Good afternoon, everyone. I hear you getting quiet so we will begin. I'm Kellye Testy and I'm the dean of the University of Washington's Law School, and it is my distinct pleasure to welcome all of you today to our beautiful home here in Gates Hall. We're really pleased to bring you this program this afternoon on the new healthcare bill and some of the legal questions that are surrounding it, for many reasons. And there truly are many. This topic is a vital one for the citizens of Washington State, and it's very important for us to provide an opportunity for analysis of these issues, for dialog on these leading issues of the day.

As Washington's only public law school it's right that we do that. And we're also, of course, home to one of the nation's most influential faculties of law. So it's appropriate that we bring that expertise to bear on these pressing issues of the day.

Our faculty are outstanding scholar teachers who are themselves and who educate leaders in all areas of law and business and public service. And as we being this program today, I want to thank particularly two of those faculty leaders: my colleagues, professor Stuart Jay and Professor John Junker. They had this great idea to bring this program together and so, Professor Jay, Professor, Junker I thank you both for that idea and for moving this forward.

I also want to say thank you to TVW for being our media here today, and thank Miss Sherry Ireton who is a terrific director of publicity and media here in the law school. She worked very quickly to help us bring this program together at the University of Washington.

It's now my honor to introduce the moderator of our program. The moderator today is Mr. Hugh Spitzer. Hugh Spitzer is one of Washington's finest lawyers, having now practiced municipal and public finance law for over 30 years. He's been with Foster Pepper -- a terrific law firm -- since '82, and I'm very proud to share that he's also a member of our alumni and serves as well here as an affiliate professor in the School of Law.

Mr. Spitzer is an outstanding teacher in the areas of constitutional local government law and is particularly recognized here for his expertise in Washington State constitutional law. Hugh, I want to thank you very much for being our moderator today. The program now is in your very good hands.

Hugh Spitzer:

Thank you. Welcome everybody. For those of you in the back, there are seats. A couple over here, a few in the front row. It says reserved but I don't believe it.
So please join us. Welcome to this roundtable panel discussion of the constitutional status of the Patient Protection and Affordable Care Act, which was just passed by congress. There has been a great deal of public debate and discussion over the pros and the cons of the healthcare reform bill from a policy standpoint.

And there has been assertions, both in congressional debate and now in suits filed in federal court in Florida and in Virginia -- and I think one more was just filed by various attorneys general, those two -- that key aspects of the act are unconstitutional.

This afternoons panel is going to discuss constitutional issues around healthcare reform, not the policy issues. But there's a lot to talk about. Our panelists include four professors from the UW Law School and Seattle University Law School.

On my far left is Kathryn Watts, who teaches constitutional law and administrative law here at the UW. She clerked for Justice John Paul Stevens. Then next is Stuart Jay of the University of Washington, who has taught constitutional law here for about 30 years, having served as a law clerk to Chief Justice Warren Burger. It's true.

Professor Jay has written extensively on the history of the United States Constitution. And in a few minutes, when he arrives here from teaching his common law course at Seattle University Law School, will be John McKay. And here he comes, right on cue.

Good to see you. John is teaching common law right now at Seattle U. He's worked as a litigation lawyer for a major Seattle law firm. Served as special assistant to the director of the FBI as president of our nation's Legal Services Corporation and was US attorney for the Western District of Washington for five years during the recent Bush administration. And then to my immediate left is Sally Sanford of the University of Washington, who focuses on healthcare law and healthcare delivery systems. She clerked for Ninth Circuit circuit judge Robert Beezer and served as an assistant state attorney general before joining the law school faculty.

So here's the format for today's discussion. First we're going to have a summary of the acts provisions by Sally Sanford, followed by a description of the attorneys general complaints from John McKay. And after that, I will pose questions about the new law to one or more of the panelists. And after he or she has provided a response, I'll ask if others have additional observations to add.

At about 5:00, we'll respond to questions from the audience. And rather than having audience members traipsing to microphones and worrying about all that, in about quarter to 5:00, I'll ask some folks to pick up questions that you may have written down.

There are on the edges on the aisle -- there should be anyway -- little piles of paper, and you can pass the papers down. And you can really write questions on any piece of paper as we go along. And we'll gather them up at about 5:00 and then I'll select some representative questions for panel comment and we'll close at 5:30.
First, Professor Sanford, maybe you can take five minutes. Give us a quick overview of 2,400-page Patient Protection and Affordable Care Act.

[laughter]

**Sally Sanford:**

Yes, I'll try. I'll attempt a short, simple summary of what really is a very long, extraordinarily complex law. It was just amended today. There are a number of interconnected provisions in this law that aim broadly to increase access, to control cost, and to improve the quality of medical care in this country. The most immediately significant provisions really focus on increasing access to healthcare insurance, so that's what I'll focus on here. Also, that's where the provision are that are being challenged in the lawsuit.

Beginning on 2014, most Americans will be required to have health insurance. This is what's known as the individual mandate. People can have insurance through an employer, through Medicare, through Medicaid or through individual purchase, but most Americans will have to have a basic level of health coverage.

Now there are exemptions in the law for financial hardship, for religious objections and if the only available policy is more than 8% of income. There are those exceptions. Under the law, there are subsidies available for many of those who end up having to buy insurance on their own, who are not eligible for Medicaid, Medicare or an employer plan. These subsidies will be available on a sliding scale for people who have incomes between 133% of the poverty level and up to 400%. By way of reference, right now 400% of the FPL for a family of four is about $88,000.

So what if somebody is required to have health insurance and they don't? That's where the tax penalties come in. If you're deemed able to afford insurance and you don't have it, you'll be required to pay a yearly tax. And ultimately the amount of that tax will be $695 per person, up to $2,000 per family or 2.5% of income, whichever is greater. That's the tax part.

These provisions are really inexorably linked to significant restrictions on the health insurance industry. So under the new law, insurance companies will no longer be able to deny coverage, or drop coverage or charge more because of health status.

So if someone gets cancer or is badly injured, or was born with a heart condition or has high blood pressure or had a C-section, none of that will matter to whether or not they're allowed to buy insurance or how much it will cost compared to other people. That's really significant.

Now these people who have to buy insurance on their own, where will they go? As you might know, the individual insurance market right now can really be a scary, volatile, confusing and expensive place, especially if you're over 50 or have a pre-existing condition.

And I mentioned just now the new restrictions on insurance practices. Another big area of provisions have aimed an aim to stabilize the market and make it more straightforward. So this is the establishment of what are to be known as state-based health insurance exchanges. Within these exchanges, private insurers will offer standard, easily-
comparable plans. Now the idea is that the states will mostly set up these exchanges and regulate them. But if a state doesn't, the federal government will.

Ow, the final significant access provision in this big law is the expansion of Medicaid. So this joint federal/state program will be expanded to include citizens and legal residents who have incomes below a 133% of the poverty level. And these newly eligible people will mostly be adults, childless adults.

He federal government will provide a much higher match that it generally does, so the match will initially be a 100%. The federal government will pay all for the eligible people and then ramping down to 90% after a couple of years.

All told, the Congressional Budget Office estimates that all of these provisions will add about 32 million more people to the insured ranks through public and private insurance; it will cost close to a trillion dollars over 10 years; and it will reduce the federal deficit by more than $100 billion over that same amount of time.

Some aspects of the law kick in this year, 2010. A few examples: allowing children to stay on their parents plan until they're 26; prohibiting pre-existing condition limitation on children; establishing a temporary national high-risk pool for people who now can't get insurance; and beginning to close the Medicare donut hole for those who have Part D coverage with a gap.

