Written by **Steve Byas** on June 20, 2017

Offensive Trademark Law Nixed by Supreme Court

"I am THRILLED. Hail to the Redskins," Dan Snyder, owner of the Washington Redskins, said in a statement released in reaction to the unanimous ruling of the U.S. Supreme Court that a 71-year-old trademark law against disparaging terms is a violation of the First Amendment to the Constitution.

While the NFL Redskins were not a party to this particular case, Lisa Blatt, an attorney for the team, believes the decision will benefit their own legal dispute with the federal government. "The Supreme Court vindicated the team's position that the First Amendment blocks the government from denying or cancelling a trademark registration based on the government's opinion." The Trademark Office had stripped the team of its trademark protections in 2014, asserting that the term "Redskins" is disparaging to American Indians.

The 8-0 decision (Judge Neal Gorscuch did not vote as the case was argued before he was confirmed to the court) involved a band known as The Slants. Slant founder Simon Tam said that although "slants" has been used as a derisive slur against persons of Asian ancestry, his purpose in taking the name was to make the term one of ethnic pride. The Slants' band members are of Asian ancestry themselves.

The U.S. Trademark Office, however, contended that the term was still disparaging, regardless of the group's intent. In the case before the Supreme Court, government lawyers argued that the trademark law did not violate free speech, because the band could still use the term — they just would not have trademark protection. Trademark protection gives an individual or a company the right to block the sales of merchandise using the company's name or some other distinctive symbol the company uses. An example of a famous trademark would be McDonald's "golden arches."

Associate Justice Samuel Alito wrote the opinion explaining the court's reasoning, and was joined by Chief Justice John Roberts, and fellow associate justices Clarence Thomas and Stephen Breyer. The other justices concurred with the decision, but with a different opinion, written by Associate Justice Anthony Kennedy. Kennedy wrote, "A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting view to the detriment of all."

"Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful," Alito noted, "but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought we hate."

The American Civil Liberties Union (ACLU) called the ruling a "major victory for the First Amendment."

But was it? While it is encouraging that the Supreme Court can unanimously protect free speech as more important than not offending someone, at least in the case of The Slants, some of Alito's comments are troubling to those who recognize that the Constitution forbids Congress from making *any law* abridging the freedom of speech.

For example, Alito addressed the idea that "commercial" speech is somehow not as protected as non-commercial speech. "The commercial market is well stocked with merchandise that disparages prominent figures and groups, and the line between commercial and non-commercial speech is not always clear, as this case illustrates. If affixing the commercial label permits the suppression of any speech that may lead to political or social 'volatility,' free speech would be endangered."

It is not clear whether Alito accepts the premise that Congress can pass laws abridging purely commercial speech, but one can certainly find no such distinction in the First Amendment: "Congress shall make no law … abridging the freedom of speech."

There is no question that Congress did make a law 71 years ago that abridged the freedom of speech concerning its trademark law. If a trademark can be withheld simply because the government does not approve of the content of the speech, then that is clearly an abridgement of the freedom of speech.

Most troubling with Alito's written opinion was the comment that the federal government "has an interest in preventing speech expressing ideas that offend."

This raises a very serious question. Virtually any idea offends someone, somewhere. Who is to decide which opinions can be "prevented" from even being expressed? If the government has the power to decide which ideas can be "prevented" from even being expressed, then the First Amendment is really of no effect.

The dispute over the NFL Redskins is instructive. Nine of 10 American Indians have no problem with the use of the term "Redskins" as a sports mascot, according to a poll last year conducted by the *Washington Post.* It found that 80 percent are not offended if called a "redskin" by a non-Indian.

In 2014, the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office cancelled six trademarks held by the Washington Redskins, in a 2-1 vote, declaring that the term "Redskins" is disparaging to a "substantial composite of Native Americans."

The argument that this action does not violate the First Amendment because the business can still use the name without trademark protection is deceptive. The First Amendment states that Congress can pass "no law" *abridging* the freedom of speech. A trademark law that limits a team's nickname is clearly an abridgement of the team's free speech. Just because the team can still use the nickname does not mean that free speech has not been abridged.

In the case of the Redskins' nickname, Congressman Tom Cole of Oklahoma has asked the commissioner of the National Football League to get the name changed because the NFL is "on the wrong side of history." Cole certainly has as much right as any other American citizen to believe the use of the term "Redskins" is on the wrong side of history, but his opinion should not mean any more than a barber in West Virginia.

And just what is the history of the term? Mosiah Bluecloud, a spokesman for the Kickapoo Tribe of Oklahoma, explained the historical origins of the term: "In reference to the paint we used.… We painted ourselves with red paint. It's written down by a linguist — a famous linguist, and one of my heroes, Ives Goddard — who talked about how the term started out as what we called ourselves. Redskins was not

something the colonizers gave to us. We took that name, and it was translated."

Bluecloud's position — that the term "Redskins" originated with the indigenous peoples themselves — appears correct. Chief Mosquito of the Piankeshaw tribe is recorded as having addressed an English officer in 1769, using the phrase, "if any red skins do you harm." In 1812, Osage Chief No Ears made this statement: "I know the manners of the whites and the red skins."

This contradicts the inflammatory myths being circulated that the term came from the practice of paying a bounty for Indians (using a "red skin" in reference to a bloody, red scalp of a Native American). Adrian Jawort, in his November 12, 2012 article in *Indian Country Today* entitled "Redskins Not So Black and White," dismissed that as simply "revisionist history."

This illustrates some of the danger involved in Congress passing laws abridging the freedom of speech. Distortions of history can then be protected by law. False history cannot be challenged, if the challenge happens to "offend" someone, especially if that someone is an officer of the government.

Speech might be unpopular, but that does not make it wrong. Attempts to enforce certain opinions as superior with the heavy hand of government seems to be what is on the wrong side of history.