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## Government Regulation Gets the Finger from a Feisty Frog: Bad Frog Brewery, Inc. v. New York State Liquor Authority

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# GOVERNMENT REGULATION GETS THE FINGER FROM A FEISTY FROG: *BAD FROG BREWERY, INC. V. NEW YORK STATE LIQUOR AUTHORITY*

## I. INTRODUCTION

It may be difficult to imagine that a frog extending its middle finger could significantly impact the future of First Amendment protection.<sup>1</sup> However, the feisty amphibian depicted on the labels of Bad Frog Brewery's beer bottles has the potential to do just that.<sup>2</sup>

The degree of constitutional protection afforded to commercial speech remained uncertain until 1976, when the Supreme Court initially conferred First Amendment protection on such speech.<sup>3</sup> In analyzing what degree of protection to afford commercial speech, the Court initially applied a balancing test.<sup>4</sup> Ultimately dissatisfied with that approach, the Court created its current test in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.<sup>5</sup> While the *Central Hudson* test has prevailed for almost twenty years, application of the test has led to varied results.<sup>6</sup>

The majority of modern landmark cases addressing the regulation and protection of commercial speech have involved advertising.<sup>7</sup> In several of

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1. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. Although the First Amendment refers to Congress, it also applies to the states through the Fourteenth Amendment. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

2. See *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87 (2d Cir. 1998).

3. See generally *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748 (1976) (holding that commercial speech deserves some First Amendment protection); Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 MINN. L. REV. 289 (1987).

4. *Virginia State Bd.*, 425 U.S. at 762-71.

5. 447 U.S. 557 (1980). See *infra* Part II.B.

6. See generally *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986). See *infra* Part II.C.

7. See Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 68-72 (1999); P. Cameron DeVore, *Advertising and Commercial Speech*, 538 PRAC. L. INST. PAT. 59, 65 (1998).

these cases, courts have held that trademarks and product labels constitute commercial speech.<sup>8</sup> However, since the Supreme Court initially conferred First Amendment protection upon commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>9</sup> all such cases, with one exception,<sup>10</sup> have dealt with speech that conveys some amount of information.<sup>11</sup>

In *Bad Frog Brewery, Inc. v. New York State Liquor Authority*,<sup>12</sup> the United States Court of Appeals for the Second Circuit addressed the issue of whether the First Amendment protected an allegedly offensive gesture portrayed by a frog on a brewery's beer label.<sup>13</sup> The simple depiction of an animated frog extending its middle finger presented a novel issue.<sup>14</sup> The Second Circuit's decision could therefore have a far-reaching impact on First Amendment protection of commercial speech.

This Note examines the Second Circuit's decision in *Bad Frog Brewery*. Part II explores the evolution of the commercial speech doctrine and the various standards used to measure First Amendment protection of commercial speech. Part III discusses the procedural history of *Bad Frog Brewery* and the Second Circuit's application of the *Central Hudson* test. Part IV compares the Second Circuit's application of the *Central Hudson* test to prior applications of the test by the Supreme Court. Part V discusses *Bad Frog Brewery's* potential impact on the government's ability to regulate allegedly offensive commercial speech. Finally, Part VI concludes that the *Bad Frog* court's expansive construction of commercial speech protection is consistent with the underlying principles of the First Amendment.

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8. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995); *Friedman v. Rogers*, 440 U.S. 1, 12 (1979); *Nutritional Health Alliance v. Shalala*, 953 F. Supp. 526, 527-29 (S.D.N.Y. 1997), *aff'd*, 144 F.3d 220 (2d Cir. 1998), and *cert. denied*, 119 S. Ct. 589 (1998); *United States v. General Nutrition, Inc.*, 638 F. Supp. 556, 562 (W.D.N.Y. 1986).

9. 425 U.S. 748 (1976).

10. In *Friedman v. Rogers*, 440 U.S. 1 (1979), the one exception, the Court examined a government prohibition against an optometry business trade name that contained minimal information.

11. See *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 96 (2d Cir. 1998) (citing *Friedman*, 440 U.S. 1).

12. 134 F.3d 87 (2d Cir. 1998).

13. See *id.* at 90.

14. See *id.* at 90-91.

## II. EVOLUTION OF THE COMMERCIAL SPEECH DOCTRINE

### *A. Initial Recognition of First Amendment Protection of Commercial Speech: Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*

Before 1976, the Supreme Court did not recognize First Amendment protection for commercial speech.<sup>15</sup> In fact, throughout most of American jurisprudence, the Court did not even face the issue of whether commercial speech should enjoy First Amendment protection.<sup>16</sup> When the Court first addressed the issue in the early 1940's, it held that First Amendment protection did not reach commercial speech.<sup>17</sup> In the decades following that initial determination, the Court wavered slightly, but never expressly conferred constitutional protection upon commercial speech.<sup>18</sup>

Finally, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court explicitly gave First Amendment protection to commercial speech.<sup>19</sup> *Virginia State Board* involved a challenge by consumers to a state regulation prohibiting the advertising of prescription drug prices.<sup>20</sup> The Court decided the First Amendment protected the commercial speech at issue and determined the regulation was unconstitutional.<sup>21</sup> In reaching this conclusion, the Court balanced individual and societal interests against the state's justifications for the regulation.<sup>22</sup> Using this balancing test, the Court struck down the

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15. See Lively, *supra* note 3, at 289.

16. See David Hoch & Robert Franz, *Legal Developments: Eco-Porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 ALB. L. REV. 441, 447 (1994).

17. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (stating that "the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and . . . the states and municipalities . . . may not unduly burden or proscribe its employment . . . [but] the Constitution imposes no such restraint on government as respects purely commercial advertising").

18. In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 388-89 (1973), the Court rejected the argument that commercial speech should receive First Amendment protection in cases where the commercial activity was illegal. In *Bigelow v. Virginia*, 421 U.S. 809, 821 (1975), the Court interpreted *Pittsburgh Press* to mean that the advertisements involved would have been entitled to some First Amendment protection if the commercial activity had been legal.

19. See *Virginia State Bd.*, 425 U.S. at 748.

20. See *id.* at 748-50.

21. See *id.* at 748-49.

22. See *id.* at 766.

advertising ban as unconstitutional because it did not directly achieve the state's interest.<sup>23</sup> The Court explained speech does not lose constitutional protection simply because money is spent to produce it or because it is sold for profit.<sup>24</sup>

In addition to the groundbreaking conclusion that commercial speech merits some Constitutional protection, *Virginia State Board* contained three other critical holdings. First, the Court defined commercial speech as "speech which does 'no more than propose a commercial transaction.'"<sup>25</sup> Second, the Court held that some forms of commercial speech are not immune from government regulation.<sup>26</sup> Finally, and perhaps most importantly, the Court distinguished commercial and non-commercial speech by holding that the former is subject to more extensive government regulation than the latter.<sup>27</sup> Thus, the Court did not extend to commercial speech the full protection given to non-commercial speech.<sup>28</sup>

### B. Setting a New Standard: The Central Hudson Test

Four years after the landmark decision of *Virginia State Board*, the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission* created a detailed test for determining whether, and to what extent, commercial speech enjoys First Amendment protection from government regulation.<sup>29</sup> The *Central Hudson* test consists of four prongs.<sup>30</sup> First, the speech involved must concern legal activity and cannot be misleading.<sup>31</sup> Second, the government must have a substantial interest in the regulation.<sup>32</sup> Third, the regulation must directly advance that

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23. *See id.* at 768–69.

