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## **THE TAMPON TAX: SALES TAX, MENSTRUAL HYGIENE PRODUCTS, AND NECESSARY EXEMPTIONS**

Jennifer Bennett\*

### I. INTRODUCTION

Women<sup>1</sup> in the United States face many economic obstacles that their male counterparts do not. Many of these obstacles – including the wage gap, economic issues related to childbearing, and implicit bias in the workplace, among others – are the result of multiple political, social, and cultural factors, making them hard to eliminate. The tampon tax is comparatively simple to take on: if state legislatures decide to remove it, women will no longer have to pay it. The term “tampon tax” refers to how

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<sup>1</sup> This Article primarily refers to the tampon tax as it applies to cisgender women. Please note that this tax also places a burden on many transgender men or gender fluid individuals, who are often particularly vulnerable to economic and other harms. As an attempt to acknowledge the impact the tampon tax has on individuals other than cisgender women, this Article primarily refers to tampons, pads, and the like, as “menstrual hygiene products” rather than “feminine hygiene products,” except where quotations from primary sources require otherwise.

the majority of states impose a general sales tax on tampons, pads, reusable menstrual cups, and other menstrual hygiene products.<sup>2</sup> Some supporters of ending the tampon tax also consider it to be part of the “pink tax,” which refers more broadly to the additional cost women pay for common products such as razors.<sup>3</sup>

As one writer put it, the tampon tax has “deceptively low stakes and big symbolic punch,” affecting all women at some point in their lives regardless of whether they have ever considered its impact.<sup>4</sup> Ending the tampon tax is much easier than eliminating the wage gap, permanently securing women’s access to reproductive rights, or taking on any of the numerous other challenges women face on account of their gender, and the economic results are fairly easy to measure.<sup>5</sup> According to the market research firm Euromonitor, the tampon tax currently costs American

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<sup>2</sup> Taryn Hillin, *These Are the U.S. States that Tax Women for Having Periods*, FUSION (June 3, 2015, 12:33 PM), <http://fusion.net/story/142965/states-that-tax-tampons-period-tax/>.

<sup>3</sup> Tribune News Services, *Illinois Advances Bill to Exempt Tampons, Similar Products from Sales Tax*, CHICAGO TRIBUNE (Mar. 10, 2016, 11:51 AM), <http://www.chicagotribune.com/news/local/breaking/ct-illinois-tampon-tax-20160310-story.html>; Molly Trifflin, *Meet the Woman Who’s Calling Out Companies for Charging Women More*, TIME: Motto (March 4, 2016), <http://motto.time.com/4245619/pink-tax-study/>.

<sup>4</sup> Ann Friedman, *How Ending the Tampon Tax Became Viral Legislation*, NEW YORK MAG: THE CUT (Apr. 29, 2016, 2:39 PM), <http://nymag.com/thecut/2016/04/how-the-tampon-tax-became-viral-legislation.html>.

<sup>5</sup> *Id.*

women approximately \$3.1 billion each year.<sup>6</sup> In California alone, the tax is estimated to cost women \$20 million per year.<sup>7</sup> Eliminate the tampon tax, and women have that much more money to spend elsewhere.

As of January 2016, only five states – Maryland, Massachusetts, Minnesota, New Jersey, and Pennsylvania – explicitly exempted tampons and other menstrual hygiene products from sales tax.<sup>8</sup> Several states – California, Connecticut, Illinois, Indiana, Ohio, Mississippi, New York, Wisconsin, Utah and Virginia – considered adding similar exemptions during their 2016 spring legislative sessions.<sup>9</sup> Tennessee considered

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<sup>6</sup> *Why is the US 'Tampon Tax' So Hated?*, BBC (Sept. 14, 2016), <http://www.bbc.com/news/world-us-canada-37365286>.

<sup>7</sup> Sarah Larimer, *The 'Tampon Tax,' Explained*, THE WASHINGTON POST: WONKBLOG (Jan. 8, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/01/08/the-tampon-tax-explained/>.

<sup>8</sup> MD. CODE ANN., TAX-GEN. § 11-211 (2016); *A Guide to Sales and Use Tax*, MASS. DEPT. OF REVENUE, <http://www.mass.gov/dor/individuals/taxpayer-help-and-resources/tax-guides/salesuse-tax-guide.html#health> (last visited June 19, 2017); MINN. STAT. § 297A.67(17) (2015); N.J. REV. STAT. § 54:32B-8.1(5) (2015); 72 PA. CONS. STAT. § 7204(4) (2016).

<sup>9</sup> Larimer, *supra* note 7; Rachel Treisman, *State Pushes to Eliminate Tampon Tax*, YALE DAILY NEWS (Mar. 3, 2016), <http://yaledailynews.com/blog/2016/03/03/state-pushes-to-eliminate-tampon-tax/>; *Illinois Advances Bill to Exempt Tampons, Similar Products from Sales Tax*, *supra* note 3; Randy Ludlow, *Lawsuit, Legislation Battle Ohio's 'Tampon Tax,'* COLUMBUS DISPATCH (Mar. 28, 2016, 6:25 AM), <http://www.dispatch.com/content/stories/local/2016/03/28/lawsuit-legislation-object-to-tampon-tax-as-discriminatory.html>; Susan Rinkunas, *Bill to Nix Tampon Tax Unanimously Passes New York Senate*, NEW YORK: THE CUT (Apr. 12, 2016, 2:50 PM), <http://nymag.com/thecut/2016/04/bill-to-nix-tampon-tax-passes-new-york-senate.html>; Ben Winslow, *Bill Creates Tax Exemption for Diapers, Feminine Hygiene Products in Utah*, FOX 13 (Jan. 26, 2016, 10:06 AM), <http://fox13now.com/2016/01/26/bill-creates->

lowering, but not eliminating, its tampon tax.<sup>10</sup> Connecticut, Illinois, and New York ultimately passed their anti-tampon tax bills and created an exemption for menstrual hygiene products.<sup>11</sup> Utah explicitly rejected adding an exemption, while the remaining states neither passed nor explicitly rejected their bills.<sup>12</sup>

The tampon tax ultimately represents an unfair tax burden imposed on nearly one-half the population because of their sex, leading some women to file lawsuits alleging that the tax is a form of gender discrimination. Imposing a tax on a biological necessity unfairly burdens women, who already face a myriad economic and other disadvantages

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tax-exemption-for-feminine-hygiene-products-in-utah/; Margaret Carmel, *Legislators Look to Toss Out 'Tampon Tax,'* POTOMAC LOCAL (Jan. 27, 2016, 6:04 PM), <http://potomaclocal.com/2016/01/27/legislators-look-to-toss-out-tampon-tax/>; Michele McCormack, *Wisconsin Lawmaker Trying to Get Rid of "Tampon Tax,"* WDJT (Mar. 8, 2016, 6:03 PM), <http://www.cbs58.com/story/31419990/wisconsin-lawmaker-trying-to-get-rid-of-tampon-tax>.

