

## Note

### END THE BLOODY TAXATION: SEEING RED ON THE UNCONSTITUTIONAL TAX ON TAMPONS

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**ABSTRACT**—Why was there so much activism in the United States, and across the world, to end the tampon tax in 2016? This Note situates the movement to end the tampon tax within a broader history of feminist activism related to tampons and menstruation. It also analyzes the constitutional dimensions of the tax on feminine hygiene products and serves as a litigation guide for plaintiffs claiming that a state, city, or county sales tax on feminine hygiene products violates the Equal Protection Clause. Lastly, this Note demonstrates the hardships women face paying this tax and encourages state legislatures and city councils to create an exemption for feminine hygiene products in their respective tax codes.

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INTRODUCTION

Women in the United States, Europe, and Australia protested their nations’ respective “tampon taxes” in 2015 and 2016 with a significant amount of success. These advocates vastly increased the amount of awareness and media attention on the tampon tax, which led to the elimination or reduction of the tax in some American cities and states, Canada, and France.<sup>1</sup> The so-called tampon tax is the tax levied on feminine hygiene products: tampons, sanitary napkins, and menstrual

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<sup>1</sup> Examples of recent article headlines include: “No Taxation on our Menstruation!,” “The Fight to End Period Shaming Is Going Mainstream,”; and “Periods Are Not a Luxury.” See, e.g., Maggie Stamets, *No Taxation on Our Menstruation!: This Lawsuit Could End the Tampon Tax*, BUST, <https://bust.com/feminism/15819-no-taxation-on-our-menstruation-this-lawsuit-could-end-the-tampon-tax.html> [https://perma.cc/Y53P-5V38]; Abigail Jones, *The Fight to End Period Shaming Is Going Mainstream*, BUST (Apr. 20, 2016, 6:01 AM), <http://www.newsweek.com/2016/04/29/womens-periods-menstruation-tampons-pads-449833.html> [https://perma.cc/HW2M-5QJP]; Cristina Garcia, *Periods Are Not a Luxury: California Assemblywoman Cristina Garcia on Why She’s Still Fighting to Make Tampons and Pads More Affordable and Accessible*, COSMOPOLITAN (Jan. 26, 2017), <http://www.cosmopolitan.com/politics/a8642997/tampon-tax-california-periods/> [https://perma.cc/BML6-3WPZ].

cups.<sup>2</sup> Consumers and legislators across the world have openly questioned why items like dandruff shampoo and lip balm are often exempt from state and federal taxes as “medical appliances” or “necessities” while tampons and pads continue to be taxed in most states. This questioning finally came to a head in 2015 and 2016 when groups of women in New York,<sup>3</sup> Florida,<sup>4</sup> California,<sup>5</sup> and Ohio,<sup>6</sup> filed class action lawsuits contending that state taxes on feminine hygiene products were unconstitutional. Then, state legislatures in New York,<sup>7</sup> Illinois,<sup>8</sup> and California<sup>9</sup> passed bills exempting tampons and other feminine hygiene products from state sales taxes. At the same time, Canada exempted feminine products from its sales tax,<sup>10</sup> and efforts to abolish the tampon tax continued in the United Kingdom<sup>11</sup> and Australia.<sup>12</sup> Even President Barack Obama commented on the tax, suggesting that the tampon tax exists because men were the ones debating and ultimately passing state tax laws and perhaps were either unconcerned with<sup>13</sup> or ignorant of women’s need for feminine hygiene products.

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<sup>2</sup> See *Period Products: Information About Tampons, Pads, and More, Health Guides*, CENTER FOR YOUNG WOMEN’S HEALTH (last updated May 6, 2016), <http://youngwomenshealth.org/2013/03/28/period-products> [<https://perma.cc/98GX-PNDR>] (giving explanations and definitions for menstrual products including tampons, pads, period panties, and menstrual cups).

<sup>3</sup> See Complaint, *Seibert v. N.Y. State Dep’t of Taxation & Fin.* (N.Y. Sup. Ct. Mar. 3, 2016) (No. 151800/2016).

<sup>4</sup> See Complaint, *Wendell v. Fla. Dep’t of Revenue* (Fla. Cir. Ct. July 6, 2016) (No. 2016-CA-1526).

<sup>5</sup> See Complaint, *DiSimone v. California* (Cal. Super. Ct. Mar. 23, 2016) (No. CGC-16-552458).

<sup>6</sup> See Complaint, *Rowitz v. Ohio Dep’t of Taxation* (Ohio Ct. of Claims, Apr. 11, 2016) (No. 2016-00197) (dismissed without prejudice). Refiled as class action. See Complaint, *Rowitz v. Ohio*, (Franklin Cty., Ohio Ct. Common Pleas Apr. 11, 2016) (No. 2016-CV-003518).

<sup>7</sup> S.B. 7838, 2016 S., Reg. Sess. (N.Y. 2016).

<sup>8</sup> H.B. 818, 2017 Gen. Assemb., Reg. Sess. (Ill. 2017).

<sup>9</sup> Assemb. B. 1561, 2015 Assemb., Reg. Sess. (Cal. 2016). The governor, however, vetoed the statute, arguing that the state needed the funds it would receive from the tax on tampons and pads. See, e.g., Erwin Chemerinsky, *Governor Wrong to Veto End of “Pink Tax,”* ORANGE COUNTY REG. (Sept. 22, 2016, 8:00 AM), <http://www.ocregister.com/articles/tax-729792-products-women.html> [<https://perma.cc/KRT7-DL3L>].

<sup>10</sup> Jason Fekete, *Federal Government Taking the Tax off Tampons and Other Feminine Hygiene Products, Effective July 1*, NAT’L POST (May 28, 2015, 4:11 PM), <http://news.nationalpost.com/news/canada/federal-government-taking-the-tax-off-tampons-and-other-feminine-hygiene-products-effective-july-1> [<https://perma.cc/29KY-KSL9>].

<sup>11</sup> *Tampon Tax: France MPs Back VAT Cut on Sanitary Products*, BBC NEWS (Dec. 11, 2015), <http://www.bbc.com/news/world-europe-35070148> [<https://perma.cc/FGP4-VHCE>].

<sup>12</sup> “*Tampon Tax*”: *Australia Decides Not [sic] Remove Controversial Levy*, BBC NEWS (Aug. 21, 2015), [www.bbc.com/news/world-australia-34013354](http://www.bbc.com/news/world-australia-34013354) [<https://perma.cc/BB7Z-TJBZ>].

<sup>13</sup> Elise Foley, *Obama Pretty Sure Clueless Men Are the Reason Tampons Are Taxed as Luxury Items*, HUFFINGTON POST (Jan. 15, 2016, 3:57 PM), [http://www.huffingtonpost.com/entry/obama-tampon-tax\\_us\\_569950f0e4b0778f46f94d97](http://www.huffingtonpost.com/entry/obama-tampon-tax_us_569950f0e4b0778f46f94d97) [<https://perma.cc/EBW6-A7ER>].

In the United States, each state legislature has the authority to determine its own sales tax.<sup>14</sup> Most states tax all personal non-real property through their respective sales taxes but carve out exemptions for certain goods, which are usually whatever the state defines as a medical appliance or a necessity. Sales-taxed items thus carry the inherent implication that they are luxury, nonnecessary goods. Sales taxes usually at least exclude groceries, food stamp purchases, and medical appliances.<sup>15</sup> Tax-exempt “medical appliances” can be a broad category, including products ranging from prescription medicine and insulin to lip balm and cotton balls, depending upon the state.<sup>16</sup> Some cities and states have additional exemption categories, such as agriculture supplies and clothing beneath a certain price point.<sup>17</sup>

Proponents of abolishing the tax on feminine hygiene products contend that access to tampons and sanitary napkins is a basic human rights issue, that these products are necessary medical goods, and that levying a tax on a gendered product is a violation of the Fourteenth Amendment’s

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<sup>14</sup> See *State and Local Taxes*, U.S. DEP’T OF THE TREASURY (last updated Dec. 5, 2010), <https://www.treasury.gov/resource-center/faqs/Taxes/Pages/state-local.aspx> [<https://perma.cc/G9NQ-FBZU>].

<sup>15</sup> See, e.g., FLA. DEP’T OF REVENUE, *Nontaxable Medical Items and General Grocery List* (Jan. 2016), [http://floridarevenue.com/Forms\\_library/current/dr46nt.pdf](http://floridarevenue.com/Forms_library/current/dr46nt.pdf) [<https://perma.cc/8R9E-FG7F>] (outlining the nontaxable medical items, common household remedies, and grocery items in the state of Florida, including items such as thermometers, bandages, earwax-removal products, bunion pads, lip balms, and virtually all grocery items); IND. DEP’T OF REVENUE, *Informational Bulletin #29, app. A* (Apr. 2016), <https://www.in.gov/dor/files/sib29.pdf> [<https://perma.cc/4J4N-8D83>] (clarifying that bakery items, baking chocolate, BBQ potato chips, frosting, ice cream, pickles, and trail mix are among the tax-free food items in Indiana); U.S. DEP’T OF AGRIC., *Important SNAP Information*, [https://www.fns.usda.gov/sites/default/files/Retailer\\_Notice\\_111412.pdf](https://www.fns.usda.gov/sites/default/files/Retailer_Notice_111412.pdf) [<https://perma.cc/GKG5-HQQB>] (explaining that Supplemental Nutrition Assistance Program (SNAP) users may purchase food items that are subject to sales tax but that sales tax “cannot be charged when SNAP is used to make the purchase”).

<sup>16</sup> See, e.g., PA. DEP’T OF REVENUE, *Sales and Use Tax: Taxability of Medical & Surgical Supplies* (June 3, 2008), [http://revenue.pa.gov/GeneralTaxInformation/Tax%20Types%20and%20Information/Documents/SUT/sut-taxability\\_medical-surgical\\_supplies.pdf](http://revenue.pa.gov/GeneralTaxInformation/Tax%20Types%20and%20Information/Documents/SUT/sut-taxability_medical-surgical_supplies.pdf) [<https://perma.cc/7HZM-2TX7>] (listing exempt items, including gauze pads); TEX. COMPTROLLER OF PUBLIC ACCOUNTS, *Tax Topics: Sales Tax Exemptions for Over-the-Counter Drugs and Medicines*, (Nov. 2012), <https://comptroller.texas.gov/taxes/publications/94-155.pdf> [<https://perma.cc/MQS6-RW5C>] (explaining that over-the-counter drugs are exempt from Texas state sales tax, including acne treatment products, hand sanitizer, antiperspirants, cold remedies, and cough suppressants, as well as wound care dressings, like adhesive bandages, gauze rolls and pads, and medical tape).

<sup>17</sup> Sarah Larimer, *The “Tampon Tax,” Explained*, WASH. POST: WONKBLOG (Jan. 8, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/01/08/the-tampon-tax-explained/> [<https://perma.cc/6BHZ-LJJ5>]; see also MASS. DEP’T OF REV., *A Guide to Sales and Use Tax*, MASS.GOV (last updated Jan. 27, 2017), <http://www.mass.gov/dor/individuals/taxpayer-help-and-resources/tax-guides/salesuse-tax-guide.html#exempt> [<https://perma.cc/TCK8-C9ZB>] (explaining that in Massachusetts, clothing “is generally exempt from the sales tax” but that “any individual clothing item costing more than \$175 is taxable on the amount over the basic exemption”).

Equal Protection Clause. The effect of the tax on women is enormous: the average woman is estimated to have roughly 450 periods in her lifetime, and since nearly every woman uses feminine hygiene products during her period, the additional cost imposed by state sales tax on feminine hygiene products adds up.<sup>18</sup> Many low-income women have difficulty obtaining feminine hygiene products and the Supplemental Nutrition Assistance Program (SNAP) does not offer funds that may be used toward purchasing them, forcing women with limited means to be resourceful—by using old rags, for instance.<sup>19</sup> Additionally, the very fact that tampons are used to absorb a bodily fluid during menstruation means the tax raises public health and sanitation concerns.<sup>20</sup>

Furthermore, feminine hygiene products seem to fit the tax-free categorization of medical appliances or necessities better than some of the existing items in those categories. For example, before the New York state legislature finally exempted tampons and sanitary pads from local and state sales taxes, Rogaine, birth control pills, condoms, bandages, dandruff shampoo, and lip balm had long been exempt due to their use as medical equipment or, more generally, to aid health.<sup>21</sup> Moreover, the U.S. Food and Drug Administration (FDA) classifies feminine hygiene products as

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<sup>18</sup> Jordan Gass-Poore, *Citing Gender Bias, State Lawmakers Move to Eliminate “Tampon Tax,”* NPR POL. (Mar. 6, 2016, 1:00 PM), <http://www.npr.org/2016/03/06/467377295/citing-gender-bias-state-lawmakers-move-to-eliminate-tampon-tax> [<https://perma.cc/WJ3K-PRT5>].

<sup>19</sup> Bryce Covert, *Most Homeless Women Can't Get Pads or Tampons. These Women Want to Change That.*, THINKPROGRESS (Apr. 22, 2015, 12:00 PM), <https://thinkprogress.org/most-homeless-women-cant-get-pads-or-tampons-these-women-want-to-change-that-fc8b983d0c98#.d9mdkjalw> [<https://perma.cc/AA7J-3ZU3>]. The Food and Nutrition Service (FNS) runs SNAP, the “largest program in the domestic hunger safety net.” *Supplemental Nutrition Assistance Program (SNAP)*, FOOD & NUTRITION SERV., U.S. DEP’T OF AGRIC. (last updated Jan. 30, 2017), <https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap> [<https://perma.cc/3YMX-MJ4P>]. FNS coordinates with various state agencies, educators, and local organizations to help those eligible for nutrition assistance access the program. *Id.*

<sup>20</sup> See Ashley Fetters, *The Tampon: A History*, THE ATLANTIC (June 1, 2015), <https://www.theatlantic.com/health/archive/2015/06/history-of-the-tampon/394334/> [<https://perma.cc/VHW4-NUQG>] (examining the complex history of the development of the tampon, its use for menstruation, and its role in public health crises).

