Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence

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INTRODUCTION

The state ought not to help those who can better help themselves. That precept, though fundamental to philosophical justifications of liberal constitutional republics,[1] does not get much play in the judicial deliberations of those same republics' courts. Courts in the United States, for instance, generally regard state action as prima facie justified, curbing such state action only if it evinces irrationality[2] or an arbitrary and

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1. *See, e.g.*, Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1141-42 (1989) (describing various strains of liberal political philosophies in terms of their common presumption in favor of private action); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 645 (1988) ("Whether based on rights theories (Dworkin) or economic theories (Calabresi and Ackerman), liberals often preserve the free market system as the core image and justify governmental regulation of the market by reference to the concept of 'market failure' or to cases where 'unequal bargaining power' vitiates consent." (footnotes omitted)); *see also infra* notes 175-83 (cataloging a wide range of liberal political views that favor private action but justify state action as necessary to achieve what private action cannot).

2. *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568, 591-94 (1979) (upholding the public agency's refusal to employ persons receiving methadone treatment as rational).

capricious[3] exercise of power. Thanks to its bracingly plain demand for "no law . . . abridging the freedom of speech,"[4] however, the First Amendment has encouraged courts to regard state action somewhat more critically. In particular, courts applying strict scrutiny to content-based restrictions on speech have long included in their deliberations consideration of whether self-help[5] remedies render state action superfluous.[6] This Article carefully reviews the extant case law to draw out that jurisprudential theme and to follow its recent rise to prominence.[7] Though self-help formerly affected courts'

3. *See, e.g.*, Baltimore Gas & Electric Co. v. Natural Res. Def. Council, 462 U.S. 87, 101-04 (1983) (utilizing an arbitrary and capricious standard and upholding the Nuclear Regulatory Commission rule regarding assessment of environmental impact of stored spent nuclear fuel).

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

5. The present Article gives to "self-help" the following definition: a private party's act, neither prohibited nor compelled by law, of preventing or remedying a legal wrong without any public official's assistance. This definition closely follows that of Douglas Ivor Brandon et al., *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 850 (1984) who defines "self-help" as "legally permissible conduct that individuals undertake absent the compulsion of law and without the assistance of a government official in efforts to prevent or remedy a legal wrong." *Id.* (citing William M. Burke & David J. Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 S. CAL. L. REV. 1, 4 (1973)). The change from those authors' "legally permissible" language to the present "[not] prohibited . . . by law" language reflects both the general principle that the law allows all acts it does not specifically disallow, and the practical observation that public officials cannot effectively prohibit acts they cannot detect. The change from "individual" to "private party" aims to broaden the definition's application to include an act of a natural person, a legal person, or any combination of persons acting in concert. The other changes promote clarity and brevity.

This present use of "self-help" reaches more broadly than the more narrow notion in the context of commercial law. *See, e.g.*, Edward L. Rubin, *The Code, the Consumer, and the Institutional Structure of the Common Law*, 75 WASH. U. L.Q. 11, 36 (1997) ("Self-help can be defined as one party's ability to take control of an item or sum of money in dispute without judicial intervention." (footnote omitted)).

6. *See* discussion *infra* Parts I, II.

7. This Article takes as given, and thus ought not be read to comprehensively defend, strict scrutiny's role in free speech jurisprudence. For a critique of strict scrutiny largely compatible with the present paper, see Eugene Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2441-44 (1996) [hereinafter Volokh, *Permissible Tailoring*]. Notably, Professor Volokh has specifically criticized *Reno v. ACLU*, 521 U.S. 844 (1997) (Reno II), a case cited herein as an exemplar of the view that the strict scrutiny's "least restrictive means" prong must take the adequacy of self-help remedies into account, for granting too

deliberations only implicitly, it has lately come to play an open and explicit role in determining the constitutionality of speech restrictions. U.S. courts have thus made clear that when it comes to restricting speech based on its content, state agents must not try to do for us what we can do reasonably well for ourselves.[8]

Under the guise of strict scrutiny, the Supreme Court has interpreted the First Amendment to require that state actors imposing a content-based restriction on speech prove that the restriction (1) advances a compelling government interest, and (2) is narrowly tailored to achieve that end.[9] The Court includes under the latter prong an inquiry into whether the state action in question offers the least restrictive means of achieving the state's allegedly compelling interest.[10] These two

little protection to free speech. *See* Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 157 [hereinafter Volokh, *Shielding Children*]. Again, though, rather than contradicting the present effort to clarify the minimum boundaries of free speech, Professor Volokh's article aims at the complimentary goal of showing that courts should do still more to protect our rights. *Id.* at 197.

8. *See infra* notes 173-81 and accompanying text.

9. *See, e.g.*, United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest."); Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989) ("It is not enough to show that the Government's ends [in restricting speech based on its content] are compelling; the means must be carefully tailored to achieve those ends.").

10. *Playboy*, 529 U.S. at 813 ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."); *Reno II*, 521 U.S. at 874 ("[The] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.").

Often, under the "narrowly tailored" prong of strict scrutiny, the Court does no more than inquire into the availability of less restrictive means. The Court is vague, however. *See, e.g.*, *Reno II*, 521 U.S. at 870-79 (citing vagueness, overbreadth, and availability of less restrictive means as evidence that the statute was not narrowly tailored); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 351-53 (1995) (citing overbreadth and availability of less restrictive means as evidence that the statute was not narrowly tailored); *see also* Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1532 (1995) ("Although the Court tends to use terms like 'narrowly tailored' and 'least restrictive means' indiscriminately, . . . First Amendment scrutiny is comprised of two distinct elements. First, the regulation must . . . not be overinclusive or overbroad. Additionally, it must impose no greater infringement upon the affected speech than is necessary." (footnotes omitted)); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 416-17 (1998) ("[T]he Court . . . has suggested that 'overbreadth' and 'narrow tailoring' are different expressions for precisely the same

aspects of strict scrutiny—the "compelling interest" prong and the "least restrictive means" inquiry—have provided two openings for courts to consider self-help alternatives to state action.

Traditionally, and as detailed in Part I, courts tend to cite the ready availability of self-help remedies as evidence that state agents lack any compelling interest to restrict speech.[11] Perhaps because the self-help remedies before them have taken such simple and direct forms—looking away, for instance—those courts have not trumpeted the fact that they have employed self-help to limit state action.[12] Rather, such courts seem to regard such self-help as a plain fact about the world, an effective remedy always ready at hand, that obviously renders state action superfluous.[13]

The advent of technologies capable of filtering offensive speech, however, has recently encouraged courts to see self-help in a different light. As Part II describes, courts increasingly cite such technological self-help as evidence that state agents have sought unjustifiably restrictive means of achieving their ends.[14] The Supreme Court, for instance, recently confirmed its willingness to compare the restrictiveness of the state's remedy for the supposed ills of free speech with the restrictiveness of alternative, self-help remedies.[15] The Supreme Court, moreover, has embraced self-help's new role with evident consciousness that it has opened the door to radically revising the proper limits of state action: "Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us."[16]

constitutional defect."); Volokh, *Permissible Tailoring*, *supra* note 7, at 2421-22 (finding four sub-tests within the "narrowly tailored" test: advancement of the interest, overinclusivness, least restrictive means, and underinclusiveness). Readers who prefer other taxonomies of First Amendment law should bear in mind, however, that the one adopted here has no substantive effect on the Article's analysis.

11. *See* discussion *infra* Part I.

12. *See* discussion *infra* Part I.

13. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 217 (1975); Cohen v. California, 403 U.S. 15, 25-26 (1971).

14. *See infra* Part II.

15. *See Playboy*, 529 U.S. at 814 ("[T]he mere possibility that user-based Internet screening software would 'soon be widely available' was relevant to our rejection of an overbroad restriction of indecent cyberspeech." (quoting *Reno II*, 521 U.S. at 876-77)).

16. *Id.* at 818.

Notwithstanding these contrasts between the two ways in which courts invoke self-help in strict scrutiny jurisprudence, the same fundamental principle applies in all such cases: Courts rightly endeavor to alleviate the social costs of free speech by the most efficient means possible. The phenomenon initially may seem puzzling; the Court's pursuit of efficiency appears to transcend the doctrinal distinction between the strict scrutiny "compelling interest" and "least restrictive means" inquiries. That distinction might prove more sharp if courts read the First Amendment's plea for "no law . . . abridging the freedom of speech"[17] to categorically exclude a great many speech restrictions from any plausible claim to constitutionality.[18] Instead, courts have upheld the constitutionality of restrictions on, for instance, political speech,[19] indecent speech,[20] obscene speech,[21] harmful-to-minors speech,[22] prurient speech involving minors,[23] defamatory speech,[24] unoriginal speech,[25] commercial speech,[26]

17. U.S. CONST. amend. I.

18. Justice Black offered a well-known and concise statement of such First Amendment absolutism:

> I do not subscribe to [the balancing] doctrine for I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field.

Konigsberg v. State Bar of Cal., 366 U.S. 36, 61 (1961) (Black, J., dissenting).

19. *See* Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 465 (2001); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 668-69 (1990).

Note that it is not accurate to claim that these and related cases concern only money. As the Court in *Colorado Republican Federal Campaign Committee* recognized, "Spending for political ends and contributing to political candidates both fall within the First Amendment's protection of speech and political association." 533 U.S. at 440 (citing Buckley v. Valeo, 424 U.S. 1, 14-23 (1976) (per curiam)); *see also Austin*, 494 U.S. at 657 ("[T]he use of funds to support a political candidate is 'speech'; independent campaign expenditures constitute political expression at the core of our electoral process and of the First Amendment freedoms." (quotations omitted)).

