tection than are other communications entities.[1125] "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizens, 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. . . . Second, broadcasting is uniquely accessible to children, even those too young to read. . . . The ease with which children may obtain access to broadcast material . . . amply justif[ies] special treatment of indecent broadcasting." [1126] The Court emphasized the "narrowness" of its holding, which "requires consideration of a host of variables." [1127] The use of more than "an occasional expletive," the time of day of the broadcast, the likely audience, "and differences between radio, television, and perhaps closed-circuit transmissions" were all relevant in the Court's view.[1128]

Governmentally Compelled Right of Reply to Newspapers.— However divided it may have been in dealing with access to the broadcast media, the Court was unanimous in holding void under the First Amendment a state law that granted a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper.[1129] Granting that the number of newspapers had declined over the years, that ownership had become concentrated, and that new entries were prohibitively expensive, the Court agreed with proponents of the law that the problem of newspaper respon-

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[1125] FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

[1126] 438 U.S. at 748–51. This was the only portion of the constitutional discussion that obtained the support of a majority of the Court. In Denver Area Educational Telecommunications Consortium v. FCC, 518 U.S. 727, 748 (1996), the Court noted that spectrum scarcity "has little to do with a case that involves the effects of television viewing on children."

[1127] 438 U.S. at 750. *See also* id. at 742–43 (plurality opinion), and id. at 755–56 (Justice Powell concurring) ("The Court today reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion.").

[1128] 438 U.S. at 750. Subsequently, the FCC began to apply its indecency standard to fleeting uses of expletives in non-sexual and non-excretory contexts. The U.S. Court of Appeals for the Second Circuit found this practice arbitrary and capricious under the Administrative Procedure Act, but the Supreme Court disagreed and upheld the FCC policy without reaching the First Amendment question. FCC v. Fox Television Stations, Inc., 556 U.S. ___, No. 07–582 (2009). *See also* CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008), vacated and remanded, 129 S. Ct. 2176 (2009) (invalidating, on non-constitutional grounds, a fine against CBS for broadcasting Janet Jackson's exposure of her breast for nine-sixteenths of a second during a Super Bowl halftime show). The Supreme Court vacated and remanded this decision to the Third Circuit for further consideration in light of FCC v. Fox Television Stations, Inc. Decisions regarding legislation to ban "indecent" expression in broadcast and cable media as well as in other contexts are discussed under "Non-obscene But Sexually Explicit and Indecent Expression," *infra*.

[1129] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).