

# The Statements I Most Regret

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I have said a lot of things that I regret. Here are the worst of the worst, beginning with the one that most makes me squirm:

1. “Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America.”

That’s the title of my 2005 book on constitutional interpretation, and it’s a statement, all right. The great literary critic Wayne Booth explores the idea of an “implied author,” that is, the apparent character behind a written work, who may or may not resemble the real person. The implied author of *Radicals in Robes* is disrespectful and accusatory; he engages in plenty of name-calling. He is uncharitable to smart and good people. He wraps himself in the flag (“wrong for America”). He goes for the platitude. He’s not interesting. At times, he’s like a radio talk show host.

I don’t like that guy.

True, the book was written at a particular historical moment, when I feared that federal judges would read the Constitution as if it reflected the views of the conservative end of the Republican Party. That fear was hardly baseless, and under President Trump, it might turn out to be even more justified. I do not regret the substantive arguments in the book. But it makes too many debaters’ points, and the tone is all wrong, and so is much of the terminology—for example, using the word “fundamentalists” to describe those who believe in following the original meaning of the Constitution. Ugh.

2. “We ought to ban hunting, I suggest, if there isn’t a purpose other than sport and fun. That should be against the law. It’s time now.”

I said that orally, in a symposium at Harvard in 2007. The statement caused some serious trouble when the Senate considered my nomination to serve as Administrator of the Office of Information and Regulatory Affairs in 2009. It’s fair to say that the statement almost derailed my nomination.

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But that's not why I regret it! Academics should not refrain from saying what they think because of the prospect of a difficult confirmation hearing. I regret the statement because I do not believe it. As I recall, my written remarks did not contain anything like that statement, and (I confess) the infectious enthusiasm and moral commitment of the very large crowd led me to endorse a position that, on reflection, I do not hold.

To be sure, there are strong moral objections to killing animals for sport and fun; I share those objections. But a legal ban on hunting would intrude on social practices that have long played a large role in American culture. True, traditions are hardly self-justifying, and it would be better if people preferred baseball, skeet shooting, and nature walks to hunting and killing live animals. But a legal ban, imposed by some kind of elite, would be a horrific fit with our nation's culture, and it would be disrespectful to the practices and commitments of millions of people (about 13.7 million, at last count).

3. "Marriage, as such, should be completely privatized."

That gem appears in chapter 15 of *Nudge* (2008), coauthored with Richard Thaler. The argument of the chapter is that the word "marriage" should not appear in any laws, and marriage licenses should "no longer be offered or recognized by any level of government." Sure, religious organizations could perform marriage ceremonies. But government would get out of the marriage business.

What a terrible idea. For countless people (including the present author, married in 2008, after chapter 15 was done), official marriage is important, even precious. It recognizes a status, and it does so in the distinctive way that comes from the state itself. Abolishing that status would impose a serious loss—and it might well have unintended bad consequences for spouses and children alike.

To be sure, Thaler and I were trying to solve a particular problem: the intense and seemingly intractable debate over same-sex marriage. We thought that privatization would be a way to make that debate disappear. We failed to foresee the immense power of the movement for same-sex marriage, which was able to achieve its goals in an extraordinarily short time. But even if that movement had turned out to fail, our proposal would throw away an indispensable institution.

4. "Cognitive infiltration."

In 2008, Adrian Vermeule and I published an essay in the *Journal of Political Philosophy*, "Conspiracy Theories: Causes and Cures." The essay deals mostly with why people believe (false) conspiracy theories; it explores the relevance of the availability heuristic, informational cascades, and group polarization. More briefly,

it discusses what government might do to correct (false) conspiracy theories. It emphasizes that the “first-line response to conspiracy theories is to maintain an open society.” But among other things, it suggests “a distinctive tactic for breaking up the hard core of extremists who supply conspiracy theories: cognitive infiltration of extremist groups, whereby government agents or their allies (acting either virtually or in real space, and either openly or anonymously) will undermine the crippled epistemology of believers by planting doubts about the theories and stylized facts that circulate within such groups, thereby introducing beneficial cognitive diversity.”

Vermeule and I note that we “assume a well-motivated government that aims to eliminate conspiracy theories, or draw their poison, if and only if social welfare is improved by doing so.” We also note, in passing (and without endorsing any particular proposal), that government has an array of possible responses to conspiracy theories, including bans and taxes. But we focus on (and do endorse) the idea of “cognitive infiltration,” and we spend several pages elaborating what that might entail.

I regret the term, because it is so readily susceptible to misinterpretation, and because it can be understood to conjure up the image of a new kind of Big Brother, using secret surveillance, and lies and tricks of various sorts, to undermine freedom of speech and association. Puzzlingly, and perhaps revealingly, not one of our many early readers objected to the term, or even flagged the possibility of misinterpretation, during the lengthy period in which the paper was circulating in draft and subject to comments (including peer review at the *Journal of Political Philosophy*). But when I was nominated to serve in the Executive Office of the President, a lot of alarm bells rang. Rereading the paper, I understand why.

I hasten to add that my own understanding of the proposal was quite narrow: We were speaking of how the U.S. government might disrupt recruitment efforts by terrorists who mean to kill Americans. (Vermeule, a wonderful friend and exceptional scholar, can of course speak for himself.) Nor was the proposal wild-eyed. From the public record, it appears that with respect to terrorists, the U.S. government is indeed working to use its own “agents or their allies (acting either virtually or in real space, and either openly or anonymously)” to “undermine the crippled epistemology of believers by planting doubts about the theories and stylized facts that circulate within such groups, thereby introducing beneficial cognitive diversity.”

In my view, there is nothing even a little bit wrong with that. But the narrowness of the proposal was not self-evident from the paper, and the term “cognitive infiltration” was a poor choice. It created a lot of misunderstanding and apparently widespread concern. (The fact that my job title was Administrator of the Office of Information and Regulatory Affairs was not helpful, because some

people thought that the word “information” suggested a propaganda function. In fact it refers mostly to the Paperwork Reduction Act.)

There is an interesting question about audience here. Red Auerbach, the great coach of the Boston Celtics, liked to say, “It’s not what you say; it’s what they hear.” If this particular paper had stayed in the academic domain—with readers of the *Journal of Political Philosophy*—there would be little or no cause for regret, because (I think) no one, or almost no one, would have taken it to be alarming. But academic articles always have some chance of receiving broader attention, and academics usually do best to avoid misunderstanding by general readers.

One last point: If an academic has said little or nothing that he regrets, there’s a real problem. A main job of academics is to float ideas and take risks, and if they do not make mistakes, or learn enough to change their minds, well, that’s really something to regret.

## References

- Sunstein, Cass R.** 2005. *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America*. New York: Basic Books.
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