<sup>10</sup> Tom Humphrey, *With Viagra Bill Killed, Women Lawmakers Suggest Cut in 'Tampon Tax,'* KNOXVILLE NEWS SENTINEL (Mar. 6, 2016), <http://www.knoxnews.com/news/politics/with-viagra-bill-killed-women-lawmakers-suggest-cut-in-tampon-tax-2d65c242-158d-7bbd-e053-0100007f95-371210161.html>.

<sup>11</sup> Rinkunas, *supra* note 9; Kim Geiger & Monique Garcia, *Rauner Approves Repeal of Sales Tax on Tampons,* CHICAGO TRIBUNE (Aug. 19, 2016, 6:20 PM), <http://www.chicagotribune.com/news/local/politics/ct-bruce-rauner-tampon-tax-met-0821-20160819-story.html>.

<sup>12</sup> Cristina Flores, *Utah Lawmakers, All Male, Kill 'Tampon Tax' Bill,* KUTV (Feb. 11, 2016), <http://kutv.com/news/local/lawmakers-all-male-kill-tampon-tax-bill>; Larimer, *supra* note 7; Treisman, *supra* note 9; *Illinois Advances Bill to Exempt Tampons, Similar Products from Sales Tax,* *supra* note 3; Ludlow, *supra* note 9; Carmel, *supra* note 9; McCormack, *supra* note 9.

compared to men. The states that still tax menstrual hygiene products ought to follow Maryland, Massachusetts, Minnesota, New Jersey, Pennsylvania, and now Connecticut, Illinois, and New York's lead and exempt tampons and other menstrual hygiene products from state sales tax.

## II. THE TAMPON TAX, SALES TAXES, AND NECESSARY EXEMPTIONS

### A. *Pre-2016 Exemptions to the Tampon Tax*

“‘[W]e’ve been taught to hide this, not talk about it.’”<sup>13</sup> In 2015, women in the US and across the world increasingly began speaking up about menstruation and its tax consequences.<sup>14</sup> Forty U.S. states currently impose a special tax on women for being biologically female: the tampon tax.<sup>15</sup> As noted above, the term “tampon tax” refers to a general sales tax on menstrual hygiene products.<sup>16</sup> Women are increasingly speaking up about the injustice of a tax that, by its very existence, unfairly targets women.<sup>17</sup> Canada removed its tampon tax in a ban that went into effect on

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<sup>13</sup> Larimer, *supra* note 7.

<sup>14</sup> Friedman, *supra* note 4.

<sup>15</sup> Hillin, *supra* note 2.

<sup>16</sup> *Id.*

<sup>17</sup> Jennifer Weiss-Wolf, *New York, Time to Shelve the Tax on Tampons*, N.Y. DAILY NEWS (June 1, 2015, 11:17 AM), <http://www.nydailynews.com/opinion/jennifer-weiss-wolf-shelve-tampon-tax-article-1.2242455>.

July 1, 2015, after a successful petition by Canadian women.<sup>18</sup> Ten U.S. states do not have a tampon tax; five states have created specific exemptions for tampons and other menstrual hygiene products; and five states simply do not charge sales tax.<sup>19</sup> The easiest way for states to move forward is to create a specific exemption from sales tax for menstrual hygiene products.

By the end of 2015, the five states that had already exempted tampons and other menstrual hygiene products from sales tax did so by including tampons in other, already exempted categories.<sup>20</sup> Maryland includes tampons in an exemption for disposable medical supplies.<sup>21</sup> Massachusetts includes tampons in an exemption for health care items.<sup>22</sup> Minnesota includes tampons in a special exemption for menstrual hygiene

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<sup>18</sup> Rebecca Zamon, *Canadian Government Approves Motion to Get Rid of 'Tampon Tax'*, HUFF. POST CANADA: LIVING (June 29, 2015, 1:59 P.M.), [http://www.huffingtonpost.ca/2015/05/28/tampon-tax-canada\\_n\\_7462582.html](http://www.huffingtonpost.ca/2015/05/28/tampon-tax-canada_n_7462582.html).

<sup>19</sup> Larimer, *supra* note 7; MD. CODE ANN., TAX-GEN. § 11-211 (2016); *A Guide to Sales and Use Tax*, *supra* note 8; MINN. STAT. § 297A.67(17) (2015); N.J. REV. STAT. § 54:32B-8.1(5) (2015); 61 PA. CONS. STAT. § 9.2(4) (2016).

<sup>20</sup> MD. CODE ANN., TAX-GEN. § 11-211(c)(2) (2016); *A Guide to Sales and Use Tax*, *supra* note 8; MINN. STAT. § 297A.67(17) (2015); N.J. REV. STAT. § 54:32B-8.1(5) (2015); 72 PA. CONS. STAT. § 7204(4) (2016).

<sup>21</sup> MD. CODE ANN., TAX-GEN. § 11-211(c)(2) (2016) (“The sales and use tax does not apply to a sale of... sanitary napkins or tampons”).

<sup>22</sup> *A Guide to Sales and Use Tax*, *supra* note 8. While the Massachusetts Department of Revenue specifically lists tampons and sanitary napkins as tax-exempt, the statute does not. *Id.*; see MASS. GEN. LAWS ch. 64H, § 6(l) (2016).

products.<sup>23</sup> New Jersey includes tampons in an exemption for medical products sold for human use.<sup>24</sup> Finally, Pennsylvania includes tampons in both a special statutory exemption for certain hygiene products<sup>25</sup> and a regulatory exemption for household paper goods and soaps.<sup>26</sup>

Three of the states that eliminated the tampon tax prior to 2016 did so by categorizing menstrual hygiene products as medical or health care products.<sup>27</sup> Maryland includes tampons in a statute that specifically exempts certain medical supplies and physical aids from sales tax.<sup>28</sup> While the Massachusetts statute does not explicitly list tampons as tax-exempt, the Massachusetts Department of Revenue includes tampons and sanitary napkins in a list of tax-exempt health care items.<sup>29</sup> New Jersey includes

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<sup>23</sup> MINN. STAT. § 297A.67(17) (2015) (“Feminine hygiene products. Sanitary napkins, tampons, or similar items used for feminine hygiene are exempt”).

<sup>24</sup> N.J. REV. STAT. § 54:32B-8.1(a)(5) (2015) (“Receipts from sales of the following sold for human use are exempt from the tax imposed under the ‘Sales and Use Tax Act’... tampons or like products”).

<sup>25</sup> 72 PA. CONS. STAT. § 7204(4) (2016) (“The tax... shall not be imposed upon any of the following... sale at retail or use of sanitary napkins, tampons or similar items used for feminine hygiene”).

<sup>26</sup> 61 PA. CODE. § 9.2(4) (2016) (“Household supplies purchased for residential consumption... are taxable with the exception of... sanitary napkins, tampons or similar items used for feminine hygiene”).

<sup>27</sup> MD. CODE ANN., TAX-GEN. § 11-211 (2016); *A Guide to Sales and Use Tax*, *supra* note 8; N.J. REV. STAT. § 54:32B-8.1(a)(5) (2015).