24. *See id.* at 761.

25. *Virginia State Bd.* 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)).

26. *See Virginia State Bd.*, 425 U.S. at 770.

27. *See id.* at 771–72; *see also* Jo-Jo Baldwin, *Constitutional Law—Freedom of Speech. No Longer that Crazy Aunt in the Basement, Commercial Speech Joins the Family*: 44 *Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996), 20 U. ARK. LITTLE ROCK L.J. 163, 173 (1997).

28. *See Virginia State Bd.*, 425 U.S. at 771, 772 n.24. The Court in *Virginia State Board* set forth several situations where commercial speech would not enjoy First Amendment protection. *Id.* at 770. For example, the Court noted that the First Amendment might not apply when the regulation is merely a time, place or manner restriction; when the speech involved is false or misleading; or when the transaction proposed by the speech is illegal. *See id.* at 770–72.

29. *See generally Central Hudson*, 447 U.S. 557 (1980).

30. *See id.* at 566.

31. *See id.*

32. *See id.*

substantial state interest.<sup>33</sup> Finally, the regulation must be narrowly tailored to serve the government's interest.<sup>34</sup>

While the first two prongs of the *Central Hudson* test are relatively straightforward, the third and fourth are susceptible to varied interpretations.<sup>35</sup> Consequently, application of the third and fourth prongs has differed from case to case, resulting in inconsistent rulings.<sup>36</sup>

*Central Hudson* involved a state regulation prohibiting all utilities from using advertisements to promote the consumption of electricity.<sup>37</sup> The initial goal of the regulation was to conserve fuel during a state shortage.<sup>38</sup> When the shortage ended, the state attempted to maintain the advertising ban, claiming its continuing interest in conserving fuel and keeping electric rates low.<sup>39</sup> The Court held that the regulation was not narrowly tailored to serve the state's interest because it unnecessarily restricted advertising that would not cause increased energy consumption.<sup>40</sup> Further, the state failed to show that it could not serve its interests with a less severe restriction on speech.<sup>41</sup> As a result, the Court held that New York's ban unconstitutionally infringed upon the utility company's First Amendment rights.<sup>42</sup>

### C. Prongs Three and Four of the Central Hudson Test

#### 1. Shifting Gears: *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*

Six years after *Central Hudson*, the Court shifted gears in its application of the third and fourth prongs of the commercial speech test. *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*<sup>43</sup> involved a challenge to a Puerto Rican statute banning all casino

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33. *See id.*

34. *See id.* at 566.

35. *See Central Hudson*, 447 U.S. at 566. *See generally* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Posadas de P.R. Associates v. Tourism Co. of P.R.*, 478 U.S. 328 (1986).

36. *See generally* 44 *Liquormart*, 517 U.S. at 484; *Posadas*, 478 U.S. at 328.

37. *See Central Hudson*, 447 U.S. at 558.

38. *See id.* at 559.

39. *See id.* at 560.

40. *See id.* at 570.

41. *See id.*

42. *See id.* at 570–72.

43. 478 U.S. 328, 341–43 (1986).

advertisements, despite the fact that certain types of gambling were legal.<sup>44</sup> In determining the constitutionality of the prohibition, the Court in *Posadas* broadened the third prong of the *Central Hudson* test, which requires direct advancement of a substantial state interest.<sup>45</sup> The government's asserted interest was to reduce demand for casino gambling.<sup>46</sup> The Court held the regulation directly advanced the government's interest because the legislature "obviously believed, when it enacted the advertising restrictions at issue . . . that advertising of casino gambling . . . would serve to increase the demand for the product advertised."<sup>47</sup> In other words, the Court deferred to the legislature's determination that the regulation directly advanced the government's interest.

In analyzing the third prong, the Court also rejected the argument that the regulation was underinclusive.<sup>48</sup> The Court decided the ban on casino advertising furthered the legislature's interests, even though advertising of certain types of gambling, such as the lottery and horse racing, were permitted.<sup>49</sup> Altogether, the Court accepted the government's assertion that the regulation furthered the interests in reducing public demand for casino gambling.<sup>50</sup>

The *Posadas* Court also broadened previous interpretations of the *Central Hudson* test's fourth prong, requiring the regulation be "no more extensive than necessary to serve the government's interest."<sup>51</sup> As it did with the third, the *Posadas* Court deferred to the legislature's judgment in applying the fourth prong.<sup>52</sup> Finally, the Court added a new twist to its analysis by concluding that because Puerto Rico could have banned gambling altogether, its ban on advertising of gambling was sufficient and narrowly tailored.<sup>53</sup>

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44. *See id.* at 330–31.

45. *See id.* at 341.

46. *See id.*

47. *See id.* at 341–42.

48. *See Posadas*, 478 U.S. at 342. The underinclusiveness argument was that the law restricted only certain types of gambling while leaving other types free to advertise. *See id.*

49. *See id.* at 343.

50. *See id.*

51. *Id.* at 343–44; *see also Central Hudson*, 447 U.S. at 570–71.

52. *See Posadas*, 478 U.S. at 343–44. *Posadas* argued that rather than suppressing commercial speech, the legislature should counteract the potential dangers with counterspeech discouraging casino gambling. *See id.* at 344. The Court rejected this argument, concluding that, "it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising." *Id.*

53. *See id.* at 345–46.

## 2. Defying *Posadas*: *44 Liquormart, Inc. v. Rhode Island* Tightens the Reins on the Government

Ten years after *Posadas*, the Supreme Court altered its interpretation of the *Central Hudson* test in *44 Liquormart, Inc. v. Rhode Island*.<sup>54</sup> The *44 Liquormart* Court applied the third and fourth prongs in a way that expanded First Amendment protection of commercial speech.<sup>55</sup> In *44 Liquormart*, the Court examined Rhode Island statutes prohibiting the advertising of alcoholic beverage prices.<sup>56</sup> The state's asserted interest was to promote temperance among its citizens.<sup>57</sup> Applying the *Central Hudson* test,<sup>58</sup> the Court held the statutes unconstitutionally restricted protected commercial speech for two reasons. First, the state failed to demonstrate that its regulations would advance the state's interest, and second, the state failed to show the statutes were narrowly tailored.<sup>59</sup>

The holding of *44 Liquormart* went beyond a mere victory for an individual plaintiff. The Court, in a plurality opinion, rebuked *Posadas* and expanded First Amendment protection of commercial speech in several ways.<sup>60</sup> First, the Court made clear that under the third prong of the

54. 517 U.S. 484 (1996).

