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NATURAL LAW AND FREEDOM OF COMMUNICATION UNDER
THE FOURTEENTH AMENDMENT

William A. Carroll*

Introduction

The due process clause of the fourteenth amendment has been a fertile field for the development of natural-law concepts in American constitutional law. For a time after the adoption of the fourteenth amendment the Supreme Court refused to give a substantive meaning to due process,¹ but this attitude eventually yielded to a highly individualistic natural-law interpretation of due process more closely akin to laissez-faire economics than to traditional natural law.² For example, the Court held that the setting of railroad rates by state administrative agencies, whose actions were not subject to court tests of reasonableness, violated due process;³ it nullified a New York statute limiting employment in bakeries to ten hours a day and six days a week, on the ground that the statute violated "liberty of contract."⁴ Prior to these decisions, the Court had rejected the contention that due process requires states to grant such procedural rights as grand jury indictment⁵ and exemption from compulsory self-incrimination,⁶ both of which are guaranteed in federal courts by the fifth amendment. Freedom of communication found no federal protection against state invasion under due process of law until well into the twentieth century.

At the close of the first quarter of the twentieth century, due process of law served as an effective instrument for protecting the liberty of businessmen, but it afforded little other protection. Nevertheless, by giving due process a substantive content, the Court laid the foundation for the broad extension of civil rights protection against state invasion by judicial interpretation of the due process clause, which commenced during the 1920's.

Professor d'Entreves has said that "the necessity of referring positive law to some ideal standard" is one of the problems on which "natural law has a word to say, that, indeed, natural law is perhaps nothing other than a name for the right answer."⁷ The introduction of substantive due process means that judges must have some "ideal standard" by which to test state law. The objectives of this paper are: first, to trace the incorporation of freedom of speech and press into the due process clause of the fourteenth amendment; second, to show how the Court employed natural-law standards in that incorporation; and third, to suggest standards derived from natural-law concepts for inter-

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¹ Slaughter-House Cases, 83 U.S. 36 (1872); Munn v. Illinois, 94 U.S. 113 (1876).
⁵ Hurtado v. California, 110 U.S. 516 (1884).
⁷ d'Entreves, The Case for Natural Law Reexamined, 1 Natural L.F. 5, 6 (1956).
preting and applying the rule that states must respect the right to freedom of speech and press.

Incorporation of Freedom of Communication Into the Fourteenth Amendment

In light of the substantive content given the due process clause in the protection of property and "liberty of contract," it is not surprising that other claims were advanced under due process, not the least of which were the claims to freedom of speech and press. If due process of law has any substantive content, the right of freedom of communication certainly can be claimed, not only as a *sine qua non* of democratic government, but as a fundamental human right within the liberty guaranteed by the fourteenth amendment.

In the first case in which freedom of the press was claimed under the fourteenth amendment, the Court sidestepped the issue and held that since there had been no previous restraint, freedom of the press was not violated. The following year the Court ignored the due process issue and upheld a Kentucky statute forbidding the operation of any institution of learning for both Negro and white students, on the ground that corporations cannot claim the same rights under the Constitution as natural persons. Dissenting, Justice Harlan declared that the right to give harmless instruction, or instruction beneficial to its recipients, was “beyond question, part of one’s liberty as guaranteed against hostile state action by the Constitution of the United States.” A dozen years later, while upholding a Minnesota statute that forbade teaching or advocating that citizens of Minnesota should not help the United States in the prosecution of the war, the Court avoided deciding whether the federal constitution prohibited state deprivation of freedom of expression. Justice Brandeis dissented, however, finding it hard to believe that the liberty guaranteed by the fourteenth amendment “does not include liberty to teach, either in the privacy of the home or publicly, the doctrine of pacifism; so long, at least, as Congress has not declared that the public safety demands its suppression.” But the majority of the Court was still unconvinced, and two years later, abandoning all its earlier qualifications, the Court declared that “neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about ‘freedom of speech’ . . . .”