<sup>28</sup> MD. CODE ANN., TAX-GEN. § 11-211 (2016).

<sup>29</sup> *A Guide to Sales and Use Tax*, *supra* note 8; *see* MASS. GEN. LAWS ch. 64H, § 6(l) (2016).

tampons in a statute that specifically exempts certain medical items from sales tax.<sup>30</sup>

### B. *Sales Tax, Poverty, and Necessity Exemptions*

All but five U.S. states raise revenue through a sales tax.<sup>31</sup> Sales taxes disproportionately affect those living near or below the poverty level because each sales tax charge takes up a larger portion of an impoverished person's available disposable income as compared to that of a wealthy person. When a poorer woman and a wealthy woman buy the same menstrual hygiene product, the poorer woman must spend a larger percentage of her disposable income on the tax than the wealthy woman.<sup>32</sup> Women are paid a lower average wage than men nationwide; for every dollar a white man makes, a white woman makes 78 cents.<sup>33</sup> It is estimated that white women will lose out on an average of \$430,480 over their entire career because of this gap.<sup>34</sup> For women of color, the wage gap

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<sup>30</sup> N.J. REV. STAT. § 54:32B-8.1(a)(5) (2015).

<sup>31</sup> Hillin, *supra* note 2.

<sup>32</sup> Susan Pace Hamill, *The Vast Injustice Perpetuated by State and Local Tax Policy*, 37 HOFSTRA L. REV. 117, 123 (2008).

<sup>33</sup> Catherine Hill, *The Simple Truth About the Gender Pay Gap (Spring 2016)*, AM. ASSOC. OF UNIV. WOMEN, <http://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/> (last visited June 19, 2017).

<sup>34</sup> *The Lifetime Wage Gap, State by State*, NAT'L WOMEN'S LAW CENTER (April 4, 2016), <http://nwlc.org/resources/the-lifetime-wage-gap-state-by-state/>. Based on current wage

is even larger; Hispanic or Latina women make 54 cents for every dollar a white man makes, Native American women 59 cents, and African American women 63 cents.<sup>35</sup> Women of color will lose over twice as much relative to white men during their entire career as would white women.<sup>36</sup> Women also face gender inequality at the top of the corporate ladder. The all-time highest number of women CEOs at Fortune 500 companies was 24 (approximately 5%); the number as of February 2016 is 21 (4%).<sup>37</sup>

Perhaps partially because of this, 13.4% of all women (regardless of race) in the U.S. lived in poverty in 2015, compared to only 9.9% of men, making women 35% more likely to live in poverty than men.<sup>38</sup> Women of color were even more likely than average to live in poverty, with 23.1% of African American women, 22.7% of Native American

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gap statistics and a 40-year career. *Id.*

<sup>35</sup> Hill, *supra* note 33.

<sup>36</sup> *The Lifetime Wage Gap, State by State*, *supra* note 34.

<sup>37</sup> Ana Swanson, *The Number of Fortune 500 Companies Led by Women is at an All-Time High: 5 Percent*, THE WASHINGTON POST: WONKBLOG (June 4, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/06/04/the-number-of-fortune-500-companies-led-by-women-is-at-an-all-time-high-5-percent/>; Kristen Bellstrom, *Why 2015 was a Terrible Year to be a Female Fortune 500 CEO*, FORTUNE (Dec. 23, 2015, 9:30 AM), <http://fortune.com/2015/12/23/2015-women-fortune-500-ceos/>.

<sup>38</sup> Jasmine Tucker & Caitlin Lowell, *National Snapshot: Poverty Among Women & Families, 2015*, NAT'L WOMEN'S LAW CENTER (Sept. 14, 2016), <http://nwlc.org/resources/national-snapshot-poverty-among-women-families-2015/>.

women, and 20.9% of Hispanic women living in poverty.<sup>39</sup> Transgender and gender nonconforming individuals were also particularly likely to be living in poverty, with 29% – nearly one-third – of transgender individuals living in poverty in 2015.<sup>40</sup> While eliminating the tampon tax will not, by itself, lift anyone out of poverty, it can help to ease the burden these women face. As one of the sponsors of California’s tampon tax bill said, “[i]f we can’t make [menstrual hygiene products] free we should at least make them affordable. . . [h]aving your period when [you are] poor means that once a month you have the added stress of finding a way to pay for these essentials.”<sup>41</sup>

In many cases, legislators have already taken steps to make certain essentials easier to afford. Sales tax generally does not apply to all sales made in a state;<sup>42</sup> instead, many states exempt certain items from sales taxes, often on the basis of necessity.<sup>43</sup> “Necessity” generally means

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<sup>39</sup> *Id.*

<sup>40</sup> S.E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT’L CENTER FOR TRANSGENDER EQUALITY 10 (2016), [www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.pdf](http://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.pdf) (last visited June 19, 2017).

<sup>41</sup> Larimer, *supra* note 7.

<sup>42</sup> Hillin, *supra* note 2.

<sup>43</sup> *End the Tampon Tax*, N.Y. TIMES: THE OPINION PAGES (Feb. 8, 2016), [http://www.nytimes.com/2016/02/08/opinion/end-the-tampon-tax.html?\\_r=0](http://www.nytimes.com/2016/02/08/opinion/end-the-tampon-tax.html?_r=0); Hillin,

groceries and other life essentials, but several states also have exemptions for medical supplies.<sup>44</sup> The best way for states to eliminate the tampon tax is to create a necessity exemption similar to those used to exempt menstrual hygiene products from sales tax in Maryland, Massachusetts, Minnesota, New Jersey, and Pennsylvania prior to 2015.

While many states don't acknowledge the inevitable necessity of menstrual products, some states provide sales tax necessity exemptions for products that most people would consider less necessary than hygiene. For example, 11 states have necessity exemptions for both candy and soda.<sup>45</sup> Of those 11, only one also has a necessity exemption for menstrual hygiene products.<sup>46</sup> In addition to the states with candy and soda exemptions, Indiana exempts bakery items (including cookies, donuts, pies, and tarts) as necessities.<sup>47</sup> Absent an as-yet unheard of medical diagnosis, candy, soda, and baked sweets are not unavoidable biological

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*supra* note 2.

<sup>44</sup> Hillin, *supra* note 2.

<sup>45</sup> Susie Poppick, *More States Tax Tampons Than Candy in America*, MONEY: EVERYDAY MONEY (June 3, 2015), <http://time.com/money/3907775/states-tax-tampons-candy-america/> (Arizona, Georgia, Louisiana, Massachusetts, Michigan, Nebraska, Nevada, New Mexico, South Carolina, Vermont, Wyoming).

<sup>46</sup> *Id.* Only in Massachusetts are candy, soda, and feminine hygiene products all treated as tax-exempt necessities. See MASS. GEN. LAWS ch. 64H, § 6(h) (2016); *A Guide to Sales and Use Tax*, *supra* note 8.

