

## THE UNCONSTITUTIONAL TAMPON TAX \*

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## ABSTRACT

*Thirty-five states impose a sales tax on menstrual hygiene products, while products like spermicidal condoms and erectile dysfunction medications are tax-free. This sales tax—commonly called the “tampon tax”—represents an expense that girls and women must bear on top of the cost of biologically necessary items that they need in order to attend school, work, and otherwise participate in public life. This article explores the constitutionality of the tampon tax and argues that it is an impermissible form of gender discrimination under the Equal Protection Clause. First, menstrual hygiene products are a unique proxy for female sex, and therefore any disadvantageous tax classification of these products amounts to a facial classification on the basis of sex. There is no “exceedingly persuasive justification” for taxing menstrual hygiene products, and so the tax must fail intermediate scrutiny. Even assuming arguendo that the tampon tax is not viewed as a tax on female sex, it is still unconstitutional because it cannot pass rational basis review.*

*Since 2016, four states and the District of Columbia have legislatively repealed their sales tax on menstrual hygiene products. One state, Nevada, did so by ballot referendum in 2018. Other states will consider repeal bills in upcoming legislative sessions or may consider ballot initiatives in the future. Women have also brought class*

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For helpful comments and conversation, the authors thank Deborah Dinner, Kate Gallo-way, Holning S. Lau, and Carla Spivack.

*action litigation in four jurisdictions, seeking declarations that the state tampon tax is unconstitutional and requesting refunds of prior taxes paid. The article develops the constitutional arguments that can be used by litigators in any ongoing or future case, recognizing that menstrual equity activism, including impact litigation, is likely to continue in the future.*

*Ultimately, what and whom a society seeks to tax signal its larger values. The continued imposition of state sales tax on menstrual hygiene products, seemingly without a principled distinction from other products that are exempted as necessities, exacerbates the aggregate economic inequality that already exists between the sexes. The tampon tax is unconstitutional and should be repealed in all states.*

## INTRODUCTION

“A tax on wearing yarmulkes is a tax on Jews,” Justice Antonin Scalia famously wrote in *Bray v. Alexandria Women’s Health Clinic*.<sup>1</sup> Of course, the reality is more complicated. Although a special tax on *wearing* yarmulkes would be problematic, there is no constitutional violation as long as retail *sales* of yarmulkes are taxed like the retail sales of all other clothing.<sup>2</sup> Imagine, however, that a state sales tax law exempted from taxation some items of religious clothing, such as First Communion veils worn by girls during a Roman Catholic religious rite,<sup>3</sup> or a turban worn by a Sikh man as a symbol of commitment to his faith,<sup>4</sup> while still imposing

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1. 506 U.S. 263, 270 (1993).

2. States vary in their sales tax treatment of clothing. In Massachusetts, for example, clothing under \$175 is exempt from sales tax. See Mass. Dep’t of Revenue, *A Guide to Sales and Use Tax*, MASS.GOV., <https://www.mass.gov/guides/sales-and-use-tax> [<https://perma.cc/8BDX-H7KN>] (last visited Dec 1, 2018) (listing tax-exempt items “[f]ood & [m]eals” as well as “[a]pparel & [f]abric [g]oods” less than \$175). Maryland, in contrast, has an annual “Shop Maryland Tax-Free Week,” typically coinciding with the start of a new academic year, when “qualifying apparel and footwear \$100 or less, per item, are exempt from the state sales tax.” Comptroller of Maryland, *Shop Maryland Tax-Free Week*, MARYLANDTAXES.GOV, [https://taxes.marylandtaxes.gov/Individual\\_Taxes/Individual\\_Tax\\_Types/Sales\\_and\\_Use\\_Tax/Tax\\_Information/Shop\\_Maryland\\_Programs/Shop\\_Maryland\\_Tax-free\\_Week/](https://taxes.marylandtaxes.gov/Individual_Taxes/Individual_Tax_Types/Sales_and_Use_Tax/Tax_Information/Shop_Maryland_Programs/Shop_Maryland_Tax-free_Week/) [<https://perma.cc/7XBN-AQEN>] (last visited Dec. 1, 2018).

3. See, e.g., SUSAN RIDGELY BALES, *WHEN I WAS A CHILD: CHILDREN’S INTERPRETATIONS OF FIRST COMMUNION* 25–26, 157–62, 164–66 (2005) (describing the importance of veils worn by girls during the First Communion ceremony).

4. See, e.g., ELEANOR NESBITT, *SIKHISM: A VERY SHORT INTRODUCTION* 48 (2d ed. 2016) (describing the significance of turban for Sikh men); see also Sahar Aziz, *Sticks and Stones, the Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 CUNY L. REV. 33, 47 (2009) (describing the mistaken similarities between turbans worn by some Muslims and

the tax on yarmulkes. Such taxation clearly would amount to an unconstitutional tax on Jews.<sup>5</sup>

An analogous situation exists right now with many states' treatment of menstrual hygiene products. Currently, thirty-five states impose a sales tax on tampons, sanitary napkins, and similar products, while simultaneously exempting from taxation numerous other items that are deemed necessities rather than luxuries.<sup>6</sup> For example, Wisconsin exempts spermicidal condoms and erectile dysfunction drugs from taxation, but taxes tampons and sanitary napkins as luxury items.<sup>7</sup> Similarly, California treats various skin cleansers, moisturizers, and baby oil as tax-exempt medical "necessities," but taxes tampons and sanitary napkins as luxuries.<sup>8</sup> Until a recent change in the law, New York's broad "medical supplies" sales tax exemption covered products ranging from dandruff shampoo to foot powder to bandages—but not tampons and sanitary napkins.<sup>9</sup> Although this article urges and welcomes legislative reforms and ballot initiatives to address these discrepancies, it focuses on further developing the constitutional argument against

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"distinct turban styles of Sikhs," although members of both groups "have suffered verbal harassment and have been denounced as terrorists"); Neha Singh Gohil & Dawinder S. Sidhu, *The Sikh Turban: Post-911 Challenges to This Article of Faith*, 9 RUTGERS J.L. & RELIGION, no. 2, 2008, at i, i ("Members of the Sikh faith—the fifth largest religion in the world—are required to wear a turban pursuant to religious mandate."); cf. NESBITT, *supra*, at 48 (describing wearing a turban as not a technical requirement of the Sikh faith).

5. See *Bray*, 506 U.S. at 270.

6. See *infra* Part I.B.

7. See WIS. STAT. § 77.54(14) (2011 & Supp. 2017) (exempting from sales tax "drugs"); WIS. ADMIN. CODE TAX § 11.09(2)(k) (2018) (defining "drug" for purposes of section 77.54(14) of the Wisconsin Statutes to include "medicated condoms"); *id.* § 11.09(2)(b) (defining "drugs" to include "prescription medicines"); see also Jordan Gass-Poore, *Citing Gender Bias, State Lawmakers Move to Eliminate 'Tampon Tax,'* NPR (Mar. 6, 2016, 1:00 PM ET), <https://www.npr.org/2016/03/06/467377295/citing-gender-bias-state-lawmakers-move-to-eliminate-tampon-tax> [<https://perma.cc/2P38-8L3E>] (describing effort in Wisconsin to repeal the tampon tax).

8. See CAL. REV. & TAX. CODE § 6369(b) (West 2010) (exempting from sales tax "medicines," the definition of which includes "any substance or preparation intended for use by external or internal application to the human body in the diagnosis, cure, mitigation, treatment, or prevention of disease and commonly recognized as a substance or preparation intended for that use"); CAL. CODE REGS. tit. 18 § 1591(a)(9)(B) (2016) (defining a "medicine" as "[a]ny substance or preparation intended for use by external or internal application to the human body in the diagnosis, cure, mitigation, treatment, or prevention of disease"). Additionally, the code gives as examples of tax-exempt "medicines" baby lotion, oil, and powder, and also medicated skin creams. *Id.* § 1591(b)(1).

9. See N.Y. TAX LAW § 1115(a)(3) (McKinney 2017) (exempting from sales tax medical equipment and supplies "required for such use or to correct or alleviate physical incapacity, and products consumed by humans for the preservation of health but not including cosmetics or toilet articles"); N.Y. COMP. CODES R. & REGS. tit. 20, § 528.4(b)(3) (2018) (listing Example 5 (dandruff shampoo) and Example 8 (foot powder)).

existing state sales tax laws. Specifically, we argue that a tax on menstrual hygiene products—when roughly analogous male or unisex products are exempt on grounds of “necessity”—amounts to an unconstitutional tax on women, because menstrual hygiene products are so inextricably linked to female biology.<sup>10</sup> In other words, in the same way that taxing yarmulkes while exempting other religious clothing would be treated as a tax on Jews, the exclusion of menstrual hygiene products from the various “medical” or seemingly necessity-based sales tax exemptions amounts to a tax on women.

Part I of this article provides an overview of the scope and operation of sales tax generally and the tax on menstrual hygiene products particularly—i.e., the tax on tampons, sanitary pads, menstrual cups and similar items (commonly called the “tampon tax”).<sup>11</sup> In so doing, we also discuss why menstrual hygiene products are indeed medically necessary. And we quantify the particular burden that the tampon tax—when added to the already significant expense of menstrual hygiene products themselves—imposes on women.<sup>12</sup>

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10. See *infra* Part IV.

11. Government leaders in Australia recently agreed to eliminate the 10% goods and services tax (“GST”) on menstrual hygiene products. See Eli Meixler, *Australia Ditches ‘Tampon Tax’ After 18 Years of Outrage from Women’s Rights Groups*, TIME (Oct. 3, 2018), <http://time.com/5413585/australia-ends-tampon-tax-gst/> [https://perma.cc/YCH3-L23K]. Earlier this year, the Australian Senate passed legislation that would exempt from the GST “sanitary products,” defined as “tampons, pads, liners, cups, sponges and other products used in connection with menstruation.” Treasury Laws Amendment (Axe the Tampon Tax) Bill 2018 (*Cth*) sch 1 item 2 (Austl.). Some commentators predicted that political opposition would prevent the change from occurring legislatively. See, e.g., Louise Yaxley, *Senate Vote to Scrap ‘Tampon Tax’ Won’t Stop Women Paying 10 Per Cent More for Sanitary Products*, ABC (June 18, 2018, 12:16 AM), <http://www.abc.net.au/news/2018-06-18/tampon-tax-to-stay-despite-senate-voting-to-remove-it/9879382> [https://perma.cc/YCH3-L23K] (predicting that the Australian legislation “is unlikely to pass in the House of Representatives because the Coalition Government does not support the change”). Note that not all of those states in the United States that exempt menstrual hygiene products from sales taxation adopt a definition that is as capacious as the Australian legislation’s. See, e.g., Mass. Dep’t of Revenue, *supra* note 2 (containing separate lists of “exempt items” and “taxable items”). The Massachusetts statute and the Massachusetts Guide are silent as to the tax treatment of menstrual sponges and menstrual cups, but by inference, they likely are exempt from sales tax as well. See *id.*

12. See *infra* Part I. We acknowledge at the outset the difficulty of talking about menstruation without excluding from the discussion transgender individuals and people across the gender spectrum who menstruate. See, e.g., Gabriela Armuand et al., *Transgender Men’s Experiences of Fertility Preservation: A Qualitative Study*, 32 HUM. REPROD. 383, 384 (2017) (detailing the hormone regimen administered to transgender men who wished to resume menstruation in order to become pregnant or to produce eggs for in vitro fertilization); Joan C. Chrisler et al., *Queer Periods: Attitudes Toward and Experiences with Menstruation in*

Part II describes the recent antitampon tax movement, which started with public awareness and policy campaigns and then spread to legislatures, courts and at least one direct appeal to voters.<sup>13</sup> We delve in particular into four class action challenges brought in New York, Florida, California, and Ohio.<sup>14</sup> The New York and Florida cases spurred legislative change and are no longer active.<sup>15</sup> The California case has been dismissed.<sup>16</sup> The Ohio case is temporarily inactive, pending an administrative appeal.<sup>17</sup> In neither California nor Ohio has the litigation inspired successful repeal of the tampon tax.<sup>18</sup> Most recently, in January 2018, after dismissing the case on procedural grounds, the Superior Court of California rejected (in dicta) the argument that the tampon tax violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution or its state counterpart.<sup>19</sup>

Parts III and IV provide an in-depth analysis of why the tampon tax violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Among other things, this article might serve as a road map for litigators attempting to challenge the tax as unconstitutional. Although particular application of the argument will vary slightly by state (since each state sales tax system has its own definitions and classifications), the underlying themes are broadly applicable and can be adapted as needed.

Part III describes the relevant background to equal protection jurisprudence, with particular attention to the question of what qualifies as unconstitutional sex discrimination. We discuss how the analysis differs depending on whether the law makes a facial

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*the Masculine of Centre and Transgender Community*, 18 CULTURE, HEALTH & SEXUALITY 1238, 1239 (2016) (reporting that literature search resulted in zero scholarly articles concerning menstruation by transgender men). We have attempted to include multiple perspectives in our analysis. Although linguistically we have not managed to capture the full range of the human experience with gender at each mention of “women” and menstruation, anyone who has menstruated, does menstruate, or will begin or resume menstruation is impacted by our analysis of the constitutionality of the tax on menstrual hygiene products.

13. *See infra* Part II.A.

14. *See infra* Part II.B–E.

15. *See infra* Part II.B, C.

16. *See infra* Part II.D.

17. *See infra* Part II.E.

18. *See infra* Part II.D–E.

19. *See infra* Part II.D.

sex classification or is facially neutral, since both of those frameworks are relevant to the tampon tax.<sup>20</sup> In so doing, we review significant Supreme Court decisions including *Geduldig v. Aiello* (holding that the denial of insurance benefits for pregnant workers was facially neutral, rather than a facial sex-based classification),<sup>21</sup> *Personnel Administrator of Massachusetts v. Feeney* (upholding a state law hiring preference for veterans, even though men were more likely than women to be veterans),<sup>22</sup> and *United States v. Virginia* (declaring the male-only admissions policy at the Virginia Military Institute to be impermissible sex discrimination because of the organization's failure to show an "exceedingly persuasive justification" for excluding women).<sup>23</sup>

Part IV then advances the argument that the tampon tax is a form of impermissible gender discrimination under the Equal Protection Clause. Because menstrual hygiene products are so closely tied to female reproductive anatomy, their comparatively unfavorable tax treatment—in comparison with other roughly analogous unisex and male items that receive tax exemptions as necessities—amounts to a tax on women. Indeed, the principal equal protection argument is that menstrual hygiene products are essentially a proxy for female sex; therefore, the disadvantageous tax classification of these items amounts to a facial classification on the basis of sex.<sup>24</sup> We thoroughly analyze why *Geduldig* need not—and indeed, should not—be read as foreclosing this argument. We reach the same conclusion under a facial neutrality/disparate impact analysis, because the tampon tax has a disparate impact on women and likely is connected to indifference toward (or squeamishness about) the female biological process of menstruation.<sup>25</sup> After all, shifting menstrual hygiene products like tampons and sanitary napkins to the list of tax-exempt necessities requires explicitly analyzing and listing these products, while avoiding the issue leaves them in the default "taxable" category.<sup>26</sup> Furthermore, because the tampon tax should be analyzed as a sex-based classification, it should trigger intermediate scrutiny, which it cannot pass. There is no "exceedingly persuasive justification" for excluding menstrual hygiene

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20. See *infra* Part III.

21. 417 U.S. 484, 494 (1974).

22. 442 U.S. 256, 269, 271, 281 (1979).

23. 518 U.S. 515, 534 (1996).

24. See *infra* Part IV.A.

25. See *infra* Part IV.B.

26. See *infra* Part I.B.

products from the favorable tax exemptions afforded to other necessities.<sup>27</sup>

Even assuming *arguendo* that the tampon tax is not viewed as a tax on women for purposes of triggering intermediate scrutiny, Part V develops the argument that the tampon tax is nevertheless unconstitutional because it cannot pass rational basis review. The exclusion of menstrual hygiene products from any list of “necessities” genuinely is irrational, given the clear evidence that they are literally necessary for women to leave their homes, go to school or work, and otherwise participate in society. Although a broad sales tax base is desirable in order to generate the greatest amount of revenue for the state, the negative expressive impact of the tampon tax is far greater than any revenue these products could generate.<sup>28</sup>

The article concludes by positioning tampon tax repeal efforts in the context of larger efforts to eliminate discrimination. Ultimately, it is unfair to tax women on products that are necessary for them to fully participate in society, while simultaneously exempting other items that are no more (and often less) necessary.

## I. OVERVIEW OF THE TAMPON TAX

### A. *The Workings of State Sales Tax*

The state sales tax is familiar to most people.<sup>29</sup> For many, payment of the sales tax is a weekly or even daily occurrence.<sup>30</sup> In

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27. See *infra* Part IV.C.

28. See *infra* Part V.

29. See, e.g., Jerome R. Hellerstein, *Significant Sales and Use Tax Developments During the Past Half Century*, 39 VAND. L. REV. 961, 963 (1986) (describing development of state sales tax during the period of 1932 to 1984).

30. See, e.g., Scott R. Baker et al., *Shopping for Lower Sales Tax Rates* tbl. 2 (Nat'l Bureau of Econ. Research, Working Paper No. 23665, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2893738](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2893738) [<https://perma.cc/4M46-9X5C>] (showing in a multiple-year study of over 150,000 households the frequency of purchases of taxable and nontaxable items is a rate of 0.041 times per month to 5.571 purchases per month). For a related study of United Kingdom consumers, see Rachel Griffith et al., *Consumer Shopping Behavior: How Much Do Consumers Save?*, 23 J. ECON. PERSP. 99, 102 (2009), finding in a survey of over 23,000 households in the United Kingdom for the calendar year 2006 the average household acquired food and beverages every four days.

forty-five states (all but Alaska, New Hampshire, Oregon, Delaware, and Montana) and the District of Columbia,<sup>31</sup> any time a consumer walks into a corner store and buys tangible property like a newspaper or a pencil, the retailer must collect a sales tax equal to a percentage of the property that is sold.<sup>32</sup> The consumer pays the tax at the register and typically has no further interaction with the sales tax system.<sup>33</sup>

Mechanically, the state imposes on the seller the obligation to collect the sales tax and then remit it to the state.<sup>34</sup> The amount of the sales tax is determined by reference to the retail price of the property sold.<sup>35</sup> State sales tax percentages range from approximately 2.9% to 7.25%.<sup>36</sup> Because local governments may impose

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31. Alex Raut, *States Without Income Tax Rely on Varying Forms of Revenue*, TAX FOUND. (Apr. 26, 2012), <https://taxfoundation.org/states-without-income-taxes-rely-varying-forms-revenue> [<https://perma.cc/QJ6P-V4R8>] (listing Alaska, Delaware, Montana, New Hampshire, and Oregon as states without sales tax). This has been true since at least 1984. Compare Hellerstein, *supra* note 29, at 936 (“At the end of 1984, in contrast to the single state that levied a general sales tax in 1932, the tax was in full force in forty-five states and the District of Columbia—every state except Alaska, Delaware, Montana, New Hampshire, and Oregon”), with Taryn Hillin, *These Are the U.S. States That Tax Women for Having Periods*, SPLINTER (June 3, 2015, 12:33 PM), <https://splinternews.com/these-are-the-u-s-states-that-tax-women-for-having-per-1793848102> [<https://perma.cc/7F43-9L68>] (listing Alaska, Delaware, Montana, New Hampshire, and Oregon as those that do not have a sales tax).

