

## Notes

### BLEEDING WOMEN DRY: TAMPON TAXES AND MENSTRUAL INEQUITY

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**ABSTRACT**—In recent years, the problem of menstrual inequity has attracted increased attention. Most states impose a sales tax on menstrual hygiene products—a “tampon tax.” A burgeoning social movement has sought to end the tampon tax, and lawmakers have taken notice by introducing, and in some cases successfully passing, measures to repeal the tax by exempting menstrual hygiene products from the sales tax. This Note evaluates, from a tax policy standpoint, the pros and cons of repealing the tampon tax. It argues that although repeal is usually undesirable as a matter of tax design, the tax should nevertheless be repealed both because menstrual hygiene products are necessities and because the tax is discriminatory. Building on this conclusion, this Note further argues for a women’s menstrual health credit, provided to all women of menstruating age, on the basis that a tax credit would better bridge the financial disparity gap between women who must pay for menstrual hygiene products and men who do not. Along the way, this Note also compares the proposed credit to other proposals to combat menstrual inequity, such as a free-tampons program and expanding welfare benefits to include tampons, concluding that the tax credit would create fewer administrative complexities, would reach more women overall, and is less stigmatizing.

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*Fluid—like that other, inside/outside of philosophical discourse—is, by nature, unstable. Unless it is subordinated to geometrism, or (?) idealized.*

*Woman never speaks the same way. What she emits is flowing, fluctuating. Blurring. And she is not listened to, unless proper meaning (meaning of the proper) is lost . . . .*

*“And there you have it, Gentlemen, that is why your daughters are dumb.”*

—Luce Irigaray<sup>†</sup>

INTRODUCTION

In 2016, a wave of feminist activism focusing on the burdens of menstruation swept the world. The aim of the movement was simple: repeal the tampon tax, a sales tax imposed on tampons and other menstrual hygiene products. *Time Magazine* proclaimed 2016 the “Year of the Period,”<sup>1</sup> and a *New York Times* editorial headline blared, “End the Tampon Tax.”<sup>2</sup> In

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<sup>†</sup> THIS SEX WHICH IS NOT ONE 112 (Catherine Porter trans., 5th prtg. 1993).

<sup>1</sup> Maya Rhodan, *Tampon Tax Ends in States After ‘Year of the Period,’* TIME (June 3, 2016), <http://time.com/4355164/tampon-tax-ends-in-states-after-year-of-the-period> [https://perma.cc/A7ZR-PH3J] (noting the increased visibility of menstruation in mainstream media and new legislation to eliminate taxes on menstrual hygiene products).

<sup>2</sup> The Editorial Board, *End the Tampon Tax*, N.Y. TIMES (Feb. 8, 2016), <https://www.nytimes.com/2016/02/08/opinion/end-the-tampon-tax.html> [https://perma.cc/CSR9-KG3F] (arguing for repeal of taxes on menstrual hygiene products and pointing out that these products are unaffordable for many women even without taxes).

Europe, feminist campaigners pressed the European Commission to scrap imposition of the Value-Added Tax (VAT) on tampons.<sup>3</sup> Meanwhile, in the United States, petitions like *No Tax on Tampons: Stop Taxing Our Periods! Period.*, started by Jennifer Weiss-Wolf of the Brennan Center for Justice at New York University along with *Cosmopolitan Magazine*, gained momentum. That petition has gathered over 71,000 signatures as of June 2018.<sup>4</sup>

That the tampon tax movement has gained the attention of a women's magazine more known for its focus on fashion and beauty than on political and feminist issues only illustrates how the movement has pervaded mainstream consciousness. Professors Bridget Crawford and Carla Spivack offer four reasons why the tampon tax has attracted global attention, one of which particularly highlights the intersection of tax and feminism: "the ability to describe the effects of gender discrimination in simple financial terms that every woman (and man) can understand."<sup>5</sup> This Note is situated in this tax–feminism intersection; it will harness tax law and illustrate critical tax theory's "fundamental assumption" that "[t]ax law is political"<sup>6</sup> to further feminist goals such as equal treatment, encouraging women's market work,

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<sup>3</sup> *Value-Added Tax in Europe: Freedom Fighters*, ECONOMIST (May 14, 2016), <http://www.economist.com/news/finance-and-economics/21698694-reforms-vat-may-lead-more-democratic-convoluted-system-freedom-fighters> [<https://perma.cc/WBB4-6HKD>] (describing the tampon tax campaign in Europe). The VAT, sometimes known as a Goods and Services Tax (GST), is a consumption tax that is common worldwide. See OECD, CONSUMPTION TAX TRENDS: VAT/GST AND EXCISE RATES, TRENDS AND POLICY ISSUES 2016, at 181–84 (2016) (listing 167 countries operating a VAT as of 2016). It is functionally similar to a retail sales tax, except that every business in the production and distribution chain pays a value-added tax, while only retailers pay the tax in the American sales tax system. See JOEL SLEMROD & JON BAKIJA, TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES 195–96 (4th ed. 2008) (explaining VAT taxation scheme). For an explanation of the sales tax, see *infra* Section I.A.

<sup>4</sup> Jennifer Weiss-Wolf & *Cosmopolitan Magazine*, *No Tax on Tampons: Stop Taxing Our Periods! Period.*, CHANGE.ORG, <https://www.change.org/p/u-s-state-legislators-stop-taxing-our-periods-period> [<https://perma.cc/6X8T-3FJS>].

<sup>5</sup> Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, 2017 WIS. L. REV. 491, 542. Other reasons cited include: "a generational embrace of openness in discussing women's bodily functions," "fast and powerful communication facilitated by the Internet," and "the relative ease of finding a solution for discriminatory tax regimes (compared to other forms of gender discrimination)." *Id.* For an excellent account of the historical link between menstruation, tampon taxes, and feminism, see Victoria A. Hartman, Note, *End the Bloody Taxation: Seeing Red on the Unconstitutional Tax on Tampons*, 112 NW. U. L. REV. 313, 319–26 (2017). Tampon taxes are not only a feminist issue, but also a human rights issue. Crawford and Spivack have situated the tampon tax within the right to be free from discrimination, the right to health, the right to education, the right to work, and the right to dignity. See Bridget J. Crawford & Carla Spivack, *Human Rights and the Taxation of Menstrual Hygiene Products in an Unequal World*, in HUMAN RIGHTS AND TAX IN AN UNEQUAL WORLD (Philip G. Alston & Nikki Reisch eds., Oxford Univ. Press 2018) (forthcoming 2018) (on file with *Northwestern University Law Review*).

<sup>6</sup> ANTHONY C. INFANTI & BRIDGET J. CRAWFORD, CRITICAL TAX THEORY: AN INTRODUCTION, at xxi (2009).

and assistance to caregivers.<sup>7</sup> The result is an argument for the repeal of the tampon tax and the institution of a women’s health credit in the United States.

The tampon tax is a consumption tax, administered in the form of a sales tax in the United States—or a VAT elsewhere.<sup>8</sup> Thus, the term “tampon tax” may be misleading, as there is no tax targeted specifically at tampons and other feminine hygiene products. Rather, these items are simply part of the sales tax tax base. Nevertheless, most, if not all, tax codes contain exemptions for certain necessary items, such as groceries or clothing.<sup>9</sup> Since menstruation is not optional, and items like Viagra or even candy are exempt, tampons should be considered necessities and not taxed.<sup>10</sup> So the feminist argument goes.