20. *See* FCC v. Pacifica Found., 438 U.S. 726, 747-55 (1978).

21. *See* Miller v. California, 413 U.S. 15, 36-37 (1973).

22. *See* Ginsberg v. New York, 390 U.S. 629, 635-43 (1968).

23. *See* New York v. Ferber, 458 U.S. 747, 754-58 (1982).

24. *See* Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985).

25. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555-60 (1985).

26. *See* Fla. Bar v. Went for It, Inc., 515 U.S. 618, 623-24, 635 (1995).

speech constituting workplace harassment,[27] fighting words,[28] speech inciting unrest,[29] threatening speech,[30] and refusals to speak.[31] Even when they demand proof of a compelling interest, courts have afforded facial legitimacy to a wide variety of state restrictions on speech.[32] Consequently, in order to give the compelling interest inquiry bite, courts have fallen back on what amounts to a cost-benefit analysis.[33] They quite naturally engage in a similar analysis, albeit without using economic terminology, when trying to calculate the least restrictive means of achieving a compelling interest.[34] Under both prongs of strict scrutiny, courts effectively minimize the social costs of censorship by demanding proof that state agents can restrict speech more efficiently than private parties can—that state censors qualify, in other words, as least cost avoiders.

None of this analysis signifies that "compelling interest" equals "least restrictive means" equals "wealth maximization." Those different inquiries continue to apply to different questions and to yield different answers thereto. It does demonstrate how common threads appear when we view strict scrutiny through the lens of self-help, however.[35] That observation alone makes the present effort worthwhile from a pedagogical point of view.

As discussed in Part III, moreover, delineating self-help's role under strict scrutiny also serves to illustrate a fundamental principle of liberal jurisprudence: Political entities should undertake only those projects that they can accomplish

27. *See* Aguilar v. Avis Rent A Car System, Inc., 980 P.2d 846, 872 (Cal. 1999).

28. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-74 (1942).

29. *See* Feiner v. New York, 340 U.S. 315, 320-21 (1951).

30. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776 (1994).

31. *See* Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 469-74 (1997). The Court recently explained *Glickman* as permitting the state to coerce speech only as part of a more comprehensive regulatory scheme. *See* United States v. United Foods, Inc., 533 U.S. 405, 410-13 (2001). Far from limiting state action, however, that interpretation suggests that the state can restrict speech only if it also restricts liberty in general.

32. *See generally* Volokh, *Permissible Tailoring*, *supra* note 7, at 2420-21 (cataloging the many and diverse sorts of compelling interests that courts have recognized).

33. *See infra* Part I.

34. *See infra* Part II.

35. It also incidentally suggests the need, apparently not yet fulfilled in the academic literature, of a law and economics explanation of the distinction between strict scrutiny's various prongs.

more effectively than private ones can. The growing efficacy of self-help remedies has provided courts with an opportunity to put that principle to work, demonstrating its application in the context of free speech strict scrutiny cases. As the growing body of "self-help" case law has recognized, evaluations of the relative efficacy of political and private means must take relevant facts into account.[36] As a general matter, however, technological advances that give private parties increasingly refined means of manipulating information have led—and should lead—courts to reduce the permissible scope of state action. Just as we upgrade computer software to benefit from progressively better hardware, in other words, we should upgrade First Amendment jurisprudence to benefit from progressively better self-help.

I. SELF-HELP VERSUS THE STATE'S COMPELLING INTEREST

As early as 1971,[37] near and arguably even prior to the Supreme Court's articulation of the contemporary strict scrutiny test,[38] courts began citing the availability of self-help

36. *See infra* Part III.

37. *See* Cohen v. California, 403 U.S. 15, 21 (1971), discussed *infra* Part I.A.

38. The Supreme Court first articulated the strict scrutiny test of content-based restrictions on speech in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978). The *First National Bank* Court elaborated on the "exacting scrutiny" applied to content-based restrictions: "'[T]he State may prevail only upon showing a subordinating interest which is compelling' . . . ." *Id.* (quoting Bates v. Little Rock, 361 U.S. 516, 524 (1960)). "Even then," the Court continued, "the State must employ means 'closely drawn to avoid unnecessary abridgment. . . .'" *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)). Intimations of that test appear in earlier cases, though in less precise terms and wholly or partially in defense of other First Amendment rights. The quotes in *First National Bank* from *Bates* and *Buckley*, for instance, come from passages defending the right of association—not of speech. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 428-29, 444 (1963) (holding restrictions on assembly and speech unconstitutional on the grounds that "the State has failed to advance any substantial regulatory interest . . . which can justify the broad prohibitions which it has imposed" and stating that "nothing in this record justifies the breadth and vagueness of the [restrictions]"); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (arguing that "even though the governmental purpose [behind a restriction on associational freedom] be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved"); Thomas v. Collins, 323 U.S. 516, 530, 542-43 (1945) (reversing conviction for illegal public assembly and speech on grounds that "[i]t is . . . in our tradition to allow the widest room for discussion, the narrowest range for its restriction,

remedies as evidence that state actors could not justify their content-based restrictions of speech as serving any compelling interest. As the review of the case law below indicates, courts have continued to employ self-help to similar effect. In retrospect, from an economic point of view, that makes sense. All else being equal, we quite naturally prefer to have the social costs of free speech alleviated by the most efficient means possible.[39] If a simple and direct form of self-help, such as averting one's gaze, offers an especially cheap and effective response to speech that offends solely due to its content, courts would rightly disfavor any obviously less efficient state response to the problem. Conversely, courts might approve state censorship if offensive speech so pervades the media as to leave life in a cave as the only effective self-help remedy. Whether in a particular case self-help offers a better cost-benefit ratio than state action remains a question of fact, but the inherent inefficiencies of state action justify placing a heavy

particularly when this right is exercised in conjunction with peaceable assembly"); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (commenting that "the power to regulate [public discussion of religion] must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom"); Schneider v. State, 308 U.S. 147, 162, 165 (1939) (finding unconstitutional a content-neutral ban on distribution of handbills on grounds that the asserted purpose, to prevent littering, was "insufficient to justify" the restriction and because there were other "obvious methods of preventing littering").

39. Not all else is equal, of course, in a case where one offended by speech can assert a right to avoid it, such as a property right, independent of the rights defined by the First Amendment. A staunch proponent of law and economics analysis might well argue that efficiency, properly understood, encompasses the costs of violating such independent rights. The present discussion need not vet that methodological claim, however; it suffices to observe that such cases should be disposed of on the grounds that a party who can avoid offensive speech by the exercise of an independent right has an obligation under strict scrutiny's "least restrictive means" test to do so. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141, 147 (1943) (finding unconstitutional a city ordinance barring door-to-door distributors of publications from summoning residents to receive the publications on grounds that "[t]he dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors").

Nor is all else equal when speech intrudes into the privacy of one's home. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 484-85, 488 (1988) (finding constitutional an ordinance banning picketing before or about a residence on grounds that the state has a significant interest in protecting residential privacy). It hardly takes a law and economics zealot, however, to conclude that a cost-benefit analysis can accommodate the salient difference between encountering offensive speech in public and having it burst into one's living room.

burden of proof on those who would use it to impose content-based restrictions on speech.[40]

It should thus cause no surprise that courts have found state action restricting speech based on its content unconstitutional in cases where they have found self-help capable of generating the same benefits. Granted, it may seem a bit surprising that academic commentators have almost entirely overlooked this aspect of First Amendment law.[41] The courts that have ensconced self-help in the "compelling interest" prong of the strict scrutiny test have not done so very self-consciously or explicitly. They appear, rather, to have had more concern for applying common sense to the problems at hand than for developing jurisprudential signposts for future courts.

Ritualistic invocation of the captive audience doctrine also bears some blame for having obscured from courts and commentators the more fundamental role that self-help plays in strict scrutiny's compelling interest prong. By showing that they aim to protect a captive audience, state actors can demonstrate a compelling interest for their content-based restrictions on speech.[42] What constitutes a captive audience?

40. While an economist might frame the issue in these terms, an ethicist might argue that statists bear the burden of proof because they initiate coercion against those they would restrict from freely speaking. Jurisprudes can cite yet another reason for regarding censorship skeptically: The First Amendment facially prohibits state action "abridging the freedom of speech." U.S. CONST. amend. I.

41. Solveig Bernstein deserves credit for having argued that the availability of self-help remedies should go to show the lack of any compelling interest for content-based restrictions on speech, though she did not cite any case law in support of that claim. SOLVEIG BERNSTEIN, BEYOND THE COMMUNICATIONS DECENCY ACT: CONSTITUTIONAL LESSONS OF THE INTERNET 30-31 (Cato Inst. Policy Analysis No. 262, 1996), http://www.cato.org/pubs/pas/pa-262.html (Nov. 4, 1996) ("The federal government's interest in restricting indecent speech on interactive computer networks cannot be 'compelling' if there is a purely private way to effectively solve the problem."). Rebecca Tushnet made a similar argument with regard to speech restrictions generally, though again without citing any supporting case law. Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 29 (2000) ("Given that there are ways for private actors to protect original content through voluntary transactions, the government arguably does not have a compelling interest in restricting speech through copyright.").

