Utah Law Review

Volume 2026 | Number 2 Article 3

4-8-2026

Can Speech Policy Protect Public Health?

Irina D. Manta
School of Law at Hofstra University, irina.d.manta@hofstra.edu

Cassandra Burke Robertson
Case Western Reserve University School of Law, cassandra.robertson@case.edu

Zoë Robinson
Marquette University Law School, zoe.robinson@marquette.edu

Follow this and additional works at: https://dc.law.utah.edu/ulr

Recommended Citation
Irina D. Manta et al., Can Speech Policy Protect Public Health?, 2026 ULR 321 (2026).

This Article is brought to you for free and open access by Utah Law Digital Commons. It has been accepted for inclusion in Utah Law Review by an authorized editor of Utah Law Digital Commons. For more information, please contact valeri.craigle@law.utah.edu.

CAN SPEECH POLICY PROTECT PUBLIC HEALTH?

Irina D. Manta,[*] Cassandra Burke Robertson[**] & Zoë Robinson[***]

Abstract

Government speech shapes public health outcomes, yet political incentives often lead officials to either remain silent about emerging threats or subordinate scientific evidence to partisan goals. This Article examines how three factors interact to influence public health: the constitutional status of health-related speech, the political economy of public health policymaking, and the modern information environment. Drawing on insights from public choice theory, we demonstrate how misaligned incentives lead political actors to avoid communicating about health risks or spread misinformation that serves their short-term interests at the expense of population health. The conventional tools of public health policy were developed when official sources could effectively shape public understanding, but today's fragmented information landscape demands new approaches to health communication.

This Article analyzes both the constitutional framework governing health-related speech and the practical dynamics that complicate effective public health messaging. We propose specific mechanisms to combat harmful misinformation while creating stronger incentives for accurate government communication about health threats. Throughout, we move beyond binary debates about censorship versus free speech to develop approaches that reflect the complex relationship between information flows, political incentives, and public health outcomes. The history of public health challenges—from the AIDS crisis of the 1980s to today's emerging strains of avian influenza—shows how institutional responses often falter. Understanding these dynamics can help shape better responses to current and future health crises.

[*] © 2026 Irina D. Manta, Cassandra Burke Robertson & Zoë Robinson. Professor of Law and Founding Director of the Center for Intellectual Property Law, Maurice A. Deane School of Law at Hofstra University.

[**] John Deaver Drinko-Baker Hostetler Professor of Law and Director of the Center for Professional Ethics, Case Western Reserve University School of Law.

[***] Professor of Law, Marquette University Law School.

We would like to thank the library staffs of our universities for research assistance.

INTRODUCTION

In the early 1980s, as an unknown disease began claiming lives in American cities, Dr. John Gullett contacted the CDC to report a patient with an unusual combination of Kaposi's sarcoma and Pneumocystis pneumonia.[1] The CDC's initial response was muted—so muted that later, no one at the agency even remembered speaking with him.[2] This institutional silence would set the tone for the first years of what would become known as the HIV/AIDS epidemic. While the CDC eventually became more engaged, other government entities remained passive. New York City's mayor and health commissioner took little action even as their city contained half of the country's AIDS cases.[3] The National Cancer Institute showed minimal urgency despite mounting evidence of a crisis.[4] Most tellingly, President Reagan's administration, focused on reducing federal spending, repeatedly declined CDC requests for AIDS funding.[5]

The human cost of this governmental inaction was devastating. The blood bank industry, politically powerful and resistant to implementing testing procedures, successfully delayed screening the blood supply for over two years—even after it was known that hepatitis B tests could serve as a proxy for detecting AIDS.[6] By the time an AIDS-specific test was finally implemented in 1985,[7] the damage was done: about half of all hemophiliacs in the United States had become infected with HIV.[8] Today, more than 700,000 Americans have died from HIV/AIDS.[9]

The dangers of government silence during health crises have not diminished in the decades since AIDS first emerged. Indeed, these dangers have intensified in our modern information ecosystem, where government health agencies—traditionally trusted sources of scientific guidance—increasingly find their messaging shaped by political imperatives rather than public health evidence.[10] When government agencies cease communicating scientific updates and health guidance—whether through politically-motivated directives or institutional paralysis—they create

---

[1] *See* RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC 65 (1987) [hereinafter SHILTS, BAND PLAYED ON].

[2] *See id.*

[3] *See id.* at 139, 150.

[4] *See id.* at 65.

[5] *See infra* note 26.

[6] *See* SHILTS, BAND PLAYED ON, *supra* note 1, at 177, 477–78.

[7] *See infra* note 30 and surrounding text.

[8] *See infra* note 33 and surrounding text.

[9] *See infra* note 39 and surrounding text.

[10] *See, e.g.*, Gabrielle Emanuel, Selena Simmons-Duffin & Rob Stein, *Federal Health Agencies Told to Halt All External Communications,* NPR (Jan. 22, 2025, at 18:40 PM ET), https://www.npr.org/sections/shots-health-news/2025/01/22/nx-s1-5270866/hhs-cdc-health-communications-trump [https://perma.cc/BCM9-UHY8].

dangerous information vacuums.[11] These dynamics have played out dramatically during the COVID-19 pandemic, where politically-motivated minimization of health risks and premature declarations of victory have undermined public health responses.[12] As we face new threats like emerging variants of avian influenza, the stakes of accurate, timely, and scientifically-grounded government health communication have never been higher.[13]

This Article examines the intersection of three critical factors that shape public health outcomes: the constitutional status of health-related speech, the political economy of public health policy-making, and the modern information environment. We argue that effectively protecting public health requires moving beyond traditional regulatory approaches to better account for how political incentives and information flows shape both official decision-making and public behavior. Drawing on insights from public choice theory, we demonstrate how misaligned incentives often lead political actors to either remain silent about emerging health threats or actively spread misinformation that serves their short-term interests at the expense of public health.

This is a defining moment for public health. Recent public health crises—from COVID-19 to the opioid epidemic—have demonstrated both the human costs of regulatory failure and the critical role that information plays in shaping individual and collective responses to health threats.[14] At the same time, there is unprecedented political polarization.[15] When false health claims spread unchecked while political leaders avoid speaking difficult truths, the result is not just needless suffering but a broader erosion of trust in public health institutions and expertise. Yet simply calling for "better" health communication or stricter regulation of false claims fails to

---

[11] *See* Sean C. Clark, *Never in a Vacuum: Learning from the Thai Fight Against HIV*, 13 WM. & MARY J. WOMEN & L. 593, 615 (2007) ("Because its spread is preventable given a properly informed population, HIV requires an information vacuum in which to thrive. Media blitzes like that initiated by the Thai government are a highly effective way of preventing such a vacuum."); Cynthia M. Ho, *Avoiding the TRIPS Trap: A Path to Domestic Disclosure of Clinical Drug Data Consistent with International Norms*, 54 CORNELL INTL. L.J. 479, 481 (2021) ("In an information vacuum, companies can selectively provide information in advertising and even scientific papers for years while patient health and safety is unnecessarily compromised.").

[12] *See, e.g.*, Irina D. Manta, Cassandra Burke Robertson & Zoë Robinson, *Public Health Policy as Public Choice Failure*, 25 HOU. J. HEALTH L. & POL'Y 8 (2025) (symposium edition).

[13] *See, e.g.*, Amy Maxmen, *How America Lost Control of the Bird Flu and Raised the Risk of Another Pandemic*, PBS NEWS (Dec. 26, 2024, at 18:58 ET), https://www.pbs.org/newshour/health/how-america-lost-control-of-the-bird-flu-and-raised-the-risk-of-another-pandemic [https://perma.cc/2XLE-S8TC].

[14] *See infra* Section I.A.

[15] Molly J. Walker Wilson, *Effective Public Health Communication in a Post-COVID-19 America: Lessons from Behavioral Science*, 28 LEWIS & CLARK L. REV. 109, 188 (2024) (explaining how "extreme polarization, with pro-maskers and anti-maskers and pro-vaccine and anti-vaccine individuals pitted against each other" increased negative emotions among the public).

address the underlying dynamics that make effective public health policy so challenging in practice.

This Article proceeds in three parts. Part I examines how public choice theory helps explain persistent failures in public health policy-making, focusing particularly on how political incentives shape both government speech and silence about health risks. Part II analyzes the constitutional framework governing health-related speech, including both limitations on false commercial speech and protections for other forms of health communication. Part III outlines the complexities surrounding truth and falsity in health information and analyzes the effectiveness of private mechanisms in navigating this question. Part IV develops a novel approach to operationalizing speech policy to better serve public health goals, proposing specific mechanisms to both combat harmful misinformation and create stronger incentives for accurate government communication about health threats. Part V concludes.

Throughout, we emphasize the need to move beyond simplistic debates about censorship versus free speech to develop more nuanced approaches that account for the complex relationship between information flows, political incentives, and public health outcomes. While the challenges are daunting, understanding these dynamics is essential for crafting more effective responses to both current and future public health crises.

I. THE POLITICAL ECONOMY OF PUBLIC HEALTH COMMUNICATION

Public health policy presents a paradox. On its surface, protecting population health appears to be a quintessential example of government serving the public interest—few government functions could be more fundamental than safeguarding community health. Yet public health policy remains subject to the same political pressures and interest-group dynamics that affect other areas of governance. Public choice theory helps explain why government actors frequently fail to implement scientifically supported health measures, even when evidence clearly shows these measures would reduce illness and death in the population. This failure is particularly evident in how government actors communicate—or remain silent—about health risks. Understanding these dynamics requires examining three interconnected elements: the role of public choice theory in shaping political decisions about public health, the constitutional status of health-related speech, and the contemporary information environment that can either amplify or diminish health messages. This Part analyzes how these factors combine to create both obstacles to effective public health policy and potential pathways for reform.

A. Public Choice Theory and the Regulation of Health Information

Public choice applies economic principles to systematically analyze the drivers of political actors' choices in the policy- and law-making process. Public choice understands both legislators and the executive-supervisor president as rational actors whose decisions are driven by the goal of maximizing political outcomes for

themselves, specifically re-election.[16] Political elites, then, are "consumers in a free market seeking to maximize their own utility."[17] As such, private groups that are able to organize collectively can effectively and efficiently lobby political actors for their preferred outcomes by promising—explicitly or implicitly—advantages to political actors, including financial benefits (e.g., campaign contributions) and electoral benefits (e.g., votes).[18] For this reason, the greater public interest rarely drives law-making and other government interventions into public life. Even for issues that are broadly understood as exclusively public goods, such as exemptions from generally applicable laws for religious activities, legislative decision-making has been shown to be a result of a "subtle and complex process through which the suppliers (the legislators) weigh the gains derived from the prospective transfer (votes gained) against the costs borne (votes lost)."[19]

Public health interventions have traditionally been conceptualized in a public interest frame.[20] A public interest view of government intervention in public health crises understands government action (or inaction) to be motivated by ameliorating health harms in the community.[21] And any failure of those actions to serve the public interest is understood as either poor institutional or policy design, or ignorance

---

[16] Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 357 (1999) ("Public choice [theory] thus suggests that the legislature will typically be in thrall to narrow private interests . . . [who] will attempt to purchase rents from the legislature. Legislators will sell such rents in exchange for their own rents, in the form of . . . campaign contributions, and other reelection advantages."); *see also* James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, *in* THE THEORY OF PUBLIC CHOICE - II 11, 13 (James M. Buchanan & Robert D. Tollison eds., 1984) (explaining that "[p]ublic choice theory essentially takes tools and methods of approach . . . [from] economic theory and applies [them] to the political or governmental sector"); Dennis C. Mueller, *Public Choice: A Survey*, 14 J. ECON. LITERATURE 395, 396 (1974) (describing public choice theory and the *quid pro quo* concept generally).

[17] Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J. L. & PUB. POL'Y, 715, 723 (2013).

[18] *See, e.g.*, A. Mechele Dickerson, *Regulating Bankruptcy: Public Choice, Ideology, & Beyond*, 84 WASH. U. L. REV. 1861, 1875–76 (2006) ("Public choice theory generally posits that political actors will behave in a self-interested fashion and that their decisions will be influenced by small, organized, single-issue special interest groups. Specifically, politicians are said to sell their votes to special interest groups in return for votes, campaign contributions, promises for future favors, or illegal bribes.").

[19] Zoë Robinson, *Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion*, 20 WM. & MARY BILL RTS. J. 133, 145 (2011); *see also* Larkin, *supra* note 17, at 723.

[20] *See, e.g.*, CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 29 (1990) (describing the goals of Congress as those "to protect public health and safety from risks of various sorts—at work, in the air and water, and in consumer products—and to counteract the social subordination of disadvantaged groups.").

[21] *See id.*

and/or incompetence on the part of the political actors.[22] Yet, despite health law, public health, and public choice scholars largely ignoring the salience of public choice for analyzing public health law and policy, a small but growing body of work has emphasized that there is little reason to believe that public health is somehow special in the policy-making arena.[23] In this, public health is understood as a political good, with public health regulations and the allocation of resources driven by private interests, and with public health policies often having "perverse effects, undermining instead of promoting" public health.[24]

That public health is subject to the same push and pull and redistributive effects of politics can be seen in the context of various historic public health crises. A recent example is the HIV/AIDS epidemic. The way that the HIV/AIDS crisis unfolded provides a paradigmatic case of both public choice problems and ultimately solutions. While it certainly involved unique features of its own—especially the initial stigmatization of the disease as one of a socially disfavored group, gay men—many aspects of this public health crisis were ultimately much more similar to than different from governmentally-mishandled diseases such as COVID-19.