Most of the law, however, phases in over the next many years, with the provisions at issues in these lawsuits going into effect primarily in 2014. Now as I mentioned, these are a few of the many, many provisions of the law. And I'll be further discussing the details for the years to come and it'll be an interesting time both for health law and for constitutional law.

Hugh Spitzer:

Next, we'll have John McKay give us a summary of Florida and Virginia complaints, so we know where we're starting from.

John McKay:

Right. There are two actions. The first and I think the major action, just by virtue of its participation, is filed in United States District Court for the Northern District of Florida. There are 13 states signing on to the original complaint, and I believe now there are 14 states signed on to this particular claim. This is the bulk claim now being filed in Florida in United States court. There are four counts. The first count is really the straight 10th Amendment claim, which we'll discuss. But reduced to its basics, it's simply that the United States has overstepped its authority with regards to the states and all those rights that are reserved to the states, as count one.

There are two counts that relate to the taxing authorities of the United States government and the claims that those taxing authorities, through the schemes that have been created in the statute, are also unconstitutional in that regard.

That relates to the capitation part of this plan, so there is a claim. They're very broadly stated within the complaints that the Constitution has been violated in that regard. And
the final count is that the parties claim declaratory relief, and a declaration that, in fact, the scheme is unconstitutional for the grounds that they have claimed.

13 Attorneys General have signed on to this lawsuit. I think a 14th is on. Others may know whether that's true by now. I think it's true.

Very interesting that the next complaint has been filed in Virginia, in the eastern district of Virginia, in what's known as the "rocket docket" there, which is a speedier type of claim. It's as if you were looking at a, from a litigator's standpoint, a particular front of activity, and then there is an action that goes around the outside of it to be filed perhaps more quickly in the eastern district of Virginia. Typically, cases there will move very, very fast. Oftentimes six months and done in the rocket docket of the eastern district of Virginia.

This claim is much more limited. It relates to the commerce clause aspect of the case, and is much simpler both procedurally and substantively.

Hugh Spitzer:

Let's just get right down to the discussion. People have been challenging the constitutionality of proposed or new legislation for many years, probably even earlier than when James Madison stood up in Congress in 1791, and said that the national bank legislation was unconstitutional, far beyond the enumerated powers of the federal government, and would impinge on state powers. Ever since then, people have been going after legislation. Professor Jay, for starters, in your view, where does the federal government get the authority to enact this legislation? Is this the taxing power? The spending power? The commerce clause? Where does this come from?

Stuart.

Stewart Jay:

The power comes from at least two different and separate bases, although they can work together in the constitutional scheme. One is the power to tax and spend, which means Congress gets to tax people and then spend the money for the general welfare on literally any object in the national interest. Clearly, healthcare is a national interest, since it consists of a sixth of our economy.

The second basis is the commerce clause. Since the 1930s, the Supreme Court has given the broad power to regulate transactions in interstate commerce. Both health insurance and healthcare themselves are considered to be forms of interstate commerce.

It's in fact, kind of ironic. They just a few years ago -- Republicans in Congress -- passed the partial birth abortion act which outlawed a very, very rarely-performed surgical procedure, when it was performed in commerce. If that tiny little procedure is regulable under the commerce clause, surely a sixth of the economy is.

Would you like me to elaborate?

[laughter]
This program is not in concept any different than unemployment compensation, Social Security, old age pensions. Social Security does disability programs. Medicare. When you pay Medicare out of your tax deductions, out of every paycheck, you are pre-insuring for your old age healthcare. That's exactly what's going on here. You pay taxes, they go to Medicaid. If you happen to lose your job, your income falls, you're covered. You pay taxes to Social Security, you're disabled, you can't work any longer. You're covered. Do you have a choice about paying those taxes? Well, you try telling the IRS that. You'll get medical care for sure, then, in a federal prison.

[laughter]

**Hugh Spitzer:**

But here, this law requires that people purchase a private product in the private sector, not join a single payer program. Isn't that different? Professor Watts, has there ever been anything like this before?

**Kathryn Watts:**

That's really the big point that you hear being said over and over, attacking this, is that it is very novel for Congress to try to tell individuals that you must go out there and buy something, buy a good or a service, on the private market. That's what distinguishes the examples that Professor Jay just gave of Social Security programs, or other sorts of programs where the government is acting as the insurer. Here, you're telling people they must go out there on the private market. So, if you think about it purely through that lens of telling people "you must go out there and buy," this is novel, but if you think about it through the taxing lens, because as Professor Jay said, there's really two hooks here. There's the commerce hook and the taxing and spending hook.

If you think about it through the taxing lens, then maybe not as novel, because you think about things like, oh, I've got kids and when I go out there and contract with a private individual who'll take care of my kids, I get some tax benefits from that that others don't enjoy.

The same with mortgages, those of us that have mortgages get some benefits in terms of tax deductions or mortgages that we've entered into where we're engaging with a private party. So I think in part, that debate about how novel this is or how not novel it is hinges on whether you're thinking about it purely through the commerce lens or through the taxing lens.

**Hugh Spitzer:**

But if Congress can mandate that people buy health insurance, why can't Congress make people buy wheat or refrigerators or American cars, all to bolster the economy? Anybody want to comment on that? What's stopping them?

**Stuart Jay:**

Well, for one thing, political will.

[laughter]
It's unlikely that Congress is going to pass a mandatory Prius purchase act. But on the other hand, Congress might very well put regulations on automobiles such that as a practical matter, the only cars available on the market are like Priuses, which is essentially the same thing. The other really fascinating point about this argument...

**Hugh Spitzer:**

We'll all be going really fast.

**Stuart Jay:**

Yeah. Well, another fascinating point about this argument that you're being forced into the private market, the constitutional solution if that's true, is to have a public mandate. Or if Congress really wanted to get wild about this, they could abolish private health insurance because it crossed the state lines. And Congress can abolish any economic activity crossing state lines, and then they could create a federal health insurance plan, which you are then required to participate in like Medicare.

It just turns out that we are friendlier to the private sector, and the reason the law is friendlier to the private sector is because certain conservative parties in Congress insisted that we not have a public option. It's a little strange that they would turn around and criticize the law for the absence of a public option.

**Sally Sanford:**

Add something else to that too, that it's not really true to say that doing without insurance has no economic consequences. In our country, when you have as much as one in seven people without insurance, that really makes for some quirky economics. You have in several different ways. One, in imposing costs on everybody else when those people do need to seek care. And I think our own state insurance commissioner recently figured out that every year, is it about almost billion dollars a year in uncompensated care takes place in our own state, and that's people who get charity care from the outset and also people who don't pay their bills.

So that's a big cost, and that gets shifted both to the government, which pays in what's called disproportionate share payments, and also to everyone who has insurance. The insurance commissioner estimated that in this state, it adds almost a thousand dollars to every group insurance policy, just directly attributable to those costs.

So there's the cost if people ultimately do seek care. And we had a federal law that requires emergency care to be provided. And then we also have a state law actually that requires the provision of charity care.

And then secondly, staying out of the insurance pool, particularly if you're young and healthy -- and a lot of the young people are out of the insurance pool -- really messes up the risk-balancing. So that also has economic consequences, unlike not buying car. It's different.

**Hugh Spitzer:**

John?
John Junker:

Well, I may just throw in a little bit different viewpoint here. And I'll just give a caveat, I was a little late or my own introductions, so I don't know what was said, but I'm a former Republican, I like to say I'm estranged from the Republican Party.