<sup>21</sup> N.Y. STATE DEP’T OF TAXATION & FIN., *Drugstores and Pharmacies* (Aug. 5, 2014), [https://www.tax.ny.gov/pdf/tg\\_bulletins/sales/b14\\_193s.pdf](https://www.tax.ny.gov/pdf/tg_bulletins/sales/b14_193s.pdf) [<https://perma.cc/78QV-DWKL>] (Tax Bulletin: Sales and Use Tax, TB-ST-193); see *Verified Class Action Complaint at 1*, *Seibert v. N.Y. State Dep’t of Taxation & Fin.* (N.Y. Sup. Ct. 2016) (No. 151800/2016); see also John J. Flanagan, *Senate Gives Final Passage to Legislation that Would Eliminate the Tax on Feminine Hygiene Products*, N.Y. STATE SENATE (May 25, 2016), <https://www.nysenate.gov/newsroom/press-releases/john-j-flanagan/senate-gives-final-passage-legislation-would-eliminate-tax> [<https://perma.cc/UT6X-RBWZ>] (stating that prior to the inclusion of feminine hygiene products, “medicine, medical equipment, supplies to correct or alleviate physical incapacity, and products consumed by humans for the preservation of health” were tax exempt).

“medical device[s],”<sup>22</sup> yet most states with sales taxes exclude them from that category.<sup>23</sup> Tampons and sanitary pads are instead consistently placed in state tax regulations alongside cosmetic products and hygiene products—which the FDA has not categorized as medical appliances—like hand sanitizers, baby powder, shaving cream, and breath spray.<sup>24</sup> While efforts to abolish the tax on tampons proliferate, in most states, the tax continues unabated.<sup>25</sup>

The uproar over the tampon tax is more than mere annoyance that a product has not been properly recognized as a necessity. Rather, to tampon tax protestors, the levy on feminine hygiene products is shockingly discriminatory and a violation of the Equal Protection Clause. They see the tax as part of a larger pattern of governmental failure to prioritize women’s needs by both relying on revenues from taxes on a health care product that women use out of biological necessity and omitting these medical products from tax exemption. Furthermore, feminine hygiene products are a unique category of goods with no easy comparison. It is not simple to think of another medically necessary product used by virtually everyone of one sex but by no one of the other. As Erwin Chemerinsky wrote regarding the tampon tax, “[i]f the government were to say that only men or only women had to pay an additional tax of several hundred dollars a year solely because of their sex, that would be clearly an unconstitutional denial of equal protection.”<sup>26</sup>

In discussing these issues involving the tampon tax, this Note proceeds in five parts. First, Part I situates the movement to end the tampon tax within the broader history of feminist activism related to tampons and menstruation. Part II next outlines the 2015 and 2016 litigation and legislative efforts to eliminate the tax on feminine hygiene products in the United States and abroad. Then, Part III discusses the “exacting scrutiny”

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<sup>22</sup> See U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY AND FDA STAFF—MENSTRUAL TAMPONS AND PADS: INFORMATION FOR PREMARKET NOTIFICATION SUBMISSIONS (510(K)S) 13 (2005), <https://www.fda.gov/medicaldevices/deviceregulationandguidance/guidancedocuments/ucm071781.htm> [<https://perma.cc/HWY8-U37A>] (recommending that labeling for tampons comply with the required disclosures for medical devices).

<sup>23</sup> Suzannah Weiss, *12 States Without a Tampon Tax, Because People Who Menstruate Shouldn’t Be Penalized for Having a Period*, BUSTLE (Aug. 22, 2016), <https://www.bustle.com/articles/179914-12-states-without-a-tampon-tax-because-people-who-menstruate-shouldnt-be-penalized-for-having-a> [<https://perma.cc/B9DZ-FF3E>] (explaining that as of August 1, 2016, thirty-nine states taxed tampon sales).

<sup>24</sup> See, e.g., ILL. ADMIN. CODE tit. 86, § 130.311(c)(2)(O) (2014) (placing feminine hygiene products into the category of “grooming and hygiene products” alongside shampoo, shaving cream, deodorant, baby powder, hand sanitizer, acne products, and lip balm).

<sup>25</sup> Gass-Poore’, *supra* note 18.

<sup>26</sup> Chemerinsky, *supra* note 9.

test used in Equal Protection challenges to sex discrimination and the existing Equal Protection tax scholarship—both of which would play a part in any constitutional challenge regarding the tampon tax. Part IV uses that framework, and the “exacting scrutiny” analysis, to discuss the tampon tax as a violation of the Fourteenth Amendment’s Equal Protection Clause. Finally, Part V discusses how that analysis supports the argument that we should abolish the tampon tax.

#### I. WHY NOW?: THE PUSH FOR ELIMINATING THE TAMPON TAX IN CONTEXT

The international focus on the tampon tax has emerged during a time characterized by an increase in feminist foreign policies,<sup>27</sup> escalating feminist Internet activism,<sup>28</sup> intensifying Internet-based protests,<sup>29</sup> and even arguably a new global fourth-wave feminism.<sup>30</sup>

Bridget Crawford and Carla Spivak, legal scholars and professors of law, have demonstrated that the tampon tax issue illustrates the surprisingly gendered nature of seemingly neutral institutions such as the tax system.<sup>31</sup> They argue that tax reform in particular is necessary for gender equality.<sup>32</sup> Crawford and Spivak have persuasively suggested four main reasons for

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<sup>27</sup> Marie O’Reilly, *Feminist Foreign Policies Are Gaining Popularity, and Increasing the Peace*, PRI (Oct. 27, 2016, 10:00 AM), <https://www.pri.org/stories/2016-10-27/feminist-foreign-policies-are-gaining-popularity-and-increasing-peace> [<https://perma.cc/HV46-MTVL>]. The article notes that in the past few years, wealthy nations have increased funding for gender equality. *See id.* For example, from 2000 to 2014, Sweden quintupled its aid for funding gender equality in countries experiencing conflict. *Id.*

<sup>28</sup> Nisha Chittal, *How Social Media Is Changing the Feminist Movement*, MSNBC (published Mar. 26, 2015, 6:03 PM; updated Apr. 6, 2015, 11:09 AM), <http://www.msnbc.com/msnbc/how-social-media-changing-the-feminist-movement> [<https://perma.cc/YYY3-5ZFN>] (arguing that social media campaigns have not only raised awareness but have also “generated tangible results” such as in the ongoing “#StandWithPP” campaign, which began in 2012 as a way for Twitter users to champion Planned Parenthood in the face of its anti-abortion critics).

<sup>29</sup> *Id.* Chittal highlights both explicitly political protests, like the “#StandWithWendy” Twitter campaign supporting State Representative Wendy Davis’s famous thirteen-hour filibuster at the Texas State Capital in 2013, as well as stereotype-smashing campaigns like the “#AskHerMore” campaign emphasizing the superficiality of traditional red-carpet questions asked to women and the “#NotBuyingIt” campaign calling out sexism in Super Bowl advertisements. *See id.*

<sup>30</sup> Kira Cochrane, *The Fourth Wave of Feminism: Meet the Rebel Women*, THE GUARDIAN (Dec. 10, 2013, 1:55 PM), <https://www.theguardian.com/world/2013/dec/10/fourth-wave-feminism-rebel-women> [<https://perma.cc/DQ94-7ZHC>]. Cochrane wrote that in 2013, “a new swell [of feminism] built up and broke through” and further pointed to local grassroots groups and Internet consciousness-raising as examples, arguing that technology has allowed women to create a popular reactive movement online that has encouraged new campaigns and protests. *See id.*

<sup>31</sup> Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, 2017 WIS. L. REV. 491, 493.

<sup>32</sup> *Id.* at 491.

why the tampon tax has now become a global issue: (1) there is an increasing openness to discussing women's bodies, (2) the Internet allows for easy and quick communication, (3) the discriminatory financial effects of the tax are easy to understand, and (4) the solution for discriminatory tax regimes is relatively simple compared to some other forms of gender discrimination.<sup>33</sup>

But it is also important to situate activism against the tampon tax within the history of feminist activism regarding tampon regulation and labeling, as well as menstrual shaming, to better understand how the resistance to the tampon tax is a modern piece of a decades-long endeavor toward menstrual equity<sup>34</sup> in the United States.<sup>35</sup> Additionally, there are currently other branches of a movement for menstrual equity developing alongside the protests against the tampon tax, including civil rights groups pressuring U.S. educational and penal institutions to provide free tampons to students and inmates,<sup>36</sup> start-up companies selling products like blood-absorbing underwear and organic, nontoxic tampons and embracing unapologetic and frank advertising;<sup>37</sup> and plenty of writers offering think pieces arguing that tampon advertising is infantilizing and shaming of periods<sup>38</sup> and that Instagram should not remove images of menstrual blood.<sup>39</sup>

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<sup>33</sup> *Id.* at 542.

<sup>34</sup> The term *menstrual equity* was coined by attorney Jennifer Weiss-Wolf to “describe the notion of what it means to consider the ability to manage menstruation in the context of full democratic and civic participation.” Abigail Jones, *Periods, Policy and Politics: Menstrual Equity Is the New Thing*, NEWSWEEK (May 8, 2017, 11:26 AM) (internal quotation marks omitted), [www.newsweek.com/periods-policy-and-politics-menstrual-equity-new-thing-596027](http://www.newsweek.com/periods-policy-and-politics-menstrual-equity-new-thing-596027) [<https://perma.cc/2DUH-URCZ>].

<sup>35</sup> For a great overview of the modern menstrual equity movement, see *id.*

<sup>36</sup> See, e.g., Chandra Bozelko, *Prisons that Withhold Menstrual Pads Humiliate Women and Violate Basic Rights*, THE GUARDIAN (June 12, 2015, 7:30 AM), <https://www.theguardian.com/commentisfree/2015/jun/12/prisons-menstrual-pads-humiliate-women-violate-rights> [<https://perma.cc/3JPY-LDTJ>]; Melissa Jeltsen, *Providing Free Pads and Tampons to Incarcerated Women Is About More Than Hygiene: It's a Question of Dignity*, HUFFINGTON POST (published June 23, 2016, 3:00 PM; updated June 23, 2016), [www.huffingtonpost.com/entry/new-york-prisons-periods\\_us\\_576bfcade4b0b489bb0c901b](http://www.huffingtonpost.com/entry/new-york-prisons-periods_us_576bfcade4b0b489bb0c901b) [<https://perma.cc/Y9JZ-DT4P>].

<sup>37</sup> See, e.g., Katie Richards, *Ever Think About What's in a Tampon? This Company's Subway Ads Start the Conversation: Lola Launches First Non-Digital Campaign*, ADWEEK (May 15, 2017), [www.adweek.com/brank-marketing/ever-think-about-whats-in-a-tampon-this-companys-subway-ads-start-the-conversation](http://www.adweek.com/brank-marketing/ever-think-about-whats-in-a-tampon-this-companys-subway-ads-start-the-conversation) [<https://perma.cc/J5AP-W39d>].

<sup>38</sup> See, e.g., Saya Weissman, *5 Tampon Ads that Treat Women as Adults*, DIGIDAY (Aug. 1, 2013), <http://digiday.com/marketing/5-awesome-tampon-ads> [<https://perma.cc/4ASG-C5PF>].

<sup>39</sup> See, e.g., Heather Saul, *Instagram Apologises for Deactivating Photographer Harley Weir's Account After Pictures Showing Menstrual Blood*, THE INDEPENDENT (Sept. 8, 2016, 4:36 PM), [www.independent.co.uk/people/instagram-deactivates-photographer-harley-weirs-account-after-showing-menstrual-blood-a7232186.html](http://www.independent.co.uk/people/instagram-deactivates-photographer-harley-weirs-account-after-showing-menstrual-blood-a7232186.html) [<https://perma.cc/6SDW-N4JP>] (discussing artists and



Two themes underlie this short history of feminist tampon activism: (1) activists' focus on the health of women and on eliminating the cultural taboo and expectation of shame and silence around women's menstruation, and (2) the federal government's failure to take seriously the role tampons play in women's health, despite pressure from women's health organizations and consumer advocacy groups to increase transparency in tampon regulation.

#### A. Tampon Regulation and Labeling Controversies<sup>40</sup>

Though this Note focuses on the tax classification of tampons, tampons' regulatory classification has also garnered much controversy over the years, and the tampon tax protests today can be viewed as stemming from the movement against that classification. The relevant history begins in the 1970s. Tampons were originally classified as cosmetic products for regulatory purposes, but in 1976 the Federal Food, Drug, and Cosmetic Act (FDCA) classified tampons as medical devices.<sup>41</sup> The intention of this classification switch was to mandate the disclosure of ingredients used in manufacturing tampons, as at the time all medical products had to list ingredients on packaging, but cosmetics items did not.<sup>42</sup> Somewhat bizarrely, new legislation the following year reversed that mandate, requiring cosmetic items but not medical items to list ingredients on packaging, ultimately shielding tampons—as medical items—from requiring ingredient disclosure.<sup>43</sup>

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photographers who challenge Instagram's bans and restrictions regarding depictions of menstrual blood).

<sup>40</sup> This is by no means a comprehensive history of tampons and tampon-related litigation in the United States. Neither is it a thorough recounting of the feminist critiques of tampon manufacturing and marketing and of societal views of menstruation. For more background and history, see generally Crawford & Spivack, *supra* note 31, at 508 (arguing that the tampon tax and societal discomfort with menstruation stems from "anxiety caused by the specter of a specifically female adult who cannot control bodily effluvia"); Fetters, *supra* note 24 (describing the history of tampons in Western society and in the United States specifically); Ashley Fetters & Eleanor Barkhorn, *There Has to Be a Better Way to Sell Tampons: Why Does So Much Marketing Center Around Candy and Infantilizing Language? Two Editors Discuss*, THE ATLANTIC (July 30, 2013), <https://www.theatlantic.com/sexes/archive/2013/07/there-has-to-be-a-better-way-to-sell-tampons/278197/> [<https://perma.cc/9Y7M-8KRY>] (discussing the infantilizing marketing of tampons); Jamie Kohen, *The History of the Regulation of Menstrual Tampons* (Apr. 6, 2001) (unpublished class paper) (on file with Harvard Law School library system), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:8852185> [<https://perma.cc/YN4S-HM8J>] (providing a history of tampon regulations and litigation in the United States).

<sup>41</sup> Fetters, *supra* note 20.

<sup>42</sup> *Id.*

<sup>43</sup> Crawford & Spivack, *supra* note 31, at 507.