In response to campaigns against the tampon tax,<sup>11</sup> countries and states have started taking steps to repeal the tax. For example, prior to its vote to exit the European Union (EU), the United Kingdom (UK) pushed to change EU rules that impose a minimum of five percent tax on menstrual hygiene products.<sup>12</sup> In early 2016, EU leaders signaled support for member states to scrap the VAT on tampons,<sup>13</sup> but by mid-2016, the EU parliament had voted

<sup>7</sup> See *infra* notes 182–92 and accompanying text for a discussion of these goals, first elucidated by Anne Alstott.

<sup>8</sup> For a discussion of sales tax exemptions, see *infra* Section II.B.

<sup>9</sup> Jared Walczak & Scott Drenkard, *State and Local Sales Tax Rates in 2017*, 539 TAX FOUND. FISCAL FACT, Jan. 2017, at 1, 5–6, <https://files.taxfoundation.org/20170131121743/TaxFoundation-FF539.pdf> [<https://perma.cc/KUK7-7N7M>]; see, e.g., VT. STAT. ANN. tit. 32, § 9741(13) (2017) (exemption for food); GA. CODE ANN. § 48-8-3(75) (2015) (exemption for clothing).

<sup>10</sup> See, e.g., Prachi Gupta, *Why the Hell Are Tampons Still Taxed?*, COSMOPOLITAN (Oct. 15, 2015), <http://www.cosmopolitan.com/politics/news/a47780/abolish-tampon-tax-america> [<https://perma.cc/E2G4-8WZ7>] (comparing tax exemptions in various states); Linda Qiu, *Are Pads and Tampons Taxed but Viagra and Rogaine Not?*, PUNDITFACT (Jan. 22, 2017, 3:51 PM), <http://www.politifact.com/punditfact/statements/2017/jan/22/ashley-judd/are-pads-and-tampons-taxed-viagra-and-rogaine-not> [<https://perma.cc/8FXE-RW7U>] (discussing Ashley Judd’s comments about taxation of Rogaine and Viagra versus taxation of menstrual hygiene products). The tampon tax imposes a financial burden, which can run up to \$900 over a woman’s lifetime assuming a sales tax rate of 5%, uniquely on women. See *infra* notes 167–74 and accompanying text. That amount does not include the price women have to pay for the menstrual hygiene products themselves, meaning that many women cannot afford these products at all. See *infra* notes 185–87 and accompanying text. As a result, these women may miss school or work. *Id.*

<sup>11</sup> See, e.g., Weiss-Wolf & Cosmopolitan Magazine, *supra* note 4 (discussing global movements to eliminate national taxes on menstrual products).

<sup>12</sup> Vince Chadwick, *UK Targets EU ‘Tampon Tax’*, POLITICO (published Oct. 28, 2015, 10:52 AM; updated Oct. 28, 2015, 6:22 PM), <http://www.politico.eu/article/tampon-tax-eu-news-uk-mp-tory-labour> [<https://perma.cc/2FTH-NBLC>].

<sup>13</sup> *Deal Reached to Scrap ‘Tampon Tax’, Officials Say*, BBC NEWS (Mar. 17, 2016), <http://www.bbc.com/news/uk-politics-35834142> [<https://perma.cc/S6Y6-PYB4>].

against such proposals.<sup>14</sup> Thus, EU countries continue to impose taxes on tampons ranging from five percent to over twenty percent,<sup>15</sup> as the UK continues to press for reform by tacking tampons onto a pending EU proposal to lower VAT rates on e-books and digital publications.<sup>16</sup>

There has been some progress in the United States toward the repeal of the tampon tax. Reform has mostly happened at the state and local level because sales taxes are imposed either by states at the state level or by municipalities. Since 2016, New York,<sup>17</sup> Illinois,<sup>18</sup> Connecticut,<sup>19</sup> and Florida<sup>20</sup> have passed legislation to provide sales tax exemptions for tampon purchases. Cities like Chicago<sup>21</sup> and Washington, D.C.<sup>22</sup> have also done the

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<sup>14</sup> *Anger as EU Rejects Tampon Tax Reduction*, GAZETTE (BLACKPOOL) (May 28, 2016, 7:00 AM), <https://www.blackpoolgazette.co.uk/news/anger-as-eu-rejects-tampon-tax-reduction-1-7935982> [<https://perma.cc/G2UW-VF4M>].

<sup>15</sup> *Value-Added Tax in Europe: Freedom Fighters*, *supra* note 3.

<sup>16</sup> Joe Kirwin, *EU VAT E-Book Plan Snagged Over U.K. Sanitary Product Demands*, BLOOMBERG NEWS (Feb. 13, 2017), <https://www.bna.com/eu-vat-ebook-n57982083673> [<https://perma.cc/3GN6-N8TJ>].

<sup>17</sup> *Governor Cuomo Signs Legislation to Exempt Sales and Use Taxes on Feminine Hygiene Products*, N.Y. STATE (July 21, 2016), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-exempt-sales-and-use-taxes-feminine-hygiene-products> [<https://perma.cc/A837-Z6LW>]; *see* N.Y. TAX LAW § 1115(a)(3-a) (McKinney 2017) (“Receipts from the following shall be exempt from the tax on retail sales: . . . [f]eminine hygiene products, including, but not limited to, sanitary napkins, tampons and panty liners.”).

<sup>18</sup> Natalie Wickman, *State’s ‘Tampon Tax’ Going Away Sunday*, NEWS-GAZETTE (Dec. 29, 2016, 8:00 AM), <http://www.news-gazette.com/news/local/2016-12-29/states-tampon-tax-going-away-sunday.html> [<https://perma.cc/Z3F3-3KS7>]; *see* 35 ILL. COMP. STAT. 105/3-5(37) (2018) (“Use of the following tangible personal property is exempt from the tax imposed by this Act: . . . menstrual pads, tampons, and menstrual cups.”).

<sup>19</sup> Rachel Treisman, *State Pushes to Eliminate Tampon Tax*, YALE DAILY NEWS (Mar. 3, 2016, 2:59 AM), <http://yaledailynews.com/blog/2016/03/03/state-pushes-to-eliminate-tampon-tax> [<https://perma.cc/D24A-W5YB>]; *see* CONN. GEN. STAT. ANN. § 12-412(122) (West 2018) (“Taxes imposed by this chapter shall not apply to the gross receipts from . . . [s]ales of feminine hygiene products.”).

<sup>20</sup> Catherine Pearson, *Florida Just Became the Latest State to Abolish the ‘Tampon Tax,’* HUFFINGTON POST (May 26, 2017, 11:14 AM), [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/AQ46-CXAF>]; *see* FLA. STAT. § 212.08(7)(nnn) (2018).

<sup>21</sup> Celeste Bott, *Lawmakers Vote to Eliminate Tampon Tax, Expand Contraceptive Options*, CHI. TRIB. (Apr. 21, 2016, 6:28 PM), <http://www.chicagotribune.com/news/local/politics/ct-illinois-legislature-tampon-tax-met-0421-20160421-story.html> [<https://perma.cc/TN9G-BZFC>]; *see* CHI., ILL., MUN. CODE § 3-40-010(b)(ii) (2018) (“The tax imposed by this section shall not be applicable to or imposed upon sales of the following items: . . . medical appliances including, but not limited to, tampons and sanitary napkins, and insulin, urine testing materials, syringes and needles used by diabetics.”).