[laughter]

But that I sort of retained joint custody over a few issues maybe with the Republican Party. So let me just say first of all, I think that those of us who teach constitutional law, this is, you might say, something of an erotic dream, because you have a case that's being filed as a 10th Amendment case, one that's challenging the exercise of the commerce clause. Moments after the bill becomes law, 13 states file a lawsuit to enjoin the law itself, and to declare it unconstitutional. This is beautiful. This is a beautiful experience for us to be able to discuss this, and I think we should recognize that this kind of a constitutional confrontation which seems to be brewing, short-lived though it may be, and I don't know that it will be, raises some very serious issues.

We were looking at some violence, threats of violence. We are hearing some very strong language. That isn't the first time this kind of language has appeared in our history, where the federal government has exercised a power where it hasn't exercised it in the past.

And so, I think it is not surprising, as a tactical exercise, that we would see a number of attorneys general, no coincidentally from almost overwhelmingly from one political party, filing a lawsuit to say that this is unconstitutional.

I have to say, as someone who has litigated for years, that the idea that there would be a simultaneous filing of constitutional challenges by 14, 15 states this soon after a very complex bill is passed, I would say that's some pretty amazing legal work, in terms of determining the constitutional merits on one side or the other.

It's one way to say this has to also be seen, I don't mean this disrespectfully to the states involved, as a political exercise, and one might question the timing of the filing as a prima fascia indication that at least questions should be asked about the legitimacy of the constitutional challenges.

As I said, I still hold some views in joint custody with the Republican Party, so some of these issues resonate with me, that a government 2,00 miles away, at least from here, is going to mandate my participation in private insurance.

I think it's to the better that we have this discussion. I think it's to the better that we have this constitutional debate, and I think there are issues that relate to what the court might do if it were to reach the United States Supreme Court, with regard to some skepticism expressed by some members of the court, with regard to the reach of the commerce clause, or whether or not we're going to be hearing more about the 10th Amendment.

Hugh Spitzer:

Let's follow up on that. You're talking about the impact on the states, and here you have a number of states' attorneys general asserting that they're representing the states, and filing this action. John, aren't the states now, since they're being forced to participate in this vastly expanded Medicaid program -- isn't this effectively commandeering the states?
Commandeering, for those of you who aren't familiar with it, is a term where basically the federal government is making state or local officers do things. There was a case a few years ago, in 1997, called Prinz, where the Supreme Court said the federal government could not force a sheriff to collect data and send it off to a national database. That was just collecting data. Here, they're forcing the states to run these massive Medicaid programs. Isn't that commandeering?

John Junker:

Yes. You want to say yes to that, at least I do, in a certain way. In the Prinz case, I think you're talking about a very specific directive from the federal government that causes an almost direct clash in what we know as federalism. That is, that those same bureaucrats that I talked about moments ago, 2,000 miles away, would require a certain act to be performed by an individual. I think this is a substantively very different situation, because the federal government and the state government in their various exercises of their authority are heavily involved in healthcare. For the federal government to say, "We want data for guns," you might say, "Well, why?"

For the federal government to say, "We have a problem in healthcare that requires federal involvement to correct for all of our citizens. We're going to be more active in a field that we've already been active." A very different question, I think, when it comes to a question of commandeering, taking away a discrete responsibility by a local official. I don't really see that as a major issue.

Stuart Jay:

I want to point out that in the Prinz case, the issue was whether a sheriff in Montana could be forced to process Brady handgun applications. As you can imagine, that was a sensitive subject for a Montana sheriff. Basically, the case holds that you can't force state officers into the federal bureaucracy, and make them process federal administrative actions. In this particular case, no state has to participate at all. If they don't want to participate in the insurance exchanges, the federal government will take over for them. If they don't want to accept the expanded obligations to provide Medicaid funding, then they can simply withdraw from the Medicaid program. They have no obligations whatsoever.

It's not then a form of coercion in any kind of a direct sense. What the states actually are claiming in the lawsuit, which is to me a bit unbelievable from a conservative Republican attorney general, is that they so depend on Medicaid, it's become customary, their citizens expect it, that they can't live without it. That's a very unusual argument for conservatives to make who generally argue constitutionally speaking the government has no obligation to spend a dime on you for medical care.

But somehow now they seem to think that they are constitutionally coerced to keep providing medical benefits or health benefits for their citizens. They have no such responsibility under the federal legislation. Not coercion.

Hugh Spitzer:

Professor Watts?

Kathryn Watts:
I agree with Professor Jay about the 10th Amendment, the commandeering kind of a claim, and what we're talking about here is entirely different from prior precedents like Prinz where there was just simply no choice. It was a mandate that you must report this data to the feds. And here we're not talking about that since there is the ability to opt out of Medicaid and there's the ability to opt out of administering the exchanges because the federal government will do it. Where I think maybe I differ slightly is in thinking about the relevance of the claims in the Florida complaint in particular, you really see the states playing up this notion of coercion, which I think can be slightly distinct from their claim of commandeering.

If you think about the powers Congress is trying to rest this legislation on that we started out talking about, commerce clause power or the power to tax and spend, the Supreme Court's jurisprudence, there's a key case, South Dakota v. Dole, involving federal highway funds. And in that case the court suggested that the federal government can hold out a carrot to the states. We'll give you some money if you do X, Y and Z. So it's the states voluntarily agreeing. OK, I'll take that money and then I agree to do X, Y and Z.

Well in South Dakota v. Dole, the court said when you hold out that carrot, the conditions you're attaching can't be overly coercive. And I think the coercion point that Professor Jay is talking about could be quite important in the context of that legal claim where the states, in trying to argue that Congress has exceeded its taxing and spending powers, has overstepped the permissible limits of the taxing and spending powers because it's holding out conditions over the states' heads that are overly coercive.

Whether that should succeed or shouldn't succeed, that's a different question. But in terms of that being a plausible, viable claim for them to raise, I think it's a logical path to try to follow because we've never had a case that has said the line of coercion has been crossed before. So that line has never been exceeded. In South Dakota v. Dole it was to give a percent of federal highway funds.

So here if you're talking about Medicaid program, which the states all say is so crucial now and so expected, does that cross the line or not? I think that's something that the states are trying to play with to some extent when you read their complaint.

Sally Sanford:

Just to explain a little about the possibility of withdrawing from Medicaid. So Medicaid was created in 1965 as companion legislation to Medicare. And so Medicaid is a joint federal/state program so that the federal government provides guidelines and financial support for state health programs historically for categories of low income people, mostly people over 65 who are low income, pregnant women, people with qualifying disabilities, and children. Going forward it will be everybody under 133% of poverty. And what the states get from the federal government besides guidance for the programs, guidelines, is money - so matching funds. Our state is a 50/50 match state, so for every dollar we spend, we get a dollar from the federal government. Other states it's up to for ever 20 cents, you get 80 cents, and right now it's higher with the stimulus bill.

It is a voluntary program. States can choose to join. All states now belong. The last state had a Medicaid program first in 1982 - that was Arizona. And it really is very central to the way that we pay for healthcare for our low-income citizens, and also the way in which safety net providers are supported.
In our state, about 19% of our state population is on Medicaid. We got a lot of money from the federal government to support that, and also spend a lot of money from our state budgets. So while legally states could just decide to no longer have a Medicaid program, that would be practically, and ethically, really difficult.

Hugh Spitzer:

Go ahead, Professor Jay.