32. See, e.g., ARTHUR R. ROSEN & WALTER NAGEL, 1300 TAX MGMT. SALES & USE TAX PORFOLIOS: GENERAL PRINCIPLES § 1300:01.B (describing the imposition, calculation, collection of states’ sales taxes). For one state’s public educational materials regarding the sales tax, see *Student Tax Educations Program—Teens and Taxes: Everyday Purchases*, OHIO DEP’T TAX’N, [https://www.tax.ohio.gov/taxeducation/everyday\\_purchases.aspx](https://www.tax.ohio.gov/taxeducation/everyday_purchases.aspx) [<https://perma.cc/D3V3-RFZ6>] (last visited Dec. 1, 2018).

33. The sales tax is different from a use tax insofar as applicable state laws typically impose a sales tax on the retail purchase of goods within the state, whereas a use tax is “levied upon the use, storage, or consumption of tangible personal property within the state if such property had not already been subject to the state’s sales tax.” 1 RICHARD D. POMP & OLIVER OLDMAN, *STATE AND LOCAL TAXATION* 6–39 (8th ed. 2015). For an overview of the relationship between sales tax and use tax in the context of the recent decision by the Supreme Court in *South Dakota v. Wayfair*, 585 U.S. \_\_\_, 138 S. Ct. 2080 (2018), see Adam Thimmesch, *More Post-Wayfair Thoughts: Sales Tax?*, SURLY SUBGROUP (June 26, 2018), <https://surlysubgroup.com/2018/06/26/more-post-wayfair-thoughts-sales-tax/> [<https://perma.cc/6P7U-PFNX>], focusing on South Dakota’s requirement that out-of-state sellers collect sales tax and not use tax given sales in excess of an aggregate dollar amount or number of sales, and critiquing the Court for having “unsettled some even longer-standing doctrine in this area,” in part by collapsing the distinction between the sales tax and use tax.

34. See, e.g., 85 C.J.S. *Taxation* § 2213 (“Generally, the responsibility for the collection of a sales tax is on the seller.”); ROSEN & NAGEL, *supra* note 32, § 1300.01.B.

35. ROSEN & NAGEL, *supra* note 32, § 1300.01.B.

36. See, e.g., JARED WALCZAK & SCOTT DRENKARD, TAX FOUND., *STATE AND LOCAL SALES TAX RATES* 3 (2018), <https://files.taxfoundation.org/20180313143458/Tax-Foundation-FF572.pdf> [<https://perma.cc/FLY8-NXZN>] (reporting that out of all states that have a sales tax system, Colorado has the lowest rate at 2.9% and California has the highest rate

their own sales tax on top of the state sales tax, the combined aggregate state and local sales tax rates range from 4.35% (Hawaii) to 10% (Louisiana).<sup>37</sup> Nationwide, state sales tax generates more revenue than state income tax does.<sup>38</sup> Indeed, many state budgets are funded in greatest part by the sales tax.<sup>39</sup>

In comparison to the sales tax system, state and federal income tax regulations require individual taxpayers to file long and complex forms at least once a year, if not more frequently.<sup>40</sup> To many

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at 7.25%).

37. See, e.g., *id.* at 2–3 (reporting that out of all states that have a sales tax system, Hawaii has the lowest combined state and local rate at 4.35% and Louisiana has the highest rate at 10.02%).

38. See, e.g., *2016 Annual Survey of State Government Tax Collections*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2016/econ/stc/2016-annual.html> [https://perma.cc/8CW8-QMLY] (last visited Dec. 1, 2018) (reporting 2016 state sales and gross receipts tax collections of more than \$441 billion, but just over \$391 billion in state income tax collections).

39. *Id.* In the five states that do not have a sales tax, other taxes serve as the main source of revenue. Alaska, for example, collects a large percentage of its revenue from taxes imposed on natural resources extraction. See, e.g., *id.* (reporting Alaska’s 2016 state tax collection by category); see also Raut, *supra* note 31. Delaware relies on personal income taxes, corporate franchise taxes, and a gross receipts tax, sometimes called the “hidden sales tax,” imposed on the seller of goods and services in the state. Jonathan Starkey, *Delaware Taxes: Top 5 Sources of State Revenue*, DEL. ONLINE: FIRST ST. POL. (May 19, 2014, 11:52 AM ET), <https://www.delawareonline.com/story/firststatepolitics/2014/05/19/delawaretaxes/9279693> [https://perma.cc/365S-S3KK]. A gross receipts tax is a tax on a company’s gross revenues, without regard to source. Del. Div. of Revenue, *Gross Receipts Tax Frequently Asked Questions*, DELAWARE.GOV, <https://revenue.delaware.gov/frequently-asked-questions/gross-receipts-tax-faqs/> [https://perma.cc/K8N3-WJTF] (last visited Dec. 1, 2018). The Delaware rates range from 0.1006% to 0.7543%, based on the type of business. *Id.* The law makes available an exclusion of the first \$100,000 to \$1,250,000 in gross monthly revenue, again based on the type of business. *Id.* States may rely on revenue from forfeiture of abandoned property or state-run casinos and lotteries, as well. See Starkey, *supra*.

40. In response to calls for simplification of the federal income tax reporting requirements, the Treasury Department issued a much-anticipated “post-card” form, meant to be smaller and more straightforward than the existing form. See, e.g., Lis Moyer, *Treasury, IRS Reveal a Postcard-Size Form to File Your Taxes*, CNBC (June 29, 2018, 3:30 PM), <https://www.cnbc.com/2018/06/29/treasury-irs-announce-postcard-size-form-1040-for-next-year.html> [https://perma.cc/CT3B-XWBP] (showing an image of the “postcard” return). Compare INTERNAL REVENUE SERV., FORM 1040, U.S. INDIVIDUAL INCOME TAX RETURN (2018), <https://www.irs.gov/pub/irs-dft/f1040-dft.pdf> [https://perma.cc/JXK2-ERB7] (draft of postcard-size U.S. Individual Income Tax Return) with INTERNAL REVENUE SERV., FORM 1040, U.S. INDIVIDUAL INCOME TAX RETURN (2017), <https://www.irs.gov/pub/irs-pdf/f1040.pdf> [https://perma.cc/K88Y-AZWW] (two-page U.S. Individual Income Tax Return). A shift to filing by “postcard” is not considered salutary by most tax professionals and has been the subject of some criticism. See, e.g., Francine Lipman (@Narfnampil), TWITTER (June 26, 2018, 1:05 PM), <https://twitter.com/Narfnampil/status/1011702014353465344> [https://perma.cc/7CLF-M4CC] (calling the postcard tax return “a terrible application of form over substance”); Harry Stein (@HarrySteinDC), TWITTER (June 26, 2018, 6:37 AM), <https://twitter.com/HarrySteinDC/status/1011604405437845505> [https://perma.cc/XU6U-6QKC] (“I’ve been a tax preparer for 7 years. This new ‘postcard’ tax form is more than silly. People are going to screw up their taxes because of it . . .”).

people, the income tax system seems arcane, inscrutable, and perhaps even unfair, as there is a not unfounded assumption that well-advised individuals use sophisticated techniques to minimize taxes in ways that the average taxpayer does not understand.<sup>41</sup> But the sales tax is salient, simple, and largely unavoidable.<sup>42</sup> It is a lens through which one easily can identify inequality.<sup>43</sup>

The sales tax is considered a regressive tax, in that it is not calibrated to ability to pay.<sup>44</sup> The degree of a sales tax system's regressivity depends in large part on what items are exempt from the sales tax. And indeed, almost every state classifies at least some items of tangible property as tax-exempt.<sup>45</sup> States tend to describe tax-exempt items in broad categories, such as medicines or groceries.<sup>46</sup> Generally speaking, items that tend to be exempt from state

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41. See, e.g., Karyl A. Kinsey et al., *Framing Justice: Taxpayer Evaluations of Personal Tax Burdens*, 25 LAW & SOC'Y REV. 845, 867 (1991) ("[T]ax policies that allow people to lower taxes legally serve in the aggregate to increase the perceived unfairness of the tax system. These policies generate perceptions of unfairness among taxpayers who do not qualify for the tax benefits they provide, without any offsetting reductions in perceived unfairness among those who do qualify."). Students studying tax laws frequently express such sentiments, as well. See, e.g., ROBERT W. MCGEE & GALINA G. PREOBRAGENSKAYA, ACCOUNTING AND FINANCIAL SYSTEMS REFORM IN EASTERN EUROPE AND ASIA 315, 317 (2006) (reporting results of survey of 134 Romanian students suggesting that the predominant view is that tax evasion is morally acceptable when the tax system itself is unfair).

42. See, e.g., Mark J. Cowan, *Nonprofits and the Sales and Use Tax*, 9 FLA. TAX. REV. 1077, 1105 (2010) (discussing the ease of administration of collection of sales tax from retail consumers); David Gamage & Darien Shanske, *Three Essays on Tax Salience: Market Salience and Political Salience*, 65 TAX L. REV. 19, 24 (2011) ("Tax salience is important because of the common intuition, confirmed by some evidence, that taxpayers consistently perceive themselves as paying less (or more) in taxes in response to certain forms of tax presentation."); Hayes R. Holderness, *The Unexpected Role of Salience in State Competition for Businesses*, U. CHI. L. REV. 1091, 1094 (2017) (discussing the difference between "undersalient" and "hypersalient" taxes on consumer behavior); Jacob Goldin, Note, *Sales Tax Not Included: Designing Commodity Taxes for Inattentive Consumers*, 122 YALE L.J. 258, 263 (2012).

43. See Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, 2017 WIS. L. REV. 491, 546 (2017) ("It does not require any special training in law or economics to understand that taxes on menstrual products mean less money left in the female consumer's pocket.").

44. See, e.g., MABEL L. WALKER, WHERE THE SALES TAX FALLS 1 (1934) (calling the sales tax an "upside down income tax" based on "inability to resist rather than ability to pay"); Joseph R. Santoro & Caleb S. Fuller, Note, *Reassessing the Fair Tax*, 77 U. PITT. L. REV. 385, 393 n.57 (2016) (explaining that "the poor, on average, spend a higher percentage of their income on consumer goods"); see also JOHN F. DUE, SALES TAXATION 39-40 (1957) (describing sales tax as striking more heavily the persons least able to pay). The critique of the regressivity of the sales tax is as old as the sales tax itself.

45. See, e.g., Cowan, *supra* note 42, at 1106.

46. See ROSEN & NAGEL, *supra* note 32, § 1300.05.D (describing "Special Types of Tangible Personal Property").

sales tax are those that are “necessities” of basic living.<sup>47</sup> But odd discrepancies appear in what counts as a “necessity,” with thirty-five states subjecting menstrual hygiene products to sales tax, while simultaneously exempting products that are no more—and often less—necessary by any estimation, as described in the next section. Because of the clear burden that this differential sales tax treatment imposes on women, it merits closer examination.

### B. *The State Tax Treatment of Menstrual Hygiene Products*

There are fifteen states that do not impose sales tax on menstrual hygiene products, as of November 2018. Five of them are states that have no sales tax at all.<sup>48</sup> Five more—Maryland,<sup>49</sup> Massachusetts,<sup>50</sup> Minnesota,<sup>51</sup> New Jersey,<sup>52</sup> and Pennsylvania<sup>53</sup>—specifically exempt menstrual hygiene products from taxation, and have done so since before 2016, when other states began to respond to rising public sentiment against the tampon tax.<sup>54</sup> These latter five states that specifically exempt menstrual hygiene products from sales tax accomplish the result in different ways.

For example, Maryland has a sales tax exemption for the sale of “medicine” and “disposable medical supplies.”<sup>55</sup> Rather than bringing menstrual hygiene products within the definition of “medical

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47. Crawford & Spivack, *supra* note 43, at 496–97; *see also* ROSEN & NAGEL, *supra* note 32, § 1300.05.D.

48. *See* Raut, *supra* note 31.

49. MD. CODE ANN., TAX—GEN. § 11-211(c)(2) (LexisNexis 2016 & Supp. 2018).

50. MASS. GEN. LAWS ch. 64H, § 6(l) (2017), *amended by* 2018 Mass. Acts ch. 90, § 4 (listing medicine and specifically medically related products that are not subject to sales tax).

51. MINN. STAT. § 297A.67(17) (2017) (exempting from sales tax “[s]anitary napkins, tampons, or similar items used for feminine hygiene”).

52. N.J. STAT. ANN. § 54:32B-8.1(a)(5) (West 2017) (listing “tampons or like products” as exempt from sales tax under general statutory heading “Exemption; medical”).

53. PA. CONS. STAT. § 7204(4) (2015 & Supp. 2018) (exempting from sales tax “sanitary napkins, tampons or similar items used for feminine hygiene”).

54. *See infra* Part II.A.

55. MD. CODE ANN., TAX—GEN. § 11-211(a)(2)–(3) (LexisNexis 2016 & Supp. 2018). According to the Comptroller of Maryland, “medicine” means “a preparation or substance intended to cure, mitigate, treat or prevent illnesses. Medicine includes prescription and non-prescription drugs, patent medicines, and oxygen sold for medical purposes.” Comptroller of Md., *Spotlight on Maryland Taxes*, MARYLANDTAXES.GOV, [http://taxes.marylandtaxes.gov/Business\\_Taxes/Business\\_Tax\\_Types/Sales\\_and\\_Use\\_Tax/Tax\\_Information/Special\\_Situations/Medicine\\_and\\_Medical\\_Equipment.shtml](http://taxes.marylandtaxes.gov/Business_Taxes/Business_Tax_Types/Sales_and_Use_Tax/Tax_Information/Special_Situations/Medicine_and_Medical_Equipment.shtml) [https://perma.cc/WKQ7-CCZG] (last visited Dec. 1, 2018).

supplies,” however, the Maryland statute then has a separate exemption for “sanitary pads, tampons, menstrual sponges, menstrual cups, or other similar feminine hygiene products,” without regard to the definition of medicine or medical supplies.<sup>56</sup>

Massachusetts is somewhat different, in that the Massachusetts sales tax exemption applies to “sales of medicine” and specifically delineated items including artificial limbs, eyeglasses when prescribed by a doctor, oxygen masks, and baby oil.<sup>57</sup> Nowhere does the statute mention a tax exemption for menstrual hygiene products.<sup>58</sup> Only by consulting the official Massachusetts Department of Revenue Guide to Sales and Use Tax does one learn that tax-exempt “health care items” include not only the items listed in the statute but also “sanitary napkins and belts” and “tampons.”<sup>59</sup> Because the list of products in the statute and the guide are so similar, it may be that Massachusetts legislators were squeamish about listing menstrual hygiene products in the statute itself.<sup>60</sup>

Finally, the District of Columbia<sup>61</sup> and four states—Connecticut,<sup>62</sup> Florida,<sup>63</sup> Illinois,<sup>64</sup> and New York<sup>65</sup>—repealed their tampon

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56. MD. CODE ANN., TAX—GEN. § 11-211(c)(2) (LexisNexis 2016 & Supp. 2018). Prior to the enactment of Maryland Senate Bill No. 81, the exemption applied to “sanitary napkins or tampons” only. 2018 Md. Laws 525–26 (effective July 1, 2018).

57. MASS. GEN. LAWS ch. 64H, § 6(l) (2011 & Supp. 2018); 2018 Mass. Acts ch. 90, § 4 (effective May 21, 2018) (listing medicine and specifically medically related products that are not subject to sales tax); *see, e.g.*, Mass. Dep’t of Revenue.

58. *See* MASS. GEN. LAWS ch. 64H, § 6(l) (2011 & Cum. 2018); 2018 Mass. Acts ch. 90 § 4 (effective May 21, 2018).

59. Mass. Dep’t of Revenue, *supra* note 2.

60. *See id.*

61. D.C. CODE § 47-2005(38)(A) (2018) (exempting from sales tax “feminine hygiene products” defined as “sanitary napkin[s], sanitary towel[s], tampon[s], menstrual cup[s], or sanitary pad[s]”). The District of Columbia City Council legislation that exempted menstrual hygiene products also created a new exemption for diapers. *Id.*

62. CONN. GEN. STAT. § 12-412(122) (2018) (exempting from sales tax “feminine hygiene products” although the term is not defined further).

63. FLA. STAT. § 212.08(nnn) (2018) (exempting from sales tax “products used to absorb menstrual flow” defined as “products used to absorb or contain menstrual flow, including, but not limited to, tampons, sanitary napkins, pantliners, and menstrual cups”).

64. 35 ILL. COMP. STAT. 105/3-5(37) (2016 & Supp. 2017) (exempting from sales tax “menstrual pads, tampons, and menstrual cups”).

65. N.Y. TAX LAW § 1115(a)(3-a) (McKinney 2017) (exempting from sales tax “[f]eminine hygiene products, including, but not limited to, sanitary napkins, tampons and panty liners”). From a drafting perspective, it is interesting that when the New York legislators repealed the tampon tax in 2016, they did so by adding this section “(3-a).” *See id.* Section 3 provides an exemption for drugs and medicines used “in the cure, mitigation, treatment or prevention of illnesses or diseases . . . and supplies required for such use or to correct or alleviate physical incapacity, and products consumed by humans for the preservation of health but not including cosmetics or toilet articles.” *Id.* § 1115(a)(3). As a drafting matter,

tax statutes in 2016 or 2017.<sup>66</sup> In 2018, voters repealed Nevada's tampon tax by ballot referendum; the repeal takes effect on January 1, 2019.<sup>67</sup> These jurisdictions all created a specific legislative exemption from sales tax for menstrual hygiene products.<sup>68</sup> Each of these jurisdictions now has a sales tax statute that treats menstrual hygiene products as a stand-alone category of exempt goods.<sup>69</sup>

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legislators could have simply added the exemption for menstrual hygiene products as a new subsection at the end of the list, or even added the exemption for menstrual hygiene products in the same place where it appears, but renumbered the subsections. *See id.* § 1115(a)(3-a). Instead, the drafters chose to leave in place subsections (a)(3) (pertaining to drugs and medicines) and (a)(4) (relating to prosthetics, hearing aids, eyeglasses and artificial devices “to correct or alleviate physical incapacity in human beings,” and sandwich the new exemption between those existing subsections. *Id.* § 1115(a)(3)–(4). One possible interpretation of this choice is that the drafters wanted to keep the exemption for menstrual hygiene products physically clustered near the health-related exemptions and they thought that renumbering the subsequent subsections would create more confusion than clarity. For a selection of readings from which one might derive a list of best practices in legislative drafting, see, for example, Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons* (pt. 2), 66 *STAN. L. REV.* 725 (2014); Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 *CORNELL L. REV.* 685 (2014); Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 *B.C. L. REV.* 1613 (2014); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 *COLUM. L. REV.* 807 (2014).

66. In 2016, the California legislature passed a repeal bill, but it was vetoed by Governor Brown. *See* Liam Dillon, *Gov. Brown Vetoes Bill That Would Have Cut Taxes on Tampons and Diapers*, *L.A. TIMES* (Sept. 13, 2016, 11:53 AM), <http://www.latimes.com/politics/essential/la-pol-sac-essential-politics-updates-governor-vetoes-bills-to-repeal-sales-147379-0791-htlmstory.html> [<https://perma.cc/S9CH-9832>] (reporting Governor Brown's veto); *see also infra* Part II.