55. See generally *id.*

56. See *id.* at 489.

57. See *id.* at 504.

58. While the Court in *44 Liquormart* indeed applied the *Central Hudson* test, several concurring justices implied that commercial speech should be more, if not fully, protected. See *44 Liquormart*, 517 U.S. at 517–34 (Scalia, Thomas, O'Connor, JJ., concurring). In fact, these concurring opinions indicated that the *Central Hudson* test might be on the way out. See *id.*

59. See *44 Liquormart*, 517 U.S. at 505, 507.

60. See *44 Liquormart*, 517 U.S. at 505, 507, 509–10. In a concurring opinion, Justice Scalia expressed his “discomfort” with the *Central Hudson* test and his “aversion towards paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them.” *Id.* at 517 (Scalia, J., concurring). However, Justice Scalia also stated that without a constitutional basis for a decision, preventing states from passing laws the Court finds paternalistic would, in itself, be paternalistic. See *id.* As a result, despite his discomfort with the *Central Hudson* test, Justice Scalia concluded that he did “not believe [the Court had] before [it] the wherewithal to declare *Central Hudson* wrong. . . .” *Id.* at 518.

Justice O'Connor, in a concurring opinion joined by Justices Rehnquist, Souter, and Breyer, also expressed discomfort with the *Central Hudson* test, indicating the Court might be leaning toward stricter scrutiny of commercial speech regulation. See *id.* at 528–34 (O'Connor, J., concurring). Because the regulation at issue in *44 Liquormart* failed under the “less stringent standard set out in *Central Hudson*,” it was not necessary for the Court to address the issue of whether a stricter test was needed. *Id.* at 531–32.

Justice Thomas took the most drastic stance of the concurring justices. See *44 Liquormart*, 517 U.S. at 518–28 (Thomas, J., concurring). Thomas concurred in the decision that the Rhode Island statutes were unconstitutional, but maintained:

[i]n cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the



*Central Hudson* test the government has the burden of proving the challenged regulation will advance its interest "to a material degree."<sup>61</sup> The Court added that this burden could only be satisfied with evidentiary support, imposing a stricter standard than was previously required by the holdings in *Central Hudson* and *Posadas*.<sup>62</sup> Second, the Court stated the *Posadas* Court erred in deferring to the legislature by contradicting a long line of precedent that had struck down similarly broad regulations when less restrictive alternatives were available.<sup>63</sup> The *44 Liquormart* Court declined to defer to legislative judgment and rejected the "greater-includes-the-lesser" rationale of *Posadas*.<sup>64</sup> Thus, *44 Liquormart's* interpretation of the third and fourth prongs of *Central Hudson* resulted in even greater First Amendment protection for commercial speech.<sup>65</sup>

The path the Supreme Court will take in future analyses of the commercial speech doctrine is unclear. However, if the Supreme Court's analysis and decision in *44 Liquormart* and the Second Circuit's decision in *Bad Frog Brewery* are any indication, the future may indeed hold a more expansive view of First Amendment protection for commercial speech.<sup>66</sup>

### III. *BAD FROG BREWERY V. NEW YORK STATE LIQUOR AUTHORITY*: THE CASE AND ITS HISTORY

#### A. *The Facts*

Bad Frog Brewery, a beer manufacturer, bottled its product with labels displaying a picture of a frog "giving the finger."<sup>67</sup> This gesture is

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marketplace, the balancing test adopted in *Central Hudson* . . . should not be applied. . . . Rather, such an "interest" is *per se* illegitimate and can no more justify regulation of "commercial" speech than it can justify regulation of "noncommercial" speech.

*Id.* at 518.

61. *44 Liquormart*, 517 U.S. at 505 (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).

62. *See 44 Liquormart*, 517 U.S. at 505.

63. *See id.* at 509–10.

64. *See id.* at 510. The *44 Liquormart* Court used the phrase "greater-includes-the-lesser" to describe the *Posadas* majority's reasoning that "the greater power to completely ban gambling necessarily includes the lesser power to ban advertising of casino gambling." *Id.* (quoting *Posadas*, 478 U.S. at 345–46).

65. *See supra* Part II.A–C.1.

66. *See infra* Part V.

67. *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 90–91 (2d Cir. 1998). The gesture of giving the finger is normally meant "to convey, among other things, the message 'f--k you.'" *Id.* at 91 n.1.

considered by many to be offensive.<sup>68</sup> The labels also contained slogans such as “[t]urning bad into good” and “[h]e just don’t care” next to a warning of the potential health hazards of alcohol consumption.<sup>69</sup> The labels were approved by the Federal Bureau of Alcohol, Tobacco and Firearms and by fifteen states.<sup>70</sup>

In 1996, the brewery submitted two applications for label approval to the New York State Liquor Authority (“NYSLA”).<sup>71</sup> In those applications, the company claimed the frog’s gesture was not meant to be offensive, but rather was intended to mean “I want a Bad Frog beer,”<sup>72</sup> a statement of “good will.”<sup>73</sup> Contending that the brewery’s claim was untenable and the label would encourage combative behavior and entice underage drinkers, NYSLA denied both applications.<sup>74</sup>

### B. Procedural History

Bad Frog brewery sought a preliminary injunction prohibiting NYSLA’s ban on the labels, which the United States District Court denied.<sup>75</sup> Subsequently, the parties filed cross motions for summary judgment, and the court granted NYSLA’s motion.<sup>76</sup> In granting summary judgment to NYSLA, the district court found Bad Frog’s labels were commercial speech, and therefore the *Central Hudson* test applied.<sup>77</sup> The court held NYSLA’s rejection of the labels satisfied the *Central Hudson* test and was thus constitutionally permissible.<sup>78</sup> Bad Frog Brewery then filed an appeal with the United States Court of Appeals for the Second Circuit.<sup>79</sup>

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68. See *id.* at 91 and n.1.

69. See *id.* at 91.

70. See *id.*

71. See *id.*

72. *Id.* at 91.

73. See *Bad Frog Brewery*, 134 F.3d at 91.

74. See *id.*

75. See *id.* at 92.

76. See *id.*

77. See *id.* at 92–93.

78. See *id.*

79. See *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 90 (2d Cir. 1998).

### C. Bad Frog on Appeal

#### 1. Is a Frog on a Label Commercial Speech?

On appeal, the Second Circuit considered whether NYSLA's ban of the brewery's labels violated First Amendment protection of commercial speech.<sup>80</sup> The court first addressed whether Bad Frog's labels were in fact commercial speech; both parties contended they were not.<sup>81</sup> Bad Frog claimed that because the labels did not convey commercial information, they were noncommercial speech and were thus entitled to full First Amendment protection.<sup>82</sup> NYLSA agreed the labels did not convey consumer information, but argued the government's regulation was nonetheless subject to the lesser scrutiny applicable to commercial speech.<sup>83</sup> The court disagreed with both parties and found the labels identified the source of the product and proposed a commercial transaction, and therefore qualified as commercial speech.<sup>84</sup>

In arriving at this conclusion, the court examined the history of commercial speech protection.<sup>85</sup> While the court's review of the

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80. *See id.*

81. *See id.* at 94.