In 1975, one year before the FDCA's enactment, Procter & Gamble began manufacturing its extremely absorbent tampon called Rely.<sup>44</sup> Emerging during the time of the legislative classification switch up, Rely escaped new testing requirements and ingredient disclosure.<sup>45</sup> By 1980, investigators from the Centers for Disease Control and Prevention (CDC) published a report linking tampons to toxic shock syndrome (TSS), suggesting a correlation between increased absorbency and risk of TSS.<sup>46</sup> Procter & Gamble subsequently removed the ultra-absorbent Rely from the market,<sup>47</sup> and the FDA asked manufacturers to voluntarily add a TSS warning label to tampon boxes.<sup>48</sup> After more research on tampons and TSS, the FDA mandated that all tampon manufacturers provide a warning label about the dangers of TSS and a package insert about the signs of TSS.<sup>49</sup> Importantly, however, these new FDA regulations failed to require the use of standard terminology for absorbency levels, leaving women without an informed way to choose between various tampons to minimize their risk of TSS.<sup>50</sup>

Women have consequently questioned the safety of feminine hygiene products since the 1970s.<sup>51</sup> The women's health movement, considered by many scholars to be the "grandmother" of menstrual activism, became "a recognizable force of social change along with the reemergence of the feminist movement in the late 1960s and early 1970s."<sup>52</sup> The movement had a long and drawn-out fight for regulated and clearly defined absorbency standards. The FDA first called a task force to develop absorbency standards in 1981 but consequently continued to deny the need for mandatory standardization of absorbency terms and instead asked tampon manufacturers to note on tampon packaging that each individual should use the most minimal absorbency level.<sup>53</sup> In response to another CDC study confirming the relationship between tampons with increased

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<sup>44</sup> Fetters, *supra* note 20.

<sup>45</sup> *Id.*

<sup>46</sup> *Procter & Gamble Settles a Toxic Shock Suit*, N.Y. TIMES (Aug. 25, 1982), <http://www.nytimes.com/1982/08/25/us/procter-gamble-settles-a-toxic-shock-suit.html> [<https://perma.cc/NCQ3-7YDS>].

<sup>47</sup> Studies showed a higher statistical correlation between TSS and Rely than for any other type of tampon. Sharra L. Vostral, *Rely and Toxic Shock Syndrome: A Technological Health Crisis*, 84 YALE J. BIOLOGY & MED. 447, 455, 457 (2011).

<sup>48</sup> Kohen, *supra* note 40, at 7.

<sup>49</sup> *Id.* at 10.

<sup>50</sup> *Id.* at 12.

<sup>51</sup> Chris Bobel, *From Convenience to Hazard: A Short History of the Emergence of the Menstrual Activism Movement, 1971–1992*, 29 HEALTH CARE FOR WOMEN INT'L 738, 740 (2008).

<sup>52</sup> *Id.* (citation omitted).

<sup>53</sup> Kohen, *supra* note 40, at 10–15.

absorbency and the risk of developing TSS, the FDA finally created an absorbency label proposal in 1988—but it continued to delay enactment of the rule.<sup>54</sup>

Public Citizen, a national nonprofit consumer advocacy group, then sued the FDA in 1989 for unnecessary delay in promulgating long-needed regulations regarding tampon absorbency labels.<sup>55</sup> Others, including the press, likewise criticized the FDA for its sluggishness on an issue crucial to women’s health.<sup>56</sup> The district court judge in the Public Citizen lawsuit, for instance, characterized the FDA as “lethargic in responding to and carrying out its legal obligation and thus fail[ing] to adequately inform and protect the public on this important health issue.”<sup>57</sup> In October 1989, the FDA finally issued a repropoed rule stating that it would standardize the existing absorbency terms.<sup>58</sup>

Simultaneously, beginning as early as 1982, women’s activist groups and medical organizations were pressuring the FDA to require ingredient labeling for tampons.<sup>59</sup> Of particular concern was that consumers did not have information about the amount of dioxins in tampons. An FDA scientist validated this concern in 1987, noting that “[i]t is critical to an adequate risk assessment that the level of dioxins in tampons, sanitary pads, diapers, and other medical devices be measured.”<sup>60</sup> Though the FDA acknowledged consumer demand for tampon ingredient labeling in its discussion of the 1989 repropoed rule for absorbency labeling, the FDA cited the lack of evidence showing any allergies or adverse reactions to tampon ingredients as a barrier preventing the FDA from having the authority to enact such a rule.<sup>61</sup>

Women continued to draw attention to the questionable safety of tampons due to the government’s reluctance to increase regulation. Journalist Karen Houppert questioned in a *Village Voice* article, and later in a book, why menstruation was shrouded in secrecy. She suggested that the

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<sup>54</sup> *Id.* at 16–21.

<sup>55</sup> Bobel, *supra* note 51, at 748 (adding that Public Citizen wanted “to force the FDA to require all tampon manufacturers to print the numerical absorbency tampons and the information that high absorbency puts women at higher risk of TSS on every box”).

<sup>56</sup> See Kohen, *supra* note 40, at 20.

<sup>57</sup> See *id.* (quoting Public Citizen Health Research Grp. v. Comm’r, FDA, 724 F. Supp. 1013, 1026 (D.D.C. 1989)).

<sup>58</sup> *Id.* at 22.

<sup>59</sup> See *id.* at 25–26.

<sup>60</sup> *Id.* at 26 (citation omitted). The debate over dioxin continued into the 1990s. A 1990 study partially authored by the FDA concluded that products like tampons containing bleached wood pulp did not contain toxic levels of dioxin. See *id.* at 27.

<sup>61</sup> *Id.* at 26–27.

societal suppression of menstruation speech allowed tampon manufacturers to operate opaquely.<sup>62</sup> In an attempt to push the government to lift the veil on the safety of tampon ingredients and manufacturing, U.S. Representative Carolyn B. Maloney spearheaded the Tampon Safety and Research Act of 1997.<sup>63</sup> The Act would have mandated research on the effects that dioxin and other synthetic fibers in tampons have on women's health, including whether they pose any risk for developing TSS.<sup>64</sup> Representative Maloney has been bringing this legislation to Congress for twenty years, but the Act has been blocked from going to a vote all nine times.<sup>65</sup>

At the same time, women's health advocates outside of the United States were concerned about tampon safety too. For instance, a feminist environmentalist group called Women's Environmental Network coordinated with the BBC to broadcast a segment on the hazards of chlorine-bleached paper products, including tampons.<sup>66</sup> Approximately 20% of U.K. residents saw the show, and viewers made over 50,000 calls to manufacturers and members of the British Parliament to request that manufacturers reduce dioxin pollution.<sup>67</sup> Activism efforts in the United States have been less effective at enacting satisfactory regulations for

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<sup>62</sup> Stephanie Zacharek, *Red Flag: In "The Curse," Karen Houppert Rages Against the Shame Women Feel About Menstruation*, SALON (Apr. 21, 1999, 3:00 PM), <http://www.salon.com/1999/04/21/houppert/> [<https://perma.cc/9NKH-ETCX>]. Houppert wrote:

As long as everything is so hush-hush, who chitchats about quality or safety? . . . Who calls the industry or the FDA on the fact that consumers can read a list of ingredients on a shampoo bottle but not on a package of tampons, which are held for hours in one of the most porous and absorbent parts of a woman's body?

*Id.* (internal quotation marks omitted).

<sup>63</sup> Carolyn B. Maloney, Press Release, *Maloney Bill Would Study Health Effects and Safety of Feminine Hygiene Products*, MALONEY.HOUSE.GOV (Apr. 2, 2015), <http://maloney.house.gov/media-center/press-releases/maloney-bill-would-study-health-effects-and-safety-of-feminine-hygiene> [<https://perma.cc/F2JW-B3AE>].

<sup>64</sup> *Id.*

<sup>65</sup> Roni Caryn Rabin, *Period Activists Want Tampon Makers to Disclose Ingredients*, N.Y. TIMES (May 24, 2017), <https://www.nytimes.com/2017/05/24/well/live/period-activists-want-tampon-makers-to-disclose-ingredients.html> [<https://perma.cc/DE59-AHP5>]. In 1999, Representative Maloney (D-NY) renamed this legislation the Robin Danielson Feminine Hygiene Product Safety Act (H.R. 1708), named after a young woman who died from TSS. Maloney, *supra* note 63. Maloney reintroduced her bill (now H.R. 2379) once again in May 2017. Meanwhile, Representative Grace Meng (D-NY) introduced the related Menstrual Equity for All Act (H.R. 972) in February 2017, which would improve access to menstrual products. *See* Grace Meng, Op-Ed, *Our Laws Period-Shame Women—So I'm Going to Change Them*, MARIE CLAIRE (Feb. 17, 2017), <http://www.marieclaire.com/politics/a25464/congresswoman-grace-meng-menstrual-equity-bill/> [<https://perma.cc/JYG5-T54S>]. Meng reintroduced the bill as Menstrual Products Right to Know Act (H.R. 2416) in May 2017. Maloney, *supra* note 63.

<sup>66</sup> Bobel, *supra* note 51, at 749.

<sup>67</sup> *Id.*

tampon businesses, and there has instead been a larger emphasis on alternative products and alternative feminine hygiene businesses.<sup>68</sup>

Today, a clear inconsistency remains between how the federal government and most state governments categorize tampons. It is a gaping discrepancy that the federal government treats tampons like medical products under FDA regulation—which keeps their ingredients and safety levels shrouded in secrecy like prescription drugs—but that most states do not likewise categorize tampons as medical products in their tax codes.

### *B. The Menstrual Equity Movement*

In addition to activism against the tampon tax, there is the menstrual equity movement, which aims to eliminate the stigma around menstruation and ensure that periods do not act as a barrier to girls' and women's access to education, health care, and other opportunities.<sup>69</sup> The movement is predicated on the belief that menstrual hygiene is a public health issue and that, particularly for poor and incarcerated women, “worrying about bleeding through clothing or keeping up basic hygiene causes psychological stress and a formidable barrier to employment and education.”<sup>70</sup>

The movement has garnered increasing amounts of attention. For instance, the American Civil Liberties Union (ACLU) drew attention to the concept of menstrual equity in 2014 when it filed a lawsuit on behalf of eight female inmates against Muskegon County jail in Michigan.<sup>71</sup> The lawsuit alleged multiple inhumane policies in the jail, including that inmates were “denied access to clean underwear and basic sanitary items such as toilet paper and feminine hygiene products.”<sup>72</sup>

The menstrual equity movement gained more steam in 2016 with the unanimous passage of New York City Council legislation providing for the placement of tampon and pad dispensers in all public schools that have any female students in grades six through twelve, in prisons, and in homeless

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<sup>68</sup> *Id.* at 749–50.

<sup>69</sup> Jones, *supra* note 34.

<sup>70</sup> Christina Cauterucci, *New York City Council Approves Free Tampons and Pads in Schools, Prisons, and Shelters*, SLATE (June 22, 2016, 5:50 PM), [http://www.slate.com/blogs/xx\\_factor/2016/06/22/new\\_york\\_city\\_council\\_votes\\_to\\_give\\_free\\_tampons\\_and\\_pads\\_to\\_women\\_in\\_schools.html](http://www.slate.com/blogs/xx_factor/2016/06/22/new_york_city_council_votes_to_give_free_tampons_and_pads_to_women_in_schools.html) [<https://perma.cc/8J66-LVJ8>].

<sup>71</sup> *ACLU of Michigan Sues Muskegon County over Unconstitutional Policies, Hazardous Conditions at Jail*, ACLU OF MICH. (Dec. 4, 2014), <http://aclumich.org/article/aclu-michigan-sues-muskegon-county-over-unconstitutional-policies-hazardous-conditions-jail> [<https://perma.cc/XYZ3-46DT>].

<sup>72</sup> *Id.*

shelters within the jurisdiction.<sup>73</sup> Emphasizing that tampons are not luxury goods, Julissa Ferreras-Copeland—the council member who proposed the legislation—stated that “[m]enstrual hygiene products are as necessary as toilet paper, and no one is freaking out about toilet paper.”<sup>74</sup> The legislation is the first of its kind, and New York State Assemblywoman Linda Rosenthal promised to bring similar legislation forward at the state level.<sup>75</sup>

The accomplishments of the menstrual equity movement during the last two years—in bringing attention to the concept of menstruation as a public health issue and inspiring related legislation and litigation—is promising for the future success of tampon regulation and taxation reform. Contemporary tampon tax protesters build upon the work of the 1970s activists who demanded transparency in tampon ingredients. Activists now wage multiple fronts on the battle to persuade federal, state, and city governments to take women’s menstrual health seriously.

## II. LEGISLATIVE AND COURT-BASED REFORM EFFORTS

Most recently, we saw increasing efforts to banish the tampon tax at the local and state level in the United States and at the national level abroad in 2016. Prior to those resistance efforts, five out of the forty-five U.S. states that collect sales tax already had exemptions for female hygiene products, offering exemptions either through placing tampons and sanitary napkins into an existing exemption category or by creating an additional exemption explicitly for female hygiene products.<sup>76</sup> For instance, Maryland offers a sales tax exemption for “medicine and medical equipment,” which includes a range of items from tampons and sanitary napkins to crutches, corrective eyeglasses, and breastfeeding products and supplies.<sup>77</sup> Minnesota and Massachusetts similarly exempt feminine hygiene products through a “health products” exemption,<sup>78</sup> while New Jersey created a sales tax exemption specifically for feminine hygiene products.<sup>79</sup> Pennsylvania also

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<sup>73</sup> Cauterucci, *supra* note 70.

<sup>74</sup> *Id.* (internal quotation marks omitted).

<sup>75</sup> *Id.*

<sup>76</sup> See Weiss, *supra* note 23.

<sup>77</sup> COMPTROLLER OF MD., *Medicine and Medical Equipment*, SPOTLIGHT ON MARYLAND TAXES, [http://taxes.marylandtaxes.com/Business\\_Taxes/Business\\_Tax\\_Types/Sales\\_and\\_Use\\_Tax/Tax\\_Information/Special\\_Situations/Medicine\\_and\\_Medical\\_Equipment.shtml](http://taxes.marylandtaxes.com/Business_Taxes/Business_Tax_Types/Sales_and_Use_Tax/Tax_Information/Special_Situations/Medicine_and_Medical_Equipment.shtml) [<https://perma.cc/VLD6-VTLU>].

<sup>78</sup> MASS. DEP’T OF REVENUE, *A Guide to Sales and Use Tax*, MASS.GOV (last updated Jan. 27, 2017), <http://www.mass.gov/dor/individuals/taxpayer-help-and-resources/tax-guides/salesuse-tax-guide.html#exempt> [<https://perma.cc/TCK8-C9ZB>]; MINN. DEP’T OF REVENUE, *Health Product Exemptions* (Apr. 2009), [www.revenue.state.mn.us/businesses/sut/factsheets/FS117E.pdf](http://www.revenue.state.mn.us/businesses/sut/factsheets/FS117E.pdf) [<https://perma.cc/W2CC-SDA2>].