42. *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (finding that the state has the power to restrict indecent broadcasts on grounds that "prior warnings cannot completely protect the listener or viewer from unexpected

As section A describes, the way that courts have applied the term[43] strongly suggests that an audience qualifies as "captive" only if it lacks attractive self-help remedies for countering offensive speech.[44] As section B observes, moreover, even outside the scope of the captive audience doctrine, the ready availability of a self-help remedy can deprive the state of any compelling interest for restricting speech.[45] Reference to self-help thus both helps to explain the captive audience doctrine and accounts for other aspects of strict scrutiny's compelling interest prong. As a general matter, cases in the former line tend to concern forms of self-help so immediate and instinctual—averting one's gaze, for instance—as to seem a fact of biology, whereas cases in the latter line tend to concern forms of self-help so customary and commendable—raising one's children, for instance—as to seem a fact of morality. It remains for us to sift through the precedents and draw out the

program content"); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) (observing that content-based restrictions on speech have been upheld when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure"); *see also* Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 152 (1992) ("While offensive speech generally may not be suppressed simply because of its offensiveness, the Court has recognized that such speech may be regulated when it is delivered to a captive audience." (footnote omitted)); Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?*, 27 U.C. DAVIS L. REV. 255, 326 (1994) ("The Court has . . . held in numerous cases that the governmental interest in protecting non-captive audiences from offense, such as those who pass by a beggar, are not sufficiently compelling to satisfy strict scrutiny.").

43. *See infra* Part I.A (discussing cases); *see also* Eanes v. State, 569 A.2d 604, 611 (Md. 1990) (defining a "captive audience" as "the unwilling listener or viewer who cannot readily escape from the undesired communication, or whose own rights are such that he or she should not be required to do so"); Nadine Strossen, *The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate*, 62 N.Y.U. L. REV. 201, 211 n.47 (1987) (reviewing WOMEN AGAINST CENSORSHIP (Varda Burstyn ed., 1985)) ("[L]ower federal courts and scholarly commentators have concluded that members of an audience should be deemed captive whenever they cannot leave without incurring a substantial burden, or are in a place where they have a right or privilege to remain.").

44. Occasional extreme statements attributing utter helplessness to a captive audience, *see, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1973) (Douglas, J., concurring) (characterizing bus commuters as a captive audience "incapable of declining to receive" message), should not obscure the fact that courts impliedly assess self-help alternatives in their determinations of captivity. Even bus commuters can, for instance, close their eyes and stuff wax in their ears. Courts evidently recognize, however, that such self-help would come at too high a cost.

45. *See infra* Part I.B.

exact role that self-help has played in determining when a compelling interest justifies a content-based restriction on speech.

A. SELF-HELP AND CAPTIVE AUDIENCES

Cohen v. California[46] apparently represents the earliest—and certainly represents the most notorious—of the Supreme Court cases finding that the ready availability of self-help remedies disproves the state's claim to have a compelling interest in content-based restrictions on speech.[47] The *Cohen* Court reversed as unconstitutional a conviction based on the public display of a jacket emblazoned with "Fuck the Draft," reasoning that parties offended by the sentiment "could effectively avoid further bombardment of their sensibilities simply by averting their eyes."[48] Ready access to that form of self-help meant that the audience did not qualify as captive, which in turn denied the state its last and best claim to have a compelling interest in restricting the offensive speech.[49] The Supreme Court applied similar reasoning in *Spence v. Washington*[50] to reverse the conviction, under a flag misuse statute, of a protestor who had attached a peace sign to his U.S. flag and had flown it on private property but in public view. The state lacked any compelling interest to forbid the display, reasoned the Court, because "[a]nyone who might have been offended could easily have avoided the display."[51] *Cohen* also evidently inspired the holding of *Erznoznik v. City of Jacksonville*,[52] where the Court struck down as unconstitutional an ordinance prohibiting indecent drive-in movies. The *Erznoznik* Court paraphrased *Cohen* to set forth a more general rule: Absent two narrow exceptions—when the target of speech expressly asks to not receive it at home or when an audience's captivity makes it impractical for them to avoid unwanted speech—"the burden normally falls upon the

46. 403 U.S. 15 (1971).

47. *Id.* at 21-22.

48. *Id.* at 21.

49. *See id.* "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Id.*

50. 418 U.S. 405, 406 (1974) (per curiam).

51. *Id.* at 412.

52. 422 U.S. 205, 212 (1975).

viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'"[53]

Conversely, Supreme Court opinions suggest that a captive audience does exist when no self-help remedy would suffice to mitigate the impact of offensive speech. When, for instance, the Court in *Lehman v. City of Shaker Heights*[54] upheld the constitutionality of a municipality's ban on political advertisements in its public transport buses, Justice Douglas concurred on grounds that the city's content-based restriction on speech protected the sensibilities of "people who because of necessity become commuters and at the same time captive viewers or listeners."[55] By contrast, four justices dissented in *Lehman* on grounds that commuters confronted with the print ads in question could simply avert their eyes.[56] "This is not a case where an unwilling or unsuspecting rapid transit rider is powerless to avoid messages he deems unsettling," they argued.[57] Self-help thus resolved the case; the *Lehman* Justices' varying evaluations of the effectiveness of self-help determined whether they thought the state had a compelling interest in protecting an allegedly captive audience from offensive speech. Similar concerns played a role in *FCC v. Pacifica Foundation*,[58] where the Court found restrictions on indecent broadcasts constitutional on grounds, in part, that "prior warnings cannot completely protect the listener or viewer from unexpected program content."[59]

In its most recent analysis of the role that self-help plays in strict scrutiny's compelling interest test, *Consolidated Edison Co. v. Public Service Commission*,[60] the Supreme Court signaled its willingness to allow offensive speech to briefly

53. *Id.* at 210-11 (alteration in original) (quoting *Cohen*, 403 U.S. at 21).

54. 418 U.S. 298, 304 (1974).

55. *Id.* at 306-07.

56. *Id.* at 320 (5-4 decision) (Brennan, J., dissenting).

57. *Id.*

58. 438 U.S. 726 (1978).

59. *Id.* at 748. I thank Professor Doris Estelle Long for the intriguing observation that, judging from the case law, courts appear to think that averting one's gaze offers a more effective form of self-help than plugging one's ears. *Pacifica*, at least, seems to evince that bias. Given that courts have not invoked self-help very explicitly or often under the compelling interest prong, however, it remains uncertain why courts favor visual over auditory self-help—or even whether they really do.

60. 447 U.S. 530, 542 (1980).

intrude even the private confines of the home.[61] *Consolidated Edison* concerned the constitutionality of a public utility commission's attempt to protect allegedly captive consumers by banning a utility's inclusion in monthly bills of pamphlets discussing nuclear power policy. Despite its admission that "short exposure to Consolidated Edison's views may offend the sensibilities of some consumers,"[62] the Court struck down the speech restriction on grounds that offended parties had ample remedy in "transferring the bill insert from envelope to wastebasket."[63] The Court emphasized the narrow scope of any compelling interest the state has in protecting the privacy of persons seeking seclusion at home from unwanted speech. That compelling interest arises only when state action offers the sole remedy against unwanted speech,[64] the Court explained, and only to enforce an individual's express plea to not suffer such speech at home.[65] In effect, then, the

61. *Id.*; *see also* Watchtower Bible and Tract Soc'y v. Village of Stratton, 122 S. Ct. 2080, 2090 (2002) (finding violative of the First Amendment an ordinance requiring those who would proselytize door-to-door to first obtain a permit and, in so doing, forfeit their anonymity). Although the opinion did not take pains to delineate the lines of its analysis, it cast doubt on the interests asserted by the municipality on grounds, in relevant part, that "the posting of 'No Solicitation' signs . . . coupled with the resident's unquestioned right to refuse to engage in conversation with unwelcome vistors, provides ample protection for the unwilling listener." *Id.* at 2091.

62. *Consol. Edison*, 447 U.S. at 541.

63. *Id.* at 542 (footnote omitted).

64. *Id.* at 542 n.11 (citing Martin v. City of Struthers, 319 U.S. 141, 147 (1943)). The *Martin* Court found unconstitutional a city ordinance barring door-to-door distributors of publications on the grounds that "traditional legal methods[] leav[e] to each householder the full right to decide whether he will receive strangers as visitors." *Martin*, 319 U.S. at 147. The *Martin* Court's subsequent discussion of appropriate "legal methods" demonstrates that it did not exclude, and suggests that it meant to include, self-help remedies. *See, e.g.*, *id.* at 147-48 (discussing the role warnings play in combating trespass); *id.* at 148 (encouraging municipalities to leave "the decision as to whether distributors of literature may lawfully call at a home where it belongs—with the homeowner himself"); *see also* Kovacs v. Cooper, 336 U.S. 77, 86 (1949) (interpreting *Martin* to have been based "on the ground that the home owner could protect himself from such intrusion by an appropriate sign 'that he is unwilling to be disturbed'" (quoting *Martin*, 319 U.S. at 148)).

65. *Consol. Edison*, 447 U.S. at 542 n.11 (1980) ("Even if there were a compelling state interest in protecting consumers against overly intrusive bill inserts, it is possible that the State could achieve its goal simply by requiring Consolidated Edison to stop sending bill inserts to the homes of objecting customers."). In support of that claim, the Court cited *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970), where it had upheld the constitutionality of a statute authorizing an addressee who had been mailed an erotic advertisement to require its sender to cease all further such

Consolidated Edison Court tied the "residential privacy" justification for content-based censorship to a self-help standard, allowing the justification to prevail only when other remedies proved inadequate[66] and even then only insofar as to empower each individual to effectuate his or her own choices.[67] The *Consolidated Edison* Court likewise described the scope of the state's compelling interest in protecting *non*-residential audiences from offensive speech in terms that plainly invoked

mailings. *Consol. Edison*, 447 U.S. at 542 n.11 (citing *Rowan*, 397 U.S. at 737). The *Rowan* Court grounded its decision on an appeal to the merits of self-help, arguing that "[t]o hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home." *Rowan*, 397 U.S. at 737.