<sup>47</sup> IND. CODE § 6-2.5-5-20(b)(3) (2016).

necessities, but menstruation is. Missouri considers tickets to neutral site championship games necessities,<sup>48</sup> and New York considers American flags<sup>49</sup> and admissions to live circus performances<sup>50</sup> necessities. No matter how fervent your patriotism, you can make it through a normal day without a flag to wave; if you are a menstruating woman, it is impossible to have a normal day without menstrual hygiene products. Tickets to neutral site championship games, while fun and diverting entertainment, are as necessary to everyday life as admissions to live circus performances: not at all. Most states exempt prescription medication from sales tax.<sup>51</sup> Because Viagra is a prescription medication,<sup>52</sup> it is included in this general exemption, meaning that men's erectile dysfunction drugs are considered necessities, while women's menstrual hygiene products are not. In other words, a medication to assist men in recreational sexual activity receives an exemption, while products required by women's reproductive systems do not.

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<sup>48</sup> MO. REV. STAT. § 144.030(39) (2000).

<sup>49</sup> N.Y. TAX § 1115(11) (2016).

<sup>50</sup> § 1105(f)(1).

<sup>51</sup> Josh Barro, *The Latest Sales Tax Controversy: Tampons*, N.Y. TIMES: THE UPSHOT (Jan. 7, 2016), [http://www.nytimes.com/2016/01/07/upshot/the-latest-sales-tax-controversy-tampons.html?\\_r=0](http://www.nytimes.com/2016/01/07/upshot/the-latest-sales-tax-controversy-tampons.html?_r=0).

<sup>52</sup> *How to Get a Prescription*, PFIZER VIAGRA, <https://www.viagra.com/getting/fill-your-prescription-now> (last visited June 19, 2017).

Most of the “necessities” listed in the preceding paragraph are far from truly necessary, unlike menstrual hygiene products. Tampons are required as part of a biological function over which women have no control. Women need tampons or some other menstrual hygiene product in order to avoid bleeding through their clothing every month, which can cause numerous health problems in addition to the near-universal embarrassment of a red spot on the back of one’s pants.<sup>53</sup> Poor menstrual hygiene has been linked to infection and cervical cancer.<sup>54</sup> Calling menstrual hygiene products “essential for women’s health,” the American Medical Association recently recommended that all states exempt tampons and other menstrual hygiene products from sales tax.<sup>55</sup> If you are a woman between the ages of approximately 12 and 50<sup>56</sup> and want to attend school, pursue a career, enjoy public spaces, or generally exist in any meaningful way, tampons are a necessity.

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<sup>53</sup> Larimer, *supra* note 7; McCormack, *supra* note 9.

<sup>54</sup> Jennifer Weiss-Wolf, *Helping Women and Girls. Period.*, N.Y. TIMES (Jan. 28, 2015, 11:28 AM), [http://kristof.blogs.nytimes.com/2015/01/28/helping-women-and-girls-period/?\\_r=0](http://kristof.blogs.nytimes.com/2015/01/28/helping-women-and-girls-period/?_r=0).

<sup>55</sup> American Medical Association, *AMA Adopts New Policies on Final Day of Annual Meeting*, AM. MED. ASS’N (June 15, 2016), <https://www.ama-assn.org/ama-adopts-new-policies-final-day-annual-meeting>.

<sup>56</sup> *Menstruation and the Menstrual Cycle Fact Sheet*, U.S. DEPT. OF HEALTH AND HUMAN SERVICES OFFICE OF WOMEN’S HEALTH (Dec. 23, 2014), <http://womenshealth.gov/publications/our-publications/fact-sheet/menstruation.html#g>.

### III. THE RECENT MOVEMENT TO END THE TAMPON TAX

#### A. *State Legislatures' Attempts to End the Tampon Tax*

Women are not the only people who see the tampon tax as gendered and unfair.<sup>57</sup> During a pre-State of the Union YouTube interview, Ingrid Nilsen asked President Obama why he thought tampons were taxed as “luxury goods” in most states.<sup>58</sup> “I suspect it’s because men were making the laws when those taxes were passed,” he said.<sup>59</sup> “Women... [should] work to get those taxes removed.”<sup>60</sup>

In several states, women *are* working to get those taxes removed.<sup>61</sup> California Assemblywoman Cristina Garcia introduced a bill to exempt tampons and other menstrual hygiene products from sales taxes.<sup>62</sup> If passed and signed into law, Assembly Bill 1561 would have “exempt[ed] from those taxes the gross receipts from the sale in this state of, and the storage, use, or other consumption in this state of, sanitary napkins and

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<sup>57</sup> See The White House, *The YouTube Interview with President Obama*, YOUTUBE (Jan. 15, 2016), <https://www.youtube.com/watch?v=Tjl8ka3F6QU> (stating President Obama’s position on this subject from minute 35:15 to minute 38:00).

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

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See generally Larimer, *supra* note 7 (emphasis added).

<sup>62</sup> *Id.*

tampons.”<sup>63</sup> Although the bill passed both state legislative chambers unanimously, Gov. Jerry Brown ultimately vetoed it and other tax reform bills in September 2016.<sup>64</sup> Other states that considered similar bills during the 2016 legislative session included Connecticut, Illinois, Ohio, New York, Wisconsin, Utah, and Virginia.<sup>65</sup> Tennessee considered a bill that would lower, but not eliminate completely, its tax on tampons.<sup>66</sup>

In Connecticut, three anti-tampon tax bills have been introduced.<sup>67</sup> One of the bills, House Bill 5117, would “exempt feminine hygiene products from the sales tax pursuant to the exemption for medical supplies

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<sup>63</sup> Assemb. B. 1561, 2016 Leg., 2015-2016 Sess. (Cal. 2016).

<sup>64</sup> Derek Hawkins, *With Governor’s Veto, California’s ‘Tampon Tax’ Will Survive, for Now*, THE WASHINGTON POST (Sept. 14, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/09/14/with-governors-veto-californias-tampon-tax-will-survive-for-now/?utm\\_term=.7ea0cbee4f44](https://www.washingtonpost.com/news/morning-mix/wp/2016/09/14/with-governors-veto-californias-tampon-tax-will-survive-for-now/?utm_term=.7ea0cbee4f44).

<sup>65</sup> Jordan Gass-Poore, *Citing Gender Bias, State Lawmakers Move to Eliminate ‘Tampon Tax,’* NPR (Mar. 7, 2016), <http://www.npr.org/2016/03/06/467377295/citing-gender-bias-state-lawmakers-move-to-eliminate-tampon-tax> (discussing Wisconsin tax on tampons); Larimer, *supra* note 7 (discussing California tax on tampons); Treisman, *supra* note 9 (discussing Connecticut tax on tampons); *Illinois Advances Bill to Exempt Tampons, Similar Products from Sales Tax*, *supra* note 3; Ludlow, *supra* note 9 (discussing Ohio tax on tampons); Rinkunas, *supra* note 9 (discussing New York tax on tampons); Winslow, *supra* note 9 (discussing Utah tax on tampons); Carmel, *supra* note 9 (discussing Virginia tax on tampons); McCormack, *supra* note 9 (discussing Wisconsin tax on tampons).