<sup>79</sup> N.J. Div. of Taxation, *New Jersey Sales Tax Guide* (July 2017), <http://www.state.nj.us/treasury/taxation/pdf/pubs/sales/su4.pdf> [<https://perma.cc/9HQB-4JAX>].

created a sales tax exemption covering “disposable diapers, incontinence products, toilet paper, sanitary napkins, tampons or similar items used for feminine hygiene.”<sup>80</sup>

The first successful lawsuit to exempt feminine hygiene products from sales tax, and the only judicial decision on the tampon tax to date, arose in Illinois in 1989: *Geary v. Dominick’s Finer Foods, Inc.*<sup>81</sup> Although the Illinois legislature returned to taxing feminine hygiene products about two decades later, the Chicago City Council and the Illinois state legislature again worked to exempt them from sales tax in 2016.<sup>82</sup>

Illinois is not the only example of court-based challenges to the tampon tax. Between 2015 and 2016, the United States saw a slew of civil lawsuits and legislative endeavors to eliminate sales taxes on tampons and other feminine hygiene products. These cases serve as examples for future reform efforts and carry important lessons regarding how the tampon tax can be successfully worked into existing exemption categories. Section II.A examines *Geary*, the first and only U.S. judicial decision on the validity of the tampon tax, which overturned the tax by comparing tampons to the existing medical appliance exemptions. Section II.B demonstrates how class action claims arguing that the tampon tax violated the state and federal constitutions successfully spurred state legislatures to remove the tax. Section II.C chronicles ongoing international reform efforts. Section II.D illustrates the challenges to litigation.

#### A. *Geary v. Dominick’s Finer Foods, Inc. and Other Reform Efforts in Illinois*

In the 1989 case of *Geary v. Dominick’s Finer Foods, Inc.*, a group of female plaintiffs brought a class action suit against the City of Chicago and various retailers alleging that the sales tax on tampons and other feminine hygiene products was illegal under the Chicago Sales Tax Ordinance.<sup>83</sup> The Chicago Sales Tax Ordinance levied a sales tax but exempted medical appliances from the tax.<sup>84</sup> Although the Ordinance itself did not define *medical appliances*, an Illinois Department of Revenue regulation defined

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<sup>80</sup> 061 PA. CODE § 9.2 (1991), <http://www.pacode.com/secure/data/061/chapter9/s9.2.html> [https://perma.cc/X2JV-G2KF].

<sup>81</sup> See 544 N.E.2d 344, 355 (Ill. 1989).

<sup>82</sup> See *infra* Section II.A.

<sup>83</sup> See *Geary*, 544 N.E.2d at 345–46. To successfully claim damages, the plaintiffs had to overcome the “voluntary-payment” doctrine, which states that one cannot recover taxes that one, knowing all the facts, fully paid. *Id.* at 346. The plaintiffs successfully used the duress defense by contending that, because the products are necessities with no substitutes, they had no choice but to pay the tax. *Id.* at 353.

<sup>84</sup> *Id.* at 353–54.

*medical appliances* to include diapers and absorbent pads for incontinence.<sup>85</sup> Furthermore, four years prior to the *Geary* decision, the Illinois Department of Revenue had begun including tampons and other feminine hygiene products in the medical appliances category for state sales taxes—effectively eliminating the state tax on feminine hygiene products—while the City of Chicago’s tax on feminine hygiene products remained.<sup>86</sup>

Rather than challenging the constitutionality of the City of Chicago’s Ordinance or the Illinois regulations, the plaintiffs in *Geary* instead challenged the City of Chicago’s interpretation of *medical appliances*.<sup>87</sup> Despite the fact that the Illinois Department of Revenue had explicitly classified feminine hygiene products as medical products, the City of Chicago and the various retailer defendants attempted to characterize *medical appliances* as those that relate to illnesses.<sup>88</sup> The defendants further argued that since tampons are used in congruence with menstruation, a “normal bodily function,” they should be considered merely hygienic and not medical appliances.<sup>89</sup>

The Illinois Supreme Court, however, disagreed and ruled that tampons were medical appliances.<sup>90</sup> The court noted that feminine hygiene products executed absorbent functions similar to cotton and adhesive bandages, which were already listed as medical appliances.<sup>91</sup> And so, for nearly two decades, the City of Chicago did not tax feminine hygiene products.

In 2009, the Department of Revenue for the State of Illinois issued new regulations for its Retailers’ Occupation Tax for drugs, medicines, medical appliances, and grooming and hygiene products.<sup>92</sup> Under the new regulations, prescription and nonprescription medicines, drugs, and medical appliances were to be taxed at a 1% rate; “grooming and hygiene products,” meanwhile, would be taxed at the “general merchandise rate” of 6.25%.<sup>93</sup> Feminine hygiene products were explicitly listed as grooming and hygiene products at the state level.<sup>94</sup>

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<sup>85</sup> *Id.* at 354.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 355.

<sup>88</sup> *See id.* at 353–55.

<sup>89</sup> *Id.* at 355.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> ILL. ADMIN. CODE tit. 86, § 130.311 (2017).

<sup>93</sup> *Id.* § 130.311(a).

<sup>94</sup> *Id.* § 130.311(d)(2)(O).



The new regulation stated that pills, powders, salves, and other products which were alleged to have “medicinal claims”—such as healing, fighting infection, acting as a soaking aid for pain, stopping pain, curing athlete’s foot, relieving muscular aches and pains, among others—could qualify as a medical appliance at the low 1% tax rate.<sup>95</sup>

By March 2016, feminine hygiene products were taxed at a 10.25% rate in Chicago.<sup>96</sup> This rate included the 1.25% Chicago city tax, the 6.25% state sales tax, the 1.75% county tax, and the 1% regional transportation authority tax.<sup>97</sup> On March 16, 2016, under pressure from the city’s women, the Chicago City Council passed an ordinance again categorizing feminine hygiene products as medical appliances and, thus, exempting them from the city’s 1.25% sales tax.<sup>98</sup> However, the other tax layers remained, and so Chicago City Council aldermen voted for a resolution requesting that the Illinois General Assembly likewise exempt feminine hygiene products from the state sales tax.<sup>99</sup> The General Assembly complied and created a bill, which explicitly amended the relevant state statutes to exempt menstrual pads, tampons, and menstrual cups.<sup>100</sup>

Then, on August 19, 2016, Illinois Governor Bruce Rauner signed the bill into law.<sup>101</sup> Illinois became the third state in 2016, after Connecticut and New York, to eliminate the tampon tax.<sup>102</sup> The law took effect January 1, 2017. The series of events in Illinois demonstrates how public pressure and bipartisan support at the state and city level can lead quickly to elimination of the tampon tax.<sup>103</sup>

#### *B. Class Action Litigation Spurring Legislative Action in Other States*

In New York, opponents of the tampon tax first attacked it through litigation as opposed to political channels. In March 2016, five women filed a class action lawsuit against the New York State Department of Taxation and Finance alleging discriminatory taxation and violation of the Equal

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<sup>95</sup> *Id.* § 130.311(c)(1).

<sup>96</sup> Michael J. Bologna, *A Dozen States Taking Steps to Ban Tampon Tax*, BLOOMBERG BNA (March 25, 2016), <https://www.bna.com/dozen-states-taking-n57982069042/> [<https://perma.cc/XA4Q-SJGG>].

<sup>97</sup> *Id.*

<sup>98</sup> *See id.*

<sup>99</sup> *Id.*

<sup>100</sup> H.R. 0818, 100th Gen. Assemb., Reg. Sess. (Ill. 2017).

<sup>101</sup> *Illinois Becomes Third State to Eliminate “Tampon Tax,”* N.Y. DAILY NEWS (Aug. 19, 2016, 6:52 PM), <http://www.nydailynews.com/life-style/illinois-state-eliminate-tampon-tax-article-1.2758527> [<https://perma.cc/HPD3-WSY5>].

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

Protection Clause of both the New York constitution and the U.S. Constitution.<sup>104</sup> The named plaintiff, Margo Seibert, was a cofounder of the nonprofit group Racket, which Seibert started after a group of homeless women emphasized their need for feminine hygiene products. The group is dedicated to “exposing and eliminating menstrual taboos, and advocating for equal access to menstrual hygiene products.”<sup>105</sup>

The lawsuit received a significant amount of press coverage,<sup>106</sup> and before it could progress in court, the New York legislature acted. On May 25, 2016, the legislature approved Assembly Bill 7555, which eliminated the tampon tax and instead classified feminine hygiene products with medical products that are deemed to be necessities such as bandages, medicine, and condoms.<sup>107</sup> Before signing the bill into law, Governor Andrew Cuomo stated that “[r]epealing this regressive and unfair tax on women is a matter of social and economic justice.”<sup>108</sup> The New York case is a great example of how a class action lawsuit can attract media attention and spur the public into lobbying their legislature to eliminate the tampon tax, thereby eliminating the need for lawsuits to continue beyond the early stages of litigation.

As of July 2017, three states—California, Florida, and Ohio—currently face Equal Protection Clause violation claims based upon their taxes on tampons and other feminine hygiene products.<sup>109</sup>

The plaintiffs in the California lawsuit sued the California State Board of Equalization in August 2016, allegedly calling the tax “a vestige of an antiquated patriarchal era when women were somehow considered unequal to men.”<sup>110</sup> The Florida class action lawsuit likewise claims that the tax on tampons discriminates against women and points out that hair-regrowth

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<sup>104</sup> See Verified Class Action Complaint, *Seibert*, *supra* note 21, at 1.

<sup>105</sup> WE ARE RACKET: PERIODS WITHOUT SHAME, <http://www.weracket.com> [<https://perma.cc/Z8RF-UXXD>].

<sup>106</sup> See, e.g., Stamets, *supra* note 1.

<sup>107</sup> S.B. 7838, 2016 S., Reg. Sess. (N.Y. 2016), <https://www.nysenate.gov/legislation/bills/2015/s7838/amendment/a> [<https://perma.cc/KP7D-798R>]; Assemb. 7555A, 2015–2016 Reg. Sess. (N.Y. 2015) <https://www.nysenate.gov/legislation/bills/2015/a7555/amendment/a> [<https://perma.cc/KH6Z-WHHK>].

<sup>108</sup> Press Release, Statement from Governor Andrew M. Cuomo on Passage of Legislation to Repeal Tax on Feminine Hygiene Products (May 25, 2016), <https://www.governor.ny.gov/news/statement-governor-andrew-m-cuomo-passage-legislation-repeal-tax-feminine-hygiene-products> [<https://perma.cc/H5V6-NKFP>].

<sup>109</sup> Complaint, *DiSimone*, *supra* note 5, at 1; Complaint, *Wendell*, *supra* note 4, at 1; Complaint, *Rowitz* (No. 2016-00197), *supra* note 6, at 1.

<sup>110</sup> Jennifer Wadsworth, *Fight Over Absurd “Tampon Tax” Continues in California Court*, SAN JOSE INSIDER (Sept. 20, 2016) (internal quotation marks omitted), <http://www.sanjoinside.com/2016/09/20/fight-over-absurd-tampon-tax-continues-in-california-court> [<https://perma.cc/NGJ8-QEGV>].

treatment is tax-exempt in Florida.<sup>111</sup> The plaintiff asked the judge to issue an injunction to stop the state of Florida from collecting the tax and to give women a rebate for the taxes they have paid on feminine hygiene products for the last three years.<sup>112</sup> And in Ohio in March 2016, four women filed a lawsuit in the Ohio Court of Claims against the Ohio Department of Taxation, claiming Equal Protection Clause violations of both the Ohio constitution and the U.S. Constitution.<sup>113</sup> Under the Ohio tax code, prescription medicine and durable medical equipment are tax-exempt.<sup>114</sup> The plaintiffs, who were seeking class action status, sought not only the end of the tax but also a “refund” of \$66 million to Ohio tampon purchasers.<sup>115</sup>

Whether these lawsuits will reach the conclusion the Illinois Supreme Court reached almost thirty years ago in *Geary v. Dominick’s Finer Foods, Inc.* remains to be seen. Since all three lawsuits are still in the complaint stage, their exact arguments demonstrating the illegality of the tampon tax are still unknown.

While a bill proposed in June 2015 in the Ohio House of Representatives would have abolished the state’s tampon tax, the likelihood of it passing seems slim. The bill continues to sit in the ways and means committee, where it was sent back in October 2015.<sup>116</sup> Other state legislatures likewise made recent steps to eliminate their tax on feminine hygiene products. For example, Connecticut successfully exempted feminine hygiene products from sales tax in its budget-implementation bill, which will go into effect on July 1, 2018.<sup>117</sup> Additionally, in November 2016, the Council of the District of Columbia passed the Feminine Hygiene and Diapers Sales Tax Exemption Amendment Act of 2016.<sup>118</sup> Finally, as

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<sup>111</sup> See Complaint, *Wendell*, *supra* note 4, at 2. This lawsuit may now be moot because the Florida legislature has now passed legislation exempting tampons from the state sales tax. See *infra* note 119.

<sup>112</sup> *Id.* at 19.

<sup>113</sup> See Complaint, *Rowitz* (No. 2016-00197), *supra* note 6, at 2.

<sup>114</sup> OHIO DEP’T OF TAXATION, *Sales and Use Tax: Drugs, Durable Medical Equipment, Mobility Enhancing Equipment, and Prosthetic Devices*, OHIO.GOV (Sept. 2010), [http://www.tax.ohio.gov/sales\\_and\\_use/information\\_releases/st\\_2010\\_03.aspx](http://www.tax.ohio.gov/sales_and_use/information_releases/st_2010_03.aspx) [https://perma.cc/9DZN-ME67].

<sup>115</sup> See Complaint, *Rowitz* (No. 2016-00197), *supra* note 6, at 13.

<sup>116</sup> H.B. 272, 131st Gen. Assemb., Reg. Sess. (Ohio 2016); see also Randy Ludlow, *Lawsuit, Legislation Battle Ohio’s “Tampon Tax,”* COLUMBUS DISPATCH (published Mar. 27, 2016, 12:01 AM; updated Mar. 28, 2016, 10:25 AM), <http://www.dispatch.com/content/stories/local/2016/03/28/lawsuit-legislation-object-to-tampon-tax-as-discriminatory.html> [https://perma.cc/N6EU-G23V].

