

SUBSCRIBE NOW AND RECEIVE *CRISIS AND LEVIATHAN** FREE!



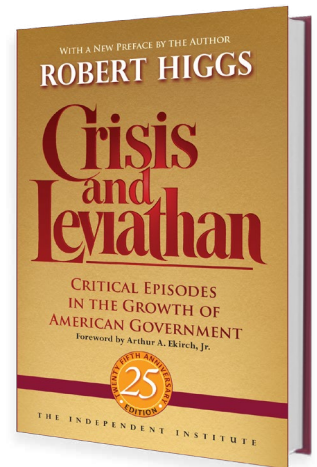
“*The Independent Review* is a sparkling effervescence of views and insights on economics, history, and politics for people who don’t mind having their minds bent and blistered with high entropy ideas.”

—**GEORGE GILDER**, bestselling author, *Wealth and Poverty*, *Knowledge and Power*, and *Microcosm*

Subscribe to [The Independent Review](#) and receive a free book of your choice* such as the 25th Anniversary Edition of *Crisis and Leviathan: Critical Episodes in the Growth of American Government*, by Founding Editor Robert Higgs. This quarterly journal, guided by co-editors Christopher J. Coyne, and Michael C. Munger, and Robert M. Whaples offers leading-edge insights on today’s most critical issues in economics, healthcare, education, law, history, political science, philosophy, and sociology.

Thought-provoking and educational, [The Independent Review](#) is blazing the way toward informed debate!

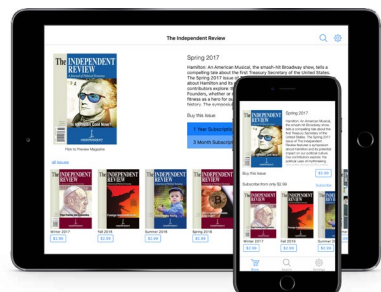
Student? Educator? Journalist? Business or civic leader? Engaged citizen? This journal is for YOU!



*Order today for more **FREE** book options

SUBSCRIBE

Perfect for students or anyone on the go! *The Independent Review* is available on mobile devices or tablets: iOS devices, Amazon Kindle Fire, or Android through Magzter.



REVIEW ESSAY

Free to Hate? Safe Spaces in American Politics

— ◆ —

MICHAEL C. MUNGER

Academic freedom is not one of the five First Amendment freedoms. (If it matters, very few Americans can name more than one of these five—56 percent do manage to remember that “speech” is protected, according to the Freedom Forum, but that’s it, and 40 percent of Americans can’t name even one freedom the First Amendment guarantees [Freedom Forum, *The State of the First Amendment: 2018*, June 2018, at https://www.freedomforuminstitute.org/wp-content/uploads/2018/06/2018_FFI_SOFA_Report.pdf].) To understand the nature of academic freedom, freedom of association, and freedom of speech, we have to hark back to the reason these freedoms are conferred and protected in the first place.

Two new books, *Speak Freely: Why Universities Must Defend Free Speech* (Princeton, N.J.: Princeton University Press, 2018) by Keith Whittington and *Hate: Why We Should Resist It with Free Speech, Not Censorship* (New York: Oxford University Press, 2018) by Nadine Strossen, take up different aspects of this problem. Whittington—a professor at Princeton—is concerned mostly with obligations and responsibilities of universities. Strossen—a longtime president of the American Civil Liberties Union, back before it largely abandoned the First Amendment—addresses broader problems of speech and social media. Each book is timely and insightful; together, they constitute a blueprint for recapturing the central role that free expression and association should have in policy and legal analysis.

Michael C. Munger is co-editor of *The Independent Review* and director of the Program in Philosophy, Politics, and Economics at Duke University.

The Independent Review, v. 24, n. 2, Fall 2019, ISSN 1086–1653, Copyright © 2019, pp. 295–305.

In this review essay, I first examine some background on “safe spaces” and the nature of academic freedom and then address Whittington’s view of the importance of protecting ideas and viewpoint diversity on campus. Then I broaden the focus to take a look at some larger problems and consider Strossen’s grim optimism about the eternal values of free expression and how they are under threat.