<sup>22</sup> Fenit Nirappil, *D.C. to Lift Sales Tax on Diapers, Tampons*, WASH. 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](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) [<https://perma.cc/F244-PSD6>]; *see also* Feminine Hygiene and Diaper Sales Tax Exemption Amendment Act of 2016, 2016 D.C. Laws 21-201 (Act 21-557) (feminine hygiene and diaper sales tax exemptions). The exemption has not yet gone into effect due to problems with funding. *See* D.C. CODE § 47-2005(38) (2018).

same, and New York City went even further by funding the provision of menstrual hygiene products in homeless shelters and public schools.<sup>23</sup> At least thirteen states considered repeal of taxes on feminine hygiene products in 2016.<sup>24</sup> The issue has only grown in prominence since then; in 2017, New York Congresswoman Grace Meng introduced the Menstrual Equity for All Act of 2017, which would, among other things, provide a refundable tax credit to low-income women and require prisons and large employers to provide feminine hygiene products.<sup>25</sup> As of August 2018, the bill is in several committees.<sup>26</sup>

At the same time, the calls for reform have also prompted some criticism and backlash. Some commentators have pointed out that the tampon tax “is [a] sales tax that, in most states, applies to tampons,” rather than “an obvious and pressing instance of discrimination.”<sup>27</sup> Others note that state sales tax laws are complicated, and although they exempt some

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<sup>23</sup> Christina Cauterucci, *New York City Council Approves Free Tampons and Pads in Schools, Prisons, and Shelters*, SLATE (June 22, 2016, 5:50 PM), [http://www.slate.com/blogs/xx\\_factor/2016/06/22/new\\_york\\_city\\_council\\_votes\\_to\\_give\\_free\\_tampons\\_and\\_pads\\_to\\_women\\_in\\_schools.html](http://www.slate.com/blogs/xx_factor/2016/06/22/new_york_city_council_votes_to_give_free_tampons_and_pads_to_women_in_schools.html) [<https://perma.cc/M59C-KVSC>]; see N.Y.C., N.Y., ADMIN. CODE § 9-141 (2017) (“All female individuals arrested and detained in the custody of the department for at least 48 hours shall be provided, at the department’s expense, with feminine hygiene products as soon as practicable upon request.”); *id.* § 12-207(b) (“The department of citywide administrative services shall make available to agencies operating or having oversight of providers operating temporary shelters a supply of feminine hygiene products sufficient to meet the needs of residents. The department shall also make available a supply of feminine hygiene products sufficient to meet the needs of youth in secure detention facilities operated by the administration for children’s services, as well as youth in congregate care facilities operated by the administration for children’s services who are awaiting placement with a licensed foster care agency.”); *id.* § 21-968(b) (“The department shall make feminine hygiene products available at no cost to students in bathrooms of school buildings.”).

<sup>24</sup> Nicole Kaeding, *Tampon Taxes: Do Feminine Hygiene Products Deserve a Sales Tax Exemption?*, 547 TAX FOUND. FISCAL FACT, Apr. 2017, at 1, 5 n.10, <https://files.taxfoundation.org/20170425105103/Tax-Foundation-FF547.pdf> [<https://perma.cc/2JM8-RQFB>] (California, Connecticut, Illinois, Michigan, Mississippi, Missouri, New York, Rhode Island, Tennessee, Utah, Virginia, Washington, and Wisconsin).

<sup>25</sup> Press Release, Grace Meng, U.S. Rep., Meng Renews Effort to Make Menstrual Hygiene Products More Accessible and Affordable to Women (Feb. 13, 2017), <https://meng.house.gov/media-center/press-releases/meng-renews-effort-to-make-menstrual-hygiene-products-more-accessible> [<https://perma.cc/MQ9V-M3RP>].

<sup>26</sup> *All Actions: H.R. 972 — 115th Congress (2017–2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/972/all-actions> [<https://perma.cc/6CYN-8NKQ>]. This bill combines bills that Congresswoman Meng introduced in 2015 and 2016. See, e.g., Menstrual Products Tax Credit Act of 2016, H.R. 5917, 114th Cong. (2016); Menstrual Products for Employees Act of 2016, H.R. 5915, 114th Cong. (2016); Fund Essential Menstruation Products Act of 2015, H.R. 3117, 114th Cong. (2015).

<sup>27</sup> See, e.g., Samantha Allen, *The ‘Tampon Tax’ Outrage Is Overblown*, DAILY BEAST (Oct. 22, 2015, 1:00 AM), <http://www.thedailybeast.com/articles/2015/10/22/the-tampon-tax-outrage-is-overblown.html> [<https://perma.cc/G2HE-6JFF>].

necessities, “[t]here is no hard and fast rule.”<sup>28</sup> One *Washington Post* opinion-editorial calls the tampon tax movement a “fraud,” and argues that tax rates on other products would have to be raised in order to cover the lost tax revenue.<sup>29</sup>

Regardless of these criticisms, this Note argues that a tax on menstrual hygiene products is facially discriminatory against women and thus must be repealed, despite traditional tax design concerns.<sup>30</sup> Repeal, however, is only half the battle. As a method of redistribution, the tax system can—and, depending on our philosophical convictions of what a just society means, *should*—be used to remedy sex inequality.<sup>31</sup> Providing a women’s health credit to all women of menstruating age is one step toward equalizing relative levels of welfare between men and women and will end menstrual inequity.<sup>32</sup>

Although the tampon tax movement has gained attention worldwide, the scope of this Note will be confined to United States-centric reform. Accordingly, Part I offers a gloss on the sales tax system in the United States. It also canvasses legislative and legal responses to the tampon tax movement, providing more in-depth information on the state repeals and the Menstrual Equity for All Act of 2017. Part II then responds to common arguments against ending the tampon tax, and shows that because the tampon tax constitutes gender discrimination and violates traditional principles of tax equity, it cannot be justified. Building on this theoretical argument, Part III assesses the various actions already taken or currently being considered in response to the tampon tax and proposes that repeal combined with a women’s health tax credit is the best solution. In so doing, this Note differentiates itself from existing scholarship on the tampon tax, which is

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<sup>28</sup> See, e.g., Brooke Rogers, *No, the Government Isn’t Taxing Your Period*, NAT’L REV. (Apr. 15, 2016, 2:12 PM), <http://www.nationalreview.com/article/434103/tampon-tax-feminist-issue-du-jour> [<https://perma.cc/FHP9-Q24V>].

<sup>29</sup> Catherine Rampell, *The ‘Tampon Tax’ Fraud*, WASH. POST (Jan. 25, 2016), [https://www.washingtonpost.com/opinions/the-tampon-tax-fraud/2016/01/25/fb9c7e68-c3a8-11e5-8965-0607e0e265ce\\_story.html](https://www.washingtonpost.com/opinions/the-tampon-tax-fraud/2016/01/25/fb9c7e68-c3a8-11e5-8965-0607e0e265ce_story.html) [<https://perma.cc/T3ZH-MLXV>].

<sup>30</sup> See *infra* Section II.B.

<sup>31</sup> See *infra* notes 261–62 and accompanying text.

<sup>32</sup> One easily identifiable example of a different level of welfare between men and women is the gender pay gap. As of 2017, women ages 25 to 34 earned only eighty-nine cents for every dollar men earned; the gap was larger for workers ages 16 and older. See Nikki Graf, Anna Brown & Eileen Patten, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RES. CTR. (Apr. 9, 2018), <http://www.pewresearch.org/fact-tank/2018/04/09/gender-pay-gap-facts> [<https://perma.cc/GX7A-6TXN>]. While the gap likely has various causes, gender discrimination could be a contributing factor. If so, the tax system could be a useful method to remedy this structural gender inequity. See *infra* notes 255–64 and accompanying text for a more detailed discussion of this topic.

largely focused on repeal.<sup>33</sup> This Note is the first to evaluate tampon taxes from a tax policy perspective and to suggest a solution consistent with sound taxation principles.