<sup>66</sup> Humphrey, *supra* note 10; S.B. 2285, 109th Gen. Assemb. (Tenn. 2016); H.B. 2059, 109th Gen. Assemb. (Tenn. 2016).

<sup>67</sup> Treisman, *supra* note 9; S.B. 216, 2016 Gen. Assemb., Feb. Sess. (Conn. 2016); H.B. 5117, 2016 Gen. Assemb., Feb. Sess. (Conn. 2016); H.B. 5119, 2016 Gen. Assemb., Feb. Sess. (Conn. 2016).

and devices.”<sup>68</sup> The two other Connecticut bills would create a new exemption specifically for tampons and sanitary pads.<sup>69</sup> Senate Bill 216 would amend Connecticut’s current sales tax exemption statute to specifically include an exemption for “[s]ales of feminine hygiene products.”<sup>70</sup> House Bill 5119 would “exempt tampons and sanitary pads from the sales tax.”<sup>71</sup> Connecticut ultimately chose to exempt menstrual hygiene products from sales tax, making it one of three states whose anti-tampon tax bills succeeded in 2016.<sup>72</sup>

Illinois’ bill added a sales tax exemption specifically for menstrual hygiene products.<sup>73</sup> Senate Bill 2746 exempts “feminine hygiene products, including sanitary napkins, tampons, menstrual cups, pantliners, and feminine wipes” from Illinois’ Use Tax Act, Service Use Tax Act, Service

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<sup>68</sup> H.B. 5117, 2016 Gen. Assemb., Feb. Sess. (Conn. 2016).

<sup>69</sup> S.B. 216, 2016 Gen. Assemb., Feb. Sess. (Conn. 2016); H.B. 5119, 2016 Gen. Assemb., Feb. Sess. (Conn. 2016).

<sup>70</sup> S.B. 216, 2016 Gen. Assemb., Feb. Sess. (Conn. 2016).

<sup>71</sup> H.B. 5119, 2016 Gen. Assemb., Feb. Sess. (Conn. 2016).

<sup>72</sup> Fenit Nirappil, *D.C. to Lift Sales Tax on Diapers, Tampons*, THE WASHINGTON POST (Nov. 17, 2016), [https://www.washingtonpost.com/local/dc-politics/dc-to-lift-sales-tax-on-diapers-tampons/2016/11/17/5cc5f634-aceb-11e6-8b45-f8e493f06fcd\\_story.html?utm\\_term=.3fb630a36a1c](https://www.washingtonpost.com/local/dc-politics/dc-to-lift-sales-tax-on-diapers-tampons/2016/11/17/5cc5f634-aceb-11e6-8b45-f8e493f06fcd_story.html?utm_term=.3fb630a36a1c).

<sup>73</sup> *Illinois Advances Bill to Exempt Tampons, Similar Products from Sales Tax*, *supra* note 3; S.B. 2746, 99th Gen. Assemb., 2015 and 2016 Sess. (Ill. 2016).

Occupation Tax Act, and Retailers' Occupation Tax Act.<sup>74</sup> In August 2016, Gov. Bruce Rauner signed the bill into law.<sup>75</sup>

Ohio legislators introduced two bills that would have specifically exempted tampons and pads from sales tax.<sup>76</sup> House Bills 272 and 484 would both have exempted “[s]ales of tampons, panty liners, menstrual cups, sanitary napkins, and other similar tangible personal property the principal purpose of which is feminine hygiene in connection with the menstrual cycle.”<sup>77</sup> Neither of Ohio’s bills succeeded.

New York’s bill specifically exempts menstrual hygiene products such as tampons and pads from sales tax.<sup>78</sup> Senate Bill 6726 adds an exemption for “[s]anitary napkins and tampons.”<sup>79</sup> The bill passed both the New York Assembly<sup>80</sup> and Senate by large margins, passing the

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<sup>74</sup> S.B. 2746, 99th Gen. Assemb., 2015 and 2016 Sess. (Ill. 2016).

<sup>75</sup> Geiger & Garcia, *supra* note 11.

<sup>76</sup> Ludlow, *supra* note 9; H.B. 272, 131st Gen. Assemb., Reg. Sess. (Ohio 2016); H.B. 484, 131st Gen. Assemb., Reg. Sess. (Ohio 2016).

<sup>77</sup> H.B. 272, 131st Gen. Assemb., Reg. Sess. (Ohio 2016); H.B. 484, 131st Gen. Assemb., Reg. Sess. (Ohio 2016).

<sup>78</sup> Rinkunas, *supra* note 9; S.B. 6726, 2016 Gen. Sess. (N.Y. 2016).

<sup>79</sup> S.B. 6726, 2016 Gen. Sess. (N.Y. 2016).

<sup>80</sup> Rinkunas, *supra* note 9.

Senate by a unanimous 58-0.<sup>81</sup> Gov. Andrew Cuomo signed the bill into law in July 2016.<sup>82</sup>

In Tennessee, legislators introduced identical bills in both the Senate and the House to reduce the tampon tax.<sup>83</sup> Under Senate Bill 2285, filed in the House as House Bill 2059, “the retail sale of feminine hygiene products shall be taxed at the rate of [5%] of the sales price.”<sup>84</sup> Menstrual hygiene products are currently taxed at the general Tennessee sales tax rate of 7%.<sup>85</sup> The bills defined “feminine hygiene products” as “any product to be used by women with respect to menstruation... [including] tampons, pads, liners, [and] cups.”<sup>86</sup> Neither of the bills passed.

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<sup>81</sup> Josefa Velasquez, *Senate Unanimously Passes Bill Eliminating ‘Tampon Tax,’* POLITICO N.Y. (Apr. 11, 2016, 4:42 PM), <http://www.capitalnewyork.com/article/albany/2016/04/8596300/senate-unanimously-passes-bill-eliminating-tampon-tax>.

<sup>82</sup> Abigail Jones, *New York Terminates the Tampon Tax*, NEWSWEEK (July 21, 2016, 7:29 PM), <http://www.newsweek.com/new-york-tampon-tax-cuomo-periods-tampons-menstruation-donald-trump-482918>.

<sup>83</sup> Humphrey, *supra* note 10; S.B. 2285, 109th Gen. Assemb. (Tenn. 2016); H.B. 2059, 109th Gen. Assemb. (Tenn. 2016).

<sup>84</sup> S.B. 2285, 109th Gen. Assemb. (Tenn. 2016); H.B. 2059, 109th Gen. Assemb. (Tenn. 2016).

<sup>85</sup> TENN. CODE ANN. § 67-6-202(a) (2016).

<sup>86</sup> S.B. 2285, 109th Gen. Assemb. (Tenn. 2016); H.B. 2059, 109th Gen. Assemb. (Tenn. 2016).