Background: Safe Spaces and the Nature of Academic Freedom

There’s a controversial, core truth, and we should just get it out of the way. Academic freedom *requires* safe spaces. The notion of a university entails a strong presumption that any bona fide group can associate in its own space and choose what it wants to hear. That raises several thorny issues, of course. First, what is a bona fide group? What groups, with what sorts of goals, will be certified and allowed to spend money? This access is often controlled by capricious student-government units, full of power-mad ideologues or rent seekers jealously guarding their own control over resources. Discretionary group certification is fraught with danger.

Second, even if a group is constituted, university administrations have set themselves up as gatekeepers, able to withhold room access or security for speakers or events. The requirements are minimal: a door that closes, a microphone, and sufficient security to exclude people who are not members of the group. But those things are not guaranteed, and such tacit endorsement requirements corrode academic freedom. More than ten years ago an Evan Maloney documentary called *Indoctrinate U* (2007; yes, I was in it; you can watch it at <https://www.youtube.com/watch?v=WHyvRHrYYBA>) showed a prescient understanding of this tendency, which has since exploded into full-fledged repression.

To fulfill their purpose, universities must authorize “safe spaces” for selective, exclusive groups, whether the selection principle is religious (you have to believe in order to belong) or social (fraternities and sororities get to invite some students and not others to participate). Freedom of association is the key to understanding academic freedom. And academic freedom, not freedom of speech, is the bedrock principle of universities and colleges.

Third and perhaps most dangerous, is the tendency to see the affording of a single, global “safe space” as the first task of the university. Groups that have every right to use their private safe space are tempted to annex the entire university, denying, disinviting, or disrupting presentations by speakers invited by other groups. *That* is a violation of academic freedom. If someone else is saying something you disagree with, there are two remedies: (1) don’t go to the event; and/or (2) organize your own event to offer an alternative or corrective perspective.

Some universities have blocked this tendency to hijack academic discourse. Robert Zimmer, president of the University of Chicago, sent a letter to all first-year students decrying not just safe spaces themselves but also the impulse that leads some students to want safe spaces in the first place. As Zimmer later put it, “Universities cannot be viewed

as a sanctuary for comfort but rather as a crucible for confronting ideas and thereby learning to make informed judgments in complex environments.” “Having one’s assumptions challenged and experiencing the discomfort that sometimes accompanies this process are intrinsic parts of an excellent education. Only then will students develop the skills necessary to build their own futures and contribute to society” (Robert J. Zimmer, “A Crucible for Confronting Ideas,” *University of Chicago Magazine*, Fall 2016, at <http://mag.uchicago.edu/university-news/crucible-confronting-ideas>).

In a marvelous discussion of the Chicago policy, activist and commentator Anthony Kapel (“Van”) Jones showed that he understands academic freedom. The entire video (*Van Jones’ Excellent Metaphors about the Dangers of Ideological Safety*, March 2, 2017, at <https://heterodoxacademy.org/van-jones-excellent-metaphors/>) is worth watching, but the short message is this: In the gym, there are weights. They are heavy, and it takes work and training to learn to move them. Classrooms and lectures should be no different.

There are two ideas about safe spaces. One is a very good idea, and one is a terrible idea. [The good idea is] being physically safe on campus, not being subjected to sexual harassment and physical abuse.

But there is another view that is now ascendant. . . . It’s a horrible view, which is that “I need to be safe ideologically, I need to be safe emotionally, I just need to feel good all the time. And if someone else says something that I don’t like, that is a problem for everyone else, including the administration.”

I think that’s a terrible idea for the following reason: I don’t want you to be safe ideologically. I don’t want you to be safe emotionally. I want you to be strong. That’s different. I’m not going to pave the jungle for you. Put on some boots and learn how to deal with adversity. I’m not going to take the weights out of the gym. That’s the whole point of the gym.

You can’t live on a campus where people say stuff that you don’t like? . . . You are creating a kind of liberalism that the minute it crosses the street into the real world is not just useless but obnoxious and dangerous. I want you to be offended every single day on this campus. I want you to be deeply aggrieved and offended and upset and then to learn how to speak back. (first ellipses indicate a pause)

How can academic institutions thread this needle, preserving freedom of association—which necessarily involves the ability to exclude and control—while preventing any group from universal annexation? The most persuasive accounts I have seen are from McGill professor Jacob Levy (“Safe Spaces, Academic Freedom, and the University as a Complex Association,” *Bleeding Heart Libertarians*, March 28, 2016) and Megan McCardle (“College Campuses Can’t Become One Big ‘Safe Space,’” *Chicago Tribune*, April 4, 2016). Universities must simultaneously encourage the

confrontation of differing ideas while protecting any legitimate group's ability to have its own safe space.

