

#### FREE SPEECH

Why do we protect free speech? What values does it serve? How has the Supreme Court interpreted the First Amendment? What has the Court gotten right and wrong? Why are current debates over free expression often so divisive? How can we do better? In this succinct but comprehensive and scholarly book, Len Niehoff and Thomas Sullivan tackle these pressing questions. Free Speech: From Core Values to Current Debates traces the development and evolution of the free speech doctrine in the Supreme Court and explores how the Court – with varying levels of success – has applied that doctrinal framework to "hard cases" and current controversies, such as those involving hate speech, speech on the internet, speech on campus, and campaign finance regulation. This is the perfect volume for anyone – student, general reader, or scholar – looking for an accessible overview of this critical topic.

Len Niehoff is Professor from Practice at the University of Michigan Law School, where he teaches First Amendment and media law. He has practiced First Amendment law for almost forty years, representing journalists and media outlets in numerous cases. He is the author of more than 100 publications.

Tom Sullivan is President Emeritus and Professor of Law and Political Science at the University of Vermont. Previously he served as Provost at the University of Minnesota and Dean at the University of Minnesota and University of Arizona law schools. He is the author of twelve books and over seventy-five articles and essays.



## Free Speech

#### FROM CORE VALUES TO CURRENT DEBATES

### LEN NIEHOFF

University of Michigan Law School

## E. THOMAS SULLIVAN

University of Vermont





# **CAMBRIDGE**UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org Information on this title: www.cambridge.org/9781108830577 DOI: 10.1017/9781108902380

© Len Niehoff and E. Thomas Sullivan 2022

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

#### First published 2022

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data NAMES: Sullivan, E. Thomas, author. | Niehoff, Leonard M., author.

TITLE: Free speech: from core values to current debates / Thomas Sullivan, University of Vermont;

Len Niehoff, University of Michigan Law School.

DESCRIPTION: Cambridge, United Kingdom; New York, NY: Cambridge University Press, 2022. | Includes bibliographical references and index.

IDENTIFIERS: LCCN 2021056496 (print) | LCCN 2021056497 (ebook) | ISBN 9781108830577 (hardback) |

ISBN 9781108822138 (paperback) | ISBN 9781108902380 (epub)
Subjects: LCSH: Freedom of speech–United States.

CLASSIFICATION: LCC KF4772 .s85 2022 (print) | LCC KF4772 (ebook) | DDC 342.7308/53–dc23/eng/20211223

LC record available at https://lccn.loc.gov/2021056496 LC ebook record available at https://lccn.loc.gov/2021056497

> ISBN 978-1-108-83057-7 Hardback ISBN 978-1-108-82213-8 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.



For my wife, Lisa, and our son, Jordan

– Len Niehoff

For all my students I have taught for over four decades

– Tom Sullivan



## Contents

Acknowledgments		page ix
	Introduction	1
	PART I CORE VALUES	9
1	Instrumental Value Arguments for Free Speech	11
2	Intrinsic Value Arguments for Free Speech	22
3	Free Expression and Due Process Values	32
4	The Everyday First Amendment	40
	PART II HISTORY	53
5	The First Amendment Prior to 1919	55
6	The First Amendment from 1919 to 1963	59
7	The First Amendment from 1964 to the Present: Free Speech Broadened and Compartmentalized	74
8	The First Amendment from 1964 to the Present: Hard Cases	86
	PART III BASIC PRINCIPLES	103
0	Content and Viewpoint Restrictions Are Disfavored	105



V111	Contents		
10	Vagueness and Overbreadth Are Special Concerns	117	
11	Exceptions Must Be Limited and Narrowly Crafted	128	
	PART IV CURRENT CONTROVERSIES	147	
12	Hate Speech	149	
13	Campaign Finance Regulation	160	
14	Speech in Public Schools	175	
15	Academic Freedom	193	
16	Speech on the Internet	208	
	Conclusion: Our Hazardous Freedom	225	
Inde	Index		



## Acknowledgments

Professor Niehoff wishes to thank Dorothy Kryskowski of the University of Michigan Law School for her invaluable assistance in the preparation of the manuscript of this book. He also thanks his research assistants, Renee Griffin (class of 2021, University of Michigan Law School) and Rachel Carpman (class of 2021, University of Michigan Law School), for their hard work. In addition, he extends his thanks to the University of Michigan Law School for its support of this project through summer funding grants. Finally, he wishes to express his appreciation to the law students in his First Amendment and Media Law courses over the past thirty years, where many of the ideas explored here were discussed and tested.

Professor Sullivan wishes to thank his research assistants, Anders Newberry (class of 2020, Vermont Law School), Katie Conroy (class of 2021, University of Minnesota Law School), and Eric Tucker (class of 2022, Duke University Law School). He also thanks Leslie Black Sullivan for her support and encouragement throughout this project. In addition, he extends his appreciation to Scott Dewey, research librarian at the University of Minnesota Law School Library, and to colleagues at Cambridge University Law Faculty, the Law Library Staff, and to President David Ibbetson of Cambridge University's Clare Hall College for their advice and support during a visiting faculty appointment at the University of Cambridge.