Hardly had the Supreme Court definitively declared that freedom of speech was not protected by the fourteenth amendment, than it began a process that

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8 Patterson v. Colorado, 205 U.S. 454 (1907). The Court said, “We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First.” Id. at 462.
10 Id. at 67.
12 Id. at 343.
13 Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922). For the development of the Court’s attitude toward restriction of freedom of speech and press by the states before those freedoms were incorporated into the due process clause of the fourteenth amendment, the author is indebted to Green, *Liberty Under the Fourteenth Amendment*, 27 WASH. U.L.Q. 497 (1942) and Note, *The Emergence of a Nationalized Bill of Rights: Due Process and a “Higher Law” of Liberty*, 7 BROOKLYN L. REV. 490 (1938).
could ultimately lead only to a reversal of that declaration. In 1923 the Court recognized that the fourteenth amendment protected life and liberty, as well as property, by holding that a statute of Nebraska forbidding the teaching of a modern foreign language in any school to a child who had not completed the eighth grade invaded the liberty guaranteed by the fourteenth amendment. And two years later, in another decision reflecting the broadened concept of liberty under the fourteenth amendment, the Court invalidated an Oregon statute that virtually required all children to attend public schools. The way was thus prepared for the obiter dictum in the Gitlow case, decided a week later, which read freedom of speech and press into the due process clause of the fourteenth amendment. Justice Sanford, speaking for the Court, declared:

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.

The importance of this statement was not widely recognized at first, but as one writer said a decade and a half later, "[T]he dictum in . . . [this] case that unwarranted restriction of opinion by a State violates the Fourteenth Amendment represents an unqualified advance. The long-range protection inherent in . . . [this] position embodies the prospect of ultimate good." So readily was this dictum admitted into the body of our constitutional law, that Justice Brandeis could write in a concurring opinion in 1927, before the concept had ever been applied to invalidate state legislation:

Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights.

14 Meyer v. Nebraska, 262 U.S. 390 (1923). Saying that the Court had never exactly defined the liberty guaranteed by the fourteenth amendment, Justice McReynolds, for the Court, declared:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. Id. at 399.

17 Ibid.
18 Id. at 666.
On the same day the Court for the first time held unconstitutional a state statute limiting freedom of expression. There was no discussion of the freedom protected, nor even any mention of freedom of speech and press, although it was clearly implied.

Any doubt that freedom of expression was protected by the due process clause of the fourteenth amendment was finally removed and the protection made explicit in 1931. Invalidating a decision of a California court upholding the so-called Red Flag Law, the Court explained why freedom of expression was part of the liberty thus protected. Chief Justice Hughes said:

The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.

Freedom of expression was thus recognized as requisite to the operation of our system of government. A fortnight later the Court, holding the application of a Minnesota statute regulating newspapers and periodicals unconstitutional, declared, "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." Dissenting in this case with the concurrence of three other justices, Justice Butler conceded that the question of whether freedom of speech and press were included in the liberty of the fourteenth amendment "has been finally answered in the affirmative."

Natural Law Implications of Incorporation

The Supreme Court, in its incorporation of first amendment freedoms into the fourteenth amendment, is aware that it is dealing with basic rights — rights which inhere in the human person — and indeed, that their incorporation rests on their fundamental character. In the first case incorporating the freedoms of speech and press, these rights were referred to as "fundamental personal rights." Later, Justice Brandeis said, "Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." In Near v. Minnesota Chief Justice Hughes, speaking for

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22 Fiske v. Kansas, 274 U.S. 380 (1927). The Court declared that the Criminal Syndicalism Act of Kansas, as applied, violated the due process clause of the fourteenth amendment.
24 Id. at 369.
26 Id. at 707.
27 Id. at 723-24. For the development of the attitude of the Court toward protection of freedom of speech and press in the states, see Green, Liberty Under the Fourteenth Amendment, 27 Wash. U.L.Q. 497 (1942).
the Court, proclaimed, "It was found impossible to conclude that this essential personal liberty [of press and speech] of the citizen was left unprotected by the general guaranty of fundamental rights of person and property." Similar statements about the fundamental character of freedom of speech and press have been made repeatedly by the Court. Justice Sutherland explicitly recognized the natural law implications of these statements when he wrote of "the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests." Reasonable freedom of speech and press is protected against state invasion, not because the Constitution specifies this freedom as immune from state action, but because the Court has determined that it is fundamental to the liberty protected by the due process clause of the fourteenth amendment. The Court has gone beyond the written law to protect rights that are not only essential to the operation of government responsible to the people, but also basic to the dignity of the human being. It has thereby employed principles that can only be derived from some concept of a higher law. It is this recognition of the higher-law content implicit in substantive due process that has made possible the protection of basic rights and liberties against invasion by state government. Professor Morrison, commenting on Justice Black's objective of taking the "natural-law gloss" off due process by seeking to apply the first eight amendments to the states, added:

Of course what would really follow from the discard of the natural-law gloss is that we should restore to the due process clause the meaning it had before such gloss was imposed upon it. This would be the standard of English practice as set forth in the Hoboken case in 1856, or at most the concept of the fair trial which was stated in Davidson v. New Orleans and quoted with approval by Mr. Justice Black in 1938.

Due process would then afford little protection against state invasion of individual rights, including the right to freedom of communication. In specifying freedom of speech and press as a fundamental right included within the liberty protected by the due process clause of the fourteenth amendment, the Court chose a right that is ordinarily included in lists of natural rights.

31 Id. at 707.
36 Justice Black would probably argue, as he did in his dissent in Adamson v. California, 332 U.S. 46, 71-72 (1947), that the fourteenth amendment makes the first eight amendments apply to the states, but he has never been able to convince a majority of the Supreme Court that this is so. See Morrison, supra note 35.
37 For a list of natural rights, including communication, and a discussion of them, see McAniff, The Natural Law — Its Scope and Function, 22 Fordham L. Rev. 246, 249-50 (1953).
If man is fully to realize his social and rational nature, this right of speech and press is essential. Maritain, preferring the designation "freedom of investigation and discussion" to that of "freedom of speech and expression," said, "Freedom of investigation is a fundamental natural right, for man's very nature is to seek the truth."

He added, however, that there may be some regulation of expression by "positive law."

The Court has not only defined freedom of communication as a fundamental right, but significantly, it has also recognized that the freedoms of speech, press, and assembly are essential to a government responsible to the people. The significance of this recognition transcends the fact that the citizens of the United States live under a government responsible to the people, or even that the national government is required under the Constitution to "guarantee to every State in this Union a Republican Form of Government." In fulfilling all the characteristics of his nature, therefore, man will participate in the government under which he lives. This recognition fulfills Aristotle's description of man as "by nature a political animal," a characterization St. Thomas expanded in his translation, "Man is naturally a political or social animal." If by nature man is a political or social animal, that government most suitable to his nature is one in which he participates, and in present-day conditions such participation seems to be effected best through some form of representative government. The effectiveness of representative government rests in part upon freedom of communication, which the Court has undertaken to protect against state invasion. Maritain recognized that the nature of man calls for political participation when he wrote:

The famous saying of Aristotle that man is a political animal does not mean only that man is naturally made to live in society; it also means that man naturally asks to lead a political life and to participate actively in the life of the political community. It is upon this postulate of human nature that political liberties and political rights rest, and particularly the right of suffrage.

To be sure, not all peoples have been sufficiently developed or fortunate enough to realize that aspect of their human nature that calls for political participation. But where, as in the United States, institutions for political participation exist, the duty to implement and improve them by protecting political rights, including the right to communicate, is evident. Therefore, by tying the freedoms of speech, press, and assembly to representative government, the Court — whether intentionally or otherwise — drew attention to the fact that these

38 Maritain, The Rights of Man and Natural Law 89 (Anson transl. 1943).
39 Id. at 89-90.
40 See Stromberg v. California, 283 U.S. 359, 369 (1931). In upholding the right to freedom of assembly under the fourteenth amendment, the Court quoted with approval from its opinion in an earlier case, United States v. Cruikshank, 92 U.S. 542, 552 (1876), "The very idea of government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." De Jonge v. Oregon, 299 U.S. 353, 364 (1937).
41 U.S. Const. art. IV, § 4.
42 Aristotle, Politics 54 (Jowett transl. 1943).
44 Maritain, op. cit. supra note 38, at 84.
freedoms spring from the nature of man, and thus are ultimately derived from the natural law.