82. *See id.* The brewery argued that the labels were merely intended as a joke, and were not meant to convey consumer information. *See id.*

83. *See id.* at 94; *see also supra* Part II.A.

84. *See* *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 95–97 (2d Cir. 1998).

85. *See id.* (citing *Posadas de P. R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 340 (1986) (failing to address whether advertising conveyed information but considering commercial speech as a whole to be speech that only proposes a commercial transaction); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983) (noting the core of commercial speech is speech that merely proposes a commercial transaction, and outside of the core lies speech that is both commercial and noncommercial in nature; whether this combination should be treated as commercial depends on factors such as whether it is an advertisement, whether it makes reference to a specific product, and whether it is economically motivated); *Friedman v. Rogers*, 440 U.S. 1, 11, 12, 15 (1979) (stating a trade name is a form of commercial speech even though it conveys no information about price or service, and that a prohibition against use of trade name is sustainable because of opportunity to mislead); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762, (1976) (holding speech that does no more than propose a commercial transaction is not outside of First Amendment protection but implying commercial speech that does not convey information may not enjoy First Amendment protection); *Bigelow v. Virginia*, 421 U.S. 809, 822, 825 (1975) (holding advertisements for abortion services that “did more than simply propose a commercial transaction” enjoyed some degree of First Amendment protection); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 388–89 (1973) (holding that where commercial activity being advertised is illegal, commercial speech is not entitled to First Amendment protection); *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding a handbill constituted “purely commercial advertising” was not protected by the First Amendment)).

jurisprudence defining commercial speech revealed vague and inconsistent precedent, the court nonetheless determined the labels were indeed commercial speech.<sup>86</sup> In reaching this conclusion, the court found the following facts to be persuasive: that the labels referred to a specific product; they proposed a commercial transaction; the commercial aspects of speech stood independent of any supposed non-commercial aspects; and the labels were economically motivated.<sup>87</sup> Because the court found the labels to be commercial speech, it held they were subject to the *Central Hudson* test.<sup>88</sup>

## 2. Applying the *Central Hudson* Test to *Bad Frog Brewery*

### a. Prong One: Unlawful or Misleading Speech

Under the first prong of the *Central Hudson* test, the Court of Appeals found the speech involved was not unlawful or misleading.<sup>89</sup> The court therefore advanced to the second prong of the test.<sup>90</sup>

### b. Prong Two: Substantial State Interest

NYSLA asserted two substantial interests—protecting children from vulgar advertising and promoting temperance.<sup>91</sup> The court concluded both interests were indeed substantial.<sup>92</sup> First, the court found states have a compelling interest in protecting minors, including the need to shield them from speech that might not be considered offensive by adults.<sup>93</sup> Second, the court held the state's interest in promoting temperance was substantial, citing the Supreme Court's consistent acknowledgment that regulation of alcohol consumption serves a substantial state interest.<sup>94</sup>

### c. Prong Three: Direct Advancement of Government Interest

The third prong of *Central Hudson* called for an examination of whether the state had demonstrated its regulation directly advanced its

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86. See *Bad Frog Brewery*, 134 F.3d at 97.

87. See *id.* at 95–97; see also *supra* Part II.B.

88. See *Bad Frog Brewery*, 134 F.3d at 97.

89. See *id.* at 98.

90. See *id.*

91. See *id.*

92. See *id.*

93. See *id.*

94. See *Bad Frog Brewery*, 134 F.3d at 98.

substantial interest.<sup>95</sup> The court explained that in order to satisfy this prong of the test, the state had to demonstrate the offensive frog posed real harms, and the regulation would materially alleviate those harms.<sup>96</sup> The court noted a showing that the regulation would only remotely support the government's purpose would be insufficient to satisfy the third prong.<sup>97</sup>

The Court of Appeals determined the District Court construed the third prong too narrowly.<sup>98</sup> First, the court found NYSLA's decision was underinclusive in protecting children from vulgarity.<sup>99</sup> The court reasoned that simply banning particular beer labels would not significantly reduce children's exposure to vulgarity.<sup>100</sup> Second, with regard to promoting temperance, the court concluded NYSLA failed to demonstrate the regulation would either materially or substantially advance the state's interests.<sup>101</sup> In analyzing the third prong, the court emphasized the need for empirical evidence to support the state's burden in proving material advancement.<sup>102</sup> NYSLA had provided no such evidence and consequently failed to satisfy prong three.<sup>103</sup>

#### d. Prong Four: Narrowly Tailored

Under the fourth prong, the court sought to determine whether the prohibition of Bad Frog Brewery's labels was narrowly tailored to serve the asserted state interest.<sup>104</sup> In other words, the court needed to determine whether the prohibition was no "more extensive than necessary to serve the asserted state interest."<sup>105</sup>

Bad Frog claimed the regulation was more extensive than necessary.<sup>106</sup> In support of its argument, the brewery suggested several less intrusive alternatives.<sup>107</sup> For example, Bad Frog suggested NYSLA

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95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.* at 100.

99. *See Bad Frog Brewery*, 134 F.3d at 99–100. However, the court noted the mere fact that a regulation is underinclusive will not necessarily defeat this prong of the test. *See id.* at 99.

100. *See Bad Frog Brewery*, 134 F.3d at 99. The court noted the state interest at issue was not insulating children from the vulgarity of alcoholic beverage labels, but rather insulating them from vulgarity. *See id.* at 100.

101. *See id.* at 100–01.

102. *See id.* at 100.

103. *See id.*

104. *See id.* at 101.

105. *Id.*

106. *See Bad Frog Brewery*, 134 F.3d at 101.

107. *See id.*

could restrict areas in which stores were allowed to display the beer bottles and cans or limit billboard and over-the-air advertising.<sup>108</sup> The court held NYSLA's regulation was excessive in light of these feasible and less intrusive alternatives.<sup>109</sup> Ultimately, the state failed to satisfy this final prong of the *Central Hudson* test.<sup>110</sup>

Because the NYSLA regulation failed to satisfy both the third and fourth prongs of the *Central Hudson* test, the Second Circuit reversed the district court decision and held the regulation violated Bad Frog Brewery's First Amendment rights to free speech.<sup>111</sup>

#### IV. THE *BAD FROG BREWERY* DECISION IN LIGHT OF COMMERCIAL SPEECH JURISPRUDENCE

##### *A. Are the Labels Commercial Speech?*

Evaluating whether the Second Circuit's decision in *Bad Frog Brewery* was consistent with Supreme Court commercial speech jurisprudence provides some indication of the future of the commercial speech doctrine. The first issue in this analysis is whether the label in *Bad Frog Brewery* constitutes commercial speech.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*,<sup>112</sup> the Supreme Court defined commercial speech as "speech which does 'no more than propose a commercial transaction.'"<sup>113</sup> Clearly, advertisements satisfy that definition because they urge consumers to purchase the advertised product.<sup>114</sup> Most of the cases that have applied *Central Hudson* involved advertisements.<sup>115</sup>

The Bad Frog Brewery label, however, does not fall precisely into the category of an advertisement. While courts have categorized certain labels

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108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.* at 100-01.

