Well good afternoon everyone it’s wonderful to see you here. I want to welcome you. I’m Kellye Testy the dean of the law school I suspect that most of you know that but I see a few people I haven’t met so just so you know who has the honor of introducing our speaker to day.

I want to welcome you first and foremost to one of in a series of events that our Gates public service law program at our center for public service hosts each year. And as you’ll probably have come to know about the law school we have a very deep commitment to public service within our mission. As part of that, Michelle Storms as the leader of the center for public service is the kind of an anchor for that part of our program. This speaker series is one that we’ve really love because it enables us to bring in people who share that mission and from whatever corner of the world or whatever subject they work within to share how they work for social justice, how they work in public service and in the public interest from the very many angles substantively that people do that.

And so today it’s a particular delight for me to be able to introduce Susan Cohen who is our speaker today. The title of her talk is in front of you so I won’t repeat that here but I do want to say that I particularly loved that part after the colon: ‘where sex, religion, and politics collide’. That has to be a really interesting intersection, right? I’ve known of and known Susan Cohen for many many years and so it’s really special for me to be able to introduce her here today and also just to have had her here with us in the law school for a few days and as part of our community.

I want to let you know just as kind of the official matters about her that she it is the Director for government affairs of the Guttmacher Institute. She has spent with that organization an impressive number of years. I really admire that because I think that institutional loyalty and really having a track record where you can get a lot of things accomplished sometimes means that you need to stick with something for a while. So I’m impressed by the number of roles that she has played their beginning as a public policy associate, becoming a senior associate for public policy, assistant director for public policy, and then in ’02 being named Director of government affairs. And in that role she’s responsible for facilitating and coordinating issue analysis and strategy development within the DC. I think the Institute’s largest office is in New York with a significant office in DC.

Ms. Cohen has also served on the boards of the National Family Planning and Reproductive Health Association, in AVSC International, and now Engendered Health, as chair of the population and family planning section of the American Health Association and on the national governing council of the American Jewish Congress. For academic background is that she earned an MPH at UNC, University North Carolina in Chapel Hill school of public health. She also earned her B.A. from Vassar College.

So it a great pleasure that I welcome her to the University of Washington School of Law. It’s a
delight and an honor to have you here with us today Susan. And I really am so eager to hear you share some of what you’ve learned about this interesting intersection. I just want to also say that I really appreciate the work you do in this important area. This is one that is certainly at the forefront of our policy debates today. And some of the things that are happening and afoot in this field are really quite concerning let us say. So with that let me say a very warm welcome we’re thrilled that you’re here.

Susan Cohen

Thank you so much to all of you but especially to Dean Testy and Dean Storms for making it possible for me to come out here and get out of Washington, DC. It’s really a delight to not be there for a little while. It’s especially nice to be here because as you know since you live here this state is such an oasis considering the tsunami of very restrictive laws and policies that are washing over much of the rest of the country. I’m going to not talk about all that stuff today. I’m going to focus on the topic above. I am happy to talk about some of those other issues in questions and answers if we have time, but I first need to make a few disclaimers. First of all as you know from hearing my bio I am not a lawyer. I’m not going to be talking about cases or litigation except in very light passing. There are many of you in the audience who do that for a living and no much more about that than I do. What I do do in Washington is helping to form and pass laws before they get to the litigation phase which in most of the ones I work on happen to always go sooner or later. So I’m going to be talking about the process before we get to the litigation phase. And really even before we get to the legislative part, I’m going to of the spend most of my time talking about the politics. And on the subject of politics I guess we can start with the war on women, the vaunted war on women about which there seems to actually be some debate out there. You may or may not accept that that’s a legitimate point of debate, but I would say on whether you agree there’s a war on women going on are not there so most definitely going on a war on reproduction and reproductive rights. And I would say that beyond attacks on abortion rights these in my 30 some years working in this field are the most overt attacks even on contraception that I have ever seen in terms of the breadth and depth. And again that’s why I’m so grateful to be out here and away from the East Coast.

I should start by just saying a couple of words about the Guttmacher Institute because you may or may not be familiar with exactly who we are. As Kelli mentioned we are based in New York City. We are a private, not for profit, nonpartisan think tank for lack of a better phrase. We have a staff whose main job is to conduct social and demographic research we publish their research and that of others that come into our publications department in a peer review journal. And then in our Washington office where I direct government affairs we are directly involved in working with Congress and the administration on the legislative side in terms of regulations and executive policies. And of course we work very closely all of the time with our colleague organizations with a similar advocacy agenda. With that I will add the obvious, I guess, which is that we engage in research and advocacy and manage to maintain the integrity of both at the same time. We feel very proud of the fact that the information that we generate and because we’re not a constituency based organization our stock in trade is the evidence that we generate that it is equally cited by those who disagree with us as those who are allies with us. We feel very secure in the information that we put out to inform and hopefully enlightened public debate around these issues. And at the same time we have a very clear point of view. We are pro-choice. We are pro reproductive rights. And we manage to maintain the integrity of their research as well as engage in the advocacy arena.

