



Published on *Washington Examiner* (<http://washingtonexaminer.com>)

[Home](#) > Memo to Supreme Court: Let health care move into the 21st Century

By *Daniel J. Popeo*

Created *Mar 30 2011 - 11:20am*

# Memo to Supreme Court: Let health care move into the 21st Century

## Comments (0)

Many of the advances in health care in recent decades have come about because major players in the field -- doctors, hospitals, researchers, government officials, drug companies, insurers, pharmacies -- have been willing to share information.

That willingness has numerous benefits; for example, it ensures that medical breakthroughs are quickly communicated throughout the country, and facilitates medical research by enabling clinical trials to be set up rapidly.

But three states have adopted laws designed to obstruct that communication. Vermont, New Hampshire, and Maine have concluded that too much truthful information is a bad thing because it encourages doctors to prescribe more drugs, thereby driving up the states' health care costs.

Their laws bar the transfer of information regarding doctors' prescribing practices, at least where the information might be used to promote prescription drug sales. In April, the Supreme Court will decide (in *Sorrell v. IMS Health*) whether Vermont's speech ban violates the First Amendment. The Court can strike an important blow for both free speech rights and the future of health care by ruling against Vermont.

All agree that information about doctors' prescribing habits is extremely valuable. Government regulators use it to prevent abuse of controlled substances. Pharmacy benefit managers use it to ensure compliance with drug formularies. Researchers use it to identify which doctors have patients who might qualify to participate in medical trials. Drug companies use it to identify doctors who might be interested in hearing about their products.

The information is provided on a nationwide basis by companies that purchase prescriber-identifiable (PI) data from pharmacies, compile the data in a manner that provides information about doctors (but not patients), and then make it available to others in the health care field.

Vermont has no objection to that activity, except when the information is provided to drug companies to assist them in promoting their products to doctors. Drug companies devote significant resources to sending "detailers" to visit doctors and provide them the latest medical

information about prescription drugs.

PI data allows drug companies to better target their marketing efforts. Most doctors are happy to speak with detailers; it's an effective way for them to keep up with medical advances, and Vermont does not allege that the information provided is false or misleading.

But Vermont argues that doctors are getting too much information from drug companies. It asserts that there is an "imbalance" in the "marketplace of ideas," and that the voices of those calling for increased use of lower-cost drugs are being drowned out. Vermont asserts that its statute will make it more difficult for drug companies to market their products, thereby "correcting" the alleged imbalance and (Vermont hopes) leading to decreased health care costs.

This should be an easy case for the Supreme Court. The First Amendment has never been understood to permit government speech restrictions designed to inhibit the ability of one side of a debate to speak loudly. Rather, as the Supreme Court has repeatedly held, the First Amendment stands for the proposition that truthful information is never harmful, and that the public interest is best served by encouraging robust discussion on all sides of a debate.

But a decision striking down the Vermont statute would not just be good constitutional law; it would also be good for public health. Health care has made great strides in recent decades in large part because participants have been encouraged to speak freely with one another.

There will always be modern-day Luddites who fear change and thus will resist efforts to bring medicine into the 21st century. If they have concerns about the drug prescription practices, they should speak up and let their voices be heard -- not attempt to suppress the truthful speech of others. And if a State's concerns really come down to concerns about rising costs, there are far better ways to address the problem than resorting to speech suppression.

*Examiner contributor Daniel J. Popeo is chairman and general counsel of the Washington Legal Foundation.*

[Op Eds](#) [Daniel J. Popeo](#) [Health care reform](#) [obamacare](#) [prescription drugs](#) [U.S. Supreme Court](#)

**Source URL:** <http://washingtonexaminer.com/opinion/op-eds/2011/03/memo-supreme-court-let-health-care-move-21st-century>