In the United States, the AIDS epidemic was characterized for years by an attitude of denial and lack of interest on the part of most government actors and the mainstream media, who all rarely engaged in speech about this growing problem in the first half of the 1980s.[25] Reducing federal government spending was a key goal of President Ronald Reagan's platform, and the CDC's requests for AIDS funding

---

[22] TOMAS J. PHILIPSON & RICHARD A. POSNER, PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE 200 (1993) ("Economists used to believe that most governmental interventions in the economy were motivated by a genuine desire to ameliorate market failures or achieve other broadly supported 'public interest' goals, and that if the interventions failed in fact to serve the public interest, this was a result of ignorance or incompetence on the part of individual legislators or administrators, or of poor institutional design.").

[23] *See* Peter T. Leeson & Henry A. Thompson, *Public Health and Public Choice*, 195 PUB. CHOICE 5, 8 (2021) ("[T]he public choice revolution largely has ignored public health: 'While there is now an extensive body of scholarship . . . on the interest-group approach to political processes, public health is one significant area of governmental activity that . . . has not been brought under such analytical scrutiny.'") (quoting Robert D. Tollison & Richard E. Wagner, *Self-Interest, Public Interest, and Public Health*, 69 PUB. CHOICE 323, 323 (1991)).

[24] Leeson & Thompson, *supra* note 23, at 6; *see also* WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 13–19 (2009).

[25] When infectious disease doctor John Gullett contacted the CDC in April 1981 to report a patient's Kaposi's sarcoma and Pneumocystis pneumonia (later discovered to be hallmark AIDS symptoms), the doctors at the CDC itself initially did not seem to pay attention to his story, and later nobody at the CDC remembered speaking to him at all. *See* SHILTS, BAND PLAYED ON, *supra* note 1, at 65. While at least part of the CDC eventually became more active, the much more financially endowed National Cancer Institute (NCI) was still not showing much urgency on the topic of Kaposi's sarcoma and opportunistic infections at its conference on the topic by September 1981. *See id.* at 93.

went against that goal.[26] The main sufferers of the disease—first homosexual men and then other disfavored groups—were not viewed as an important voting block, and their well-being was not expected to be of particular concern to other voters.[27] The blood bank industry, which lobbied against efforts to constrain the spread of HIV, turned out to have greater political influence: Industry officials at first refused to test the blood supply or take any other measures to reduce the odds of infection through that route.[28] There was continued resistance by blood bank officials against testing the blood supply as late as 1984, after more than two years of fighting with the CDC over this topic, even though it was known that the hepatitis B test was a decent proxy to detect AIDS in blood donations.[29] It was not until 1985 that an AIDS-specific antibody test was developed and broadly implemented to test the blood supply.[30] In the time leading up to this, "[m]any officials of the blood banks, the plasma fractionation industry, and the FDA accepted with little question estimates that the risk of AIDS was low ('one in a million transfusions'), and they accepted advice that control strategies . . . would be ineffective, too costly, or too risky."[31] Indeed, "there were missed opportunities to learn from pilot tests to screen potentially infected donors or implement other control strategies that had been rejected as national policy."[32] The key group to pay the price for these failures were those in frequent need of blood donations: about half of all hemophiliacs in the

---

[26] The federal administration was reducing or at least not increasing agency budgets generally, and scientists could not do the work they needed to understand AIDS better; by February 1982, the CDC had no money for much-needed chimpanzee studies or even to hire its own statistician to study AIDS. *See id.* at 125–26; *see also Economic Policy: The Reagan Revolution,* RONALD REAGAN PRESIDENTIAL FOUND. & INST., https://www.reaganfoundation.org/ronald-reagan/the-presidency/economic-policy/ [https://perma.cc/2WCK-RSSX] (last visited Aug. 29, 2025) (explaining President Reagan's economic philosophy).

[27] *See, e.g.*, Allan M. Brandt, *AIDS: From Social History to Social Policy*, 14 L. MED. & HEALTH CARE 231, 234–36 (1986) (discussing social attitudes and stigmatization of groups vulnerable to AIDS). AIDS being viewed as a "gay disease" also became one of the reasons that the Religious Right generally opposed AIDS funding. *See* SHILTS, BAND PLAYED ON*, supra* note 1, at 328–29. Additionally, groups such as intravenous drug users, prostitutes, and bisexual men were blamed as well. *See* Polly Thistlewaite & Zoe Leonard, *Prostitution and HIV Infection, in* WOMEN, AIDS, & ACTIVISM, THE ACT UP/NY WOMEN & AIDS BOOK GROUP (Cynthia Chris & Monica Pearl eds., 1999).

[28] *See, e.g.*, Carol McGraw, *Some AIDS Victims Win Blood Cases*, L.A. TIMES (Sep. 16, 1990, at 24:00 PT), https://www.latimes.com/archives/la-xpm-1990-09-16-mn-1224-story.html [https://perma.cc/NK28-WMSZ].

[29] *See* SHILTS, BAND PLAYED ON*, supra* note 1, at 177, 477–78.

[30] *A Timeline of HIV and AIDS*, HIV.GOV, https://www.hiv.gov/hiv-basics/overview/history/hiv-and-aids-timeline/#year-1985 [https://perma.cc/U9Y7-YFRD] (last visited Aug. 29, 2025).

[31] INST. OF MED., HIV AND THE BLOOD SUPPLY: AN ANALYSIS OF CRISIS DECISIONMAKING 3–4 (Lauren B. Leveton, Harold C. Sox, Jr., & Michael A. Stoto eds., 1995), https://www.ncbi.nlm.nih.gov/books/NBK232419/#__NBK232419_dtls__ [https://perma.cc/B3EG-WRXU].

[32] *Id.* at 76.

United States, and 90% of severe hemophiliacs, became infected with HIV and either died of AIDS or continue to live with HIV today.[33]

An important measure that would have helped in the many years before effective action was taken is more speech by government actors—speaking out early about the health threat, even when they lacked direct authority to implement solutions, rather than remaining silent and later attributing inaction to jurisdictional limitations or the responsibility of other government entities.[34] The mayor and health commissioner of New York City, for example, remained passive in both their expressions and actions for years even though the city at one point contained half of the AIDS cases in the country.[35] This passivity was particularly striking given that New York health officials had previously demonstrated their capacity for extensive public health communication during other crises, such as the smallpox outbreaks discussed below, where they held daily press conferences and deployed multiple information channels to keep the public informed.[36]

One of the most significant agents of change in that respect became activist Larry Kramer, who wrote an influential accusatory article and later a successful play, *The Normal Heart*, about AIDS.[37] This represents an example of private speech influencing the development of government speech and policy in a positive direction. At the federal level, Surgeon General C. Everett Koop's 1986 report (commissioned by President Reagan and distributed to the media and public) eventually constituted effective government speech through its easily understandable public health advice and its ability to finally create genuine media attention and ultimately political action.[38] Sadly, due to the significant public policy failures—including most government actors' refusal to speak out about AIDS—of the early years, more than 700,000 people in the United States have died of

---

[33] *Post-Epidemic Advancements in Treatment and Product*, INDIANA HEMOPHILIA & THROMBOSIS CTR., https://web.archive.org/web/20240525151328/https://www.ihtc.org/hemophilia-HIV [https://perma.cc/2CHR-QEZX] (last visited Aug. 29, 2025).

[34] There were perennial debates in the first half of the 1980s on whether AIDS policy and discussions were the responsibility of the federal government, state and local governments, or individuals (and especially the gay community). *See, e.g.*, Elizabeth Fee & Nancy Krieger, *Understanding AIDS: Historical Interpretations and the Limits of Biomedical Individualism*, 83 AM. J. PUB. HEALTH 1477, 1479 (1993).

[35] *See* SHILTS, BAND PLAYED ON, *supra* note 1, at 139, 150.

[36] *See infra* text accompanying notes 45–47.

[37] *See* SHILTS, BAND PLAYED ON, *supra* note 1, at 244–45, 556.

[38] *See id.* at 587–88; C. EVERETT KOOP, U.S. DEP'T OF HEALTH & HUM. SERVS., SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME (1986), https://www.ncjrs.gov/pdffiles1/Digitization/107002NCJRS.pdf [https://perma.cc/6RA8-V3FX]. There was certainly controversy on how best to frame public health messaging around AIDS even if one agreed that an official message should be issued; one point of dispute was to what extent to use fear as a tool to induce people to take preventive measures against the disease. *See* Amy Lauren Fairchild, Ronald Bayer, Sharon H. Green, James Colgrove, Elizabeth Kilgore, Monica Sweeney & Jay K. Varma, *The Two Faces of Fear: A History of Hard-Hitting Public Health Campaigns Against Tobacco and AIDS*, 108 AM. J. PUB. HEALTH 1180 (2018).

HIV/AIDS; more than 1.2 million people live with HIV in the country today, and there remain over 35,000 new infections yearly.[39] Koop's government speech was too little, too late.

B. Speech as Both Shield and Sword: The Dual Nature of Health Communication

The previous Section outlined how public health policy responds to political pressures. In this Section, we explore the central role of speech in mediating that relationship. Public health scholars and political commentators have observed the central role of information—that is, speech—to public health successes and failures.[40] At one end of the public health information spectrum exists speech that accurately identifies risks and consequences of disease in a public health crisis, as well as articulates scientifically supported risk mitigation and elimination measures. This speech can be considered true speech—that is, speech that presents information considered scientifically valid and accepted in the context of the crisis—inasmuch as it presents information that is considered scientifically valid and accepted in the context of the crisis.[41] True health speech is a crucial public health mechanism; it presents scientifically complex information to the broader public in a way that "mold[s] the informational environment" and drives public knowledge and opinion.[42] And ultimately, from an epidemiological perspective, true speech is critical to optimizing population-level health outcomes of individuals and groups within the community, particularly in emergency situations, by either nudging behavioral choices or explaining mandatory health directives.[43]

True health speech is also a foundational public choice mechanism. Past public health crises highlight the importance not only of true health speech but also the role of government as the lead disseminator of information for the successful

---

[39] *The HIV/AIDS Epidemic in the United States: The Basics*, KAISER FAM. FOUND. (Oct. 9, 2024), https://www.kff.org/hivaids/fact-sheet/the-hivaids-epidemic-in-the-united-states-the-basics/ [https://perma.cc/8MG5-R4DX]; THE HIV/AIDS EPIDEMIC IN THE UNITED STATES: THE BASICS, KAISER FAM. FOUND. (Feb. 2019), https://files.kff.org/attachment/Fact-Sheet-HIV-AIDS-in-the-United-States-The-Basics [https://perma.cc/FM6R-EJPN].

[40] Health information systems recognize both information inputs (e.g., data on health outcomes, performance of health systems, etc.) and information outputs (e.g., information about a disease and intervention advice). *See* Carla AbouZahr & Ties Boerma, *Health Information Systems: The Foundations of Public Health*, 83 BULL. WORLD HEALTH ORG. 578, 579 (2005). Here we focus on the output side of public health information.

[41] For purposes of this Article, "true speech" refers to speech that presents information considered scientifically valid and generally accepted within the relevant scientific community, as distinguished from false or misleading health claims.

[42] Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 LOY. L.A. L. REV. 363, 375 (2006).

[43] *See* Špela Šalamon, Andrew Ewing, Greta Fox, Stephane Biodeau, Carlos Gershenson, Matti TJ Heino, & Yaneer Bar-Yam, *SARS-CoV-2 and COVID-19: From Crisis to Solution*, WORLD HEALTH NETWORK SCI. COMMCN'S (Jan. 18, 2024), https://doi.org/10.59454/whn-2401-334 (discussing how the ongoing harm of COVID-19 needs to be "more widely communicated to the public").

management of public health crises.[44] Where the government leads with clear and frequent true health speech, it can undercut political opposition, both facilitating scientifically valid public health measures and entrenching political positioning.

For example, in the context of smallpox outbreaks, Judith Walzer Leavitt outlines how disparities in the government management of information in New York as compared to Milwaukee led to different public health and political results. Leavitt explains how, in New York, alongside active public health measures to reduce the risk of contracting smallpox (e.g., vaccination efforts, isolation, etc.), health officials held daily press conferences discussing information on all confirmed and suspected cases, in addition to providing public information via signs, lapel buttons, radio interviews, and newspaper editorials.[45] Conversely, during an outbreak in Milwaukee, the government imposed various mitigation measures, including isolation and a vaccination campaign, but it failed to couple these measures with information.[46] There was limited daily information about the disease emanating from the government, and consequently, the speech environment was filled with "mixed and partisan messages."[47]

While Leavitt does not analyze these divergent approaches through a public choice lens, the contrasting strategies may reflect different political calculations by officials in each city. New York's proactive communication strategy could have served multiple political interests: demonstrating governmental competence and control during a crisis, preempting criticism by staying ahead of the information cycle, and building public trust through transparency. Conversely, Milwaukee officials may have calculated that remaining silent would avoid potential blame for unpopular measures or controversial health messaging or perhaps lacked the political incentives to invest resources in extensive public communication campaigns. The different outcomes—with New York achieving greater public cooperation—suggest that political actors' communication choices during health crises can serve both public health goals and their own political interests, though these incentives are not always aligned.

