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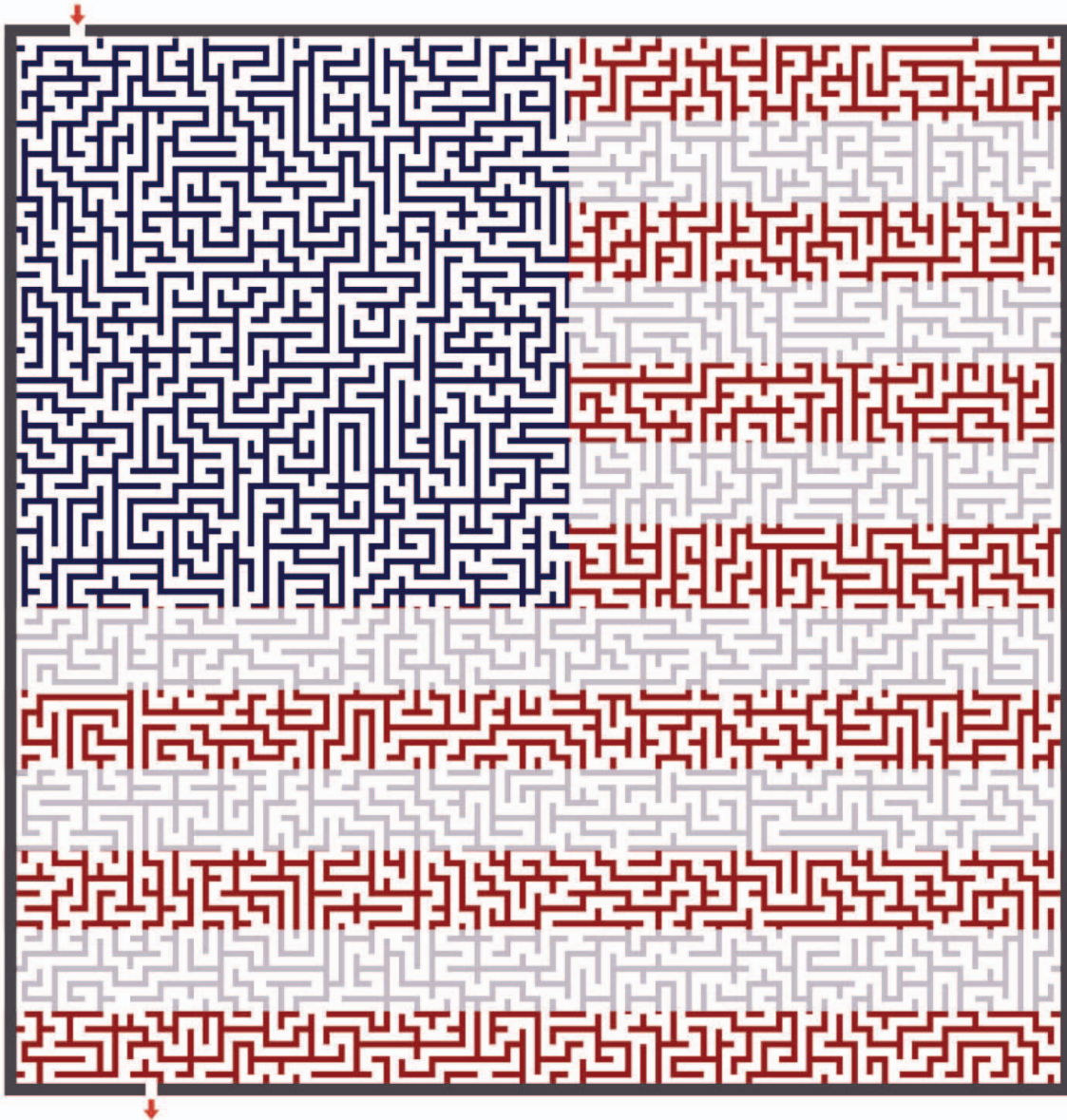
## The Supreme Court's Brain Teaser

Alan E Garfield



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**FIRST AMENDMENT:** "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."



# THE SUPREME COURT'S BRAIN TEASER

The way to create a nation with "liberty and justice for all" isn't by censoring bad ideas, but by agreeing on good ones.

ALAN GARFIELD

Did the United States Patent and Trademark Office properly deny trademark registration to an Asian-American band called the Slants? Did the office rightfully cancel the Washington Redskins' trademark? Or did both of these actions violate the free speech rights of the mark owners?

The Supreme Court will wrestle with these questions on Wednesday when it considers the USPTO's refusal to register the Slants' trademark. How the court rules will affect how a lower court rules in the Redskins' case.

Figuring out what the court should do is a bit of a brain teaser. Let's take it one step at a time.

## Why should we ever protect hate speech?

Before we get to the trademark issue, you might be wondering why the First Amendment should ever protect speech that disparages a group of people. After all, doesn't such speech just foster prejudice and encourage discrimination? Wouldn't it make more sense to say that the First Amendment doesn't protect hate speech in any context?

This argument is certainly reasonable, and many countries, persuaded by this logic, have enacted laws that punish hate speech. France, for example, has a

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law that forbids “insult,” “defamation,” or “provocation to discrimination, hatred, or violence” toward a person or group of persons based on their ethnicity, nationality, race, or religion.