<sup>117</sup> Jennifer Horne, *Bills to Eliminate “Tampon Tax” Pass in Connecticut, New York, Illinois*, THE COUNCIL OF STATE GOVERNMENTS (June 17, 2016, 3:26 PM), <http://knowledgecenter.csg.org/kc/content/bills-eliminate-tampon-tax-pass-connecticut-new-york-illinois> [https://perma.cc/DH2G-44HA].

<sup>118</sup> Christina Sturdivant, *D.C. Council Moves to End the “Tampon Tax,”* DCIST (Nov. 17, 2016, 12:10 PM), [http://dcist.com/2016/11/dc\\_axes\\_tampon\\_tax.php](http://dcist.com/2016/11/dc_axes_tampon_tax.php) [https://perma.cc/SYE4-Y3PL]. After

part of a tax-cut package, the Florida legislature made tampons, pads, and menstrual products tax-free in May 2017, an act notably supported by liberal and conservative lawmakers alike.<sup>119</sup>

The above lawsuits and legislative attempts to end the tampon tax are encouraging and demonstrate two important components of the larger current push for menstrual equity and feminist activism generally. First, activists such as tampon tax protesters are willing to go to the courts if necessary. Second, so far, female—and not male—politicians have initiated legislation to abolish the tampon tax, which underlines both the important role female politicians play in equalizing the law and how the government has traditionally failed to prioritize women’s needs.

### C. *International Reform Efforts*

National efforts in Canada, France, and the United Kingdom have successfully eliminated the national tax on tampons in each respective country, demonstrating the menstrual equity movement’s global reach.

#### 1. *Successful Tampon Tax Elimination in Canada, France, and the United Kingdom*

In contrast to stalled federal efforts in the United States, activists in other countries have found success in pursuing national reforms. For example, pressure from Canadian citizens and legislative mobilization by the New Democratic Party jointly pushed the Canadian federal government to end its federal tax on tampons.<sup>120</sup> Feminine hygiene products in Canada became tax-free on July 1, 2015, when the Department of Finance announced that it was officially eliminating the 5% goods and services tax and the harmonized sales tax previously levied on tampons and sanitary napkins.<sup>121</sup> Seventy-five thousand people in Canada had signed a petition demanding the end of the tax, which deemed feminine hygiene products as “nonessential items” or “luxury goods,” while cake decorations and contact lenses were exempt.<sup>122</sup>

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the council passes a bill in the District of Columbia, the bill is sent to the U.S. House of Representatives and the U.S. Senate in order to become law.

<sup>119</sup> Catherine Pearson, *Florida Just Became the Latest State to Abolish the “Tampon Tax”*: Well Done!, HUFFINGTON POST (May 26, 2017, 11:14 AM), [http://www.huffingtonpost.com/entry/florida-just-became-the-latest-state-to-abolish-the-tampon-tax\\_us\\_59282d4de4b0df34c35b77cf](http://www.huffingtonpost.com/entry/florida-just-became-the-latest-state-to-abolish-the-tampon-tax_us_59282d4de4b0df34c35b77cf) [https://perma.cc/XX2L-BXLX].

<sup>120</sup> Fekete, *supra* note 10.

<sup>121</sup> Tara Culp-Ressler, *After Years of Backlash, Canada Ditches the “Tampon Tax”*, THINK PROGRESS (May 29, 2015), <https://thinkprogress.org/after-years-of-backlash-canada-ditches-the-tampon-tax-ed5cd867fbf4#.96xdrf1v4> [https://perma.cc/9PMT-2S7G].

<sup>122</sup> *Id.*; see also Petition, *Government of Canada—No Tax on Tampons: A Campaign to Remove the GST Charged on Menstruation Products*, CHANGE.ORG, <https://www.change.org/p/no-tax-on-tampons->

The French effort to abolish the tampon tax was less straightforward. Socialist Members of Parliament introduced the legislation as an amendment to the 2016 budget.<sup>123</sup> The amendment would bring the Value Added Tax (VAT) placed on feminine hygiene products down from 20% to 5.5%.<sup>124</sup> Like plaintiffs and legislators in the United States, the French Members of Parliament pushing for the amendment also argued that tampons, sanitary napkins, and menstrual cups were “basic needs” and thus should not be taxed at a luxury-goods rate.<sup>125</sup> In October 2016, the government rejected the proposal for reasons similar to those given by Governor Jerry Brown, who vetoed proposed legislation in California<sup>126</sup>: it claimed that had the amendment succeeded, tax revenues would have decreased by 55 million Euros (63 million USD).<sup>127</sup> The public outcry was significant, with “#taxetampon”<sup>128</sup> trending in Paris on Twitter the day after the amendment was rejected.<sup>129</sup> A focal point of public criticism was the comment made by Christian Eckert, French Minister of State for the Budget, who compared tampons to men’s shaving foam.<sup>130</sup> He then insinuated that though some members of the public are passionate about ending the tampon tax, the issue is more complicated than they realize.<sup>131</sup> Women’s groups protested and emphasized that feminine hygiene products should be treated under the law equally to other necessity items like food and condoms.<sup>132</sup> Likely in response to public pressure, Prime Minister Manuel Valls said that the French government had the funds to absorb lost revenue from the tax cut.<sup>133</sup> The National Assembly voted again on the amendment, and it passed in December 2015.<sup>134</sup>

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a-campaign-to-remove-the-gst-charged-on-menstruation-products-sign-the-petition [https://perma.cc/N6MX-8B76].

<sup>123</sup> *France Rejects “Tampon Tax” Change*, BBC NEWS (Oct. 15, 2015), <http://www.bbc.com/news/world-europe-34538672> [https://perma.cc/7XLS-U5AM].

<sup>124</sup> *Id.*

<sup>125</sup> *See id.*

<sup>126</sup> *See* Wadsworth, *supra* note 110 and text accompanying *infra* note 150.

<sup>127</sup> *France Rejects “Tampon Tax” Change*, *supra* note 123.

<sup>128</sup> French for *tampon tax*. *See* CASSELL’S FRENCH–ENGLISH, ENGLISH–FRENCH DICTIONARY 709, 712 (Denis Girard ed., 1977) (defining “tampon” and “taxe”).

<sup>129</sup> *France Rejects “Tampon Tax” Change*, *supra* note 123.

<sup>130</sup> *Id.* One Twitter user tweeted, “And beards and menstruation are basically the same thing, right?—French Parliament, apparently.” *Id.* (internal quotation marks omitted). Another challenged Eckert to go a month without shaving while she would go a month without tampons so that they could compare the results. *Id.*

<sup>131</sup> *See id.*

<sup>132</sup> *Tampon Tax: France MPs Back VAT Cut on Sanitary Products*, *supra* note 11.

<sup>133</sup> *See id.*

<sup>134</sup> *Id.*

The French reduction from having a 20% VAT on feminine hygiene products to 5.5% brings it in line with the current VAT on feminine hygiene products in the United Kingdom.<sup>135</sup> The U.K. VAT on feminine hygiene products has been at 5% since a 2001 campaign to lower the tampon tax.<sup>136</sup> The British government went even further, however, by lobbying the European Commission to banish the tampon tax altogether, which EU law currently requires to be at a rate of at least 5%.<sup>137</sup> The European Commission mandates a minimum 5% VAT on feminine hygiene products because it does not classify them as “essential,” unlike condoms and razors, which are categorized as “essential” and thus are not mandatorily taxed.<sup>138</sup> As the British government was waiting to see if the European Union would allow it to remove the tampon tax altogether, Chancellor George Osborne announced in his 2015 Autumn Statement that the money raised by the 5% VAT on feminine hygiene products would go to women’s charities.<sup>139</sup> As of May 2016, the European Commission said it would enact laws to enable member states to reduce or abolish their taxes on feminine hygiene products, but no such laws have been enacted at the time of this writing.<sup>140</sup> Thus, as it stands, EU citizens who want to abolish the tampon tax in any of the EU member states must lobby the entire EU, which is a high bar to overcome. Time will tell whether the post-Brexit United Kingdom will still be tied to EU regulations on this issue and, if not, whether the it will move forward with abolishing the tax.

## 2. *The Tampon Tax Lives on in Australia*

Efforts to abolish the tampon tax in Australia have been less successful. As in some American states, in Australia products like condoms and sunscreen are deemed “necessities” exempt from the national goods-and-services tax, while feminine hygiene products are considered “non-essential” and face a 10% goods-and-services tax.<sup>141</sup> The characterization of tampons and sanitary pads as non-essential items may seem like a lower

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<sup>135</sup> Jon Stone, *French Parliament Votes to Cut “Tampon Tax” VAT on Women’s Sanitary Products*, INDEPENDENT (Dec. 15, 2015, 9:49 PM), <http://www.independent.co.uk/news/uk/politics/french-parliament-votes-to-cut-tampon-tax-vat-on-womens-sanitary-products-a6773676.html> [https://perma.cc/Y6LH-BZG6].

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See Nick Gutteridge, *EU Denies MP’s Claims It Has “Dropped” Osborne’s Agreement to Exempt UK from Tampon Tax*, EXPRESS (May 26, 2016, 2:00 AM), <http://www.express.co.uk/news/politics/673665/EU-referendum-George-Osborne-Brexit-tampon-tax-John-Redwood> [https://perma.cc/6VDB-Y4CC].

<sup>141</sup> “*Tampon Tax*”: *Australia Decides Not [sic] Remove Controversial Levy*, *supra* note 12.

bar to overcome than the medical appliances category often used in U.S. states and in other countries. Australia's historical practice requires, however, that all state and territory governments agree before any changes to the goods-and-services tax can be made, despite not being a constitutional requirement.<sup>142</sup> After a petition demanding the end of the tampon tax reached over 103,000 signatures,<sup>143</sup> Australian state treasurers considered the issue at a treasurers' meeting in August 2015, but like the legislative decisions in California and France, decided not to make any changes to the classifications of tampons, citing that the estimated tax revenue losses would be around 22 million U.S. Dollars.<sup>144</sup> At least one Australian activist believes it may take years to abolish the Australian tampon tax, because both houses in Parliament must approve of the necessary legislative changes.<sup>145</sup>

The recent proliferation of global action to eliminate the tampon tax in so many different countries underscores how important this issue is to women and activists all around the world.

#### D. Challenges to Litigation

##### 1. When Revenue Concerns Outweigh Equality: The California Example

The movement in California to abolish the tampon tax in 2016 followed the opposite trajectory as that in New York—first there were legislative efforts followed by a lawsuit—with a very different result: the tampon tax survived. First came Assembly Bill 1561, proposed by a bipartisan duo of female assembly members, which would have created an explicit exemption for “sanitary napkins” and “tampons.”<sup>146</sup> Medical devices and prescription drugs, like Viagra, were already exempt.<sup>147</sup> Had this Bill succeeded, feminine hygiene products including tampons, sanitary

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<sup>142</sup> *Id.*

<sup>143</sup> Subeta Vimalarajah, Petition, *To: Australia's 8 State and Territory Treasurers: Stop Taxing My Period!*, COMMUNITY RUN, <https://www.communityrun.org/petitions/stop-taxing-my-period> [<https://perma.cc/UZ3A-H9KP>].

<sup>144</sup> “Tampon Tax”: Australia Decides Not to Remove Controversial Levy, *supra* note 12.

<sup>145</sup> Tegan Taylor, *Australia's Tampon Tax Changes Years Away Despite Changes in Chicago, UK, Activist Says*, AUSTRALIAN BROADCASTING CORP. NEWS (Aug. 11, 2016, 4:05 PM), <http://www.abc.net.au/news/2016-03-18/tampon-tax-changes-in-chicago-uk-australia-will-lag-activist/7257146> [<https://perma.cc/8PD4-5WC6>].

<sup>146</sup> AB-1561, 2015–16 State Assemb., Reg. Sess. (Cal. 2016), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160AB1561](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1561) [<https://perma.cc/5QAX-DMYB>].

<sup>147</sup> Anna North, *Jerry Brown's Disappointing Tampon Tax Decision*, N.Y. TIMES (Sept. 14, 2016, 2:21 PM), <https://takingnote.blogs.nytimes.com/2016/09/14/jerry-browns-disappointing-tampon-tax-decision> [<https://perma.cc/7YDJ-SSCS>].

napkins, and menstrual cups would have been untaxed through 2022.<sup>148</sup> Despite some opposing assembly members' contention that the 100 existing exemptions were too many already, the Bill passed the state legislature unanimously in August 2016.<sup>149</sup> However, in September 2016, Governor Jerry Brown vetoed the Bill, along with six other tax bills, saying the legislature was not the proper venue for making tax decisions.<sup>150</sup> Instead, he said that such "tax breaks . . . should be considered during budget deliberations so that all spending proposals are weighed against each other at the same time."<sup>151</sup>

Less than three months after Governor Brown's veto,<sup>152</sup> Assemblymember Cristina Garcia, a cosponsor of the vetoed Bill, introduced another bill that would eliminate the tax on tampons in California.<sup>153</sup> Although the new bill would effect the same "budget constraint" as the prior one (approximately \$20 million annually), Garcia hoped that the increased national momentum against the tampon tax, as well as a pending California lawsuit contending that the tampon tax violates the Equal Protection Clause, would make a difference.<sup>154</sup> As of July 2017, the new bill had been referred to the senate appropriations suspense file,<sup>155</sup> where it will be eligible for a rehearing during the second year of the legislative session, and the lawsuit was in the pleadings stage.<sup>156</sup>

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<sup>148</sup> Cal. AB-1561 [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160AB156](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB156) [<https://perma.cc/5QAX-DMYB>].

<sup>149</sup> North, *supra* note 147.

<sup>150</sup> Wadsworth, *supra* note 110 (quoting Jerry Brown as saying that "[t]ax breaks . . . are the same as new spending" and should be decided in budget deliberations). In response, Assemblymember Cristina Garcia, a Democrat who cosponsored the bill, said that "[s]aying that the measure should have been put in the budget is just side-stepping the fact that we shouldn't be balancing the budget off half of the population." North, *supra* note 147.

<sup>151</sup> Jacqueline Burte Cote, *Yet Another Politician Mansplains Why Tampons & Diapers Should Be Taxed*, CAFEMOM (Sept. 13, 2016, 6:06 PM), [http://thestir.cafemom.com/politics\\_views/200584/yet\\_another\\_politician\\_mansplains\\_why](http://thestir.cafemom.com/politics_views/200584/yet_another_politician_mansplains_why) [<https://perma.cc/G63V-92RB>]; *see also* Sharon Bernstein, *California Governor Vetoes Bill to Repeal Tampon Tax*, REUTERS (Sept. 13, 2016, 6:21 PM), <http://www.reuters.com/article/us-california-tampon-idUSKCN11J2QK> [<https://perma.cc/UU5T-9MRD>].