#### I. BACKGROUND AND RESPONSES TO THE TAMPON TAX

The outcry over the tampon tax has prompted varied responses. The primary response has been to seek to repeal the tax, which in effect means creating an exemption for menstrual hygiene products from the broader sales tax, although such attempts are not always successful. However, there have been some notable exceptions: the free tampons program in New York City and the Menstrual Equity for All Act of 2017. Prior to evaluating these responses, Section A first explains the concepts of a sales tax and exemptions from the tax base. Section B proceeds by evaluating the various legislative responses to tampon taxes in other jurisdictions, and Section C looks to judicial responses, such as a notable Illinois case regarding the tampon tax that was litigated in the 1980s. Overall, repeal, rather than judicial action, appears to be the dominant solution proposed by most activists, which raises tensions with tax design and policy that will be discussed more fully in Part II.

##### A. *How a Sales Tax Works*

A retail sales tax is one form of a consumption tax.<sup>34</sup> Under the retail sales tax, businesses remit tax on all sales of goods and services to consumers but not on sales of input goods and services to other businesses.<sup>35</sup> A consumption tax, in turn, means that the tax base—i.e., what is taxed—is consumption, or the use of goods and services.<sup>36</sup> Thus, the tampon tax simply means that the use of tampons is being taxed.

In the United States, sales taxes are imposed on both the state and local levels.<sup>37</sup> Currently, there is no national sales tax, although proposals to shift the federal tax base from income to consumption have periodically been

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<sup>33</sup> See Crawford & Spivack, *Tampon Taxes, Discrimination, and Human Rights*, *supra* note 5, at 546 (identifying repeal as a clear legal remedy); Hartman, *supra* note 5, at 326–38 (focusing on legislative and court-based efforts).

<sup>34</sup> In European countries, where the tampon tax has attracted a lot of attention, a sales tax is administered in the functionally similar form of a value-added tax. See *supra* note 3 and accompanying text for an explanation of the VAT.

<sup>35</sup> SLEMROD & BAKIJA, *supra* note 3, at 232. Input goods and services are those that are used or transformed in the production process. See *id.* at 196.

<sup>36</sup> *Id.* at 195.

<sup>37</sup> Walczak & Drenkard, *supra* note 9, at 1.



made.<sup>38</sup> As of 2017, a state sales tax is collected in forty-five states and the District of Columbia.<sup>39</sup> Alaska, Delaware, Montana, New Hampshire, and Oregon are the outliers—these states do not collect a sales tax on the state level.<sup>40</sup> State sales taxes range from a high of 7.25% in California to a low of 2.9% in Colorado.<sup>41</sup> In addition to the state sales tax, local sales taxes are also imposed in areas of thirty-eight states.<sup>42</sup>

Sales taxes are, despite their appearances, generally regressive. A pure consumption tax taxes “everyone a fixed amount on the consumption dollar.”<sup>43</sup> Because of this identical treatment, sales taxes appear fair. Sales taxes, however, actually have regressive distributional consequences. Regressivity means that “the share of income paid in taxes falls with income.”<sup>44</sup> Because high-income individuals are able to save higher proportions of their income, low-income individuals will almost always pay a larger portion of their income in sales taxes than do higher-income individuals. Because lower-income individuals bear a larger proportional burden of the tax, a sales tax is regressive.

That being said, it is true that “a consumption tax could have any degree of progressivity whatever” if the tax is designed to include an exemption for essentials or a cash transfer to people below a certain income.<sup>45</sup> Perhaps because of the disproportionate impact of the sales tax on low-income people,<sup>46</sup> most states exempt certain “necessary”—as opposed to “luxury”—items, such as food and prescription medication, from the sales tax base.<sup>47</sup> As one court put it, a Pennsylvania tax law exempting the purchase of food and beverages from grocery stores, but not from restaurants or cafes, “demonstrates a definite mandate to exclude the purchase of life’s necessities from the assessment of sales tax.”<sup>48</sup> The same court noted that sales taxes are imposed on purchases of prepared or packaged food and beverages because

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<sup>38</sup> *E.g.*, William G. Gale, *The National Retail Sales Tax: What Would the Rate Have to Be?*, 107 TAX NOTES 889 (2005) (discussing a Bush-era legislative proposal to impose a national retail sales tax).

<sup>39</sup> Walczak & Drenkard, *supra* note 9, at 1.

<sup>40</sup> *Id.* at 2.

<sup>41</sup> *Id.* at 3.

<sup>42</sup> *Id.* at 1.

<sup>43</sup> LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 100 (2002).

<sup>44</sup> Thomas Piketty & Emmanuel Saez, *How Progressive Is the U.S. Federal Tax System? A Historical and International Perspective*, 21 J. ECON. PERSP. 3, 4 (2007).

<sup>45</sup> MURPHY & NAGEL, *supra* note 43, at 96.

<sup>46</sup> JANE GRAVELLE, CONG. RESEARCH SERV., HJ5700, *GENERAL SALES TAX RATES, FOOD EXEMPTIONS AND SALES TAX CREDITS, WITH A PRO AND CON ANALYSIS* 5 (1972).

<sup>47</sup> *See, e.g.*, Jay M. Zitter, Annotation, *Sales and Use Tax Exemption for Medical Supplies*, 30 A.L.R.5th 494 (1995) (collecting exemptions from the sales tax for medical supplies).

<sup>48</sup> *CRH Catering Co. v. Commonwealth*, 521 A.2d 497, 500 (Pa. Commw. Ct. 1987).

those are “a luxury.”<sup>49</sup> Some scholars, however, have also suggested that sales taxes (and exemptions) in the United States are “seemingly impose[d] . . . wherever political expediency dictates.”<sup>50</sup>

Exemptions from the tax base raise various issues of tax design. Exemptions create issues of interpretation—as Professors Joel Slemrod and Jon Bakija put it, “[w]henver some commodities are exempt from tax, where the line is drawn is important.”<sup>51</sup> Moreover, exemptions narrow the tax base and result in lost revenues.<sup>52</sup> And exemptions muddy the tax base by creating distortions and raising costs overall.<sup>53</sup> Specifically, exemptions create an incentive to consume more of the untaxed goods and less of other taxed goods, even when it might be more efficient for one to consume the taxed goods.<sup>54</sup> That inefficiency represents an additional cost. These problems will be more extensively explored in Part II. Despite these inefficiencies, as the rest of this Part shows, most responses to the tampon tax movement have been confined to one action: repeal.

### B. Legislative Responses

As the feminist movement to repeal the tampon tax has risen in prominence in recent years, legislators in some states have responded in kind by repealing the tampon tax and, in some cases, going further to provide free menstrual hygiene products or propose alternative ways to help women pay for such products. This Section collects the various actions lawmakers have taken in relation to the tampon tax, most of which are focused on repealing the tampon tax.

Of the states that impose a statewide sales tax, five states already “repealed their sales tax on” tampons and similar feminine hygiene products before 2016: Maryland, Massachusetts, Pennsylvania, Minnesota, and New Jersey.<sup>55</sup> Thus, it cannot be said that the recent movement to end the tampon tax<sup>56</sup> has spurred the exemption in those states. As noted above, however, some states, including New York, Illinois, and Connecticut, have passed legislation to exempt tampons from sales taxes.<sup>57</sup> And other states are taking

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

<sup>50</sup> See, e.g., Crawford & Spivack, *Tampon Taxes, Discrimination, and Human Rights*, *supra* note 5, at 500.

<sup>51</sup> SLEMROD & BAKIJA, *supra* note 3, at 246. That is, legislatures must determine which products or services fit into a particular exemption.

