be subject to scrutiny as compelled speech even if it is classified as

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[143] 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 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 109-110, 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* Largent v. Texas, 318 U.S. 418, 422 (1943); Jamison v. Texas, 318 U.S. 413, 414-18 (1943). Although I do not address the argument in any detail here, these cases seem to imply that religious speech, like government speech, is primarily defined by the speaker's identity.

[144] *See infra* notes 185-201 and accompanying text.

[145] *Riley*, 487 U.S. at 796-97; 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").

government speech.[146] Indeed, students have successfully challenged particular school requirements on exactly those grounds. In *West Virginia Board of Education v. Barnette*,[147] the Court invalidated a state law requiring all children in public schools to salute and pledge allegiance to the flag, holding that that the law required an affirmation of belief[148] and thus violated the First Amendment. Justice Jackson held for the Court:

> 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.[149]

A school's name may not be freighted with quite the same "belief" structure as the pledge of allegiance or flag, but it is easy to imagine that a sponsor's identity could be just as controversial as the flag or the pledge of allegiance. As the debate about school commercialism and the 'Coke Day' incident demonstrates,[150] many students consider corporate branding to be a matter of political and social import. So far, most objections to the practice have centered on the prevalence of advertising in schools. Naming rights, however, could take the issue into a new realm by forcing students to not only observe corporate advertisements in the hallways but to carry them around on their transcripts. A student who strongly opposed a particular corporate sponsor might argue that being forced to acknowledge or support that sponsor amounted to a compelled acknowledgement or endorsement of the sponsor on the *student*'s part, since she must not only attend the named facility but perhaps also wear school uniforms or sports jerseys bearing the sponsor's name. In that respect, students, too, may have speech rights which are implicated by naming rights arrangements.

Even though it may be impossible to predict how any particular naming rights policy will be categorized, the framework described here

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[146] *See Wooley,* 430 U.S. at 717.

[147] 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").

[148] 319 U.S. at 633.

[149] *Id.* at 642.

[150] *See supra* notes 7-11.

does identify 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, 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 which 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 that argument.

B. School Naming Rights as Commercial Speech: Content-Based Classification

Whereas the government speech standard appears to apply with equal force no matter what kind of speech the government engages in, private actors' speech is regulated by a variety of different standards depending on the content of the speech[151] rather than just the identity of the speaker.[152] In the school naming rights context, the most prominent non-governmental speakers are the sponsors themselves, most of whom are commercial actors pursuing commercial interests. And in an unsteady and somewhat unpredictable line of cases, the Supreme Court held that restrictions on "commercial speech" are subject to a form of intermediate scrutiny. This Section gives a brief overview of 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, it highlights some of the problematic border disputes between commercial speech, government speech, and forum analysis.

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[151] The following Section on forum analysis addresses the relevance of the speaker's *location*.

[152] 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 40-42 and accompanying text and *infra* notes 171 & 204 and accompanying text.

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 "commercial speech," neither has it bemoaned the lack of one.[153] Instead, the Court has "recited various descriptions, indicia, and disclaimers without settling upon a precise and comprehensive definition."[154] 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 Council* that commercial speech is that which does "'no more than propose a commercial transaction.'"[155] 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.[156] This approach generally followed Blackmun's formulation, which regarded as commercial only that which is exclusively so. It also preserved the existence of the commercial speech category while simultaneously extending full First Amendment protection to a wide range of

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

[154] Stern, *supra* note 153, at 56; Piety, *supra* note 46, at 381.

[155] 425 U.S. 748, 762 (1976) (citing Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations, 413 U.S. 376, 385 (1976)); *see also* Thomas C. Goldstein, Nike v. Kasky *and the Definition of "Commercial Speech"*, 2003 SUP. CT. REV. 63, 72 (referring to this as the "most often-repeated" definition of commercial speech the Court has offered).