112. 425 U.S. 748 (1976).

113. *Virginia State Bd.*, 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)).

114. *See Pittsburgh Press Co.*, 413 U.S. at 385 (defining commercial speech as an advertisement that merely proposes a commercial transaction).

115. *See generally* Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55 (1999); P. Cameron DeVore, *Advertising and Commercial Speech*, 538 PRAC. L. INST. PAT. 59 (1998).

as commercial speech,<sup>116</sup> the labels in those cases primarily employed words to convey their messages.<sup>117</sup> By contrast, the Bad Frog Brewery labels use an image rather than words to convey a message.<sup>118</sup> As a result, the labels only implicitly “propose” a commercial transaction. In previous decisions, labels were deemed to be commercial speech because they used words to propose a commercial transaction.<sup>119</sup> Arguably, the Bad Frog Brewery labels do not qualify as commercial speech because the disputed “speech” is a picture rather than words. If such an argument were accepted, application of the *Central Hudson* test would be inappropriate.

However, the Supreme Court has held labels generally serve the purpose of inviting consumers to purchase a product.<sup>120</sup> As the Supreme Court stated in *Kordel v. United States*,<sup>121</sup> “[e]very labeling is in a sense an advertisement.”<sup>122</sup> While the frog on Bad Frog’s bottles might amuse, entertain, or even offend consumers, its primary purpose is to make consumers think “I want a Bad Frog beer.”<sup>123</sup> Based on the Court’s assertion in *Kordel*, the Bad Frog labels inherently exist to propose a commercial transaction. Thus, the *Bad Frog Brewery* court’s decision that the beer labels constitute commercial speech follows Supreme Court precedent.<sup>124</sup>

## B. The Central Hudson Analysis

### 1. Lawful Activity, Not Misleading

Having determined that Bad Frog Brewery’s labels qualify as commercial speech, the next subject of inquiry is whether the Second Circuit correctly applied the four prongs of the *Central Hudson* test. The court correctly determined the first prong was satisfied, as the speech involved concerned lawful activity and was not misleading.<sup>125</sup> Alcohol consumption in New York is a lawful activity for adults.<sup>126</sup> In *Posadas*, the

116. See, e.g., *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995) (involving a challenge to a regulation prohibiting beer labels from displaying alcohol content).

117. See, e.g., *id.* at 480–81.

118. See *Bad Frog Brewery*, 134 F.3d at 96.

119. See generally *Rubin*, 514 U.S. 476.

120. See *Kordel v. United States*, 335 U.S. 345, 351 (1948).

121. 335 U.S. 345 (1948).

122. *Id.* at 351.

123. *Bad Frog Brewery*, 134 F.3d at 91.

124. See *Kordel*, 335 U.S. at 351.

125. *Central Hudson*, 447 U.S. at 563.

126. See *Bad Frog Brewery*, 134 F.3d at 98.

Court found gambling advertisements satisfied the first prong because gambling is legal in Puerto Rico.<sup>127</sup> It follows that Bad Frog Brewery's labels also satisfy this part of the test because alcohol consumption is a lawful activity for adults in New York.<sup>128</sup>

Furthermore, the court's determination that the Bad Frog Brewery labels were not misleading<sup>129</sup> is also correct. Although NYSLA claimed placing the slogan "He just don't care"<sup>130</sup> next to a health warning would "invite the public not to heed conventional wisdom,"<sup>131</sup> the labels do not attempt to convey deceptive information and therefore do not mislead consumers. The labels merely display a picture of a frog in order to entice consumers to purchase the product.<sup>132</sup> Thus, by determining the brewery's labels concerned lawful activity and were not misleading, the Second Circuit's decision was consistent with precedent.

## 2. Substantial Government Interest

The *Bad Frog Brewery* court also followed precedent in determining the state had a substantial interest in regulating the speech. The state's two asserted interests, promoting temperance and protecting children, clearly fall within the realm of what the Supreme Court has held to be of substantial state concern.<sup>133</sup>

For example, in *44 Liquormart*, the Supreme Court found a substantial government interest in promoting temperance.<sup>134</sup> Further, the Supreme Court has consistently held promotion of children's well-being constitutes a substantial or even compelling government interest.<sup>135</sup> Thus, the Second Circuit's determination that the state satisfied the second prong

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127. See *Posadas*, 478 U.S. at 340.

128. See *Bad Frog Brewery*, 134 F.3d at 98.

129. See *id.*

130. *Id.* at 91.

131. *Id.*

132. See *id.* at 94.

133. See *44 Liquormart*, 517 U.S. 484, 490–91 n.4 (1996) (quoting *S & S Liquormart, Inc. v. Pastore*, 497 A.2d 729, 733–734 (R.I. 1985)) ("[T]here can be no question that [the state's interest in promoting temperance is] indeed substantial . . ."); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (finding the state has a legitimate interest in protecting children from exposure to indecent phone messages); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 706–07 (1977) (noting the state has an interest in "protect[ing] the welfare of children").

134. See *44 Liquormart*, 517 U.S. at 490–91 n.4.

135. See generally *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996) (stating the Court has found "the need to protect children from exposure to patently offensive sex-related material" to be compelling); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) (noting the state's interest in helping parents' efforts to discuss birth control with children is "undoubtedly substantial").



of the *Central Hudson* test also conforms to the Supreme Court's previous applications of this prong.

### 3. Direct Advancement of Substantial Government Interest

With regard to *Central Hudson's* third prong, the Second Circuit correctly determined NYSLA's regulation did not directly advance the state's interests.<sup>136</sup> First, the Supreme Court has held "the notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles."<sup>137</sup> As for the goal of protecting children, the NYSLA regulation in *Bad Frog Brewery* was clearly underinclusive. In a world where television, radio, film and other forms of expression expose children to offensive language on a daily basis, protecting minors from offensive phrases and gestures cannot be accomplished simply by prohibiting a label on a product to which children are not even permitted access.<sup>138</sup>

As to the state's interest in promoting temperance, prohibiting the label would do little to discourage alcohol consumption.<sup>139</sup> While labeling arguably has an impact on consumer decisions, and the Bad Frog label might appeal to some consumers, it is unlikely that the frog's presence on the label would encourage adults to purchase and consume the beer if they did not drink beer in the first place.<sup>140</sup> Even if the label could encourage some people to consume alcohol when they otherwise would not, NYLSA failed to show that it would.<sup>141</sup> In fact, as the Second Circuit emphasized, NYSLA failed to satisfy its burden to prove that the prohibition would materially advance either of its purported interests.<sup>142</sup>

In *44 Liquormart*, the Court placed the burden on the state to prove, with empirical evidence, that a regulation of commercial speech would materially advance the state's asserted interests.<sup>143</sup> Further, the Court also indicated if a state regulation merely mitigated the harm the state sought to remedy, the regulation would not be sufficient to satisfy the third prong of the *Central Hudson* test.<sup>144</sup>

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136. See *Bad Frog Brewery*, 134 F.3d at 100.