So with that bit of background reading lead into the topic a at hand I should point out that I also am very proud that Guttmacher was a really at the beginning of the whole contraceptive coverage issue in fact I think it’s fair to say that our organization was if not the one one of the original organizations to put this issue on the public agenda. And that started back in 1994 when we
published a report called 'uneven and unequal'. And it was the first time that anyone had done a survey of insurance companies to get a sense of to what extent and whether at all contraceptive services were covered as a standard part of insurance. And as you can imagine we discovered that it was not covered at all. Not surprisingly to those who understand Health Care and our Healthcare System that has always focused more on curative care than on preventive care abortion services were always covered and tend to be covered today. Although that may be changing very soon considering the Federal and state laws that are coming out around that. Contraception was not covered because it was considered preventive services and preventive services and drugs generally speaking were excluded. We brought that to the public discussion in 1994 because that was the time if you were around then or are old enough to remember that President Clinton and first Lady Hillary Clinton were trying to bring Health Care to the Congress for that last incarnation of a serious push for national healthcare legislation. And so we brought back into the debate.

It was very important in raising consciousness as you know that whole Health Care effort disintegrated, but the issue of contraceptive coverage really started to take off after that report. Soon after we put that out there in 1997 we were instrumental in drafting a Federal bill called the Equity in Prescription Insurance Coverage and Contraception Act. That was introduced on a bipartisan basis in the house and the senate it accrued many cosponsors and we’re getting right up to the precipice of getting some real action on it when we had our big hearing in the senate Health and Human Services Committee on December 10 2001. That was the day of our hearing and after that we were going to be moving forward. Senator Kennedy was the chairman of the committee at that time, he was a big proponent. But of course after December 10 it disappeared from the agenda at the Federal level. But the issues continued to take hold and the first state to pass its tone contraceptive coverage law was my own home state of Maryland back in 1998. And it all spawned from the evidence that we put out there and started to create a movement across the country and among the advocates. So in 1998 was the first law passed in Maryland. In 1999 we were able at least in the congressional level we were able to mandate that for Federal employees anyway in the Federal employees health benefits program that contraceptive coverage would be mandated and it has been available as a matter of law to all Federal employees since 1999. So that’s the way that evidence to really gets to shape policy and that’s really the role that we play in moving these issues forward.

Let me move back to what I’m supposed to have been really focusing on today and that is where we are with this particular controversy that I’m sure all of you are someone aware of. I don’t know how much of it. I hope that it’s not going to be too repetitive for many of you. Some of you probably know a lot of what I’m going to be talking about today. But I am going to focus on the politics leading up to where we are and a little bit about the unknowns that are still out there that have yet to be resolved. As I mentioned before the attacks going on against abortion rights, against contraceptive services, against Planned Parenthood as an organization have now been intense and ongoing for over a year now. But it wasn’t until this issue of the rule that the administration put out pursuant to the Affordable Care Act that this whole explosion happened and really went stratospheric. I think you could say this mix of sex religion and politics is always combustible and that’s exactly what happened when this got put onto the Federal agenda.

There are lots of balls in the air still, obviously the big kahuna is the Supreme Court decision that’s going to be coming out at the end of June, early July on the whole Affordable Care Act itself. And there are practical issues that I’m going to be addressing about how this rule if it survives, and we certainly are working on the assumption that a will, lots of practical issues about how it will be implemented. And obviously with the congressional and presidential elections in November that’s going to affect everything. So let’s stipulate to there’s a lot out there that we don’t know, can’t know, and everything could change later on. I’m going to talk about what we do know right now.
So where are we right now? What is the deal that we’re currently operating under? So this is sort of the barebones summary. As of August 1 most health plans, not every single one but, most health plans in the country must cover contraceptive services and supplies for all of their subscribers and dependents. Not only must be covering it but copays, deductibles, any out of pocket costs are prohibited because this rule is pursuant to part of the Affordable Health Care act called the Preventive Health Services amendment. And this and other services that are authorized under the amendment may not have copays and deductibles. Churches and houses of worship are exempt from this requirement because they primarily employed people of their own faith and they seek to inculcate their religious values as their primary mission so they were granted an exemption. However, religiously affiliated institutions which would include Catholic hospitals, Catholic universities, social services organizations will eventually, let me put it this way employees of those entities will eventually be guaranteed contraceptive coverage but their employers get an extra year to try to work this out with the administration so that those entities can have an arm’s length if they choose to from having anything to do with getting close to that coverage. And I’ll talk a little bit more about that. But at the same time the people who work for them will be guaranteed the same coverage that the rest of us get.

So that’s the outline. The devil of course is always in the details. And now I’m going to move to the sex part of the talk. And I’m sorry it’s not going to be the sexy but you know that’s my work. It’s pretty clinical, not very exciting. Now obviously contraceptive services does relate to sex which most people do have at some point in their lives. And while most people think about the social and economic reasons to prevent or delay pregnancy, that’s what we think about in terms of being able to go to law school, stay in law school, get a job, get a better job, make more money all of those things. There are also important health related reasons to be able to have control over your own fertility. And Senator Barbara Mikulski, my home state senator recognized this and she was the one who offered the Women’s Health Amendment to the preventive Health Services Amendment to make sure that some Health Services that were specific to women’s preventive health needs were also going to be covered under the Affordable Care Act.