[156] *See, e.g.*, *Murdock*, 319 U.S. 105 (invalidating on First Amendment grounds an ordinance and license tax on evangelists disseminating a religious message and selling religious materials and finding that the "sale" of religious literature does not turn evangelism into commercial speech).

commercially-related speech. In *Riley v. National Federation of the Blind*, for example, the Supreme Court held that a North Carolina statute governing solicitation of charitable contributions was an unconstitutional restriction on *non*commercial speech.[157] 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, we 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. Therefore, we apply our test for fully protected expression."[158] *Riley* thus suggested that inclusion of a partially noncommercial message can remove speech from the commercial category. But the Court revisited and limited *Riley* just one year later in *Board of Trustees v. Fox*, saying that the commercial and protected speech in *Riley* "was 'inextricably intertwined' because the state law *required* it to be included."[159] *Fox*, by contrast, involved a university's attempts to ban on-campus Tupperware parties. Opponents of the ban cited *Riley* and argued that the 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."[160] 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."[161] *Riley* and *Fox* thus reinforce the point that the best way to protect a particular act of "commercial" speech is not to classify it as such.

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

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[157] 487 U.S. 781, 789, 798 (1988).

[158] *Id.* at 796.

[159] 492 U.S. 469, 472 (1989).

[160] *Id.* at 474.

[161] *Id.*; *see also Central Hudson*, 447 U.S. at 563 n.5 (refusing to grant full free protection to speech simply because it "links a product to a current public debate."); New York 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).

traces back to *Bolger v. Youngs Drug Products Corp*,[162] in which 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 has 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."[163] 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.[164] Indeed, 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."[165]

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.[166] Controversy over commercial speech bubbled to the surface most recently in *Kasky v. Nike*, a California Supreme Court case on which the United States Supreme Court granted – and later controversially dismissed – certiorari.[167] Responding to allegations (which were undoubtedly entitled to full First Amendment protection) that it abused workers in overseas sweatshops, Nike published a series of "editorial advertisements," press releases, and letters sent to newspapers and universities.[168] 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

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[162] 463 U.S. 60 (1983).

[163] *Id.* at 64 (citing Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 455-56 (1978)).

[164] *Id.* at 67-68.

[165] *Bolger*, 463 U.S. at 67-68.

[166] *See, e.g.*, Edenfield v. Fane, 507 U.S. 761, 765 (1993) ("[A]mbiguities may exist at the margins of the category of commercial speech."); Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993) (acknowledging "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category."); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985) (noting that "the precise bounds of the category of … commercial speech" are "subject to doubt, perhaps.")

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

[168] Goldstein, *supra* note 155, at 65.

California prohibiting false and misleading statements,"[169] 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 Amendment protection.[170] The Court justified this determination on three major grounds. First, it found that the speaker (Nike), was likely to be engaged in commerce.[171] Second, the court held that the intended audience was likely to be actual or potential buyers.[172] 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.[173] The California court's framework set off a firestorm of academic and popular debate, most of it negative, all of it calling for clarification from the United States Supreme Court. [174] 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[175] and Breyer[176] and dooming commercial speech to the same twilight of ill-definition it has endured since its birth.[177] 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*, purveyors of commercial speech could not count on any First Amendment protection whatsoever, even when they mixed their commercial messages with "political" ones.[178] In 1976,

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[169] *Kasky*, 45 P.3d at 248.

[170] *Id.* at 315; *see also Central Hudson*, 447 U.S. at 563 n.5 (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 46.

[171] *Kasky*, 45 P.3d at 258

[172] *Id*.

[173] *Id.*

[174] *See, e.g.*, 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); Goldstein, *supra* note 155.

[175] 539 U.S. 665 (Kennedy, J., dissenting from dismissal of certiorari)

[176] 539 U.S. 665 (Breyer, J., dissenting from dismissal of certiorari)

[177] *See* Collins & Skover, *supra* note 174; Samuel A. Terilli, Nike v. Kasky *and the Running-but-Going-Nowhere Commercial Speech Debate*, 10 COMM. L. & POL'Y 383 (2005).