Proposed Tests

The role played by natural-law concepts in the Supreme Court's protection of freedom of speech and press against state invasion need not end with the incorporation of this freedom into the due process clause of the fourteenth amendment. The Constitution dictates that no state shall "deprive any person of . . . liberty . . . without due process of law," and the Court has determined that the liberty specified includes a reasonable exercise of freedom of speech and press. The Court has thereby laid down a general principle, which, to be meaningful, must be applied in concrete cases. Professor Rommen has said, "Positive law, then, needs the enduring critic provided by natural law; it must forever be confronted by objective justice." The need for the natural-law critic is particularly acute when the positive law is as general as that embodied in the proposition that the states may not invade freedom of speech and press. While the Court has developed a number of subsidiary principles to elaborate its general principle of freedom of communication, the need for natural-law standards in this vital sector of constitutional law continues.

A study of the natural law engenders questions that can serve as standards to guide the Court in concrete cases and in developing subsidiary principles regarding freedom of communication. Does the claimed right to freedom of speech and press actually promote the exercise of that right in the light of all circumstances? Does it unnecessarily interfere with the exercise of equally important or more important rights? Does it accord with the customs of the country? Does it conflict with the common good? Although these questions do not exhaust the possibilities for testing the right to expression, they seem particularly pertinent, and as will be shown, they appear to have been in the minds of members of the Court in some cases.

Does the claimed right to freedom of speech and press actually promote the exercise of that right in all circumstances? Since the right to communicate, which flows from the sociable and rational nature of man, is a fundamental human right, it should be protected. But not every claim under an acknowledged right should be honored, since the claim might actually lead to a diminution of the exercise of the right under which it was invoked. When the Associated Press argued that it should be exempt from the provisions of the Sherman Antitrust Act on the basis of freedom of the press, the Court stated:

It would be strange indeed . . . if the grave concern for freedom of the press which prompted the adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.

Does the claimed right to freedom of speech and press unnecessarily interfere with the exercise of equally important or more important rights? R. D.

45 Rommen, Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany, 4 NATURAL L.F. 1, 24 (1959).
Lumb examined the writings of St. Thomas Aquinas and Suarez to meet charges that the natural law is not in fact unchanging, as its defenders have maintained. He suggested that implied in their method is a recognition that there is a hierarchy of natural-law duties, so that one natural-law precept has to step aside when it conflicts with a more important one.

It seems that what they [Aquinas and Suarez] have in mind is the "conflict-of-duties" situation. *More than* one precept may be applicable to the situation in question. It is true that one must not steal, but one must live, and situations will arise when not only the principle proscribing theft, but also the principle which protects human life must be considered. If, as in the necessity example, the latter principle is applied, what we are doing is working out in detail a reconciliation between the different precepts in cases where the features may be subsumed under one or other principle, and we are also emphasizing the higher value.48

Lumb later suggested that the same sort of approach might be made regarding rights, pointing out that the felon's right to liberty is overridden by the community's right to protection. "In such cases, a decision has to be made as to which right is to be accorded superiority."49

It is reasonable, then, to argue that there is a hierarchy of rights as well as duties under the concept of natural law. High in the hierarchy of rights is the right to life, for without life no rights can be exercised by human beings. It is significant that the first of the "natural inclinations" to which St. Thomas referred as instructing the reason about the natural law is that which provides for "preserving human life."50 Suarez stated that "the right to preserve one's own life is the greatest right."51 The prohibition against stealing may sometimes be suspended in order that the higher duty, to preserve life, may be carried out.52 Similarly, the right to freedom of speech must sometimes bow before the higher right to life. This hierarchy of rights is given tacit recognition in the order in which the fifth and fourteenth amendments list rights in their respective due process clauses — by prohibiting the denial of "life, liberty, or property, without due process of law."53 The first right is to life, the condition of all others; the second is to liberty, which permits one to live in accordance with his nature; the third is to property, which provides for man the material goods necessary for preserving both life and liberty. That the right to life outranks the right to freedom of speech was implicitly recognized by Justice Holmes when he said,

48 *Id.* at 227-28.
49 *Id.* at 233. For other references to the hierarchy of rights, see Wu, *Fountain of Justice* 103, 130 (1955); Mullaney, *The Natural Law, the Family and Education*, 24 Fordham L. Rev. 102, 109-10 (1955).
50 AQUINAS, *Summa Theologica* 1009 (Fathers of the English Dominican Province transl. 1927).
53 A similar order is found in Locke.