Stuart Jay:

But that doesn't mean that it's unconstitutional. There are two types of coercion that the Supreme Court has mentioned as possibly being unconstitutional. One would be if you took some grant to the states, say highway spending, and you said to the states, "If you want your highway money, which of course you really have to have, then we want you to provide shelters for all of the stray animals in your state." In other words, you use money they actually can't live without to leverage something that has nothing to do with the money in the first place. That's not what's going on here.

The second kind of argument which Professor Watts alludes to is the claim that sometimes, maybe we're so dependant on the federal government, that you keep imposing more obligations on us. Yeah, in theory we're going to get more money from you, but we can't afford any more. Those kinds of claims have never been successful, not since 1937, when it was first rejected by the Supreme Court.

If you think about it, there's no principle basis for making that argument. What happens if Congress, instead of this program, increases Medicaid a little bit more, doesn't cover all adults, but covers somewhat more adults, and so the plan costs states maybe 10%, or 20% of what this plan is going to cost them? At what point, does it become coercion, because they say they can't afford it? That's a really difficult question.

Moreover, some states seem to think that they can afford it, and furthermore, within the states, there seems to be disagreement. For example, in our own state, the governor seems to think that we can afford the plan, and moreover, she seems to think we can't afford not to be in the plan. But, she has a disagreement with the attorney general on this question.

Now frankly, it seems to me that the appropriate authorities to make that kind of determination are the legislatures and the governors of the state. They're the ones who are political bodies responsible for budgets, not attorney generals, and certainly not federal courts. So how this coercion argument could work as a practical constitutional principle, I don't understand.

Hugh Spitzer:

You know, we had a bunch of Rehnquist-era decisions around the 10th Amendment and related areas, like New York vs. US in 1992. Can't force states to take title to waste. Prinz, which we've talked to, about the sheriff in Montana, US vs. Lopez, feds can't regulate weapons near schools, and so on. Morrison in 2000, which prevented a federal remedy for gender motivated violence. The court said this is beyond Congress' power. We've seen a bunch of cases where the US Supreme Court has said, "This is beyond Congress' power." So, isn't the 10th Amendment still alive, and really has teeth? Don't
these cases tell us that full sovereignty is still alive, and that there are limits to what the federal government can be engaged in?

Stuart Jay:

That's right. There are definitely limits. Two of the cases that you mentioned, Lopez and Morrison, are not 10th Amendment cases. They're about the scope of the commerce clause. One case says that you can't make possession of a gun, which is not an economic act, a federal offense when it has no connection to interstate commerce. Congress immediately amended the act, and said that if you've got a gun that's crossed state lines, and then you possess it near a school, you're guilty of a federal offence. Every court of appeal that has heard that case, or heard the new act has upheld it, so that goes to show you how effective that is.

As to the Violence Against Women Act, essentially the court says, "Well, Congress can't make it a crime to engage in violence against women in a particular state. It's not an economic activity." OK, fine.

Purchasing insurance is an economic activity. Purchasing healthcare is an economic activity. Not just any activity, they cross state lines. And again, it accounts for something like a sixth of our economy. This is not like a local crime occurring.

The only other two cases you mentioned of common during the New York and the Prinz case are the only two cases in which the Supreme Court in modern times has used the 10th Amendment and say that Congress can't do something.

Again, Prinz was a case in which Congress tried to coerce a state official to administer a federal program. It doesn't happen in this particular case.

New York against the United States was a case in which the federal government was trying to force states to take title to privately own radioactive nuclear waste. That is not what the courses happened in this case. What New York did say though was that Congress could hold out carrots to the States. That is, give them economic incentives to build low-level nuclear waste facilities.

Give them positive incentives and moreover, give them sticks. If you don't build your facilities, if you don't enter into cooperative arrangements, eventually you are not going to be able to ship your nuclear waste outside your state. That is coercion and that is why the state of New York was complaining so much, they thought.

But they lost that argument. They lost their argument completely. The only argument they won was they couldn't be required to literally take title to the nuclear waste. And as I have told you previously, nothing requires the states to participate in this plan as a matter of constitutional compulsion.

Hugh Spitzer:

But this is really for everybody. The Supreme Court has a way of sometimes following recent precedent and sometime studying, turning on a dime and so, of the challenges that have been post in these lawsuits which one has the best chances to success and would you be surprised if the Supreme Court maybe five to four decided this was beyond the
authority of the federal government, either the individual mandate or decided that this is coercive. Which of these various complaints might get somewhere? Professor Watts?

Kathryn Watts:

Most academics out there, I'm not alone in this line, will be surprised if the Supreme Court ultimately find that these law is unconstitutional. I would certainly agree with that. So if I have to pick what is the most viable, what is the most plausible line to proceed along, I don't think it's commerce clause. Although where there's one justice in the current court, Justice Thomas, who indicated that he would be willing to rethink our history's entire commerce clause jurisprudence, essentially. He would be one to try the angle for it, try to tee up your briefs at, if you're litigating.

Hugh Spitzer:

There's one vote.

Kathryn Watts:

Yeah, so there might be one vote there. But others that are more conservative side to the court that you might think might be sympathetic to the challenges being brought here by the states, like a Justice Scalia. And he's joined opinions recently. There was a big opinion involving home-grown medical marijuana and whether it was outside of Congress' federal reach to be able to regulate somebody's ability to grow marijuana for medicinal purposes. And Justice Scalia -- to the surprise of many -- joined on saying that that was within Congress' power. So I don't think you can just say, ah, we've got five conservatives -- if you lump in Justice Kennedy, who is often thought to swing vote, into the conservatives together and say we'd get five votes. Because there's many on the conservative side that I don't think you can safely count on here. So I would be surprise if the Supreme Court ultimately found this to be unconstitutional.

Sally Sanford:

I agree with Kathryn, but I would say that it would probably be the individual mandate under a commerce clause analysis for those very reasons. The two cases you mentioned, Lopez and Morrison, they were 5-4 decisions and in the more recent one, medical marijuana, was a 6-3, and the person who shifted was Justice Kennedy and then also Scalia. So Kennedy may end up being the swing vote if it were 5-4. I think that it's unlikely but that are the claims that are raised in the complaints. That's the one that I think might have the most possible traction.

Kathryn Watts:

You have to wonder if Kennedy and Scalia switch votes in the case because of the topic, right? The topic there being marijuana. Compare the topic here.

Hugh Spitzer:

It probably had to do with medicine. Professor McKay, if you're a betting person, any of these arguments that you'd put your money on?

John Junker:
No, I wouldn't bet money on the success of this case. I think the more interesting question is was it an ethical exercise to file the cases? And I think that's something that we haven't quite addressed yet but I think it's a legitimate question. And I think really I can't disagree with my colleagues here on what the likely outcome is. At least now as the cases lie, I just don't see even an individual mandates in the commerce clause, which I think is probably the strongest case.

Having raised the issue, I don't think it is an unethical exercise. But I have to admit my ethics eyebrow arches up over the top of my head when I see 13 states filing on...together so quickly after the bill becomes law. I wonder about the thoroughness of the constitutional analysis, some which is being picked apart I think pretty cleanly here.

So I think it is a legitimate question for people to ask of those who are signing on to these lawsuits: what is the basis in law for these cases and why isn't this a political exercise when viewed as a whole?

Stuart Jay:

I think probably the coercion argument that the states are being force to greatly expand a program that they can't live without probably has the most promise. On the other hand, if anybody wants to place any bets, I'm available afterwards. I hope to finance my retirement through this. I want to make one point of the commerce clause and the mandate. Not the least of which is by the way, you need the commerce clause for the mandate, it's just the taxing and spending kind of deal basically. You get a better tax rate if you have insurance is kind of the bottom line of it.