[178] 316 U.S. 52 (1942) (upholding constitutionality of municipal ordinance forbidding distribution of printed handbills for commercial advertising in the streets,

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 State Board*, the Court held for the first time that "speech which does 'no more than propose a commercial transaction'" is not "so removed from any 'exposition of ideas,' and from 'trust, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government'" that it should be completely without protection.[179] The Court focused on the First Amendment rights of potential *patients*, as recipients of this information,[180] finding that even if an advertiser's motives were purely economic, his speech was entitled to some level of protection.[181]

Having established in *Virginia State Board* that commercial speech is entitled to some First Amendment protection, the Court set out a four-step analysis to test restrictions on it in *Central Hudson Gas & Electric v. Public Service Commission*.[182] The first prong of that test asks whether the speech at issue "concerns lawful activity and [is not] misleading."[183] If the speech fails this initial inquiry, it receives no First Amendment protection at all.[184] If it passes, the second prong then assesses whether the government's interest is "substantial."[185] The third asks whether the regulation directly advances the government interest asserted,[186] 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.[187] Though the second and third prongs are relatively simple for a government regulation to meet,[188] the final prong has become an

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even though half of the handbill in question was devoted to a nominally political protest). *Valentine* pre-dated the mixed-message cases discussed above.

[179] 425 U.S. at 762.

[180] *Id.* at 754-56, 763-65.

[181] *Id.* at 762.

[182] 447 U.S. 557 (1980).

[183] *Id.* at 566.

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

[185] 447 U.S. at 566.

[186] *Id.*.

[187] *Id.*

[188] The Court has upheld as valid government interests the promotion of energy conservation, *Central Hudson*, 447 U.S. at 566, the prevention of drunkenness, *44 Liquormart 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 Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (applying *Central Hudson* and finding that Florida Bar rules prohibiting lawyers from using

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.[189] The Court's more recent jurisprudence, however, has clarified that the fourth prong of *Central Hudson* does allow the government some leeway in its regulations. In *Fox*, the Court held that a regulation on commercial speech not need be the least restrictive measure available, so long as it is a "fit that is not necessarily perfect, but reasonable between means and ends."[190]

Central Hudson has endured as a test, though its application has been uneven.[191] 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*,[192] four Justices found that San Diego's complete ban on all outdoor commercial advertising display signs met the requirements for regulating commercial speech because it directly advanced governmental interests and was not overbroad.[193] Five years later, the Court's protection of commercial speech "undoubtedly reached its nadir"[194] in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.[195] In *Posadas*, the Court upheld Puerto Rico's flat prohibition on advertising about casinos.[196] Writing for the Court, Justice Rehnquist suggested that since Puerto Rico could ban casino gambling altogether, it was also entitled to restrict

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direct mail to solicit person injury clients within thirty days of their injury easily met the first three prongs and more narrowly met the fourth as well).

[189] 447 U.S. at 569-72.

[190] 492 U.S. at 480; s*ee also Florida Bar*, 515 U.S. at 635 (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).

[191] Post, *The Constitutional Status of Commercial Speech*, *supra* note 153, 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.").

[192] 453 U.S. 490 (1981).

[193] *Id.* at 508-513 (plurality opinion) (striking down the regulation on other First Amendment grounds).

[194] Stern, *supra* note 153, at 65.

[195] 478 U.S. 328 (1986).

[196] 478 U.S. 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.").

gambling advertisements.[197] *Posadas* led a short and troubled life, however, and was repudiated in 1996 by *44 Liquormart, Inc. v. Rhode Island*.[198] 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.[199] 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."[200] *44 Liquormart* thus signaled a new and increasingly-protective era of commercial speech doctrine.[201] Having restricted the definition of commercial speech – thus leaving more speech with full First Amendment protection – the Court has also increased the protections accorded to that speech.[202]

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. 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

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[197] *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 is not misleading or fraudulent." 478 U.S.. at 340-41.

[198] 517 U.S. 484 (1996).

[199] *Id.* at 505-08.

[200] *Id.* at 502.

[201] *See Developments in the Law - Corporations and Society*, 117 HARV. L. REV. 2169, 2275-82 (2004) Stern, *supra* note 153, at 72 ("The splintered opinions in *44 Liquormart* should not obscure the fact that this decision heralded a more protective attitude toward commercial speech.").