137. *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (emphasis omitted).

138. See *Bad Frog Brewery*, 134 F.3d at 99.

139. *Id.* at 100.

140. See *id.*

141. See *id.*

142. See *id.*

143. See *44 Liquormart*, 517 U.S. at 505.

144. See *id.* The Court conceded that "common sense supports the conclusion that a prohibition against price advertising . . . will tend to mitigate competition and maintain prices at a

The Second Circuit's analysis in *Bad Frog Brewery* under *Central Hudson's* third prong parallels the Supreme Court's analysis in *44 Liquormart*.<sup>145</sup> Just as the mere possibility of mitigating the harm was not enough to save the regulation in *44 Liquormart*,<sup>146</sup> the mere speculation that the NYSLA regulation might mitigate children's exposure to offensive material and perhaps lessen adult consumption of alcohol is similarly insufficient.<sup>147</sup> Under *44 Liquormart*, NYSLA's ban cannot be upheld as materially advancing New York's state interests in the absence of evidentiary support to that effect.<sup>148</sup> Like Rhode Island in *44 Liquormart*, NYSLA failed to provide any necessary evidentiary support, and therefore failed to meet the standard set out in the third prong of the *Central Hudson* test.<sup>149</sup> Thus, the Second Circuit analyzed prong three consistently with the Supreme Court's prevailing standard.

#### 4. Narrowly Tailored

The final consideration in analyzing the Second Circuit's decision is whether the court properly determined NYSLA's regulation was not narrowly tailored to meet the state's interests.<sup>150</sup> As with the other *Central Hudson* prongs, the court in *Bad Frog Brewery* properly analyzed the fourth prong according to Supreme Court precedent.

In *44 Liquormart*, the Supreme Court refused to defer to the legislature on this issue and found because the state could have promulgated other viable regulations that would not have restricted speech, the regulation at issue was not narrowly tailored.<sup>151</sup> Following this approach, *Bad Frog Brewery* presented several less restrictive alternatives that would have served NYSLA's interests but would not have prohibited speech to the same extent that the regulation at issue did.<sup>152</sup> Thus, a

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higher level," thus furthering the state's interest. *Id.* Nonetheless, the Court held without any evidentiary support, it would not recognize that the regulation would significantly promote the State's interest of promoting temperance. *Id.*

145. See *Bad Frog Brewery*, 134 F.3d at 98–100; *44 Liquormart*, 517 U.S. 484.

146. See *44 Liquormart*, 517 U.S. at 505–07.

147. See *Bad Frog Brewery*, 134 F.3d at 98–100.

148. See *44 Liquormart*, 517 U.S. at 505; *Bad Frog Brewery*, 134 F.3d at 100.

149. See *Bad Frog Brewery*, 134 F.3d at 100.

150. See *id.* at 100–01.

151. See *44 Liquormart*, 517 U.S. at 507.

152. See *Bad Frog Brewery*, 134 F.3d at 101. For example, the brewery suggested the state could restrict advertising to point-of-sale locations, restrict over-the-air advertising, or segregate the product in the store. See *id.* Furthermore, the court noted the state could restrict permissible locations for the beer within stores or prohibit the placement of the picture of the frog on the outside of six-packs or cases of beer. See *id.*

comparison of *Bad Frog Brewery* to *44 Liquormart* validates the Second Circuit's holding that it was "plainly excessive [for NYSLA] to prohibit the labels from all use."<sup>153</sup>

Finally, the court in *Bad Frog Brewery* appropriately did not apply the "greater-includes-the-lesser" standard that the Supreme Court followed in *Posadas* but overruled in *44 Liquormart*.<sup>154</sup> By ignoring the standard applied in *Posadas*, the Court of Appeals followed the precedent set by *44 Liquormart* and thus correctly analyzed the case under the fourth prong of the *Central Hudson* test.

### C. Summary

The Court of Appeals for the Second Circuit navigated *Bad Frog Brewery v. New York State Liquor Authority* through a long and convoluted history of commercial speech jurisprudence.<sup>155</sup> Much of the precedent available to the court provided either unclear or inconsistent rules of law.<sup>156</sup> Even so, the court, in its careful consideration of various commercial speech regulation interpretations, reached a sound and logical result in light of the most recent Supreme Court decisions. The most recent of these, *44 Liquormart*, indicated heightened scrutiny of commercial speech may be waning.<sup>157</sup> The decision in *Bad Frog Brewery* is consistent with that prediction. Moreover, as discussed in the next section, because *Bad Frog Brewery* presents a novel factual scenario, it has the potential to reach even further than *44 Liquormart* in restricting government regulation of commercial speech.

## V. THE IMPACT OF *BAD FROG BREWERY* AND THE FUTURE OF COMMERCIAL SPEECH

Although *Bad Frog Brewery* followed the precedent set by the Supreme Court in *44 Liquormart* with regard to the commercial speech doctrine, two cases in the Fourth Circuit, *Penn Advertising of Baltimore*,

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153. *Bad Frog Brewery*, 134 F.3d at 101.

154. *44 Liquormart*, 517 U.S. at 511. The *44 Liquormart* Court dismissed the greater-includes-the-lesser standard, claiming it was "inconsistent with both logic and well-settled doctrine." *Id.*

155. See generally *Bad Frog Brewery v. New York State Liquor Auth.*, 134 F.3d 87 (2d Cir. 1998).

156. See *id.* at 95–96.

157. See *44 Liquormart*, 517 U.S. at 517–34; see also *supra* notes 58–60 and accompanying text.

*Inc. v. Schmoke*<sup>158</sup> and *Anheuser-Busch, Inc. v. Schmoke*,<sup>159</sup> muddled First Amendment protection of commercial speech. These two cases failed to follow *44 Liquormart*, and the Supreme Court declined to correct this failure.<sup>160</sup> *Bad Frog Brewery*, however, reverts back to the heightened protection of commercial speech granted by *44 Liquormart*.<sup>161</sup>

#### A. *Bad Frog Brewery in Light of Recent Legal Developments*

In 1995, the Court of Appeals for the Fourth Circuit decided two companion commercial speech cases, *Penn Advertising of Baltimore, Inc. v. Schmoke*<sup>162</sup> and *Anheuser-Busch, Inc. v. Schmoke*.<sup>163</sup> The Second Circuit's decision in *Bad Frog Brewery* contrasts sharply with the Fourth Circuit's decisions in these cases.