Unfortunately, speech can also be weaponized in public health emergencies in the form of false health speech. False health speech is a significant and growing problem. The former head of the Food and Drug Administration (FDA), Robert Califf, has stated that health misinformation is the "leading cause of meaningful life-years lost" and the "most common cause of death in the United States."[48] The former Surgeon General of the United States, Vivek Murthy, identified combating health misinformation as a "moral and civil imperative that will require a whole-of-society

---

[44] *See, e.g.*, *supra* note 38 and accompanying text.

[45] Judith Walzer Leavitt, *Public Resistance or Cooperation? A Tale of Smallpox in Two Cities*, 1 BIOSECURITY & BIOTERRORISM 185, 189 (2003).

[46] *Id.* at 189–90

[47] *Id.* at 190.

[48] Darius Tahir, *FDA Head Robert Califf Battles Misinformation — Sometimes with Fuzzy Facts,* KFF HEALTH NEWS (July 24, 2023), https://kffhealthnews.org/news/article/fda-head-robert-califf-battles-misinformation-sometimes-with-fuzzy-facts [https://perma.cc/A7A2-QVHB].

effort."[49] False health speech includes both misinformation—"inaccurate" or "false" information—and disinformation—inaccurate or "false information deliberately intended to mislead."[50] In the context of health information, however, whether something is in fact inaccurate or false is dependent on the definition of falsity.

Scientific falsity is not binary. Instead, it exists on a spectrum. At its narrowest, false health speech is limited to claims that are uniformly recognized as false by the scientific community. One example of this is the anti-vax claim that certain vaccines cause autism in children, a claim that has been overwhelmingly disproved in the scientific literature.[51] However, false health speech is not limited to claims that are made with intent to counter true health speech. False health speech encompasses claims that are contrary to true health speech even where the speaker believes the source of the false health information is valid or where the speaker is simply exasperated with burdensome public health measures.[52]

A broader conception of false health speech would additionally include claims that lack the evidentiary support customarily required for scientific consensus to be reached.[53] For example, studies on the efficacy of particular drugs could reach conflicting results, or drug trials could have been only tested on animals and not humans. The broadest definition of false health information includes claims that are technically true but fail to include information that prevents the claim from misleading others.[54] An example would be a claim that a study has shown MMR vaccines to cause autism in children, but which omits the fact that subsequent studies have demonstrated that the study was flawed or falsified.[55]

---

[49] VIVEK H. MURTHY, U.S. PUB. HEALTH SERV., CONFRONTING HEALTH MISINFORMATION: THE U.S. SURGEON GENERAL'S ADVISORY ON BUILDING A HEALTHY INFORMATION ENVIRONMENT 2 (2021), https://www.hhs.gov/sites/default/files/surgeon-general-misinformation-advisory.pdf [https://perma.cc/FJQ5-VA9R].

[50] *Misinformation and Disinformation*, AM. PSYCH. ASS'N, https://www.apa.org/topics/journalism-facts/misinformation-disinformation [https://perma.cc/77D8-4WUB] (last visited Aug. 29, 2025).

[51] *See, e.g.*, Anders Hviid, Jørgen Vinsløv Hansen, Morten Frisch, & Mads Melbye, *Measles, Mumps, Rubella Vaccination and Autism: A Nationwide Cohort Study*, 170 ANNALS INTERNAL MED. 513 (2019).

[52] Richard S. Saver, *Physicians Spreading Medical Misinformation: The Uneasy Case for Regulation*, 108 MINN. L. REV. 911, 919–21 (2023). Notably, medical misinformation is distinct from medical disinformation, where the latter requires knowledge of the falsity of the statement. AM. PSYCH. ASS'N, *supra* note 50.

[53] *See* Alexandra J. Roberts, *False Influencing,* 109 GEO. L.J. 81, 100, 107–11 (2020) (discussing how false influencing harms consumers by making misleading health claims); *see generally* Leah R. Fowler, Max N. Helveston & Zoë Robinson, *Influencer Speech-Torts*, 113 GEO L.J. 415, 423–29 (2025) (discussing how health and wellness influencers profit off pushing false and harmful health information and proposing that placing tort liability on influencers for negligence could remediate harms).

[54] *See generally* Fowler, Helveston & Robinson, *supra* note 53.

[55] *Id.* For a discussion of the MMR controversy and related liability questions, see Dorit Rubinstein Reiss & John Diamond, *Measles and Misrepresentation in Minnesota: Can There*

False health speech can clearly result in immediate health harms. False health speech also undermines long-term public health measures by destabilizing public trust in, and acceptance of, true health speech.[56] Importantly, as public opposition to true health speech increases, perversely political will to implement measures based on true health speech decreases.[57] As outlined above, those responsible for public health measures are rational actors.[58] When true health speech fails to garner the support of the voter base, political actors will simply not implement scientifically necessary health measures.[59]

The weaponization of public health information for political ends has increased dramatically over the past decades as a result of the internet and, more recently, social media.[60] Previously, dissemination of false health information was restricted by various gatekeeping mechanisms.[61] It was difficult for individuals to disseminate false health speech widely, and groups were often limited to leaflets or conferences in their attempts to distribute false health information.[62] Conversely, when government agencies chose to communicate about health issues, true health speech was centrally reposed in the government and typically disseminated through large information distributors such as radio and newspapers[63]—though as the AIDS crisis demonstrates, government silence could create dangerous information vacuums even in this more controlled environment.

The advent of social media, however, shifts the health speech dynamics, dramatically increasing the traction of false health speech. In this contemporary digital context, false health speech is readily created, disseminated, and shared by organizations and individuals, facilitating peer-to-peer communications and evaluations of health information. Further, the advent of the influencer economy has only exacerbated the problem of false health speech. Health influencers—"online opinion leaders who make social media content related to science, medicine, or wellness . . . who use their influence to impact health behaviors and purchases"[64]—are dominant on social media. These for-profit actors peddle products and advice for profit. Brands and lobby groups, amongst others, have recognized the value of influencers and invest significant resources into influencer marketing in hopes of

---

Be Liability for Anti-Vaccine Misinformation That Causes Bodily Harm?, 56 S.D. L. REV. 531, 551–59 (2019).

[56] *See, e.g.*, Manta, Robertson & Robinson, *supra* note 12.

[57] *See id.*

[58] *See supra* Section I.A.

[59] *See* Manta, Robertson & Robinson, *supra* note 12.

[60] *See* Michael L. Rustad & Thomas H. Koenig, *Creating a Public Health Disinformation Exception to CDA Section 230*, 71 SYRACUSE L. REV. 1251, 1256 (2021) (referring to false health information on social media as a "public health infodemic").

[61] *See* Dan Dumbrell & Robert Steele, *The Changing Nature of Health Information Dissemination Through the Role of Social Media*, 411–414 APPLIED MECHANICS & MATERIALS 110, 112 (2013).

[62] *See id.*

[63] *Id.*; SHILTS, BAND PLAYED ON, *supra* note 1, at 65.

[64] Fowler, Helveston & Robinson, *supra* note 53, at 423.

"going viral."[65] Ultimately, this results in an "infodemic" that leads to an environment saturated in false health speech.[66] Consequently, the environment influences public support for health measures, which in turn affects the ongoing willingness of political actors to take appropriate formal steps to ensure that public health measures are followed.[67]

Central to the public choice failures of public health policy, then, is speech. Communication—speech—has a central role during public health crises.[68] Communicating accurate information about risks and consequences of disease in a public health crisis, as well as about scientifically supported risk mitigation and elimination measures, is critical to optimize population-level health outcomes by nudging (or compelling) the community to take measures that benefit both individuals and the general population.[69] Furthermore, speech influences support for public health measures, which in turn affects the ongoing willingness of political actors to take appropriate formal steps to ensure that public health measures are followed. Lars Noah has noted the difficulties that can arise when politics and public health intersect, commenting that "where crass political calculations have at times trumped evidence-based public health information, fears over government censorship have now started to give way to concerns about hijacking" public health for political gain.[70] Speech can thus act as either a valuable mechanism for, or an obstacle to, the public interest.

---

[65] *See id.* at 419.

[66] *See* Rustad & Koenig, *supra* note 60, at 1256.

[67] Other issues compound the problem in the contemporary context, including partisan polarization, heightened individualism, and the eroding trust in democratic institutions and public voices. *See* Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. 739, 755 (2018) [hereinafter Robertson, *Judicial Impartiality*] (explaining that "a strong partisan social identity (which makes people predisposed to view their own party's actions favorably) combined with a growing and personalized division between the two parties (which can lead people to distrust others' motives and doubt the legitimacy of actions taken by the opposing party), can politicize beliefs" about policy choices).

[68] *See* Meredith Wadman & Jocelyn Kaiser, *Trump Hits NIH with 'Devastating' Freezes on Meetings, Travel, Communications, and Hiring*, SCIENCE (Jan. 22, 2025, at 17:45 ET), https://www.science.org/content/article/trump-hits-nih-devastating-freezes-meetings-travel-communications-and-hiring [https://perma.cc/EVT5-Y2C8] (discussing how all public health agencies were suspended for some time at the start of the second Trump presidency from communicating with the public and what consequences resulted); Chris Dall, *Scope of the Communications Hold on Federal Health Agencies Expands*, UNIV. OF MINN. CTR. FOR INFECTIOUS DISEASE RSCH. & POL'Y (Jan. 23, 2025), https://www.cidrap.umn.edu/misc-emerging-topics/scope-communications-hold-federal-health-agencies-expands [https://perma.cc/HR9X-9H98] (describing how these actions included a disruption of "case reports on infectious disease outbreaks and epidemiologic studies. This week's [Morbidity and Mortality Weekly Report] was to include items on the H5N1 avian flu outbreak on US dairy and poultry farms.").

[69] *See* Šalamon et al., *supra* note 43.

[70] Lars Noah, *Censorship Is So Last Century: Therapeutic Products, Propaganda, and Compelled Speech*, 66 ST. LOUIS U. L.J. 79, 80 (2021).

II. CONSTITUTIONAL FRAMEWORKS FOR HEALTH-RELATED SPEECH

To address the public health challenges outlined above, we must first understand which forms of false health speech fall outside constitutional protection. While the First Amendment generally protects speech—even false speech—several established doctrinal pathways permit regulation of particularly dangerous forms of health misinformation. These constitutional frameworks become increasingly important as false health speech inflicts substantial and documented harms on individuals and communities.

The contemporary information environment, particularly social media, amplifies these harms by allowing false health claims to spread rapidly and widely.[71] Health influencers—content creators who monetize health advice—further intensify the problem by profiting from the spread of unproven treatments and misleading claims.[72] Understanding the scope and limits of constitutional protection for health-related speech is therefore crucial for developing effective regulatory responses that can survive First Amendment scrutiny.

Two constitutional categories of speech provide the primary pathways for regulating the most harmful false health speech: false or misleading commercial speech and fraudulent speech. Commercial speech doctrine allows regulation when health-related claims are made in connection with the sale of goods or services and lack truthfulness. Fraud doctrine reaches beyond commercial contexts to address deliberately deceptive health claims that cause harm. These established constitutional frameworks offer concrete tools for addressing dangerous health misinformation while respecting First Amendment values.

These regulatory challenges are compounded by the public choice dynamics discussed in Part I, where political incentives often discourage government officials from providing clear health communication, making the constitutional tools for addressing false speech even more crucial. False health speech can and does inflict real harms at the individual and population levels, including physical harm,[73] emotional harm,[74] and economic harm,[75] among others. False health speech during the COVID-19 pandemic "led directly to loss of life, likely on an enormous scale."[76]

---

[71] *See, e.g.*, Sezer Kisa & Adnan Kisa, *A Comprehensive Analysis of COVID-19 Misinformation, Public Health Impacts, and Communication Strategies: Scoping Review*, J. MED. INTERNET RSCH., Aug. 21, 2024, at 1, 2 (discussing how the "spread of misinformation had far-reaching consequences: it undermined public health efforts, promoted harmful practices, contributed to vaccine hesitancy, and possibly prolonged the pandemic.").

[72] *See* Fowler, Helveston & Robinson, *supra* note 53.

[73] *Id.*

[74] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268–80 (1964).

[75] *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

[76] Jamal Greene, *Government Counterspeech*, KNIGHT FIRST AMEND. INST. (Dec. 16, 2022), https://knightcolumbia.org/content/government-counterspeech [https://perma.cc/FF

Critically, the spread of false health information significantly hinders public support for necessary health-related actions by the government.[77] It does so by promoting alternative treatments and prevention methods or by directly challenging essential health guidelines without any scientific backing.[78] The contemporary speech environment amplifies the public choice impact of false health speech.[79] Online media, and especially social media, represent the primary sources of health information for a vast number of people, and false health speech spreads rapidly.[80] False health speech is only intensified by the growth of health and wellbeing influencers, whose commercial motivations often bring their false claims within the scope of regulable commercial speech doctrine, though enforcement challenges remain significant.[81] The contemporary context, then, is an environment where speech that is harmful to public health is readily available and disseminated, creating an obstacle for public support for evidence-based public health measures. To overcome public choice obstacles for scientifically accurate public health measures, one approach is to ratchet down false health speech.