67. An Act Relating to Taxes on Retail Sales Tax, S. 415, 2017 Leg., 79th Sess. (Nev. 2017) (providing for a ballot referendum exempting “feminine hygiene products,” defined as sanitary napkins or tampons, from state sales tax, which passed and is effective January 1, 2019); *see also* Anna North, *Nevada Just Got Rid of Its “Tampon Tax,”* *VOX* (Nov. 7, 2018), <https://www.vox.com/2018/11/7/18056648/nevada-question-2-tampon-tax-results> [<https://perma.cc/TCW7-82V5>] (reporting that Nevada voters approved repeal of state sales tax of 6.85% on sanitary pads and napkins). The ballot initiative passed by a 56.48% vote. *Ballot Questions, Statewide*, SILVER ST. ELECTION, <http://www.silverstateelection.com/ballot-questions/> [<https://perma.cc/2ZGH-2YAT>] (last visited Dec. 1, 2018). In Nevada, voter approval is required for all amendments or repeal of the Nevada State Sales and Use Tax of 1955, currently in effect. *See, e.g.*, NEV. SEC'Y OF STATE, PROVISIONS TO BE VOTED UPON IN STATE OF NEVADA AT GENERAL ELECTION, NOVEMBER 6, 1956, at 13 (1956), <https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1956.pdf> [<https://perma.cc/VZ9W-34RB>] (providing for sales and use taxes in Nevada).

68. *See, e.g., supra* notes 55–56 and accompanying text (describing Maryland's separate statutory sales tax exemption for menstrual hygiene products).

69. *See supra* notes 61–65 (citing newly enacted legislation in Connecticut, the District of Columbia, Florida, Illinois, and New York).

As noted above, the typical statutory division between taxable and non-taxable items roughly tracks the distinction between “necessities” and “luxuries.”<sup>70</sup> For example, in Minnesota, the sales tax exemption applies to groceries like flour, vegetables, poultry, and eggs;<sup>71</sup> clothing such as t-shirts, rain ponchos, and belts;<sup>72</sup> prescription medicines;<sup>73</sup> and menstrual hygiene products.<sup>74</sup> But Min-

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70. This would appear to be the basic approach adopted by Massachusetts where menstrual hygiene products, food, and articles of clothing below a certain threshold amount are not taxed, but more expensive products are. *See* Mass. Dep’t of Revenue, *supra* note 2 (listing tax-exempt items “[f]ood & [m]eals” as well as “[a]pparel & [f]abric [g]oods” less than \$175); *see also* Timothy R. Hurley, *Curing the Structural Defect in State Tax Systems: Expanding the Tax Base to Include Services*, 61 MERCER L. REV. 491, 497 (2010) (explaining that sales taxes apply to all tangible personal property unless specifically exempted); CHI., ILL., CODE § 3-40-2 (2018) (exempting tampons and sanitary napkins from Chicago’s Home Rule Municipal Retailer’s Occupation Tax, SO2016-705, Mar. 16, 2016; Edward M. Burke & Leslie A. Hairston, sponsors) (vote by Chicago City Counsel to treat menstrual hygiene products as “medical necessities” and thus exempt from local sales tax, in light of the State of Illinois’ previous classification of these products as “medical appliances”). The distinction between necessities and luxuries is explicitly incorporated in the European Union’s Value Added Tax. *See, e.g.*, Council Directive 2006/112, art. 96–99, 131–63, 2006 O.J. (L 347) (EC) (setting four categories—exempt, zero tax, reduced rate, and standard rate—with listed necessities such as bread, flour, cheese, milk, and children’s clothing qualifying for no taxation or taxation at a reduced rate of not less than five percent, and luxuries subject to the standard rate and taxed at the highest level). The difference between the categories of exempt and zero tax is significant insofar as an item in the “zero” category can be moved up to one of the higher tax categories (but cannot return to the zero category). *See* Crawford & Spivack, *supra* note 43, at 497, 499 (explaining European VAT classifications and tax treatment of menstrual hygiene products).

71. MINN. STAT. § 297A.67(2) (2017 & Supp. 2018) (exempting from sales tax “food and food ingredients,” meaning “substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value”); *see also* MINN. DEPT OF REVENUE, FOOD AND FOOD INGREDIENTS SALES TAX FACT SHEET 102A (2017), <http://www.revenue.state.mn.us/businesses/sut/factsheets/fs102a.pdf> [<https://perma.cc/6AS4-9V4D>] (giving examples of taxable and non-taxable food and food ingredients); Jennifer Dunn, *State by State: Are Grocery Items Taxable?*, TAX JAR: SALES TAX BLOG (Feb. 1, 2018), <https://blog.taxjar.com/states-grocery-items-tax-exempt> [<https://perma.cc/EL7Z-KJVT>] (showing map of states where groceries are tax exempt).

72. MINN. STAT. § 297A.67(8) (2017 & Supp. 2018) (defining tax-exempt clothing as “human wearing apparel suitable for general use”); *see also* MINN. DEPT OF REVENUE, CLOTHING SALES TAX FACT SHEET 105 (2009), <http://www.revenue.state.mn.us/businesses/sut/factsheets/fs105.pdf> [<https://perma.cc/GER9-JJMN>] (listing clothing items that are and are not subject to state sales tax).

73. MINN. STAT. § 297A.67(7)(c)(1)(ii)–(iii) (2017 & Supp. 2018) (exempting from sales tax “drugs,” meaning any item “intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease” or “intended to affect the structure or any function of the body”); *see also* MINN. DEPT OF REVENUE, DRUGS SALES TAX FACT SHEET 117A (2017), <http://www.revenue.state.mn.us/businesses/sut/factsheets/FS117A.pdf> [[perma.cc/Z52M-ZTKR](https://perma.cc/Z52M-ZTKR)] (giving examples of nontaxable drugs); MINN. DEPT OF REVENUE, GROOMING AND HYGIENE PRODUCTS SALES TAX FACT SHEET 117F (2017), <http://www.revenue.state.mn.us/businesses/sut/factsheets/FS117F.pdf> [<https://perma.cc/2DFM-R22X>].

74. MINN. STAT. § 297A.67(17) (2017 & Supp. 2018) (“Sanitary napkins, tampons, or

nesota imposes a sales tax on candied cake decorations, marshmallows, honey roasted nuts, and breath mints;<sup>75</sup> fur clothing and hair bows;<sup>76</sup> and vaginal douches.<sup>77</sup>

In the remaining thirty-five states, menstrual hygiene products are subject to sales tax—while multiple other products are exempt.<sup>78</sup> In addition to exempting various necessities, many of these states even exempt clear non-necessities. For example, Arizona and Georgia exempt soda and candy from taxation, while imposing sales tax on tampons.<sup>79</sup> Other unusual exemptions in jurisdictions that tax menstrual hygiene products include tattoos and piercings (Georgia), chainsaws (Idaho), bibles (Maine), doughnuts (Michigan), coffins (Mississippi), newspaper ink (Nevada), minor league baseball souvenirs (New Mexico), garter belts (Vermont), and manicures (West Virginia).<sup>80</sup>

These unusual exemptions underscore the oddity of simultaneously taxing a product that most females must use every month for much of their lives in order to leave their homes. There is no debate that tampons, sanitary pads, and similar menstrual hygiene products are necessities for women's health; they absorb the flow of menstrual blood. They are also necessary for numerous weeks after childbirth to stop and absorb the flow of lochia.<sup>81</sup> Women without

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similar items used for feminine hygiene are exempt.”).

75. MINN. DEPT OF REVENUE, *supra* note 71 (listing these items as taxable).

76. MINN. STAT § 297A.67(8)(c)(9) (2017 & Supp. 2018) (defining fur clothing by reference to section 297A.61(46) as “human wearing apparel that is required by the Federal Fur Products Labeling Act, United States Code, title 15, section 69, to be labeled as a fur product, and the value of the fur components in the product is more than three times the value of the next most valuable tangible component”).

77. MINN. DEPT OF REVENUE, *supra* note 75 (listing as taxable feminine “douches, wipes, sprays”).

78. *See supra* notes 48–69 and accompanying text.

79. *See, e.g.*, Susie Poppick, *More States Tax Tampons than Candy in America*, TIME (June 3, 2015), <http://time.com/money/3907775/states-tax-tampons-candy-america> [<https://perma.cc/S7DS-8ZQ2>] (listing Arizona, Georgia, Louisiana, Michigan, Nebraska, Nevada, New Mexico, South Carolina, Vermont, and Wyoming as states where soda and candy are tax-free but tampons are not); *see also* TAX FOUND., FACTS AND FIGURES: HOW DOES YOUR STATE COMPARE? (2015), [https://files.taxfoundation.org/legacy/docs/Fact&Figures\\_15\\_web\\_2.pdf](https://files.taxfoundation.org/legacy/docs/Fact&Figures_15_web_2.pdf) [<https://perma.cc/EB28-2L2C>].

80. *See, e.g.*, Jennifer Weiss-Wolf, *Menstrual Products Are Taxed in 40 States. Here's What You Can Buy Tax-Free*, MS.: BLOG (Feb. 19, 2016), <http://msmagazine.com/blog/2016/02/19/menstrual-products-are-taxed-in-40-states-heres-what-you-can-buy-tax-free> [<https://perma.cc/H6TM-J9LK>].

81. *See, e.g.*, L.W. Oppenheimer et al., *The Duration of Lochia*, 93 BRITISH J. OBSTETRICS & GYNECOLOGY 754, 755 (1986) (reporting median duration of lochia of thirty-three days in study of 236 women); Dan Sherman et al., *Characteristics of Normal Lochia*, 16 AM. J. PERINATOLOGY 399, 399 (1999) (“Lochia is usually defined as sloughing of decidual

such products must rely on unsanitary rags (which can cause serious infections), cut up their children's diapers to create make-shift pads, place unwieldy toilet paper or napkins in their underwear, or even go without coverage.<sup>82</sup> A study by researchers at the Yale University School of Medicine found that the use of tampons helps to reduce the risk of endometriosis, so tampons may be health-enhancing for women.<sup>83</sup> In fact, the Food and Drug Administration classifies tampons and sanitary pads as medical devices, underscoring their objective status as necessities.<sup>84</sup>

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tissue and is generally perceived as sequential vaginal discharge.”).

82. See, e.g., HOLLY SEIBOLD, TESTIMONY OF BRAWS: BRINGING RESOURCES TO AID WOMEN'S SHELTERS, IN SUPPORT OF D.C. B21-0696, THE FEMININE HYGIENE AND DIAPERS SALES TAX EXEMPTION AMENDMENT ACT OF 2016, at 3 (2016) (recounting oral reports by women at a District of Columbia homeless shelter who resort to “using toilet paper, paper towels, or diapers in lieu of sanitary pads or tampons as they are either cheaper or available for free”). BRAWS was represented before the District of Columbia Council by Aysha Iqbal, Shannon Cooper, and Leslie Benjamin, students in the Legislation Clinic at the University of the District of Columbia David A. Clarke School of Law, under the supervision of Professor Marcy Karin. See *id.* at 11; see also Helaina Hovitz, *Tampons Are a Necessity, Not a Luxury*, VICE (May 24, 2017, 12:30 PM), [https://impact.vice.com/en\\_us/article/j5e9qb/tampons-are-a-necessity-not-a-luxury](https://impact.vice.com/en_us/article/j5e9qb/tampons-are-a-necessity-not-a-luxury) [<https://perma.cc/D3B9-KNGY>] (“Women who cannot afford menstrual products reported that they substitute with whatever they can find: toilet paper, paper towels, rags, even dirty socks. Without access to period products, these women are at risk for infection, making a lack of access to clean feminine hygiene supplies a health issue and a human rights issue.”).

83. Erika L. Meaddough et al., *Sexual Activity, Orgasm and Tampon Use Are Associated with a Decreased Risk for Endometriosis*, 53 GYNECOLOGICAL & OBSTETRIC INVESTIGATION 163 (2002) (reporting results of study of 2012 subjects); see also *Use of Tampons and Sexual Activity Protect Women Against Endometriosis*, YALENEWS (May 29, 2002), <https://news.yale.edu/2002/05/29/use-tampons-and-sexual-activity-protect-women-against-endometriosis> [<https://perma.cc/7YCS-TQKP>].

84. See 21 C.F.R. § 884.5425 (2018) (sorting into Class II scented or scented-deodorized pads made with materials lacking an established safety profile); *id.* § 884.5435 (sorting into Class I various unscented pads); *id.* § 884.5470 (sorting into Class II unscented tampons); see also U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY AND FDA STAFF—MENSTRUAL TAMPONS AND PADS: INFORMATION FOR PREMARKET NOTIFICATION SUBMISSIONS (510(K)S), at 13 (2005), <https://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/ucm071799.pdf> [<https://perma.cc/RX2Z-8983>] (recommending that disclosure of contents of pads and tampons meet the same standards as they apply to medical devices). The significance of a product's placement into Class I or Class II is that “[m]ost Class I devices and a few Class II devices are exempt from the premarket notification [510(k)] requirements subject to the limitations on exemptions,” although other requirements may apply. U.S. FOOD & DRUG ADMIN., CLASS I/II EXEMPTIONS (2018), <https://www.fda.gov/medicaldevices/deviceregulationandguidance/overview/classifyyourdevice/ucm051549.htm> [<https://perma.cc/G4AQ-HNUT>]. “Premarket notifications” are submissions to the FDA that demonstrate safety and effectiveness of a particular device. U.S. FOOD & DRUG ADMIN., PREMARKET NOTIFICATION 510(K), <https://www.fda.gov/medicaldevices/deviceregulationandguidance/howtomarketyourdevice/premarketnotifications/premarketnotification510k/default.htm> [<https://perma.cc/BWC4-ALFM>].

The sales tax on menstrual hygiene products matters. Although each individual woman differs, one recent study estimated that the average woman spends roughly 2280 days (6.25 years) of her life menstruating.<sup>85</sup> Given variations in rates of consumption and price, the average woman might spend between \$704<sup>86</sup> and \$2000<sup>87</sup> on tampons and pads alone (excluding any tax) over the course of a lifetime.<sup>88</sup> A woman might pay from \$20 to \$145 for state taxes

85. See, e.g., Jessica Kane, *Here's How Much a Woman's Period Will Cost Her over a Lifetime*, HUFFPOST (May 18, 2015, 12:05 PM ET), [https://www.huffingtonpost.com/2015/05/18/period-cost-lifetime\\_n\\_7258780.html](https://www.huffingtonpost.com/2015/05/18/period-cost-lifetime_n_7258780.html) [<https://perma.cc/JC6L-ZGP9>] (“[T]he average woman endures some 456 total periods over 38 years, or roughly 2,280 days with her period—6.25 years of her life.”). Another study suggests that a woman menstruates for an average of 2535 days over the course of her lifetime. See Julitta Onabanjo, *Celebrating Menstruation, from Menarche to Menopause*, UNFPA (May 24, 2018), <https://esaro.unfpa.org/en/news/celebrating-menstruation-menarche-menopause> [<https://perma.cc/4K35-QVVR>]; Karen Zraick, *It's Not Just the Tampon Tax: Why Periods Are Political*, N.Y. TIMES (July 22, 2018), <https://www.nytimes.com/2018/07/22/health/tampon-tax-periods-menstruation-nyt.html> [<https://perma.cc/5DG2-CX94>] (citing statistic that average woman menstruates 2535 days in a lifetime).

86. This calculation assumes an expense of \$17.60 per year every year for forty years. See, e.g., Gass-Poore, *supra* note 7 (citing study by Euromonitor International that the average American woman spent \$17.60 on tampons and pads in 2015).

87. Kane, *supra* note 85 (calculating that in the course of her lifetime, the average woman will spend a lifetime average of \$1773 on tampons, \$443 on panty liners and \$4555 on other items such as pain relievers and replacements for stained clothing). This concurs with our estimate of a woman's lifetime expense for tampons and pads of \$1732.80, calculated by assuming 2280 days of menstruation and use of three tampons and one pad per day (for a total of 6840 tampons and 2280 pads per lifetime) and a cost of \$0.21 per tampon and \$0.13 per pad. See Tampax Pearl Active Plastic Tampons, Light/Regular Absorbency Multipack, Unscented, 34 Count, 4 Boxes, (Total 136 Count), <https://www.amazon.com/Tampax-Plastic-Absorbency-Multipack-Unscented/dp/B077NL6SPR> [<https://perma.cc/9Z4G-HL LZ>] (last visited Dec. 1, 2018) (selling pack of four boxes of thirty-four tampons for \$27.88, or \$0.21 per pad); Stayfree Ultra Thin Regular Pads with Wings For Women, Reliable Protection and Absorbency of Feminine Moisture, Leaks, <https://www.amazon.com/Stayfree-Reliable-Protection-Absorbency-Feminine/dp/B00NJNIY1C> [<https://perma.cc/VR3P-9DKE>] (last visited Dec. 1, 2018) (selling pack of thirty-six absorbent pads for \$18.89, or \$0.13 per pad); see also Victoria Hartman, Note, *End the Bloody Taxation: Seeing Red on the Unconstitutional Tax on Tampons*, 112 NW. U. L. REV. 313, 317 (2017) (“[S]ince nearly every woman uses feminine hygiene products during her period, the additional cost imposed by state sales tax on feminine hygiene products adds up.”). One estimate is that that every British woman will pay an estimated 922 pounds over her lifetime in taxes on menstrual hygiene products. Laura Coryton, *Periods Come with £18,450 Price Tax. #EndTamponTax Already!*, CHANGE.ORG (Sept. 3, 2015), <https://www.change.org/p/1550755/u/13003696> [<https://perma.cc/B7JL-L2ZT>] (showing an online petition urging women to oppose the United Kingdom's Value Added Tax on menstrual hygiene products). This is over \$1200. See *Currency Converter*, OANDA, <https://www.oanda.com/currency/converter/> [<https://perma.cc/C62C-8TY6>] (last visited Dec. 1, 2018) (using conversion rate of 1.30888 British pounds per one United States dollar, the average for the twenty-four-hour period ending Thursday, June 28, 2018, 22:00 UTC).

88. See, e.g., Gass-Poore, *supra* note 7 (laying foundation to estimate the potential lifetime cost of the sales tax on menstrual hygiene products by estimating that the average woman will have 450 periods in a lifetime).

on top of that, allowing for price variation and state sales tax rates that range from 2.9% to 7.25%.<sup>89</sup>

Given this ability to quantify the tax's financial harm, and given that male-specific products including spermicidal condoms and erectile dysfunction drugs are generally tax-exempt,<sup>90</sup> it is not surprising that many people have urged their state legislators to repeal the tampon tax as a matter of fairness and equality. Nor is it surprising that they have turned to the courts to challenge the tampon tax as a violation of equal protection. The next part examines and analyzes the four class action lawsuits that have been filed so far. In each, the framing of the argument is slightly different, in order to track the particular state's language. However, the underlying shape and theme of the legal arguments are very similar.