[202] *See, e.g.*, *Lorillard*, 533 U.S. 525; *see also* Note, *Making Sense of Hybrid Speech*, 118 HARV. L. REV. 2836, 2854 (2005); Stern, *supra* note 153, at 58.

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 make even an otherwise-innocuous naming rights deal into something more commercial.[203] Thus naming rights to Nike High School might be classified as noncommercial speech, but if the Nike swoosh logo were added, the effect would undoubtedly be commercial.[204]

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 well.[205] Balancing these factors is no easy task. As discussed above,[206] most sponsors enter into naming rights deals 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 State Board*) 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."[207]

Traditional "product identification" advertising is vanishingly rare. Indeed, "[a] great deal – perhaps almost all – corporate advertising expression does not have anything at all to do with the transmission of

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[203] Note, *Making Sense of Hybrid Speech*, *supra* note 202, 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.").

[204] *See id.* at 2839 n.14.

[205] 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." *Virginia State Board*, 425 U.S. at 762.

[206] *See supra* notes 40-46 and accompanying text.

[207] 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 (last visited Oct. 15, 2006).

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."[208] But while advertising itself has changed greatly over the years, 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 Board* definition, are increasingly divorced from what most companies 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 may find themselves manning the ramparts of an empty castle.

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 intended to help the company's bottom line commercially but which could also very easily be described as political or even charitable.[209] The dispute over Nike's speech in *Kasky* illustrates the point and the context quite clearly,[210] and highlights the difficult questions courts face when resolving mixed motive speech cases. Must 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? 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 which is entitled to full First Amendment protection, but that emblazoning the

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[208] ROGER A. SHINER, FREEDOM OF COMMERCIAL EXPRESSION 308 (2003); *see also* Piety, *supra* note 46, 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)).

[209] *See generally* Piety, *supra* note 46.

[210] Nike essentially argued that its statements feel 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 Petitioner Nike Corp. at 21, Nike v. Kasky, 539 U.S. 654 (2003) (02-575); *see also id*., 6, 24, 27, 30, 35, 36. 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 Mark Kasky at 29-36, Nike v. Kasky, 539 U.S. 654 (2003) (02-575), 2002 U.S. Briefs 575.

donor's name on the side of the building is commercial speech, or even, as suggested in Part III.A, government speech.

After the detail-dependent classification question is resolved, the next question 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.[211] 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 of *Central Hudson* asks whether the regulation at issue directly advances the government interest asserted, and it is here that 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 school's educational missions.[212] That debate would echo loudly in the naming rights context.

The fourth prong – overbreadth, which doomed the regulation in *Central Hudson* itself – 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 certain classes of advertisements.[213] 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

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[211] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 331 (2003).

[212] *See supra* notes 7-11 and accompanying text. *See also* Seth Grossman, Comment, *Grand Theft Oreo: 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").

[213] *Compare Posadas*, 478 U.S. at 344 (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*, 517 U.S. at 509 ("Given our longstanding hostility to commercial speech regulation of this type, *Posadas* clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy."); *see also Metromedia*, 453 U.S. at 508-13 (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 "Our commercial speech cases recognize some room for the exercise of legislative judgment.").

requires the state to carry a "heavy burden."[214] In shouldering that burden, the government would do well to connect *Central Hudson*'s second and fourth prongs. In other words, the court might find 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). Although courts have not explicitly acknowledged any connection between the second and fourth prongs of *Central Hudson*, a close reading of commercial speech cases suggests that it does in fact exist. To take just one example, in the pre-*Central Hudson* case of *Ohralik v. Ohio State Bar Association*,[215] the Supreme Court found that a broad prophylactic ban on lawyers' in-person solicitation of clients was a permissible regulation of commercial speech, given the importance of the governmental interest in preventing solicitees' duress.[216]

The difficulty of applying commercial speech doctrine to naming rights highlights not just the problems of commercial speech – which have been ably documented elsewhere[217] – but also the border disputes between government speech and commercial speech. Resolving those disputes may prove nearly impossible under current doctrine, since the government speech and commercial speech analyses begin with fundamentally different inquiries that yield non-exclusive answers. 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, of course, and may result in overlapping answers: Speech can simultaneously meet the tests for government and commercial speech. The preceding Part 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 apply to government speech and use it to differentiate

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[214] *44 Liquormart*, 517 U.S. at 516.