The constitutional status of false speech—and the capacity of government to limit it—is context dependent.[82] At base, the First Amendment entrenches speech as something uniquely valuable in our constitutional community, and the Supreme

---

L6-88WK]; *see also* Jack Healy, *After They Spurned Vaccines, Covid Crept In. Then, Regret*., N.Y. TIMES, July 31, 2021, at A1 (highlighting personal accounts of individuals who, influenced by health misinformation, chose not to receive the COVID-19 vaccine and later experienced adverse health outcomes).

[77] *See* Manta, Robertson & Robinson, *supra* note 12.

[78] *See, e.g.*, *COVID-19 Symptoms and Complementary Approaches: What You Need to Know*, NIH NAT'L CTR. FOR COMPLEMENTARY & INTEGRATIVE HEALTH, https://www.nccih.nih.gov/health/covid-19-and-alternative-treatments-what-you-need-to-know [https://perma.cc/R428-BJ3Q] (last updated Mar. 2025) (listing alternative treatments that have been peddled for COVID-19); *Complementary and Alternative Medicine: Partner Resources*, IMMUNIZE.ORG: CLINICAL RESOURCES (Nov. 5, 2025), https://www.immunize.org/clinical/vaccine-confidence/topic/alt-medicine/#:~:text=NIH's%20National%20Center%20for%20Complementary,prevent%20or%20cure%20COVID%2D19 [https://perma.cc/4UNK-WHZP] (explaining the lack of "scientific evidence that any of these alternative remedies can prevent or cure COVID-19").

[79] Fowler, Helveston & Robinson, *supra* note 53; *see* Evan Orticio, Louis Martí & Celeste Kidd, *Social Prevalence Is Rationally Integrated in Belief Updating,* 6 OPEN MIND: DISCOVERIES COGNITIVE SCI. 77 (2022); *see also* Youjung Jun, Rachel Meng & Gita Venkataramani Johar, *Perceived Social Presence Reduces Fact-Checking,* 114 PNAS 5976 (2017).

[80] *See* Rustad & Koenig, *supra* note 60, at 1284–87 (describing some of the dangerous false health information that spread on social media during the COVID-19 pandemic, such as the suggestion to gargle with bleach).

[81] *See generally* Fowler, Helveston & Robinson, *supra* note 53.

[82] *See, e.g.*, Cassandra Burke Robertson & Sharona Hoffman, *Professional Speech at Scale*, 55 U.C. DAVIS L. REV. 2063, 2097 (2022) ("[E]ven the elimination of a categorical exclusion does not result in absolute protection for all speech—it merely requires a higher level of scrutiny.").

Court has consistently held that restrictions on expression are presumptively unconstitutional unless "narrowly tailored" to meet a "compelling government interest."[83] However, there are recognized categories of speech exempt from First Amendment coverage or subject to a lower level of scrutiny,[84] including "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct."[85] False speech is not itself a recognized category of exempt speech.[86] Yet, when false statements fall into an existing category of unprotected speech or cause serious harm, that speech may fall outside the scope of the Speech Clause.[87] Consequently, the

---

[83] Ashcroft v. Am. C.L. Union, 535 U.S. 564, 573 (2002) (internal quotation marks omitted); *see also* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011).

[84] The Court's existing Speech Clause jurisprudence recognizes a limited subset of categories of uncovered speech, including obscenity (Miller v. California, 413 U.S. 15, 23–24 (1973)), fighting words (Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)), copyright (Harper & Row, Publishers, Inc., v. Nation Enters., 471 U.S. 539, 559–60, 569 (1985)), child pornography (New York v. Ferber, 458 U.S. 747, 764 (1982)), perjury (United States v. Alvarez, 567 U.S. 709, 746–47 (2012) (Alito, J., dissenting)), fraud (*see* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976)), incitement (Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)), and defamation (N.Y. Times v. Sullivan, 376 U.S. 254, 267, 297–98 (1964)); (Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)). *See generally* Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV. F. 346 (2014) (arguing that the categories of unprotected speech have been treated "no differently historically than [they are] now"); Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 318 (2018) ("[T]he regulation of contracts, commercial fraud, perjury, conspiracy, workplace harassment . . . have all historically been treated as beyond the ambit of the First Amendment."); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2167 (2015) (challenging the assumption that the existence of "low-value categories of speech . . . extends back to the ratification of the First Amendment"). In addition, numerous categories of speech have not been subject to constitutional scrutiny despite implicating the First Amendment. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (noting that there are a number of speech-activities "that are regulated without offending the First Amendment").

[85] *Ohralik*, 436 U.S. at 468.

[86] Act of Dec. 20, 2006, Pub. L. No. 109-437, 120 Stat. 3266.

[87] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 717–19 (plurality opinion), 737–38 (Breyer, J., concurring) (2012); Cass R. Sunstein, *Falsehoods and the First Amendment*, 33 HARV. J. L. & TECH. 387, 388 (2020). Lower courts have subsequently taken this approach to challenges to laws including falsity as an element. *See, e.g.*, United States v. Bonin, 932 F.3d 523, 536 (7th Cir. 2019) ("Because the acts-as-such clause prohibits more than mere lies, it falls outside the scope of *Alvarez's* holding."); United States v. Keyser, 704 F.3d 631, 639–40 (9th Cir. 2012) (holding that hoax speech was not protected speech pursuant to *Alvarez*); United States v. Williams, 690 F.3d 1056, 1064 (8th Cir. 2012) (holding that true threats are constitutionally regulable and not implicated by *Alvarez*). For analysis of *Alvarez* and falsity, see generally Judith Miller, *Defending Speech Crimes*, 2020 U. CHI. LEGAL F. 177 (2020); James Weinstein, *What Lies Ahead?: The Marketplace of Ideas,* Alvarez v. United States*, and First Amendment Protection of Knowing Falsehoods*, 51 SETON HALL L. REV. 135 (2020); Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439 (2019).

capacity of government to limit false health speech is necessarily correlated with the constitutional category under which speech restrictions are justified.[88] Both state and federal governments have implemented various mechanisms to restrict and/or sanction misleading or false commercial speech as well as fraudulent speech.[89]

Two constitutional categories of uncovered speech enable government regulation of the most harmful false health speech: false or misleading commercial speech and fraudulent speech.[90] First, false health speech is often accompanied or motivated by commercial gain.[91] Commercial health speech is typically disseminated by pharmaceutical companies, advertisers, and influencers, where their speech is monetized through the sale of goods and/or services.[92] The commercialization of false health information provides a path for restricting it. Commercial speech is covered by the Speech Clause and is valued for providing information to consumers to facilitate.[93] However, where commercial speech is false or misleading, the benefits of commercial speech dissipate. Consequently, the Court

---

[88] Here we do not attempt to argue for a new category of uncovered speech, namely false health speech, and instead rely on restricting false health speech through existing categories of uncovered speech. The idea that false health speech could be uncovered is not implausible, and is the subject of future work.

[89] *See* Fowler, Helveston & Robinson, *supra* note 53, at 435–39. The FTC and FDA have overlapping interests and authority in addressing labeling, advertising, and endorsing, including influencer misinformation that can cause injury to consumers. However, they have agreed that the FDA has primary responsibility for misinformation involving prescription drugs, and the FTC has primary responsibility for the "truth and falsity of all advertising," excluding labeling, of other "foods, [non-prescription] drugs, [non-restricted] devices, and cosmetics." *See* Memorandum of Understanding Between the Federal Trade Commission and the Food and Drug Administration, MOU 225-71-8003 (May 14, 1971), https://www.fda.gov/about-fda/domestic-mous/mou-225-71-8003 [https://perma.cc/2GFE-4Q9M].

[90] *See* Fowler, Helveston & Robinson, *supra* note 53, at 449, 452–72.

[91] *See* Rustad & Koenig, *supra* note 60, at 1287–88 (explaining how "[f]inancial motives are behind many viral disinformation campaigns because conspiracy theories entice users to follow that link and read sensationalized postings. Advertisers pay websites according to the number of visitors, so 'click bait' false news postings are a common method of boosting revenue.").

[92] *See* Fowler, Helveston & Robinson, *supra* note 53, at 423–31.

[93] *See* Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583 (2008). For the purposes of this Article, we assume that monetized speech can be categorized as "commercial speech." *See* Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 67–68 (1983). *But see* Margaret Whelan, Note, *Common Sense and Commercial Speech*, 48 U. PITT. L. REV. 1121, 1139 (1987) (describing *Bolger's* approach to disaggregating commercial and non-commercial speech as "unworkable"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 897 (2d ed. 1988) (calling *Bolger's* approach to disaggregating commercial and non-commercial speech "perplexing").

has consistently held that false or misleading commercial speech is uncovered speech and subject only to rational basis review.[94]

Second, fraudulent speech jurisprudence provides an additional protection for the most egregious false health speech. While fraud can occur in the context of commercial speech, it more broadly captures speech that includes false representations as matters of fact that both do, and are intended to, deceive.[95] State consumer protection laws, such as truth in advertising laws, and federal schemes, including FTC and FDA limitations on misleading commercial speech, have been deployed to limit false health speech.[96] In addition, profession-specific schemes have been implemented and applied to limit false health misinformation. For example, health professionals are "expected to ground the information they convey and the advice they offer" in scientifically valid health information.[97]

Beyond these regulatory approaches to private speech, it's also worth noting that government speech itself falls outside First Amendment constraints. The Supreme Court has stated that government speech does not "normally trigger the First Amendment rules designed to protect the marketplace of ideas"[98] and that the Speech Clause "does not regulate government speech."[99] This principle becomes important when considering government's role as a counterspeaker to false health information, as discussed further below.

While the efficacy of these regulatory schemes in terms of limiting false health speech is questionable, they do offer some possibilities for public and private

---

[94] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 784–85 (2018); *In re* R.M.J., 455 U.S. 191, 203 (1982); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770–73 (1976); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980); Sorrell v. IMS Health Inc., 564 U.S. 552, 579 (2011); Reed v. Town of Gilbert, 576 U.S. 155, 178 (2015). Misleading commercial speech is not typically framed as uncovered speech. Instead, the traditional framing sorts speech as commercial or non-commercial, noting that commercial speech is covered by the First Amendment but protected at a lower level of scrutiny (i.e., intermediate scrutiny), *unless* that speech is misleading or deceptive, in which case rational-basis review applies. *See* Va. State Bd. of Pharmacy, 425 U.S. at 780–81; Steven H. Shiffrin, *Qualified Absolutism, Categorical Balancing, and New Categories*, 85 ALB. L. REV. 37 (2021).

[95] United States v. Alvarez, 567 U.S. 709, 719 (2012); Leslie Gielow Jacobs, *Freedom of Speech and Regulation of Fake News*, 70 AM. J. COMPAR. L. 278, 284 (2022).

[96] For a discussion of state consumer protection and false health speech, see Fowler, Helveston & Robinson, *supra* note 53, at 434–39.

[97] Claudia E. Haupt & Wendy E. Parmet, *Lethal Lies: Government Speech, Distorted Science, and the First Amendment*, 2022 U. ILL. L. REV. 1809, 1811 (2022); *see* Scott J. Schweikart, *Constitutional Regulation of Speech (and False Beliefs) in Health Care*, 20 AMA J. ETHICS 1041, 1041–44 (2018); *see generally* Wes Henricksen, *Disinformation and the First Amendment: Fraud on the Public*, 96 ST. JOHN'S L. REV. 543 (2022) (discussing how the spread of false information "has significantly undercut public faith in the electoral system, integrity of election results, and democratic institutions").

[98] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015).

[99] Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009).

remediation of harms caused by false health speech,[100] and, importantly for our purposes, mechanisms by which to dampen false health speech in the public sphere. False health speech presents a significant public choice obstacle to the implementation of scientifically valid public health regulations. Actively pursuing the existing, and constitutionally sound, regulatory mechanisms to limit that speech has a critical role to play in clearing the information environment that stands in the way of legislators pursuing regulation that protects the population during public health crises.

III. NAVIGATING SCIENTIFIC UNCERTAINTY IN HEALTH COMMUNICATION

We previously discussed the extreme end of misinformation—that is, unprotected fraudulent speech and misleading commercial speech that can be directly regulated. But as we move away from the unprotected extremes, there is a more difficult category of speech that fits in the murky middle of truth and falsity—information that contradicts the publicly accepted orthodoxy, but may, however unlikely, lead to a broader scientific understanding. Sometimes this speech is truly cutting edge, and over time successfully moves from the fringe to the center of scientific acceptance. For example, Dr. Anthony Leonardi's early claim that COVID-19 could dysregulate T cells and lead to lowered immunity originally suffered scorn, but has been increasingly borne out by later research.[101] Other times, the speech is plausible but scientifically unsupported, such as the possibility that vaccination could lead to antibody-dependent enhancement, risking the possibility that prior vaccination could actually make infection with a new coronavirus strain more severe.[102] Such speech is important, leading to a better scientific understanding whether ultimately confirmed or discredited. At the same time, however, such speech can cause public harm if it is acted on prematurely, for example by discouraging vaccination.