## II. CLASS ACTION LITIGATION

### A. *Background*

On January 1, 2015, New York-based attorney and activist Jennifer Weiss-Wolf came home from an inspirational "polar bear swim" on Coney Island and stumbled upon a request by some local teens collecting tampons and pads for a food pantry.<sup>91</sup> Their drive spurred her to begin thinking and writing about how menstruation impacts actual lives, especially the lives of poor and vulnerable women and girls.<sup>92</sup> Over the course of 2015, Weiss-Wolf emerged as the leading voice in the United States for "menstrual equity," a term she describes as follows:

In order to have a fully equitable and participatory society, we must have laws and policies that ensure menstrual products are safe and affordable and available for those who need them. The ability to access

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89. *See supra* note 36 and accompanying text. This estimate does not take into account additional local taxes. It also does not take into account the cost of any menstruation-related products or associated sales taxes. Menstruation-related products might include heating pads, pain relief medication, or new underwear. *See, e.g., Kane, supra* note 85 (estimating the total lifetime cost of a woman's period, taking into account all related product needs, as \$18,171, without specifying whether the estimate builds in state and local taxation).

90. *See supra* note 7 and accompanying text.

91. JENNIFER WEISS-WOLF, PERIODS GONE PUBLIC: TAKING A STAND FOR MENSTRUAL EQUITY, at x–xi (2017) (describing the origins of her menstrual equity activism).

92. *Id.* at xiv–xvii.

these items affects a person's freedom to work and study, to be healthy, and to participate in daily life with basic dignity. And if access is compromised, whether by poverty or stigma or lack of education and resources, it is in *all* of our interests to ensure those needs are met. Menstrual equity is still an evolving concept and goal.<sup>93</sup>

In 2015, the menstrual equity movement gained significant traction. A massive online petition campaign helped prompt Canada's repeal of its national tax.<sup>94</sup> Taking a cue from activists in Canada, Weiss-Wolf began a United States-based online petition, cosponsored by *Cosmopolitan* magazine, called *No Tax on Tampons: Stop Taxing Our Periods! Period*.<sup>95</sup> In 2015, Kiran Gandhi ran the London Marathon while "free bleeding."<sup>96</sup> Thousands of women took to social media with the hashtag "#PeriodsAreNotAnInsult" to protest then-candidate Donald Trump's attempt to discredit reporter Megyn Kelly by saying, "[S]he's not very tough and she's not very sharp. She gets out there and she starts asking me all sorts of ridiculous questions, and you could see there was blood coming out of her eyes, blood coming out of her . . . wherever."<sup>97</sup> Activists and ordinary people around the globe brought so much attention to the issue of menstruation that *Cosmopolitan* called 2015 "The Year the

93. *Id.* at xvi.

94. Tara Culp-Ressler, *After Years of Backlash, Canada Ditches the 'Tampon Tax,'* THINKPROGRESS (May 29, 2015, 3:50 PM), <https://thinkprogress.org/after-years-of-backlash-canada-ditches-the-tampon-tax-ed5cd867fbf4> [<https://perma.cc/5XC2-QWGW>] (citing number of signatories to an Internet petition as a factor leading to tampon tax repeal in Canada).

95. See Petition, *No Tax on Tampons: Stop Taxing Our Periods! Period.*, CHANGE.ORG, (Oct. 10, 2015), <https://www.change.org/p/u-s-state-legislators-stop-taxing-our-periods-period> [<https://perma.cc/D38W-DR4G>]; see also Bridget Crawford, *Interview with Jennifer Weiss-Wolf, New York Attorney and Menstrual Equity Advocate*, FEMINIST L. PROFESSORS (Nov. 22, 2016), <https://www.feministlawprofessors.com/2016/11/interview-jennifer-weiss-wolf-new-york-attorney-menstrual-equity-advocate/> [<https://perma.cc/6PCA-6CMU>].

96. Kiran Gandhi, *Sisterhood, Blood and Boobs at the London Marathon 2015*, MADAME GANDHI (Apr. 26, 2015), <https://madamegandhi.blog/2015/04/26/sisterhood-blood-and-boobs-at-the-london-marathon-2015> [<https://perma.cc/3VQP-7ZHS>] ("I ran with blood dripping down my legs for sisters who don't have access to tampons and sisters who, despite cramping and pain, hide it away and pretend like it doesn't exist.").

97. See, e.g., Laura Bennett, *What Trump Really Meant When He Said That Megyn Kelly Had "Blood Coming Out of Her Wherever,"* SLATE (Aug. 10, 2015, 7:33 PM), [https://www.slate.com/blogs/the\\_slatest/2015/08/10/megyn\\_kelly\\_blood\\_coming\\_out\\_of\\_her\\_wherever\\_comment\\_in\\_cnn\\_don\\_lemon\\_interview.html](https://www.slate.com/blogs/the_slatest/2015/08/10/megyn_kelly_blood_coming_out_of_her_wherever_comment_in_cnn_don_lemon_interview.html) [<https://perma.cc/K3DY-BPYV>].

Period Went Public,”<sup>98</sup> and National Public Radio declared it to be “The Year of the Period.”<sup>99</sup>

Menstrual equity activism continued well into the next two years and is ongoing. Many students have begun to demand that their colleges and universities provide free menstrual hygiene products on campus.<sup>100</sup> An Ohio woman began the Free the Tampons Foundation, dedicated to the idea that “every bathroom outside the home should provide freely accessible items that people

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98. Anna Maltby, *The 8 Greatest Menstrual Moments of 2015*, COSMOPOLITAN (Oct. 13, 2015), <https://www.cosmopolitan.com/health-fitness/news/a47609/2015-the-year-the-period-went-public/> [<https://perma.cc/J9MY-DMJD>] (citing Gandhi’s “free-bleeding” run, Canada’s repeal of the tampon tax, and Trump’s comments about Megyn Kelly, along with a tennis player’s public statement that she was menstruating during the Australian Open tennis tournament, Instagram’s censoring of an artistic photograph of a woman with a menstrual stain on her pants, a former White House Communications Director’s television statement that she bled “every 28 days . . . but the country went on,” Apple’s update to include period tracking in its “Health” app, and comedians Key and Peele’s “menstruation orientation” routine directed at educating men).

99. See Malaka Gharib, *Why 2015 Was the Year of the Period, and We Don’t Mean Punctuation*, NPR (Dec. 31, 2015, 1:30 PM ET), <https://www.npr.org/sections/health-shots/2015/12/31/460726461/why-2015-was-the-year-of-the-period-and-we-dont-mean-punctuation> [<https://perma.cc/JNA3-YQ74>] (“This year has been epic for menstruation, with news and social media catapulting the once hush-hush topic into the open.”); see also Hélène Bidard (@Helenebidard), TWITTER (Nov. 11, 2015, 8:52 PM), <https://twitter.com/Helenebidard/status/664485866799108096> [<https://perma.cc/9U8M-XM7H>] (“Manifestation contra la taxe tampon aujourd’hui place du Châtelet #Notaxontampons #Laissezmoisaigner #CulotteGate.” [“Protest against the tampon tax today at Châtelet Place #Notaxontampons #Letmebleed #PantyGate.”]); Reina Gattuso, *2015 Was the Year of the Period, and Happy to Bleed and Pads Against Sexism Are on It!*, FEMINISTING, <http://feministing.com/2016/01/05/2015-was-the-year-of-the-period-and-happy-to-bleed-and-pads-against-sexism-are-on-it> [<https://perma.cc/VVY9-VBAB>] (last visited Dec. 1, 2018) (describing work of student activists at Jamia Millia Islamia University of Delhi, India, who decorated the campus with pads); Hayley Gleeson, *Tampon Tax: Australian Debate Reignited After France Drops VAT on Sanitary Products*, ABC NEWS (Mar. 17, 2016, 10:31 PM), <http://www.abc.net.au/news/2015-12-15/tampon-tax-france-reignites-debate-australia/7026836> [<https://perma.cc/DK5P-MG29>] (describing protests in Paris where a woman “carried a clothesline swathed with blood-stained underwear”).

100. See Kimberly Yam, *Free Tampons, Pads Now Stocked in Bathrooms Across Brown University Campus*, HUFFPOST (Sept. 7, 2016, 6:01 PM ET), [https://www.huffingtonpost.com/entry/bathrooms-across-brown-universitys-campus-are-now-stocked-with-free-tampons-pads\\_us\\_57d03400e4b0a48094a6df9e](https://www.huffingtonpost.com/entry/bathrooms-across-brown-universitys-campus-are-now-stocked-with-free-tampons-pads_us_57d03400e4b0a48094a6df9e) [<https://perma.cc/ED97-AJBD>]. Notably, however, this was a decision by the Undergraduate Council of Students, not the central university administration, to allocate funding to provide menstrual hygiene products. *Id.*; see also Jake New, *If Condoms Are Free, Why Aren’t Tampons?*, INSIDE HIGHER ED (Mar. 11, 2016), <https://www.insidehighered.com/news/2016/03/11/students-demand-free-tampons-campus> [<https://perma.cc/P26A-N4C8>] (detailing varying degrees of successful student activism designed to achieve bathrooms stocked with free menstrual hygiene products at the University of Arizona, Columbia University, Emory University, and the University of California, Los Angeles); Diamond Naga Siu, *Free Menstrual Hygiene Products Come to NYU*, WASH. SQUARE NEWS (Oct. 24, 2016), <https://www.nyunews.com/2016/10/24/free-menstrual-hygiene-products-come-to-nyu> [<https://perma.cc/5BYW-6CFH>] (describing pilot program at New York University).

who menstruate need for their periods.”<sup>101</sup> The Foundation works with business owners to provide menstrual hygiene products for their employees and guests.<sup>102</sup> Perhaps the most publicized local success came in June 2016, when New York City Mayor Bill De Blasio signed into law a measure passed by the City Council that made available free menstrual hygiene products in all public schools, city jails, and city-run homeless shelters.<sup>103</sup>

At the state level, in 2016 and 2017, twenty-three states and the District of Columbia considered bipartisan legislation to make menstrual hygiene products tax-exempt.<sup>104</sup> Eight of those states considered legislation in both years.<sup>105</sup> Legislation in New York, Connecticut, Illinois, Florida, and the District of Columbia ultimately was successful; California legislation was vetoed by the

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101. *About*, FREE TAMPONS, <http://www.freethetampons.org/about.html> [https://perma.cc/2PRC-KZGJ] (last visited Dec. 1, 2018) (“We think menstruators shouldn’t have to worry about an unexpected physical need becoming an overwhelming emotional ordeal . . . . The organization is dedicated to providing education and resources that empower advocates to create change for women nationwide.”).

102. *Id.* Another focus of menstrual equity activism is access by prisoners to menstrual hygiene products. *See, e.g.*, Mattie Quinn, *New Federal Tampons Rule Follows States and Cities’ Flow*, GOVERNING (Aug. 29, 2017), <http://www.governing.com/gov-tampons-pads-prisons-states-federal.html> [https://perma.cc/E6W8-WBAN]. On August 1, 2017, the United States Department of Justice Federal Bureau of Prisons issued an “Operations Memorandum” requiring that federal prison wardens provide to inmates at no cost tampons and pads in two sizes each, as well as pantliners. DEP’T OF JUSTICE FED. BUREAU OF PRISONS, No. 001-2017, PROVISION OF FEMININE HYGIENE PRODUCTS (Aug. 1, 2017), [https://www.bop.gov/policy/om/001\\_2017.pdf](https://www.bop.gov/policy/om/001_2017.pdf) [https://perma.cc/8XHA-N84Q] (providing guidance applicable for one calendar year beginning August 1, 2017, to all federal prisons housing female inmates).

103. Press Release, Office of the Mayor, Mayor de Blasio Signs Legislation Increasing Access to Feminine Hygiene Products for Students, Shelter Residents and Inmates (July 13, 2016), <https://www1.nyc.gov/office-of-the-mayor/news/611-16/mayor-de-blasio-signs-legislation-increasing-access-feminine-hygiene-products-students> [https://perma.cc/AFL7-9US7] (including statement by Mayor de Blasio that, “[a]s a father, husband and feminist, I am proud to sign these bills into law”).

104. *See e.g.*, H.R. 2418, 53d Leg., 1st Reg. Sess. (Ariz. 2017); H.R. 17-1127, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017); H.R. 7109, 2017 Leg., 119th Reg. Sess. (Fla. 2017); S. 502, 2016 Gen. Assemb., May Spec. Sess. (Conn. 2016); Council, 21-0696, 2016 Leg. Reg. Sess. (D.C. 2016).

105. *See* Assemb. 9, 2017–2018 Leg., Reg. Sess. (Cal. 2017); H.R. 4129, 99th Leg., Reg. Sess. (Mich. 2017); H.R. 61, 132d Gen. Assemb., Reg. Sess. (Ohio 2017); H.R. 5377, 144th Gen. Assemb., Jan. Sess. (R.I. 2017); H.R. 804, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017); H.R. 71, 62d Leg., Gen. Sess. (Utah 2017); H.D. 1593, 2017 Gen. Assemb., Reg. Sess. (Va. 2017); Assemb. 683, 2017–2018 Leg., 103d Reg. Sess. (Wisc. 2017); Assemb. 1561, 2015–2016 Leg., Reg. Sess. (Cal. 2016); H.R. 5234, 98th Leg., Reg. Sess. (Mich. 2016); H.R. 272, 131st Gen. Assemb., Reg. Sess. (Ohio 2016); H.R. 7714, 144 Gen. Assemb., Jan. Sess. (R.I. 2016); H.R. 2059, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016); H.R. 202, 61st Leg., Gen. Sess. (Utah 2016); H.D. 952, 2016 Gen. Assemb., Reg. Sess. (Va. 2016); Assemb. 949, 2015–2016 Leg., 102d Reg Sess. (Wisc. 2016).

governor.<sup>106</sup> In 2018, Nevada voters voted in favor of eliminating the sales tax on sanitary napkins and pads.<sup>107</sup> In future years, several states are expected to consider repeal legislation.<sup>108</sup>

### B. *New York: 21st Century Class Action*

Prior to 2016, New York was one of the jurisdictions that had considered (but never passed) legislation to repeal the sales tax on menstrual hygiene products.<sup>109</sup> In connection with her increasingly national profile, Weiss-Wolf formed the nonprofit policy organization *Period Equity* together with attorney Laura Strausfeld.<sup>110</sup>

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106. See, e.g., Letter from Edmund G. Brown Jr., Governor of Cal., to Members of the Cal. State Assembly (Sept. 13, 2016), [https://www.gov.ca.gov/wp-content/uploads/2017/09/AB\\_717\\_Veto\\_Message.pdf](https://www.gov.ca.gov/wp-content/uploads/2017/09/AB_717_Veto_Message.pdf) [<https://perma.cc/4PUB-VKRX>] (explaining his veto in part because “tax breaks are the same as new spending -- they both cost the General Fund money. As such, they must be considered during budget deliberations so that all spending proposals are weighed against each other at the same time.”). The bill would have eliminated the sales tax on diapers, as well. See, e.g., Jeremy B. White, *Tampon, Diaper Taxes Will Endure in California*, SACRAMENTO BEE (Sept. 13, 2016, 4:21 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article101581562.html> [<https://perma.cc/C7HN-ASGR>]. In 2017, Governor Brown did sign into law a diaper subsidy for certain low-income families with children under the age of three years. See Assemb. 480, 2017 Leg., Reg. Sess. (Cal. 2017); see also *California Becomes First State to Subsidize Diapers After Governor Signs AB 480*, EAST COUNTY TODAY (Oct. 13, 2017), <https://eastcountytoday.net/california-becomes-first-state-to-subsidize-diapers-after-governor-signs-ab-480> [<https://perma.cc/56E2-EMN7>].

107. See *supra* note 67 and accompanying text.

108. States that are likely to consider repeal legislation in 2019 include Arizona, Nebraska, Ohio, and Wisconsin. Ema Sagner, *More States Move to End ‘Tampon Tax’ That’s Seen as Discriminating Against Women*, NPR (Mar. 25, 2018, 8:01 AM ET), <https://www.npr.org/2018/03/25/564580736/morestates-move-to-end-tampon-tax-that-s-seen-as-discriminating-against-women> [<https://perma.cc/K73F-3F9Z>] (including a graphic of states with pending tampon tax exemption legislation). In 2018, a Utah bill to repeal the tampon tax died in committee. See H.B. 262, 62nd Leg. Reg. Sess. (Utah 2018) (proposing removal of sales tax on menstrual hygiene products); see also Julia Ritchey (@juliaritchey), TWITTER (Feb. 21, 2018, 6:03 PM), <https://twitter.com/juliaritchey/status/966493594583355392> [<https://perma.cc/V2FR-BRT8>] (reporting by managing editor of Utah public radio station KUER-FM that House Bill 262 failed in Utah House Revenue and Taxation Standing Committee by vote of three to seven).

109. Manhattan Assemblywoman Linda Rosenthal introduced the first repeal legislation in 2015. See Abigail Jones, *New York Terminates the Tampon Tax*, NEWSWEEK (July 21, 2016, 7:29 AM), <http://www.newsweek.com/new-york-tampon-tax-cuomo-periods-tampons-menstruation-donald-trump-482918> [<https://perma.cc/N6KZ-6VJR>] (providing a brief overview of New York’s tax treatment menstrual hygiene products, which had been subject to taxation beginning with the enactment of the state sales tax regime in 1965); see also Linda B. Rosenthal (@LindaBRosenthal), TWITTER (July 21, 2016, 11:10 AM), <https://twitter.com/LindaBRosenthal/status/756189723937439744> [<https://perma.cc/SR8W-VMND>] (“My bill repealing #tampontax signed into law! We just axed the tax! Good riddance to sexist tax.”). For a comparison of New York’s and Utah’s legislative approaches to tampon tax repeal in 2016, see Gwenyth S. Gamble Jarvi, Note, *Thank Hefner Erectile Dysfunction Is a Medical Condition: A Period Piece*, 15 PITT. TAX. REV. 181, 187–98 (2018).

110. PERIODEQUITY, <https://www.periodequity.org/> [<https://perma.cc/UQA8-MVT2>] (last

Strausfeld had been contemplating a legal challenge to the sales tax on menstrual hygiene products, as New York legislators had considered a repeal bill before, but the bill never made it to a vote.<sup>111</sup> Period Equity persuaded a New York law firm to represent five women in a class action lawsuit.<sup>112</sup>

Attorneys filed the complaint in *Seibert v. New York State Department of Taxation* on March 3, 2016, in a New York state court.<sup>113</sup> The plaintiffs alleged that the New York state sales tax violated the Equal Protection Clauses of the United States and New York Constitutions and sought to permanently enjoin the state from collecting sales tax on menstrual hygiene products.<sup>114</sup> The plaintiffs also sought restitution of an estimated \$14 million in sales tax collected in each of the preceding three years, as well as attorneys' fees and costs.<sup>115</sup>

The complaint alleged that the New York state sales tax on menstrual hygiene products was not "substantially related to an important state interest" or even "rationally related to a legitimate state purpose."<sup>116</sup> In other words, the complaint argued that the

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visited Dec. 1, 2018) (identifying the organization as "the nation's first law and policy organization fighting for menstrual equity—committed to ensuring that menstrual products are affordable, safe and available to those in need," with Jennifer Weiss-Wolf and Laura Strausfeld as cofounders).

111. See *supra* note 106 and accompanying text. The New York case was not the first legal challenge to the sales tax on menstrual hygiene products in the United States. Over twenty-seven years before, three women brought and won a class action in Illinois seeking injunctive relief against local and state taxes. See *Geary v. Dominick's Finer Foods, Inc.*, 544 N.E.2d 344, 355–56 (Ill. 1989) (holding that menstrual hygiene products should be classified as "medical appliances" for applicable tax purposes, and thus were exempt from taxation). For an analysis of the *Geary* case, see Crawford & Spivack, *supra* note 43, at 531–34, and see also Hartman, *supra* note 87, at 327–29, explaining post-*Geary* changes to the law that led to the restoration of Illinois taxes on menstrual hygiene products in 2009, setting the stage for subsequent legislation in 2016 that affirmatively exempts menstrual hygiene products from taxation.