Utah's bill would have created a sales tax exemption for menstrual hygiene products.<sup>87</sup> House Bill 202, titled "Hygiene Tax Act," would exempt "pads or liners... tampons... [and] sanitary napkins" from sales tax.<sup>88</sup> The Utah bill was ultimately voted down, 8-3, in committee.<sup>89</sup> All of the committee members were male, which, as discussed in more detail below, might have made a rejection more likely.<sup>90</sup>

In Virginia, a legislator introduced a bill to exempt tampons from the state's 5.3% state sales tax.<sup>91</sup> House Bill 952 would have amended Virginia's statute on miscellaneous sales tax exemptions to include a specific exemption for "[t]ampons and sanitary napkins."<sup>92</sup> The bill did not succeed.

Finally, Wisconsin's bill would have designated tampons and other menstrual hygiene products as necessities and exempt them from sales tax.<sup>93</sup> Assembly Bill 949 would have exempted from sales tax the "sales of

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<sup>87</sup> Winslow, *supra* note 9; H.B. 202, 2016 Gen. Sess. (Utah 2016).

<sup>88</sup> H.B. 202, 2016 Gen. Sess. (Utah 2016).

<sup>89</sup> Flores, *supra* note 12.

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

<sup>91</sup> Carmel, *supra* note 9; H.B. 952, 2016 Sess. (Va. 2016).

<sup>92</sup> H.B. 952, 2016 Sess. (Va. 2016).

<sup>93</sup> McCormack, *supra* note 9; Assemb. B. 949, 2015 Leg. Reg. Sess. (Wis. 2016).

and the storage, use, or other consumption of feminine hygiene products.”<sup>94</sup> Wisconsin’s bill did not pass.

B. *Activists’ Attempts to End the Tampon Tax Through Gender Discrimination Litigation*

Many supporters of anti-tampon tax bills have decried the tax as discriminatory against women.<sup>95</sup> Assemblywoman Ling Ling Chang, one of the sponsors of the California bill, said the tampon tax is a type of “regulatory discrimination” because women have no control over their periods and must buy menstrual hygiene products of some sort.<sup>96</sup> Garcia, the California bill’s cosponsor, said the bill was about “gender equity in our tax code.”<sup>97</sup> Sen. Melinda Bush, the sponsor of the Illinois bill, said the tampon tax is an example of gender “inequity.”<sup>98</sup> Del. Mark Keam, the sponsor of the Virginia bill, said the tax is “not equitable” because “women [have] to pay a tax on something that guys don’t have to spend

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<sup>94</sup> Assemb. B. 949, 2015 Assemb., 2015 Reg. Sess. (Wis. 2016).

<sup>95</sup> Larimer, *supra* note 7; *Illinois Advances Bill to Exempt Tampons, Similar Products from Sales Tax*, *supra* note 3; Ludlow, *supra* note 9.

<sup>96</sup> Larimer, *supra* note 7.

<sup>97</sup> Mollie Reilly, *The End of California’s Tampon Tax Could Be Near*, HUFF. POST (Jan. 28, 2016), [http://www.huffingtonpost.com/entry/california-tampon-tax-bill\\_us\\_56a950a5e4b0d82286d4df88](http://www.huffingtonpost.com/entry/california-tampon-tax-bill_us_56a950a5e4b0d82286d4df88).

<sup>98</sup> *Illinois Advances Bill to Exempt Tampons, Similar Products from Sales Tax*, *supra* note 3.

money on.”<sup>99</sup> Keam also said that because tampons are an “essential product for women,” the tampon tax has a “discriminatory impact” on them.<sup>100</sup> Sandra Kelly, a lawyer involved with the Ohio lawsuit discussed below, called the tampon tax a type of “unequal protection.”<sup>101</sup> Rep. Greta Johnson, the sponsor of one of the Ohio bills, said the tax has a disparate impact because menstruation “doesn’t happen to men.”<sup>102</sup> Rep. Brian King, one of the three “yes” votes during the Ohio bill’s committee hearing, said he thought the tax was “unfair to women.”<sup>103</sup>

In New York, women have gone a step beyond merely calling the tax discriminatory and filed a class action lawsuit, alleging the tampon tax is a form of gender discrimination in violation of the Equal Protection clause of both the U.S. and New York constitutions.<sup>104</sup> The suit, filed against the New York Department of Finance and Taxation, argues the

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<sup>99</sup> Carmel, *supra* note 9.

<sup>100</sup> *Id.*

<sup>101</sup> Ludlow, *supra* note 9.

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

<sup>103</sup> Flores, *supra* note 12.

<sup>104</sup> Rinkunas, *supra* note 9; Barbara Ross & Stephen Rex Brown, *New Lawsuit Challenges New York State’s Tampon Tax*, N.Y. DAILY NEWS (Mar. 4, 2016, 8:55 AM), <http://www.nydailynews.com/new-york/manhattan/new-lawsuit-challenges-new-york-state-tampon-tax-article-1.2551668>; Julia Marsh, *Sales Tax on Tampons Not Fair to Women: Lawsuit*, N.Y. Post (Mar. 3, 2016, 12:14 PM), <http://nypost.com/2016/03/03/sales-tax-on-tampons-not-fair-to-women-lawsuit/>.

tampon tax is discriminatory because similar products not unique to women (for example, dandruff shampoo and incontinence pads) are considered medical devices and are exempt from New York sales tax.<sup>105</sup> The suit also seeks a refund of \$28 million for women who had to pay taxes on menstrual hygiene products in the two years prior.<sup>106</sup> However, now that the bill eliminating the tampon tax has passed the Assembly and the Senate and will likely be signed into law by the governor, one publication has questioned whether the lawsuit will continue.<sup>107</sup>

Women in Ohio have filed a similar lawsuit.<sup>108</sup> The suit, filed against the Ohio Department of Taxation, claims ““a tax on tampons is a tax on women”” and as such violates the Equal Protection clause of both the U.S. and Ohio constitutions.<sup>109</sup> The plaintiffs in the suit are seeking class action certification and hope to recover \$66 million for women who had already paid the tampon tax.<sup>110</sup>

The Equal Protection Clause of the U.S. Constitution prohibits states from “deny[ing] to any person within [their] jurisdiction the equal

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<sup>105</sup> Marsh, *supra* note 104.

<sup>106</sup> *Id.*

<sup>107</sup> Rinkunas, *supra* note 9.

<sup>108</sup> Ludlow, *supra* note 9.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

protection of the laws.”<sup>111</sup> Discriminating on the basis of sex or gender falls within this prohibition.<sup>112</sup> However, gender discrimination claims only receive intermediate scrutiny; just because a law discriminates based on gender does not mean it will be struck down.<sup>113</sup> If the discriminatory law furthers an important governmental interest and is substantially related to that interest, then it does not violate the Equal Protection Clause.<sup>114</sup>

#### IV. MENSTRUAL HYGENE PRODUCTS IN PRACTICE: ECONOMIC BURDENS, MALE-DOMINATED LEGISLATURES, AND EXEMPTION CRITICS

##### A. *The Economic Burden of Menstrual Hygiene Products*

Tampons alone already cost the average American woman around \$1,773.33 over her lifetime.<sup>115</sup> Menstruation typically lasts from ages 12 to 50.<sup>116</sup> The average woman in a tampon tax state will spend nearly 40

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<sup>111</sup> U.S. CONST. amend. XIV, § 1.