Secondly, back in 1942, the Supreme Court recognized something about what would happen to our economy which is that no person is an island in the American economy. We are all connected together. Our individual actions either if you are into the market or stay out of the market have a direct effect on the market.

There was a farmer in 1942 named Roscoe Filburn, and Roscoe grew wheat on his farm. He participated in the agricultural adjustment program which gave him a guaranteed crop price in exchange for him limiting production.

This was because of total collapse of the supply and demand for wheat due to competition with the world market. No farmer economically would refuse to participate in the program because they would be bankrupt, and the court recognized that.

Now, what did Filburn do? He decided not to sell a couple hundred bushels in the market but eat it at home or feed it to his pigs, made bread and he said, "I'm not doing anything. This is inactivity. I am just keeping this stuff here."

And the court said the fact that you are not putting this into the market, you are not participating. When you add what you are doing together with every wheat farmer in the country, it is the greatest drag in the market that there is. And as we have previously heard just few minutes ago, that is the situation with healthcare in our country today because something like a seventh of the people are uninsured, particularly people who are young.

It has a tremendously adverse effect on the risk pool. It raises the cost for everyone. Furthermore, these young people who think that they are invulnerable, whoever thinks
they are invulnerable, tey are not invulnerable when they show up in the ER having been in a car accident or when they discover that they have cancer or multiple sclerosis or diabetes or something like that.

It then requires an enormous amount of money to be spent. I have a friend, uninsured. Even though she didn't have insurance, last year she started to have chest pains. She's rushed to Swedish, $45,000 bill later after about 24 hours. And 90% of it was written off.

And who pays for it? Of course, the rest of you pay for it. And we all pay it for a higher health cost and higher taxes.

You're not an island in American society. What you do or don't do has an effect on everyone else, and that's what converse essentially has recognized. And I want to point out. This is one last point. This is such a conservative plan in a way because it was conservatives who came up with this in the first place. That is the irony.

It was Mitt Romney in Massachusetts. It was the "Wall Street Journal" that was urging this. In fact it was the Democrats who said, no, we don't want to do this. We want to have a national mandate where everybody gets on. We want to have a single-payer plan, et cetera.

Instead we took the more conservative approach that the Republicans have been urging, and now we're being excoriated as somehow pushing something down the throats of people. This is a kind of remarkable political season, it seems to me, and also a time of constitutional silliness.

[laughter]

Hugh Spitzer:

We'll see. As I said, the Supreme Court has surprised people before.

Stuart Jay:

The Roberts court I would not count against for practically anything.

Hugh Spitzer:

This Roberts court.

Stuart Jay:

And I will say contrary to my own arguments that this is the court that recently reversed its decisions from the 1930s on the meaning of the Second Amendment. Back in the '30s they said the Second Amendment was just about militia participation. And recently they said, Oh no, we got that wrong back in the '30s. So anything can happen with this court.

Kathryn Watts:

We're also jumping the gun a little bit in terms of talking about what the Supreme Court would actually do because there's the question of would the Supreme Court ever take it? We're talking about the merits here in terms of whether the Supreme Court, how it would rule on the merits. And we've got to think about how the cases will filter their way up
through the system and whether the Supreme Court would choose to exercise its jurisdiction to hear a case like this.

I think that explains in part why we see these frantic filings all across the country. I don't know if you'd agree with that, John. The jurisdictions that were chosen, right, the rocket docket in the Eastern District of Virginia, hopefully likely to get a result quickly.

And then you've got Florida, which is in the 11th Circuit, which is known to be somewhat conservative. And you've got another filing in Michigan, so a different circuit court where the case will come up.

So I think the strategy has to be let's let a bunch of these cases go out there, percolate. Let's hope we get one that strikes down the act as unconstitutional, because I think most would agree it's very, very unlikely that the Supreme Court would ever decide to take this kind of a case unless a lower court finds the law to be unconstitutional.

**Hugh Spitzer:**

What are some of the other procedural hurdles that might stand in the way of these cases?

**Kathryn Watts:**

There are a number of significant procedural hurdles that are in the way. So not just at the Supreme Court level, but thinking about at the trial level to begin with, there are two major doctrines that are pretty significantly looming in the background of these cases. One is called standing and one is called ripeness. They're both constitutionally-based doctrines to the extent that the Constitution requires that you have live case or controversies.

So here the argument would be in terms of standing. Standing is about who can bring suit. Are you the right person to come in to court and bring suit? And ripeness is about have you brought suit at the right time, or did you file suit too early.

And so lingering in the background of these suits are questions of standing and ripeness. Standing because one of the questions would be are the states the right ones to be complaining here? Shouldn't it be the individuals who are being subjected to the mandate that should be going into court and suing?

Which is what we do see in a lawsuit that was filed in Michigan. There are individuals. But in the suit filed in Virginia and the suit filed in Florida, we don't have individuals that have joined those suits. It's just the states.

So maybe you could say they've got standing to complain about the commandeering and the coercion claims, but not about the general mandate in terms of commerce clause and taxing and spending authority.

There are those sorts of questions that need to be worked out that are significant in terms of standing. And then ripeness too because the mandate, as Sally said, doesn't kick in until 2014 so there are a number of years before we're going to see the mandate imposed upon people.
So is it too early for us to be litigating about the constitutionality of the mandate when a lot could happen in four years? The law could be repealed. So those are pretty significant procedural hurdles at the trial level.

**Hugh Spitzer:**

Virginia's attorney general recently said that the state of Virginia has standing because Virginia passed an anti-mandate law which conflicts with the new federal law. So does that automatically give Virginia standing?

**Stuart Jay:**

No.

[laughter]

**Kathryn Watts:**

But it's not quite that simple. You explain why no.

**Stuart Jay:**

I'll give you the simple answer. [laughs] No, because it's just a matter of the supremacy clause. The state passes a law saying the federal law is nullified, which is I think what Virginia has been saying, echoing pre-Civil War rhetoric.

[laughter]

**Hugh Spitzer:**

It's true.

**Stuart Jay:**

The news for them is that when federal law and state law conflict, federal law trumps in the area. The standing problem is this, and actually if you think about standing and ripeness and you step back from them, they have more to do with the role of courts and the appropriate role. And actually surprisingly enough, standing and ripeness are conservative doctrines.

And what they're really designed to say is that there are a lot of issues that should be resolved in political processes and not in courts because otherwise you just have judges imposing their will on society. And there's a lot of what's going on here that's just like that.

Generally speaking you see a state is not allowed to file a lawsuit because it thinks that some of its citizens are being injured by some federal program. It's the state itself that has to be in some way injured like by say a commandeering mandate.

Secondly, I'll be very surprised if conservative judges are going to be willing to take on the individual mandate when it might very well go away in the next four years, and then they've just rendered what's in effect an advisory opinion.
But stand back and look at this from a different angle. I think a conservative judge could very well say, listen, here you have a program that has been exhaustively debated for more than a year in Congress, and a subject of all sorts of expert testimony, tremendous clashes of opinion. And furthermore, it's an ongoing live political debate. In November, who knows what's going to happen. Maybe the taxpayers will rise up in furor, and the Democrats will be forced out office, and it all kind of goes away.

The conservative position, which I have some sympathy with, over the last 20 years or so has been when you're dealing with socioeconomic programs, the appropriate place to argue about those is in legislatures.