112. Bridget Crawford, *Interview with Laura Strausfeld, New York Attorney Challenging the "Tampon Tax,"* FEMINIST L. PROFESSORS (Nov. 15, 2016), <https://www.feministlawprofessors.com/2016/11/interview-laura-strausfeld-new-york-attorney-challenging-tampon-tax/> [<https://perma.cc/8ZNB-423X>] (describing involvement of attorneys at Emery Celli Brinckerhoff & Abady LLP).

113. Complaint at 1–3, 15, *Seibert v. N.Y. State Dep't of Taxation & Fin.*, No. 151800/2016 (N.Y. Sup. Ct. Mar. 3, 2016) (seeking an end to the sales tax on menstrual hygiene products in New York and requesting tax refunds on behalf of all who had made purchases in the state in the prior three years via class action lawsuit). The commencement of the legal action immediately attracted press attention. See, e.g., Emma Whitford, *NY Women File Class Action Lawsuit to End the Tampon Tax*, GOTHAMIST (Mar. 3, 2016, 12:53 PM), [http://gothamist.com/2016/03/03/tampon\\_tax\\_lawsuit.php](http://gothamist.com/2016/03/03/tampon_tax_lawsuit.php) [<https://perma.cc/E3LR-NHKR>].

114. Complaint, *supra* note 113, at 1–2.

115. *Id.* at 9, 15.

116. *Id.* at 13.

tampon tax failed intermediate scrutiny, and alternatively, that the tampon tax could not satisfy rational-basis review.<sup>117</sup> The complaint noted that under the New York State Department of Taxation and Finance's approach, products "used to stop the flow of blood from nonfeminine parts of the body are 'medical supplies,' while tampons and pads, used to stop the flow of blood from the uterus, are not."<sup>118</sup> It vividly compared New York's taxation of menstrual hygiene products with the state's failure to tax "Rogaine, dandruff shampoo, foot powder, chapstick, and so many other less medically necessary products also used by men."<sup>119</sup> However, the complaint (as is appropriate for an initial pleading) did not flesh out the reasoning behind its arguments that the tampon tax was discriminatory, other than to say that "a tax on feminine hygiene products is on its face a tax on women, and . . . results in the disparate treatment of women."<sup>120</sup>

Less than three months after the suit was filed, New York repealed its tax on menstrual hygiene products.<sup>121</sup> Instead of reclassifying menstrual hygiene products as "medical products," New York added a stand-alone exemption.<sup>122</sup> In part because the plaintiffs' injunctive claims became moot, they agreed to a voluntary dismissal of their case.<sup>123</sup> When asked why the plaintiffs did not pursue their claim for refunds, restitution, attorneys' fees and costs, Strausfeld noted that, "Pursuing a case of this sort, on a contingency fee basis and with an uncertain result, is expensive for the attorneys."<sup>124</sup> The plaintiffs did, however, retain the option to renew those claims.<sup>125</sup> Thus, it seems that the plaintiffs' primary goals were to draw attention to the cause and to effectuate legal

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117. *Id.* at 8. The plaintiffs parsed the state regulations exempting from taxation "medical supplies," defined as "supplies used in the cure, mitigation, treatment or prevention of illnesses or diseases," and regulations' examples of medical supplies as "bandages, gauze, and dressings." *Id.* at 5 (citing N.Y. COMP. CODES R. & REGS. tit. 20, § 528.4(g) (2018)).

118. *Id.* at 9 (citing N.Y. COMP. CODES R. & REGS. tit. 20, § 528.4(g) (2018)).

119. *Id.*

120. *Id.* at 13.

121. See Associated Press, *New York Legislature Cuts Taxes on Tampons and Other Feminine Hygiene Products*, N.Y. TIMES (May 25, 2016), <https://www.nytimes.com/2016/05/26/nyregion/new-york-legislature-cuts-taxes-on-feminine-hygiene-products.html> [https://perma.cc/LBC5-5T3F]; Anna North, *A Welcome End to New York's 'Tampon Tax'*, N.Y. TIMES: TAKING NOTE (May 26, 2016, 4:07 PM), <https://takingnote.blogs.nytimes.com/2016/05/26/a-welcome-end-to-new-yorks-tampon-tax/> [https://perma.cc/5JPV-Z63A].

122. See N.Y. TAX LAW § 1115(a)(3-a) (McKinney 2017).

123. See Crawford, *supra* note 112.

124. *Id.*

125. *Id.*

change, rather than to receive compensation. They were able to claim victory once New York repealed its tax.<sup>126</sup>

### C. Florida: Legislative Change and Dismissal

Likely inspired by the result in New York, less than two months after the New York legislature voted to repeal the state's tampon tax, a Florida attorney filed a class action in *Wendell v. Florida Department of Revenue* on behalf of a plaintiff who sought to challenge Florida's taxation of menstrual hygiene products.<sup>127</sup> As in the New York suit, the plaintiff sought injunctive relief, a tax refund, and a declaration that the Florida statute violated the Equal Protection Clauses of the United States and Florida Constitutions.<sup>128</sup> And just as the New York plaintiffs had pointed out the oddity of New York's classifications, the plaintiff here focused on the failure of Florida to include menstrual hygiene products in the state's tax-exempt category of related "common household remedies recommended and generally sold for internal or external use in the cure, mitigation, treatment, or prevention of illness or disease in human beings."<sup>129</sup> The complaint specifically noted that unisex blood absorption-related products like "band-aids, bandages, gauze, and adhesive tape" were tax-exempt under Florida law, as were common household remedies "also used by men, such as epsom salts, athlete's foot treatment, hair regrowth treatment, and petroleum jelly."<sup>130</sup>

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126. See, e.g., Annamarya Scaccia, *New York Is Finally Pulling the Plug on Its Tampon Tax*, VICE: BROADLY (Apr. 13, 2016, 11:45 AM), [https://broadly.vice.com/en\\_us/article/d7an8v/new-york-is-finally-pulling-the-plug-on-its-tampon-tax](https://broadly.vice.com/en_us/article/d7an8v/new-york-is-finally-pulling-the-plug-on-its-tampon-tax) [https://perma.cc/8S4K-8GYW] (quoting New York attorney Zoe Salzman of Emery Celli Brinckerhof & Abady as saying that the lawsuit "motivated" the New York state's legislative repeal).

127. Complaint at 2, *Wendell v. Fla. Dep't of Revenue*, No. 2016-CA-001526 (Fla. Leon County Ct. 2016).

128. *Id.* at 2, 19.

129. *Id.* at 15 (citing FLA. STAT. § 212.08(2)(a) (2018)).

130. *Id.* at 2 (citing FLA. ADMIN. CODE ANN. r. 12A-1.020(5) (2018)). When asked about menstrual hygiene products related to "treatment or prevention of illness or disease in human beings," the plaintiff's attorney explained that the products "play an essential role in reducing and preventing the spread of blood borne illnesses," and that "[s]imply put, it's a public health safety issue, the costs of which are solely borne by women. These products are not luxuries—women can't just stay home until they stop bleeding." Bridget Crawford, *Interview with Dana Brooks Cooper, Florida Attorney Challenging the "Tampon Tax,"* FEMINIST L. PROFESSORS (July 28, 2016), <https://www.feministlawprofessors.com/2016/07/interview-dana-brooks-cooper-florida-attorney-challenging-tampon-tax-2/> [https://perma.cc/2TZ2-STF6].

On May 26, 2017, almost ten months after the filing of the Florida class action (and one year after New York's repeal), the Florida legislature repealed its tampon tax and Governor Rick Scott signed the bill into law.<sup>131</sup> In February 2018, the Florida class action was dismissed.<sup>132</sup> Far from being an obstacle to reform (as one legislative aide had warned),<sup>133</sup> the class action may have spurred the state legislature to act.

Before either New York or Florida repealed its sales tax on menstrual hygiene products, attorneys filed separate class actions lawsuits in California<sup>134</sup> and Ohio.<sup>135</sup> The plaintiffs in both cases sought declaratory judgments that each state's respective sales tax on menstrual hygiene products was unconstitutional, injunctive relief from enforcement, and restitution for taxes previously paid.<sup>136</sup> Although it does not appear that the attorneys in any of the four class action cases consulted each other, it is clear that they were aware of the other suits, as the complaints in all four jurisdictions included substantially similar language.<sup>137</sup>

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131. H.R. 7109, 2017 Leg., Reg. Sess. (Fla. 2017); *see also* Catherine Pearson, *Florida Just Became the Latest State to Abolish the 'Tampon Tax,'* HUFFPOST (May 26, 2017, 11:14 AM ET), [https://www.huffingtonpost.com/entry/florida-just-became-the-latest-state-to-abolish-the-tampon-tax\\_us\\_59282d4de4b0df34c35b77cf](https://www.huffingtonpost.com/entry/florida-just-became-the-latest-state-to-abolish-the-tampon-tax_us_59282d4de4b0df34c35b77cf) [<https://perma.cc/6RML-AT3H>].

132. *See* Notice of Stipulated Dismissal, *Wendell v. Fla. Dep't of Revenue*, No. 2016-CA-001526 (Fla. Leon County Ct. 2018); Notice of Dismissal, *Wendell v. Fla. Dep't of Revenue*, No. 2016-CA-001526 (Fla. Leon County Ct. 2018) (dismissed with prejudice).

133. *See* Jeff Burlew, *Sen. Simpson Seeks Repeal of 'Tampon Tax,'* TALLAHASSEE DEMOCRAT (Jul. 13, 2016, 5:13 PM ET), <https://www.tallahassee.com/story/news/2016/07/13/sen-simpson-seeks-repeal-tampon-tax/87049694/> [<https://perma.cc/54YK-HJVX>] (quoting Rachel Perrin Rogers, Republican Senator Simpson's chief legislative assistant, as saying that Senator Simpson had been previously unaware of the tampon tax and that "[i]n my experience as a committee analyst and legislative assistant, there have been many situations in which what very easily could have been a simple legislative fix became difficult as a result of ongoing litigation"). Ms. Rogers' predictions do not appear to have been borne out in this case.

134. Complaint at 1, 3, *DiSimone v. Cal. Dep't of Tax and Fee Admin.*, 2018 Cal. Super. LEXIS 1814 (Jan. 29, 2018) (No. 16CV293099); *see also* Jennifer Wadsworth, *Fight Over Absurd 'Tampon Tax' Continues in California Court,* SAN JOSE INSIDE (Sept. 20, 2016), <https://www.sanjoinside.com/2016/09/20/fight-over-absurd-tampon-tax-continues-in-california-court> [<https://perma.cc/5TMB-HEG5>].

135. *See* Class Action Complaint, *Rowitz v. Ohio*, No. 16CV003518 (Ohio C.P. Apr. 11, 2016).

136. Complaint, *supra* note 127, at 15; Class Action Complaint, *supra* note 135, at 13.

137. *Compare, e.g.,* Class Action Complaint, *Rowitz v. Ohio*, No. 2016-00197JD (Ohio Ct. of Cl. Mar. 14, 2016) (labeling one cause of action "Inapplicable Tax and Arbitrary, Capricious, Legally Deficient Determination Against All Defendants"), *with* Complaint, *supra* note 113, at 12 (using identical heading "Inapplicable Tax and Arbitrary, Capricious, Legally Deficient Determination Against All Defendants"). The defendants in the Ohio case cited the similarities between the complaints in the Ohio and New York cases in their motion to Dismiss. *See* Motion to Dismiss of Defendant States of Ohio, Ohio Department of

#### D. California: Dismissal and Dicta

*DiSimone v. California* resembled the New York and Florida cases in that it sought injunctive relief, refund of prior taxes paid, and attorneys' fees and costs.<sup>138</sup> As in *Seibert* and *Wendell*, the complaint alleged a violation of the Equal Protection Clauses of the United States Constitution and state constitution.<sup>139</sup> It asserted that the California tax on menstrual hygiene products is "not only discriminatory in intent and disparate in impact, it is arbitrary, capricious, and irrational. This sales tax is not substantially related to the advancement of any important government interest."<sup>140</sup> In a separate filing in *DiSimone*, a doctor emphasized that California imposes sales tax on menstrual hygiene products while simultaneously exempting Viagra as a medical necessity.<sup>141</sup>

Initially, the plaintiffs sued the state of California, the governor, and, individually and in a representative capacity, the director of the California State Board of Equalization, the entity responsible for administering the state's tax system.<sup>142</sup> The court dismissed, as improper parties, the governor and the director of the Board of Equalization.<sup>143</sup> The court permitted the plaintiff to substitute the California Department of Tax and Fee Administration in lieu of the Board of Equalization.<sup>144</sup> The parties then cross-moved for summary judgment.<sup>145</sup> The court granted the defendant's motion on

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Taxation, Joseph W. Testa, Tax Commissioner of Ohio & Joseph W. Testa Individually at 1 n.1, *Rowitz v. Ohio*, No. 16CV003518 (Ohio C.P. June 16, 2016).

138. See Complaint, *supra* note 134, at 15.

139. *Id.* at 13.

140. *Id.* at 3.

141. Declaration of Felice L. Gersh, M.D. in Support of Plaintiff's Motion for Summary Judgment at 5, *DiSimone*, 2018 Cal. Super. LEXIS 1814 (No. CGC-16-552458). Unlike the New York or Florida complaints, the California complaint included claims of an alleged violation of plaintiff's Fourteenth Amendment right to due process and a 42 U.S.C. § 1983 violation of her federal civil rights. Complaint, *supra* note 134, at 3. However, this article focuses on the complaint's equal protection argument.

142. Complaint, *supra* note 134, at 1; see *About BOE*, CAL. STATE BD. EQUALIZATION, <https://www.boe.ca.gov/info/about.htm> [<https://perma.cc/D97G-R4XA>] (last visited Dec. 1, 2018) (stating that the Board of Equalization's mission is "to serve the public through fair, effective, and efficient tax administration").

143. Orders Sustaining Demurrers with Leave to Amend & Setting Case Management Conference at 1, 10, *DiSimone*, 2018 Cal. Super. LEXIS 1814 (No. CGC-16-552458).

144. Order Granting Substitution of Defendant, *DiSimone*, 2018 Cal. Super. LEXIS 1814 (No. CGC-16-552458).

145. California Department of Tax & Fee Administration's Notice of Motion & Motion for Summary Judgment at 1–2, *DiSimone*, 2018 Cal. Super. LEXIS 1814 (No. CGC-16-552458); Plaintiffs' Notice of Motion & Motion for Summary Judgment or, in the Alternative, Summary Adjudication at 1–2, *DiSimone*, 2018 Cal. Super. LEXIS 1814 (No. CGC-16-

procedural grounds.<sup>146</sup> The court reasoned that the proper taxpayers to seek a refund were the retailers who had paid the tax to the State of California, and that individual retail consumers could seek relief directly from the state only in limited circumstances that were not available in this case.<sup>147</sup>

Having dismissed the case on grounds that the wrong plaintiffs had sued, the court could have stopped there. Instead, the court subsequently explained in dicta why it viewed California's tampon tax as constitutional.<sup>148</sup> In so doing, the court did not explore the argument—developed more fully below—that the tampon tax is so closely tied to women's biology that it can be viewed as a facially sex-based classification.<sup>149</sup> Instead, it analyzed the tax only through a disparate impact lens, concluding that there was insufficient evidence of disparate impact and no evidence of discriminatory intent.<sup>150</sup> As discussed below, this analysis is incomplete.<sup>151</sup> The California court failed to engage the facial classification argument (which the pleadings had not made explicitly), oversimplified the facial neutrality argument (also not explicit in the pleadings), and was too conclusory in accepting that California has a rational basis for excluding menstrual hygiene products from the list of exempted necessities. We explore those issues in greater depth in Part IV.

#### E. *Ohio: Administrative Appeal and Judicial Inactivity*

In March 2016, four plaintiffs filed a class action lawsuit, arguing that the Ohio state sales tax on menstrual hygiene products violates the Equal Protection Clause of the state and federal constitutions.<sup>152</sup> In the alternative, the plaintiffs sought to have menstrual hygiene products brought within the definition of tax-free "drugs," defined in the state sales tax law as including a "substance

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552458).

146. Order Granting Motion of California Department of Tax & Fee Administration for Summary Judgment & Denying Motion of Plaintiffs for Summary Judgment at 3–4, *DiSimone*, 2018 Cal. Super. LEXIS 1814 (No. CGC-16-552455).

147. *Id.* at 4.

148. *Id.* at 4–9.

149. *See id.*; *see also infra* Part IV.A.

150. Order Granting Motion, *supra* note 146, at 6–7 (“[W]e do not know if men or women generally bear a heavier tax burden as a result of all the various products which are, and are not, exempt.”).

151. *See infra* Part IV.

152. Class Action Complaint, *supra* note 137, at 1–2.

that is intended to affect the structure or any function of the body.”<sup>153</sup> Like their counterparts in New York, Florida, and California, the Ohio plaintiffs also sought a refund for sales tax paid in the past and attorneys’ fees and costs.<sup>154</sup>

The defendants, the Ohio Department of Taxation and Joseph Testa, individually and as Tax Commissioner of Ohio, moved to dismiss the case on the grounds that the Ohio statute required the plaintiffs first to file a claim for a sales tax refund with the Ohio State Tax Commissioner, which they had not done.<sup>155</sup> Before the court ruled on the motion, the defendants filed either to dismiss the case or alternatively, to stay the proceedings until the plaintiffs concluded their administrative appeals.<sup>156</sup> The court granted the stay while the plaintiffs requested a refund from the Ohio Board of Tax Appeals.<sup>157</sup>

The Ohio Board of Tax Appeals denied the taxpayers’ application to the Ohio Tax Commissioner for a refund of sales tax paid on menstrual hygiene products.<sup>158</sup> The taxpayers have filed a notice of appeal to the Ohio Tenth District Court of Appeals; therefore, the Court of Common Pleas case is currently marked as “inactive,” pending that appeal.<sup>159</sup> The basis for the appeal is three-fold: first, the plaintiff’s claim that the Ohio sales tax on menstrual hygiene products violates the equal protection clauses of the federal and state constitutions; second, that the classification of tampons as medical devices by the federal Food and Drug Administration (“FDA”) preempts any other classification for state law purposes;

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153. Class Action Amended Complaint at 1–2, 4, *Rowitz v. Ohio*, No. 16CV003518 (Ohio C.P. Apr. 20, 2016) (citing OHIO REV. CODE ANN. § 5739.01 (2016)). And like their California counterparts, the Ohio plaintiffs sought a declaration that the tampon tax violates the Due Process Clause of the Fifth Amendment and a finding of a § 1983 violation of federal civil rights. *See id.* at 12; Complaint, *supra* note 134, at 3.

154. Class Action Amended Complaint, *supra* note 153, at 13; *see supra* Part II.E.

155. Motion to Dismiss, *supra* note 137, at 2–6.

156. Second Motion to Dismiss & Motion to Stay of Defendants State of Ohio, Ohio Department of Taxation & Joseph W. Testa, Tax Commissioner of Ohio at 1–2, *Rowitz v. Ohio*, No. 16CV003518 (Ohio C.P. Jan. 13, 2017).