66. The *Consolidated Edison* Court's invocation of *Martin* suggests that it regarded the adequacy of self-help remedies as a sufficient but not a necessary basis for denying the "residential privacy" excuse, for *Martin* held that the adequacy of an independent legal claim, such as trespass, might also suffice to discredit the state's claim to have a significant interest in protecting residential privacy by way of a content-neutral restriction on speech. *See supra* note 64.

67. One might well wonder how the *Consolidated Edison* Court distinguished its rather narrow interpretation of the residential privacy compelling interest from its holding in *FCC v. Pacifica Foundation*, *see supra* notes 64-65 and accompanying text, where it upheld a restriction on indecent broadcasting on grounds, in part, that it "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (citation omitted). The *Consolidated Edison* majority did not speak to the apparent contradiction. Justice Stevens distinguished the cases, however, on grounds that the speech at issue in *Consolidated Edison* risked at worst presenting offensive ideas, whereas the speech at issue in *Pacifica* took an ugly form. *Consol. Edison*, 447 U.S. at 547-48 (Stevens, J., concurring). His distinction makes sense from a self-help point of view because quick action—such as "transferring the bill insert from envelope to wastebasket," *id.* at 542—can largely obviate the impact of offensive ideas in print form whereas even "prior warnings cannot completely protect" audiences from the offense rendered by indecent words. *Pacifica*, 438 U.S. at 748. Other distinguishing factors include the *Pacifica* Court's concern for protecting children from indecent broadcasting, *id.* at 749-50, and its admonition that "each medium of expression presents special First Amendment problems. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Id.* at 748 (citations omitted).

Of course, these considerations go only to whether the state has demonstrated that it has a compelling interest in restricting speech. They do not resolve whether the state has narrowly tailored its censorship. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 814 (2000) ("[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.").

self-help: "Where a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech."[68]

The Supreme Court's judgments on whether the state has a compelling interest in content-based censorship thus effectively hold that an audience qualifies as captive only if members of that audience lack adequate self-help remedies to offensive speech.[69] Lower courts have applied this principle in a variety of circumstances, interpreting and extending it in the process. They have followed the Supreme Court in substance by defining as "non-captive" those audiences that enjoy adequate self-help remedies. They have also mirrored the Supreme Court in form, by "announcing" their use of self-help only implicitly—by dint of the effect of their rulings—rather than by express statement.

In *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, for instance, the D.C. Circuit held that the Federal Aviation Administration's refusal to allow political advertising in federally-owned airports violated the First Amendment because "[a] person in the airports' concourses or walkways who considers an advertisement—commercial or noncommercial—to be objectionable enjoys the freedom simply to walk away."[70] In *Collin v. Smith*,[71] the Seventh Circuit found unconstitutional on similar grounds a municipal ordinance barring Nazis from assembling and speaking. The court explained, "There *need be* no captive audience, as Village residents may, if they wish, simply avoid the" offensive demonstrations.[72]

Trial courts have, in striking down content-based restrictions on print advertisements in public transit systems, shown remarkable sensitivity to the various factors that can render self-help more or less efficacious. Applying strict scrutiny to a ban on distasteful ads in public areas of a subway

68. *Consol. Edison*, 530 U.S. at 541-42.

69. One might say, "if and only if" were it not for *Consolidated Edison's* reference to *Martin*. *Martin* allowed that the availability of "traditional legal methods," such as trespass suits, could discredit the state's claim to have a significant interest in protecting residents' privacy by outlawing all door-to-door proselytizing.

70. 708 F.2d 760, 767 (D.C. Cir. 1983).

71. 578 F.2d 1197 (7th Cir. 1978).

72. *Id.* at 1207.

system, the court in *Penthouse International, Ltd. v. Koch*[73] distinguished between commuters walking through open areas of subway stations and captive passengers of the sort protected by the Supreme Court in *Lehman*.[74] No compelling interest justified protecting the former type of audience, the *Penthouse* court reasoned, because "[i]ndividuals hurrying to catch a subway train who pass by an advertisement that does not interest them, or even offends them, may simply avert their eyes and move on, just as pedestrians on a city street."[75] Going even further than *Penthouse*, the court in *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Authority*[76] found the captive audience doctrine insufficient to justify content-based restrictions on ads displayed even *within* public buses and transit cars. "It is of course not impossible for [the Chicago Transit Authority (CTA)] riders to avert their eyes from the printed message [the Planned Parenthood Association (PPA)] seeks to deliver," the court argued.[77] Apparently aware that such self-help has its limits, however, the court cautioned that its pronouncement "should not be misread as a holding on whether [the] CTA might constitutionally apply the same rationale to highly graphic depictions."[78] As such cases

73. 599 F. Supp. 1338, 1349 (S.D.N.Y. 1984).

74. Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (upholding the constitutionality of a municipality's ban on political advertisements in its public transport buses).

75. *Penthouse*, 599 F. Supp. at 1346; *see also id.* at 1347 ("The *Lehman* Court's concern for captive listeners is inapplicable to the case at bar. The Penthouse ads were never displayed inside of subway cars; they were always posted in the open public areas of the subway stations—the walls of the passageways and platforms." (footnote omitted)).

76. 592 F. Supp. 544, 555 (N.D. Ill. 1984), *aff'd*, 767 F.2d 1225, 1227 (7th Cir. 1985).

77. *Id.* Although it affirmed the trial court opinion, the court of appeals evinced confusion about the role played by the captive audience doctrine in the proceedings below. The circuit court claimed that the CTA did not "attempt to show that its rejection of PPA's message is 'necessary to serve a compelling state interest,'" *Planned Parenthood*, 767 F.2d at 1233 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)), yet the court went on to observe that the "CTA in its reply brief argues that its rejection of PPA's message is justified by its desire to protect the captive audience of bus and train riders." *Id.* at 1233 n.11. The circuit court thus seemed unaware that the captive audience doctrine serves to determine whether the state has a compelling interest in restricting speech based on its content. *See supra* note 63 and accompanying text.

78. *Planned Parenthood*, 592 F. Supp. at 555 n.18 (citation omitted); *cf.* FCC v. Pacifica Found., 438 U.S. 725, 748-49 (1978) ("To say that one may avoid further offense by turning off the radio when he hears indecent language

demonstrate, even when strict scrutiny's traditional legal jargon obscures the operative doctrine, courts in practice determine whether an audience qualifies as captive by carefully calculating whether its members enjoy access to adequate self-help remedies.

B. SELF-HELP AND PERSONAL RESPONSIBILITY

Even outside the scope of the captive audience doctrine, the ready availability of self-help remedies can show that the state has no compelling interest in restricting speech. In contrast to the ample case law demonstrating self-help's role in defining captive audiences, granted, only very recent and relatively scant case law indicates self-help's more general role in strict scrutiny's compelling interest prong. Each type of appeal to self-help complies with the same principle, however: The state cannot bear the heavy burden of proving that is has a compelling interest in a content-based restriction on speech when, in counterbalance, a court finds some form of self-help adequate to mitigate the harms in question. As illustrated in the preceding section, courts engaged in captive audience inquiries express that principle by invoking immediate, physical, and even instinctual forms of self-help.[79] This section illustrates how courts invoke self-help when scrutinizing more generally whether the state has a compelling interest in its content-based speech restrictions, albeit self-help arising less from reflex than from customary social practices.

The Supreme Court demonstrated in *United States v. Playboy Entertainment Group, Inc.*,[80] how the self-help that parents enjoy by merit of their traditional authority over their children can serve to disprove a state claim to a compelling interest in restricting speech.[81] The Court relied heavily on a "least restrictive means" analysis, finding unconstitutional a ban on indecent cable programming during prime time viewing hours because the state might have required only that cable companies block signals to and at the request of individual households.[82] The Court argued in the alternative, however,

is like saying that the remedy for an assault is to run away after the first blow.").

79. *See supra* Part I.A.

80. 529 U.S. 803 (2000).

81. *See id.* at 814.

82. *See id.* at 807 (finding no error in the lower court's conclusion "that a regime in which viewers could order signal blocking on a household-by-

that the state had failed to demonstrate a compelling interest in its content-based speech restriction. The state had argued that "'[t]here would certainly be parents—perhaps a large number of parents—who out of inertia, indifference, or distraction, simply would take no action to block [the indecent signals], even if fully informed of the problem and even if offered a relatively easy solution.'"[83] The Court countered, "Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech."[84] Evincing faith in parents' concern for and control over their children, the Court held that the state had no compelling interest beyond empowering each household to effectuate its own cable programming preferences: "The Government has not shown that this alternative, a regime of added communication and support, would be insufficient to secure its objective, or that any overriding harm justifies its intervention."[85]

Even if lower courts have noticed how the Supreme Court subtly invoked self-help in *Playboy* to prove that the state lacked a compelling interest in restricting speech,[86] they have had little time to digest and apply the holding. That did not stop the court in *Torries v. Hebert*[87] from independently advancing the same argument, however.[88] In finding unconstitutional a criminal prosecution based on the playing of "gangster rap" at a skating venue frequented by minors, the *Torries* court held that no compelling interest justified such a content-based restriction on speech.[89] Distinguishing precedents that had found such an interest in the regulation of broadcast speech, the *Torries* court observed that

> parents have absolute control over whether or not to allow their children to attend the Skate Zone on Saturday nights. Parental

household basis presented an effective, less restrictive alternative to [time channeling]" and affirming the lower court).

83. *Id.* at 825 (quoting Appellant's Brief at 33, United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) (No. 98-1682)).

84. *Id.*

85. *Id.* at 826.

86. Commentators apparently have not helped bring it to anyone's attention.

87. 111 F. Supp. 2d 806 (W.D. La. 2000).