Contraceptive services while they were mentioned during the senate debate on this were not explicitly covered by or stated in the amendment but they were clearly implied. The ideal all along for political reasons and we’re all working with Senator Mikulski on this was to make sure that they were covered by without saying so overtly so that that wouldn’t jeopardize passage for the amendment and leave the process to an evidence based process later on to determine whether or not contraceptive services fit under the definition. And that’s exactly what happened. After the amendment passed in the act passed then this decision about what the scope of the Women’s Health Amendment would cover was essentially Department of Health and Human Services contracted that out to the Institute of Medicine. In over a period of eight months lots of hearings, expert panels they came out with key recommendations that said the following services must be covered under the women’s health amendment: HIV and screening for sexually transmitted infection, coverage of the HPV vaccine which prevents cervical cancer, counseling for adolescents on reproductive health issues, prenatal care, well women visits, counseling and equipment to support breastfeeding, domestic violence screening, and contraceptive services and supplies. The IOM’s two key conclusions word about contraception. Contraceptive services and supplies are essential Health Care for women because making them more accessible and easier to use is key to reducing unintended pregnancy in the United States. It seems self-evident but believe it or not it’s not always evident to everybody. And secondly preventing unintended pregnancy is critical not just for social and economic reasons that we all know but also for the health reasons that I was alluding to before because pregnancies too closely spaced are linked directly to negative birth outcomes such as low birth weight and preterm birth.
I’m going to skip over this part because I’m taking too long building up to the better stuff. But basically it important as a matter of background to keep in mind that preventing unintended pregnancy has always been a longtime Federal priority for decades now. The Healthy People Report that I allude to in there is something that comes out every 10 years and that identifies preventing unintended pregnancies as a key public health priority for the reasons I just said about preventing low birth weight. The Centers for Disease Control and Prevention declared family planning to be one of the top public health achievements of the 20th century along with vaccinations, safer and healthier food, fluoridation of water and motor vehicle safety. And there is a host of Federal programs that reflect the premise that family planning is basic preventive care.

Now our opponents to concede, for the most part, that this is all true. But then they turn around and say but we can prove to you that family planning clearly doesn’t work because half of all pregnancies in the United States are unintended. And that is true. In fact, contraception and using contraception is much harder to use well than it seems that it should be. The average woman in the United States wants to have two kids but in order to do so she needs to spend about five years being pregnant or trying to be and 30 years avoiding it. That’s hard. Now what I have up here however shows that when used consistently and correctly using contraception really does dramatically reduce the incidence of unintended pregnancy. In any given year, the 2/3 of women who do use contraception consistently and correctly account for only a tiny sliver, 5%, of the roughly three million unintended pregnancies that occur each year. The other 95% of the unintended pregnancies that of her in the United States each year result from the women who either use no method of all, that’s I think 16%, and then the rest of that 95% do use contraception but may do it intermittently, may not use it correctly. And a lot of the reason for that is cost. And herein lies the problem and this brings us up to the Affordable Care Act. Contraception is expensive to use. Many of you who are still in your reproductive years know that. But it’s very cost effective to cover under insurance.

The opponents of contraceptive coverage guarantee argue that contraception is everywhere. It’s ubiquitous. So why do we have to mandate it and why should it be provided for free? Well, that’s because cost is a real barrier. The average copays that a woman will pay over the course of the year for using the pill is $600 out of pocket, $1000 out of pocket or so to use an IUD, one of the most effective methods of contraception out there. We know that there have been studies demonstrating that the lack of insurance is significantly associated with reduced use of prescription methods. Having insurance coverage makes it easier to keep filling the prescription month after month. And equally, maybe even more important, it levels the playing field so that women can make a choice about whether they want to use an IUD or a more effective method which is always more expensive. And having that coverage up front that eliminates those upfront costs so that she can really make a decision about what is best for her at this stage in her life. And for insurers coverage is a very good deal. We know that through the National Business Group on Health they’ve done a study, they represent large employers, they’ve done a study actually more than one concluding that covering contraception saves companies more than it costs them in premiums because of the expenses that companies do not incur for unintended pregnancy, maternity and childcare not to mention the indirect costs to companies of employee absences in reduced productivity. So that’s on the private insurance side. When it comes to public insurance like Medicaid we at the Guttmacher Institute have done many studies over the years documenting the cost benefit of investing in family planning. A dollar invested in family planning Federal programs saves almost $4.00 in short term Medicaid expenditures related to births from unintended pregnancies. The other point I need to make here, I put free in air quotes, because there is at least one major political candidate out there who is referring to this as ‘free stuff’ that women are angling to get. And I think it’s important to understand the concept that even mandating coverage without copays doesn’t make it free. You’re paying for it in your premiums. What we’re talking about is no additional out of pocket cost, and as I said at the beginning, not only for contraceptive services but for mammograms, childhood
immunizations. These are other services that the Congress in its wisdom has determined that either lowering or removing these copays is extremely important as a matter of public policy in order to facilitate access to these preventive services that I think we all agree is for the public good. So that’s all I had to say about the sex part.

Now moving on to religion, this is where the battle lines really got drawn and I’d say in full as of last September. It was last September that the department of health and human services promulgated what was called the interim final rule on the contraceptive coverage issue that essentially totally mirrored what the Institute of Medicine recommendations were back in August. One thing HHS did that was not addressed in the IOM report was to come up with a refusal clause that as I mentioned in the beginning exempts houses of worship and churches from having to comply. This was not something that was discussed or addressed in the legislation although I should point out that it was contemplated. There were senators who had amendments that would have exempted not just churches but a lot of entities from this requirement and they did not offer that amendment. So it’s not like Congress hadn’t thought about it but they didn’t act on it. Nonetheless HHS, I would say for obvious political reasons, made a judgment and they decided to try to defuse some of what eventually was not really diffusible to try to at least take churches out of the equation. But that didn’t make anybody happy. Our side wasn’t happy because that meant that some women were not gonna get coverage if they were unlucky enough to work in a church even if they weren’t necessary believers. Maybe they were the janitor in the church and yet they would lose out. So we weren’t happy about that. And needless to say that the official religious establishment most notably the U.S. Conference of Catholic Bishops thought it was only a token opening and not nearly sufficient so the battle lines were drawn.

