During COVID-19, the public health toll of vaccine misinformation has risen from bothersome to titanic. As many as 12 million persons may have forgone COVID-19 vaccination in the US because of misinformation, resulting in an estimated 1200 excess hospitalizations and 300 deaths per day. If 5 fully loaded 747s crashed each week due to wrong information, regulators would be apoplectic. Several other countries have criminalized the spread of vaccine misinformation. But because of the Supreme Court’s attachment to a particular conception of free speech rights, the thrust of the US government’s response is to disseminate accurate vaccine information and hope it corrects misconceptions. Although a few kinds of false statements lie outside the First Amendment’s protections, many others are considered protected speech. The Supreme Court recognizes that false speech can cause harm, but is more willing to abridge speech rights to avoid some kinds of harm than others. Legal scholars have long bemoaned the Supreme Court’s selective attention to harm avoidance, and the pandemic has exposed its public health consequences.

In a 2012 case invalidating a law that criminalized lying about receiving military medals, the Supreme Court refused to hold that false statements lie wholly outside First Amendment protection. The Supreme Court emphasized that false statements can have value; allowing widespread consensus to be challenged without fear of reprisal may facilitate truth discovery.1 When a government-imposed restriction on misinformation is based on the content of the speech, courts will apply their most intensive level of review. The government must show that its restriction furthers a compelling government interest that a more narrowly tailored policy—one that burdens speech less—could not achieve as effectively. Allowable restrictions on false speech include bans on perjury, false statements to the government, impersonating government officials, commercial fraud, and defamation. These prohibitions “protect the integrity of Government processes,” preclude people from gaining material advantage through deceit, and prevent “tangible harm to others.”1

Courts would certainly deem combating COVID-19 a compelling interest, and the government could readily demonstrate that vaccine misinformation harms its interest. The problem is that courts have proven too willing to endorse more narrowly tailored policy alternatives. Although in theory courts limit their review to “effective alternatives,”1 in cases involving other important health matters, courts have suggested policies that public health experts would find laughable—for example, in lieu of restricting prescription drug sales representatives from promoting off-label uses, capping the number of off-label prescriptions a physician can write; instead of requiring that “crisis pregnancy centers” inform patients that the State of California offers low-cost family planning services, funding a public advertising campaign (something California had already tried).

Arguments that health officials could simply fight vaccine misinformation with “counter speech” would find favor, despite evidence that false beliefs arising from vaccine misinformation are extremely difficult to dislodge.2,3 The volume of misinformation, its rapid spread through trusted social networks, and cognitive biases reinforcing preexisting beliefs all undercut the notion that the solution to false speech is more speech in this case.

Courts’ readiness to accept ineffectual policies when public health is at stake underscores that the scales are heavily tipped toward First Amendment rights. Yet, restricting false statements about health products in some contexts is permissible. For commercial speech (such as advertising), misleading statements enjoy no First Amendment protection.4 The US Food and Drug Administration

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can act against companies that claim without sufficient evidence that their products help prevent or treat disease. The Federal Trade Commission and state attorneys general can bring civil and criminal actions against businesses that sell health products using deceptive advertising or fraudulent misrepresentations. There is also latitude for regulating professional speech: state medical licensing boards can suspend the licenses of physicians whose statements constitute unprofessional conduct, and have done so occasionally when physicians have spread false information about COVID-19 vaccines and therapeutics.

Thus, the Supreme Court will allow the government to police false statements in some contexts regardless of how remote the risk of actual harm. But other falsities that can directly lead to serious harm enjoy legal protection. Although an advertisement from a health products company calling vaccines less safe and effective against COVID-19 than hydrogen peroxide is actionable, the same statement from a television news pundit is not. Moreover, noncommercial harms that the Supreme Court has allowed the government to prevent through speech restrictions—like ensuring that government processes function smoothly and a person’s reputation is not damaged by defamatory statements—pale compared with other harms arising from false speech, such as prolonging a pandemic.

Certainly, allowing the government to police false claims has real risks. Although some claims are demonstrably false, others are less so, and regulators may err in distinguishing among them. Especially in the scientific realm, the knowledge that makes statements demonstrably true or false evolves. In addition, some people who disseminate false statements know they are lies, whereas others believe they are true. Thus, there is a risk of suppressing speech that ultimately proves to be truthful, and of chilling discourse by making people worry about whether they can back up their claims.

But these problems also apply to areas where courts allow regulation of false statements. Lawmakers have found ways of addressing them, such as by requiring the government to prove certain things about the statement or the speaker’s state of mind. These measures could also be applied to vaccine misinformation.

If courts are concerned about disruption of government processes and tangible harm to individuals, they should recognize that vaccine misinformation causes both. Furthermore, if courts allow the government to restrict false speech to prevent economic harms such as being defrauded, should they not also allow speech restrictions to prevent loss of life? If officials may ban false advertising to prevent people from ingesting unsafe, unproven treatments, why can they not also ban false statements to prevent people from forgoing safe, proven vaccines?

At a minimum, courts ought to permit prohibitions on false information disseminated with reckless disregard for its falsity that materially influences people’s vaccination decisions. And yet, the current Supreme Court is unlikely to do so. The risks associated with allowing the government to suppress information about a contested scientific issue would be considered too great.

This leaves the government with anemic countermeasures for false speech about important health issues. It can continue to issue messages supporting vaccine safety and fund vaccine education initiatives. It can also continue to pressure social media platforms to do what the government itself cannot. Because the First Amendment does not apply to private actors, digital media companies such as Facebook, Twitter, and Spotify have more latitude to restrict speech. However, making corporations the primary bulwarks against vaccine misinformation is an unpromising public health strategy. Platforms have scant incentives to aggressively monitor vaccine-related speech, even if they could someday gain the technical capacity to do swiftly, at scale, with low error rates. COVID-19 vaccine misinformation also spreads through television and radio outlets, which may be economically rewarded for spreading misinformation and appear disinclined to stop.

Vaccine misinformation during the COVID-19 pandemic underscores how reverence for freedom of speech in the US intensifies our vulnerability to public health threats. Given what we know about how vaccine misinformation influences vaccine acceptance and how intractable false
beliefs are, this misinformation may be among the most significant barriers to controlling infectious disease in the 21st century.

REFERENCES