Levy states,

I'm going to start with a strange kind of claim that freedom of speech is not a value of universities. . . . Under general [constitutional] principles of freedom of speech . . . you are allowed to lie. . . . [For example,] you're allowed to publish a book that has your name on the cover that you did not write. You have a contractual arrangement known as ghostwriting where you pay the writer, the writer writes the book, you buy the writer's services. . . . All of this is perfectly legal. It's a lie! [But] there's nothing objectionable about it from the perspective of the freedom of speech.

On a university campus, if you submit written work in one of your classes that you paid someone else to write for you and you put your name on it, you get expelled. [If I publish research] that I didn't write and I paid someone else to write and I put my name on it, I get fired. And appropriately so. . . . Academic freedom is the core meaning, the core institutional life, of freedom of debate and freedom of inquiry *in the university setting*. And one thing that's notable about academic freedom as I've just labeled it is that it *creates safe spaces* [for specialized discussion, with internally shared assumptions about method and evidence]. . . . We get together and argue about the new high level stuff that we are trying to understand. We ask each other hard philosophy questions, hard political science questions, hard chemistry questions, but *they're hard as understood within the context of that intellectual community*. (emphasis added)

Expression is protected in universities because advancing along narrow avenues of knowledge or thought is what the highly specialized, separate universities do. That's academic freedom. Freedom of *speech* is different, a general political value of the United States, guaranteed by the force of the First Amendment. Political speech is presumptively allowed and need not be defended by the speaker or validated by the content of the speech. But even freedom of speech does not give anyone a right to demand an audience or prevent someone else from having an audience at a university seminar or in a classroom. *Academic* freedom is even more restrictive, requiring an active deference to groups and freedom of association. Other groups get to make their own choices, subject to their own rules of internal self-governance and control of their membership.

In fact, my right to have a safe space that prevents you from trespassing is precisely the same right as your right to have a safe space that excludes me. No one group can annex the commons, ever. If a group cannot exclude members or cannot expel members who violate its rules, then that is a violation of freedom of association. That would be true if a department were prevented from ostracizing a faculty member guilty of research malpractice, if a club were prevented from requiring restrictions on viewpoint diversity

for its members, or if a fraternity, sorority, or political or religious club were forced to accept all applicants even if the newcomers shared none of the group's values. Strangely, many people want to be safe *from* other groups. But the very right that lets you have your safe space gives me the right to have mine. It's the same right. Either both of us have it, or it's not really a right at all.

Academic freedom places restrictions on the kind of arguments and counterarguments and truth claims that have standing *within* a particular group. Academic groups and student groups must be allowed and encouraged to carve off particular subjects or activities to be considered deeply rather than always being obliged to start over at the broadest possible level. In fact, academic freedom must encompass both the right to constitute a narrowly focused group and the right to challenge any conclusion that is part of the general orthodoxy. It's not a contradiction, but the implication of the freedom to conduct research and foster learning.

Speak Freely

The point of this lengthy prolegomenon is that we need a foundation: what exactly is the purpose of the liberty to speak in a university? Those of us privileged to work and teach in universities are not just "free"; we also have responsibilities. The closest view to my own is Montesquieu's conception of liberty in a society that is self-governed: "It is true that, in democracies, the people seem to act as they please; but political liberty does not consist in an unlimited freedom. In governments, that is, in societies directed by laws, liberty can consist only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will" (Charles de Montesquieu, *The Spirit of the Laws*, book 11, at https://www.constitution.org/cm/sol_11.htm).

Tenure or an academic position is not a freedom to do anything one pleases; it is not unlimited because the liberty the contract confers is not without purpose. Academic freedom is a license to pursue truths according to one's own lights, as one sees those truths. But it is required that such freedom be used to pursue truths, using the evidence, logic, or other tokens that "count" as truth in your own academic safe space. A professor is "safe" from outside groups that deny such truths but is responsible to the norms and values of the group that licenses and certifies the safe space where he or she operates.