Now of the conservative religious groups approach was from the beginning and continues to be to trivialize contraception and to trivialize pregnancy prevention, promoting only the issue about free exercise of religion. As you see in this excerpt from a comment letter of the U.S. Conference of Catholic Bishops they argued what I would say are to counter factual points. One they assert that pregnancy is not a disease so therefore prevention of pregnancy does not merit insurance coverage. That’s their first argument. Their second argument is that covering contraception also means covering sterilization and what in their mind they view as abortifacients such as emergency contraception and oral contraceptive pills. So that’s the case they made at the beginning. They continue to make that. I’m not going to get into the science of EC. We actually have a pharmacist here who knows all the ins and outs of this but let’s just assert for the record that from the FDA’s point of view it was approved as a method of contraception. That’s what it is. It cannot interrupt an established pregnancy end of discussion as a matter of science. As a matter of religion, that’s a separate matter but we’re talking science here when it comes to Health Insurance and so I don’t have any more to say about that.

On January 20th, that’s when the White House announced that it was going to go forward with its original plan to limit the exemption only two churches and houses of worship and that’s when, if you’ll pardon the expression, holy hell really did break loose. So that led to lots of sturm und drung in the media and the infamous hearing by chairman Darrel Issa. I know this picture has been seen around the world many times and perhaps you’re a sick of seeing it as I am but it really speaks volumes for how this kind of broke open into the war on women in very stark terms. This was a hearing that Issa had put together that was supposedly about religious liberty and not about contraception at all and that was the reason that you see them in the first panel who are taking the oath are all religiously affiliated if not representing religious organizations outright. And that was the reason that chairman Isso refused to allow the witness put forward by the democrats, Sandra Fluke, who has also become sort of an unwitting media star in all of this. She just graduated from Georgetown Law School as you probably know she is very active in law students to reproductive
And she was deemed not qualified because she was not invited by the democrats as an expert on religious liberty. She was there to talk about the issue of contraception.

So the hearing went forward Carolyn Maloney the congresswoman from New York was the one who coined the famous rhetorical question that we hear a lot still. In fact the women are all sitting behind the men who were standing up here so that’s where they are. But they were not there on the first panel. So that’s when the politics of this got even more explosive. Now this is a little bit out of chronological order but it’s important to just backup a couple of weeks. And that’s when the President held a press conference to say that on reflection he decided that she was going to reconsider the rule that the White House had put out on January 20th because the war on religion was raging full blown up until this point. I’m sorry to keep talking about the U.S. Conference of Catholic Bishops but indeed they are the main lobby. And I would call them a lobby out there arguing against this rule. This is not a monolithic view of the religious or faith community. There are many, many faith groups who take a different view from the Catholic Bishops and I would also point out that so do many Catholic organizations take a different view from the Catholic Bishops. During this whole fight that was leading up to the White House take to as I call it that’s when even liberal Catholic pundits on television and in the media who are pro contraception recognized that disconnect between the church and the flock when it came to contraceptive prevalence our own studies showing that 99% of all women at reproductive age have used contraception at some point in their lives and Catholic women use it as frequently as anybody else. It still didn’t matter as much as what was perceived as an affront against the church. And so that’s when president Obama came out with his revised plan which I think was very wise in retrospect and helped quell things quite substantially. And that’s when he said, ‘whether you’re a teacher, a small businesswoman, a nurse, a janitor no woman’s health should depend on who she is or where she works or how much money she makes. Every woman should be in control of the decisions that affect her own health, period. If a woman’s employer is a charity or hospital that has a repurchase of Egyptian to providing contraceptive services as part of their health plan the Health Insurance Company not the hospital, not the charity will be a required to reach out and offer the woman contraceptive care,’ he said free of charge I wish she had and use those words but without copays and without hassles. ‘Religious liberty will be protected and a law that requires free preventive care, preventive care [without copays] will not discriminate against women. In other words the administration has put forth a position that guarantees all FDA approved methods without additional cost to the woman but in a way that takes into account the religious views of employers. No employer has to provide contraception, has to pay for it, or has to cover it directly.’ And that was enough to satisfy the catholic health association with the association of Catholic hospitals in the United States, catholic charities them major social services organization of the catholic church and the association of Jesuit colleges and universities. So there cool with this.