<sup>52</sup> See *supra* note 29 and accompanying text.

<sup>53</sup> MURPHY & NAGEL, *supra* note 43, at 125.

<sup>54</sup> SLEMROD & BAKIJA, *supra* note 3, at 218.

<sup>55</sup> Crawford & Spivack, *Tampon Taxes, Discrimination, and Human Rights*, *supra* note 5, at 535.

<sup>56</sup> See *supra* Introduction for a discussion of the recent campaigns against the tampon tax.

<sup>57</sup> See *supra* notes 17–24 and accompanying text.

heed of the wave of viral legislation: Colorado,<sup>58</sup> Texas,<sup>59</sup> and Wisconsin,<sup>60</sup> among others,<sup>61</sup> are considering or have considered an end to the tax on tampons. The feminist movement appears to be impactful in spurring legislative change, at least in the form of a repeal.

The campaign to repeal the tampon tax is very much a grassroots movement that has garnered support from both sides of the aisle. Illinois is a good example of how a municipality and state approached the tampon tax issue. The City of Chicago led the charge by abolishing the tampon tax in March 2016.<sup>62</sup> State lawmakers quickly followed suit; in August 2016, when Republican Governor Bruce Rauner signed the repeal bill into law, Illinois became the third state that year to repeal the tampon tax.<sup>63</sup> In a statement during deliberations that harkens back to the rhetoric of necessity that guides exemptions from the sales tax base,<sup>64</sup> Democratic State Senator Melinda

<sup>58</sup> See Blair Miller & Jaclyn Allen, *Colorado Bill That Would Exempt State from 'Tampon Tax' Passes First Committee*, DENVER CHANNEL (published Feb. 13, 2017, 5:37 PM; updated Feb. 13, 2017, 10:37 PM), <http://www.thedenverchannel.com/news/politics/colorado-bill-that-would-exempt-state-from-tampon-tax-passes-first-committee> [https://perma.cc/WL9K-AJKA].

<sup>59</sup> See Madlin Mekelburg, *Texas Lawmakers Want to Help Women by Removing the Tampon Tax, 'Period.'* DALL. MORNING NEWS (Dec. 26, 2016), <https://www.dallasnews.com/news/texas-legislature/2016/12/26/texas-lawmakers-want-help-women-removing-tampon-tax-period> [https://perma.cc/GQH9-74SC]. Unfortunately, the bills remained stuck in committee and were not heard during the 2017 legislative session. Jackie Wang, *Bills Exempting Tampons from Texas Sales Tax Went Nowhere This Session*, TEX. TRIB. (May 24, 2017, 12:00 AM), <https://www.texastribune.org/2017/05/24/tampon-tax-bills-stalled-due-legislators-reluctance-lose-tax-revenue> [https://perma.cc/RVJ2-CZLG].

<sup>60</sup> Meg Jones, *Wisconsin Legislator Aims to Get Rid of State's 'Tampon Tax.'* MILWAUKEE J. SENTINEL (published Mar. 25, 2017, 3:42 PM; updated Mar. 25, 2017, 9:48 PM), <http://www.jsonline.com/story/news/politics/2017/03/25/wisconsin-legislator-aims-get-rid-states-tampon-tax/99222076> [https://perma.cc/A9MG-8QZ7].

<sup>61</sup> After the governor of California, Jerry Brown, vetoed a bill repealing the tampon tax, Assemblywoman Christina Garcia reintroduced the bill. State Assemb. 9, 2017–2018 Gen. Assemb., Reg. Sess. (Cal. 2017). However, the fiscal committee of the California legislature delayed the bill until 2018. John Myers, *The Effort to Make Tampons Tax Free in California Has Been Delayed Until 2018*, L.A. TIMES (May 26, 2017, 12:58 PM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-the-effort-to-make-tampons-tax-free-in-1495827774-htmistory.html> [https://perma.cc/MCE4-DH6P]. In 2018, the reinvigorated bill died in committee. Liam Dillon, *Effort to Make Tampons Tax-free in California Fails Again*, L.A. TIMES (Jan. 18, 2018, 12:23 PM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-tampon-tax-exemption-fails-1516307419-htmistory.html> [https://perma.cc/EA84-GAJ3]. Interestingly, Nevada legislators punted the issue to voters, putting a measure on the November 2018 ballot that will ask Nevadans whether the tax should be repealed. Ramona Giwargis, *5 Measures Will Be on 2018 Ballot in Nevada*, LAS VEGAS REV.-J. (Jan. 18, 2018, 7:11 PM), <https://www.reviewjournal.com/news/politics-and-government/nevada/5-measures-will-be-on-2018-ballot-in-nevada> [https://perma.cc/YX77-95G6].

<sup>62</sup> Bott, *supra* note 21.

<sup>63</sup> *Illinois Becomes Third State to Eliminate 'Tampon Tax.'* N.Y. DAILY NEWS (Aug. 19, 2016, 6:52 PM), <http://www.nydailynews.com/life-style/illinois-state-eliminate-tampon-tax-article-1.2758527> [https://perma.cc/YU2J-4HX8]; see also 35 ILL. COMP. STAT. 105/3-5(37) (2018).

<sup>64</sup> See *supra* notes 47–49 and accompanying text for a discussion of sales tax exemptions.

Bush, who sponsored the bill in the Illinois Senate, noted that menstrual hygiene products are “taxed as luxury items, but all women know that periods are not a luxury[.]”<sup>65</sup> According to State Senator Bush, the tampon tax “unfairly targets women for a product they are literally biologically incapable of avoiding.”<sup>66</sup>

The reform does not come cheap—the Illinois Committee on Government Forecasting and Accountability estimates that Illinois residents spend \$14.7 million on menstrual hygiene products annually,<sup>67</sup> translating to about \$1 million in lost tax dollars at the state tax rate of 6.25%.<sup>68</sup> But this number has to be considered in the larger context of the Illinois sales tax system, which is expected to rake in nearly \$8.2 billion in 2017.<sup>69</sup> The lost revenue from abolishing the tampon tax seems like a drop in the bucket when compared to such an astronomical number (less than 0.02% !); this may also explain why both local and state authorities have moved so quickly to change the law in Illinois. There is little lost, and the repeal could be framed as a low-cost, easy, bipartisan win. Thus, it will not be surprising if similar efforts sweep the nation in the coming months, assuming there is sufficient political will from state legislators to resist the objections of fiscal conservatives and to take a pro-feminist stance. Of course, as demonstrated by failed attempts to repeal the tax in several states,<sup>70</sup> the political will may not be easy to muster.

Indeed, it is probably because of the simplicity and clarity of the solution that the tampon tax movement has attracted so much attention. As Professors Crawford and Spivack point out, “To the ordinary consumer, the solution . . . is straightforward: repeal it.”<sup>71</sup> But is it ever so simple? Crawford and Spivack argue it is not; according to them, the tampon tax is “only a smaller (and mostly Westernized) part of a larger problem of menstrual hygiene.”<sup>72</sup> And they are right; in many parts of the world, young girls and women do not have access to clean water or sanitation for their

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<sup>65</sup> Press Release, Melinda Bush, Ill. State Senator, Periods Are Not a Luxury: End the Unfair Tax on Tampons (Mar. 10, 2016, 9:01 AM), <http://www.senatormelindabush.com/news/17-press-releases/171-end-the-tampon-tax-periods-are-not-a-luxury> [<https://perma.cc/7NSK-VCMY>].

<sup>66</sup> *Id.*

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

<sup>68</sup> 35 ILL. COMP. STAT. 105/3-10 (2018) (imposing a rate of “6.25% of either the selling price or the fair market value”).