As we sadly know from recent events, the French law has not immunized the country from racial and religious tensions. But such a law is not even an option in the United States because the Supreme Court has said that hate speech is protected by the First Amendment.

The only exceptions are if the hate speech amounts to a personal threat, is likely to cause an immediate breach of the peace or occurs in special settings like schools or workplaces.

Why do we protect such awful stuff?

It's not because we like hate speech. Hopefully, most of us find it deplorable. Instead, it's because we think our interests are better served by allowing people to express hateful thoughts than by allowing the government to censor what people can say. In other words, the cure for hate speech – government censorship – is worse than the disease itself.

The problem with permitting government censorship is that you don't know how the power will ultimately be used. So, for example, imagine that the Supreme Court did allow the government to punish speech that disparages a group of people.

We might be delighted if the government used this exception to punish members of the Ku Klux Klan or the American Nazi Party. Who's going to shed a tear when those hatemongers get carted off to jail?

But what if the government said that “Black Lives Matter” is hate speech because it implies that white lives don't matter? Or that “Blue Lives Matter” is hate speech because it disparages the

lives of African-Americans.

What if the government said that an Israeli Independence Day parade constitutes hate speech toward Palestinians, or opposition to same-sex marriage is hate speech toward gays and lesbians?

These examples can help you appreciate why permitting hate speech might be preferable to unleashing potentially unbridled government censorship. At the same time, just because we permit hate speech doesn't mean we have to tolerate it. It merely means that the response must come from positive speech to counter the harmful speech rather than from government censorship.

Put simply, the proper response to a rally of 10 skinheads is a counter rally with 10,000 people advocating tolerance. The Supreme Court eloquently captured this notion of countering harmful speech with positive speech when it held that the First Amendment protected flag burning: “We can imagine no more appropriate response to burning a flag than waving one's own.”

## But does the government need to facilitate hate speech by giving trademark protection to disparaging marks?

Even if people have the right to say hateful things about others, that doesn't mean the government has to facilitate their speech by affirmatively protecting their disparaging trademarks. Sure, people can scream “Redskins” from the mountaintops. But why should the government lend its assistance to a football team that wants to use “Redskins” as a trademark?

If the team wants the government's help, why shouldn't it have to play by the government's rules? And why shouldn't the government refuse to lend its assistance to any mark that disparages a group of Americans?

This argument also seems reasonable. It undoubtedly explains why the

federal trademark law instructs the USPTO to deny registration to marks that disparage people – and why the office canceled the Redskins' trademark and refused to register the Slants' trademark.

But, once again, the question is whether the cure is worse than the disease. Are we comfortable giving the government discretion to decide which marks are disparaging, or would we prefer to permit these marks and hope that public opprobrium will serve as an adequate check?

If we empower the government to deny protection to disparaging marks, we run the risk that the government could deny trademark registration to “Black Lives Matter,” the “Zionist Organization of America” or “Defenders of Traditional Marriage.”

Do we want to go down that rabbit hole? Or should we keep the government out of the business of deciding which marks are appropriate and instead rely on public shaming to deter owners who choose offensive marks?

Of course, no amount of shaming will cause the American Nazi Party to change its mark, but we probably don't want this group to disguise its name with a euphemism. We want to know who we're dealing with so we can track the group's activities and publicly denounce them.

But for disparaging marks on commercial products or services, like the Washington Redskins trademark, people will have to respond with their pocketbooks and voices. People could refuse to buy Redskins' tickets or merchandise, and they could boycott companies that advertise during Redskins games. These economic boycotts might not seem like counter-speech, but you can be sure that “money talks.”

People could also protest outside of the Redskins' stadium, write op-eds criticizing the team name and send petitions and letters to the Redskins' owners.

Admittedly, relying on public outcry

to curb hateful trademarks puts minority groups at a comparative disadvantage. If the Washington football team used a name that disparaged Catholics, the large number of Catholics in this country could almost certainly convince the team owners to change the name. But when the team name disparages a minority group like Native Americans, it's harder to generate a sizable public response.

Native Americans have to hope that their fellow Americans will treat a mark that disparages some Americans as a mark that disparages all Americans.

There is a famous story about how Denmark acted to protect Jews from the Nazis during World War II. In response to the Nazis' insistence that Danish Jews wear a yellow star, the Danish King Christian X started wearing a yellow star and the rest of the Danish population followed suit.

It's a wonderful story of a majority standing up for a persecuted minority. The only problem is that it's not true. Danish Jews, unlike the Jews in other Nazi-occupied countries, were never required to wear yellow stars, and King Christian never wore a star.

Nevertheless, the United States Holocaust Memorial Museum says that the story's essence is accurate. King Christian and the Danish people did actively intervene to protect Danish Jews from Nazi persecution and succeeded in saving almost all of them.

It's an inspiring story that Americans are always free to emulate anytime a minority group is being wrongfully persecuted or disparaged. Doing so will make us proud. It will also make us safer – because each of us is potentially part of a minority in our increasingly diverse country.

The way to create a nation with “liberty and justice for all” is not by censoring bad ideas. It's by acting to implement good ideas.

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