<sup>152</sup> *See* Bernstein, *supra* note 151.

<sup>153</sup> Mollie Reilly, *The Fight Against the Tampon Tax Gets New Life in California*, HUFFINGTON POST (Dec. 5, 2016, 8:08 PM), [http://www.huffingtonpost.com/entry/california-tampon-tax\\_us\\_5845fe51e4b055b31398fb7f](http://www.huffingtonpost.com/entry/california-tampon-tax_us_5845fe51e4b055b31398fb7f) [<https://perma.cc/5SAW-Y9PR>].

<sup>154</sup> *See id.*

<sup>155</sup> A.B. 9, 2016–17 State Assemb., Reg. Sess. (Cal. 2017), <https://legiscan.com/CA/bill/AB9/2017> [<https://perma.cc/N7FT-TBLT>].

<sup>156</sup> Register of Actions, *DiSimone v. California* (Cal. Super. Ct. July 18 2017) (No. CGC-16-552458), <http://jsaccess.sftc.org:8080/ajsWeb/requester?APPNAME=WEB&PRGNAME> [<https://perma.cc/74C2-BTZU>].



So even when eliminating the tampon tax has public and legislative support, government leaders may act to block its elimination, demonstrating the need for litigation as the vehicle to eliminate the tax in those situations. Even some liberal politicians, like Democratic Governor Jerry Brown, are satisfied with the revenue justification for taxing health products required by women.

## 2. *Resistance to Eliminating Taxes on Feminine Hygiene Products*

The resistance to eliminating municipal, state, and national taxes (such as in Canada and France) on feminine hygiene products is rooted in two primary arguments: first, that feminine hygiene products are not necessities, and second, that states cannot afford to lose the guaranteed revenue from taxes on tampons.

The belief that tampons and sanitary pads should not be categorized as a necessity is illustrated by the French Minister of State for the Budget's perhaps misguided attempt to compare tampons to men's shaving cream, a luxury in France with a VAT of 20%.<sup>157</sup> A less offensive line of reasoning is what the City of Chicago argued in the 1989 *Geary* case: that tampons and pads are not medical appliances but are purely used for hygiene.<sup>158</sup> True, the distinction between medical appliance and hygiene product may be subtle, especially depending on how a tax code defines each category. But both these arguments rely on a misunderstanding of, or a lack of concern about, basic female biology and contradict how medical associations characterize tampons as a medical necessity.<sup>159</sup>

Joseph Henchman, the overseer of state policy for the think tank Tax Foundation, also argues that "necessity is subjective," implying that there is no clear single definition of a *necessity*.<sup>160</sup> While this may be true, so long as there are tax-exempt categories based upon the idea that some items deserve to be tax-exempt because they are so essential to people's lives, there will and should be debate about what items should be placed into such exempt categories.<sup>161</sup> Furthermore, there are normative justifications for determining that tampons and feminine hygiene products are necessary

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<sup>157</sup> See *France Rejects "Tampon Tax" Change*, *supra* note 123.

<sup>158</sup> *Geary v. Dominick's Finer Foods, Inc.*, 544 N.E.2d 344, 355 (Ill. 1989).

<sup>159</sup> See Press Release, American Medical Association, AMA Adopts New Policies on Final Day of Annual Meeting, (June 15, 2016) (stating that "[f]eminine hygiene products are essential for women's health"), <https://www.ama-assn.org/ama-adopts-new-policies-final-day-annual-meeting> [<https://perma.cc/WUP2-XRTU>].

<sup>160</sup> Josh Barro, *The Latest Sales Tax Controversy: Tampons*, N.Y. TIMES: THE UPSHOT (Jan. 7, 2016) <https://www.nytimes.com/2016/01/07/upshot/the-latest-sales-tax-controversy-tampons.html> [<https://perma.cc/294Q-MEFG>]. Henchman notes that "nuanced arguments about what constitutes necessity have often led to very complicated sales tax rules." *Id.*

<sup>161</sup> *Id.*

products, such as that their use helps to prevent disease and infection.<sup>162</sup> There are also comparative arguments that arise by, for example, looking at the currently tax-exempt items and establishing how feminine hygiene products are more or equally essential to basic human needs as items like frosting or Band-Aids.<sup>163</sup>

Other resistance stems from the reluctance to lose the revenue brought to a state or city through the tampon tax and often coupled with the argument that the tax codes are already overly complicated.<sup>164</sup> Those especially concerned about generating state or federal revenue from sales tax defend the tampon tax as a way to ensure tax revenue in a slow economy: the more products that are exempted from sales tax, the more the state must rely on tax revenue from restaurant meals and “durables” like consumer electronics and home appliances.<sup>165</sup> Yet since consumers cut back on eating out and buying these durable goods during a weak economy, the state risks a low tax-revenue stream if it does not continue to receive revenue from more necessary products, like feminine hygiene products.<sup>166</sup>

Yet this argument that the tampon tax is justified because consumers will consistently buy tampons even in a poor economy reveals that tampons are indeed a necessity. If legislatures are reluctant to eliminate the tax due to budget concerns and revenue loss, the best hope for overturning the tampon tax may be through filing a lawsuit, as the California case demonstrates.<sup>167</sup>

### III. INTERMEDIATE AND EXACTING SCRUTINY ANALYSIS

For a plaintiff to succeed in demonstrating that the tampon tax is unconstitutional under the Equal Protection Clause, a court must find, through an intermediate scrutiny analysis, that the tax is discriminatory and does not further an important government interest via a means that is substantially related to that interest. Section III.A provides an overview of the Equal Protection Clause, Section III.B traces the development of the intermediate scrutiny analysis for sex-based classifications, and Section III.C highlights the traditional analysis of tax claims under the Equal Protection Clause. At bottom, this Section provides the legal framework for a challenge to the tampon tax under the Equal Protection Clause.

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<sup>162</sup> See *infra* notes 250–54 and accompanying text.

<sup>163</sup> See, e.g., FLA. DEP'T OF REVENUE, *supra* note 18.

<sup>164</sup> See *supra* Section II.D.

<sup>165</sup> Barro, *supra* note 164.

<sup>166</sup> *Id.*

<sup>167</sup> See *supra* Section II.E.1.

### A. *The Equal Protection Clause: An Overview*

The Fourteenth Amendment's Equal Protection Clause provides that no state shall "deny to any persons within its jurisdiction the equal protection of the laws."<sup>168</sup> The Supreme Court has interpreted this Clause to guarantee that people who are similarly situated will be treated equally under the law; however, the Court allows for differential treatment when there are relevant distinctions between individuals or among groups.<sup>169</sup> Thus, a plaintiff bringing an equal protection claim will have a stronger case if she can demonstrate that she is the same as, or is similarly situated to, the individuals or groups to which she compares herself. It is rare, however, for the Court to explicitly analyze whether a plaintiff with an equal protection claim is actually similarly situated to the others from whom the plaintiff is allegedly being treated differently.<sup>170</sup> Rather, the Court tends to focus its analysis on whether the plaintiff belongs to a "suspect classification" and, if so, to what extent the law in question upholds or relates to a legitimate government interest.<sup>171</sup>

The Court's analysis of equal protection claims occurs within a framework of a general deference to the legislature but becomes a "more searching judicial inquiry" when the law impedes individual rights or discriminates against a minority group.<sup>172</sup> The level of judicial scrutiny depends upon what "suspect classification" the plaintiff falls into.<sup>173</sup> Over time, the Court has identified three levels of scrutiny: rational basis, intermediate scrutiny, and strict scrutiny.<sup>174</sup> The floor for equal protection claims is the rational basis test, which requires the government to show that the statute is reasonably related to a government interest.<sup>175</sup> Under this test,

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<sup>168</sup> U.S. CONST. amend. XIV, § 1.

<sup>169</sup> See Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1079 (2011).

<sup>170</sup> Natasha L. Carroll-Ferrary, Note, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of "Similarly Situated,"* 51 N. Y. L. SCH. L. REV. 595, 610 (2006) ("[I]n most . . . cases involving claims of equal protection violations, courts do not conduct an analysis of whether the parties are similarly situated before considering the equal protection claim.").

<sup>171</sup> Barnes & Chemerinsky, *supra* note 169, at 1079.

<sup>172</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

<sup>173</sup> Barnes & Chemerinsky, *supra* note 169, at 1079. Indeed, the categorization of the plaintiff into a suspect category is so imperative in equal protection cases that the results "will almost always depend on the ability to convince a court that there is a racial or gender classification present or discrimination with regard to a fundamental right." *Id.*

<sup>174</sup> *Id.* at 1077–79.

<sup>175</sup> *Id.* at 1077.

governmental actions are usually upheld.<sup>176</sup> On the other hand, if the plaintiff is treated differently due to a racial classification, then the Court will apply a strict scrutiny analysis, and the government must show that the statute is “narrowly tailored” to support a “compelling” government interest.<sup>177</sup> The strict scrutiny analysis is the highest tier of scrutiny that the Court applies for equal protection claims, and rarely does the Court uphold a statute when applying strict scrutiny.<sup>178</sup>

Until 1976, these were the only two tiers of scrutiny used in equal protection claims, and as sex was not yet deemed a suspect category, civil rights groups led by then-professor Ruth Bader Ginsburg argued that sex classifications should be analyzed under strict scrutiny just like racial classifications were.<sup>179</sup>

### *B. Development of the Intermediate Scrutiny Standard for Sex Classifications*

A series of Supreme Court decisions has outlined the somewhat ambiguous level of scrutiny needed for sex discrimination cases. The Court first extended the Equal Protection Clause to apply to sex discrimination in 1971 in *Reed v. Reed*.<sup>180</sup> Prior to this case, the Court had never struck down a sex-based law as a violation of the Equal Protection Clause.<sup>181</sup> The *Reed* Court held that an Idaho law specifying that men were to be preferred to women in the appointment of estate administrators was an “arbitrary preference” that did not stand up to the demands of the Fourteenth Amendment.<sup>182</sup> The state’s reasoning for the law was purely administrative—to reduce the workload of probate courts when faced with two potential estate administrators of different sexes—which the Court conceded to be a legitimate objective but one too arbitrary to be upheld under the Equal Protection Clause.<sup>183</sup> The *Reed* Court neither explained why it decided to use a stricter standard than the usual rational basis test it

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<sup>176</sup> *Id.* at 1077–78.

<sup>177</sup> *See id.* at 1078–79.

<sup>178</sup> *Id.* at 1078–79.

<sup>179</sup> Wendy W. Williams, *Ruth Bader Ginsburg’s Equal Protection Clause: 1970–80*, 25 COLUM. J. GENDER & L. 41, 42 (2013).

<sup>180</sup> 404 U.S. 71, 75 (1971).

<sup>181</sup> Before *Reed*, the Court insisted that the Constitution allowed states to “draw[] a sharp line between the sexes.” *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948); *see also* Williams, *supra* note 183, at 42 (demonstrating the feminist legal efforts to get the Court to view sex as a strict scrutiny category and noting that in *Reed*, “for the first time in its history, [the Court] str[uck] down a gender-line in law as a violation of the Equal Protection Clause of the Fourteenth Amendment”).

<sup>182</sup> *Reed*, 404 U.S. at 74.

<sup>183</sup> *Id.* at 76.

had previously used for sex discrimination equal protection claims nor articulated the standard it used in this case, other than to note that the Idaho law was subject to “scrutiny.”<sup>184</sup> This standard, now known as “intermediate scrutiny,” but not identified as such until five years later in *Craig v. Boren*,<sup>185</sup> lives somewhere in the gap between the low-level rational basis tier and the strict scrutiny tier.<sup>186</sup> The Court seemed to be applying a formal equality approach, finding that for two comparable candidates for estate administrator, sex cannot be deemed a preferential factor, so long as the state’s means for doing so are “arbitrary.”<sup>187</sup>

After *Reed*, feminist legal scholars, led by Ruth Bader Ginsburg, continued to push for a clarified strict scrutiny classification for sex discrimination cases.<sup>188</sup> In *Frontiero v. Richardson*, a plurality opinion by Justice William Brennan did find that sex classifications should be examined with strict scrutiny; but, without the necessary five-Justice majority, it did not become controlling law.<sup>189</sup> The law at issue in *Frontiero* allowed a serviceman to claim his wife as a “dependent” to obtain increased health and living benefits without proof that the wife relied on her husband for support.<sup>190</sup> But for a married servicewoman to claim her husband as a “dependent,” she had to submit proof demonstrating not only that he did in fact rely on her for economic support but also that he relied on her for over half of his support.<sup>191</sup>

The district court hypothesized that the legislature created the law to reflect the societal norm that men are “breadwinner[s]” while women are “typically the ‘dependent’ partner”; thus, for administrative reasons, the

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<sup>184</sup> *Id.* at 75.

<sup>185</sup> 429 U.S. 190, 218 (1976).

<sup>186</sup> See Randal D. Shields, Comment, *Constitutional Law: Intermediate Scrutiny—Gender-Based Classifications*: Michael M. v. Superior Court of Sonoma County, 15 AKRON L. REV. 595, 597 (1982) (“The *Reed* Court stretched the rational basis test into what was really a disguised balancing test similar to a strict scrutiny approach, but without the demand for a compelling state interest.”).

<sup>187</sup> Formal equality is the view that “the law should combat discrimination against similarly situated equals. According to this view, women ought to enjoy all the rights and privileges afforded to men, and no more . . . . The call to formal equality required advocates to downplay certain biological and socially constructed differences between the sexes. In the process, proponents of formal equality articulated an intuitively attractive, justice-oriented appeal: treat each sex the same, and women will prosper.” Keith Cunningham-Parmeter, *(Un)Equal Protection: Why Gender Equality Depends on Discrimination*, 109 NW. U. L. REV. 1, 21 (2015) (footnotes omitted). For more on formal equality, see Williams, *supra* note 179 and accompanying text.