<sup>112</sup> U.S. v. Virginia, 518 U.S. 515, 534 (1996).

<sup>113</sup> *Id.* at 533.

<sup>114</sup> *Id.*

<sup>115</sup> Jessica Kane, *Here's How Much a Woman's Period Will Cost Her Over a Lifetime*, HUFF. POST: HEALTHY LIVING (May 18, 2015, 12:05 AM), [http://www.huffingtonpost.com/2015/05/18/period-cost-lifetime\\_n\\_7258780.html](http://www.huffingtonpost.com/2015/05/18/period-cost-lifetime_n_7258780.html). This appears to be a before-tax estimate based on an average cost of \$7 per 36-count box. *Id.*

<sup>116</sup> *Menstruation and the Menstrual Cycle Fact Sheet*, *supra* note 56.

years paying that tax;<sup>117</sup> based on a national average life expectancy of about 81 years for women, that amounts to almost 50% of her life.<sup>118</sup>

Approximately 70% of women use tampons to handle their periods.<sup>119</sup> Women typically use about 20 tampons per menstrual cycle and go through approximately 456 menstrual cycles over 38 years (approximately 240 tampons per year, or approximately 9,120 tampons total).<sup>120</sup> A typical 36-count box of tampons costs about \$8 before tax.<sup>121</sup> At around six and a half 36-count boxes per year, women who primarily use tampons will each spend approximately \$52 annually, not including tax.<sup>122</sup>

Some women prefer to use pads or sanitary napkins rather than tampons. Women typically use about seven 48-count boxes of pads per year (approximately 336 pads per year).<sup>123</sup> A typical 48-count box of pads

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<sup>117</sup> *Id.*

<sup>118</sup> *QuickStats: Life Expectancy at Birth, by Sex and Race/Ethnicity — United States, 2011*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 5, 2014), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6335a8.htm>.

<sup>119</sup> Kane, *supra* note 115.

<sup>120</sup> *Id.*

<sup>121</sup> *Tampon Prices*, WALGREENS, <http://www.walgreens.com/search/results.jsp?Ntt=Tampons&partialsearch=true> (last visited June 19, 2017).

<sup>122</sup> Kane, *supra* note 115; *Tampon Prices*, *supra* note 121.

<sup>123</sup> Tracie Egan Morrissey, *This is How Much it Costs to Own a Vagina: An Itemized List*, Jezebel (Apr. 6, 2012, 1:30 PM), <http://jezebel.com/5890058/this-is-how-much-it-costs->

costs about \$7 before tax.<sup>124</sup> At around seven 48-count boxes per year, women who primarily use pads will each spend approximately \$49 annually, not including tax.<sup>125</sup>

Women stand to collectively save a significant amount of money if the states where they reside were to exempt tampons from sales tax. In California, eliminating the tampon tax is estimated to collectively save women over \$20 million per year.<sup>126</sup> In Connecticut, total savings are estimated at \$3.6 million per year.<sup>127</sup> In Illinois, total savings are estimated at \$14.7 million per year.<sup>128</sup> In New York, where an anti-tampon tax bill became law in July 2016, eliminating the tax is estimated to collectively save women \$8.5-\$10 million per year.<sup>129</sup> Even Tennessee's bill, which would lower rather than eliminate the tampon tax, would collectively save women over \$4.2 million.<sup>130</sup>

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to-own-a-vagina-an-itemized-list.

<sup>124</sup> *Pad Prices*, WALGREENS, <http://www.walgreens.com/store/c/always-maxi-pads-regular-without-wings/ID=prod16386-product> (last visited June 19, 2017).

<sup>125</sup> Morrissey, *supra* note 123; *Pad Prices*, *supra* note 124.

<sup>126</sup> Larimer, *supra* note 7.

<sup>127</sup> Treisman, *supra* note 9.

<sup>128</sup> *Illinois Advances Bill to Exempt Tampons, Similar Products from Sales Tax*, *supra* note 3 (based on a state sales tax of 6.25%).

<sup>129</sup> Velasquez, *supra* note 81; Jones, *supra* note 82.

<sup>130</sup> Humphrey, *supra* note 10. Based on a sales tax reduction of two percentage points, an average yearly tampon cost of \$120 per woman, and 1,750,417 women needing tampons. *Id.*

Supporters of anti-tampon tax bills often point out that menstrual hygiene products should be exempted as necessities because, for most women, they are as necessary as food and shelter. Garcia, the sponsor of the California bill, said that women have “no choice” but to buy tampons, because “you can’t just ignore your period.”<sup>131</sup> Chang, the cosponsor of Garcia’s bill, said that menstruation is “a biological function that women can’t control.”<sup>132</sup> Rep. Melissa Sargent, the sponsor of the Wisconsin bill, said tampons should not be taxed as luxury goods because “I certainly know my period is not a luxury;” instead, menstruation is “an undeniable and unavoidable fact for women.”<sup>133</sup> Rep. Sherry Jones, the sponsor of one of the Tennessee bills, said tampons are necessary for “human dignity.”<sup>134</sup> Tampons or other menstrual hygiene products are necessities for menstruation – which makes them necessities for most women – and tax law should reflect this.

Anti-tampon tax bills often have bipartisan support. The California bill was sponsored by both Garcia, a Democrat, and Chang, a

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<sup>131</sup> Larimer, *supra* note 7.

<sup>132</sup> *Id.*

<sup>133</sup> McCormack, *supra* note 9.

<sup>134</sup> Humphrey, *supra* note 10.

Republican.<sup>135</sup> Serino, the sponsor of the New York bill, is a Republican, while Bush, the sponsor of the Illinois bill, is a Democrat.<sup>136</sup> Susan Yolen, a supporter of the Connecticut bills, said that whether a person is a Republican or a Democrat does not matter, because regardless of their party affiliation, all women have periods.<sup>137</sup> Keam, the sponsor of the Virginia bill, said members of both parties should agree the tampon tax is unfair and “not turn [the tampon tax] into a partisan fight over who supports women more.”<sup>138</sup>

One of the reasons the tampon tax has persisted for so long may be that to many people, the issue simply is not visible.<sup>139</sup> Garcia said that many women had been taught to hide their periods rather than talk about them.<sup>140</sup> Yolen said that women had been told that periods were their problem and it was up to them to make their periods invisible.<sup>141</sup> When periods’ very existence is rarely acknowledged in public, many people might not have any idea of the associated costs.

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<sup>135</sup> Larimer, *supra* note 7.

<sup>136</sup> Velasquez, *supra* note 81; *Illinois Advances Bill to Exempt Tampons, Similar Products from Sales Tax*, *supra* note 3.

<sup>137</sup> Treisman, *supra* note 9.