88. *See id.* at 822. Although the *Torries* opinion postdated the *Playboy* one, it did not cite it. *Id.* at 806-25.

89. *See id.* at 822.

> control of their children's attendance at the Skate Zone is an adequate protection from unexpected program content, a level of control which is patently different compared to a broadcast communication.[90]

Like *Playboy*, then, *Torries* stands for the proposition that parents' authority over their children can serve as a form of self-help sufficiently effective to invalidate the state's claim to have a compelling interest in protecting minors from harmful speech.[91]

Playboy arguably represents not merely an expansion of self-help's role in strict scrutiny's "compelling interest" prong, but also a limitation on prior authority. Extant law had suggested that the state might have a compelling interest in shielding a child from indecent speech regardless of the moral authority and effective control of that child's parents.[92] "The State . . . has an independent interest in the well-being of its youth,"[93] the Supreme Court in *Ginsberg v. New York* had summarily claimed, even while admitting that the statute in question left parents in control of their children's access to indecent material.[94] The *Action for Children's Television v. FCC (ACT III)* litigation generated more careful consideration of the State's allegedly independent interest.[95] After confirming the undisputed proposition that "the Government has a compelling interest in supporting parental supervision of what children see and hear on the public airwaves," the *ACT III* majority added, "[W]e believe the Government's own interest in the well-being of minors provides an independent

90. *Id.*

91. Given that the *Torries* court did not explicitly say it was invoking parents' self-help to counter a compelling interest claim, two interpretive proofs of that reading bear note: the context of the court's discussion of parents' self-help, amidst references to captive audience cases that concerned compelling interest claims, *see supra* Part I.A, and the court's separate disposition of the "least restrictive means" question, *see* 111 F. Supp. 2d at 822 ("Rather than choosing the least restrictive means to control the alleged violence at the Skate Zone, defendants have thrown the broadest net possible.").

92. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 640 (1968); Action for Children's Television v. FCC, 58 F.3d 654, 663 (D.C. Cir. 1995) (Act III) (en banc).

93. *Ginsberg*, 390 U.S. at 640.

94. *Id.* at 639. That admission arguably renders as dictum the Court's broad claim, *id.* at 640, that the state has an independent interest in molding children into particular sorts of citizens.

95. *See Act III*, 58 F.3d at 660-63.

justification for the regulation of broadcast indecency."[96] Chief Judge Edwards dissented on grounds that the interests of parents and state regulators conflicted[97] and that the former should trump the latter.[98] The majority, finding those two interests entirely compatible in the case at hand, ultimately dodged the problem of reconciling them.[99] The Supreme Court in *Playboy* arguably limited the far reach of the claims aired in *Ginsberg* and *Act III*. Because the *Playboy* Court found the effectuation of parental authority sufficient to satisfy any compelling interest in protecting children from harmful speech,[100] the Court also necessarily suggested that parents have a stronger interest in controlling their children's access to speech than the state does.[101]

II. SELF-HELP VERSUS THE RESTRICTIVENESS OF THE STATE'S MEANS

In contrast to the role it played from the very birth of strict scrutiny's "compelling interest" prong,[102] only quite recently has self-help begun to influence deliberations over whether speech restrictions qualify, under strict scrutiny's other prong, as "narrowly tailored." Self-help has won this newfound influence by virtue of its capacity to illustrate that state action does not represent the least restrictive means of achieving the state's compelling interest. Furthermore, while in compelling interest inquiries self-help appears as a basic fact of the

96. *Id.* at 661.

97. *Id.* at 678 (Edwards, C.J., dissenting) ("In asserting both interests—facilitating parental supervision and protecting children from indecent broadcast—the Government must assume not only that parents agree with the Commission, but that parents supervise their children in some uniform manner. Surely, this is not the case.").

98. *Id.* at 682 ("Where the interest of protecting children conflicts with parental preferences, and where this interest is asserted with no evidence of harm, it cannot withstand exacting scrutiny."); *see also id.* at 686 (Wald, J., dissenting) ("Although the Supreme Court has recognized the government's own interest in protecting children from exposure to indecency, it has never identified this interest as one that could supersede the parental interest.").

99. *See id.* at 663.

100. *See supra* notes 80-85 and accompanying text.

101. *See also* Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 494-507 (2000) (criticizing the notion that the state has an interest in protecting a child from speech regardless of the preferences of that child's parents).

102. *See supra* Part I.

physical or social world, self-help in least restrictive means inquiries takes the form of cutting-edge technologies, such as filtering software. That undoubtedly accounts for yet another distinction between the ways in which courts invoke self-help under strict scrutiny: Whereas courts tend to let self-help shape compelling interest findings without comment—indeed, almost unconsciously—courts measuring the restrictiveness of state action against alternative self-help remedies quite evidently realize that they have introduced a potentially revolutionary force to First Amendment law. Notwithstanding those contrasts, the same basic justification accounts for self-help's role under strict scrutiny's "compelling interest" and "least restrictive means" inquiries. In both instances, courts seek the most efficient means of alleviating the social costs of free speech.

Only very recently has the Supreme Court, in *United States v. Playboy Entertainment Group, Inc.*, made it clear that self-help can go to show that state restrictions on speech fail strict scrutiny's "least restrictive alternative" test.[103] The *Playboy* Court, explaining its holding in *Reno II*,[104] said, "[T]he mere possibility that user-based Internet screening software would 'soon be widely available' was relevant to our rejection of an overbroad restriction of indecent cyberspeech."[105] Though arguably dictum,[106] that interpretation of *Reno II* clarifies what the earlier case had but strongly suggested.

The American Civil Liberties Union had argued in *Reno II* that the Communications Decency Act (CDA)[107] unconstitutionally limited Internet speech because, among other reasons, filtering tools offered a private alternative to a state prohibition on indecent Internet speech.[108] To the government's assertion that there existed no equally effective

103. 529 U.S. 803, 813 (2000).

104. Reno v. ACLU, 521 U.S. 844, 876-77 (1997) (Reno II).

105. 529 U.S. at 814 (quoting *Reno II*, 521 U.S. at 876-77).

106. The passage quoted from *Playboy* appears in the context of the Court's questioning whether the possibility of state action taking advantage of a new technology—the ability to block signals to and at the request of single households—might suffice to render too restrictive a ban on all indecent prime-time cable programming. *Id.* Strictly speaking, then, the Court did not hold that filtering software in particular or purely private action in general can suffice to invalidate state action as too restrictive by comparison.

107. 47 U.S.C.S. § 223 (Lexis Supp. 2001).

108. Brief of Appellees, at 36, Reno v. ACLU, 521 U.S. 844 (1997) (Reno II) (No. 96-511).

alternative to the CDA's criminal ban on indecent speech, the ACLU countered that the trial court had "found that the existing software affords parents a significant option for protecting children," and that the government itself had admitted to a growing and competitive market for self-help tools.[109] The ACLU also cited protections available through the major commercial online services and technical standards then under development that would facilitate user-based blocking of indecent Internet speech.[110] Plaintiff Citizens Internet Empowerment Coalition backed a similar analysis in its *Reno II* brief, which cited the availability of blocking and filtering software as proof that the CDA was "unconstitutional because there are less restrictive measures Congress could have selected that would have been much *more* effective in preventing minors from gaining access to indecent online material."[111]

Those arguments evidently convinced the Court in *Reno II*, for it struck down the CDA on grounds, in relevant part, that the statute did not offer the least restrictive means of achieving the government's goals.[112] The *Reno II* Court did not take great pains, however, to specify that it had measured the efficacy of the CDA against that of private self-help. It of course recited strict scrutiny's "least restrictive means" test: "[The] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."[113] In addition, the emphasis it added to the findings of fact certainly proves suggestive: "[T]he District Court found that '[d]espite its limitations, currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for their children will soon be widely available.'"[114] Nonetheless, the *Playboy* Court's interpretative gloss—that the availability

109. *Id.*

110. *Id.* at 36-37.

111. Brief of Appellees American Library Association et al. at 34-35, *Reno II*, 521 U.S. 844 (1997) (No. 96-511).

112. *Reno II*, 521 U.S. at 876-79.

113. *Id.* at 874.

114. *Id.* at 877 (quoting ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996) (Reno I), *aff'd* by *Reno II*, 521 U.S. at 849) (emphases added by the *Reno II* Court).

of "user-based Internet screening software . . . was relevant to [*Reno II*'s] rejection of an overbroad restriction of indecent cyberspeech"[115]—helpfully drives the point home.

Several lower courts have recently put self-help to similar use in finding state action unconstitutional under strict scrutiny's "least restrictive means" test.[116] *PSINet, Inc. v. Chapman*[117] concerned a challenge to a Virginia statute that criminalized the provision to minors of electronic files containing information harmful to minors.[118] The *PSINet* court enjoined the statute,[119] reasoning that "[l]ess intrusive and more effective means of limiting online access by children to adult materials are widely available to parents and other users who wish to restrict or block access to online sites, etc., that they feel are inappropriate."[120] The court considered and rejected the objection that those self-help remedies would "place the responsibility of protecting minors with individual parents, and not the legislature."[121] In contrast, and as critiqued below, the Third Circuit recently considered and embraced a similar objection.[122] Unlike the Third Circuit, however, and in express recognition of the Supreme Court's *Reno II* and *Playboy* decisions, the *PSINet* court concluded, "Technological advances are relevant considerations of whether the methods chosen by the government to meet its interests are the least restrictive."[123]

115. 529 U.S. at 814 (quoting *Reno II*, 521 U.S. at 876-77).