[215] 436 U.S. 447 (1978).

[216] *Id.* at 468; *see also Florida Bar*, 515 U.S. 618 (upholding Florida bar association's prohibition on lawyers sending written solicitations to prospective personal injury clients within thirty days of the accident). *But see In re Primus*, 436 U.S. 412 (1978) (finding that an ACLU lawyer's letter to a group of indigent political clients falls within the "generous zone of First Amendment protections reserved for associational freedoms" and that "[w]here political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterized government regulation of the conduct of commercial affairs.").

[217] *See generally* Symposium, Nike v. Kasky *and the Modern Commercial Speech Doctrine*, 54 CASE W. RES. 965 (2004).

between different kinds of *non*governmental 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 the previous Section 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 is trying to limit the speech of a private speaker, such as an the 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.

C. School Naming Rights and Forum Analysis: Forum-Based Classification

The previous two Sections have considered naming rights as government speech, as commercial speech, and even as a combination of both. There is, however, another possibility: That naming rights constitute *non*commercial 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 support, an essentially noncommercial act. Such speech is generally entitled to the full protections of the First Amendment, with certain very limited exceptions.[218] However, even this "pure" speech can be validly regulated based upon the "forum" where it is made. In the case of naming rights, which obviously take place in the unique forum of public schools, that analysis can be deceptively simple. When considered alongside the commercial speech and government speech approaches described above, it becomes even more so, since forum analysis focuses primarily on the location of a speech act, rather than on the speaker or the content involved.

[218] These exceptions include obscenity, Miller v. California, 413 U.S. 15, 24 (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.

1. Defining the Forum

The acceptability of a government regulation on "pure" speech depends on the characterization of the "forum"[219] where the speech is made.[220] 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.[221] This lack of a boundary makes it difficult to predict how courts will characterize the "forum" created by naming rights arrangements,[222] but it is clear that their determination will turn on a fact-intensive review of the particular policy or decision at issue.

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."[223] Regulations of speech in such forums are subject to strict scrutiny, and the only acceptable restrictions are those on time, place, and manner, or content-based restrictions which are narrowly drawn to serve a compelling state interest.[224] Fortunately for school

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[219] For the purposes of forum analysis, "place" includes not just physical property but even channels of communications such as a intraschool mail system. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44-50 (1983); *see also Rosenberger*, 815 U.S. at 830 ("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, 801 (1985) (treating charitable contribution fund as property for purposes of forum analysis).

[220] *Perry,* 460 U.S. at 46 (describing forum analysis).

[221] Lefstin, *supra* note 184, at 706.

[222] *Compare* Texas v. Knights of the Ku Klux Klan, 58 F.3d 1075, 1078 (5th Cir. 1995) (finding that the adopt-a-highway program does not create a public forum), *with Cuffley*, 208 F. 3d 702 (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.").

[223] *Perry*, 460 U.S. at 45.

[224] Widmar v. Vincent, 454 U.S. 263, 269-70 (1981); *see also* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992) (upholding reasonable restrictions on distribution of religious literature and solicitation in an airport terminal, which is not a traditional public forum); *Cornelius*, 473 U.S. 788 (holding that Combined Federal Campaign created a nonpublic forum in which restrictions must be reasonable, and that refusal to allow certain advocacy groups to participate in that forum abridged their First Amendment Rights); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (upholding prohibition on sleep-in demonstration in a park that did not generally allow overnight camping); Police Department 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 (1965) (overturning civil rights activist's convictions for disturbing the peace, obstructing a public passage, and

boards, naming rights policies are unlikely to create public forums, although it is possible that an "open" public naming rights policy – one which accepted all sponsors with no mechanism for oversight and no regulations – might do so. A school board which in practice failed to exercise control over its sponsors might also inadvertently create a public forum.[225] 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.[226] Schools and other government entities which 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 *non*public forums such as military bases[227] and the sidewalks outside post offices.[228] Regulations on speech in such nonpublic forums are acceptable, even if based on subject matter or speaker identity, so long as they are "reasonable in light of the purpose served by the forum and are viewpoint neutral."[229] In other words, the First Amendment does not prohibit the viewpoint neutral exclusion of speakers who would hinder the purpose of the nonpublic forum.[230] A naming rights policy might create a nonpublic forum if it