These are unquestionably difficult issues, but public choice theory suggests that leaving room for broad public debate is essential—even when it involves what

---

[100] Tort remedies also provide avenues for remediation of false health speech. *See generally* Fowler, Helveston & Robinson, *supra* note 53; Dorit Rubenstein Reiss, *Anti-Vaccine Misinformation and the Law: Challenges and Pitfalls*, 18 IND. HEALTH. L. REV. 85 (2021) (discussing potential legal claims to respond to disease misinformation).

[101] Andrew Nikiforuk, *What If COVID Reinfections Wear Down Our Immunity?*, THE TYEE (Nov. 7, 2022), https://thetyee.ca/Analysis/2022/11/07/COVID-Reinfections-And-Immunity/ [https://perma.cc/6PSH-V26P]; *see also* Lavanya Visvabharathy, Barbara A. Hanson, Zachary S. Orban, Patrick H. Lim, Nicole M. Palacio, Millenia Jimenez, Jeffrey R. Clark, Edith L. Graham, Eric M. Liotta, George Tachas et al., *T Cell Responses to SARS-CoV-2 in People with and Without Neurologic Symptoms of Long COVID*, MEDRXIV (pre-print Oct. 21, 2022), https://doi.org/10.1101/2021.08.08.21261763.

[102] Nobunao Ikewaki, Gene Kurosawa, Gary A. Levy, Senthilkumar Preethy & Samuel J.K. Abraham, *Antibody Dependent Disease Enhancement (ADE) After COVID-19 Vaccination and Beta Glucans as a Safer Strategy in Management*, 41 VACCINE 2427 (2023), https://doi.org/10.1016/j.vaccine.2023.03.005.

Professor Farber has bluntly referred to as "kooks and cranks (or more kindly put, visionaries and crusaders)."[103] Putting up with some level of non-fraudulent misinformation is the price of remaining open to new information—an especially important factor in fast-moving and novel public health crises.[104]

Creating space for open public dialogue means thinking about how we facilitate health speech, particularly during the evolution of scientific truth and falsity on a particular topic. Traditionally, debates about health information occurred among health professionals, while dissemination and wider public debate of health information involved limited information mechanisms (e.g., newspapers, television, and radio) *and* information originators (e.g., health professionals and government).[105] For example, when smallpox spread throughout North America, the primary source of information were the various state and local health departments, which distributed information through direct sources (e.g., pamphlets and signs) as well as through newspapers.[106] In a contemporary context, however, most health speech occurs online, and the internet and, more recently, the proliferation of social media have led to an expansion in both mechanisms of health information dissemination and in the type and nature of parties disseminating health information.

Consequently, in the absence of direct government prohibition on a significant proportion of health speech in the online environment, it is critical to consider how and when private mechanisms for restricting health speech should function. In the contemporary context of health information dissemination, the focus is on social media and the place of content moderation, including the role of social media platforms in determining whether or when to remove content contrary to its corporate terms of use.[107] Content moderation involves removal of content flagged as false health speech and in contradiction of the policies of the platform.[108] At the same time, however, content moderating also includes making decisions about what

---

[103] Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 580 (1991).

[104] *Id.* ("Kooks and cranks can be expected to do and say many silly, if not obnoxious, things, but we must put up with them in order to spread valuable information.").

[105] Dumbrell & Steele, *supra* note 61*,* at 112.

[106] *See* Leavitt, *supra* note 45; *see also* Charles B. Collins & Tony N. Sapiano, *Lessons Learned from Dissemination of Evidence-Based Interventions for HIV Prevention*, 51 AM. J. PREVENTATIVE MED. 140 (2016) (discussing the source and mechanisms of public health information dissemination during the HIV/AIDS crisis).

[107] *See* Thomas Stackpole, *Content Moderation Is Terrible by Design,* HARV. BUS. REV. (Nov. 9, 2022), https://hbr.org/2022/11/content-moderation-is-terrible-by-design [https://perma.cc/X7WP-ZRV8] (highlighting the daily life and challenges of social media content creators); Emily Denniss & Rebecca Lindberg, *Social Media and the Spread of Misinformation: Infectious and a Threat to Public Health*, HEALTH PROMOTION INT'L, Mar. 2025.

[108] Stackpole, *supra* note 107.

speech—even false health speech—should nonetheless be protected.[109] And in the evolution of health speech, what once was largely accepted as false may later become known to be true, and vice-versa, meaning that careful choices must be made.[110]

Content moderation can involve a combination of pure private speech and government speech.[111] Private resources can make a difference—for example, health scholars have noted that while health-harming information often violates platform guidelines, that does not always (or even often) result in removal of that content, largely due to resource constraints.[112] Some have argued that private social media entities themselves should have the same free speech rights as any other speaker.[113] In practice, however, the government at times tries to control their speech. For example, some states have tried to restrict private content moderation decisions, passing laws to limit the content moderation capacity of social media platforms.[114]

On the other side of the coin, the government has occasionally engaged in "jawboning" to pressure social media companies to more heavily prune misinformation online.[115] An approach informed by public choice principles would

---

[109] Nina I. Brown, *Regulatory Goldilocks: Finding the Just and Right Fit for Content Moderation on Social Platforms*, 8 TEX. A&M L. REV. 451, 474 (2021) ("A threshold problem is that efforts to reform section 230 to induce particular content moderation practices will necessarily make distinctions about speech on the basis of its content. For example, if revisions to section 230 are predicated on reducing false information, the government is making what would otherwise be an impermissible speech distinction: false speech is often protected by the First Amendment.").

[110] *See supra* text accompanying note 101.

[111] Evelyn Douek & Genevieve Lakier, *Lochner.com?*, 138 HARV. L. REV. 100, 170 (2024) (explaining that the "government jawboning of platforms also works in a completely different way—it is much more likely to involve 'ongoing, extensive and often collaborative relationships' with platforms about upstream policies, rather than individual pieces of content"); Robertson & Hoffman, *supra* note 82, at 2130 ("When possible, governmental authorities should collaborate with these platforms and integrate them into regulatory policies.").

[112] *See, e.g.*, International Fact-Checking Network, *An Open Letter to YouTube's CEO from the World's Fact-Checkers*, POYNTER (Jan. 12, 2022), https://www.poynter.org/fact-checking/2022/an-open-letter-to-youtubes-ceo-from-the-worlds-fact-checkers/ [https://perma.cc/JF3A-QVTU].

[113] Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1613 (2018) ("As internet intermediaries have become more and more vital to speech, First Amendment advocates have urged courts to apply the holding in *Tornillo* to platforms, granting them their own speech rights.").

[114] *See, e.g.*, S.B. 7072, 123rd Leg., 2d Reg. Sess. (Fla. 2021); H.B. 20, 87th Leg., 2d. Sess. (Tex. 2021).

[115] Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 57, 65–83 (2015) (defining jawboning as "a specific type of informal pressure by a government actor on a private entity: one that operates at the limit of, or outside, that actor's authority" and summarizing occasions on which the U.S. government influenced internet platforms to act

leave content moderation in the hands of private actors, neither pressuring them to delete information nor requiring them to preserve content that violates platform guidelines. This allows social media entities the leeway to experiment with different policies and to compete based on their approach to content moderation.

One example of a social media platform that has proven important in recent years is the X platform, formerly known as Twitter. From the start of the worldwide COVID-19 pandemic in 2020, it became the central social media hub on which scientists and activists shared information about the evolving state of knowledge about the virus and how to contain it, a phenomenon that continued for years. X enabled regular individuals across countries to hear directly from thinkers such as Yale immunobiologist and COVID researcher Akiko Iwasaki,[116] Scripps research scientist Eric Topol (who is one of the ten most-cited researchers in medicine),[117] Baylor College of Medicine virologist and vaccine researcher Peter Hotez,[118] and Long COVID researcher and advocate Hannah Davis.[119] While X was also teeming with COVID minimizers or anti-vaxxer types, it still played a crucial role in the exchange of knowledge and in the mobilization of activist groups, especially in an environment where in-person activism always carries the risk of (re-)infection with the virus.

The platform also enabled interacting with and protesting the content of government messaging. For example, activists regularly commented on CDC

---

in specific ways); *see also* Genevieve Lakier, *Informal Government Coercion and the Problem of "Jawboning*,*"* LAWFARE (July 26, 2021, at 15:52 ET), https://www.lawfareblog.com/informal-government-coercion-and-problem-jawboning [https://perma.cc/9KPF-9BB5]; Ira Rubinstein & Tomer Kenneth, *Taming Online Public Health Misinformation*, 60 HARV. J. LEGIS. 219, 242–43 (2023) ("[G]overnments can lobby platforms to confront [public health misinformation]. In a more adversarial manner, public officials can also summon platform executives to official hearings, publicly urging them to act against [public health misinformation] in specific ways or requiring them to submit information about their actions.").

[116] Akiko Iwasaki (@VirusesImmunity), X, https://x.com/VirusesImmunity?s=20 [https://perma.cc/JA2N-H6RB] (last visited Aug. 29, 2025) (account with over 200,000 followers); *see also Akiko Iwasaki, PhD,* YALE SCH. MED., https://medicine.yale.edu/profile/akiko-iwasaki/ [https://perma.cc/8J8P-QDSY] (last visited Aug. 29, 2025).

[117] Eric Topol (@EricTopol), X, https://x.com/EricTopol?s=20 [https://perma.cc/5NEQ-52RE] (last visited Aug. 29, 2025) (account with over 600,000 followers); *see also Eric Topol, MD*, SCRIPPS RSCH., https://www.scripps.edu/faculty/topol/ [https://perma.cc/6VJJ-XRTH] (last visited Aug. 29, 2025).

[118] Peter Hotez (@PeterHotez), X, https://x.com/PeterHotez?s=20 [https://perma.cc/68YM-2HLE] (last visited Aug. 29, 2025) (account with over 400,000 followers); *see also Peter Jay Hotez, M.D., Ph.D.*, BAYLOR COLL. MED., https://www.bcm.edu/people-search/peter-hotez-23229 [https://perma.cc/U8R8-YKFL] (last visited Aug. 29, 2025).

[119] Hannah Davis (@ahandvanish), X, https://x.com/ahandvanish?s=20 [https://perma.cc/N6J6-HFCD] (last visited Aug. 29, 2025) (account with almost 60,000 followers); *see also Research Team*, PATIENT-LED RESCH. COLLABORATIVE, https://patientresearchcovid19.com/covid19-patient-led-research-team [https://perma.cc/64WP-E4ZK] (last visited Aug. 29, 2025).

threads that failed to reference masking as a safety tool while tending to focus on vaccination-only strategies instead. Recently, the CDC hid a reply to one of its vaccine-only messages by Stanford scholar Pantea Javidan that highlighted Long COVID and showed the image of masked researcher Dr. Ziyad Al-Aly giving Long COVID testimony before a Senate Committee.[120] The CDC's decision to hide that and other replies discussing vaccination's modest effect on reducing Long COVID, as well as replies asking why these previous replies had been hidden, backfired: Dr. Javidan's original post earned over 45,000 views, and her follow-up post protesting the removal had close to 300,000.[121] Thus, her true health speech reached a large audience despite the government's attempt to prevent that.

The X platform was that of choice for many COVID scientists and activists despite many X users' decision to leave due to various decisions and actions by its owner Elon Musk, including incidents where his AI chatbot, Grok, spouted antisemitic conspiracy theories, leading to the cancellation of planned government contracts.[122] Nevertheless, X persisted in the COVID science and activism world for some time—why? In addition to some degree of path dependency and potentially X's practical format for COVID-related discussions, the answer likely lies in part in the problematic content moderation decisions that X's competitors made. For example, Meta's Threads platform, for some time, banned searches for terms such as "COVID" or "Long COVID," which rendered it near-useless as a hub for sharing information and organizing around such topics.[123] For all its other abject content

---

[120] *See* Julia Doubleday, *CDC Hides Replies Referencing the Senate HELP Committee's Long COVID Hearing*, THE GAUNTLET (Feb. 5, 2024), https://www.thegauntlet.news/p/cdc-hides-replies-referencing-the [https://perma.cc/QW9W-3GSP].

[121] *See id.*

[122] For a discussion of X's loss of users, see, e.g., Matt Binder, *Twitter / X Is Losing Daily Active Users. CEO Linda Yaccarino Confirmed It.*, MASHABLE (Sep. 29, 2023), https://mashable.com/article/twitter-x-daily-active-users-drop-under-elon-musk [https://perma.cc/X6ER-92QK] (analyzing the loss of tens of millions of users since Musk took over). This may have come to a head after the 2024 presidential election, when a significant number of users quit and/or migrated to Bluesky. *See, e.g.*, Craig Robertson, *What Does the X Exodus to Bluesky Mean for Journalism?*, THE CONVERSATION (Dec. 20, 2024, at 07:48 ET), https://doi.org/10.64628/AB.nruajvw94. The trend is unlikely to reverse itself with the controversies that Musk has been courting since the beginning of Trump's second presidency in 2025, often involving the Department of Government Efficiency (DOGE) that he has led through actions often struck down as unlawful and Musk's alleged attempts to buy elections. *See, e.g.*, Edith Olmsted, *Elon Musk Says He Has No Clue Why People Hate His Guts*, THE NEW REPUBLIC (Mar. 31, 2025, at 09:38 ET), https://newrepublic.com/post/193367/president-elon-musk-accuses-bullying-unpopular [https://perma.cc/D85M-3HC2]; Zoë Schiffer & Makena Kelly, *xAI Was About to Land a Major Government Contract. Then Grok Praised Hitler*, WIRED (Aug. 14, 2025, at 13:34 ET), https://www.wired.com/story/xai-grok-government-contract-hitler/ [https://perma.cc/F3QR-YB4T].