157. Entry Granting Stay, *Rowitz v. Ohio*, No. 16CV003518 (Ohio. C.P. Nov. 22, 2017).

158. Decision and Order, *Rowitz v. Testa*, Nos. 2017-250, 2017-251, 2017-252, 2017-253 (Ohio B.T.A. Feb. 20, 2018); Defendants State of Ohio, Ohio Department of Taxation & Joseph W. Testa, Tax Commissioner of Ohio’s Notice of BTA Decision & Subsequent Appeal, Exhibit A, *Rowitz v. Ohio*, No. 16CV003518 (Ohio C.P. Mar. 19, 2018).

159. Notice of Appeal Pursuant to Revised Code Section 5717.04, *Rowitz v. Testa*, No. 18-AP-000191 (Ohio Ct. App. Feb. 20, 2018); *see Case Information Online*, FRANKLIN COUNTY CLERK COURTS, <https://fedefcjs.co.franklin.oh.us/CaseInformationOnline/nameSearch> [<https://perma.cc/6B4V-VHDS>] (last visited Dec. 1, 2018) (search “Rowitz”) (listing case number 16-CV-003518 as inactive).

and, third, that menstrual hygiene products should be classified for state law as “drugs,” “durable medical equipment,” or “prosthetic devices,” and thus exempt from taxation.<sup>160</sup>

The preemption argument is weak, as there is no reason to think that an FDA definition would control for purposes of state sales tax law, which is in the exclusive domain of the taxing state.<sup>161</sup> And the attempt to shoehorn menstrual hygiene products into the definition of drugs, durable medical equipment, or prosthetic devices strains statutory interpretation beyond plain meaning (although the relevant definition of “drugs” is so broad that it could conceivably include menstrual hygiene products).<sup>162</sup> The equal protection argument, however, is strong and it is there that we now turn.

### III. RELEVANT EQUAL PROTECTION JURISPRUDENCE

The Supreme Court has long recognized sex as a suspect classification for equal protection purposes, such that facially sex-based governmental distinctions receive heightened review.<sup>163</sup> Although sex-based classifications do not trigger strict scrutiny, they do trigger intermediate scrutiny, which means that the classifications

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160. Notice of Appeal, *supra* note 159 (quoting OHIO REV. CODE ANN. § 5739.01(FFF), (HHH), (JJJ) (2007 & Supp. 2018)).

161. For a sample of relevant scholarship on federalism, see, for example, Heather K. Gerkin, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85 (2014); Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503 (2007); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005).

162. For a sample of relevant scholarship on statutory interpretation, see, for example, RONALD B. BROWN & SHARON J. BROWN, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT 1–3 (2002) (explaining the importance of statutory interpretation); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017); William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539 (2017); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Abbe Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons* (pts. 1 & 2), 65 STAN. L. REV. 901 (2013), 66 STAN. L. REV. 725 (2014); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006).

163. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives,” i.e., pass intermediate scrutiny); *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (plurality opinion) (stating that classifications based on sex should “be subjected to close judicial scrutiny”).

must be substantially related to an important governmental purpose.<sup>164</sup> In *United States v. Virginia*,<sup>165</sup> the Supreme Court emphasized the stringent nature of this review, describing it as “skeptical scrutiny” that requires an “exceedingly persuasive justification” to be satisfied.<sup>166</sup>

In comparison to facial sex-based classifications, it is harder to challenge facially neutral governmental distinctions that have a disparate impact as to sex. Pursuant to the Supreme Court’s holding in *Personnel Administrator v. Feeney*,<sup>167</sup> a showing of disparate impact as to gender is not itself sufficient to trigger intermediate scrutiny. A plaintiff must also prove discriminatory intent.<sup>168</sup>

*Feeney* involved a challenge to Massachusetts’ veteran preference statute, with the plaintiffs claiming it violated the Equal Protection Clause of the Fourteenth Amendment.<sup>169</sup> Under the statute, all veterans who qualified for state civil service positions had to be considered for appointment ahead of any qualifying nonveterans.<sup>170</sup> This had a hugely disparate impact on women; at the time the *Feeney* litigation began in 1975, veterans comprised over 25% of the Massachusetts population, and over 98% of the veterans were male.<sup>171</sup>

Still, the Court ruled that there was no equal protection violation, because the challengers could not show that “a gender-based discriminatory purpose ha[d], at least in some measure, shaped the Massachusetts veterans’ preference legislation.”<sup>172</sup> The Court explained that “the State intended nothing more than to prefer ‘veterans’” and that the “intent to exclude women from significant public jobs was not at work in this law.”<sup>173</sup> The Court acknowledged that the Massachusetts legislature likely was *aware* that most veterans were men, but explained that this was not enough: to win,

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164. *Craig*, 429 U.S. at 197.

165. 518 U.S. 515 (1996).

166. *Id.* at 531 (quoting *Miss. Univ. for Women v. Hogen*, 458 U.S. 718, 724 (1982)).

167. 442 U.S. 256 (1979).

168. *Id.* at 274.

169. *Id.* at 259.

170. *Id.* at 261–63 (quoting MASS. GEN. LAWS ch. 4, § 7 (1976)).

171. *Id.* at 270.

172. *Id.* at 276, 281.

173. *Id.* at 277.

the plaintiffs needed to show that the legislature “selected or reaffirmed [this] particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon” women.<sup>174</sup>

The question of whether a law draws a facial classification based on sex, therefore, is critical. Often, the answer is obvious: the statutory text itself explicitly references sex or gender.<sup>175</sup> Sometimes, however, it is a closer call whether a classification is facially sex-based. That was the case in *Geduldig v. Aiello*.<sup>176</sup>

*Geduldig* involved state and federal equal protection challenges to California’s disability insurance system, which was funded by automatic paycheck deductions and insured “against the risk of disability stemming from a substantial number of ‘mental or physical illness[es] and mental or physical injur[ies].’”<sup>177</sup> The statute did not cover disabilities lasting fewer than eight days, and the benefits did not extend beyond twenty-six weeks.<sup>178</sup> Most disabilities were covered, but the system excluded disabilities resulting from alcoholism, drug addiction, sexual psychopathy, and normal pregnancies, although disabilities resulting from abnormal pregnancy complications (such as ectopic pregnancies) were covered.<sup>179</sup> The Supreme Court rejected the argument that, in excluding coverage for disabilities from typical pregnancies, the system was engaging in invidious sex discrimination under the Equal Protection Clause.<sup>180</sup> The Court explained in a footnote:

The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics . . . . The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant

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174. *Id.* at 279.

175. *See, e.g.*, *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 59–61 (2001) (applying intermediate scrutiny to a statute that imposed different requirements for a child’s acquisition of citizenship depending on whether the citizen parent was the mother or father).

176. 417 U.S. 484 (1974).

177. *Id.* at 487–88.

178. *Id.* at 488.

179. *Id.* at 489, 493.

180. *Id.* at 494.

women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.<sup>181</sup>

Many commentators and legislators immediately disagreed with *Geduldig*.<sup>182</sup> Four years after *Geduldig* was decided, Congress amended Title VII to clarify that its prohibition of discrimination based on sex included pregnancy discrimination.<sup>183</sup> But, of course, Congress could not amend the Supreme Court's interpretation of the Equal Protection Clause, and so *Geduldig* technically remains applicable to constitutional claims even though it is irrelevant to employment discrimination claims brought under Title VII.

More recently, some commentators have suggested that the Supreme Court has, at least implicitly, moved beyond *Geduldig*'s reasoning. Neil and Reva Siegel, for example, point to the Supreme Court's decision in *Nevada Department of Human Resources v. Hibbs*,<sup>184</sup> where the Court recognized the Family and Medical Leave Act ("FMLA") as a valid exercise of Congress's power to enforce the Equal Protection Clause on grounds that the FMLA entitled both male and female employees to take leaves in connection with the arrival of a new baby, and would thus arguably prevent employers from viewing childcare solely as women's work.<sup>185</sup> The *Hibbs* Court thus acknowledged, Siegel and Siegel argue, that "unconstitutional sex stereotyping has shaped laws governing pregnant women as well as new mothers."<sup>186</sup> They conclude that "[w]here the Court was once inclined to view the regulation of pregnant women as presumptively benign, the Court is now more quick

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181. *Id.* at 496–97 n.20.

182. David L. Kirp & Dorothy Robyn, *Pregnancy, Justice, and the Justices*, 57 TEX. L. REV. 947, 948, 951, 954 (1979); *see, e.g.*, Diane L. Zimmerman, Comment, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441, 442–43, 482 (1975).

183. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k)) states that:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or inability to work.

184. 538 U.S. 721, 722 (2003).

185. *See* Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From Struck to Carhart*, 70 OHIO ST. L.J. 1095, 1106 (2009).

186. *Id.* at 1107.

to recognize constitutional concerns at stake.”<sup>187</sup> This evolution, they suggest, brings *Geduldig’s* reasoning into question.

Moving beyond the pregnancy context, Holning Lau and Hillary Li have argued that the Supreme Court’s decision in *Obergefell v. Hodges*,<sup>188</sup> which struck down same-sex marriage bans, also casts doubt on *Geduldig’s* approach.<sup>189</sup> Lau and Li point out that although *Geduldig* “concluded that there was no sex discrimination because not all women are, or will ever be, pregnant . . . *Obergefell* was much less concerned about the fact that some gays and lesbians are neither interested nor ever will be interested in getting married.”<sup>190</sup> In other words, the *Obergefell* Court focused less on whether every gay person was specifically and tangibly affected by the same-sex marriage bans, and instead emphasized the aggregate and symbolic effect of the ban. We draw on these arguments, along with others, in explaining below why *Geduldig* should not foreclose viewing the tampon tax as unconstitutionally sex-based.

#### IV. WHY THE TAMPON TAX IS AN UNCONSTITUTIONAL SEX-BASED TAX

The tampon tax straddles the divide between the “facial classification” and “facial neutrality” scenarios. The sales tax systems in the thirty-five states that impose the tampon tax do not explicitly mention women when they classify menstrual hygiene products as “taxable” and other necessities as “exempt.”<sup>191</sup> However, in the same way that comparatively unfavorable tax treatment of yarmulkes would be viewed as a tax on Jews (even if the word “Jew” did not appear in the legislation), so too should a tax on menstrual hygiene products—in the context of a tax system that exempts other “necessities”—be understood as a tax on women. Indeed, as we discuss further below, the most appropriate analysis of the tampon tax is as a facial sex-based classification. Moreover, the facial

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187. *Id.* at 1113.

188. 576 U.S. \_\_\_, 135 S. Ct. 2584 (2015).

189. See Holning Lau & Hillary Li, *American Equal Protection and Global Convergence*, 86 FORDHAM L. REV. 1251, 1261–63 (2017) (noting that the *Obergefell* Court focused on the discriminatory impact of same-sex marriage bans).

190. *Id.* at 1263.

191. See, e.g., N.D. CENT. CODE § 57-39.2-04(26)(d)(2) (2018) (providing sales tax exemption for “incontinent pad and pants” used by “a person with bladder dysfunction”). Menstrual hygiene products are subject to taxation because they are not specifically exempt. See *id.* § 57-39.2-04.

neutrality framework also supports the argument that the tampon tax is unconstitutional. As applied to the tampon tax, there is an important synergy between the facial classification and facial neutrality frameworks.

#### A. *The Facial Classification Model*

*Geduldig* initially poses a challenge to the argument that the tampon tax should be viewed as a facial sex-based classification. After all, *Geduldig* held that the exclusion of pregnancy-related conditions from disability coverage did not amount to facial discrimination against women.<sup>192</sup> If pregnancy (and its associated disabilities) does not count as a proxy for female sex, why should menstruation (and its associated products)? Litigators challenging the tampon tax as unconstitutional must have a satisfactory answer to that question.

Without endorsing *Geduldig*'s holding, we contend that there are numerous reasons why pregnancy is distinguishable from the tampon tax. First, it is important to recognize that *Geduldig* predated the fully fleshed-out modern approach to sex discrimination cases, where facial classifications immediately trigger intermediate scrutiny. *Geduldig* was decided in 1974, two years before the Supreme Court decided *Craig v. Boren*, which recognized intermediate scrutiny as the test for sex-based classifications.<sup>193</sup> Of course, even as of 1974, the Supreme Court had suggested that certain differential treatment based on sex should trigger heightened review.<sup>194</sup> But the lack of clarity on what heightened review should involve, and how stringent it should be, arguably muddled the *Geduldig* Court's analysis. The majority opinion was short, and did not fully grapple with the question of whether unfavorable treatment of pregnancy amounted to unfavorable treatment of women. Rather, the Court conclusorily relied on an oddly drawn distinction

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192. *Geduldig v. Aiello*, 417 U.S. 484, 494, 497 (1974).

193. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (establishing intermediate scrutiny as standard for evaluating sex-based statutory classifications). Tellingly, at the time *Geduldig* was decided, some commentators interpreted it as applying only rational basis review to sex-based classifications. See, e.g., Lois B. Gordon, *Pre-Marriage Name Change, Resumption, and Reregistration Statutes*, 74 COLUM. L. REV. 1508, 1512 n.13 (1974).

194. The *Geduldig* Court acknowledged this, and deemed "this case . . . a far cry from cases like *Reed v. Reed* and *Frontiero v. Richardson*, involving discrimination based upon gender as such." *Geduldig*, 417 U.S. at 496 n.20 (citations omitted).

between “pregnant women” and “nonpregnant persons”<sup>195</sup>—a distinction that, according to Kenji Yoshino, has “elicited disbelieving and pained laughter from generations of my Constitutional Law students.”<sup>196</sup> Tellingly, the *Geduldig* majority itself—in stating that even “the most cursory analysis”<sup>197</sup> supported its conclusion—implicitly admitted that it was not doing much more than that.

Second, as scholars like Reva Siegel, Neil Siegel, Holning Lau, and Hillary Li have observed, various aspects of more recent Supreme Court decisions have called *Geduldig*’s reasoning into question. As discussed above, these scholars show how, in both the pregnancy and the same-sex marriage contexts, the Court has moved away from the formalism that characterized *Geduldig*.<sup>198</sup> Instead, the Court has focused on the underlying stereotyping and aggregate effect of the laws being challenged.<sup>199</sup> This shift further supports the argument that *Geduldig*’s formalism should not prevent courts from viewing a tax on menstrual hygiene products as a functional tax on women.

Third, even under *Geduldig*’s own cursory reasoning, menstruation (and its related products) should still fare better than pregnancy (and its related disabilities). Under the *Geduldig* Court’s approach, the California program did not discriminate against women writ large, because “pregnancy is an objectively identifiable physical condition with unique characteristics,” with most women falling, at any given time, into the category of “nonpregnant persons.”<sup>200</sup> Today, pregnancy in the United States is even less frequent than it was at the time of *Geduldig*; in 2017, the United States fertility rate fell to a record low of 60.2 births per 1000 women of childbearing age, down 3% from 2016.<sup>201</sup> The total fertility rate is down to 1.84 births per woman.<sup>202</sup> Thus, now more than ever, women spend the vast majority of their lives as “nonpregnant persons.”

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195. *Id.* at 496–97 n.20

196. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 782 (2011).

197. *Geduldig*, 417 U.S. at 497 n.20.

198. *See supra* notes 184–90 and accompanying text.

199. *See supra* notes 184–90 and accompanying text.

200. *Geduldig*, 417 U.S. at 496–97 n.20.

201. Sabrina Tavernise, *U.S. Fertility Rate Fell to a Record Low, for a Second Straight Year*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/17/us/fertility-rate-decline-united-states.html> [<https://perma.cc/VB8V-ZP22>].

202. Claire Cain Miller, *The U.S. Fertility Rate Is Down, Yet More Women Are Mothers*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/upshot/the-us-fertility-rate-is-down-yet-more-women-are-mothers.html> [<https://perma.cc/7NH3-D4ZG>].

By contrast, menstruation is a regular occurrence in most women's lives from, on average, the ages of thirteen to fifty-one.<sup>203</sup> According to a recent study by the Association of Reproductive Health Professionals, women currently have an estimated 450 periods during their lifetime.<sup>204</sup> One recent analysis concluded that the average woman spends roughly 2280 days (6.25 years) menstruating.<sup>205</sup> Therefore, *Geduldig's* approach of dividing women into those who were affected and those who were not (i.e., "pregnant women" versus "nonpregnant persons") makes even less sense in the context of menstruation. Unlike pregnancy, menstruation is a consistent, unavoidable aspect of most women's lives for an average of four decades. Menstruation is thus an even stronger proxy for female sex than is pregnancy.

Fourth, the *Geduldig* Court gave two policy justifications for California's exclusion of pregnancy-related disabilities from its disability insurance program, neither of which are applicable to the tampon tax.<sup>206</sup> The Court suggested that the cost of covering all instances of temporary disability "accompanying normal pregnancy and delivery" would be so large as to require restructuring California's entire program.<sup>207</sup> By contrast, the tampon tax is a relatively small feature of state sales taxation systems; adding menstrual hygiene products to the already-existing lists of exempted products is highly unlikely to bankrupt state treasuries.<sup>208</sup>

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203. See Kane, *supra* note 85.

204. See *supra* note 86–88 and accompanying text (estimating the time that the average woman spends menstruating over the course of her lifetime).

205. See *supra* note 87 and accompanying text.

206. *Geduldig v. Aiello*, 417 U.S. 484, 493–94 (1974).

207. *Id.* at 493. The *Geduldig* Court stated that even if California were overstating the case that it would be "impossible" to maintain the program if it covered pregnancies, the program would need to change one or more significant variables, such as "the benefit level deemed appropriate to compensate employee disability, the risks selected to be insured under the program, and the contribution rate chosen to maintain the solvency of the program and at the same time to permit low-income employees to participate with minimal personal sacrifice." *Id.* at 493–94. The Court concluded that the Equal Protection Clause did not require "such policies to be sacrificed or compromised." *Id.* at 494.

208. By way of illustration, the California state budget for 2018 to 2019 is greater than \$201 billion. *Welcome to 2018–19 State Budget*, CAL. BUDGET, <http://www.ebudget.ca.gov/budget/2018-19EN/> [<https://perma.cc/9PQ4-A4FL>] (last visited Dec. 1, 2018); see also EDMUND G. BROWN JR., CALIFORNIA STATE BUDGET 2018–2019, at 18–20, <http://www.ebudget.ca.gov/2018-19/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf> [<https://perma.cc/X24D-4ETQ>]. According to one recent estimate, the State of California collects approximately \$20 million in taxes associated with the sale of menstrual hygiene products. Nicole Kaeding, *Tampon Taxes: Do Feminine Hygiene Products Deserve a Sales Tax Exemption?*, TAX FOUND. (Apr. 26, 2017), <https://taxfoundation.org/tampon-taxes-sales-tax/> [<https://perma.cc/D57T-MKV5>]. Thus, tampon tax revenue in California represents less than 0.011% of

*Geduldig* also emphasized the lack of evidence that the current version of the disability program was benefitting men more than women, noting that even with the pregnancy exclusion, women were still “contribut[ing] about 28 percent of the total disability insurance fund and receiv[ing] back about 38 percent of the fund in benefits.”<sup>209</sup> This, too, contrasts with the tampon tax situation currently occurring in many states, where male-specific items like spermicidal condoms are exempted from taxation, even while menstrual hygiene products are not.<sup>210</sup>

Finally, we note that *Geduldig* itself did not say that pregnancy-related classifications *never* amounted to sex-based classifications; it merely said that not “*every* legislative classification concerning pregnancy is a sex-based classification.”<sup>211</sup> If *Geduldig* left the door open for even some legislative classifications concerning pregnancy to qualify as sex-based classifications, the door should be equally (if not more) open for legislative classifications concerning menstruation to qualify.

