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U.S. Conservatives Are Threatening Global Free Speech

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ARGUMENT

An expert's point of view on a current event.

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Republican attacks on domestic media are undermining legal protections around the world.

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Last month, Florida Gov. Ron DeSantis moderated a panel on the importance of “truth.” DeSantis opened with a broadside against mainstream media outlets: “When you’re knowingly putting out false information and, indeed, I’d say these companies are probably the leading purveyors of disinformation in our entire society right now, there needs to be an ability for people to defend themselves ... through a private right of action.”

DeSantis’s call to make it easier to sue the media for “false information” is part of a larger Republican revolt against the 1964 Supreme Court *New York Times v. Sullivan* decision, which sets a very high bar for when public figures and officials can successfully sue for defamation. They must show, by clear and convincing evidence, that the defamatory statement was made either with knowledge of its falsity or reckless disregard as to its truth or falsity, the “actual malice” test. According to its critics, *Sullivan* has allowed a biased mainstream media to slander conservatives and Republicans with impunity. The backlash has received legal support from conservative Supreme Court justices Clarence Thomas and Neil Gorsuch, who have signaled a willingness to overturn *Sullivan*.

But there is every reason to think that overturning *Sullivan* would cause massive collateral damage to political speech on both sides of the partisan divide. Worse yet, overturning *Sullivan* would not only undermine liberty, equality, and democracy in the United States. It would likely also do so in democracies around the world where these freedoms are already under systematic threat. In fact, *Sullivan* is one of the most successful exports of U.S. free speech doctrine, which has inspired judges across the globe to provide journalists and dissidents with a legal shield against censorial politicians and government officials.

The Republican efforts to overturn *Sullivan* might seem especially self-damaging. Surely, those benefiting the most from the First Amendment’s current protection for peddling falsehoods are “Make America Great Again” election deniers, QAnon enthusiasts, and other right-wing conspiracy theorists. It perhaps shouldn’t be a

surprise that Republicans' attacks on speech-protective defamation laws and on "news outlets engaged in bad behavior" are highly selective. After all, many of them defend Fox News despite recent evidence that several of its anchors knowingly spread false information about the 2020 presidential election with the knowledge of senior executives. Ironically, *Sullivan* is Fox's best hope of getting off the hook—although Fox's gross journalistic malpractice may satisfy even *Sullivan*'s demanding standards.

So if Republicans in favor of eroding *Sullivan* are akin to a person trapped in a hole why shouldn't Democrats hand them a shovel in the shape of bipartisan support? The pre-*Sullivan* history shows that more permissive libel laws will predictably be (ab)used by those in power, disproportionately silencing minority views and groups. Moreover, democratic self-government is weakened when "We the People" are deterred from vigorously criticizing our elected representatives for fear of defamation lawsuits, since even suits that are ultimately unsuccessful impose great tangible and intangible burdens.

In *Sullivan*, an Alabama official won an enormous civil damages award (\$500,000) against civil rights leaders, as well as the *New York Times*, for an ad that described Alabama's persecution of peaceful civil rights activists. The then-permissive libel laws imposed strict liability and substantial damages for even inadvertent, inconsequential inaccuracies. Southern officials took advantage of these laws to institute multiple libel lawsuits against civil rights activists and media outlets with the specific goal of silencing their critics. Recognizing that *Sullivan*'s tightened defamation standards would allow some minor false statements about officials to escape punishment, the Supreme Court also recognized that, pre-*Sullivan*, too many true statements were punished or chilled to the detriment of the civil rights cause and to democracy more broadly. This calculus still holds true today.

In Florida, lawmakers have introduced a bill that would make it much easier to sue for defamation by, among other things, limiting the protections for journalists and establishing that "an allegation that the plaintiff has discriminated against another person or group because of their race, sex, sexual orientation, or gender identity constitutes defamation per se." Accusing someone of such discrimination would thus automatically be deemed damaging to their reputation, without needing to prove the contextual factors that are usually required to demonstrate harm in any particular case

—including in the obverse case, involving false statements that someone has made accusations of this type of discrimination.

These proposals target journalists and the media and disadvantage the liberal-progressive side of divisive culture war debates about race, sexual orientation, and gender identity. The Florida bill follows the playbook of Donald Trump, who, as president, threatened to “open up libel laws.” By 2018 this rhetoric had convinced more than half of Republicans that the media was “the enemy of the people” and a poll showed that 43 percent of Republicans that Trump “should have the authority to close news outlets engaged in bad behavior.” Such disastrous outcomes would be facilitated by weakening *Sullivan*’s protective shield for government critics.

Regardless of whose political ox may be gored in any particular situation, the overall impact of weakening *Sullivan* would be to mute critics of government officials and policies. One only has to look at European democracies to find alarming examples of how the powerful can exploit fewer speech-protective defamation laws to silence criticism and “insults.” In 2022, the European Commission proposed a directive to counter the rising threat of strategic lawsuits against public participation (“SLAPPs”), which are used to intimidate and silence journalists and human rights defenders, even when the suit is meritless.