<sup>69</sup> BRUCE RAUNER, GOVERNOR, ILLINOIS STATE BUDGET: FISCAL YEAR 2018, at 131 (2017), <https://www.illinois.gov/gov/budget/Documents/Budget%20Book/FY2018%20Budget%20Book/FY2018OperatingBudgetBook.pdf> [<https://perma.cc/V5H9-FPWK>].

<sup>70</sup> See *infra* notes 131–33 and accompanying text.

<sup>71</sup> Crawford & Spivack, *Tampon Taxes, Discrimination, and Human Rights*, *supra* note 5, at 546.

<sup>72</sup> *Id.* at 547.

menstrual needs, let alone commercial products like tampons or sanitary napkins.<sup>73</sup> Although my claim takes a more U.S.-centric perspective, it is essentially similar: repeal is only half of the solution, and more needs to be done to remedy gender inequities brought on by menstruation. The tax system is the best redistributive tool for this goal and should be used to provide a demogrant<sup>74</sup> to all women of menstruating age as a way of reducing the financial burdens of menstruation.

Although repeal has been the dominant form of change, there are some notable exceptions. First, the New York City Council appears to have taken the campaign slogan “Free the Tampons”<sup>75</sup> quite literally. The Council recently passed a legislative package providing free tampons and sanitary napkins in public schools and homeless shelters,<sup>76</sup> making New York City “the first city in the nation to proactively guarantee access to menstrual hygiene products.”<sup>77</sup> The law also requires jails to provide such products “as soon as practicable” upon request.<sup>78</sup> The New York City approach is significant because it goes further than repealing the tampon tax at the local level by providing free tampons and sanitary napkins and is thus an example of how repeal might be coupled with other reforms.<sup>79</sup> It also raises an

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<sup>73</sup> *Id.*

<sup>74</sup> A demogrant is a cash transfer given out to individuals who meet specified criteria. See Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CALIF. L. REV. 1905, 1908 (1987).

<sup>75</sup> See *About, FREE THE TAMPONS*, <http://www.freethetampons.org/about.html> [<https://perma.cc/KU69-L6ZJ>] (foundation advocating for the provision of free tampons in every bathroom).

<sup>76</sup> *Provision of Feminine Hygiene Products in Schools*, N.Y. CITY COUNCIL (July 13, 2016), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2637114&GUID=834E4DFC-7F14-4E1E-812F-2CD862A4FC1D&Options=ID%7cText%7c&Search=feminine+hygiene> [<https://perma.cc/Q6UF-GZZY>].

<sup>77</sup> Sarah Ruiz-Grossman, *NYC Mayor Signs Free Tampons for Schools, Jails, Shelters into Law*, HUFFINGTON POST (July 14, 2016, 3:29 PM), [http://www.huffingtonpost.com/entry/new-york-city-mayor-bill-de-blasio-signs-tampons-free-law\\_us\\_5787bc57e4b08608d3336b27](http://www.huffingtonpost.com/entry/new-york-city-mayor-bill-de-blasio-signs-tampons-free-law_us_5787bc57e4b08608d3336b27) [<https://perma.cc/24ET-935M>].

<sup>78</sup> *Requiring that the DOC Issue Feminine Hygiene Products to Inmates*, N.Y. CITY COUNCIL (July 13, 2016), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2637117&GUID=4D97B9EE-4986-4B87-B846-2E52A329695A&Options=ID|Text|&Search=feminine+hygiene> [<https://perma.cc/E75H-76GW>]. It is unclear what “as soon as practicable” means in practice. Conditions in prisons are woefully undignified for women, with documented instances of access to tampons being removed as punishment. See *Complaint at 1, Semelbauer v. Muskegon Cty.*, 2015 WL 9906265 (W.D. Mich. Sept. 11, 2015) (No. 1:14-CV-1245) (alleging prison did not provide adequate menstrual hygiene products). It remains to be seen how effective this law will be in protecting prisoners’ rights.

<sup>79</sup> Even at the White House, tampons have not been easily accessible, at least until recently. Alyssa Mastromonaco, a senior female staffer during the Obama Administration, had to request a tampon dispenser in the women’s bathroom in the West Wing. Tierney McAfee, *How the White House Got Its First Tampon Machine and Other Tales from an Obama West Wing Insider*, PEOPLE (Mar. 15, 2017, 6:50 PM), <http://people.com/politics/obama-staffer-alyssa-mastromonaco-new-book-white-house>

interesting question about how broader reform might be implemented. The text of the bills refer to “female” students,<sup>80</sup> inmates, and arrestees,<sup>81</sup> while a press release from Mayor Bill de Blasio’s office suggests that transgender, intersex, and gender nonconforming residents of city shelters and Children’s Services facilities will also benefit from free access.<sup>82</sup> The dissonance implicates a question of tax design, to be explored in Part III, regarding which groups should benefit from a particular tax reform.

A second exception to a straightforward repeal approach is Congresswoman Grace Meng’s Menstrual Equity for All Act of 2017. Like its New York City counterpart, this bill, H.R. 972, would condition the receipt of federal funds by states on the provision of menstrual hygiene products to female inmates.<sup>83</sup> It would also make menstrual hygiene products, including tampons, pads, liners, and cups, qualified medical expenses that can be paid for with funds from a health savings account (HSA).<sup>84</sup> Unfortunately, not everyone has an HSA,<sup>85</sup> as only individuals with high-deductible health plans are eligible.<sup>86</sup> There is also no requirement that

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[<https://perma.cc/86W8-GCT5>]. Barring cost concerns associated with the administrative complexities of supplying menstruation products to the masses, the problem of access can be as simple as providing a tampon dispenser. See *infra* notes 213–16 and accompanying text for further discussion of these complexities. To be clear, any of the proposed solutions—including the menstrual health credit—would have administrative costs. The tax credit, however, would have fewer such costs because it utilizes the pre-existing tax framework. See *infra* text accompanying note 242.

<sup>80</sup> N.Y. CITY COUNCIL, *supra* note 76.

<sup>81</sup> N.Y. CITY COUNCIL, *supra* note 78.

<sup>82</sup> *Mayor de Blasio Signs Legislation Increasing Access to Feminine Hygiene Products for Students, Shelter Residents and Inmates*, CITY OF N.Y. (July 13, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/611-16/mayor-de-blasio-signs-legislation-increasing-access-feminine-hygiene-products-students> [<https://perma.cc/S5G4-5X79>] [hereinafter *de Blasio Press Release*].

<sup>83</sup> Menstrual Equity for All Act of 2017, H.R. 972, 115th Cong. (2017).

<sup>84</sup> *Id.* An HSA is a tax-advantaged account owned by an eligible individual. Robin Fisk, *Patient Financial Responsibility Under High Deductible Health Plans: What Providers Can & Can’t Do If the Patient Can’t Pay*, 18 HEALTH LAW. 16, 16 (2006). Pre-tax contributions to the HSA grow tax-free and are also exempt from tax when spent on “qualified medical expenses.” *Id.* Thus, the HSA has three unique tax advantages—contributions, growth, and withdrawal are all tax-free. See *id.* Representative Meng sponsored a similar provision in H.R. 6199, which recently passed the House. See Restoring Access to Medication and Modernizing Health Savings Accounts Act of 2018, H.R. 6199, 115th Cong. (2018); see also Nicole Gaudiano, “Menstrual Equality”: House Passes Measure Allowing Women to Buy Tampons, Pads with Health Spending Accounts, USA TODAY (July 27, 2018), <https://www.usatoday.com/story/news/politics/2018/07/27/house-oks-menstrual-equality-measure-help-women-buy-tampons-pads/849074002> [<https://perma.cc/RX82-LK9K>].