So here you have all of the states represented in Congress through the Senate and through their representatives in Congress. They fight it out basically. They make deals just like they do in every other kind of situation.

And so you're really talking about how to spend the taxpayers' money. And that seems to me to be inappropriately just a legislative responsibility. It's not something that has any peculiar expertise for judges to inject into this argument, as far as I can see.

**Hugh Spitzer:**

Professor Watts?

**Kathryn Watts:**

I just wanted to follow up on why I don't think it's quite as simple in terms of the response. I agree that the supremacy clause puts to rest these arguments that anti-mandate laws like the one we've seen passed in Virginia and also I think Utah and Idaho have passed similar anti-mandate laws. Of course if the federal law is valid, then they are preempted and they're beside the point. But the key question is are they preempted in terms of is the federal law constitutional? Which is the whole thing that the states are trying to challenge, which brings us back to the standing question.

And that's where the fact that you have a state like Virginia, their AG is out there -- as your question, Hugh, asked, saying we have standing to sue because our state law is being preempted by what Virginia views as an unconstitutional federal statute. We have standing to challenge the constitutionality of that federal statute on that ground.

So I would say it's a little more nuanced than your answer is because of a recent decision that the Supreme Court handed down in 2007 involving global warming, Massachusetts v. EPA, a real blockbuster case in the global warming field where you had the court issue a decision. I have to say on standing front it was a little bit confused in terms of what was the basis for finding that the state - there it was Massachusetts - had standing.

But there were some glimmers in there where the court was suggesting that if a state has a quasi-sovereign interest or a sovereign interest in terms of protecting its state laws from being preempted by federal laws, that can give rise to fighting the states with some kind of standing to sue they might not otherwise have had.

I don't think Massachusetts translates into meaning that a state can simply pass a "we oppose federal law" law, and that means they can march into federal court, which is what Virginia is claiming.
So I agree with you, Stuart, in the end, Virginia's claim falls short, but I think it's a bit more nuanced in light of the history that we've seen with a case like Massachusetts v. EPA. I can see what they're trying to rest their hat on in other words.

**Stuart Jay:**

But here's the answer though.

[laughter]

Standing depends on injury. In order to bring a lawsuit in federal court, you have to have been injured or your injury has to be threatened. When Virginia says, "We have an anti-mandate statute and you're interfering with it," Virginia is not injured. Maybe taxpayers in Virginia or the people subject to the mandate are injured, and they have standing to bring a suit, like the people in Michigan have standing to bring the suit. Massachusetts v. EPA as I understand, that convoluted decision is that the state itself was injured because its beaches are washing away due to global warming. But in that case, there you have the four most conservative judges in the court dissenting, furious that the state of Massachusetts is being allowed to even bring the claim in the first place.

So I'll be surprised if any of those four think the state of Florida has standing to contest the individual mandates.

**Kathryn Watts:**

Which gets back to your point about the politics of standing and why it really does feed into the notion that this case won't ultimately succeed, because the conservatives are the ones that are strict on standing.

**Hugh Spitzer:**

One of the other things from a procedural standpoint that struck me when I read the Florida complaint is that there were so many factual allegations in it. And if they want to get to the US Supreme Court and get there soon, I think it might take a while. There might have to be a trial, and the trial can go on for a year or two. There's a lot of complex issues here. What makes people think it would actually go up on a summary judgment and actually get to any of the key issues? How long would it be before anyone would ever see any kind of a ruling? Professor McKay?

**John Junker:**

Well, I think you're exactly right. I'm not so sure. I think that raises the question of, what was the intent of filing at least the Florida case, and was it meant to be... We're talking as if, because we're professors and we teach, that this is a pure constitutional exercise, and we're going to look at case law and constitutional decisions. I think it's pretty clear, at least in the Florida lawsuit, this is in part a political exercise. All of the objections with regard to standing -- new parties will be added. I'm not sure that there is the desire to force the constitutional question to the front right now, but maybe there's another purpose, which is that some of the dissent that we're seeing can point to the lawsuits being filed as a legitimizing of some of the political objections and discussion that we're seeing outside of the halls of Congress.
In Congress, the discussion has been had, at least for now. And the reason that the discussion continues outside the hall are pretty obvious. Not one Republican voted for it.

It is being openly bashed around the country. People will be seeing more, not less, articles being written saying, "What do the Chinese think? They're our bankers. How do they feel about us voting ourselves a massive new entitlement, while they're holding all of our notes?"

These are policy questions in their political debate, and perhaps the filing of these cases is not such a pure exercise, and the fact that it's not going to go so quickly might not concern some of those who filed it.

Hugh Spitzer:

I've got a few questions on the practical side of the bill itself. While we talk about those, if people have questions they want to pose, send them to the person on the end of the aisle, and then someone will pick them up.

Stuart Jay:

May I just make a point about that? I think there's going to have to be a rather massive trial in the case, because the essence of Florida's claim is that they can't afford the program, and hence, they're being coerced. That's a massively factual claim.

By joining the lawsuit, by the way, our attorney general is joining all of the allegations of the complaint, which means that he apparently thinks we can't afford the program either. This is going to raise some fascinating issues at trial. What's going to happen when the attorney general and the governor of Washington face off at trial and the governor says, "Yes, we can afford it."

And what happens if you have a joint resolution of the House and the Senate of the state, and they say "Yes, we can afford it." How is a trial court supposed to take those kinds of things into account?

As I said earlier about the lack of a principle here is, how, after a long trial and hearing all the data about what it's going to cost the state, how is a judge going to figure out if a state can't afford something?

That strikes me as not the kind of question that's capable of an objective answer. It's a political question. It's ultimately a political decision as to whether states can or can't afford this, and do or do not want to participate in it.

Hugh Spitzer:

Sally, one question that has come up. If somebody is required to have insurance, and they don't, and they refuse to pay this tax -- I don't know if this is a tax or a penalty or what, maybe you can speak to that -- can they be thrown in jail? Can their homes be seized?

Sally Sanford:

I'm just reading about Al Capone, who went to jail for tax evasion! No. Under the terms of the statute, somebody who doesn't pay the tax cannot go to jail for that. And they also
can't have a lien on their property. I'm not sure exactly how it would play out. Those things can't happen.

**Hugh Spitzer:**

And in the exchanges, is everyone forced to buy the same insurance, whether they like it or not? How does that work?

**Sally Sanford:**

No. Under the terms of the law, within these state-based exchanges, there are to be four levels of plans. The way they are termed has changed over the bills, but now it's bronze, silver, gold, and platinum.

[laughter]

And also, for some people, the possibility of a catastrophic plan. So no, the bronze would be the basic, and then there could be better coverage.

**Hugh Spitzer:**

This is a good one. How is forcing someone to buy insurance on a private market different than, say, forcing a company to buy scrubbers to install in smokestacks, when the scrubbers are only available in the private market? Observations?

**Stuart Jay:**

That's your hypothetical, so I think you should answer it.

**Kathryn Watts:**

It's not my hypothetical. Some of you may have read the article. Maybe this is where that question came from. In the "New York Times," they had a great forum with different professors across the county debating these constitutional issues, and I forget which professor, but one of them threw out there his view that this is really valid, because this is something that falls under the power to tax and spend, and it's a tax on behavior is what we're talking about here.

And it's no different than we tax companies for failing to install certain kinds of equipment that government doesn't produce, but private companies produce that would reduce certain emissions that harm the environment, for example.

So that's something that certainly others, whoever asked the question, that would agree with you that that's a possible way to think about this.