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picketing outside a courthouse); Niemotko v. Maryland, 340 U.S. 268 (1951) (reversing disorderly conduct convictions where petitioner was convicted for having slept in public park without a permit but the permit-granting process was entirely discretionary).

[225] *See infra* notes 92-93 and sources cited therein.

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

[227] Greer v. Spock, 424 U.S. 828, 838 (1976).

[228] *Kokinda*, 497 U.S. at 730 (suggesting existence of nonpublic forum, but ultimately resolving case on other grounds).

[229] *Perry*, 460 U.S. at 49; *Cornelius*, 473 U.S. at 803.

[230] 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) (holding that possible dangerous public reaction is

did not manifest any intent to create a means of expressive activity for the sponsors.[231]

2. Schools as Limited Forums

Although it is possible that naming rights policies would be classified as either public or nonpublic forums, public schools themselves are generally regarded as a unique kind of "limited" forum,[232] 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,"[233] but such a forum is generally thought to exist where the government opens its property for expressive activity and intends[234] to make it "generally available" to a class of speakers.[235] The intent requirement is important,[236] and demonstrates the legal relevance

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insufficient rationale to bar the Ku Klux Klan from the adopt a highway program); *see also* Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966).

[231] *See* DeLoretto v. Downy Unified Sch. Dist., 196 F.3d 958, 968-69 (9th Cir. 1999) (inferring and upholding existence of a "commercial only" policy that created a nonpublic forum where school had only ever accepted commercial advertisements and later refused to post the Ten Commandments); Dolan, *supra* note 73, 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.").

[232] *Hazelwood*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 506).

[233] *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 DICKINSON L. REV. 639 (2003).

[234] *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); *Kokinda*, 497 U.S. at 730 ("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*, 505 U.S. at 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).

[235] *Int'l Soc'y for Krishna Consciousness,* 505 U.S. at 678-79.

[236] *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*., Planned Parenthood of Southern Nevada v. Clark County Sch. Dist., 941 F.2d 817*,* 822-23 (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 Association/Chicago Area v. Chicago Transit Authority, 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

of the motivations and concerns discussed in Part II of this Paper.[237] In any case, once a limited forum has been opened, its lawful boundaries must be respected,[238] and a form of modified strict scrutiny governs regulations of speech within it. Restrictions based on subject matter and speaker identity are acceptable,[239] but must nonetheless be "narrowly tailored to serve a significant government interest while leaving open ample alternatives."[240]

Schools and school-related activities have traditionally been treated as uniquely limited forums.[241] 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."[242] 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*[243] and *Hazelwood School District v. Kulhmeier*.[244] In *Tinker,* the Court famously ruled that "[n]either students or teachers shed their constitutional rights to freedom

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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.").

[237] Although not addressed in detail 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.

[238] *Rosenberger*, 515 U.S. at 829. 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.

[239] *Perry*, 460 U.S. at 49.

[240] Mainstream Loudoun v. Bd. of Trustees 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).

[241] 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. *Good News Club*, 533 U.S. at 112 ("[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.").

[242] *Hazelwood*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 506).

[243] 393 U.S. 503 (1969).