<sup>85</sup> A survey of fifty-nine health insurance plans reports that 20.2 million people enrolled in health savings account/high-deductible health plans. AMERICA’S HEALTH INSURANCE PLANS, 2016 SURVEY OF HEALTH SAVINGS ACCOUNT – HIGH DEDUCTIBLE HEALTH PLANS 2 (2017), [https://www.ahip.org/wp-content/uploads/2017/02/2016\\_HSASurvey\\_Draft\\_2.14.17.pdf](https://www.ahip.org/wp-content/uploads/2017/02/2016_HSASurvey_Draft_2.14.17.pdf) [<https://perma.cc/S9WA-TDFD>].

<sup>86</sup> Fisk, *supra* note 84, at 16.

eligible individuals have an HSA.<sup>87</sup> This provision of the bill will therefore benefit only the small subsection of the population that has HSAs.

A more impactful provision of H.R. 972 would provide a \$120 refundable tax credit for low-income users of menstrual hygiene products.<sup>88</sup> Past a certain income threshold, the amount of the credit would be zero; in other words, the tax credit phases out for high-income users.<sup>89</sup> This means that taxpayers with no tax liability would receive a lump sum payment—hence the term “refundable”—akin to a negative income tax.<sup>90</sup> Representative Meng’s proposed credit is different from other current refundable credits in that it is not designed to induce or change certain behavior. For example, the Earned Income Tax Credit (EITC),<sup>91</sup> which is a fully refundable credit for low-income families and individuals, is meant to “increase work participation among low-income households by reducing the work disincentives created by means-tested transfer programs.”<sup>92</sup> This is because the credit is “conditioned on working.”<sup>93</sup> In contrast, the menstrual hygiene tax credit does not have any behavioral incentives; it is a redistributive program more focused on equity than changing behavior. Indeed, as Representative Meng asks, “Most Americans—across all income levels—believe that feminine hygiene products are basic necessities. So why is it still so hard to afford and access them?”<sup>94</sup>

One commentator has argued that “[a] woman’s reproductive health and access to Reproductive Justice, in addition to her economic stability, cannot and should not depend on the state in which she lives.”<sup>95</sup> In her Note, Abigail Durkin correctly points out that the economic burden on women remains even if tampon taxes were repealed.<sup>96</sup> Accordingly, Durkin suggests that the

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

<sup>88</sup> Menstrual Equity for All Act of 2017, H.R. 972, 115th Cong. § 3(a) (2017) (“There shall be allowed as a credit against the tax imposed by this subtitle with respect to each eligible individual for whom the taxpayer is allowed a deduction under section 151 an amount equal to \$120.”). The \$120 credit is subject to inflation and cost-of-living adjustments. *Id.*

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

<sup>90</sup> See Lily L. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 32 (2006) (likening refundable credits to negative income taxes).

<sup>91</sup> I.R.C. § 32 (2012).

<sup>92</sup> Batchelder, Goldberg & Orszag, *supra* note 90, at 35.

<sup>93</sup> *Id.* at 34.

<sup>94</sup> Grace Meng, *Our Laws Period-Shame Women—So I’m Going to Change Them*, MARIE CLAIRE (Feb. 17, 2017), <http://www.marieclaire.com/politics/news/a25464/congresswoman-grace-meng-menstrual-equity-bill> [https://perma.cc/Q6BZ-NNJX].

<sup>95</sup> Abigail Durkin, Note, *Profitable Menstruation: How the Cost of Feminine Hygiene Products Is a Battle Against Reproductive Justice*, 18 GEO. J. GENDER & L. 131, 135–36 (2017).

<sup>96</sup> *Id.* at 135 (“[E]ven if the tax were removed, an economic burden still remains, as one must still purchase the products at their regular cost.”).

federal government preempt states by passing “legislation forbidding states to tax feminine hygiene products.”<sup>97</sup> Durkin further calls for feminine hygiene products to be included under the Supplemental Nutrition Assistance Program (SNAP) and Women, Infants, and Children (WIC) benefits.<sup>98</sup> Another solution proposed by Durkin is to include feminine hygiene products within the Affordable Care Act’s (ACA) contraception mandate, such that the insurer pays for feminine hygiene products without any cost-sharing with the insured.<sup>99</sup> These are creative solutions that can be implemented within existing frameworks such as SNAP, WIC, and ACA. But they ignore the fact that while low-income women are the ones hardest hit by the financial burdens of menstruation, the fundamental problem is gender inequity. Remedying the problem for only a subset of women, then, seems incomplete.

Save these three exceptions, legislative responses have been focused on repealing the tampon tax. Beyond repeal, New York City’s, Representative Meng’s, and Durkin’s approaches are unique, novel proposals in the fight for menstrual equity, and deserve a deeper look. Parts II and III will take up this challenge and assess the advantages and disadvantages of each approach.

### C. Legal Responses

In addition to legislative responses, there have been multiple legal challenges to various tampon taxes. One early challenge to the tampon tax arose in the 1980s with the filing of a class action lawsuit by three female consumers in Illinois. In *Geary v. Dominick’s Finer Foods, Inc.*, the plaintiffs alleged that state and local sales taxes had been “illegally collected on the sale of tampons and sanitary napkins.”<sup>100</sup> While the case was pending, the state changed its interpretation of the “medical appliances” exemption to include tampons and sanitary napkins, rendering the plaintiffs’ injunctive claim regarding the applicability of the state’s tax moot.<sup>101</sup> The claims for an injunction against the city and for restitution of paid taxes from the state and city continued.

The appellate court ruled that the plaintiffs had no standing to seek restitution because they had not protested the payment of sales taxes during

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<sup>97</sup> *Id.* at 155.

<sup>98</sup> *Id.* at 157–59. Durkin argues that this approach would easily increase access to menstrual hygiene products for low-income women. *Id.*

<sup>99</sup> *Id.* at 164–65. According to Durkin, causing insurers to fully subsidize menstrual hygiene products would increase access to these products and thus improve reproductive health. *See id.*

<sup>100</sup> 520 N.E.2d 968, 968 (Ill. App. Ct. 1988), *rev’d*, 544 N.E.2d 344 (Ill. 1989).

<sup>101</sup> *Id.* at 969.



purchase and did not pay the taxes under threat.<sup>102</sup> Therefore, the plaintiffs did not act under duress and accordingly could not recover due to the voluntary payment doctrine,<sup>103</sup> which states that “taxes paid voluntarily, though erroneously, may not be recovered without statutory authorization.”<sup>104</sup> Because the court concluded that the plaintiffs had no standing, it did not reach the question of whether tampons and sanitary napkins were medical necessities and thus exempt from the city sales tax.

The state supreme court reversed, holding that the plaintiffs sufficiently pled duress by claiming that tampons and sanitary napkins are necessities.<sup>105</sup> The court noted that “[c]learly tampons and sanitary napkins are necessities of life for a vast number of post-pubescent women. . . . Certainly if telephones and electricity are necessities, tampons and sanitary napkins, which were created to absorb the consequences which flow from a natural biological process, are necessities.”<sup>106</sup> The court also held that tampons and sanitary napkins are “medical appliances” and thus exempted from the city sales tax.<sup>107</sup> The classification turned on the court’s reasoning that tampons and sanitary napkins have absorbent purposes similar to band aids and cotton, which are explicitly considered “medical appliances” by the city, and are “used by many post-surgical patients of both sexes and all ages.”<sup>108</sup>

The *Geary* saga is significant for four reasons. First, it is emblematic of the rhetoric of necessity that has permeated the current feminist movement to repeal the tampon tax. Women’s choices are either to pay the tax or do without tampons, and that is no real choice at all, because they need tampons in order to continue their everyday lives. As Representative Meng has pointed out, some girls skip school during their periods if they are unable to access pads or tampons.<sup>109</sup> But if we accept the idea that menstrual hygiene products are necessary in order for women to live productive lives, then it seems much too incomplete to simply repeal the tampon tax, because low-income women may not be able to afford these products in the first place.