116. *See also* Hatch v. Superior Court, 94 Cal. Rptr. 2d 453, 492-93 (Cal. Ct. App. 2000) (McDonald, J., concurring and dissenting) (dissenting from the finding of constitutionality of a statute criminalizing the intentional distribution to a minor of material harmful to minors with intent to seduce that minor on grounds, in relevant part, that "the People make no effort to demonstrate that the state interest cannot be advanced by less restrictive means (like receiver-based controls or filters . . .) that impose less onerous burdens on protected speech").

117. 108 F. Supp. 2d 611 (W.D. Va. 2000) (mem.), *summary judgment and permanent injunction granted*, 167 F. Supp. 2d 878 (W.D. Va. 2001).

118. 108 F. Supp. 2d at 617.

119. *Id.* at 627.

120. *Id.* at 625.

121. *Id.* at 626.

122. *See infra* text accompanying notes 136-47 (discussing ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000) (Reno IV), *vacated and remanded sub nom.* Ashcroft v. ACLU, 122 S. Ct. 1700 (2002)).

123. 108 F. Supp. 2d. at 625. The *PSINet* court did not revisit the issue of technological advances in its least restrictive means analysis upon granting summary judgment and a permanent injunction in the case. *See* PSINet v. Chapman, 167 F. Supp. 2d 878, 886 (W.D. Va. 2001).

Cyberspace Communications, Inc. v. Engler[124] concerned a similar statute in Michigan that criminalized Internet communications knowingly disseminating to minors material harmful to them.[125] Like the *PSINet* court, the *Engler* court preliminarily enjoined the statute as unconstitutional,[126] observing that "there are many less intrusive, more effective ways to screen harmful material to minors. Some of the ways or methods that this can be accomplished is through the use of currently marketed software that restrict content received."[127] In contrast to other courts that have weighed self-help remedies in strict scrutiny analyses, however, the *Cyberspace Communications* court also cited distinctly low-tech tools:

> Parental control is the most effective method in overseeing where the child ventures. This can be as simple as placing the computer in a common area of your home, like the living room, so the child can anticipate the presence of an adult. . . . A parent could also place a lock on the computer until such time as a parent can supervise the child. If the parent cannot directly supervise the child's computer usage, then set limits, much like what shows a child can and cannot watch on television.[128]

The court had little sympathy for irresponsible parents, noting somewhat contemptuously that "every computer is equipped with an on/off switch."[129]

The *Engler* court's invocation of personal—or rather parental—responsibility echoes courts that have invoked personal responsibility under strict scrutiny's compelling interest prong.[130] Here, though, the court regarded both technical and moral forms of self-help as evidence that the state had unnecessarily restricted speech:

> Although it is difficult in today's society to constantly monitor the activities of children, it is still the right, and duty, of every parent to teach and mold children's concepts of good and bad, right and wrong. This right is no greater than in the confines of ones [sic] own home. A family with values will supervise their children. This includes setting limits, and either being there to enforce those limits, or utilizing the available technology to do so. With such less restrictive means to monitor the online activities of children, the government need not

124. 55 F. Supp. 2d 737 (E.D. Mich. 1999), *aff'd* 238 F.3d 420 (6th Cir. 2000).
125. *Id.* at 740.
126. *Id.*
127. *Id.* at 750.
128. *Id.* at 750-51.
129. *Id.* at 751.
130. *See supra* Part I.B.

> restrict the right of free speech guaranteed to adults.[131]

One might not expect such free-form sermonizing to survive appellate review. As it turns out, the Sixth Circuit affirmed the court's order and remanded the case for further proceedings.[132] On remand, the trial court issued a permanent injunction,[133] both taking the opportunity to repeat its observation that concerned parents could avail themselves of less restrictive self-help remedies[134] and taking another jab at parents who shirk their responsibilities on that count.[135]

Reno II has generated a rapidly-growing line of cases willing to grant private self-help the power to render overly restrictive state action unconstitutional. The Third Circuit's refusal to give self-help similar respect in *ACLU v. Reno (Reno IV)*[136] represents a notable exception to that trend. In that case, which concerned the constitutionality of a federal statute restricting harmful-to-minors Internet speech,[137] the Third Circuit grappled with the legal significance of "actions taken by a minor's parent to supervise or block harmful material by using filtering software."[138] From the unobjectionable observation that "such actions do not constitute government action," the court leapt to the conclusion: "[W]e do not consider this to be a lesser restrictive means for the government to achieve its compelling interest."[139] The court felt compelled, moreover, to repeat the point:

> Although much attention at the District Court level was focused on the availability, virtues and effectiveness of voluntary blocking or filtering software that can enable parents to limit the harmful material to which their children may otherwise be exposed, the parental hand should not be looked to as a substitute for a

131. *Engler*, 55 F. Supp. 2d at 752-53.

132. Cyberspace Communications, Inc. v. Engler, No. 99-2064, 2000 WL 1769592, at *1 (6th Cir. Nov. 15, 2000) (mem.) (per curiam).

133. 142 F. Supp. 2d 827, 831 (E.D. Mich. 2001).

134. *Id.* at 830 ("[O]ther, less-intrusive means to filter the reception of obscene materials exist. A parent may utilize filters or child-friendly software to accomplish similar restrictions.").

135. *Id.* ("The Court previously took judicial notice that every computer is manufactured with an on/off switch, that parents may utilize, in the end, to control the information which comes into their home via the Internet.").

136. 217 F.3d 162 (3d Cir. 2000), *vacated and remanded sub nom.*, Ashcroft v. ACLU, 122 S. Ct. 1700 (2002).

137. *Id.* at 165.

138. *Id.* at 171 n.16.

139. *Id.*

congressional mandate.[140]

That undoubtedly qualifies as dicta, because the Third Circuit resolved *Reno IV* solely on grounds that reliance on a national community standard rendered the statute in question, the Child Online Protection Act (COPA),[141] facially unconstitutional.[142] Still, it qualifies as controversial dicta. The court offered neither argument nor supporting authority for its claim that self-help should have no bearing on inquiries made under strict scrutiny's "least restrictive means" prong. Nor did the court evince any awareness that its novel theory conflicted with the Supreme Court's holding in *Reno II*. In defense of the Third Circuit, it bears repeating that *Reno II* appears to offer the first instance of a court including self-help remedies in a "least restrictive means" inquiry and that the *Reno II* court did not clearly explain what it had done on that count.[143] Incredibly, though, the Third Circuit had the *chutzpa* to cap its disparaging comments about the probative value of self-help with a "but see" cite[144] to *Playboy*, where the Supreme Court had given unmistakable support to the contrary view![145]

The Third Circuit's disposition of *Reno IV* failed to survive Supreme Court review.[146] The Court, however, granted certiorari only on the narrow question of whether COPA's reliance on "community standards" facially violated the First Amendment,[147] and the Court's plurality opinion did not specifically address the court of appeals' claim that "least restrictive means" inquiries must take no account of self-help

140. *Id.* at 181 n.24.

141. Child Online Protection Act, 47 U.S.C. § 231 (1994 & Supp. 1999).

142. 217 F.3d at 173-74 ("The overbreadth of COPA's definition of 'harmful to minors' applying a 'contemporary community standards' clause—although virtually ignored by the parties and the amicus in their respective briefs but raised by us at oral argument– . . . without reference to [COPA's] other provisions, must lead inexorably to . . . [the] unconstitutionality of the entire COPA statute.").

143. *See supra* text accompanying notes 112-15.

144. 217 F.3d. at 171 n.16.

145. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 814 (2000).

146. *See* Ashcroft v. ACLU, 122 S. Ct. 1700, 1714 (2002) (vacating and remanding the appellate opinion).

147. *See id.* at 1703 ("This case presents the narrow question whether the Child Online Protection Act's (COPA) use of' 'community standards' to identify 'material that is harmful to minors' violates the First Amendment. We hold that this aspect of COPA does not render the statute facially unconstitutional.").

remedies. Fortunately for the court of appeals—and for free speech—the Supreme Court vacated and remanded the case for further proceedings. The Third Circuit will thus have ample opportunity to rectify its crabbed perception of strict scrutiny. So rectify it should; as Part III explains, the Third Circuit erred grievously in claiming that self-help has no role to play in strict scrutiny's least restrictive means test.

III. UPGRADING FREE SPEECH JURISPRUDENCE

Self-help's influence on free speech strict scrutiny jurisprudence offers a signal example of how changing facts can shape interpretation of the Constitution's unchanging words. That relationship springs forth with particular clarity in the recent and explicit judicial acknowledgement[148] that advances in self-help's effectiveness can reduce the scope of state action permitted under strict scrutiny's "least restrictive means" test. The Supreme Court has not merely recognized the potentially revolutionary impact of pegging free speech jurisprudence to technological advances; it has embraced it:

> The Constitution exists precisely so that opinions and judgments . . . can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.[149]

How can we understand and justify that remarkable approach[150] to free speech jurisprudence?

Consider an analogy between computer software and constitutional law:[151] Just as software applications benefit

148. *See supra* Part II.

149. *Playboy*, 529 U.S. at 818.

150. *See* Jennifer L. Polse, Note, United States v. Playboy Entertainment Group, Inc., 16 BERKELEY TECH. L.J. 347, 348 (2001) (arguing that the *Playboy* Court's "reliance on technological solutions as an alternative to intrusive government regulation . . . demonstrates a sea change in the Court's approach to emerging technologies" (footnotes omitted)); Andrea K. Rodgers, Note, United States v. Playboy Entm't Group, Inc., *and Television Channel Blocking Technology*, 40 JURIMETRICS J. 499, 513 (2000) (interpreting *Playboy* to indicate that "information filtering technologies can be expected to play an increasing[ly] important role in First Amendment jurisprudence involving telecommunications").