For all of these reasons, it is inaccurate to interpret *Geduldig* as foreclosing the tampon tax’s treatment as a sex-based classification. Indeed, the sex-based classification model is the most apt framework here. Just as the exclusion of yarmulkes from a “religious clothing” tax exemption would be a tax on Jews, the exclusion of menstrual hygiene products from the various necessity-based tax exemptions constitutes a tax on women.

### B. *The Facial Neutrality Model*

Although the facial classification model does most of the work, the facial neutrality model also contributes to the argument that the tampon tax should trigger intermediate scrutiny. Under the facial neutrality model, as discussed above, both disparate impact and discriminatory intent must be shown to move from rational basis into intermediate scrutiny.<sup>212</sup> Here, the disparate impact demonstration is straightforward, since there is no question that

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the state’s budget.

209. *Geduldig*, 417 U.S. at 499 n.21 (quoting the lower court’s decision in *Aiello v. Hansen*, 359 F. Supp. 782, 800 (N.D. Cal. 1973)).

210. *See supra* Part I.B.

211. *Geduldig*, 417 U.S. at 496 n.20 (emphasis added).

212. *See supra* notes 166–68 and accompanying text.

menstrual hygiene products are used primarily or exclusively by women.<sup>213</sup>

That men sometimes purchase these products for women does not change the analysis. As the Federal Circuit recently explained in *Totes-Isotoner Corp. v. United States*,<sup>214</sup> which involved a challenge to a tariff that imposed a higher duty rate on men's leather gloves than other gloves:

It may be, as the Court of International Trade suggested, that the tariff does not discriminate between male and female purchasers of gloves because women buy men's gloves for men and men buy women's gloves for women. But this comparison entirely misses the point. The claimed discrimination is based on the sex of the glove users, not the sex of the glove purchasers . . . . Under the theory of purchaser equality, generally imposing a higher tax on vehicles purchased for female users would raise no constitutional questions if both men and women equally purchased the vehicles in question. Any such theory is untenable.<sup>215</sup>

The bigger challenge under the facial neutrality model is showing discriminatory intent. We are not aware of any “smoking gun” evidence that the tampon tax resulted from a conscious, intentional desire to harm women.<sup>216</sup> However, it is logical to infer that various states' tax treatment of menstrual hygiene products as nonnecessities is the result of a combination of indifference, lack of understanding, and discomfort with discussions about or consideration of women's biological processes.<sup>217</sup> Indeed, when a popular YouTube personality asked then-President Barack Obama about the tampon tax, he responded: “I have to tell you, I have no idea

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213. For potential uses of tampons by men, see Neil Hill, *10 Reasons Why Men Should Carry a Tampon*, GOOD MEN PROJECT (May 28, 2018), <https://goodmenproject.com/featured-content/nhe-10-reasons-why-men-should-carry-a-tampon> [https://perma.cc/R5YM-BV95] (listing “[p]lugging a puncture wound,” “[s]tarting a fire,” and making “[b]lister plaster” among reasons for a man to carry a tampon; having a tampon on hand for a woman who may need one is not among the listed reasons for a man to have tampons on hand).

214. 594 F.3d 1346, 1349–50 (Fed. Cir. 2010), *cert. denied*, 562 U.S. 830 (2010).

215. *Id.* at 1355.

216. *E.g.*, Telephone Interview with Arthur R. Rosen, Partner, McDermott, Will & Emery (July 6, 2016) (“In my heart of hearts, I do not believe that the tax administrators in New York had any discriminatory intent in mind. I believe that there was an effort to implement a very technical definition of the statutory exemption and that is the reason we have the situation with the feminine hygiene products being subject to tax.”); Crawford, *supra* note 130 (hypothesizing that the Florida legislation's then-failure to exempt menstrual hygiene products from sales tax did not result from legislators' specific goal to harm women; rather “they simply did not give it sufficient thought”).

217. See Hartman, *supra* note 87, at 349–50 (arguing that the tampon tax is connected to “misunderstandings about women's biology”).

why states would tax these as luxury items. I suspect it's because men were making the laws when those taxes were passed."<sup>218</sup>

Various menstrual taboos—and notions of menstruation as unclean and very private—date back millennia, across numerous cultures.<sup>219</sup> Even today in the United States, euphemisms are frequently used for menstrual periods<sup>220</sup> and advertisements for menstrual hygiene products typically demonstrate absorbency using blue liquid rather than a red substance that realistically illustrates menstrual blood.<sup>221</sup> The invisibility of menstruation in our

218. Reflect, *Ingrid Nilsen Interviews Obama*, YOUTUBE (Jan. 16, 2016), <https://youtu.be/K2OaaWjB6S8> [<https://perma.cc/4CE4-EKSA>]; see also Prachi Gupta, *Obama: Tampon Tax Probably Exists Because Only Dudes Were Making Laws*, COSMOPOLITAN (Jan. 15, 2016), <http://www.cosmopolitan.com/politics/news/a52262/president-obama-respond-to-tampon-tax/> [<https://perma.cc/7EAK-KARY>]; Maya Rhoden, *President Obama Doesn't Understand the 'Tampon Tax' Either*, TIME (Jan. 15, 2016), <http://time.com/4183108/obama-tampon-tax-sanitary/> [<https://perma.cc/L8SR-B9RR>]; Sade Strehlke, *Watch YouTube Star Ingrid Nilsen School President Obama on the 'Tampon Tax'*, TEEN VOGUE (Jan. 20, 2016), <https://www.teenvogue.com/story/ingrid-nilsen-obama-tampon-tax> [<https://perma.cc/Y8RQ-FRR9>].

219. *E.g.*, WEISS-WOLF, *supra* note 91, at 5–11 (describing ancient and contemporary religious and cultural “distrust, even disgust for women’s monthly blood”); see also Kay Standing & Sara L. Parker, *Girls and Women’s Rights to Menstrual Health in Nepal*, in HANDBOOK OF RESEARCH ON WOMEN’S ISSUES AND RIGHTS IN THE DEVELOPING WORLD 156, 157–61 (Nazmunnessa Mahtab et al. eds., 2017); Nikita Arora, *Menstruation in India: Ideology, Politics, and Capitalism*, 23 ASIAN J. WOMEN’S STUD. 528 (2017); Verity Bowman, *Woman in Nepal Dies After Being Exiled to Outdoor Hut During Her Period*, GUARDIAN (Jan. 12, 2018), <https://www.theguardian.com/global-development/2018/jan/12/woman-nepal-dies-exiled-outdoor-hut-period-menstruation> [<https://perma.cc/YR65-BDNP>] (describing certain practices in parts of Nepal); Kena Holkar, *How the Taboo Around Menstruation Is Rooted in Religion and Culture*, YOUTH KI AWAAZ (May 18, 2018), <https://www.youthkiawaz.com/2018/05/why-do-we-need-to-break-the-silence-around-menstrual-taboo> [<https://perma.cc/EKH4-62NW>] (describing certain practices in parts of India). On the cultural construction of menstruating women as weak, unworthy and inferior to men, see Crawford & Spivack, *supra* note 43, at 506, 508–12 (citing first-century Irish epic poetry, Shakespeare, contemporary news and current events to demonstrate radical misunderstandings of menstruation).

220. See, e.g., *Top Euphemisms for “Period” by Language*, CLUE (Mar. 10, 2016), <https://helloclue.com/articles/culture/top-euphemisms-for-period-by-language> [<https://perma.cc/ZG8M-Z57M>]; see also Roisin O’Connor, *Menstruation Study Finds Over 5,000 Slang Terms for ‘Period,’* INDEPENDENT (U.K.) (Mar. 1, 2016), <https://www.independent.co.uk/life-style/health-and-families/menstruation-study-finds-over-5000-slang-terms-for-period-a6905021.html> [<https://perma.cc/6TPC-XZ8C>] (reporting, in connection with global survey of more than 90,000 people, that the top ten English-language euphemisms for menstruation are “[c]rimson wave,” “[m]other nature,” “[l]ady time,” “[a]unt flow,” “[t]ime of the month,” “[o]n the rag,” “[s]hark week,” “[r]ed tide,” “[c]ode red,” “[m]onthly friend,” “[h]aving the painters in,” “[b]loody [m]ary,” and “[b]lob” and noting that residents of France and China are among those most likely to speak about menstruation in slang terms, using euphemisms at a rate of 91%).

221. See Ann Bartow, *Red Dot in Sanitary Napkin Advertisement Makes Her Story!*, FEMINIST L. PROFESSORS (July 6, 2011), <https://www.feministlawprofessors.com/2011/07/red-dot-sanitary-napkin-advertisement-makes-her-story/> [<https://perma.cc/KK97-5KYL>] (describing first use in advertising of menstrual hygiene product showing a red mark); Bridget

society has contributed, we believe, to the failure to affirmatively include menstrual hygiene products in the various tax exemptions for necessities. In other words, the failure to mention menstrual hygiene products on the list of exempted necessities is a foreseeable result of the desire not to see, talk, or think about menstruation at all.<sup>222</sup> And without the discussion and enumeration of menstrual hygiene products, it is hard for them to be singled out for inclusion on the tax-exempt list. Instead, they remain in the default category of taxable items.

The tampon tax thus stands in contrast to other differential taxation, such as the *Totes-Isotoner* case involving a higher tariff on men's leather gloves.<sup>223</sup> There, the Federal Circuit—after finding that this higher tariff had a disparate impact on men—concluded that there was still no equal protection violation because there was no indication of discriminatory intent.<sup>224</sup> The court reasoned that although “[a] tax on wearing yarmulkes is a tax on Jews . . . [m]en's gloves are hardly an irrational object of disfavor, and a tax on them creates no compelling inference that Congress intended to discriminate against men.”<sup>225</sup>

Menstruation and its related products, however, *have* long been an irrational object of disfavor.<sup>226</sup> Moreover, menstrual hygiene products are much more closely associated with women than are leather gloves with men, making it easier to infer some level of discriminatory intent. (Indeed, these products are often referred to as “feminine hygiene products.”) The tampon tax is thus much more analogous to a yarmulke tax than to a tax on men's leather gloves.

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Crawford, *Women Don't Bleed Blue (Even Yalies and Members of the Social Register)*, FEMINIST L. PROFESSORS (Oct. 28, 2017), <https://www.feministlawprofessors.com/2017/10/women-dont-bleed-blue-even-yalies-and-members-of-the-social-register> [https://perma.cc/4VTK-SHAX] (detailing controversy over a United Kingdom ad for menstrual hygiene product that used red instead of blue liquid to illustrate absorbency).

222. It is notable that even Massachusetts—one of the few states *not* to impose a tampon tax—does not even include menstrual hygiene products on its statutory list of exempted products; they are only mentioned in the official Massachusetts Department of Revenue Guide. See *supra* notes 57–60 and accompanying text.

223. 594 F.3d 1346, 1349–50 (Fed. Cir. 2010).

224. *Id.* at 1354–55, 1357–58.

225. *Id.* at 1358 (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993)).

226. See Crawford & Spivack, *supra* note 43, at 508–11 (describing manifestations of ignorance and anxiety about women's bodies arising out of “the specter of a specifically female adult who cannot control bodily effluvia”).

Additionally, it is important to note that in other unsuccessful disparate impact cases like *Feeney*, there was at least a genuine public policy interest motivating the differential treatment.<sup>227</sup> For example, in *Feeney*, there was no debate that a veterans' preference policy for civil service positions served significant policy goals, notwithstanding the disparate impact on women.<sup>228</sup> The tampon tax, however, serves no larger policy goal. Of course, the ultimate goal of the sales tax system is to bring in as much revenue as possible, and any exemption cuts against that goal. In light of all of the other exemptions, however—from true necessities to randomly favored items like garter belts<sup>229</sup> and manicures<sup>230</sup>—it strains credulity to argue that the tampon tax is the cornerstone of a state's sales tax system. Indeed, as discussed below, excluding tampons from a regime where other necessities are tax-exempt does not pass even rational basis review.

Finally, the Supreme Court has itself backed away slightly from the “intent” requirement in some recent cases. As Carlos Ball has written, the *Obergefell* Court did not focus on “the intent or motivation[s]” behind the same-sex marriage bans; instead, it “focuse[d] on *the effects*” of the laws.<sup>231</sup> Lau and Li situate *Obergefell* in the context of several other recent opinions that have “blur[red] the line between facial discrimination and disparate impact,”<sup>232</sup> such as retired Justice Sandra Day O'Connor's concurrence in *Lawrence v. Texas*.<sup>233</sup> In *Lawrence*, Justice O'Connor viewed Texas's criminalization of same-sex sodomy as an equal protection violation even though it technically applied to everyone and did not mention sexual orientation.<sup>234</sup> Justice O'Connor “did not resort to analyzing motive,” Lau and Li write.<sup>235</sup> “Instead, she tersely stated that engaging in same-sex sodomy is ‘closely correlated with being homosexual’ and, therefore, that the law is discriminatory. Put differently, Justice O'Connor's conclusion stems from the nature of

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227. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 259 (1979) (explaining Massachusetts' veterans' preference statute).

228. *See id.* (describing the veterans' preference statute and its disparate impact on women).

229. *See supra* note 80 and accompanying text.

230. *Id.*

231. Carlos A. Ball, *Bigotry and Same-Sex Marriage*, 84 UMKC L. REV. 639, 649 (2016).

232. Lau & Li, *supra* note 189, at 1253, 1260–61.

233. *Lawrence v. Texas*, 539 U.S. 558, 579–85 (2003) (O'Connor, J., concurring) (arguing that Texas' anti-sodomy law had the effect of discriminating against homosexual people).

234. *Id.* at 581.

235. Lau & Li, *supra* note 189, at 1261.

the law's impact on homosexuals, regardless of the law's motivations."<sup>236</sup> In a forthcoming essay, Lau similarly emphasizes the shift from the reasoning in *Loving v. Virginia*—where the Supreme Court focused on the formal language of Virginia's anti-miscegenation law and its intent—to *Obergefell's* focus on effects.<sup>237</sup> This analysis further supports the argument that plaintiffs challenging the tampon tax should not have to uncover and prove the legislators' precise intent in order to make the claim that the tampon tax should be struck down due to its disparate impact on women.

Therefore, whether the tampon tax is viewed as a facial sex-based classification or as a facially neutral classification with a disparate impact on sex, it should trigger intermediate scrutiny. Indeed, the facial classification and facial neutrality analyses here are mutually reinforcing and point toward that same conclusion. Just as the *Obergefell* Court blended aspects of the facial classification and facial neutrality doctrines in holding that the same-sex marriage bans violated the Equal Protection Clause, so too they can be intertwined here. The tampon tax implicates both lines of reasoning, illustrating the problematic nature of the tax.

### C. *The Failure to Satisfy Intermediate Scrutiny*

Because the tampon tax should be viewed as a sex-based classification—under a facial classification model, a facial neutrality model, or a combination thereof—it should trigger intermediate scrutiny. And because it cannot satisfy intermediate scrutiny, it is unconstitutional.

The Supreme Court has been clear that intermediate scrutiny is a challenging standard. As noted above, in *United States v. Virginia*, Justice Ginsburg described it as “skeptical scrutiny” that requires an “exceedingly persuasive justification.”<sup>238</sup> There is no exceedingly persuasive justification for taxing menstrual hygiene products more heavily than other necessities. On the contrary, doing so is precisely *counter* to the types of justifications that the *Virginia* Court said could pass intermediate scrutiny's muster, including “compensat[ing] women ‘for particular economic disabilities

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236. *Id.* (quoting *Lawrence*, 534 U.S. at 583 (O'Connor, J., concurring)).

237. Holning Lau, *From Loving to Obergefell: Elevating the Significance of Discriminatory Effects*, 25 VA. J. SOC. POL'Y & L. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3200809](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3200809) [https://perma.cc/G86B-AFSK].

238. 518 U.S. 515, 531 (1996).

[they have] suffered,' 'promot[ing] equal employment opportunity,' [or] to advanc[ing] full development of the talent and capacities of our Nation's people."<sup>239</sup> The tampon tax "perpetuate[s] the legal, social, and economic inferiority of women," which is exactly what the *Virginia* Court deemed impermissible.<sup>240</sup>

Indeed, the Court's language in *Virginia* highlights precisely what is so problematic about the tampon tax. Rather than compensating women for previous economic disabilities, the tax continues to harm them economically.<sup>241</sup> And the tax sends the message that products enabling women to leave their house and participate in society are not necessities, but luxuries. The tax thus stifles the full development of women's talent and capacities. It cannot survive intermediate scrutiny.

## V. TAXATION AND INEQUALITY

### A. *Why the Tampon Tax Lacks a Rational Basis*

The refusal to treat menstrual hygiene products as necessities is likely connected to at least some level of animus toward the female biological process of menstruation.<sup>242</sup> Therefore, even assuming arguendo that the tampon tax is not viewed as a sex-based classification triggering intermediate scrutiny, it should still fail rational basis review. Indeed, the tampon tax is reminiscent of the "rational basis with bite" Supreme Court cases, in which the Court applied rational basis review more stringently because it suspected that animus toward a disfavored group was playing a role in the challenged governmental classification.<sup>243</sup> In *United States Department of Agriculture v. Moreno*,<sup>244</sup> for instance, Congress amended the Food Stamp Act to exclude from participation any household containing an individual who was unrelated to anyone else in the household.<sup>245</sup> The Supreme Court held that this change violated

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239. *Id.* at 533–34 (quoting *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987); *Califano v. Webster*, 430 U.S. 313, 320 (1977) (per curiam)).

240. *Id.* at 534.

241. *See supra* Part I.B.

242. *See supra* note 226 and accompanying text.

243. *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–19 (1972) (describing the development of rational basis "with bite").

244. 413 U.S. 528 (1973).

245. *Id.* at 529–30.

the Equal Protection Clause, stating that it failed rational basis review because of the legislative history indicating that it was designed to prevent people in “hippie communes” from receiving benefits.<sup>246</sup> Even though the change obviously would have saved the United States money—by reducing the number of benefit recipients—that fiscal effect alone was insufficient to save it.<sup>247</sup> Similarly, the tax revenue from the tampon tax should not be enough to sustain its constitutionality, particularly given that it likely stems from discomfort with menstruation, a natural biological process of members of female sex.

Procedurally, making menstrual hygiene products exempt from sales tax would not require a massive legislative overhaul, as illustrated by the five jurisdictions that have recently made the change. The thirty-five states that currently tax these products<sup>248</sup> would merely need to modify their sales tax laws to move menstrual hygiene products into the category of tax-exempt “necessities” like prescription drugs and groceries or create a specific statutory exemption for them.<sup>249</sup>

### B. *The Expressive Value of the Tampon Tax*

A society signals its values through the decisions it makes about whom and what to tax.<sup>250</sup> Indeed, *Windsor v. United States*—the landmark Supreme Court case striking down the Defense of Marriage Act (“DOMA”)—was a tax case.<sup>251</sup> After Thea Speyer died in 2009 and left her entire estate to her spouse, Edith Windsor, the

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246. *Id.* at 534–35, 538.

247. *Id.* at 538.

248. *See supra* Part I.B.