But the fight continued as you know so Sandra Fluke was invited to a rump hearing since she wasn’t allowed to testify at the main hearing and this was a hearing that was organized by minority leader Nancy Pelosi which was just setup to allow Sandra Fluke to have her say. The U.S. Conference of Catholic Bishops and other conservatives fundamentally opposed to the affordable care act itself continued to wage the battle as I mentioned. And they made two arguments against even the revised rule. First they argued that the accommodation that the White House described is nothing more than an accounting gimmick, which I’ll address later. And they also argued that while people working at a Catholic hospital and students attending a Catholic university well they have a choice and if they want contraceptive coverage, they should work somewhere else or they should go to another law school. That’s the one that Sandra Fluke took on in her statement. First she spent a lot of time talking about the high cost of contraception to students. And I think you are all pretty aware of that yourselves so I won’t get into that part of her testimony but she did answer that question about ’well just go somewhere else’. She said, ’We did not expect that women would be
told in the National Media that if we wanted to comprehensive insurance that met our needs not just those of men that we should have gone to school elsewhere even if that meant a less prestigious university. We refuse to pick between a quality education and our health. And we resent that in the 21st century anyone thinks it’s acceptable to ask us to make this choice just because we are women’, pretty eloquent statement. And I think that I would add to what Sandra said in terms of the employees side this notion that in this economy that a woman applying to be a floor nurse in a Catholic hospital for a cafeteria worker has any leverage back to fall to walk away from a job because it doesn’t have contraceptive coverage well they’re just not living in the same world the rest of us are in.

So what happened next? Well you probably heard that there was a big fight about trying to undo the rule that took place in the United States Senate. Speaker Boehner at first said that he was going to take this on in the house but then he ended up deferring to the senate to see how that played out and as you probably all know it didn’t play out very well from its proponents’ perspective. There’s an amendment written and put forward by Senator Roy Blunt which I guess is aptly named. He is a republican from Missouri that he put out on the senate floor an amendment that would have exempted any employer from the contraceptive coverage the requirement. This would have allowed any employer to deny contraceptive coverage for any reason, not just contraceptive coverage let me clarify that. It’s would have allowed any employer to deny coverage for any service for any reason religious or moral-any reason, any service, any employer. In fact this was drafted and was strongly endorsed by the U.S. conference of catholic Bishops it upped the ante as I allude to hear way beyond contraception and way beyond religious institutions even to extend to individuals in fact the general counsel of the Conference of Catholic Bishops had stated that it’s what we’ve since dubbed that taco bell rule he said well if I were running a taco bell and I object to contraceptive coverage I should not be forced to have to cover for my employees. So that obviously would have completely not only gutted the contraceptive coverage requirement it would have allowed employers to that essentially opt out of any requirement under the Affordable Care Act. So for the contraceptive coverage reasons and the huge hole that it would have driven through the entire a affordable care act even in this segment was able to vote down this amendment and that was defeated on March 1 leaving the contraceptive coverage rule intact.

As you can see your senator Patty Murray was sent role in defending the rule and opposing the Blunt amendment. She was one of our real heroes in this fight. There are a couple of important issues that came up in this discussion that I think are worth highlighting. One is that the proponents of the Blunt amendment argued that without their amendment, their essential total exemption amendment, this still makes employers complicit somehow in being forced to cover services that they might find morally or religiously objectionable even though as I stated earlier the rule does not require any employer to pay for, cover, refer, have anything to do with the coverage of contraception. And I would also submit that even though employers to contribute to Health Insurance premiums for their employees that the premium that the employer kicks in is really no more the employers money than your salary is. This is an earned benefit. And so the logical extension of employers being able to say ’we own that premium and therefore we get to determine what kind of insurance that you get to buy’, well the extension of that is ’well we pay your salary so we get to decide what to do with your own money’. It’s really not all that different. So that’s one point that I think is worth highlighting. Obviously the main arguments that have been used against the rule come under the first amendment realm. And the argument has been that this is an abridgment of religious liberty. In reality though I would submit and I’m not an expert other people in this room are the, that what this Blunt amendment would have done would have provided a license to use religion as a tool to discriminate and deny as many people as possible easier access to contraception. In fact Washington and Lee law professor Tim Jost who specializes in health law disputes the first amendment claim completely and he also rejects that gimmick argument that I
mentioned earlier. And this is what he wrote recently, "This rule is not a war on religion rather it is an attempt to accommodate a serious public health need and a sincerely held religious and moral conviction. The regulation does not require anyone to use contraception or demand that any religious organization to pay for it. If unsatisfied critics object to not being able to actively prevent employees from obtaining contraceptive coverage altogether effectively violating the religious liberty of their employees by imposing their own beliefs on them, that’s a separate matter. A combination of religious belief and neutral laws of general applicability is not an easy task. For two centuries the United States has been conducting an experiment virtually unprecedented in human history: a government that neither establishes more forbids any meat reaches that’s sometimes as with conscientious objection toward taxes it has offered no quarter to minority beliefs at all. In other situations the like the Preventive AServices amendment the government has gone a great distance to accommodate the minority beliefs while also trying to accommodate the needs of the majority."

I would also point out that in the states that have contraceptive coverage laws, this being one of them, the issue of religious exemption hasn’t come up at all in eight of them. Washington State has a mandate for contraceptive coverage and it has no an exemption whatsoever. Then, there are other states where this was a hard fought issue like in California and New York and it went all the way up to their state supreme courts. And their courts said that the rights of the individuals ultimately must prevail because there should be no special treatment to institutions that operate in the public domain.

The other main legal argument that’s being put forward against the rule comes under the rubric of the Religious Freedom Restoration act. But I’m told by my legal colleagues that this also should pose no problem to the rule because there is no substantial burden of religious exercise here. Who’s not being able to exercise their religion by this rule? There is no interference at all with religious exercise and there is no burden since the rule doesn’t compel employers to do anything. Moreover RFR provides for the difference when there is a strong compelling interest and there certainly is here at least two. One, the public health rationale for preventing unintended pregnancy. Secondly ending gender discrimination in Health Insurance coverage.