In *Speak Freely*, Keith Whittington—who, if it matters, took a class from me at the University of Texas when he was an undergraduate in the late 1980s—begins his discussion of free speech on college campuses by pointing out (rightly), "There was no golden age" of completely free speech (p. 51). The problem of who gets to speak and who gets to challenge speakers has always been there and is irreducibly contentious, and we have often botched it. Whittington quotes Friedrich Paulsen:

For the academic teacher and his hearers there can be no prescribed truth and proscribed thoughts. There is only one rule for instruction: to justify the truth of one's teaching by reason and the facts.

. . . [With such freedom we expect views that are] untenable, strange, and absurd. [But] the free presentation of individual thoughts . . . has more life in it and awakens more life than the prescribed presentation of transmitted thoughts. (qtd. on p. 53)

Paulsen did think that there was a problem, according to Whittington: the irresistible temptation that science and universities present to political officials because universities are such valuable tools for controlling power and legitimating power grabs. For political parties, Paulsen argues, “[s]cience is but one of the means of [officials] keeping themselves in power by influencing public opinion. With the truth as such the parties have nothing whatever to do; if it is for us, very well, if it is against us, away with it!” (qtd. on p. 53).

Whittington’s conclusion is that universities must be insulated from outside partisan pressures. The safe space is a public trust; although there is no restriction on what can be said or thought, residents of the safe space are obliged to justify assertions with “reason and facts.” Whittington explores several points in U.S. history, in particular the 1960s, where universities tried to balance what must be taught, what is allowed to be taught, and what cannot be taught. The issues are almost the same today; Whittington cites the statement by the University of Chicago faculty in 2014: “[The university’s] fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even most members of the university community to be offensive, unwise, immoral, or wrong-headed” (qtd. on p. 56).

But are there exceptions? In particular, shouldn’t “hate speech,” which after all has neither “reason” nor “facts” as a justification, be outlawed, even (especially?) in universities? The problem, Whittington notes, is that creating and adjudicating exceptions is likely to take a more expansive definition of speech and thought that will be disallowed. As Whittington puts it,

The idea that a hate speech exception would be applied strictly and stay limited flies in the face of our historical experience. When charged with the duty to suppress *harmful* speech, officials have repeatedly understood that duty as a mandate to suppress *unpopular* speech, and speech that they personally find offensive and unpalatable. . . . When university administrators have been asked to suppress speech harmful to the campus community, they have been as likely to prohibit civil rights activists and Communist professors as white supremacists. The gradual loosening of the bonds of censorship in the United States over the past century has come about through the repeated recognition that the exceptions to free speech are exploited by those in power to suppress speech they find threatening.

. . . [E]xceptions, once created, are expanded to suit the immediate interests of those exercising power. (pp. 98–88, emphasis added)

Proponents of hate-speech restrictions are sure their side will win. These limits will never be used against the weak or the powerless because their side will always be in charge of defining what hate speech is and isn't. This may have been understandable in 2015, when an entire generation of college students had never seen their side lose. I had expected that the events of November 2016 might have shaken this certainty, making hearing "other voices" imperative. But I was wrong: according to the narrative of those who would restrict speech on campus, Trump won because universities had been too *tolerant* of dissent. The only solution is to "bash the fash" (fascists), where the definition of fascism is "anything that the partisans of the left happen to disagree with."

There are two mistakes here, each important. The first is assuming that because everyone in your academic bubble agrees with your political views, the wider world thinks that way also. The second is to assume that even if the first claim is true, it will always be true, and you will be able to control the coercive apparatus of censorship rather than having it used against you. If there were more viewpoint diversity in universities, neither of these two problems would be nearly as pressing.

Hate

Nadine Strossen is one of my heroes; let me just admit that. She is a steadfast defender of political tolerance when it comes to defending speech rights. "Tolerance" means forbearance, not approval. In fact, to be tolerant one *must* actually disapprove of the action or statement yet out of principle still defend—not applaud, defend—the actor or the speaker because a higher principle is at stake.