[123] *See, e.g.*, Caitlin O'Kane, *Threads Ban on Search Terms Like "COVID" Is Temporary, Head of Instagram Says*, CBS NEWS (Oct. 18, 2023, at 15:54 ET), https://www.cbsnews.com/news/threads-ban-search-terms-covid-adam-mosseri-meta-instagram-twitter-misinformation/ [https://perma.cc/RWT8-V8W9].

moderation failures that have enabled actions like harassment, especially of women and minorities,[124] X, for a period of time, provided greater opportunities to obtain accurate COVID data than most other information hubs on the Internet. It enabled direct criticism when the government and private actors attempted to distort or obscure the truth about COVID, including by allowing for the posting of relevant scientific articles in peer-reviewed publications.[125] While misinformation about COVID always abounded on X, it also abounded in a lot of other places, and for some years, X allowed those genuinely open-minded about learning more on the subject to find crucial pointers to scientific publications that the news media may not have adequately publicized.[126] Unfortunately, the changes that Elon Musk rendered to the platform ultimately moved it away from the possibilities of exploration and into machinery significantly focused on spreading misinformation by the time of the 2024 presidential election, from which he emerged as a powerful partner to President Trump.[127] This example illustrates the importance of the content moderation approach we outlined earlier—allowing private platforms the flexibility to experiment with different policies and compete based on their approach to content moderation. X's temporary success in facilitating scientific discourse about COVID, despite its other flaws, demonstrates how markets can sometimes provide solutions when platforms maintain space for legitimate scientific debate, even as the platform's later trajectory shows the fragility of such arrangements.

---

[124] *See, e.g.*, Will Knight, *Female Black Journalists and Politicians Get Sent an Abusive Tweet Every 30 Seconds*, MIT TECH. REV. (Dec. 18, 2018), https://www.technologyreview.com/2018/12/18/138551/female-black-journalists-and-politicians-get-sent-an-abusive-tweet-every-30-seconds/ [https://perma.cc/XH9P-Q42R].

[125] *See, e.g.*, Ikhwan Yuda Kusuma, Hening Pratiwi, Shafa Fitri Khairunnisa, Dian Ayu, Eka Pitaloka & Arie Arizandi Kurnianto, *The Assessment of Twitter Discourse on the New COVID-19 Variant, XBB.1.5, Through Social Network Analysis*, 14 VACCINE: X 1, 2 (2023), https://doi.org/10.1016/j.jvacx.2023.100322.

[126] *See* David S. Ardia, *Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance*, 16 HARV. L. & POL'Y REV. 275, 318 (2022) ("Opportunistic actors have been quick to fill the information vacuums left from the decline of traditional news sources by leveraging the affordances of social media to engage in disinformation campaigns.").

[127] *See* Miles Klee, *How Elon Musk and X Became the Biggest Purveyors of Online Misinformation*, ROLLING STONE (Aug. 9, 2024), https://www.rollingstone.com/culture/culture-features/elon-musk-twitter-misinformation-timeline-1235076786/ [https://perma.cc/U34S-HS5T]; Andrew Duehren, Maggie Haberman, Theodore Schleifer & Alan Rappeport, *Elon Musk's Team Now Has Access to Treasury's Payments System*, N.Y. TIMES (Feb. 1, 2025), https://www.nytimes.com/2025/02/01/us/politics/elon-musk-doge-federal-payments-system.html [https://perma.cc/TGW4-CS5W].

IV. STRENGTHENING GOVERNMENT HEALTH COMMUNICATION: MECHANISMS AND INCENTIVES

The preceding sections have explored two approaches to health-related speech: direct regulation of demonstrably false claims and private content moderation that respects the evolving nature of scientific knowledge. While both approaches play important roles, they are ultimately reactive measures that cannot fully address the public's need for accurate health information. This Section proposes a more proactive solution: enhancing the government's role as a source of accurate health information. Government speech is uniquely influential in shaping public understanding and behavior during health emergencies. When government officials provide clear, accurate, and timely information about health risks, they can guide appropriate public health responses and build trust in scientific institutions. Conversely, when government actors spread misinformation or remain silent about emerging threats, they create an information vacuum that others may fill with false or misleading claims. Understanding this dynamic, we argue for a heightened role for government in communicating health information—not through restricting others' speech, but through more effective deployment of its own voice to amplify scientifically sound public health guidance. There is no question that government speech is influential. Accurate, timely health information is enormously helpful in promoting public health. But the government may also spread false health information,[128] and the government's influence means that such false information amplifies harms.[129] Thus, for example, scholars have pointed to the CDC's own finding that "it was often too slow to convey reliable, actionable information during the COVID-19 pandemic."[130] President Trump was (and is) notorious for minimizing the risks of the virus and for pointing to unproven treatments.[131] Government health misinformation creates "harmful, sometimes deadly, results for individuals and communities."[132]

The conventional constitutional remedy for false or harmful speech is counterspeech. In Supreme Court orthodoxy, speech begets speech, and more speech rather than less is the preferred remedial option.[133] Underlying this approach is the concept that counterspeech is part of the "marketplace of ideas" underpinning the

---

[128] *See supra* notes 50–54 (discussing the various definitions of falsity). Trump's appointment of health secretary Robert F. Kennedy, Jr. is a move in the wrong direction in that context, unfortunately. *See, e.g.*, Stephanie Kirchgaessner, *Top US Vaccine Official Resigns over RFK Jr's 'Misinformation and Lies*,*'* THE GUARDIAN (Mar. 29, 2025, at 19:09 ET), https://www.theguardian.com/us-news/2025/mar/29/top-us-vaccine-official-resigns-over-rfk-jrs-misinformation-and-lies-dr-peter-marks [https://perma.cc/2T59-2Z9F].

[129] Haupt & Parmet, *supra* note 97, at 1813–14.

[130] Rubinstein & Kenneth, *supra* note 115, at 243.

[131] *Id.*

[132] *Id.*

[133] Greene, *supra* note 76; TRIBE, *supra* note 93, at 834; Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 B.Y.U. L. REV. 553, 553–54 (2000).

First Amendment. That marketplace, with the push and pull of speech and counterspeech, theoretically acts to expose harmful speech.[134] Justice Brandeis articulated this view in his concurring opinion in *Whitney v. California*, stating that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[135] In 2012, the Court reinforced the priority of counterspeech as a remedy for false speech, stating in *United States v. Alvarez*, that "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth."[136]

Scholars have questioned the constitutional veneration of counterspeech, both generally and specifically in the context of false health information. Kathleen Sullivan argues that counterspeech is an old and inadequate remedy for bad speech, stating that when it comes to contemporary speech, such as subordinating speech, we cannot "rely on good counsel to drive out bad."[137] G.S. Hans outlines that courts frequently rely on counterspeech as a remedy for false speech, not because of the effectiveness of counterspeech, but instead as a way of sidestepping the lack of remedial options for harmful speech in the context of judicial fears of regulatory overreach.[138] Instead, courts devolve the remedial options to those harmed by speech, suggesting that harms can be alleviated by exiting the speech environment or vocalizing objections.[139]

From a public choice perspective, the largest problem with relying on counterspeech is that government officials lack an incentive to provide updated, clear messaging.[140] First, as scientific understanding changes, government officials can be slow to update their prior statements and admit when they were wrong.[141] Second, even when the government does engage in accurate counterspeech, public health scholars have highlighted how this speech fails to move prior understanding. In the context of anti-vaccine speech and counterspeech, for example, scholars have

---

[134] G. S. Hans, *Changing Counterspeech*, 69 CLEV. ST. L. REV. 749, 757–59 (2021).

[135] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[136] 567 U.S. 709, 727 (2012).

[137] Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971, 974 (1995).

[138] Hans, *supra* note 134, at 765–70; *see also* Helen Norton, *Distrust, Negative First Amendment Theory, and the Regulation of Lies*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (Oct. 19, 2022), https://knightcolumbia.org/content/distrust-negative-first-amendment-theory-and-the-regulation-of-lies [https://perma.cc/LT3R-H69C] (discussing negative First Amendment theory, explaining "[u]nder this approach, the Constitution protects speech not so much because it is so valuable, but instead because the government is so dangerous in its capacity to abuse its regulatory power").

[139] Norton, *supra* note 138. Courts often frame counterspeech as the least restrictive alternative to legislative or regulatory limitations on speech. *See, e.g.*, 281 Care Comm. v. Arneson, 766 F.3d 774, 793–94 (8th Cir. 2014); Hans, *supra* note 134, at 765–68.

[140] *See* Manta, Robertson & Robinson, *supra* note 12.

[141] *See id.*

shown that corrections to misinformation rarely gain traction, and sometimes actually "backfire"—"cementing the mis-message, thereby escalating the problem."[142]

Yet, insights from social psychology suggest multiple ways that may amplify the effectiveness of government counterspeech. In the first instance, *how* counterspeech is framed has been shown to be impactful. In the context of hate speech and counterspeech on X, Fabienne Baider finds that while negative counterspeech is ineffective to rebuff hate speech, positive counterspeech leads to positive emotions and outcomes.[143] Reflecting on these findings in the context of health speech, the differential effectiveness of negative and positive counterspeech makes intuitive sense. Health information implicates an individual's bodily integrity.[144] When counterspeech is negative, it suggests that a person is uninformed or misinformed about what they believe to be true, meaning that the individual's subjective truth is invalid. Conversely, when counterspeech is positive, it instead can empower an individual by suggesting alternate views.[145]

One tool for heightening the effectiveness of counterspeech, then, is the framing of the counterspeech itself. For example, rather than responding to vaccine misinformation by stating "That claim about vaccines is false and dangerous" (negative counterspeech that challenges the person's existing beliefs), government health officials could instead frame their response as "It's completely normal to have questions about vaccines—here's what the latest peer-reviewed studies show about their safety and effectiveness" (positive counterspeech that validates concerns while providing alternative information). This positive approach acknowledges the legitimacy of having health questions while offering evidence-based information,

---

[142] Barbara Pfeffer Billauer, *Muzzling Anti-Vaxxer FEAR Speech: Overcoming Free Speech Obstacles with Compelled Speech*, 76 U. MIAMI L. REV. 1, 10 (2021); Olivia Benecke & Sarah Elizabeth DeYoung, *Anti-Vaccine Decision-Making and Measles Resurgence in the United States*, 6 GLOB. PEDIATRIC HEALTH 1 (July 24, 2019), https://doi.org/10.1177/2333794X19862949 (explaining how sites like Facebook, Pinterest, and Twitter have tried and failed to regulate misinformation); Philip Ball & Amy Maxmen, *The Epic Battle Against Coronavirus Misinformation and Conspiracy Theories*, NATURE (May 27, 2020), https://doi.org/10.1038/d41586-020-01452-z; David Gorski, *On "Reasonable" Apologists for the Antivaccine Movement,* RESPECTFUL INSOLENCE (Sep. 1, 2021), https://www.respectfulinsolence.com/2021/09/01/on-reasonable-apologists-for-the-antivaccine-movement/ [https://perma.cc/JM3B-PJGH].

[143] *See* Fabienne Baider, *Accountability Issues, Online Covert Hate Speech, and the Efficacy of Counter-Speech*, 11 POL. & GOVERNANCE 249 (2023), https://doi.org/10.17645/pag.v11i2.6465.

[144] *See* Trudo Lemmens, *Pharmaceutical Knowledge Governance: A Human Rights Perspective*, 41 J.L., MED. & ETHICS 163, 168 (2013) ("Some courts have emphasized the special nature of health information as intimately personal and evoking autonomy interests.").

[145] *See* Engy Abdelkader, *"Savagery" in the Subways: Anti-Muslim Ads, the First Amendment, and the Efficacy of Counterspeech*, 21 ASIAN AM. L.J. 43, 79–88 (2014) (discussing the possible empowering effects of counterspeech).

making it more likely that individuals will engage with the corrective information rather than rejecting it defensively.

Second, social scientists have demonstrated that the audience to whom counterspeech is directed matters for the effectiveness of that speech. Where speakers present counterspeech with similar social or role identities to the listener, that speech is more likely to impact the listener's views. Individuals' self-view includes multiple role identities and social identities.[146] Role identities show who an individual is in relation to others in their life (friend, parent, colleague). Social identities encompass the groups an individual belongs to (American, Republican, Methodist). Context can also play a role—in the clinical setting, "doctor" is a role identity when treating a patient, and a social identity when communicating with professional colleagues. Both role identities and social identities share culturally constructed defining features, which is called the "identity standard."[147] Thus, "the identity of 'mother' may contain a meaning of nurturing; 'boss' may contain meanings both of responsibility and of mentoring; 'Midwesterner' may contain meanings of hard work, authenticity, and humility."[148]

These identity processes are reflected in political polarization.[149] People are more likely to agree with those whom they recognize as sharing one or more social identities.[150] Likewise, when individuals see confirmation of their role identities, such as when a physician successfully provides relief to a patient, social psychologists say that the individual has achieved "self-verification."[151] The self-verification process acts to "confirm what [people] already believe about themselves . . . ."[152] Seeing one's self-assessment reflected back at oneself engenders positive emotions.[153] On the other hand, when people receive feedback at odds with their self-identity—for example, when a doctor is accused of providing medical misinformation—emotional distress results.[154] Individuals often engage in unconscious cognitive processes to alleviate that distress and avoid such feedback. Thus, "[t]his process results in a bias blind spot—by unconsciously selectively

---

[146] PETER J. BURKE & JAN E. STETS, IDENTITY THEORY 113, 118–23 (2009).