As you know, contraceptive coverage is eminently doable, practical, and politically acceptable. In fact, it used to be as I mentioned at the beginning, when we started in this back in the early nineties, contraceptive coverage laws were considered to be politically popular precisely because we have always been a nation so convulsed by abortion politics. It used to be that this was the rational response to doing everything possible to decrease the need for abortion, to reduce the likelihood of abortion through increased access to contraceptives services. So where we’re at today is the 28 states have laws requiring contraceptive coverage. Washington State, as you may know adopted its policy in 2001 and that came after an EEOC decision that emanated from a case here in 2000 that probably some of you may even have been involved in for all I know. This was a case that found that singling out contraception from prescription drug and preventive coverage is a form of sex discrimination under title seven. And there was no exemption made for religious employers. So that has been the official EEOC policy since 2000. And Washington State changed its policy in 2001 to comply with that.

Now of the 28 states that have laws, 23 of them have exemptions that essentially mirror or are even narrower like in Washington State than what the Federal rule would propose. There are only five that have much broader exemptions that would be superseded by the law. Though the states with laws, those are the orange ones, that tare essentially complying with four or even better I would say to put a value judgment on it than the Federal rule. And then the lighter of orange states are the ones that are going to have to be superseded because their exemptions are far too broad.
Now getting to the more interesting part about what we really don’t know still. And when I’m thinking about the known unknowns I am always remembering our long lost Donald Rumsfeld Secretary of Defense I don’t know if any of you remember him. But he was famous for his quotes that I have to read because it’s just so wonderful. ‘there are known no loans these are things we know that we know are known unknowns that is to say there are things that we know we don’t know but there are also unknown unknowns. There are things we don’t know we don’t know.’

I hope that I have helped to elucidate a lot of work to be known knowns are but now I want to get into the really interesting questions about what the known unknowns are. And these are the legal, practical and political most of which are now out for comment and discussion and litigation and fighting about in the political sphere.

The first issue by identified here is state preemption and I touched on that here by way of the previous maps. It’s going to be complicated to figure out how the Federal rule will relate to existing state laws. There are many state laws as I’ve indicated. So that means that in states like Washington and California we want to make sure that those laws take precedence, still get to be in effect even with the Federal rule. And we think that that should not be a problem, we think that’s the intention of the administration but that needs to be clarified. Now at the same time we want to make sure that the Federal overrides the exemptions there are a very broad enough to drive a truck through like in Arkansas and North Carolina, Arkansas and a few other states.

And in addition to that there are other states like Arkansas and North Carolina that have decided in their wisdom what counts is real birth control and what doesn’t. So in Arkansas and North Carolina they’ve defined out emergency contraception from their contraceptive coverage laws. They’ve decided that EC is not really contraception that it’s the abortion. So we’re arguing to the administration that the Federal rule passed to supersede that. That states are not going to be in a position to make up their own definitions of what’s contraception and what isn’t. That’s an important thing we’re looking for. We also want to make sure that coverage for nonprescription methods would also be included by the rule. As you know emergency contraception is available behind the counter which means you can get it without a prescription. But the way insurance works as you also know in order to get coverage for almost anything you need a prescription so how or we gonna make that work so that EC is covered by a new Federal rule? We also are submitting to the administration that vasectomies should be covered the same way that tubal ligations are. Even though the statute talks about women’s Health Services, we would argue that even though there are obviously not for women, they’re cheaper to perform. They are less intrusive. And so that there is no rationale that in a couple if the man wants to have a vasectomy that that shouldn’t be covered by this contraceptive rule. These are all things that still have to be determined. One of the real sticking points is the issue of the self-insured employers. These are situations where the employer and the insurer are the same entity. This is really one of the biggest sticking points that has yet to be resolved. The question is what is the mechanism for self-insured religiously affiliated institutions to have the distance that they want but their employees are still getting the coverage that they are entitled to? There are lots of different ideas being thrown out there the main one that’s been discussed so far: most of these self-insured employers have third party administrator managing their plans but they are administrators they are not insurers. And so we’re not quite sure how receptive the third party administrators are going to be to take on managing claims and providing insurance coverage. That’s not really what they do. So that is still to be determined.

There is the issue of what even counts as a religiously affiliated organization for when it comes to the safe harbor period, which is between now and August 1 2013. How do we decide what is a religiously affiliated organization? There is a religiously affiliated television station that his party to one of the lawsuits now. Do they count? What about for profit industries? There is actually a mining company in misery that claims that it should qualify under the religious exemption because the
owner of the company is a devout Catholic and so he is arguing that he should be able to qualify. And what are the rules? There really are no clear rules about how to define who counts.

Now from Gutmacher’s perspective our interest, we’re not an expert on church/state issues that’s not our thing. We are looking at it from the perspective of the end user, of the women and men who need this coverage and are deserving of it. To be honest it doesn’t really matter to us who counts as a religiously affiliated employer because everybody who works for them under this rule is still going to get coverage. But our friends at the ACLU feel differently about this. They are getting very heavily involved in trying to come up with rules. The administration is saying that whatever rule they come up with has no precedential value but you know how that goes. They are saying that whatever definition they come up with will only be limited to this instance but as a legal and political matter I’m not sure you can really safely say that. And our friends in the other colleague organizations argued fairly that the more institutions that can exempt themselves from directly providing coverage, the more complicated this whole scheme gets. And that just increases the risk for more people to fall through the cracks and so to that end we are certainly with them in trying to come up with clear, understandable and probably as narrowly defined rules as possible.