151. Although Lawrence Lessig has famously drawn an analogy between cyberspace code and legal code, *see* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 5-6 (1999), his analogy serves quite different ends than the present one. Lessig analogizes private action to state action in order to stress

from advances in computer hardware, so too, the application of strict scrutiny benefits from advances in the technology of self-help. As its use of "benefit" hints, this analogy relies on normative judgments. We justify upgrading software to accommodate advances in hardware on grounds that we thereby make our software quicker, more powerful, and more functional—in short, better at doing what we want software to do. Similarly, we can justify upgrading free speech jurisprudence to accommodate advances in self-help technology on grounds that we thereby make strict scrutiny better at doing what we want *it* to do: Detect and prohibit any content-based state censorship that is not absolutely necessary.

As the software analogy suggests, one might counter that upgrading free speech jurisprudence in step with advances in self-help imposes costs and uncertainty on the legal process. It takes time, effort, and sometimes considerable cash to upgrade software, after all, and to reap its benefits we often must also abandon old and comfortable habits for new ones. Similarly, as Stuart Benjamin has observed, courts struggle to keep up with the change that racing technology wreaks on legally relevant facts and, in so doing, those courts risk undermining their own precedents.[152] Perhaps courts could avoid upgrading their free speech jurisprudence if they enforced the plain meaning of the First Amendment and permitted "no law . . . abridging the freedom of speech";[153] perhaps not.[154] At any rate, by embracing strict scrutiny the Supreme Court has rejected that straight-forward interpretative strategy for one that must take account of a great many legally significant facts. On this point,

their functional equivalence, whereas I analogize software to jurisprudence in order to stress that both benefit from accommodating technological advances. In contrast to Lessig's analogy, furthermore, the present one goes toward showing an important distinction between private and state action: When the former advances, the latter should retreat.

152. *See* Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEXAS L. REV. 269, 272 (1999) ("Rapidly changing facts . . . can undermine factual findings and in turn the opinions that rely on them . . . .").

153. U.S. CONST. amend. I; *see also* Volokh, *Permissible Tailoring*, *supra* note 7, at 2456 (arguing for an interpretation of the First Amendment under which "the Court should see its task as being the development of a system of categorical rules and categorical exceptions").

154. Benjamin observes that even self-proclaimed free speech absolutists find it difficult to dodge all factual inquiries and concludes, "The state of the world is indispensable to most judicial inquiries that one can imagine." Benjamin, *supra* note 152, at 274.

then, the analogy between software and jurisprudence perhaps breaks down. For while we have the right, however unattractive, to shrink away from technological progress, courts applying strict scrutiny have a duty to protect free speech in the real and present world.[155]

That duty to update strict scrutiny jurisprudence applies *especially* with regard to advances in self-help. Consider the alternative approach, embodied by the Third Circuit's opinion in *Reno IV*, under which self-help "should not be looked to as a substitute for a congressional mandate."[156] That approach can only presume that Congress has a mandate to restrict speech regardless of whether citizens actually need such restrictions. Suppose, for instance, that a brilliant and civic-minded programmer has created and distributed free of charge software that, grace of artificial intelligence and natural language processing, effectively functions like an omniscient virtual nanny. Suppose the hypothetical software can, after conversing with a child's guardians, understand and enforce the subtle ethical guidelines they would have guide their child's access to Internet speech; the product responds perfectly to consumer preference. Suppose, in short, that advancing technology has created a perfect self-help remedy to the problem of harmful-to-minors Internet speech.

The *Reno IV* court apparently would not care. It would decline to consider the ready availability of that ideal private solution when applying the "least restrictive means" test to a statute banning harmful-to-minors Internet speech. The court would decline to take notice even if, thanks to universal use of such an effective self-help technology, no child risked exposure to harmful Internet speech. The court would instead limit

155. During oral argument in *Reno II*, Justice Scalia commented, "This is an area where change is enormously rapid. Is it possible that this statute is unconstitutional today, or was unconstitutional 2 years ago when it was examined on the basis of a record done about 2 years ago, but will be constitutional next week?" Soon thereafter, he concluded that the statute's constitutionality "depends on the—on the security of the safe harbor. And how secure the safe harbor is depends so much upon technology." Transcript of Oral Argument at *49, Reno v. ACLU, 521 U.S. 844 (1997) (Reno II) (No. 96-511), *available at* 1997 WL 136253. Justice Scalia seems particularly attuned to the effect of advancing technologies on constitutional interpretation. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 33-34 (2001) ("It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.") (Scalia, J., writing for the majority).

156. ACLU v. Reno, 217 F.3d 162, 181 n.24 (3d Cir. 2000) (Reno IV).

itself to asking whether the statute in question was the least restrictive means *of state action*—even if, as in the present hypothetical, *all* forms of state action restricted speech more, and protected minors less, than a superior form of private action.

If neither that *reductio ad absurdum* nor the contrary Supreme Court precedent discussed above[157] suffice to cast doubt on the wisdom of the *Reno IV* court's disregard for self-help's role in the "least restrictive means" inquiry, consider two more points against it. First, given the parallel role that self-help has played in strict scrutiny's "compelling state interest" inquiry,[158] it is hard to see why a court following *Reno IV* would think it relevant that noncaptive audiences can avert their eyes from offensive speech. Such an aversion constitutes merely another form of self-help, after all. Consistency would thus appear to require a court adopting *Reno IV*'s disregard for self-help to uphold the speech restrictions found unconstitutional in such Supreme Court opinions as *Cohen v. California*,[159] *Spence v. Washington*,[160] and *Erznoznik v. Jacksonville*.[161]

Second, unless the *Reno IV* court were to take the untenable position that technological advances could never have any bearing on strict scrutiny inquiries,[162] it would have effectively created a one-way ratchet for increasing state power at the expense of free speech. Advances in technology would, after all, remain capable of turning formerly unconstitutional speech restrictions into newly constitutional ones. Indeed, the *Reno IV* court eagerly anticipated that outcome, saying, "We . . . express our confidence and firm conviction that developing technology will soon render the 'community standards' challenge moot, thereby making congressional regulation to protect minors from harmful material on the Web constitutionally practicable."[163] The disregard for self-help embodied in the *Reno IV* court's approach to strict scrutiny would thus assure that technological advances increase

157. *See supra* Parts I.B., II (discussing the *Reno II* and *Playboy* opinions).

158. *See supra* Part I.

159. 403 U.S. 15, 26 (1971); *see supra* text accompanying notes 46-49.

160. 418 U.S. 405, 415 (1974) (per curiam); *see supra* text accompanying notes 50-51.

161. 422 U.S. 205, 217 (1975); *see supra* text accompanying notes 52-53.

162. *See supra* text accompanying notes 152-55 (discussing the reliance of strict scrutiny, in particular, and of constitutional jurisprudence, in general, on a fact-specific analysis).

163. ACLU v. Reno, 217 F.3d 162, 181 (3d Cir. 2000) (Reno IV).

lawmakers' power to restrict speech without likewise empowering citizens to escape state censorship.

In the final analysis, the *Reno IV* court's refusal to consider self-help "as a substitute for a congressional mandate"[164] put matters exactly backwards. Lawmakers can have no mandate to violate the Constitution. As wiser courts have demonstrated in their invocations of strict scrutiny,[165] the availability of self-help remedies must play a crucial role in determining whether lawmakers violate the First Amendment when they restrict speech based on its content. The extent to which free speech jurisprudence favors private action over state action appears not only in how courts bring self-help to bear under strict scrutiny's "compelling interest" and "least restrictive means" inquiries, but also, and more pointedly, in how courts put on proponents of state action the burden of proving self-help inadequate.[166] In contrast, courts ask for no more than a plausible accounting of self-help's effectiveness and readily excuse its burdens and inevitable imperfections.[167]

Far from an anomaly of strict scrutiny, that marked preference for private over state action appears throughout First Amendment jurisprudence.[168] It surfaces, for example, in the "not substantially broader than necessary"[169] test applied to content-neutral time, place, or manner restrictions on speech;

164. *Id.* at 181 n.24.

165. *See supra* Parts I, II (reviewing relevant case law).

166. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 816 (2000) (**"**When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals."); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978) (holding that, under strict scrutiny, "the State may prevail only upon showing a subordinating interest which is compelling, and the burden is on the government to show the existence of such an interest" (footnote and citations omitted)). *But see* People v. Hsu, 99 Cal. Rptr. 2d 184, 195 (Cal. Ct. App. 2000) (stating that there is no "blanket requirement that alternative means must first be tested before restrictions can be placed on protected speech to prevent specific conduct impermissible under any circumstances").

167. *See Playboy*, 529 U.S. at 824 ("It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.").

168. Figuring this a plausible defense of that claim would so far exceed the bounds of the present paper as to require a wholly separate one, I plan an Article tentatively titled, *Free Speech, Self-Help, and Constitutional Upgrades* (rough draft on file with the author).

169. Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989).

in the "no greater than is essential"[170] test applied to content-neutral restrictions on expressive conduct; in the "not more extensive than necessary"[171] test applied to restrictions on commercial speech; and in defamation law's distinction between public and private figures.[172] Copyright law, which justifies its speech restrictions as necessary to remedy the market's failure to encourage authors' efforts, arguably evinces a similar philosophy.[173] Even the Supreme Court's willingness to permit restrictions on fighting words demonstrates a deference to private action, because "epithets likely to provoke the average person to retaliation"[174] risk provoking an exceptional failure of self-help *qua* self-control.