Strossen is a constitutional lawyer and First Amendment advocate, and her arguments are couched as much in law and precedent as in consequence. But First Amendment jurisprudence is itself rooted in consequence or even possible consequence because of the concern for chilling effects on things that aren't said or expression we don't see. Unlike the other amendments in the Bill of Rights, the first is unequivocal: "Congress shall make no law . . ."

Strossen makes her strongest claim first, in chapter 1, to get it out of the way: laws that restrict or preempt "hate speech" violate both free-speech rules and equal-protection rules. *All* hate-speech laws, not just some of them and not just the ones that are poorly worded—all of them, inherently and per se—are both substantively mistaken and constitutionally precluded. Some restrictions are better than others, but none is allowable in Strossen's view.

She invokes two principles in advancing this claim: emergency and viewpoint neutrality. Briefly (with the inaccuracy such brevity entails), I can paraphrase these principles as follows. The "emergency principle" would require that there is no remedy other than an outright ban. There cannot be time for discussion, for exposing fallacies or falsehood through deliberation. The first remedy, if it is possible, is always more speech, not silence imposed by coercion. The "viewpoint neutrality" principle enjoins the state or authorities acting as organizers of public spaces from taking sides. The fact that one

side has the better of it is not for the state to say. Strossen illustrates the latter principle with a quote from Thurgood Marshall's *Mosley* opinion in 1972:

[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . [G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. (qtd. on p. 39)

In the case quoted, Earl Mosley, an African American, had been protesting what he saw as racism in Chicago public schools. (He was right, if it matters, which it doesn't; there's no rule that speech is protected only if you are right.) Justice Marshall realized that if restrictions are allowed, if exceptions are permitted, those exceptions will be used to oppress the weak and the minority. Again, we see that the use of censorship to protect minorities will backfire; Marshall, to his great credit, fully understood this and was a stalwart First Amendment absolutist in most instances.

However, Strossen is judicious about trying to distinguish settings when hate speech can be protected, allowed, or prohibited under these two principles. She considers a number of examples and makes an interesting point, one that had not occurred to me. She gives examples of acts or expression that advocates of hate-speech prohibitions point to and notes that many of those examples are actually protected by the First Amendment. Vandalism, including painting swastikas or racial epithets, is illegal; making physical threats, even if only implied, is assault; proposals that violate the First (or other) Amendment rights of people are protected, but they are moot as long as the courts are able to enforce the Bill of Rights.

Of course, there is no First Amendment protection against speech restrictions on someone else's private property or in employment relationships. It may be a bad idea for private parties to restrict political or religious speech—Strossen takes pains to "urge respect for free speech principles even in contexts where the First Amendment does not mandate them" (p. 56)—but, as she notes, many of the examples of "hate speech" used to indict the First Amendment are not protected in the first place.

Within the public sphere, Strossen views hate-speech restrictions as per se unconstitutional because of the difficulty—she calls it an impossibility—of avoiding vague and overbroad definitions. She quotes a statement by Congresswoman Eleanor Holmes Norton in this regard: "It is technically impossible to write an anti-speech code that cannot be twisted against speech nobody means to bar. It has been tried and tried and tried" (qtd. on p. 14).

Note the difference between "difficult" and "impossible." "Difficult" means we'll get it right next time; universities and cities all over the United States seem to think the problem is just one of difficulty. But if accomplishing the task is impossible, then we

need to recognize that Thurgood Marshall and Frederic Bastiat had it right—and this explains the subtitle of the Strossen book, *Why We Should Resist [Hate] with Free Speech, Not Censorship*. It is inconceivable that a coercive state’s discretionary power to repress the speech of the politically disfavored will not be used. The only solution is not to grant the power in the first place.

Conclusion: Viewpoint Diversity

The two books I have considered in this review address two different arenas, with Whittington considering the situation on campus and Strossen working on the more general problem of hate speech across many contexts. The difference is in the objective: Strossen shows that viewpoint diversity *cannot be prohibited* as a constitutional matter; Whittington would argue that viewpoint diversity *must be cultivated* if the United States is to have a politically and socially literate electorate.

I have claimed for years that the main danger is not repression of students on the right. It’s true enough that faculty on the political right may have trouble securing positions and students on the right may have trouble succeeding in graduate school, but instances of classroom repression or threats against students are relatively rare. As a result, conservative students are used to playing against the first team, so they learn to defend their views and give reasons and to remain calm in the face of disagreement.

