cannot be presumed obscene;[1367] nor can offensive language ordinarily be punished simply because it offends someone.[1368] Nonetheless, government may regulate sexually explicit but non-obscene expression in a variety of ways. Legitimate governmental interests may be furthered by appropriately narrow regulation, and the Court's view of how narrow regulation must be is apparently influenced not only by its view of the strength of the government's interest in regulation, but also by its view of the importance of the expression itself. In other words, sexually explicit expression does not receive the same degree of protection afforded purely political speech.[1369]

Government has a "compelling" interest in the protection of children from seeing or hearing indecent material, but total bans applicable to adults and children alike are constitutionally suspect.[1370]

[1367] Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–14 (1975).

[1368] *E.g.*, Cohen v. California, 403 U.S. 15 (1971). Special rules apply to broadcast speech, which, because of its pervasive presence in the home and its accessibility to children, is accorded "the most limited First Amendment protection" of all media; non-obscene but indecent language and nudity may be curtailed, with the time of day and other circumstances determining the extent of curtailment. FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978). However, efforts by Congress and the FCC to extend the indecency ban to 24 hours a day were rebuffed by an appeals court. Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) (invalidating regulations promulgated pursuant to Pub. L. 100–459, § 608), *cert. denied*, 503 U.S. 913 (1992). Earlier, the same court had invalidated an FCC restriction on indecent, non-obscene broadcasts from 6 a.m. to midnight, finding that the FCC had failed to adduce sufficient evidence to support the restraint. Action for Children's Television v. FCC, 852 F.2d 1332, 1335 (D.C. Cir. 1988). In 1992, however, Congress imposed a 6 a.m.-to-midnight ban on indecent programming, with a 10 p.m.-to-midnight exception for public radio and television stations that go off the air at or before midnight. Pub. L. 102–356, § 16 (1992), 47 U.S.C. § 303 note. This time, after a three-judge panel found the statute unconstitutional, the en banc court of appeals upheld it, except for its 10 p.m.-to-midnight ban on indecent material on non-public stations. Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996). *See also* "Broadcast Radio and Television," *supra*.

[1369] Justice Scalia, concurring in Sable Communications v. FCC, 492 U.S. 115, 132 (1989), suggested that there should be a "sliding scale" taking into account the definition of obscenity: "The more narrow the understanding of what is 'obscene,' and hence the more pornographic what is embraced within the residual category of 'indecency,' the more reasonable it becomes to insist upon greater assurance of insulation from minors." Barnes v. Glen Theatre, 501 U.S. 560 (1991), upholding regulation of nude dancing even in the absence of a threat to minors, may illustrate a general willingness by the Court to apply soft rather than strict scrutiny to regulation of more sexually explicit expression.

[1370] *See* Sable Communications v. FCC, 492 U.S. 115 (1989) (FCC's "dial-a-porn" rules imposing a total ban on "indecent" speech are unconstitutional, given less restrictive alternatives—*e.g.*, credit cards or user IDs—of preventing access by children). *Pacifica Foundation* is distinguishable, the Court reasoned, because that case did not involve a "total ban" on broadcast, and also because there is no "captive audience" for the "dial-it" medium, as there is for the broadcast medium. 492 U.S. at 127–28. Similar rules apply to regulation of cable TV. In Denver Area Educational Telecommunications Consortium v. FCC, 518 U.S. 727, 755 (1996), the Court, acknowledging that protection of children from sexually explicit programming is a "compelling" governmental interest (but refusing to determine whether strict scru-