[147] *Id.* at 63 ("With respect to gender identity, for example, people may be characterized as more masculine or more feminine. Clearly, the character of masculinity and femininity—that is, what it means to be male or female—varies from one society to another and even across individuals within a society.").

[148] Robertson, *Judicial Impartiality, supra* note 67, at 747.

[149] *Id.*

[150] *See* Cassandra Burke Robertson, *Due Process in the American Identity*, 64 ALA. L. REV. 255, 269 (2012) ("Members have categorized themselves on factors they value. . . . As a result, group members develop an increasingly favorable perception of the ingroup and a less favorable perception of the outgroup.").

[151] *See* BURKE & STETS, *supra* note 146, at 59.

[152] *Id.*

[153] Cassandra Burke Robertson, *Organizational Management of Conflicting Professional Identities*, 43 CASE W. RES. J. INT'L L. 603, 607 (2011) [hereinafter Robertson, *Organizational Management*].

[154] *Id.* at 607–08.

attending to self-verifying feedback and failing to notice non-self-verifying feedback, the individual maintains his or her self-conception at the cost of failing to perceive important information."[155]

This model suggests that government speech can be more effective if it can harness the power of the underlying identities. Research has already noted that government health campaigns have generally tended to be more effective when targeting specific and limited audiences rather than the general public.[156] A targeted campaign can provide specialized information to subgroups that share a social identity. Thus, for example, researchers have suggested targeting public health campaigns "toward medical students, health care workers and/or higher risk populations."[157] In the contemporary environment where influencers are entrenched as health advisors across all social media platforms, the government could similarly engage influencers to further disseminate its messaging, while simultaneously using the commercial speech and fraud doctrines discussed above to address those influencers who prioritize profit over accuracy.[158]

This shift in audience to medical professionals and influencers as targets of public health information from the government can help alleviate some of the self-interest problems against which public choice theory warns. We take it as a starting point that political actors are reluctant to engage in speech that makes them look bad, but are eager to engage in speech that makes them look good. But the "good" and "bad" outcomes depend on which role identity is activated.[159] A public health campaign that requires government officials to speak directly to the public activates the "government leader" identity and means that any message that risks undermining political goals will fail to provide self-verification.[160] This approach is particularly

---

[155] Robertson, *Judicial Impartiality, supra* note 67, at 749; *see also* Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 11 (2009) [hereinafter Robertson, *Judgment, Identity, and Independence*] ("The effects of partisan affiliation, selective perception, and selective interpretation can combine to cause people to experience the same events in vastly different ways.").

[156] *Are Health Awareness Campaigns Effective? New Study Finds Mixed Results*, SEATTLEU NEWSROOM (Dec. 9, 2020), https://web.archive.org/web/20240305131957/https://www.seattleu.edu/newsroom/stories/2020/are-health-awareness-campaigns-effective-new-study-finds-mixed-results.html [https://perma.cc/TQ8A-F75M] ("Our findings suggest that awareness programs that target specific populations as opposed to the general population are more successful in improving knowledge and health outcomes.").

[157] *Id.*

[158] *See supra* notes 90–100 and accompanying text; Billauer, *supra* note 142, at 296 (suggesting deploying government counterspeech through public education institutions, including schools and colleges).

[159] Robertson, *Organizational Management, supra* note 153, at 609 ("Conflicting professional identities may arise when the same person plays two different roles . . . . For example, an attorney who serves as in-house counsel may have an 'organizational' professional identity as an employee of the corporation as well as an 'advisor' identity as an attorney providing neutral advice to the corporation.").

[160] *Id.* ("Covert/cognitive strategies for self-verification may also provide a way to resolve conflicting professional identities.").

valuable for state and local health officials, who often have closer working relationships with community healthcare providers and local influencers than their federal counterparts.

However, a public health campaign that focuses on communication between government health agencies and medical professionals activates a shared "scientist" identity, which allows for self-verification for efforts to promote scientific clarity and knowledge.[161] And a public health campaign that simultaneously focuses on information dissemination through social media influencers is likely to reach the widest possible public audience.[162] This combined focus, along with a commitment to positive counterspeech, both diminishes the problems associated with partisan identity and cognitive precommitments and increases the possibility that counterspeech will have an effect on cognitive attention and individual behavior.[163] State and local health officials may be especially well-positioned to leverage these professional relationships, as they often work more directly with local medical communities and face fewer layers of political oversight than federal agencies.

This analysis suggests that when properly targeted, government speech may be able to overcome some of the public-choice hurdles that tend to discourage timely, effective, and accurate government health speech. Furthermore, increasing government speech through health campaigns directed at medical professionals is consistent with constitutional speech protection, and indeed, assigning government the role of counterspeaker in the public health domain sidesteps many of the constitutional issues raised by directly regulating speech, as discussed above.[164]

In addition, we submit that government has a moral duty to challenge false health speech and protect the population from avoidable consequences. Corey Brettschneider makes a similar claim in the context of hate speech, arguing that the state has a moral duty to oppose hateful speech to promote equal citizenship.[165] In the context of public health, the vulnerability of individuals and the nature of the harms strongly suggest a moral duty on the government as counterspeaker.

Unfortunately, it appears that at the time of this writing, the federal government at least may have abandoned its obligations in that area. Just one day after resuming the United States presidency in January 2025, Donald Trump ordered federal health

---

[161] *Id.* (explaining that "[w]hile everyone has multiple identities that may be activated in different situations (for example a 'parent' identity may be activated at different times than a 'doctor' identity), some situations will activate more than one identity at a time[,]" and that "[w]hen this happens, identity theory predicts that 'the identity with the higher level of prominence, or the identity with the higher level of commitment, will guide behavior more than an identity with a lower level of prominence or commitment.'") (quoting BURKE & STETS, *supra* note 146, at 133).

[162] *See, e.g.*, Ben Wasike, *When the Influencer Says Jump! How Influencer Signaling Affects Engagement with COVID-19 Misinformation*, 315 SOC. SCI. & MED. 115497 (2022) (discussing use of influencers in the COVID-19 health information context).

[163] *See* Robertson, *Judgment, Identity, and Independence*, *supra* note 155, at 45.

[164] *See supra* notes 133–138.

[165] COREY BRETTSCHNEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY? 72 (2012).

agencies including the CDC, FDA, and NIH "to pause external communications, such as regular scientific reports, updates to websites and health advisories, according to sources within the agencies."[166] According to one source, neither the reason for the pause nor its duration were communicated.[167] This development followed President Trump's executive order effectuating the United States' withdrawal from the World Health Organization (WHO).[168]

In addition to the disconcerting nature of these announcements, even in the best scenario, the timing raises the alert even further. Indeed, it came at a time of continued, largely unmitigated spread of COVID-19 and just weeks after experts warned that the United States had lost control of the H5N1 bird flu and could be facing another pandemic.[169] In the last thirty years, half of the about 900 people diagnosed with bird flu worldwide died, and "[e]ven if the case fatality rate is much lower for this strain of bird flu, COVID showed how devastating a 1 percent death

---

[166] *See* Brenda Goodman & Meg Tirrell, *Trump Administration Directs Federal Health Agencies to Pause Communications*, CNN (Jan. 22, 2025, at 12:20 ET), https://www.cnn.com/2025/01/21/health/hhs-cdc-fda-trump-pause-communication/index.html [https://perma.cc/ZG9A-2BJ5].

[167] *See id.*

[168] *See* Mary Kekatos, *Public Health Experts Worry About Implications of Trump Withdrawing US from WHO: 'An Enormous Mistake,'* ABCNEWS (Jan. 21, 2025, at 14:23 ET), https://abcnews.go.com/US/public-health-experts-implications-trump-withdrawing-us-who/story?id=117933153 [https://perma.cc/AL62-RUHD]. President Trump blamed the move on "the organization's mishandling of the COVID-19 pandemic that arose out of Wuhan, China, and other global health crises, its failure to adopt urgently needed reforms, and its inability to demonstrate independence from the inappropriate political influence of WHO member states." *Executive Order on Withdrawing the United States from the World Health Organization,* THE WHITE HOUSE (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/withdrawing-the-united-states-from-the-worldhealth-organization/ [https://perma.cc/XP8T-D8LA]. On January 22, a day after the announcement regarding communications, it also became known that President Trump had imposed a number of other restrictions on the NIH, including a pause on meetings of federal advisory committees and study sections, without which the NIH could not make further research awards; the duration of this pause and the level to which it would delay scientific advancement was not announced. *See* Meredith Wadman & Jocelyn Kaiser, *Trump Hits NIH with 'Devastating' Freezes on Meetings, Travel, Communications, and Hiring*, SCIENCE (Jan. 22, 2025, at 17:45 ET), https://www.science.org/content/article/trump-hits-nih-devastating-freezes-meetings-travel-communications-and-hiring [https://perma.cc/2NMK-EGSA]; *see also* Kerry Cullinan, *No Talks Between WHO and US Despite 'Severe Disruption' in Health Services Since Trump Slashed Aid*, HEALTH POL'Y WATCH (Apr. 10, 2025), https://healthpolicy-watch.news/no-talks-between-who-and-us-despite-severe-disruption-in-health-services-since-trump-slashed-aid/ [https://perma.cc/WEZ9-8SKM] ("[T]here has been no formal engagement between the WHO and the White House since Trump issued an executive order on 20 January withdrawing from the WHO. . . .").

[169] *See* Amy Maxmen, *How America Lost Control of the Bird Flu and Raised the Risk of Another Pandemic*, PBS NEWS (Dec. 26, 2024, at 18:58 ET), https://www.pbs.org/newshour/health/how-america-lost-control-of-the-bird-flu-and-raised-the-risk-of-another-pandemic [https://perma.cc/F9UD-LU9P].

rate can be when a virus spreads easily."[170] According to British bird flu researcher Tom Peacock, the United States knows that a bird flu pandemic could dwarf the COVID pandemic, yet "hasn't done anything to slow this down."[171] The United States suffered its first H5N1 death in January 2025, and scientists have sounded the alarm that the virus is mutating more quickly than anticipated.[172] It was reported in August 2025 that live bird flu virus had been found on the equipment, wastewater, and air of milking parlors.[173]

In the final days of the Biden presidency, the Department of Health and Human Services awarded $590 million to Moderna to fast-track an mRNA bird flu vaccine.[174] Just like with COVID, however, vaccines are unlikely to provide complete protection.[175] It will take effort on the part of the government to explain and promote other safety measures as well, this time to a population still experiencing the effects of another pandemic. Whether the Trump administration proves up to the task remains to be seen, but recent events are not promising: U.S. health secretary Robert F. Kennedy, Jr. announced in August 2025 that the federal government would terminate twenty-two grants worth $500 million for projects involving research on mRNA vaccines, a decision that has been seriously criticized by the scientific community.[176]

---

[170] *Id.*

[171] *Id.*

[172] Tex. Biomedical Rsch. Inst., *First U.S. H5N1 Death Sparks Urgency: Scientists Warn That Bird Flu Is Mutating Faster Than Expected*, SCITECHDAILY (Jan. 19, 2025), https://scitechdaily.com/first-u-s-h5n1-death-sparks-urgency-scientists-warn-that-bird-flu-is-mutating-faster-than-expected/ [https://perma.cc/JNG9-BWCQ].

[173] Apoorva Mandavilli & Emily Anthes, *Bird Flu May Be Airborne on Dairy Farms, Scientists Report*, N.Y. TIMES (Aug. 4, 2025), https://www.nytimes.com/2025/08/04/health/bird-flu-airborne.html [https://perma.cc/BPN7-FCHV].

[174] Berkeley Lovelace, Jr., *As Bird Flu Concerns Grow, Scientists Race to Develop New Vaccines*, NBC NEWS (Jan. 17, 2025, at 14:01 MT), https://www.nbcnews.com/health/health-news/bird-flu-concerns-grow-scientists-race-develop-new-vaccines-rcna187824 [https://perma.cc/Y4GJ-3CVH]. In April 2025, the Trump administration paused the final funding of that project. *See* Bill Whitaker, Aliza Chasan, Heather Abbott & Matt Riley, *As Bird Flu Hits Cattle Herds in U.S., Scientists Say These H5N1 Factors Worry Them Most*, CBS NEWS (Apr. 20, 2025, at 18:54 ET), https://www.cbsnews.com/news/bird-flu-pandemic-potential-scientists-60-minutes/#dgetkhtsagosa3w6gp0uhfro6r76k7pmf [https://perma.cc/EH42-CC3Q].