There is an issue of notification of the benefit for those people who work for a Catholic hospital or Georgetown university. How are they going to be informed that they have this coverage? Their employer is not obligated to say anything, do anything, cover anything. So we want to make short in the rule that whoever is going to be taking care of the insurance has a way of, in a timely manner, notifying all the employees and dependents that this coverage exists and that it’s available without additional cost.

There is the question of enforcement of this rule and that’s a real known unknown and that actually goes way beyond the contraceptive coverage rule because there is no sense of how to enforce any of the Affordable Care act for that matter. And a lot of that’s going to have to shake out over the next couple of years. Then there is the whole issue of litigation. Of course, there is the Supreme Court decision on the affordable care act itself that is coming in a couple of months. And in addition to that area separate litigation that has been filed on this rule. There are nine pending cases at this point my colleagues at the center for reproductive rights and ACLU tell me that only one of them is ripe. In Ron’s class this morning he was talking about ripeness and all that stuff. I think eight of them are not ripe because eight of them are nonprofits and they already have that an exemption until August 2013. But this one mining company in Missouri that’s a ripe one and so we expect that case to go forward. But they are making the arguments that I pretty much touched on earlier around Religious Freedom Restoration act and the first amendment so my colleagues are still fairly optimistic but in these Federal courts you never really can know. And then of course there’s the presidential and congressional elections that are coming up in the fall that could determine the fate of everything. This is a rule that was promulgated by this administration it can, not that easily, but anything can change when you have a new administration in charge of writing the rules.

So with that I would end with this quote that has been variously attributed to either Mark Twain or Will Rogers so I’m giving them both credit for it. It’s one of my favorite quotes because it does so much described much of the work that I do and encountered in Washington. There are a lot of people who think they really know everything there is to know about these issues. I that I’ve helped to decrease, as I said, the amount of known unknowns, increased your level of knowledge of the known knowns. And with that I’m happy for discussion and questions.

**Audience one**

I have a question and that’s on medication on Medicaid and how it can be used’
Sandra Cohen

No you’re talking about Medicare. I don’t know if everybody can hear the question. The question was how could anybody on Medicaid take advantage of contraceptive care because that’s for seniors but that’s Medicare. Medicaid is the program designed for low income people and although there is a little known fact that maybe one third or even more of the money that’s spent on Medicaid is for seniors in nursing homes who are not low income but become low income because of Health Care costs. But to answer your question no Medicaid is for all low income people.

Audience one

Thank you

Sandra Cohen

You’re welcome.

The question was: Isn’t it true that attitudes towards abortion rights and I guess to some extent contraception are getting more conservatives as with the younger generations?

Unfortunately that’s true. A lot of us have tried to understand what’s going on and frankly you could probably enlighten me more because you and your colleagues and friends are closer to that age group than I am. I guess my gut reaction to that is that these are issues that most American women just take for granted and don’t think about very much. If anything this whole fight over contraceptive coverage, in my view, has had a perverse benefit in reawakening the public to something that we’ve always taken for granted, that we didn’t even see as a Health Care issue even though we had to use prescriptions to get our contraceptives. I think it’s fair to say most of us don’t even think about it as Health Care. We think about it as just necessary for our daily lives. As far as the abortions rights issue I don’t know what to say about that except that again I think that the onslaught of attacks on abortion rights and the fact that we now have a whole middle swath of the country where abortion is getting to be almost impossible to obtain but that’s got to have an effect. There may be a lag time but we know from our work internationally, and this is no surprise I’m sure too many of you, that laws against abortion have a very little to do with how much women need it or the lengths that women will go to to end a pregnancy that they do not want to have. So it’s unfortunate if we have to remind Americans of what it was like in the days before Roe and our own country but you can look around the world and see it today in Sub-Saharan Africa, and in many places in Latin America where the prevalence and incidents of abortion are actually higher in this country even though it’s illegal. So all I can say is I hope that information will help raise consciousness and change minds but I don’t have any better explanation than that.

That’s a good question and a kind of depends on the day I guess is the answer I would give you. I guess I feel a little hopeful after this ride over the last few months as I mention in raising awareness again about the importance of contraception in our lives. I don’t know how long that’s going to last. The American attention span is very short on these issues. So I still think it’s very fragile, this kind senses at that I think we have at this moment. And since I do some traveling around the world I’m always reminded especially when I go to Europe and my European colleagues looked at me and amazement about what is going on in this country. Why we’re having arguments in this country about not just contraception but even a abortion rights which they consider to be basic Health Care and pretty much a nonissue throughout Europe. And I guess on that score I feel that on a global level the movement is really moving forward to. The United States is very much two steps forward one step back because of our polarized politics and the fact that we now have a situation where positions on issues around reproductive rights have been very identified with the two parties. When
I started in this field 30 years ago there were lots of her choice republicans and there have always been and continues to be pro-life, anti-abortion democrats. This was an issue that transcended party. It’s not that way anymore. And so because there is such a partisan tinge to all of this, which is less true on marriage the quality movement, it started that way and I think that has helped its success, but on abortion rights in particular it is so partisan that you have a republican party where no nominee or no one at the head of the party will ever be allowed to be pro-choice. And the same is true on the democratic side where no one can not be pro-choice. So it’s made the politics so much more intractable. But on the global level where really moving forward. And just because I’m in Seattle and speaking about the gates series at the gates building at the University of Washington Law School and I often do quote Melinda Gates who is now committing the gates foundation in a big way to support for family planning in the developing world. And she is the one who has said you know these issues are really only controversial inside the beltway in the United States. Contraception is just not controversial outside of the beltway. And that’s really true. And I think that we’re going to be able to get that back although frankly and some states like Texas and others they are out there to try to disqualify Planned Parenthood’s. They just lost in Federal Court today by the way. Planned Parenthood won a preliminary injunction to prevent taxes from cutting it off from its women’s health program but you know baby steps. But I’m getting a little bit far afield. I think to answer your question today I’m feeling hopeful and I’m feeling better about the global sphere the United States if we just kind of have to deal with the herky jerkiness of our politics.