The same cannot be said of students on the left. Many students who enter universities never have their views challenged and are never exposed to contrary arguments. In effect, it is students on the left who should sue universities for breach of contract because they are being denied what was promised to them: an education, which requires the interrogation of reasons and conclusions.

Being insulated from disagreement in argument and never having to debate an informed opponent is the intellectual equivalent of learning one-move chess openings. Students are rewarded, even praised, for having memorized a secular catechism of politically correct conclusions. In disturbingly many instances, students not only have not heard the arguments against their position but also don’t even really understand the arguments in favor of that view.

I was a department chair (political science) at Duke for a decade, between 2000 and 2010. During that time, in a meeting of fellow department chairs one of my colleagues looked around and said, “I probably shouldn’t say this, but” (Note: anytime you think this, take your own advice and don’t say it.)

The chair went on to say that it seemed that the main duty of education was to ensure that students had reached the correct conclusions about ideology. As a result, the chairperson said, “I find that I don’t really need to say much to the liberal [i.e., leftist] students because they already know what they need to know. I spend all my time in class trying to work on the conservative students, to call them out.”

Well. My first thought was that it would likely be a shock to Duke parents, who pay close to \$70,000 per year, to discover that their kids had learned in high school

everything they needed to know and that there was nothing more to learn. But on reflection I realized how sad it was that this bright, talented, and accomplished department chair had such a shallow and impoverished conception of education. Those liberal students were likely to be completely ineffective at political argument or persuasive argument of any kind when they step outside the protected “safe space” in which those views are sacred. My colleague needed to go talk to Van Jones.

Fortunately, this position on education is very much in the minority at Duke (which explains why I am still here after more than twenty years). There are plenty of faculty whose personal politics are leftist but who care about presenting the best and clearest versions of the “other side.” Viewpoint diversity can be achieved in the classroom by faculty who are committed to the values of a traditional liberal arts education, and ideological or partisan quotas are likely not a good solution, whether we are forcing Oberlin to hire conservatives or forcing Hillsdale to hire liberals.

Nonetheless, it is a lot to ask of an ideologically monochrome university faculty to do justice to views they disagree with. Some do it and do it well. But it is tempting to dismiss or ignore counterarguments because there are so many other deep truths on the syllabus, and you can’t cover everything. For that reason, I always suggest that young faculty bring in outside speakers or agree to teach each other’s class so that students can hear an alternative view from someone who believes it, has studied it, and really understands it. As Mill put it in *On Liberty*,

He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion. The rational position for him would be suspension of judgment, and unless he contents himself with that, he is either led by authority, or adopts, like the generality of the world, the side to which he feels most inclination.

Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them. He must know them in their most plausible and persuasive form; he must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of; else he will never really possess himself of the portion of truth which meets and removes that difficulty.

. . . So essential is this discipline to a real understanding of moral and human subjects, that if opponents of all important truths do not exist, it is

indispensable to imagine them, and supply them with the strongest arguments which the most skilful devil's advocate can conjure up.

The central claim for viewpoint diversity rests on educational value because universities are safe spaces only as long as *all* views have a space to be safe. But there is a secondary argument for viewpoint diversity, highlighted by Whittington, that universities have ignored to their peril. As Whittington sees it,

The lack of viewpoint diversity on campus has also encouraged political backlash. Although the economic, social, and cultural value of universities should encourage their broad support, it has become too easy for some to conclude that they have no stake in the success of universities. Both conservative professors and conservative students often find themselves beleaguered on campus. . . . Conservative voters, politicians, and alumni are increasingly adopting the view that mainstream colleges and universities are agents of left-wing politics that should be starved or dismantled. If university faculty understand themselves to be a force of progressive social change and political change, it should not be surprising if conservatives use the tools at their disposal to fight back. (pp. 175–76)

There are many faculty who already care about education, real education. But there is a growing narrative, partly unfair but not entirely inaccurate, that claims that university professors are demanding freedom and security from criticism without accepting the responsibilities that come along with such gifts. Whittington and Strossen, in different ways, point to a set of easily acted on principles that would allow universities to begin to win back citizens' esteem once again by deserving the public trust.