The state of nature has a law to govern it which obliges every one; and reason, which is that law, teaches all mankind who will but consult it that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions . . . . JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 123 (Cook ed. 1947).
“The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre, causing a panic.” The panic to which he referred might have endangered life and limb. Thus, the obvious implication of his oft-repeated statement is that the right to speak must defer to the right to live.

Since World War II, the Supreme Court has embraced the concept of a truncated hierarchy of rights, holding that the rights of the first amendment enjoy a “preferred position” in our constitutional system. Since the Court has never specified the rights over which first amendment rights are preferred, the unfortunate implication is that first amendment rights are preferred over all others. An apparent victim of the “preferred position” doctrine was the right to privacy in the home, which was imperiled by decisions invalidating state and local laws regulating or forbidding house-to-house canvassing for religious purposes. The right to privacy in the home provides, when respected, the conditions essential for the enjoyment of a number of other rights, particularly the right to rear children. The violation of the ancient English tradition that a man’s house is his castle was one of the important charges against the King and Parliament that led to the revolt of the American colonies. As Professor Chafee has stated:

A man’s house is his castle, and what is more important his wife’s castle. A housewife may fairly claim some protection from being obliged to leave off bathing the baby and rush down to the door, only to be asked to listen to a sermon or a political speech.

When the fourth amendment speaks of “The right of the people to be secure in their . . . houses,” it is concerned with protection against intrusion by government officials. If, however, government sees fit to provide protection against other potential invaders of the privacy of the home, strong reasons must be

55 The notion was introduced, without commitment to it, in a footnote to the opinion of the Court in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), but the words were first actually used in a dissent by Chief Justice Stone, who wrote that “the Constitution, by virtue of the First and Fourteenth Amendments, has put those freedoms [of speech and religion] in a preferred position.” Jones v. Opelika, 316 U.S. 584, 608 (1942). The following year the idea found its way into an opinion of the Court written by Justice Douglas, who said, “Freedom of press, freedom of speech, freedom of religion are in a preferred position.” Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). The phrase “preferred position,” referring to one or more first amendment freedoms, was repeated in Follett v. McCormack, 321 U.S. 573, 577 (1944); Prince v. Massachusetts, 321 U.S. 158, 167 (1944); Marsh v. Alabama, 326 U.S. 501, 509 (1946); and Kovacs v. Cooper, 336 U.S. 77, 88 (1949); it became “preferred place” in Thornhill v. Collins, 323 U.S. 516, 530 (1945), and “preferred treatment” in Saia v. New York, 334 U.S. 558, 561 (1948). For a discussion of the use of the concept of “preferred position” by the Court, see the concurring opinion of Justice Frankfurter in Kovacs v. Cooper, 336 U.S. 77, 89 (1949).
56 The Court has invalidated ordinances requiring permits for house-to-house canvassing or solicitation and vesting discretionary authority in the administrative officer issuing the permits as applied to religious canvassers or solicitors, Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939), and a similar regulation of a village owned by the United States, Tucker v. Texas, 326 U.S. 517 (1946). Despite a temporary lapse, Jones v. Opelika, 316 U.S. 584 (1942), the Court has invalidated ordinances that merely required the payment of license fees for the sale of literature as applied to religious literature, Follett v. McCormack, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943), and an ordinance that simply prohibited house-to-house distribution of advertising material as applied to advertisements for a religious meeting, Martin v. Struthers, 319 U.S. 141 (1943).
58 CHAFEE, FREE SPEECH IN THE UNITED STATES 406-07 (1948).
advanced to overrule the action on the basis of freedom of speech or religion. As Chafee said, "Freedom of the home is as important as freedom of speech."