<sup>138</sup> Carmel, *supra* note 9.

<sup>139</sup> Larimer, *supra* note 7; Treisman, *supra* note 9.

<sup>140</sup> Larimer, *supra* note 7.

<sup>141</sup> Treisman, *supra* note 9.

B. *Masculinity So Fragile: On Men's Avoidance of Menstrual Hygiene Issues*

Another reason so many states still impose the tampon tax could be that the people in power in those states are male.<sup>142</sup> Yolen described the Connecticut state legislature as a “predominantly male world.”<sup>143</sup> The Connecticut state legislature is not alone in its gender imbalance: women make up approximately 50% of the population, but in 2015 they made up only 19.4% of the U.S. House of Representatives and 20% of the U.S. Senate.<sup>144</sup> Prior to the 2016 election, only 50 women of color had served in the House.<sup>145</sup> Only two women of color had served in the Senate.<sup>146</sup> After the 2016 election, that number more than doubled, as voters elected three additional women of color to the Senate, bringing the total number to have *ever* served to five.<sup>147</sup> Garcia said that the men who dominate most

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<sup>142</sup> *Id.*; see also Larimer, *supra* note 7.

<sup>143</sup> Treisman, *supra* note 9.

<sup>144</sup> Philip Bump, *The New Congress is 80 Percent White, 80 Percent Male and 92 Percent Christian*, THE WASHINGTON POST: THE FIX (Jan. 5, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/01/05/the-new-congress-is-80-percent-white-80-percent-male-and-92-percent-christian/>.

<sup>145</sup> *Women of Color in Congress*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART, & ARCHIVES, <http://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Data/Women-of-Color-in-Congress/> (last visited June 19, 2017).

<sup>146</sup> *Id.*

<sup>147</sup> Amber Phillips, *One Election Bright Spot for Democrats: Women of Color*, THE WASHINGTON POST (Nov. 10, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/10/one-election-bright-spot-for-democrats-women-of->

political institutions were either “not thinking about [the tampon tax], or... afraid to approach it.”<sup>148</sup> In a space with comparatively few women, and in a world where women are taught to hide their periods, it is not surprising that male legislators have yet to consider tampons’ tax status. However, this does not make the tampon tax’s effects any less costly for women.

Other women have remained optimistic about whether male politicians will take the tampon tax seriously.<sup>149</sup> Bush, the sponsor of the Illinois bill, said that she is hopeful that male legislators will understand the bill’s importance because “most men have women in their lives.”<sup>150</sup> Some male legislators have already publicly supported ending the tampon tax; for example, King, one of the Ohio bill’s supporters, Rep. Juan Candelaria, who introduced one of the Connecticut bills, and Keam, who introduced the Virginia bill, are men.<sup>151</sup> Keam explained his support for ending the tampon tax by saying that the tax should not be seen as a

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<sup>148</sup> Larimer, *supra* note 7.

<sup>149</sup> *Illinois Advances Bill to Exempt Tampons, Similar Products from Sales Tax*, *supra* note 3; Treisman, *supra* note 9.

<sup>150</sup> *Illinois Advances Bill to Exempt Tampons, Similar Products from Sales Tax*, *supra* note 3.

<sup>151</sup> Flores, *supra* note 12; Treisman, *supra* note 9; Carmel, *supra* note 9.

“women’s issue,” but that male legislators should step up and help promulgate women-friendly policy, too.<sup>152</sup> When Gov. Andrew Cuomo signed the New York bill repealing the tampon tax, he called it “a regressive tax on essential products that women have had to pay for far too long,” and added that “lifting it is a matter of social and economic justice.”<sup>153</sup> Rep. Kelly Luxenberg, who introduced one of the Connecticut bills, credited President Obama’s YouTube comments with making the tampon tax a visible national issue.<sup>154</sup>

As President Obama and several writers have pointed out, many (often male) lawmakers and policy specialists seem baffled as to why women consider tampons and other menstrual hygiene products a necessity.<sup>155</sup> One male critic pointed out that “necessity is subjective.”<sup>156</sup> Of course necessity is subjective, but it quickly becomes more objective when a product is a necessity for about half of the U.S. population for approximately half of their lives. Other critics have conceded that menstrual hygiene products are “essential” to women yet still argue

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<sup>152</sup> Carmel, *supra* note 9.

<sup>153</sup> Jones, *supra* note 82.

<sup>154</sup> Treisman, *supra* note 9.

<sup>155</sup> The White House, *supra* note 57; Barro, *supra* note 51.

<sup>156</sup> Barro, *supra* note 51.

against exemption because “the same could be said for many important but taxable products.”<sup>157</sup> Sure, if tampons are recognized as necessities and exempted from sales tax, other products might eventually be exempted, too – but the current debate is over menstrual hygiene products specifically, and legislators should not make policy based primarily on fallacious slippery slope arguments.

C. *Addressing Criticism of the Fight Against the Tampon Tax*

States should eliminate the tampon tax by amending their current sales tax necessity exemptions to include tampons and other menstrual hygiene products. Women in some states have recently filed lawsuits claiming the tampon tax is a form of gender discrimination in violation of the Equal Protection Clause of the U.S. Constitution.<sup>158</sup> If other states do not end their tampon taxes, they could face similar suits. Currently, women collectively spend billions of dollars per year in tampon tax costs, with women spending around \$20 million per year in one state alone.<sup>159</sup> This is particularly unfair because due to the wage gap and other measures

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<sup>157</sup> *Keep Taxing Diapers and Tampons*, L.A. TIMES (Feb. 29, 2016, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-sales-tax-20160229-story.html>.

<sup>158</sup> Rinkunas, *supra* note 9; Ross & Brown, *supra* note 104; Marsh, *supra* note 104; Ludlow, *supra* note 9.

<sup>159</sup> Larimer, *supra* note 7.

of gender-driven economic inequality, women already have less economic power on average than men do.<sup>160</sup> It is inherently unfair to impose a special tax on women simply for having women's bodies.

## V. CONCLUSION

States should eliminate the tampon tax by amending their current sales tax necessity exemptions to include tampons and other menstrual hygiene products. Women in some states have recently filed lawsuits claiming the tampon tax is a form of gender discrimination in violation of the Equal Protection Clause of the U.S. Constitution.<sup>161</sup> If other states do not end their tampon taxes, they could face similar suits. Currently, women collectively spend billions of dollars per year in tampon tax costs, with women spending around \$20 million per year in one state alone.<sup>162</sup> This is particularly unfair because due to the wage gap and other measures of gender-driven economic inequality, women already have less economic

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<sup>160</sup> Hill, *supra* note 33.

<sup>161</sup> Rinkunas, *supra* note 9; Ross & Brown, *supra* note 104; Marsh, *supra* note 104; Ludlow, *supra* note 9.

<sup>162</sup> Larimer, *supra* note 7.

power on average than men do.<sup>163</sup> It is inherently unfair to impose a special tax on women simply for having women's bodies.

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<sup>163</sup> Hill, *supra* note 33.