*Penn Advertising*, which was initially decided prior to *44 Liquormart*, involved a First Amendment challenge to a city ordinance.<sup>164</sup> The ordinance prohibited "the placement of any sign that 'advertises cigarettes in a publicly visible location,' i.e. on 'outdoor billboards, sides of building[s], and free standing signboards.'"<sup>165</sup> An outdoor billboard company brought an action against the mayor and the city council, claiming the ordinance was unconstitutional. The defendants moved for dismissal or, in the alternative, summary judgment.<sup>166</sup> The district court granted the city's motion for summary judgment, and the billboard owners appealed.<sup>167</sup> The Court of Appeals for the Fourth Circuit later affirmed the District Court's ruling.<sup>168</sup>

Eleven months after this decision, the Supreme Court decided *44 Liquormart* and, as a result, vacated the *Penn Advertising* decision.<sup>169</sup> The Supreme Court remanded the case to the Fourth Circuit for "further consideration in light of *44 Liquormart, Inc. v. Rhode Island*."<sup>170</sup>

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158. 63 F.3d 1318 (4th Cir. 1995).

159. 63 F.3d 1305 (4th Cir. 1995).

160. See *infra* Part V.A.

161. See generally *Bad Frog Brewery*, 134 F.3d 87 (2d Cir. 1998).

162. 63 F.3d 1318 (4th Cir. 1995).

163. 63 F.3d 1305 (4th Cir. 1995).

164. See *Penn Adver.*, 63 F.3d at 1318.

165. *Id.* at 1321.

166. See *id.* at 1318, 1322.

167. See *id.*

168. See *id.* at 1326.

169. See *Penn Adver. of Baltimore, Inc. v. Schmoke*, 518 U.S. 1030 (1996).

170. See *id.*

On remand, the Fourth Circuit—without reassessing the facts of the case under the new standards set forth in *44 Liquormart*—held that *44 Liquormart* did not necessitate a change in the court's decision.<sup>171</sup>

*Anheuser-Busch, Inc. v. Schmoke*<sup>172</sup> journeyed the same path as *Penn Advertising*.<sup>173</sup> *Anheuser-Busch* involved a city ordinance prohibiting the advertisement of alcoholic beverages in “publicly visible locations.”<sup>174</sup> *Anheuser-Busch*, a large beer company, unsuccessfully challenged the ordinance in district court.<sup>175</sup> *Anheuser-Busch* appealed and the Court of Appeals for the Fourth Circuit affirmed the district court's decision.<sup>176</sup> Eleven months later, the Supreme Court vacated the decision and remanded the case to the Court of Appeals “for further consideration in light of *44 Liquormart*.”<sup>177</sup> As in *Penn Advertising*, the Fourth Circuit upheld the regulation as a constitutional time, place and manner restriction without reassessing the case in light of the *44 Liquormart* decision.<sup>178</sup>

These two cases are troubling in two respects. First, by failing to reexamine its prior decisions in light of *44 Liquormart*, the Fourth Circuit improperly failed to abide by precedent.<sup>179</sup> Essentially, the Court of Appeals:

redefined the *Central Hudson* test and virtually disregarded the requirement that any ban on speech had to significantly advance the government's interest and that the remedy had to constitute a reasonable fit. The Fourth Circuit simply accepted the belief of the City of Baltimore that the regulation on outdoor billboards would significantly advance the government's interest, and it ignored whether the ban was narrow or whether other more narrow means existed to advance the city's interest.<sup>180</sup>

171. See *Penn Adver.*, 101 F.3d at 333.

172. 63 F.3d 1305 (4th Cir. 1995).

173. See generally *Penn Adver.*, 63 F.3d at 1318; *Anheuser-Busch*, 63 F.3d at 1305.

174. See *Anheuser-Busch*, 63 F.3d at 1308. Publicly visible locations included “outdoor billboards, sides of buildings, and free standing signboards.” *Id.*

175. See *id.* at 1318.

176. See *id.*

177. *Anheuser-Busch, Inc. v. Schmoke*, 517 U.S. 1206 (1996).

178. See *Anheuser-Busch*, 101 F.3d at 327, 330. A time, place, or manner restriction is one where the government restricts not the entire activity, but rather the time, place or manner in which the activity is permitted to take place. See generally RONALD D. ROTUNDA & JOHN E. NOWAK, 4 TREATISE ON CONST. L. § 20.11, at 40 (2d ed. 1992).

179. See Felix H. Kent, *Reviewing 1997: Tobacco Settlement*, 218 N.Y. L.J. 3 (1997). See generally *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Penn Adver. of Baltimore, Inc. v. Schmoke*, 63 F.3d 1318 (4th Cir. 1995); *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995).

180. Kent, *supra* note 179, at 3.

In other words, the Fourth Circuit ignored the new ground gained in *44 Liquormart* for First Amendment protection of commercial speech and retreated to the deferential days of *Posadas*.

Following the decisions on remand to the Court of Appeals, the cases were presented to the Supreme Court for review.<sup>181</sup> In a confusing move, weakening the impact of the *44 Liquormart* decision, the Supreme Court denied certiorari.<sup>182</sup> The Court's denial of certiorari could be interpreted as approval of the Fourth Circuit's refusal to apply the heightened scrutiny required under *44 Liquormart*, and thus a rejection of *44 Liquormart's* "promise [of] a more enlightened view of commercial speech."<sup>183</sup> In sum, *Penn Advertising* and *Anheuser-Busch* seemed to threaten *44 Liquormart's* grant of broadened First Amendment protection of commercial speech.<sup>184</sup> *Bad Frog Brewery*, however, has the potential to extinguish that threat.

### B. Equalizing Commercial Speech with Non-Commercial Speech

The Second Circuit's decision in *Bad Frog Brewery* conforms to the stricter scrutiny of commercial speech regulation applied by the Supreme Court in *44 Liquormart*.<sup>185</sup>

*44 Liquormart* was a plurality opinion in which several of the justices expressed uneasiness about the *Central Hudson* test.<sup>186</sup> Justice Scalia expressed discomfort with the test but did not go as far as supporting its replacement.<sup>187</sup> Although he felt government regulations such as the one at issue in *44 Liquormart* were paternalistic, he stated that invalidating such laws without a constitutional basis would, in itself, be paternalistic.<sup>188</sup>

Justices O'Connor, Rehnquist, Souter and Breyer also expressed their disdain for the *Central Hudson* test.<sup>189</sup> O'Connor indicated stricter scrutiny might be more appropriate for regulations restricting commercial speech.<sup>190</sup>

181. See *Penn Adver. of Baltimore, Inc. v. Schموke*, 520 U.S. 1204 (1997); *Anheuser-Busch, Inc. v. Schموke*, 520 U.S. 1204 (1997).

182. See *Penn Adver.*, 520 U.S. at 1204; *Anheuser-Busch, Inc.*, 520 U.S. at 1204.

183. Kent, *supra* note 179, at 3.

184. See Kent, *supra* note 179, at 3. Kent stated that the decisions in *Penn Advertising* and *Anheuser-Busch* "leave[] anyone interested in greater First Amendment protection for commercial speech with a hollow feeling." *Id.*

185. See generally *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87 (2d Cir. 1998).

186. See *44 Liquormart*, 517 U.S. at 517-18 (Scalia, J., concurring), 531-32 (O'Connor, Rehnquist, Souter, and Breyer, JJ., concurring).