[175] *See, e.g.*, Gary Crawford, *Expert Says Bird Flu Vaccine Would Not Be a Silver Bullet*, U.S. DEP'T OF AGRIC. (May 5, 2023), https://www.usda.gov/about-usda/news/radio/daily-newsline/2023-05-05/expert-says-bird-flu-vaccine-would-not-be-silver-bullet [https://perma.cc/JKP6-RVXR] (quoting Dr. Yuko Sato from Iowa State University as stating that vaccinating poultry flocks against bird flu would not eliminate the problem).

[176] *See, e.g.*, *Cancelling mRNA Studies Is the Highest Irresponsibility*, 644 NATURE 579 (2025), https://www.nature.com/articles/d41586-025-02612-9 [https://perma.cc/RR4V-ZVLS].

These federal communication failures highlight the critical backup role that state and local health officials can play. State health departments and local public health agencies retain both the authority and responsibility to communicate health information to their communities. While they may lack the resources and reach of federal agencies, they often have advantages in local credibility, established relationships with community healthcare providers, and greater insulation from national political pressures. The Michigan example discussed below demonstrates how state officials can maintain science-based communication even when federal guidance shifts for political reasons.[177]

Meanwhile, the sudden cessation of government health communications presented severe risks to public health and safety. When federal agencies like the CDC, FDA, and NIH stop providing regular scientific updates and health advisories, it creates an information vacuum that can have devastating consequences.[178] These agencies serve as critical sources of evidence-based guidance that healthcare providers, state and local health departments, and the public rely on to make informed decisions.[179] Their silence during active health threats like COVID-19 and H5N1 influenza leaves stakeholders without access to essential surveillance data, emerging research findings, and updated safety recommendations.[180]

Perhaps even more concerning than complete communication cessation is the subordination of public health messaging to political considerations. When government officials prioritize political messaging over scientific accuracy, it can directly undermine public health responses.[181] For example, politically-motivated minimization of health risks or premature declarations of "mission accomplished" can lead people to abandon precautionary measures too early.[182] Similarly, allowing

---

[177] *See infra* note 204.

[178] Victoria Smith & Alicia Wanless, *Unmasking the Truth: Public Health Experts, the Coronavirus, and the Raucous Marketplace of Ideas*, CARNEGIE ENDOWMENT FOR INT'L PEACE (July 16, 2020), https://carnegieendowment.org/research/2020/07/unmasking-the-truth-public-health-experts-the-coronavirus-and-the-raucous-marketplace-of-ideas?lang=en [https://perma.cc/FYX5-NGMN] ("Any information vacuum left by governments is filled with the dissenting voices of anyone from medical professionals to those with no medical expertise at all.").

[179] *See* Michael R. Ulrich*, Law and Politics, an Emerging Epidemic: A Call for Evidence-Based Public Health Law*, 42 AM. J.L. & MED. 256, 265 (2016) ("By succumbing to the politicization of how to handle infectious disease, state officials often ignore their constitutional obligations to protect the public health through reasonable approaches that have a substantial chance to mitigate the risk to the general welfare.").

[180] *See supra* notes 166–169.

[181] *See* Smith & Wanless, *supra* note 178 ("In an already febrile political environment, such as that of the United States, the polarization that these debates play into only heightens existing tensions, politicizes previously apolitical issues, and mobilizes resistance to government mandates.").

[182] *See* Quint Forgey, *'It Affects Virtually Nobody': Trump Downplays Virus Threat to Young People*, POLITICO (Sep. 22, 2020, at 09:27 ET), https://www.politico.com/news/2020/09/22/trump-downplays-coronavirus-threat-young-people-419883 [https://perma.cc/Y9YW-529T].

political ideology to determine which scientific findings are shared with the public—rather than following evidence-based criteria—distorts the information environment on which healthcare providers and citizens depend for decision-making.

Both communication cessation and political subordination of health messaging share a common thread: they represent a failure of government agencies to fulfill their core public health functions. As discussed earlier, public choice theory helps to explain why political actors might choose these harmful approaches—they may calculate that downplaying risks or maintaining silence serves their short-term political interests better than communicating uncomfortable or unpopular scientific realities.[183] However, this calculation ignores the government's fundamental responsibility to protect public health through clear, accurate, and timely communication of health information. When this responsibility is abandoned, whether through silence or politically motivated distortion, it leaves the public more vulnerable to both existing and emerging health threats.[184] This is currently compounded by Trump's appointment of health secretary Robert F. Kennedy, Jr., who in his first two months since taking office already oversaw a growing measles outbreak numbering 700 recorded infections in 25 states as of April 10, 2025, as well as the first deaths from the disease in over a decade—to which he responded by making false claims about the measles vaccine.[185]

By July 9, 2025, there were 1,288 cases, which the CDC stated to be "the highest number in 33 years . . . . The last time the U.S. saw more measles cases was in 1992, eight years before the disease was declared eliminated in the country."[186] These numbers include a Texas outbreak of 753 cases, with 155 hospitalizations and three deaths.[187] "The measles milestone comes the same week that some of the nation's leading medical associations sued Health Secretary Robert F. Kennedy Jr., charging him with what they characterize as an effort to undermine trust in vaccines

---

[183] *See supra* Part II.

[184] *See* Nathan Cortez & Lindsay F. Wiley, *Hortatory Mandates*, 91 GEO. WASH. L. REV. 617, 649 (2023) ("[T]he lack of transparency in the CDC's process for developing and modifying COVID-19 guidelines—and politicization of public health interventions—eroded trust in the CDC.").

[185] *See* Ken Alltucker, *RFK Jr. Claims 'Leaky' Measles Vaccine Wanes over Time. Scientists Say He's Wrong.*, USA TODAY (Apr. 16, 2025, at 14:20 ET), https://www.usatoday.com/story/news/health/2025/04/15/rfk-jr-measles-vaccine-leaky-claims/83099634007/ [https://perma.cc/Q5V2-YRBM]. Kennedy then falsely claimed that cases had plateaued, when they were both larger than the official count and continuing to increase. *See* Jen Christensen, *US Measles Cases Are Undercounted, Experts Say, but Real Numbers Are Proving Hard to Pin Down*, CNN (Apr. 15, 2025, at 15:29 ET), https://www.cnn.com/2025/04/15/health/measles-undercount-public-health/index.html [https://perma.cc/W9VN-968S].

[186] Maria Godoy, *U.S. Measles Cases Hit Highest Level in 33 Years, CDC Reports*, NPR (July 9, 2025, at 11:30 ET), https://www.npr.org/sections/shots-health-news/2025/07/09/nx-s1-5461155/measles-outbreak-cdc-vaccination-health [https://perma.cc/398H-YHYC].

[187] *See id.*

among the American public."[188] These problems affect not only the measles vaccine, but also, for example, the COVID vaccine, where Vinay Prasad—the top-ranking vaccine official under Kennedy and a known critic of COVID vaccine and mask mandates who left the FDA after just three months, only to return a few weeks later[189]—restricted its use against the advice of government scientists.[190] Meanwhile, as per the admission of Trump's own recent CDC Director, Susan Monarez, it is misinformation about the COVID vaccine (namely that it is harmful) that led an individual to shoot almost 500 rounds at the CDC building in Atlanta in August 2025, while killing a police officer and shooting himself.[191]

This analysis suggests that we need stronger institutional safeguards to protect public health communication from political interference. While the First Amendment limits direct regulation of government speech, we could consider structural reforms that better insulate public health agencies' communication functions from political pressure. This might include establishing clearer statutory mandates for regular health communications, creating more independent oversight of agency messaging, or developing formal frameworks to ensure scientific integrity in public health communications.

V. CONCLUSION

When AIDS first emerged in the United States, government silence allowed a deadly epidemic to spread unchecked. Political incentives discouraged action: the primary victims were not an important voting bloc, federal spending priorities favored inaction, and powerful interest groups resisted testing the blood supply.[192] Only after years of mounting deaths—and persistent activism that forced government attention to the crisis—did public health officials finally begin speaking

---

[188] *See id.*

[189] *See* Lauren Gardner & David Lim, *More Questions About Prasad's Return*, POLITICO (Aug. 12, 2025, at 12:00 ET), https://www.politico.com/newsletters/prescription-pulse/2025/08/12/more-questions-about-prasads-return-00504535 [https://perma.cc/3WNR-ZWQ4].

[190] *See* Matthew Perrone, *FDA Vaccine Official Restricted COVID Vaccine Approvals Against the Advice of Agency Staff*, AP NEWS (July 2, 2025, at 17:18 MT), https://apnews.com/article/covid-shots-fda-trump-kennedy-fda-overruled-3ac51f93225aa5f20d5840468fff8b02 [https://perma.cc/RN48-XM7J]; Bhanvi Satija, *US FDA's Top Vaccine Official Vinay Prasad Leaves Agency After 3 Months*, REUTERS (July 30, 2025, at 17:45 MT), https://www.reuters.com/business/healthcare-pharmaceuticals/us-fdas-top-vaccine-official-vinay-prasad-leaves-agency-after-3-months-2025-07-30/ [https://perma.cc/L643-QB2M].

[191] *See* Mary Kekatos, *CDC Director Says Misinformation 'Led to Deadly Consequences' in Campus Shooting*, ABC NEWS (Aug. 12, 2025, at 11:03 ET), https://abcnews.go.com/US/suspected-gunman-cdc-shooting-fired-500-rounds-officials/story?id=124577732 [https://perma.cc/LWG3-R4TN] ("Law enforcement sources and sources close to the suspect previously told ABC News that [shooter Patrick] White had blamed the COVID-19 vaccine for making him sick and depressed.").

[192] *See supra* Section I.A.

clearly about the risks and necessary precautions.[193] This pattern, where political calculation leads to delayed or ineffective public health communication, has repeated itself in subsequent health crises from the opioid epidemic to COVID-19.[194]

Yet addressing these systemic failures need not involve constitutional compromises or restrictions on speech. Instead, this Article has demonstrated how government can better serve public health through more effective deployment of its own speech capabilities. The most egregious forms of false commercial speech and fraud can be regulated through existing constitutional frameworks.[195] But the more powerful tool is the government's ability to speak clearly and accurately about health risks and to amplify true health information through targeted campaigns.[196]

Our analysis suggests several concrete steps forward. First, government health campaigns should focus on medical professionals and influencers as key intermediaries, leveraging their existing relationships and credibility with different communities.[197] Second, government messaging should emphasize positive framing rather than negative counterspeech, as research shows this approach is more effective at changing behavior.[198] Third, government agencies should provide clear, consistent information about evolving scientific understanding, rather than waiting for complete certainty or avoiding uncomfortable truths.[199]

Social media platforms also have an important role to play through content moderation policies that leave room for scientific debate while restricting the most harmful forms of health misinformation. The goal should not be to censor all incorrect claims—which would be both unconstitutional and counterproductive—but rather to create an environment where accurate health information can more effectively reach the public.

Ultimately, improving public health outcomes requires aligning political incentives with public health goals. When government officials face pressure to downplay health risks for short-term political gain, the result is policies that fail to protect the population.[200] But by creating stronger mechanisms for the communication of accurate health information—including clear explanations of uncertainty and evolving scientific understanding—we can build a more resilient public health system.

Our public health challenges are only growing. Future pandemics are inevitable, emerging infectious diseases are becoming more common, and climate change threatens to bring new health risks we cannot yet imagine.[201] Building better

---

[193] *See id.*

[194] *See* Manta, Robertson & Robinson, *supra* note 12.

[195] *See generally* Fowler, Helveston & Robinson, *supra* note 53.

[196] *See supra* Part IV.

[197] *See id.*

[198] *See id.*

[199] *See id.*

[200] *See* Manta, Robertson & Robinson, *supra* note 12.

[201] *See, e.g.*, Tulio de Oliveira & Houriyah Tegally, *Will Climate Change Amplify Epidemics and Give Rise to Pandemics?*, SCIENCE (Aug. 25, 2023), https://doi.org/10.1126/science.adk4500.

systems for government health communication today is essential for protecting public health tomorrow. This requires moving beyond simplistic debates about censorship versus free speech to develop more sophisticated approaches that harness the power of government speech while respecting constitutional values.

The HIV/AIDS crisis showed how government silence and delayed action can cost hundreds of thousands of lives.[202] The COVID-19 pandemic has taught similar lessons about the importance of clear, consistent public health communication.[203] By learning from these experiences and implementing the recommendations outlined in this Article, we can better prepare for future health challenges while upholding our constitutional commitment to free speech. The path forward lies not in restricting speech but in deploying it more effectively to serve public health. As 2025 ushered in a new presidency that may not prioritize these goals, it may be incumbent on state and local health officials to pick up the slack to whatever extent possible.[204]

---

[202] *See supra* Section I.A.

[203] *See* Manta, Robertson & Robinson, *supra* note 12.

[204] One example of this happening is the Michigan Department of Health and Human Services continuing to recommend the COVID-19 vaccine for everyone six months and older, including pregnant individuals, which continues to follow the recommendations of the American Academy of Pediatrics and the American College of Obstetricians and Gynecologists rather than the guidance of Health and Human Services Secretary Robert F. Kennedy, Jr. Trevor King, *State Health Department Recommends COVID-19 Vaccination for 6 Months and Older*, WLNS.COM (July 28, 2025, at 14:25 ET), https://www.wlns.com/news/state-health-department-recommends-covid-19-vaccination-for-6-months-and-older/ [https://perma.cc/XVQ3-LXQG].