249. *See id.*

250. Republican Congresswoman Jennifer Dunn of Washington framed the relationship between the tax system and its larger implications by asking, “How should we tax? Who should we tax? What should we tax? What values does our tax system reflect?” Jennifer Dunn, *quoted in* MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* 42 (2005). *Fordham Law Review* recently sponsored a symposium and devoted an entire issue to discussion of the notion that “We Are What We Tax.” *See* Mary Louise Fellows et al., *Foreword: We Are What We Tax*, 84 *FORDHAM L. REV.* 2413, 2413–14 (2016); *see also* Kitty Richards, *An Expressive Theory of Tax*, 27 *CORNELL J. L. & PUB. POL’Y* 301, 303 (2017) (“Like every other area of law, tax law offers policymakers a chance to give expression to the values of their constituents and themselves—and the values expressed by the tax code are at least as central to the tax policy preferences of citizens, lawmakers, and judges as economic efficiency and the distribution of income.”).

251. 570 U.S. 744, 750–51, 775.

United States government denied the estate the benefit of the federal tax deduction that effectively allows for tax-free transfers to a surviving spouse.<sup>252</sup> This denial resulted from section 3 of DOMA, which defined “marriage” as a union between one man and one woman only.<sup>253</sup> Windsor was required to pay \$363,500 in estate taxes that she would not have paid had she been in an opposite-sex marriage, and she sued for an estate tax refund.<sup>254</sup>

Ultimately, the Supreme Court ruled five to four in favor of the estate, declaring section 3 of DOMA unconstitutional.<sup>255</sup> In ruling that DOMA failed to satisfy rational basis review, Justice Kennedy’s majority opinion emphasized the affront to “the dignity and integrity of the person” by refusing same-sex married couples the same preferential tax treatment as opposite-sex married couples.<sup>256</sup> *Windsor* thus illustrates how tax law can bring discrimination clearly into focus. The tax system’s choices about whom and

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252. *Id.* at 750–51; see I.R.C. § 2056(a) (Supp. V 2018) (estate tax deduction for transfers to a surviving spouse).

253. Defense of Marriage Act, 1 U.S.C. § 7 (2012 & Supp. V 2018), *invalidated by Windsor*, 570 U.S. 744 (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”).

254. *Windsor*, 570 U.S. at 750–53.

255. *Id.* at 747, 775.

256. *Id.* at 772 (“DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect.”). Noa Ben-Asher has critiqued the *Windsor* Court’s analysis as a form of “weak dignity.” Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243, 276–77 (2014) (“*Windsor*’s dignity is . . . conferred by the State and at each state’s discretion . . . [it] is much narrower in scope than contemporary theories of dignity promoted by legal and moral philosophers . . . [and it] comes with unnecessary rhetoric of injured subjects, a rhetoric that could perpetuate an attachment to injury by homosexual couples and other rights-seeking legal subjects.”).

The majority opinion also relied on principles of federalism. *Windsor*, 570 U.S. at 768 (“DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism.”). For an analysis of the federalism rationale in *Windsor*, see Courtney G. Joslin, *Windsor*,

what to tax not only reflect existing equalities or inequalities, but reinforce and perpetuate them.<sup>257</sup>

That broader lens further clarifies why the tampon tax cannot pass intermediate scrutiny or even rational basis review. To be sure, having a robust sales tax base is necessary for the integrity of the system. The more exemptions that a legislature creates, the weaker the tax base is.<sup>258</sup> Put differently, in order to generate maximum revenue, the greatest number of items should be subject to

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*Federalism, and Family Equality*, 113 COLUM. L. REV. SIDEBAR 156, 158 (2013), noting:

[C]ivil rights advocates dodged a bullet when the *Windsor* Court declined to embrace the categorical family status federalism theory. While its acceptance would have brought along the short-term gain of providing a basis for invalidating DOMA, it also would have curtailed the ability of federal officials to protect same-sex couples and other families.

Some scholars have criticized the majority opinion for failure to engage in a meaningful equal protection analysis. See, e.g., Linda C. McClain, *From Romer v. Evans to United States v. Windsor: Law as a Vehicle for Moral Disapproval in Amendment 2 and the Defense of Marriage Act*, 20 DUKE J. GENDER L. & POL'Y 351, 461 (2013) (noting that Justice Scalia's dissent critiquing the majority opinion for failure to resolve the question of what level of review applies to a claimed violation of equal protection on the basis of sexual orientation is partially correct, insofar as "the majority declines to use *Windsor* as a vehicle to establish that constitutional theory" of equal protection"). For a demonstration of how *Windsor* could have been resolved on an equal protection basis using only the facts and precedent in existence at the time of the original opinion, see Ruthann Robson, *United States v. Windsor*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS 306–16, 312 (Bridget J. Crawford & Anthony C. Infanti eds., 2017) (rewriting decision of the Supreme Court to provide that "equal protection challenges on the basis of sexual orientation classifications deserve intermediate scrutiny, similar to the gender and sex classifications that sexual orientation classifications resemble and upon which they rely," and explaining applicable precedent that leads to that result).

257. See, e.g., *Introduction*, in CRITICAL TAX THEORY: AN INTRODUCTION, at xxi (Anthony C. Infanti & Bridget J. Crawford eds., 2009) (describing as among the goals of critical tax scholarship the desire "to explore and expose how the tax laws both reflect and construct social meaning"); see also ANDRE L. SMITH, *TAX LAW AND RACIAL ECONOMIC JUSTICE: BLACK TAX* 3 (2015) (explaining the role of critical tax theory in "exposing when and where neutrally worded tax laws create, maintain or exacerbate disparate economic impacts relating to race"); Bridget Crawford (@ProfBCrawford), TWITTER (June 26, 2018, 1:05 PM), <https://twitter.com/ProfBCrawford/status/1011702004006219779> [<https://perma.cc/9LU2-LFHW>] ("#CriticalTax theorists try to point out that #tax law reflects and constitutes the society that produces it. The tax system is deeply implicated in discrimination based on race, gender, disability, immigration status.")

258. See, e.g., Kaeding, *supra* note 208 ("An ideal sales tax should apply to all final consumer purchases, without regard to whether items are classified as 'necessities' or 'luxuries.'"). A tax system that makes no distinction between taxable and nontaxable sales is nondistortive. *Id.* (explaining that tax system with a broad base "does not favor one type of consumption over another, meaning that a consumer does not have to choose between one item that is taxed versus another item that isn't taxed"). If the law does not make judgments about what items are "necessities," and thus exempt from sales tax, then taxation will play no role in a purchaser's choice to consume one product over another, all other factors being equal. See *id.* Also, if all states had a broad sales tax base with no exemptions, there would be a reduction of distortion caused by purchasers who are willing to travel to a nontax jurisdiction in order to avoid their home state's sales tax. See, e.g., Michael Smart, *Lessons in*

the sales tax. But that fiscal interest alone should not be enough to satisfy rational basis review, just as the United States' interest in collecting \$363,500 in federal estate taxes from Edith Windsor was insufficient.<sup>259</sup> The rationality of the basis for collecting that money matters, too. And given that the thirty-five states with the tampon tax already exempt other items as necessities, the refusal to include menstrual hygiene products on that list is irrational.<sup>260</sup> There is no serious dispute about whether menstrual hygiene products are necessities. When a state imposes a tax on a product that a woman needs solely because she is a woman, the state is, in effect, taxing her for being female.

Because the tampon tax is highly salient and the discriminatory impact is one that consumers can easily quantify,<sup>261</sup> repealing the

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*Harmony: What Experience in the Atlantic Provinces Shows About the Harmonized Sales Tax*, 253 C.D. HOWE INST. COMMENT. 1, 5 (2007) (describing distortion that occurs when adjacent jurisdictions have different tax bases or rates and consumers engage in strategic behavior to minimize incidence of taxation). This “forum shopping” applies only if the home jurisdiction lacks a use tax or if the taxpayer fails to comply with reporting and payment obligations under the use tax system and the non-compliance remains undetected.

On the difference between a sales use tax and a consumer's obligation to report and pay tax on items purchased outside the domiciliary jurisdiction, see, for example, M. Patrick Wilson & Christopher Price, *Local Government Sales and Use Taxes*, 40 COLO. LAW. 61–62 & nn.8–14 (2011) (describing Colorado's complex sales and use tax system); Thimmesch, *supra* note 33 (explaining that use taxes are typically involved in state taxation of online sales). There would remain an incentive to travel in order to take advantage of any differences in sales tax rates, if states continued to tax at different rates, but presumably this behavior would be less frequent than in a regime in which there are both different rates and jurisdictions that retain sales tax exemptions. Given that five states have no income tax at all, it is unlikely that even a unified rate combined with a tax base without sales tax exemptions would completely eliminate strategic behavior. See, e.g., *id.* A move to a sales tax base with zero exemptions is politically unlikely, however. See, e.g., Kaeding, *supra* note 208 (explaining that “this idea of exempting necessities is a political one, not an economic one”).

259. *Windsor*, 570 U.S. at 753. After the Obama administration announced that it would not defend the constitutionality of DOMA, the Bipartisan Law Advisory Group (“BLAG”) intervened in the case. *Id.* at 754; see also Jennifer Bendery, *Defense of Marriage Act: House Republicans Tie Federal Gay Marriage Ban to House Rules*, HUFFPOST (Jan. 2, 2013), [https://www.huffingtonpost.com/entry/defense-of-marriage-act\\_n\\_2399383.html](https://www.huffingtonpost.com/entry/defense-of-marriage-act_n_2399383.html) [<https://perma.cc/FNN9-DT4F>] (describing House Republican Conference decision to pay outside counsel to represent the Bipartisan Legal Advisory Group in defending DOMA). Note that in its attempt to defend DOMA, BLAG argued that DOMA was substantially related to the important government interest of protecting the fisc. See *Windsor v. United States*, 699 F.3d 169, 176, 185 (2d Cir. 2012). The Second Circuit rejected that argument, stating that DOMA was not substantially related to fiscal matters, and even if it were, “the Supreme Court has held that ‘the saving of welfare costs cannot justify an otherwise invidious classification.’” *Id.* at 186. As the district court [in *Windsor*] observed, “excluding any arbitrarily chosen group of individuals from a government program conserves government resources.” *Windsor*, 699 F.3d at 186–87 (quoting *Windsor v. United States*, 833 F. Supp. 2d 394, 406 (S.D.N.Y. 2012)).

260. See *supra* Part I.B.

261. See Crawford & Spivack, *supra* note 43, at 546 (“Another reason that the movement

tax would provide immediate financial relief to women and have a powerful signaling effect.<sup>262</sup> Exempting menstrual hygiene products from sales taxation communicates that women are valued and necessary participants in all aspects of public life, and that they should no longer suffer a tax penalty on account of their biology.<sup>263</sup> To use Justice Ginsburg's words, the exemption furthers the "full development of the talent and capacities of our Nation's people."<sup>264</sup> By contrast, the continued imposition of the sales tax on menstrual hygiene products, while other products are exempted as necessities, exacerbates the aggregate economic inequality that already exists between the sexes.<sup>265</sup> Maintaining that sales tax maintains inequality.

### CONCLUSION

Some critics have suggested that the tampon tax issue is too small to merit significant attention.<sup>266</sup> We disagree. First, while a

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to repeal the tampon tax has garnered so much support is that the issue is both concrete and easy to understand. Women know how much they pay per month for menstrual hygiene products and are outraged when they find out that similar products used primarily by men are not subject to taxation. Thus, the issue of gender discrimination is reduced to dollars and cents. The consequences are felt each month by every menstruating woman.”)

262. See generally Tsilly Dagan, *The Currency of Taxation*, 84 *FORDHAM L. REV.* 2537 (2016) (describing ways that tax system communicates social and other values).

263. The same signaling effect occurs when a workplace, school, or other facility provides no-cost menstrual hygiene products. See, e.g., Elizabeth Plank, *If Men Had Their Period, Would Tampons in Your Office Be Free?*, *MIC* (Apr. 4, 2014), <https://mic.com/articles/86819/if-men-had-their-period-would-tampons-in-your-office-be-free> [<https://perma.cc/92GQ-VPKN>] (quoting one marketing director about her corporation's decision to provide free menstrual hygiene products in office bathrooms as saying, “A third of our staff is women, and it's something subtle that shows we're a woman-friendly environment. It's not unlike some of the other employee perks we offer from cookies on your birthday to pizza and beer nights.”). Yet while there is unanimous cultural consensus that these locations should provide toilet paper to employees, students, and guests, the same is not true with respect to menstrual hygiene products. See Representative Sean Patrick Maloney, (@RepSeanMaloney), *TWITTER* (June 18, 2018, 11:55 AM), <https://twitter.com/RepSeanMaloney/status/1012409246112198656> [<https://perma.cc/CVA6-5K3M>] (“My office bought tampons for female visitors and our staff. Then we got an email from @HouseAdmnGOP telling us we couldn't use funds to purchase a necessary hygiene product. That's ridiculous.”).

264. *United States v. Virginia*, 518 U.S. 515, 533–34 (1996).

265. See, e.g., Naomi Cahn et al., *Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality*, 96 *TEX. L. REV.* 425, 430 (2018) (describing historical patterns of economic inequality between men and women); Michele E. Gilman, *En-Gendering Economic Inequality*, 32 *COLUM. J. GENDER & L.* 1, 9 (2016) (identifying major trends in gender and economic inequality in the twenty-first century including women's declining employment rate, women's lower pay for equal work, and greater rates of poverty among women).

266. See, e.g., Miranda Stewart (@AusTaxProf), *TWITTER* (June 18, 2018, 4:00 PM), <https://twitter.com/AusTaxProf/status/1008846954158219264> [<https://perma.cc/LXU9-ZA7W>]

particular sales tax may seem small to a person with a steady job that pays a living wage (or more), it can represent a significant percentage of a jobless or homeless woman's available assets.<sup>267</sup> Second, and relatedly, even if the tampon tax's impact on each individual woman is small, the aggregate numbers are substantial. California alone recently estimated that it was collecting \$20 million in annual sales tax revenue from the tampon tax.<sup>268</sup> News outlets estimated that prior to the November 2018 ballot initiative in Nevada,<sup>269</sup> the state collected between \$4.96 million and \$7.11 million annually on the sales of menstrual hygiene products.<sup>270</sup> Those moneys collectively represent a significant equal protection violation—one occurring in the majority of other states as well.

If one is committed as a matter of principle to non-discrimination on the basis of gender, then the magnitude of the discrimination is not a solid theoretical basis on which to determine whether the discrimination should be tolerated. Recall that the Supreme Court first reached agreement that sex-based classifications should trigger intermediate scrutiny in *Craig v. Boren*, where Oklahoma was prohibiting males from buying nonintoxicating 3.2% beer until they were twenty-one, even though females could do so at age eighteen.<sup>271</sup> Arguably, that disparity did not reflect a pressing public policy concern—but imagine how different current law might be had it not been challenged. Similarly, what if a female high school student had never challenged her rejection from the

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(“#Feminists should fight for a strong #income #tax system and broad based #GST to fund public services—including #childcare. Exempting #tampons from #GST looks like a win for women but is distracting and tiny compared to what we need for #gender equality[.]”).

267. See, e.g., Dasha Burns, *Should Tampons Be Tax Free?*, CNN (Mar. 4, 2016), <https://www.cnn.com/2016/03/04/opinions/tampon-tax-burns/index.html> [https://perma.cc/4RHE-YJMF] (“For low-income women, access to these ‘luxury’ goods can be a real challenge, especially since food stamps don’t cover feminine hygiene products.”); see also Christopher Cotropia & Kyle Rozema, *Who Benefits from Repealing Tampon Taxes? Empirical Evidence from New Jersey*, 15 J. EMPIRICAL LEGAL STUDIES 620, 639 (2018) (finding in one jurisdiction that repealed its tax on menstrual hygiene products, the greatest beneficiaries were low-income consumers).

268. See Kaeding, *supra* note 208.

269. See *supra* note 67.

270. See Jana Kasperkevic, *Nevada’s “Tampon Tax” Ballot Initiative Brings Up Questions About Gender Equality*, MARKETPLACE (Nov. 1, 2018), <https://www.marketplace.org/2018/11/01/elections/nevada-s-tampon-tax-ballot-initiative-brings-questions-about-fairness-and> [https://perma.cc/5YTS-QSXU] (using official state estimates of 867,000 girls and women in Nevada between the ages of twelve and fifty-five, and estimating a monthly expense of \$7 to \$10 per month per person, for a total of \$6.1 million to \$8.7 million in sanitary napkins and pads each month; given a tax rate of 6.85 per cent, such expenditures would generate between \$4.96 million and \$7.11 million in annual state sales tax revenue).

271. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

Virginia Military Institute?<sup>272</sup> Even today, only eleven percent of VMI's students are women, but the Supreme Court's decision in *Virginia* has had much broader implications.<sup>273</sup>

History suggests that reducing discrimination requires multiple challenges over a long period of time.<sup>274</sup> In other words, efforts to repeal the tampon tax should be understood as part of a larger strategy in reducing or eliminating discrimination on the basis of gender.<sup>275</sup> Whether treating people differently for tax purposes gives rise to a tax bill of more than \$300,000 (as in *Windsor*)<sup>276</sup> or \$300 (as one might pay in taxation for a lifetime supply of menstrual hygiene products),<sup>277</sup> the disparity is unfair and violates the Equal Protection Clause. The tampon tax is unconstitutional and should be repealed in all states.

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272. *United States v. Virginia*, 518 U.S. 515, 523 (1996).

273. *See, e.g.*, William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) (describing the Rehnquist Court, over the objections of Chief Justice Rehnquist, as “just as vigorous as the Burger Court was in carrying out the liberal feminist politics of recognition under cover of the Equal Protection Clause”); Yoshino, *supra* note 196, at 756 n.61 (describing the intermediate scrutiny as articulated in *United States v. Virginia* as “quite close to strict scrutiny”); *see also* Abigail L. Perdue, *Transforming “Shedets” into “Keydets”: An Empirical Study Examining Coeducation Through the Lens of Gender Polarization*, 28 COLUM. J. GENDER & L. 371, 372 (2014) (describing entrenchment of gender roles as one result of coeducation at Virginia Military Institute, based on a survey of 364 VMI students); Michael Kimmel, *Saving the Males: The Sociological Implications of the Virginia Military Institute and the Citadel*, 14 GENDER & SOC'Y 494, 495–96 (2000) (describing larger social consequences of coeducating military academies); *cf.* Jack Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1056 (2001) (suggesting absence of significant change in sex discrimination law).

274. *See, e.g.*, Francine Lipman (@Narfnampil), TWITTER (June 21, 2018, 2:30 PM), <https://twitter.com/Narfnampil/status/1009911465594109953> [<https://perma.cc/TF4Z-A89R>] (responding to critique that tampon tax repeal efforts should not be at the top of any reform efforts by asking, “Why do we have to chose [sic] issues that are both important; movements/progress are incremental so pushing forward on a number of fronts for justice has success.”).

275. *See, e.g.*, Bridget Crawford (@ProfBCrawford), TWITTER (June 21, 2018, 2:35 PM), <https://twitter.com/ProfBCrawford/status/1009912748975755264> [<https://perma.cc/7LZ9-63FZ>] (commenting on critique of efforts to repeal tampon tax that “[j]ustice must be capacious enough for ‘both/and’ ‘not either/or’”).

276. *See supra* notes 251–54 and accompanying text.

277. *See supra* note 87 (providing estimate of lifetime cost of sales tax on menstrual hygiene products).