187. See *id.* at 517-18 (Scalia, J., concurring).

188. See *id.* at 517 (Scalia, J., concurring).

189. See *id.* at 528-32 (O'Connor, Rehnquist, Souter, and Breyer, JJ., concurring).

190. See *id.* at 531-32 (O'Connor, Rehnquist, Souter, and Breyer, JJ., concurring).

However, she also stated the question of whether the test should be overruled in the context of *44 Liquormart* was inappropriate because the regulation at issue there failed under the “less stringent standard set forth in *Central Hudson*. . . .”<sup>191</sup>

Finally, Justice Thomas also expressed some disapproval of the *Central Hudson* test. He stated when the government’s interest lies in keeping “legal users of a product or service ignorant in order to manipulate their choices in the marketplace,”<sup>192</sup> the interest should be considered *per se* illegitimate, and the regulation should be analyzed under the same strict scrutiny analysis applied in cases involving regulation of non-commercial speech.<sup>193</sup>

The restriction at issue in *Bad Frog Brewery* is precisely the type of restriction for which Justice Thomas expressed his disdain in *44 Liquormart*. Although protecting children may not fall within the scope of Thomas’s fears, NYSLA’s interest in promoting temperance certainly does.<sup>194</sup> Phrased somewhat differently, NYSLA wants to prevent the depiction of a frog “giving the finger” in order to prevent adults, who are legal consumers of alcohol, from making an independent choice in the marketplace.<sup>195</sup>

In sum, while the Supreme Court in *44 Liquormart* expressed a wariness of the *Central Hudson* test, the Court was nevertheless unwilling to overrule it.<sup>196</sup> However, it is important to keep in mind that *44 Liquormart* was decided on the rebound of the hands-off, deferential decision in *Posadas*. Thus, while the Court in *44 Liquormart* drastically altered the interpretation of the *Central Hudson* test, perhaps it was simply unwilling to expressly abandon the test in favor of a stricter scrutiny review so soon after its inapposite decision in *Posadas*.

However, the Second Circuit’s *Bad Frog Brewery* decision ignored the potentially negative signal sent by the Supreme Court’s denial of certiorari in *Penn Advertising* and *Anheuser-Busch* and instead followed the path the *44 Liquormart* Court first tread toward strict scrutiny of commercial speech regulation.<sup>197</sup>

At present, the Supreme Court’s interpretation of the *Central Hudson* test in *44 Liquormart* appears to be intact—all four prongs remain, with

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191. *See id.* at 532 (O’Connor, Rehnquist, Souter, and Breyer, JJ., concurring).

192. *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring).

193. *See id.*

194. *See Bad Frog Brewery*, 134 F.3d at 98; *44 Liquormart*, 517 U.S. at 518.

195. *See generally Bad Frog Brewery*, 134 F.3d at 98–100.

196. *See generally 44 Liquormart*, 517 U.S. at 510.

197. *See generally Bad Frog Brewery*, 134 F.3d at 87; *44 Liquormart*, 517 U.S. at 484.

simply an altered approach to the third and fourth prongs.<sup>198</sup> Closer analysis of the Court's decision, however, indicates the Court may have implicitly afforded commercial speech nearly the same strict scrutiny protection afforded to non-commercial speech.<sup>199</sup> The different approaches to commercial and non-commercial speech analyses after *44 Liquormart* seem to be primarily semantic. For the Court to uphold a governmental regulation of commercial speech, the government must prove a *substantial* interest in regulating the speech.<sup>200</sup> For the Court to uphold a governmental regulation of non-commercial speech, the government must prove a *compelling* government interest in regulating the speech.<sup>201</sup> The difference between "substantial" and "compelling" is one of degree rather than substance. The Court's interpretation of these terms remains ambiguous.

The Court of Appeals for the Second Circuit in *Bad Frog Brewery* adhered closely to the *44 Liquormart* interpretation of the *Central Hudson* test.<sup>202</sup> A close examination of *Bad Frog Brewery* reveals the *Central Hudson* test, modified by *44 Liquormart*, is very similar to—if not the equivalent of—the strict scrutiny analysis applied to non-commercial speech. By significantly amending *Central Hudson*, the Court essentially applied a strict scrutiny analysis to commercial speech but couched it in terms of lesser scrutiny.<sup>203</sup>

*Bad Frog Brewery* stands for the proposition that the First Amendment protects even commercial speech that does not communicate anything of substance. The Second Circuit's decision in *Bad Frog Brewery* suggests the Constitution shields even a cartoon of a profane frog.<sup>204</sup> In other words, the government cannot randomly prohibit a message—even a message that does not disseminate information—merely because it finds a particular message to be offensive. This principle rests at the core of First Amendment protection. Thus, *Bad Frog Brewery* solidifies a fundamental notion of First Amendment law that has, at times, become buried in the

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198. In *44 Liquormart*, the Court altered the third and fourth prongs of *Central Hudson* by requiring evidentiary proof of material advancement of the state's interest and by rejecting the *Posadas* Court's deference to the legislature. See *44 Liquormart*, 517 U.S. at 505, 509–10.

199. See generally *44 Liquormart*, 517 U.S. at 484.

200. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 434 (1993) (Blackmun, J., concurring). For a regulation of non-commercial speech to withstand a strict scrutiny analysis, two things must be proven. First, the government must show it has a compelling interest in regulating the speech. Second, as in the *Central Hudson* analysis, the government must prove its regulation is "narrowly tailored" to achieving that purpose. See *id.*

201. See *id.*

202. See discussion *supra* Part II.B.

203. See *44 Liquormart*, 517 U.S. at 488.

204. See generally *Bad Frog Brewery*, 134 F.3d at 87.



confusion of complicated and constantly evolving commercial speech doctrine.

## VI. CONCLUSION

The *Bad Frog Brewery* court's approach to the regulation at issue is consistent with the philosophy underlying commercial speech protection, namely "society's strong interest in the free flow of commercial speech to facilitate intelligent consumer decisions."<sup>205</sup> To re-enter the realm of *Posadas* would be to take a step backwards into a hazy and ill-defined conception of the First Amendment protection of commercial speech. Doing so would also contradict the rationale behind protecting free speech in the first place—promoting the marketplace of ideas from which messages should not be excluded merely because the government finds them to be offensive.<sup>206</sup>

The Second Circuit could have chosen to place the feisty frog into an unprotected category of speech. Doing so would have allowed the government to impose ineffective and therefore unenforceable limitations on expression legitimately entitled to First Amendment protection. As Justice Stevens said, "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."<sup>207</sup> If courts follow Justice Stevens' direction, the future will likely be one of strict scrutiny of government regulation of commercial speech.

*Jennifer Brown\**

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205. John V. Tait, *Trademark Regulations & the Commercial Speech Doctrine: Focusing on the Regulatory Objective to Classify Speech for First Amendment Analysis*, 67 FORDHAM L. REV. 897, 907 (1948).

206. *44 Liquormart*, 517 U.S. at 503–04. "[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Id.*

207. *Id.*

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