Happily, the Court has more recently restricted the reach of its invalidation of laws forbidding house-to-house canvassing by upholding an ordinance that forbade house-to-house solicitation of orders for merchandise offered for sale, as applied to a person taking orders for secular magazines. Moreover, at about the same time the Court apparently abandoned the doctrine that the freedoms of the first amendment occupied a "preferred position" in this type of case. The whole history of the "preferred position" doctrine and its apparent application to house-to-house canvassing for religious causes illustrate the need for a carefully defined hierarchy of rights. To argue that something is preferred without specifying what it is preferred over is at least meaningless (and perhaps dangerous) in an area where precision of language is demanded; it is the language of Madison Avenue, rather than the language appropriate to the highest court in the land. Justice Frankfurter, speaking of the "preferred position" doctrine, complained in a concurring opinion, "I deem it a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity."

Does the claimed right to freedom of speech and press accord with the customs of the country? St. Thomas argued that custom springs from human reason through actions, rather than through speech, and it becomes law quite as much as a law enunciated by human speech. "Accordingly," he said, "custom has the force of a law, abolishes law, and is the interpreter of the law." St. Thomas further contended that "human law should never be changed, unless, in some way or other, the common weal be compensated according to the extent of the harm done in this respect." Thus, he provided what could be a useful standard for the Court in deciding cases involving freedom of speech and press. A well-established custom, in a sense having "the force of law," ought to be carefully weighed in any decision of the Court. In the development of American constitutional law, the Court has made the freedoms of speech and religion, which not only had been protected to some extent by state constitutions,

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59 Id. at 407.
61 Dissenting in Breard, Justice Black said:
   "Today's decision marks a revitalization of the judicial views which prevailed before this Court embraced the philosophy that the First Amendment gives a preferred status to the liberties it protects. I adhere to that preferred position philosophy. Id. at 650.

   Just this year, however, Mr. Justice Douglas, writing for eight members of the Court, indicated the viability of the "preferred position" doctrine when he stated:"

   Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer. (Emphasis added.) Ashton v. Kentucky, 384 U.S. 195, 200 (1966).
63 AQUINAS, op. cit. supra note 50, at 1024.
64 Id. at 1023.
65 For a comprehensive discussion of custom and law, see SUAREZ, op. cit. supra note 51, at 441-646.
but had become associated with the traditions and customs of the country, enforceable against the states as parts of the federal constitution.

In decisions concerning freedom of speech and press, the Court has been mindful of the demands of custom in developing its own standards. In an early case applying freedom of the press to a state, the Court invalidated a Minnesota statute on the ground that it provided for prior censorship of the press, and it supported its decision by referring to the English struggle against the legislative power of the licenser, and by quoting from Blackstone, Madison, and Patterson v. Colorado. A similar concern for the traditional view was shown when the Court held unconstitutional a license tax placed on newspapers by the State of Louisiana. The Court again turned to the history of the struggle for freedom of the press, showing how taxes had been used in England to interfere with the press and citing various authorities on the subject. The Court referred to the fact that taxes on newspapers, magazines, and advertising in Massachusetts in the mid-1780's had aroused such opposition that they were soon repealed, and it argued that the framers of the first amendment were familiar with these taxes as well as with the struggle for freedom of the press in England, and that they did not wish to confine that freedom within the narrow boundaries taxation could erect.

In recently upholding laws against obscenity, the Court established this standard as part of the test for constitutional proscription: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." Here again custom, as defined by "contemporary community standards," plays an important role in helping the Court to determine the meaning of the Constitution. These random examples suggest that the Court has been cognizant of custom in the development and interpretation of constitutional law. The Court has, of course, in some instances felt obliged to upset well-established customs.

The author does not intend to imply that the Court should never disturb an entrenched custom, but that it should not do so lightly. When a custom is clearly violative of the right of some persons or is inconsistent with justice, and it is of sufficient importance to warrant action within the Court's jurisdiction, then the Court may and must disturb the custom. In such circumstances the good effects outweigh the ill effects of disturbing the custom of the country, for the common good will "be compensated according to the extent of the harm done in this respect."