[244] 484 U.S. 260 (1988).

of speech or expression at the schoolhouse gate,"[245] 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.[246] The implicit acknowledgement 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 *Bethel School District No. 403 v. Fraser*,[247] which held that a school need not tolerate student speech that interferes with its "basic educational mission."[248] Specifically, the Court held in *Fraser* that a student could be subject to discipline for delivering a speech at a school assembly that was "sexually explicit" but not legally obscene, since the school was entitled to "dissociate itself" from the speech in order to demonstrate that its sexually explicit content was "wholly inconsistent with the 'fundamental values' of public school education."[249] Two years later, *Hazelwood* elaborated and clarified *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 students and the legal, moral, and ethical obligations of the writers.[250] 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 that "no violation of First Amendment rights occurred."[251] *Hazelwood* thus stands for the proposition that materials to which students might be exposed can be regulated in some circumstances, especially for curricular purposes.[252] It also extends beyond school newspapers, to include other means of expression which bear the "imprimatur" of the school.[253]

Even though *Hazelwood* established that the government is entitled to some discretion in regulating speech in schoolhouse limited

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[245] *Tinker*, 393 U.S. at 506.
[246] *Id.* at 509.
[247] 478 U.S. 675, 682 (1986).
[248] *Id*. at 685.
[249] *Id.* at 685-86.
[250] *Hazelwood*, 484 U.S. at 276.
[251] *Id.*
[252] *Id.* at 261. This point regarding curriculum obviously raises a parallel with the earlier discussion of naming rights as curricula, *supra* note 127-128, which cast their curricular value as indicative of government speech. Nevertheless, Bezanson and Buss write, *Hazelwood* "did not rest on a clearly defined idea of government speech" but rather "on doctrines premised on government's role as regulator." Bezanson & Buss, *supra* note 97, at 1418.
[253] *Hazelwood*, 484 U.S. at 269.

forums, such regulations are not immune from attack. In *Lamb's Chapel v. Center Moriches Union Free School District,* the Supreme Court found that after-school use of school property created a limited forum,[254] and that banning all religious activities from that forum constituted *viewpoint* discrimination[255] rather than the kind of subject matter regulations which are acceptable in a limited forum. Applied to the context of naming rights, *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.[256] There is no clear answer to that question. It seems reasonable that *Lamb's Chapel* was based in large 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 advertising in San Diego.[257] 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 *Lambs 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 though 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.[258] But even holding that

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[254] 508 U.S. 384, 392-93 (1993)

[255] *Id.* at 394.

[256] In the interests of keeping an already-complex issue within reasonable bounds, this Article does not address the related, interesting, and potentially mind-bending questions that would be raised if a wealthy church or other religious sponsor were to purchase naming rights. 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.*, *Rosenberger*, 515 U.S. 819 (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); *Pinette*, 515 U.S. 753 (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).

[257] 453 U.S. 490.

[258] 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*, 473 U.S. at 812-13 (remanding for a determination of whether the challenged regulations were a pretext for viewpoint discrimination).

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 *non*curricular forum created by advertising in a school newspaper.[259] This suggests that schools have more regulatory authority over naming rights deals when those deals have some kind of curricular value. And as discussed above,[260] some school board naming policies specifically acknowledge the educational function of a school's name. But as the commercial speech discussion and the concerns raised in Part II of this Paper illustrate, sponsors may indeed have advertising in mind when they enter into naming rights arrangements. Somewhat counter-intuitively, then, the degree to which 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, and thus stripped of many First Amendment protections.

3. Layering the Problem: Forum Analysis Meets Commercial and Government Speech Doctrine

This Article has thus far highlighted areas in which government speech and commercial speech overlap and interact in their definitions and governing standards. This final Subsection adds a third dimension by describing how forum analysis interacts with both commercial speech and government speech.[261]

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,

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

[260] *See supra* notes 127-128 and accompanying text.

[261] *See also* Ayers, *supra* note 93, at 623-24 (criticizing court for failing to resolve apparent conflict between forum analysis and commercial speech doctrine in the context of public transit ads); *id.* at 627-637 (exploring the "ongoing muddle of public forum doctrine and commercial/noncommercial speech distinctions"); Bezanson & Buss, *supra* note 97, at 1428-32 (criticizing the Court's attempts to draw a boundary between public forum analysis and government speech); Stern, *supra* note 153, at 113-15 (discussing the emergence of subsections within commercial speech law).

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.[262] 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.[263] In fact, the only way in which commercial speech doctrine is not entirely subsumed under nonpublic forum doctrine is that the former does not explicitly require restrictions to be viewpoint neutral.

