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Foreword

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FOREWORD

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The mass media are too important to American democracy, too capable of causing injury, and too easy a target for the perennial wish to find a scapegoat for the country's ills ever to be very far from the center of public attention and debate. That is certainly true today. And, though every generation probably thinks that it stands at a crossroads on the question what to do with the media, I would nevertheless venture to say that the issues of our time are more serious, and more complex, than ever before. One can safely predict, in any event, that we are entering another significant period of reflection and reassessment with respect to the concept of freedom of the press and to the performance of the press under that concept. The end of a century, however irrationally, seems naturally to induce a self-reflective frame of mind. At mid-century we had the famous Hutchins' Commission "Report on a Free and Responsible Press," with its powerful critique of American journalism; so now we might expect an equivalent commission to close the century and to ask whether all's well with our system of mass communications. All things considered, such a general review would probably be all to the good.

Three areas for study would seem to demand attention. The first involves a simple assessment of the performance of the press—that is, the need to identify and, when possible, measure what the press does well and what it does poorly. The second area for study involves asking what role public regulation can effectively play in encouraging good journalism and discouraging abuses. The third involves deciding what limits the First Amendment to the Constitution places on any role for public regulation.

During the course of the last half century, enormously important developments have occurred in each of these areas. Empirical studies of the press, ranging from inquiries into the effects of violent programming on social behavior to inquiries into how the methods of news reporting shape the character of public debate and voting, have proliferated since the Second World War. Professor Shanto Iyengar has been a leader in this

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field and his article in this volume, "How Television News Affects Voters: From Setting Agendas to Defining Standards," is representative of that important work. We have come a considerable distance from the mostly anecdotal evidence relied upon by the Hutchins' Commission:

As for the potential role of public regulation of the press, we also now have a deep reservoir of experience from which to gather data and draw conclusions. Libel law, for example, continues to protect individual reputation, while privacy law protects individuals against unauthorized disclosure of highly embarrassing (and true) information. But the Fairness Doctrine, the equal time rule and related public access regulations for the electronic media of television and radio have opened a whole new chapter on the subject of the role public institutions might play in minimizing distortions and equalizing opportunities for participation in public debate. Professor Don Le Duc's article here, "Recognizing the Interests of the Public in Broadcasting Programming," speaks effectively to the issue of whether these sorts of regulations are necessary to correct deficiencies in a pure "marketplace" solution.

Finally, with respect to the constitutional question of the scope of permissible regulatory intervention into the media, we now have a rich and extensive jurisprudence of cases and scholarship, ripe for review and reassessment. Virtually every year, the Supreme Court adds yet another decision or two to this ever-growing body of case law now so sizeable in fact that it has become commonplace for law schools throughout the country to offer separate courses in mass media or communications law, with a heavy emphasis on the role of the First Amendment in defining the boundaries of media regulation.

Ever since *New York Times v. Sullivan*, in 1964, the Supreme Court has been actively at work constructing the constitutional principle of freedom of the press. One of the most remarkable areas within this jurisprudence is the differential system of constitutional principles applicable to the print media on the one hand and the electronic media on the other. In a series of decisions that remain valid to this day, the Court has denied the government any constitutional authority to create and enforce public access rules for print while permitting the state to impose such rules in the context of the broadcast media. This extraordinary regime has been the subject of intense debate over the past two decades. Jonathan Emord's article here, "The First Amendment Invalidity of FCC Content Regulations," argues forcefully that the regime lacks constitutional legitimacy and that the principles applicable to the print media

should reign for the electronic sector as well. That puts him squarely in the middle of a difficult and perplexing debate about the role of government in overseeing the development of new technologies of communication.

Now, each of these areas of inquiry—assessing the performance of the press, devising effective public regulations, and determining the constitutional limits of public regulation—are important and worthy of study in themselves. But it is vital that they be seen not as discrete but as interactive and dynamic. Determining the media's shortcomings is, of course, essential to devising public regulations and deciding how much latitude there should be for public institutions to intervene. But the process of constitutional adjudication also necessarily involves defining the role of the media in American society and identifying the goals of freedom of the press. And, as this occurs, the standards by which the performance of the press will be measured and problems identified are affected too.

One of the most interesting developments in constitutional law has been the creation of a complex relationship between the Supreme Court (or courts generally) and the media. In its annual decisions about the First Amendment rights of the press, the Court has opportunities, in effect, to supervise and critique the institution of the press. One interesting question is whether this now fixed process of review induces the press to live up to the role envisioned by the Court (perhaps in hopes of better persuading the Court that the press is worthy of the freedoms it has or seeks) or actually discourages self-regulation (out of fear that self-regulation implies a recognition of problems within the press and, by extension, a need for regulation). Professor Robert Drechsel's very interesting article, "Media Ethics and Media Law: The Transformation of Moral Obligation into Legal Principle," helpfully explores this issue.

Equally important are the ways in which the effectiveness of the public regulations we devise affect the constitutional norms about what is permissible and impermissible intervention. The benefits one can hope to achieve by regulation, and at what costs, shape our general conceptions of what's possible and therefore what's constitutionally allowable. And yet we often do not really know what those benefits and costs are until regulation has been tried. It is, I think, at least partly for that reason that new technologies of communication have been—perhaps even justifiably—treated differently in terms of public regulation and of First Amendment law. New media sometimes seem to be laboratories for new forms of public regulation,

helping prepare the way for the future as circumstances change. Professor Ethan Katsh and Professor Janet Rifkin, in their article, "The New Media and A New Model of Conflict Resolution: Copying, Copyright, and Creating," propose, in this general spirit, a new copyright scheme for creative work in the new electronic age.

Touching on each of the major questions of contemporary media regulation and law, the articles in this volume are most welcome contributions.