As a more general matter, moreover, self-help's influential role in First Amendment jurisprudence reflects a fundamental principle of liberalism: The state ought not do for us what we can just as well do for ourselves.[175] That principle appears in the works that originally inspired what we now know as political liberalism,[176] in contemporary explanations of the

170. City of Erie v. Pap's A.M., 529 U.S. 277, 301 (2000).

171. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

172. *See, e.g.*, Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 163-69 (1979). The Wolston Court observed that

> public figures are less vulnerable to injury from defamatory statements because of their ability to resort to effective "self-help." They usually enjoy significantly greater access than private individuals to channels of effective communication, which enable them through discussion to counter criticism and expose the falsehood and fallacies of defamatory statements.

Id. at 164.

173. *See* Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 758-76 (2001) (analyzing the justification of copyright law).

174. Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942).

175. Note, however, that this principle serves as merely one of the limits that liberalism imposes on the exercise of state power, and a rather lenient one at that. The liberal presumptions in favor of personal liberty and solicitude for individual rights impose other, even stricter limits.

176. *See, e.g.*, THOMAS HOBBES, LEVIATHAN 130 (Michael Oakeshott ed., 1974) (1651) ("For if we could suppose a great multitude of men to consent in the observation of justice, and other laws of nature, without a common power to keep them all in awe; we might as well suppose [no need for] . . . any civil government, or commonwealth at all; because there would be peace without subjection."); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 62 (J.W. Gough ed., 1947) (1690) (arguing that because people need the state for "the mutual preservation of their lives, liberties and estates," its creation is justified); *see also* ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT ch. 1, § 10, at 23 (Fernand Braudel et al. eds., 1979) (1698)

philosophy motivating the American Revolution and founding,[177] and in subsequent explorations of those fresh ideals.[178] It remains a universal feature of the various sorts of political liberalism espoused today,[179] from the relatively statist[180] to libertarian.[181] Abraham Lincoln expressed the core

(justifying the state on grounds that "[m]an cannot continue in the perpetual and entire fruition of the Liberty that God hath given him," but limiting the permissible scope of state power by adding that "[t]his remains to us whilst we form Governments, that we our selves are Judges how far 'tis good for us to recede from our natural Liberty"); John Trenchard & Thomas Gordon, *Liberty Proved to be the Unalienable Right of All Mankind* (Cato's Letters No. 59), *reprinted in* THE ENGLISH LIBERTARIAN HERITAGE 107 (David L. Jacobsen ed., 1965) ("All Governments, under whatsoever Form they are administered, ought to be administered for the Good of the Society; when they are otherwise administered, they cease to be government, and become Usurpation.").

177. *See, e.g.*, THOMAS JEFFERSON, *Inauguration Address*, *in* 3 THE WRITINGS OF THOMAS JEFFERSON 317, 320-21 (Albert Ellery Berch & Andrew A. Lipscomb eds., 1904) (1801) ("[A] wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government . . . ."); THOMAS PAINE, *Common Sense*, *in* THE SELECTED WORKS OF TOM PAINE 6, 6 (Howard Fast ed., 1945) (1776) ("Government, even in its best state, is but a necessary evil . . . . For were the impulses of conscience clear, uniform and irresistibly obeyed, man would need no other lawgiver; but that not being the case, he finds it necessary to surrender up a part of his property to furnish means for the protection of the rest . . . ."); *see also* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1443 (1987) (observing with approval that "[t]he original theory of the Constitution was based on the belief that government was not an unrequited good, but was at best a necessary evil").

178. *See, e.g.*, JOHN STUART MILL, ON LIBERTY 9 (Alburey Castell ed., 1947) (1859) ("[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection."); WILHELM VON HUMBOLDT, THE LIMITS OF STATE ACTION 37 (J.W. Burrow ed. 1969) (1792) (arguing that the state should "not . . . proceed a step further than is necessary for [citizens'] mutual security and protection against foreign enemies; for with no other object should it impose restrictions on freedom"); *id.* at 43 (positing the provision of such security "the only thing which the individual cannot obtain for himself and by his own unaided efforts" (footnote omitted)).

179. *See supra* note 1.

180. *See, e.g.*, RONALD DWORKIN, *Liberalism*, *in* A MATTER OF PRINCIPLE 181, 193-98 (1985) (arguing that markets reflect an appropriate neutrality among competing conceptions of the good and as such have considerable normative force, but that a democracy limited by civil rights is necessary to correct market failures of various sorts); JOHN RAWLS, JUSTICE AS FAIRNESS 42-43 (Erin Kelly ed., 2001) (positing as the first and most important of his two principles of justice that "[e]ach person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all" (quotations omitted)); *id.* at 44 ("[T]here is a general presumption against imposing legal and other

idea succinctly:

> The legitimate object of government, is to do for a community of people, whatever they need to have done, but can not do, *at all*, or can not, *so well do*, for themselves—in their separate, and individual capacities.
>
> In all that the people can individually do as well for themselves, government ought not to interfere.[182]

That fundamental liberal principle may well sound—indeed, *should* sound—uncontroversial. It should appeal to anyone who regards human welfare as the only proper end of the state, for the principle follows directly from the commonsense notion that we should not squander social wealth in assigning to political entities tasks that private entities can handle more efficiently. One would have to put the well-being of the state before the well-being of the people[183] to want otherwise.

It remains a question of fact whether political means can solve any particular social problem, such as indecent or

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restrictions on conduct without a sufficient reason . . . .").

181. *See, e.g.*, 3 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY 41 (1979) ("[I]n an advanced society government ought to use its power of raising funds by taxation to provide a number of services which for various reasons cannot be provided, or cannot be provided adequately, by the market."); *id.* at 43 (describing government agencies as "a purely utilitarian device, quite as useful as the butcher and the baker but no more so—and somewhat more suspect, because of the powers of compulsion which they can employ to cover their costs"); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 149 (1974) ("The minimal state is the most extensive state that can be justified. Any state more extensive violates peoples rights."); LUDWIG VON MISES, LIBERALISM IN THE CLASSICAL TRADITION 37 (Ralph Raico trans., 3d ed., 1985) (1927) ("The liberal understands quite clearly that without resort to compulsion, the existence of society would be endangered . . . . This is the function that the liberal doctrine assigns to the state: the protection of property, liberty, and peace.").

182. ABRAHAM LINCOLN, *Fragment on Government*, *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 220 (Roy P. Basler ed., 1953) (1854?).

183. *See, e.g.*, Benito Mussolini, *The Doctrine of Fascism*, *in* FASCISM: DOCTRINE AND INSTITUTIONS 10-11 (Howard Fertig ed., 1968) (1935) ("Liberalism denied the State in the name of the [particular] individual; Fascism reasserts the rights of the State . . . . The Fascist conception of the State is all-embracing; outside of it no human or spiritual values can exist, much less have value.").

The defeat of Fascism, at least in its original guise, does not mean there remain no proponents of similarly illiberal views. As Richard A. Epstein observes, contemporary communitarians likewise complain that individual rights interfere with the collective's well-being. *See* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 320 (1995) ("One does not have to impute terrible motives to modern theories to sound at least a note of caution about arguments that have traveled in such dubious company.").

harmful-to-minors Internet speech, more efficiently than private means can. Different sorts of liberals favor quite different answers to those questions, of course, but we need not rehash their debates here. It suffices for present purposes to observe that courts rightly engage in a similar factual inquiry when, as part of strict scrutiny, they compare the efficacy of state action with that of alternative, self-help remedies. The jurisprudence of a constitutional liberal republic, like the philosophy of liberalism generally, properly regards state action as, at best, a necessary evil designed to fix a salient and grave failure of civil society. To put the matter in computational terms, state action represents a kludge.[184] We abandon kludges when presented with new and better programming solutions. So too should our courts upgrade constitutional jurisprudence by abandoning state action that advances in self-help render obsolete.

CONCLUSION

This Article reviewed the extant case law to reveal that self-help plays an under appreciated, but increasingly influential, role in free speech jurisprudence. From the very advent of the "compelling interest" test that courts apply to content-based speech restrictions, jurists have in practice—albeit only implicitly—cited the availability of simple and direct forms of self-help as grounds for finding state action unconstitutional. In the last few years, with the rise of tools empowering individuals and families to filter electronic information, courts applying strict scrutiny's "least restrictive means" test have begun to openly—and disfavorably—compare state action to alternative self-help remedies. These jurisprudential phenomena, the first somewhat covert and the second very recent, had hitherto escaped critical commentary. Analyzing self-help's role under strict scrutiny thus casts new light on First Amendment law, both clarifying old doctrines and preparing us to understand their application to new technologies.

Analyzing self-help's role in strict scrutiny cases also demonstrates that courts quite rightly invoke it when

184. "In information technology, a kludge (pronounced KLOOdzh) is an awkward or clumsy (but at least temporarily effective) solution to a programming or hardware design or implementation problem." WHATIS.COM, *at* http://whatis.techtarget.com/definition/0,,sid9_gci212446,00.html (last updated Oct. 1, 1999).

evaluating the constitutionality of state action restricting speech. Even apart from the authority of controlling precedents, it is hard to imagine how courts could justify ignoring superior private alternatives to state action. Spelling out the consequences of the single holding to the contrary, that of the *Reno IV* court, provides a *reductio ab adsurdum* against ignoring self-help. Surveying the rest of First Amendment law and the fundamentals of political liberalism, moreover, illustrates that self-help's role in strict scrutiny comports with the general principle that we should resort to political means only when private ones fail.

Advances in self-help give courts a welcome opportunity to upgrade First Amendment strict scrutiny jurisprudence. Admittedly, each time that courts thus limit state action, they impose on each of us the responsibility for adopting the new and improved self-help technologies that render such state action obsolete. We should understand that responsibility as an unavoidable cost of enjoying freedom of speech, however, and keep in mind this cautionary tenet: What we ask the state to do *for* us, it risks doing *to* us.