67 Id. at 713.
68 Id. at 713-14. [4 BLACKSTONE, COMMENTARIES *151, 152].
69 Id. at 714 [MADISON, Report on the Virginia Resolutions, in 4 WORKS 543].
70 Ibid. [205 U.S. 454, 461 (1907)].
72 Id. at 246-47. The authorities referred to were: 1 COLLETT, HISTORY OF TAXES ON KNOWLEDGE; 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND 245 (7th ed.); STEWART, LENNOX AND THE TAXES ON KNOWLEDGE, 15 SCOTTISH HISTORICAL REV. 322-27.
76 AQUINAS, op. cit. supra note 50, at 1023.
Does the claimed right to freedom of speech and press conflict with the common good? The exercise of rights becomes a problem only in society, and only when other persons are affected. A lone man on a remote island may exercise whatever rights he claims, and even in society a man may think according to the dictates of his conscience. But when claimed rights affect other persons, they may be exercised only with regard to the rights of others and society in general. St. Thomas said, "Every law is ordained to the common good." Suarez wrote:

With respect, then, to the question above set forth [Is it inherent in the nature of law that it be enacted for the sake of the common good?], there is no dispute among the various authorities; on the contrary, this axiom is common to them all: it is inherent in the nature and essence of law, that it shall be enacted for the sake of the common good; that is to say, that it shall be formulated particularly with reference to that good.

To assert that the common good must be considered is not to ignore the good of the individual human being.

The ultimate end of a group of men can, of course, be no different from the ultimate end of the members, for the group is existentially identical with the members; the common good must take its place as an implementation of the good life in the individual citizens.

Individual good and common good are not so much in conflict as complementary to each other, even though in isolated instances there may be a conflict. The balance between the individual good and the common good was well expressed by Maritain, when he said, "Because the common good is the human common good, it includes within its essence... the service of the human person."

Although the Court uses the words "common good" as rarely as it uses the words "natural right," both expressions found their way into an opinion written by Justice Sutherland when he referred to "the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests." Throughout the opinions of the Court involving freedom of speech and press runs the theme that the claimed right must be considered in the context of the rights, duties, or prerogatives of society or the state. In the landmark case that produced "the clear and present
danger" test,\textsuperscript{83} Justice Holmes spoke of the "substantive evils that Congress has a right to prevent";\textsuperscript{84} in the case incorporating freedom of speech and press into the due process clause of the fourteenth amendment,\textsuperscript{85} Justice Sanford spoke of the legislative determination "that utterances of a certain kind involve such danger of substantive evil that they may be punished";\textsuperscript{86} and in other early cases involving questions of state interference with freedom of speech and press,\textsuperscript{87} the Court spoke of the "public welfare,"\textsuperscript{88} and the "general welfare."\textsuperscript{89} When the Court finally explained why freedom of speech and press had been incorporated into the due process clause of the fourteenth amendment, Chief Justice Hughes stated:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.\textsuperscript{90}

Surely, a liberty that is "essential to the security of the Republic" contributes to the common good.

**Conclusion**

The incorporation of freedom of speech and press into the due process clause of the fourteenth amendment has widened the area in which this essential freedom applies; it has also increased the responsibility of the Supreme Court. For it is not enough to assert that freedom of speech and press is protected against state invasion; the freedom must be continually defined and redefined in application to concrete cases. Every claim to a constitutionally guaranteed right is not necessarily valid, and unless the right to freedom of communication is wisely interpreted, its continuance may be jeopardized.\textsuperscript{91} Although the Court has developed some subsidiary principles in elaborating the general principle that freedom of speech and press is included within the liberty of the due process clause, it is proposed that the questions suggested in this paper as derived from the natural law offer additional guidance to the Court. These criteria do not exhaust the possibilities for natural-law standards, but they could help the Court to interpret freedom of communication in a manner that will strengthen the constitutional position of this fundamental right.

\textsuperscript{83} Schenck v. United States, 249 U.S. 47 (1919).
\textsuperscript{84} Id. at 52.
\textsuperscript{86} Id. at 670.
\textsuperscript{87} Near v. Minnesota, 283 U.S. 697 (1931); Whitney v. California, 274 U.S. 357 (1927).
\textsuperscript{88} Whitney v. California, 274 U.S. 357, 371 (1927).
\textsuperscript{89} Near v. Minnesota, 283 U.S. 697, 707 (1931).
\textsuperscript{90} Stromberg v. California, 283 U.S. 359, 369 (1931).
\textsuperscript{91} Corwin, \textit{supra} note 62, at 281-82.