**John Junker:**

And as Professor Sanford pointed out at the very beginning of this, the reality is that the tax is not on inactivity, it's on your participation, or a person's participation in the healthcare market. If you don't have insurance, you're essentially making the decision to self-insure, because this program only has a mandate for people who can afford the insurance, but don't want to abide the insurance.
So you've chosen to go it alone, to go naked without insurance. And then when you show up at the ER with a broken arm, and it costs $5,000, and you can't pay, somebody else is going to have to pay the bill for you. Your self-insurance decision raises the effective rates for everyone else, so again, you're not an island in our economy and our society.

And as I've been watching this debate, I think actually that's the bottom line. If you notice, the people who really are pushing this are philosophical libertarians, and they really don't believe the government should be able to force you to do something.

That's a position that philosophically I have some sympathy with, but it's not a constitutional argument, frankly. It's just an argument as to why Congress maybe shouldn't have passed it in the first place, but we have plenty of programs in this program that are essentially paternalistic, just like that.

One of the most important, of course, is Medicare. Which, when it was passed—you probably don't remember, but I remember—it was damned as the first step toward Socialism. Now it is one of the most wildly popular programs in American culture.

I'll be willing to bet that 10 years from now, this program is going to be exactly like that.

**Hugh Spitzer:**

Many of the questions that I've received are rhetorical.

[laughter]

**Stuart Jay:**

They'll fit in perfectly. Hugh Others are policy questions, but there are some legal questions. And there are a few here just on how this works. Maybe Professor Sanford can help us out in this.

What provisions in the bill will affect college and graduate students?

**Sally Sanford:**

You can tell what our audience is. There's one provision that actually goes into effect this year, that allows people under the age of 26 to stay on their parents' insurance plan. The exact rules of who those people can be are yet to be established, but from the law it sounds like pretty much up to the age of 26 who does not have employer-provided insurance that they can buy themselves.

**Hugh Spitzer:**

My daughters are 21, 23, and 23. I'm not so sure I like this one.

[laughter]

**Hugh Spitzer:**

Does this law cover long-term care insurance with respect to pre-existing conditions?

**Sally Sanford:**
What a good, detailed question. There are a couple of provisions that might come into play, and I don't frankly know the details of them. There is one that has to do with long-term care insurance, and another that has to do with people on Medicaid who might need a long-term institutional type care. I don't know the details. But if you want to look up the law-anybody that's crazy to read it-a good place to look is Thomas.gov. It's a more easily searchable format than a lot of other places. And you can look up a couple of sections that have long-term care in them.

**Hugh Spitzer:**

Is it true that there is no cap on insurance premiums in the bill?

**Sally Sanford:**

Yes, it is true that there's no cap on premiums. There is an agency to be set up to try to oversee if the premium jumps are too much or not, but there's no flat amount that is said to be too much. There are, if you are getting subsidies, limits on how much you'll have to pay.

**Hugh Spitzer:**

So there's no utility regulatory system on price control of premiums.

**Sally Sanford:**

I don't know enough about utilities, but it doesn't sound like there is. There are limits on how much somebody would have to pay if they're being subsidized. And there are attempts to keep costs down. And the idea that many of the other cost controls in the bill will help keep costs down, but that's going to be a real interesting question.

**Hugh Spitzer:**

We have a number of questions for Professor Jay. I know he's talked a lot, and particularly some people who come from a different political perspective. Maybe. I don't know.

**Stuart Jay:**

Good, good.

**Hugh Spitzer:**

I will say we tried very hard to get several professors who could come and who think that this is flat out unconstitutional. There are relatively few, and they're in great demand around the country.

[laughter]

But, one question. This may be more help. Professor Jay, would it be constitutional to make failure to pay this tax or penalty a crime?

**Stuart Jay:**
Sounds like a good exam question. Well, this is the way this system works, essentially. It seems to me that since it's part of the income tax system, you'll be paying a higher rate. I would guess that if you ultimately failed to pay your income taxes, there would be consequences. That's kind of the way the system already works if you don't pay your taxes. It's a little difficult for me to imagine that Congress is going to make it a felony or misdemeanor to fail to pay this particular mandate. My guess is that it'll just be set up so that it's not even an issue.

In theory, if I don't pay my Medicare tax there are consequences, but they don't make them criminal consequences. You don't have to exactly go that far. But what is made criminal and what is not made criminal is a matter of discretion for Congress. There is not as far as I know any kind of a constitutional issue.

Hugh Spitzer:

How can Professor Jay claim that this is comparable to Social Security when from the very beginning, that program never acted as an individual retirement system, but as a conduit so that current payers can pay to current beneficiaries?

Stuart Jay:

I think I understand the question, and it's wrong. It's factually inaccurate. When the Social Security system was set up, it's true there were so few people that were receiving their pensions that there was vastly more money going into the system, but it was anticipated that at some point there was going to be more money being paid out than was coming into the system. It's just creating a huge trust fund of money that's going to be paid out on an actuarial basis in the future. So this is directly analogous to Social Security. You pay a payroll tax, and in exchange for the payroll tax, you get a pension later in life. And you also get disability insurance coverage.

This act is set up somewhat differently, just as a technical matter, but when you strip it to its constitutional essence, that's basically what it is. It's just requiring you to pay a tax, and then the government's going to spend the money and give it to somebody else.

None of us likes to pay taxes particularly, especially when the money is going into someone else's pocket. But that's the nature of our system. We have something called a progressive income tax that does exactly the same thing. And this is not a lot different.

Hugh Spitzer:

Here's another one. It's not quite clear, but it says, mandatory inclusion of children under 26 has been challenged by insurance companies. Is the statute unclear?

Sally Sanford:

I think what the person's referring to is the requirement that - I don't know whether it's a requirement or not-that pre-existing condition limits not be applied to children this year. I think that's what they're referring to. How that came about politically is, I think they wanted to have some things come into effect sooner. So for all people, the pre-existing condition limit restrictions go into effect in 2014. The bill, which is now the law was changed to say for children, that goes into effect in six months. But the part that said you have to sell to everybody, guaranteed issue, was not changed.
So some insurance companies argued a couple days ago, I think, that while they do have to not apply pre-existing condition limits to current policyholders, they don't have to sell to a sick child. But as I understand it, just yesterday the insurance companies agreed not to challenge that. They sought some legal opinions that the president would have the authority to make that the rule under an executive order.

So as I understand it, they're not going to challenge it. I don't know how the challenge would have gone. It probably would have taken four years, and then it goes into effect, anyway.

**Hugh Spitzer:**

There are five questions that are quite similar that I'm going to take the liberty of asking myself. Under Washington's Constitution and Statutes, does the attorney general have the authority to file suit on behalf of the state, when the governor and the legislature oppose the legal challenge? If so, what are the limits on the attorney general's inherent authority in the face of the governor and the legislature's opposition?

We've had several of these, and I teach constitutional law, so with your permission I'll comment on this one.

The state constitution says the attorney general shall be the legal advisor of the state officers, and shall perform such other duties as may be prescribed by law.

So what the attorney general does besides perhaps giving attorney general opinions in this state, which seems to be a constitutionally granted job, all of the other responsibilities of the attorney general are determined by the legislature, so the legislature could, if it chose, amend the relevant statute.

For instance, they could say the attorney general shall provide opinions to state officers upon request, and give the attorney general a law clerk, and a secretary and that's it, and set up an office of solicitor general, or something like that and staff it through the governor. They could do that if they wanted to. It would be very different from the way things are done.