I’m not aware that Alec has worked on these issues but maybe Lisa would know more I don’t know I’d never heard of them until the recent kerfuffle around the standard ground laws but I’m sure that my colleagues in the legal side know about them I just went. The groups that I do know about our Americans united for life they are sort of the legal arm of the anti-abortion movement. They write model legislation that they send all around the country. And the national advocacy groups in addition to the Council of Catholic Bishops is the family research council the national right to life committee of course. I’d say those are probably the big ones. I hope that none of them are offended if five forgets to name some of the other big ones who are main opponents. But they are out there they are well organized they are in many of the state’s I don’t know how much of a problem they are out here where Washington State is really bucking the tide in trying to mandate abortion coverage in Health Insurance as opposed to prohibit eight which is what is going on in so many of the other states.

The other thing I should clarify. Thank you for those clarifications about Washington’s policies. I do lump it in there with laws, but I was aware that it was a policy that emanated from the EEOC case is to state the obvious that even the laws and policies that do exist out there none of them prohibit copays that would be new for everybody. So even though contraceptive coverage is guaranteed for residents of Washington State you still have to pay copays until the Federal rule goes into effect on August 1. And that means that all insurance policies written after August 1 which would be effective in January 2013 would not allow for copays for contraceptive services.

I also wanted to say, I’m sorry. I mentioned earlier that since I’d talk about Sandra Fluke. You may know that she had organized a pretty serious pressure campaign on the president of Georgetown to come into compliance with the contraceptive coverage ruled for this August which of course he doesn’t have to do but of course he could do. And he just announced on Thursday that he would not allow student Health Insurance policies for the law students or any of the students at Georgetown to have contraceptive coverage yet. He has the rights to defer until next August and he is exercising that option. And I find that particularly strange because the employees and staff and faculty at Georgetown already have contraceptive coverage in their policies and those are policies to which the university contributes premium. But for the students that paid for the premiums entirely out of their pocket, they will not be entitled to buy policies through the university that
cover contraception for contraceptive purposes. So the battle continues.

That’s not a short answer but I’ll try to make a really short. Obviously there has been a huge escalation in antiabortion laws since the 2010 elections. There has been a lot more activity in Congress all on the health side which is controlled by social conservatives. And in the state’s we have seen a huge increase, I can’t even remember what the percentage was, the increase over 2010 but in 2011 there were 92 new antiabortion laws enacted among the state’s nationwide. I think that was something over 60 or so that had been enacted the previous year. And we also have a record number, I think over 1000 bills that have been introduced to restrict mostly abortion rights but not just that. As you know they have been going after planned parenthood affiliates trying to disqualify planned parenthood from eligibility for family planning funding etc.. So even with the enactment of many of these laws the difficulty with challenging them legally and I you know you’re getting a little bit out of my area of expertise when it comes to the legal side. But I can say that I know that my colleagues feel that sometimes it’s hard to find plaintiffs. Sometimes these are coming from states where if there is a ban for example on all abortions after 20 weeks gestation. This is clearly unconstitutional but if there are no providers providing abortions later than that then you have a plaintive to bring a case. There is also a worry about bringing bad precedent for other states. So I’m not the best person really to address all of that but I think these are difficult strategy questions not just legal questions. But in the meantime the women who live there as I said as you look at our website and look at the situation and the whole middle of the country that is essentially balkanize now where there’s so many antiabortion laws particularly around abortion but now sometimes even restricting access to contraception, contraceptive services, or providers that the practical access to these services is going away. Even if legally they’re still entitled.

**Dean Michelle Storms**

Let me just make a couple of quick observations the first one is that I honestly did lose track of the time a little bit. I was really appreciating the discussion that we were having with folks and I didn’t realize I should have stood up and said all that’s day we’re done. So thank you for that. But also really as this is all been happening in the news recently, I think many people have been a little baffled about how all the pieces fit together and what made sense and what was going on. And I’m so grateful to you for just explaining it and just really making that clear and helping us get some insight not only to what has been happening sort of the national level but things that we can think about your home and really need no the disclaimer about not being a lawyer if the work of achieving justice is really something that has to be done in partnership and across disciplines so I just want to express gratitude to you for coming in sharing what you do in your position and helping us to do better for those of us were going to become lawyers as soon to be lawyers were already lawyers. So thank you and please join me again in thanking Susan Cohen.

_Last updated 7/17/2012_