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FOREWORD: THE FIRST AMENDMENT IDENTITY CRISIS

*Erwin G. Krasnow**

This issue of the Catholic University Law Review underscores Justice Holmes' truism that "the law is behind the times."¹ Technology is driving the first amendment toward a new era. Rapid developments in the telecommunications industries are blurring the traditional distinctions between broadcasting, common carriage, private radio and telephony.

The new technologies of communications distribution have increased dramatically the number of signals that can find their way into the average American's home. Once upon a time, there were only a few electronic pathways to the consumer. Now there are almost too many to count.

The rapid expansion of technology has forced the Federal Communications Commission, Congress, and the courts to view first amendment issues in a new light. First amendment issues posed by telecommunications technology received unprecedented attention in the 1980's. The swift growth of technological innovation and the changing dynamics of industries competing in a less regulated marketplace point to increasing attention to free speech issues as we move into the 1990's.

There is no denying that the *Syracuse Peace Council*² decision has transformed the way we view the first amendment. But the ultimate resolution of free speech issues, including the destiny of the Fairness Doctrine, is unclear. This issue of the Catholic University Law Review is dedicated to the robust discussion of these unresolved issues.

The marketplace of ideas is well represented here. The authors represent a wide range of viewpoints along the regulatory spectrum—from the traditional public interest model to the born-again natural economic model. They include Charles D. Ferris, who advocated a no-censorship approach by the FCC but still won no popularity awards from broadcasters during his

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1. O. W. HOLMES, *Law and the Courts*, COLLECTED LEGAL PAPERS 294 (1920).

2. 2 FCC Rcd 5043 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989).

tenure as Chairman of the Commission; and the voices of leading members of the bar who toil unrelentlessly for the interests of their commercial and noncommercial broadcast clients.

We live in a nation whose economy increasingly depends upon access to information. Today, more than ever, the social and economic implications of controlling and communicating knowledge are of unprecedented concern as the Information Age matures. The articles reflect the complexity of free speech issues and the difficulty of assessing their impact on society. In Washington, D.C., there is a saying that where you stand depends on where you sit. Thus, readers will undoubtedly have varied reactions to the propositions which are advanced in this issue—a structural model for regulation of broadcasters; the overturning of the FCC's and Congress' approach to the broadcast of indecent programs; the recognition of a property rights approach to spectrum ownership; the danger of designating information as property; and the folly of applying the "diversity principle" to restrict the Bell Operating Companies from entering the electronic publishing industry.

Difficult choices lie ahead. As Woody Allen put it, "[m]ore than at any other time in history mankind faces a crossroads. One path leads to despair and utter helplessness; the other to total extinction. Let us pray we have the wisdom to choose correctly." Whatever path is taken in the delicate balancing of first amendment interests will result in producing some measure of despair—there will be "winners" and yes, "losers." But in making these choices, the challenge for all concerned is to have the wisdom to choose correctly. This issue of the *Catholic University Law Review* adds significantly to the quality of the debate.