But under current law, the attorney general shall appear for and represent the state before the Supreme Court, or the Court of Appeals in all cases in which the state is interested. Or institute and prosecute all actions and proceedings for or for the use of the state, which may be necessary in the execution of the duties of any state officer. Those are the two that probably provide authority for the attorney general to do this.

I would say there's a good argument that he has this authority to do this on his own, even without a client, although it seems rather odd to have a lawyer to file a lawsuit without a client, and then you get into the issue of, well, if the client is the people of the state, is that really an operable client?

It's an ethics issue, again, that is argued by government lawyers year in and year out, every year you can get an ethics credit by going to a seminar on that very subject. It's a tough one, but I will observe that the governor herself, I know, when she served as attorney general, was quite active. I think that she would be reticent about...
She was the leader on that tobacco litigation. She talked to her clients about it, but it was really her deal. I know she's cautious about going after the attorney general, although she has raised the question, who's the client?

So the answer is that there's probably a reasonable argument that he has the authority, constitutionally. Constitutionally, it's up to the legislature what he does.

**John Junker:**

Hugh, may I ask you a question?

**Hugh Spitzer:**

Sure.

**John Junker:**

The statute that you just read said that the attorney general has the right to represent us in court.

**Hugh Spitzer:**

Yes.

**John Junker:**

In this particular case, when it was pointed out to him that this might actually cost us some money, his spokesperson's answer was, "Oh, the attorney general of Florida is going to be handling the case, so it's not really going to cost us very much money." I just found out yesterday that the attorney general of Florida has actually hired a private law firm, which coincidentally is the law firm that the attorney general of Florida used to be a member of. It's also, the two individuals who are representing the state have been running around the country, writing op-ed pieces, and writing law review articles about how this is unconstitutional.

How is being represented by a private law firm in Florida, which, by the way, is now under a conflict of interest inquiry in Florida because of this very issue. How is that, exactly, representing the people of Washington?

**Hugh Spitzer:**

That may be a rhetorical question.

[laughter]

I will only observe that a number of legislators who are in a position to do this are looking very carefully at adjusting the budget. There's a lot of budget adjustments going on, cost savings people are focused on. So I know some legislators are looking at saving money by barring the attorney general from spending Washington state money on this lawsuit. The governor, as also reported in the "Olympian," withdrew a waiver that she had previously granted to the attorney general's office which would allow the attorney general to contract with outside attorneys and other contractors without having it reviewed by the state Office of Financial Management.
Now, the attorney general has to go through all of them like everybody else. So, she yanked the waiver. This did not get a lot of press, but it's interesting if that's true. I expect it is. That's what the "Olympian wrote." We'll just have to see.

John Junker:

Do you think the legislature constitutionally can cut off funding?

Hugh Spitzer:

I don't think the legislature could cut off all funding. I think they could certainly cut off funding for this particular thing. I think they're only obligated to give the attorney general the funding for a staff to prepare opinions or advice for state officers. That's the only constitutional job. We've got a few more minutes, and these all relate to things that we have talked about some, but aren't the penalty provisions essentially the same as a tax increase combined with a credit for people who buy health insurance? That was one of my questions. Is this a tax, or is this a penalty? What is this, really? How is it structured? Does it make any difference?

Sally Sanford:

In the statute itself, it's called a tax penalty.

[laughter]

Hugh Spitzer:

That answers the question.

Sally Sanford:

It also is mentioned in the portion of the law that talks about how money will be raised to pay for all of this, so there's a variety of ways that money is being raised. One of them is tax assessment on people who don't have insurance. In the law itself, it refers to it as a genuine revenue answer.

Hugh Spitzer:

Is the money earmarked? Because, any money that would be collected through this tax penalty, is it earmarked for the healthcare system? I'm just curious.

Sally Sanford:

Good question. I did look at that section, and as you can imagine, the law is difficult to read, because it cross references all other sorts of laws, so it's not 2,000 pages, it's like 100,000. It might have referenced another law that does that, but I don't think so. Nothing in the reports have talked about the taxes being earmarked for anything in particular.

Hugh Spitzer:

Does the provision allowing individuals to opt out and pay a tax instead reduce the legitimacy of the coercion argument? I'll let somebody else answer that.
Sally Sanford:

I'll just add that there was a lot of debate in Congress about whether or not the tax was high enough to incentivize people.

Hugh Spitzer:

Does the provision allowing individuals to opt out?

Kathryn Watts:

I would say it doesn't reduce the coercion argument when you're thinking about the argument being are the states being coerced to participate in administering this federal program. That's the state's claim is that they are being coerced, not that the individuals are being coerced. And so the fact that some individuals can opt out doesn't lessen the coercion claim that the states are bringing.

Hugh Spitzer:

No, but I think this maybe is meant to be a parallel argument. If the states aren't coerced because they can opt out, maybe the individuals are not coerced because they can opt out and pay a tax penalty instead.

Stuart Jay:

But I think the argument the people are making is they do feel coerced because they're going to have to pay a penalty. Of course the point here is that years and years ago, the Supreme Court effectively said there's no difference between a tax and a penalty. You can't call a tax a penalty merely because it affects people's behavior. My favorite example is Sanchez v. the United States in 1950, in which the Supreme Court upheld a stamp tax on every ounce of marijuana that you possessed. Marijuana possession of course is illegal. Not too many people are going to be getting their stamp tax. But the Supreme Court said it's structured as a tax and therefore it's a tax, even though obviously the purpose is to keep people, or to prevent people or to deter them from using marijuana.

Likewise, in 1937 the court upheld a tax on dealers in sawed off shotguns and submachine guns, which of course was an illegal activity. And the court said, "That's a tax."

So the difference between a tax and a penalty, constitutionally speaking, there isn't a difference as a practical matter. And just to put it another way, there hasn't been a case since 1937 - no, you have to go back even farther than that - since the court has said that something is not really a tax. It's actually just a tax disguised as a penalty as a regulation.

Hugh Spitzer:

A profit motive dictates that provisions like the one banning discrimination based on preexisting conditions will result in much higher premiums for everyone. How does the bill address that problem? This here is a Sally Sanford question. Also, how can one part of the bill be declared unconstitutional? We'll ask that one next. But basically if this increases premiums for everybody by driving up these premiums that are unregulated, what are we going to do then? How does the bill address that?
Sally Sanford:

There have been concerns that if you make insurance companies sell insurance to really sick people, who are expensive, and if you don't allow lifetime limits, which is also in the law, and also the law does require a minimum benefit package, then won't that just raise the premiums to an unattainably high level. Partly that's addressed, and the Congressional Budget Office gave their view of how the economics balance out by having an increased risk pool, healthier people to balance it out, and other provisions of the law that aim to better finance our healthcare system to try to keep the cost down overall, the idea that that will help stabilize the market.

Hugh Spitzer:

If one part of the bill is declared unconstitutional, will that invalidate the entire bill or not?

Sally Sanford:

Not necessarily.

Hugh Spitzer:

Is there a severability clause and how does it work?

Sally Sanford:

The law does not have a severability clause. And many laws do. And a severability clause says if part of the law is overturned, the rest stands. There isn't one in this particular law.

Stuart Jay:

And my guess is the reason there isn't one is because if you were to get rid of the mandate on the states, the program can't work. And everybody knows that. That's been the argument about the mandates all along. The only way you can have a comprehensive or close to universal health insurance plan is if you have mandates by increasing the risk pool. That's just the fact of the matter.

Hugh Spitzer:

Last comments. We've run through our allotted time. And thank you all for coming today.

[applause]