At the opposite end of the spectrum, if a court finds that a naming rights policy creates a traditional 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 allow regulation of speech under the modified strict scrutiny standard contemplated in *Central Hudson*. Rather than being limited to strictly-scrutinized, content-neutral restrictions,[264] schools could regulate naming rights to the degree that their regulations directly advance a substantial government interest and were no more extensive than necessary to serve the stated interest.[265] School administrators seeking to limit naming rights arrangements could thus reclaim some of the regulatory authority they 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.[266]

On closer examination, commercial speech and public forum analysis are very uneasy bedfellows. In a public forum, the government is prohibited from making "content-based" restrictions.[267] But in the context of commercial speech, literally every regulation is content-based. Indeed, the entire category is *defnied* based on its commercial content (at least to the degree that it is defined at all[268]. This potential

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[262] *See supra* notes 229-231 (describing the standard governing speech in a nonpublic forum).

[263] *See supra* notes 182-190 and accompanying text (describing the *Central Hudson* test).

[264] *See supra* note 224 and accompanying text.

[265] *See supra* notes 182-190 and accompanying text.

[266] *See supra* notes 211-216 and accompanying text (applying *Central Hudson* to public school naming rights).

[267] *See supra* note 224 and accompanying text.

[268] *See supra* notes 166-181 (describing lack of a workable definition of

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, "the only consistently successful method of excluding divisive public speech from a limited public forum has been 'commercial only' policies."[269] 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.

Perhaps the most interesting interaction in the third category is 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 than in any given situation both standards might simultaneously be applicable.[270] This would give the government the power to implement regulations for the limited forum which are "narrowly tailored to serve a significant government interest" and which discriminate with regard to 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

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commercial speech).

[269] Dolan, *supra* note 73, at 73; *see also* Children of the Rosary v. City of Phoenix, 154 F.3d 972, 976-78 (9th Cir. 1998) (categorizing citybus ad spaces as a nonpublic forum based on the city's prohibition on noncommercial advertising); Ayers, *supra* note 93, at 627.

[270] Indeed, some courts have noted the issue of commercial speech in public school forums. In *Dawson v. East Side Union High School*, 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. 28 Cal. App. 4th 998, 1022 (1994). The case did not, however, note the connection between forum analysis and commercial speech doctrine.

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.[271] 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 means and ends."[272] 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, the speech in that forum is commercial and thus entitled to even less protection than "pure" speech in a limited forum.

Finally, there are also problematic overlaps between government speech and forum analysis.[273] 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 which it has chosen to deliver its own message.[274] In a limited forum, however, the government 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

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[271] *Grutter*, 539 U.S. at 331.

[272] *Fox*, 492 U.S. at 480 (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*); s*ee also Florida Bar*, 515 U.S. 618 (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*, 533 U.S. at 556 (citing *Florida Bar* and striking down state restriction on tobacco advertising).

[273] Dolan, *supra* note 73, at 72 ("The limited public forum test and the government speech approaches are on a collision course.").

[274] *Rosenberger*, 515 U.S. at 833.

disagrees.[275] 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.[276] In any case, the amount of control the government has exerted over private actors' speech in the past affects the amount of control the government is *allowed* to exert in the future. In the government speech framework, a firm hand on the message being delivered – even if the message is delivered through a private actor – increases the chances that a court will classify the government as the true speaker, and thus entitled to control the message.[277] In either framework, then, the existence of a specific policy, regularly applied, helps insulate the government against First Amendment challenges.

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 an 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 fundamental concerns with the coherence of 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 wave of school naming rights cases, which will probably begin to 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 categories and standards described in Part III governs a particular naming rights

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[275] 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 they could do so.

[276] Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, *supra* note 98, at 2412 ("The unsettling potential result of this doctrinal framework is that, with few obvious limitations, the government could essentially but out large amounts of private speech simply by funding private enterprises.").

[277] *Henderson*, 112 F. Supp. 2d at 598.

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 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 only 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 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 were quarantined from each other. 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.