<sup>188</sup> Williams, *supra* note 179, at 41. At the time, Ginsburg was a Professor of Law at Columbia Law School and “the leading Supreme Court litigator for gender equality in the crucial decade, 1970–80.” *Id.*

<sup>189</sup> 411 U.S. 677, 678 (1973) (plurality opinion).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 678–79.

lower court found that it was reasonable to assume that men's wives really were dependent but require proof for women alleging dependent husbands.<sup>192</sup> Justice Brennan's four-Justice opinion rejected stereotypes about women's capabilities and noted both women's historical inequality and Congress's deepening adversity to sex-based classifications.<sup>193</sup> Importantly, the Court stated that if the government objective was to exclude or protect one sex based upon a perceived innate handicap or inferiority, then the government objective was illegitimate.<sup>194</sup> As in *Reed*, the Court found that the government's administrative justification was insufficient to find the law valid; but here, the Court further said that the government's purpose for the law was not sufficient "in order to satisfy the demands of *strict judicial scrutiny*."<sup>195</sup> A three-Justice concurrence, however, disagreed that characterizing sex as a suspect classification was necessary, arguing that the *Reed* definition was authority and that the Court should not preempt legislative authority, since the Equal Rights Amendment was then being submitted to the states for ratification.<sup>196</sup> Again, as in *Reed*, the Court used a formal-equality approach to strike down facially unequal laws.<sup>197</sup>

Feminists continued to advocate for a strict scrutiny analysis of sex-based classifications. But in 1976, the Court again failed to reach the necessary fifth vote for strict scrutiny in *Craig v. Boren*,<sup>198</sup> in which the Court instead articulated the level of scrutiny known as intermediate scrutiny.<sup>199</sup> In *Craig*, the Court used a formal-equality approach<sup>200</sup> to find

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<sup>192</sup> *Id.* at 681.

<sup>193</sup> *Id.* at 684–88.

<sup>194</sup> *Id.* at 684–85.

<sup>195</sup> *Id.* at 689 (emphasis added); see also *id.* at 690 (“[W]hen we enter the realm of ‘strict judicial scrutiny,’ there can be no doubt that ‘administrative convenience’ is not a shibboleth, the mere recitation of which dictates constitutionality.”).

<sup>196</sup> *Id.* at 691–92.

<sup>197</sup> See Cunningham-Parmeter, *supra* note 187, at 27. Cunningham-Parmeter describes how the Court was not merely using formal-equality notions but was intentionally derailing stereotypes under a power-inequality approach.

[S]tate law in *Reed* presumed that men controlled capital [while] the armed services rule in *Frontiero* presumed that women controlled the home. Both stereotypes reinforced gender roles that limited women's advancement. In each case, the Court mandated formal equality not as a means unto itself but as part of the larger objective of dismantling gender hierarchies.

*Id.*

<sup>198</sup> 429 U.S. 190 (1976).

<sup>199</sup> *Id.* at 218 (Rehnquist, J., dissenting) (noting that in this case, the Court applied “an elevated or ‘intermediate’ level scrutiny, like that invoked in cases dealing with discrimination against females”).

<sup>200</sup> Williams, *supra* note 179 at 43–44. Williams describes the formal-equality approach as one that views “discrimination against men and women as equally reprehensible in the same way some conservative justices viewed discrimination against white people as the moral and legal equivalent of discrimination against minorities.” *Id.*

that a sex-based distinction regarding the age at which one could buy alcohol was unconstitutional.<sup>201</sup> The government's justification was based on an argument the Court characterized as "statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups."<sup>202</sup> Though the Court said that previous cases had established that sex classifications must serve "important governmental objectives and must be substantially related to achievement of those objectives," this was in fact the first time that the Court articulated this loose-fitting generalities standard for sex classifications.<sup>203</sup>

Since the Court's articulation of intermediate scrutiny in *Craig v. Boren*, a challenged government action or objective can only survive if the state's action is substantially related to an important governmental objective, meaning that the government must not only demonstrate meaningful differences between men and women but must also have an adequate governmental objective that justifies this differential treatment. Yet the Court has at times requested more than merely a substantial relation to a governmental objective, leading some observers to believe that the proper level of scrutiny for sex discrimination lies somewhere between intermediate scrutiny and strict scrutiny.<sup>204</sup> Many also believe that sex-based discrimination should be treated with the same level of scrutiny as race-based discrimination: strict scrutiny.<sup>205</sup>

The Court has suggested that for sex-based discrimination, the proper level of scrutiny is intermediate scrutiny with teeth: essentially, the area between intermediate and strict scrutiny. For example, in *Mississippi University for Women v. Hogan*,<sup>206</sup> the Court held that the state or other proponent of the challenged state action must show an "exceedingly persuasive justification" for using a sex-based classification.<sup>207</sup> Furthermore, the Court has emphasized that it has some discretion when scrutinizing the government's alleged objectives. In *Weinberger v. Wiesenfeld*,<sup>208</sup> for instance, the Court contended that it does not need to accept the government's distillation of the alleged legislative purpose but

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<sup>201</sup> *Craig*, 429 U.S. at 197.

<sup>202</sup> *Id.* at 209.

<sup>203</sup> *Id.* at 197; see also Barnes & Chemerinsky, *supra* note 169, at 1079.

<sup>204</sup> Barnes & Chemerinsky, *supra* note 169, at 1079.

<sup>205</sup> *Id.*

<sup>206</sup> 458 U.S. 718 (1982).

<sup>207</sup> *Id.* at 724 (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)).

<sup>208</sup> 420 U.S. 636 (1975).

will examine the legislative history to assess what the goal of the legislation may have been.<sup>209</sup>

Together, then, at minimum any litigation against a state's tax on feminine hygiene products based upon the Equal Protection Clause will at least implicate intermediate scrutiny analysis.

### C. *Traditional Analysis of Tax Claims Under the Equal Protection Clause*

Assessing whether the tampon tax is unconstitutional under the Equal Protection Clause may require another level of analysis in addition to the intermediate scrutiny analysis: a consideration of the Court's treatment of tax cases under the Equal Protection Clause. The flexibility offered to lawmakers with respect to taxes presents a significant obstacle for challenging the tampon tax. The Court uses a rational basis approach to state tax laws, unless they deal with a historically marginalized group, and thus generally gives the state discretion to enact its tax legislation as it pleases. As tax systems have a strong presumption of constitutionality,<sup>210</sup> rarely has the Court found that a tax law violates the Equal Protection Clause.<sup>211</sup>

As in many areas of the law, tax codes ranging from the federal Internal Revenue Code to state- or city-based property tax laws have historically allowed some sex-based classifications, largely premised on gender stereotypes and expectations. Oftentimes, the Court has justified the upholding or removal of a tax based upon normative ideas about women's position within families and the domestic sphere. For example, in early alimony cases, the Court's decisions were based upon "the natural and legal duty of the husband to support the wife."<sup>212</sup> In *Gould v. Gould*, for

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<sup>209</sup> *Id.* at 648 ("But the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."); see also *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.").

<sup>210</sup> See *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526–27 (1959) ("The States have a very wide discretion in the laying of their taxes . . . . The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use, or value.").

<sup>211</sup> See *Madden v. Kentucky*, 309 U.S. 83, 88 (1940) ("[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it." (footnotes omitted)).

<sup>212</sup> *Audubon v. Shufeldt*, 181 U.S. 575, 577 (1901).



instance, the Court held that the payments a husband made to his ex-wife should not be taxed as part of the ex-wife's income tax, which encouraged the view that women existed in a dependent state to men.<sup>213</sup> Though most current tax regimes tend to be at least facially neutral toward sex-based classifications, scholars still contend that they demonstrate gender bias in estate taxation,<sup>214</sup> statutory interpretation of tax laws by courts,<sup>215</sup> pensions,<sup>216</sup> and the joint income tax return.<sup>217</sup> Evidently, a formal-equality approach may not suffice to overturn such facially neutral laws.<sup>218</sup>

Likely due to the deference the Court generally gives to the states to develop their own tax codes, there have been few tax cases that have alleged violations of the Equal Protection Clause; there have been especially few that also involve sex classifications. In addition to meeting the requirements of the Equal Protection Clause, some scholars have also contended that a tax must meet the horizontal-equity requirements grounded in the Uniformity Clause, which directs that taxes "shall be uniform throughout the United States."<sup>219</sup> The Supreme Court, however, has interpreted the Uniformity Clause to signify only geographic uniformity.<sup>220</sup> Furthermore, since most tax-based equal protection claims

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<sup>213</sup> 245 U.S. 151, 154 (1917).

<sup>214</sup> See Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers,"* 10 LAW & INEQ. 137, 150 (1991) (illustrating how modern estate planning law and practice "contains the same notions concerning married women's limited right to maintenance and the manifestation of fatherhood through property and inheritance that were present in the fourteenth century").

<sup>215</sup> See Gwen Thayer Handelman, *Sisters in Law: Gender and the Interpretation of Tax Statutes,* 3 UCLA WOMEN'S L.J. 39, 60–61 (1993) (arguing that the "every-man-for-himself" approach—giving the taxpayer the freedom to make any decision that does not interfere with the rights of others—to statutory ambiguity disadvantages women because of the difference in power that men and women possess in the private sphere).

<sup>216</sup> See generally Vicki Gottlich, *The Tax Reform Act of 1986: Does It Go Far Enough to Achieve Pension Equity for Women?*, 4 WIS. WOMEN'S L.J. 1, 19–20 (1988) (examining the effects of the private pension laws on the economic status of older women, highlighting how these laws impact women differently than men, and suggesting what can be done to ensure that more women receive meaningful economic benefits from their pension plans).

<sup>217</sup> See Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return,* 45 HASTINGS L.J. 63, 64 (1993) (arguing that the joint income tax return penalizes the second worker when two individuals live together, thus discouraging "married couples from having a second earner (usually the wife), putting both psychological and economic stress on these families, on the wife in particular").

<sup>218</sup> See Beverly I. Moran, *From Urinal to Manicure: Challenges to the Scholarship of Tax and Gender,* 15 WIS. WOMEN'S L.J. 221, 226 (2000) ("[B]ecause we are in the post-20th century feminist era, at least in tax legislation and judicial decisions, I think we can no longer rely on language alone to reveal bias. We are going to have to deal with neutral tax language and uncover whatever bias exists within that neutral language.").

<sup>219</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>220</sup> See Stephen W. Mazza & Tracy A. Kaye, *Restricting the Legislative Power to Tax in the United States,* 54 AM. J. COMP. L. 641, 656 (2006); see also, e.g., *Fernandez v. Wiener*, 326 U.S. 340, 361

would be analyzed only at a rational basis level—unless the claim involved another element that would trigger intermediate or strict scrutiny—the government typically has had to overcome only a low barrier in demonstrating its interest.<sup>221</sup> Because the purpose of taxation is to raise revenue, virtually any tax could be found to have a rational basis related to that legitimate interest.

The Court's tax-related Equal Protection Clause jurisprudence has suggested that the Court will consider whether the sex-based tax could have been classified differently, without implicating sex, and also whether that sex-based classification is clearly tied to a legitimate government interest. Where the classification is tied to a legitimate government interest, the Court has also considered whether that interest is based on sex stereotyping, in which case the law may be overturned, or whether it is tied to overcoming historical inequalities, in which case the law may be upheld. Equal protection claims based on discriminatory sex classifications have defeated tax laws in a few instances. For example, in *Moritz v. Commissioner of Internal Revenue*,<sup>222</sup> the Tenth Circuit found unconstitutional a law that allowed women an income tax deduction for dependent-care expenses, regardless of their marital status, but denied it to men who had never married.<sup>223</sup> The court rejected the government's justification that since women had lower paying jobs, it was rational to broaden their ability to deduct for dependent care.<sup>224</sup> Instead, the court said that if it were truly the government's objective to grant relief to people in low-income brackets who have dependents, it could have created such a category instead of using sex as the deciding tool.<sup>225</sup> But in *Kahn v. Shevin*,<sup>226</sup> which the Court decided only a year after the Tenth Circuit decided *Moritz*, the Court found constitutional a Florida law providing widows, but not widowers, a \$500 tax exemption under the Equal Protection Clause, citing discrimination against women in a male-

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(1945) (affirming that the Uniformity Clause “requires only that what Congress has properly selected for taxation must be identically taxed in every state where it is found”); *United States v. Ptasynski*, 462 U.S. 74, 84 (1983) (holding that Congress's decision to treat Alaskan oil as a separate class of oil does not violate the Uniformity Clause because neither “the language of the [Uniformity] Clause [n]or this Court's decisions prohibit all geographically defined classifications . . . [so long as] an excise tax appl[ies], at the same rate, in all portions of the United States where the subject of the tax is found.”).

<sup>221</sup> Eleanor Chote Jewart, Note, *The Difficulty of Equal Protection Challenges to Tax Classifications*: *Peden v. State*, 3 ST. & LOC. TAX L. 155, 159 (1998).

<sup>222</sup> 469 F.2d 466 (10th Cir. 1972).

<sup>223</sup> *Id.* at 470.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> 416 U.S. 351 (1974).

dominated workforce and women's usual economic dependency on their spouses as "a fair and substantial relation to the object of the legislation."<sup>227</sup>

One way to reconcile the different outcomes of these two similar statutes is that in *Kahn*, the objective of the statute was specifically to correct for economic obstacles women faced, whereas in *Moritz*, the objective could have been realized without a gendered basis and the state was possibly relying too much on reducing an administrative burden by using gender as a proxy for income. In this way, it seems that using sex-based classifications in a tax code or regulation may be constitutional under a power-inequality lens but not when it seems to be a somewhat arbitrary placeholder for reducing administrative work. Thus, although the Court does strongly weigh the state's interest in taxation when examining tax-related equal protection claims, it has also set precedent for consideration of how the tax relates to historical inequity. Additionally, the state may not justify its goal of obtaining tax revenue by use of sex classification when its main justification is administrative ease.

#### IV. INTERMEDIATE SCRUTINY ANALYSIS OF THE TAMPON TAX

In analyzing whether the tampon tax violates the Equal Protection Clause, a court would have to determine whether the tax is discriminatory and, if so, whether the state's justification for the tax is sufficiently related to the use of a sex-based tax. To assist in encouraging and supporting litigation against the tampon tax, Section IV.A first highlights the disproportionate effects the tampon tax has on women and Section IV.B then analyzes how the governments' two main justifications for the tax are arbitrary and not sufficiently tied to the governmental goal of increasing revenue.

##### A. *The Tampon Tax Is Discriminatory and Has Disproportionately Adverse Effects on Women*

The first hurdle in mounting an equal protection claim is to demonstrate that the law in question disproportionately and adversely affects women.<sup>228</sup> The tampon tax is discriminatory in three main ways: (1)

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<sup>227</sup> *Id.* at 355 (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)) ("We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden.").

<sup>228</sup> *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) ("When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is . . . appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert of [sic] overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.").

it is a tax on a sex-based product, (2) it places a unique economic burden on biological women, and (3) it is based on stereotyping and misunderstandings about female biology. Furthermore, the continued existence of the tax in thirty-eight states exemplifies its discriminatory nature by evidencing governments' failure to prioritize women's needs

First, the tampon tax is a sex-based tax because it is a tax on a product solely used by biological women. A sex-based tax is discriminatory even if members of the other sex occasionally are the purchasers of the product.<sup>229</sup> Biological men may still pay the tax occasionally because they may purchase feminine hygiene products for a partner, child, friend, or family member, but that does not change the fact that the government is using sex to push a product out of a tax-exemption zone into an area of taxation. There is no comparable tax on any sex-based medical product overwhelmingly used by men, for example. What distinguishes tampons from common tax-exempt medical products like cotton balls and Band-Aids is that they are not gender neutral. The delineation in most state tax regulations between exempted medical or health products and feminine hygiene products is nonsensical.<sup>230</sup> Just as the Court in *Reed v. Reed* held that sex should not be a preferential factor for choosing between two comparable candidates for estate administrator,<sup>231</sup> sex should not be a preferable factor for choosing between which comparable medical products and necessary goods to tax. It is difficult to think of a legitimate reason why, for example, cotton balls would be defined as medical products while tampons and sanitary pads are not classified as such, even though they are similarly absorbent and just as, if not more, medically necessary.

Second, the law certainly has an inequitable economic effect on biological women. The majority of purchasers of feminine hygiene products are biological women, and the only people who use feminine hygiene products are biological women. In *Kahn*, the Court upheld the tax exemption for widowers as a move toward balancing out general economic inequalities between men and women.<sup>232</sup> In the case of the tampon tax, women are hurt economically by this tax, keeping them in their historical subclass. The average American woman is estimated to use more than 16,000 tampons in her lifetime,<sup>233</sup> which one study estimated would cost

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<sup>229</sup> See *infra* note 257.

<sup>230</sup> See *supra* Part I.

<sup>231</sup> 404 U.S. 71, 76 (1971).

<sup>232</sup> *Kahn v. Shevin*, 416 U.S. 351, 353–55 (1974).

<sup>233</sup> *Fetters*, *supra* note 20.

around \$1,773.<sup>234</sup> The cost of feminine hygiene products on poor women is especially burdensome, and the extra payment imposed by the tampon tax can be very significant. Food pantries, for example, are often “desperate” for feminine hygiene products because food stamps do not cover them.<sup>235</sup>

Third, the tampon tax is based on stereotyping and misunderstandings about women’s biology. Gender-based stereotyping underlies various state tax regulations, especially in states and cities where tampons and sanitary pads are categorized as “cosmetic and hygiene products.”<sup>236</sup> Considering that women are vastly underrepresented in state legislatures,<sup>237</sup> and that legal issues that mostly affect women often go unacknowledged by state legislatures,<sup>238</sup> it is unsurprising but disappointing to find that male-dominated legislatures would list neutral products and majority-male products under the umbrella of tax exclusion while continuing to tax a common medical product that is solely used by women. Because the Court has tended to dismiss justifications for discriminatory laws under the Equal Protection Clause when they are based upon stereotypes,<sup>239</sup> the tampon tax too should be found unconstitutional. For example, in *Frontiero*, the Court deemed that administrative ease was not a sufficient reason for a state to

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<sup>234</sup> Jessica Kane, *Here’s How Much a Woman’s Period Will Cost Her Over a Lifetime*, HUFFINGTON POST (May 22, 2015), [http://www.huffingtonpost.com/2015/05/18/period-cost-lifetime\\_n\\_7258780.html](http://www.huffingtonpost.com/2015/05/18/period-cost-lifetime_n_7258780.html) [<https://perma.cc/D5GR-LD8Z>]. This figure is based upon a woman changing her tampon every six hours for a five-day duration per period cycle, thus using 20 tampons per cycle. *Id.* The average woman has 456 periods during her lifetime, so multiplied by 20 tampons per cycle, according to this method she will use approximately 9,120 tampons during her life. *Id.* For a \$7 box of 36 tampons, this leads to an estimation of a total cost of \$1,773.33 on tampons throughout a woman’s lifetime. *Id.*

<sup>235</sup> *Tampon Tax: Does Being Female in the U.S. Carry Unfair Costs?*, CHI. TRIB. (Mar. 9, 2016, 2:39 PM), <http://www.chicagotribune.com/news/nationworld/ct-tampon-tax-20160309-story.html> [<https://perma.cc/BF52-XNLN>].

<sup>236</sup> See *supra* notes 27–28 and accompanying text (noting that Illinois, for example, places tampons into the category of “grooming and hygiene products” and quoting a California lawmaker as stating that there are no other taxes that are as gender biased).

<sup>237</sup> See, e.g., Danielle Kurtzleben, *Almost 1 in 5 Congress Members are Women. Here’s How Other Jobs Compare*, NPR (June 11, 2016, 6:00 AM), <http://www.npr.org/2016/06/11/481424890/even-with-a-female-presumptive-nominee-women-are-underrepresented-in-politics> [<https://perma.cc/24CT-ZPGQ>].

<sup>238</sup> See, e.g., *Till Death Do Us Part: Part 1*, POST & COURIER (Charleston, S.C.) (Aug. 20, 2014), <http://postandcourier.com/app/till-death/partone.html> [<https://perma.cc/GC4N-HWGB>] (describing the history of legislative inaction in South Carolina in dealing with high rates of domestic violence against women and noting that “[t]hrough state officials have long lamented the high death toll for women, lawmakers have put little money into prevention programs and have resisted efforts to toughen penalties for abusers” and that “[in 2014] alone, a dozen measures to combat domestic violence died in the Legislature”); *Till Death Do Us Part: Part Four*, POST & COURIER (Charleston, S.C.) (Aug. 22, 2014) <http://www.postandcourier.com/app/till-death/partfour.html> [<http://perma.cc/7GWS-3KRQ>] (noting and quoting state lawmakers who ignore the problem by blaming the female victims for the crimes).

<sup>239</sup> See Cunningham-Parmeter *supra* note 187, at 26–27 and accompanying text.

justify a law that conclusively presumed that women were the dependent partner and men the breadwinners.<sup>240</sup> The administrative ease of taxing a medically necessary product for biological women to maintain constant tax revenue should likewise be insufficient for upholding the tampon tax in jurisdictions where other medical items are tax-exempt.

Moreover, the very existence of the tampon tax underscores how the government continues to neglect women's needs. The federal government has a long history of neglecting women's concerns about the safety of tampons.<sup>241</sup> For instance, the FDA delayed enacting a rule for standardized absorbency descriptions on tampon packaging until the Public Citizen lawsuit forced its hand years later. Even today, decades after women's health activists began pressing the FDA to regulate tampon manufacturing and to provide consumers with ingredient information, the exact components of each box of tampons are undisclosed. Moreover, the traditional societal expectation of silence around menstruation and tampon usage provides governments with more freedom to sideline menstruation-related issues.<sup>242</sup> Now, the feminist activism around the tampon tax has brought to the surface the legislatures' failures to consider women's menstruation a basic health issue and women's feminine hygiene products a basic health necessity.<sup>243</sup>

It is not a stretch to find that tampons are excluded from tax exemption due to the perceived inferiority of women and a general lack of concern about and understanding of women's biology. Crawford and Spivack have described how, in the Western literary imagination, men are perceived to bleed out of choice—usually due to a noble act in war or in another controlled way, such as a voluntary medical remedy—but women bleed without choice or control, “thus making their effluvia not only involuntary but also punitive and indicative of weakness.”<sup>244</sup> The subtle societal characterization of menstruation as a sign of weakness and something for girls and women to be ashamed of has created a culture of silence about the importance of feminine hygiene products to women's health. Perceptions remain that tampons are an extraneous luxury and misnomers persist regarding tampon usage. For instance, the French

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<sup>240</sup> *Frontiero v. Richardson*, 411 U.S. 677, 688–91 (1973).

<sup>241</sup> See *supra* Section I.A.

<sup>242</sup> See Gass-Poore', *supra* note 18 (summarizing a state legislator as stating that “the reluctance to talk about [menstruation] has prevented the issue from gaining more momentum in state legislatures”).

<sup>243</sup> See, e.g., Jones, *supra* note 1.

<sup>244</sup> Crawford & Spivack, *supra* note 31, at 510–11 (citing Gail Kern Paster, “*In the Spirit of Men There is No Blood*”: *Blood as Trope of Gender in Julius Caesar*, 40 *SHAKESPEARE Q.* 284, 286–87 (1989)). The authors add that “[t]he tax treatment reinforces the notion that these products are optional indulgences for a body whose boundaries should be subject to control.” *Id.* at 511.

Minister of State for the Budget compared tampons' necessity to that of men's shaving cream as a way to dismiss protesters calling for an elimination of the tampon tax in France.<sup>245</sup> It is bizarre to think of tampons along the lines of shaving cream, and it is dismaying that outdated notions about menstruation continue to thrive.

*B. Government Justifications for the Tampon Tax: The Ends Don't Justify the Means*

Moreover, states that tax tampons fail to meet the sufficiently related justification prong of the intermediate scrutiny analysis for sex-based equal protection claims. There are two main justifications in the case of the tampon tax. The first potential justification a state could give is that tampons do not fit into existing exemption categories because they are not necessary products or medical products. The second likely explanation for the tax is that the state wants a dependable revenue stream. Ultimately, neither justification is persuasive.

Regarding the first potential government justification of the tax, that female hygiene products are neither medical products nor necessities, abundant research demonstrates the important medical role that tampons and other feminine hygiene products play in women's health. First, the absorption function of tampons can prevent encrustation and the transmission of blood and bodily fluids to others.<sup>246</sup> Additionally, tampon use has been associated with decreased risk of endometriosis,<sup>247</sup> a chronic and painful disease that has been reported to have a similar impact on women's physical health-related quality of life as cancer.<sup>248</sup> Furthermore, proper use of sanitary products like tampons, pads, and menstrual cups reduce the risk of reproductive tract infections, which are correlated with poor menstrual hygiene practices, such as the use of old cloths.<sup>249</sup> Accordingly, the American Medical Association supports efforts to

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<sup>245</sup> *France Rejects "Tampon Tax" Change*, *supra* note 123.

<sup>246</sup> See Erika L. Meaddough et al., *Sexual Activity, Orgasm and Tampon Use Are Associated with a Decreased Risk for Endometriosis*, 53 GYNECOLOGIC & OBSTETRIC INVESTIGATION 163, 163, 168 (2002) (explaining that the researchers found that women with endometriosis tended to use tampons less frequently than women without endometriosis and thus researchers theorized that tampons may be "more efficient at the removal of menstrual fluid compared to the use of pads").

<sup>247</sup> *Id.*

<sup>248</sup> Kelechi E. Nnoaham et. al, *Impact of Endometriosis on Quality of Life and Work Productivity: A Multicenter Study Across Ten Countries*, 96 FERTILITY & STERILITY 366, 370 (2011) (finding that women with endometriosis who self-report the effect of the disease on their physical quality of life have similar scores on that questionnaire as women with cancer).

<sup>249</sup> A. Dasgupta & M. Sarkar, *Menstrual Hygiene: How Hygienic Is the Adolescent Girl?*, 2 INDIAN J. COMMUNITY MED. 77, 80 (2008) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2784630/> [<https://perma.cc/93UC-GEVE>].

eliminate the tax on tampons, calling them a “regressive penalty.”<sup>250</sup> The Food and Drug Administration also classifies tampons and feminine hygiene products as “medical appliances.”<sup>251</sup> Based upon the medical benefits tampon use imparts on women and the federal classification of tampons as medical appliances, state tax regulations should thus categorize tampons as medical products in tax codes that have exemptions for medical products and necessities.

Second, a government defending its tax on tampons will also contend that it has a legitimate interest in enacting a strong tax revenue stream. To succeed on an equal protection claim, the government must demonstrate that the purpose of garnering tax revenue (the ends) sufficiently justifies the creation of a sex-based tax for doing so (the means). The Supreme Court has generally given states a lot of leeway to create and implement their tax schemes as desired,<sup>252</sup> but eliminating the tampon tax does not undermine a state’s authority to create its own tax scheme. The argument is not that feminine hygiene products should inherently be tax-exempt. Rather, the argument is that it is discriminatory to tax a sex-based medical necessity within a tax scheme that has exemptions for medical and other necessary products. The fact that the tax revenue from feminine hygiene products is substantial and constant underscores their fundamental value to biological girls and women of menstruation age.<sup>253</sup>

So, neither of the justifications for the tampon tax suffices to pass the test. Instead, it seems to be an irrational, discriminatory double standard to tax tampons but not to tax medical products and necessities that are gender neutral or that are mostly used by men. Justice Scalia famously once wrote that “[a] tax on wearing yarmulkes is a tax on Jews.”<sup>254</sup> Likewise, a tax on tampons is a tax on biological women. It is not a mere mistake or error—the various departments of taxation of most U.S. states decided to levy a tax on a product used solely by women. This tax should be found unconstitutional under the Equal Protection Clause.

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<sup>250</sup> AMA Adopts New Policies on Final Day of Annual Meeting, *supra* note 159. In particular, the AMA president-elect, David O. Barbe, M.D., said, “Feminine hygiene products are essential for women’s health, and taxes on them are a regressive penalty . . . . We applaud the states that have already eliminated sales taxes on these products, and we urge every state to follow suit.” *Id.*

<sup>251</sup> See U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY AND FDA STAFF, *supra* note 22.

<sup>252</sup> See *supra* Section III.C.

<sup>253</sup> See Fetters, *supra* note 20 (tracing the rise in tampon use by U.S. women).

<sup>254</sup> *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993); see also *id.* (“Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed.”).



## CONCLUSION

Now is a unique time when activists have pushed into the spotlight a form of economic gender-based discrimination that has existed in most states for decades. The momentum of individuals and groups across the country, who are gathering together and advocating for the elimination of the tax on feminine hygiene products, is promising for reducing sex-based inequalities in the United States and abroad. Taxes on tampons at the city and state level in various U.S. states may be overturned by legislative action, especially if public pressure and consciousness-raising regarding menstruation and tampons continue. Class action lawsuits based on the claim that the tampon tax violates the Equal Protection Clause should also be successful, as the tax fails to meet the applicable standard. The tax on tampons is not sufficiently tied to any state objective that warrants such gender-based classification. Additionally, the economic and health consequences of the tampon tax on menstruating biological women are significant, especially for lower-income women. The decision for future courts and legislators is simple: eliminate the tampon tax.