Second, *Geary* highlights a framing issue. Are periods a disease, or a normal bodily function? Feminists would cringe at the suggestion that their

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<sup>102</sup> *Id.* at 970–71.

<sup>103</sup> *Id.* at 971.

<sup>104</sup> *Id.* at 969 (quoting *Hagerty v. Gen. Motors Corp.*, 319 N.E.2d 5, 8 (Ill. 1974)).

<sup>105</sup> *Geary v. Dominick’s Finer Foods, Inc.*, 544 N.E.2d 344, 353 (Ill. 1989).

<sup>106</sup> *Id.* at 348–49.

<sup>107</sup> *Id.* at 355.

<sup>108</sup> *Id.* at 355. In contrast, the defendants had argued that menstruation is not a disease or illness but rather a normal bodily function. *Id.*

<sup>109</sup> Meng, *supra* note 94.

sex is an illness, a crippling disease that needs to be managed or cured.<sup>110</sup> Yet, as the *Geary* defendants argued,<sup>111</sup> if periods are not a disease or illness, then they cannot rightly be considered medical appliances if the medical appliance exemption is meant for items that correct a functioning part of the body. In turn, this means that excluding menstrual hygiene products from the sales tax would either require framing periods as an illness or finding a different statutory exemption or justification for the exclusion.

Third, *Geary* and subsequent events illustrate the slow pace of change. After the Illinois Supreme Court issued its decision and remanded the case to lower courts, Illinois and the City of Chicago continued to tax tampons and sanitary napkins until the repeal of the tax at both levels in 2016.<sup>112</sup> Thus, although the tampon tax movement has gained ground in the past few years, any proposed solution moving forward needs to be practicable and to continuously galvanize the voter base.

Fourth, and most importantly, *Geary* and similar legal challenges to the tampon tax illustrate the inadequacy of the legal remedy. That is, courts can only strike down the tampon tax but cannot implement more wide-ranging and impactful measures to resolve the problem of menstrual inequity.<sup>113</sup> Legal commentators also generally endorse the route of repeal. As previously noted, Crawford and Spivack have pointed out that the straightforward solution is repeal.<sup>114</sup> Similarly, in her Note on the unconstitutionality of the tampon tax, Victoria Hartman calls for “future courts and legislators” to “eliminate the tampon tax.”<sup>115</sup> But any legal solution through the courts will only reduce the menstrual burden on women by cents on the dollar.<sup>116</sup>

Decades later, the issue is being litigated in court again. Class actions seeking to end the tampon tax have been filed in at least four states:

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<sup>110</sup> The connection between the female sex and weakness has a long history. From ancient to Victorian times, women with faintness, fluid retention, irritability, and a tendency to cause trouble were considered to be hysterical. RACHEL P. MAINES, *THE TECHNOLOGY OF ORGASM: “HYSTERIA,” THE VIBRATOR, AND WOMEN’S SEXUAL SATISFACTION* 22–42 (1999) (chronicling hysteria from the fifth century B.C. to the nineteenth century). “Hysteria” stems from a Greek word that means “that which proceeds from the uterus.” *Id.* at 21. For an excellent discussion of female hysteria, see *id.* at 21–47.

<sup>111</sup> *Geary*, 544 N.E.2d at 355.

<sup>112</sup> Crawford & Spivack, *Tampon Taxes, Discrimination, and Human Rights*, *supra* note 5, at 534. After *Geary*, the state reclassified menstrual hygiene products such that they became taxed again. *Id.*

<sup>113</sup> See *infra* Section III.D.

<sup>114</sup> Crawford & Spivack, *Tampon Taxes, Discrimination, and Human Rights*, *supra* note 5, at 546.

<sup>115</sup> Hartman, *supra* note 5, at 353.

<sup>116</sup> A box of basic tampons costs \$5.47. See *infra* note 202. At a sales tax rate of 7.25%, which is the high end of the range of sales tax rates, see *supra* note 41 and accompanying text, the savings would only be 28¢ per box.

California,<sup>117</sup> Florida,<sup>118</sup> New York,<sup>119</sup> and Ohio.<sup>120</sup> These lawsuits allege violations of state and federal constitutional protections. Specifically, plaintiffs allege that the tampon tax violates the Fourteenth Amendment's Equal Protection Clause<sup>121</sup> and Due Process Clause<sup>122</sup> because it discriminates against women by imposing a financial loss on them but not on men.<sup>123</sup> Alternatively, each complaint also claims that, properly read, existing exemptions for medical devices or supplies should include feminine hygiene products because these products are medically necessary.<sup>124</sup> The same rhetoric of necessity and issue of framing arise in these lawsuits as they do in *Geary*.

This Note is focused on prescribing tax policy, and as such will not focus on the strength or validity of the constitutional arguments brought forth by these class actions.<sup>125</sup> Judicial action—although a solid backstop in the event other reforms fail<sup>126</sup>—is unlikely to be the path toward speedier or more substantial change. For example, the New York class action's

<sup>117</sup> Class Action Complaint, *DiSimone v. State*, 2016 WL 3199722 (Cal. Super. Ct. Mar. 3, 2016) (No. 16CV293099).

<sup>118</sup> Complaint, *Wendell v. Fla. Dep't of Revenue*, No. 2016-CA-1526 (Fla. Cir. Ct. July 6, 2016); see Jeff Burlew, *Class-action Suit Seeks End of Florida's 'Tampon Tax'*, USA TODAY (July 13, 2016, 4:44 PM), <https://www.usatoday.com/story/news/nation-now/2016/07/13/class-action-suit-seeks-end-floridas-tampon-tax/87047684> [<https://perma.cc/QJ7L-5XGD>]. Florida has since repealed the tampon tax, but the status of the lawsuit is unclear.

<sup>119</sup> Summons, *Seibert v. N.Y. Dep't of Taxation & Fin.*, 2016 WL 822532 (N.Y. Sup. Ct. Mar. 3, 2016) (No. 151800/2016). This lawsuit was voluntarily dismissed after New York repealed the tampon tax. Bridget Crawford, *Interview with Laura Strausfeld, New York Attorney Challenging the "Tampon Tax,"* FEMINIST L. PROFESSORS (Nov. 15, 2016), <http://www.feministlawprofessors.com/2016/11/interview-laura-strausfeld-new-york-attorney-challenging-tampon-tax> [<https://perma.cc/67ZG-KFXN>].

<sup>120</sup> Complaint, *Rowitz v. State*, 2016 WL 1427325 (Ohio Ct. Com. Pl. Apr. 11, 2016) (No. 16CV003518).

<sup>121</sup> The Fourteenth Amendment states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

<sup>122</sup> *Id.*

<sup>123</sup> See, e.g., Complaint at 3, *DiSimone v. State*, 2016 WL 3199722 (Cal. Super. Ct. 2016) (No. 16CV293099).

<sup>124</sup> See, e.g., *id.*

<sup>125</sup> For an analysis of the constitutionality of the tampon tax, see Hartman, *supra* note 5; see also Victoria Dickson, *No More Bloody Taxes: Growing Opposition to the "Tampon Tax,"* KY. L.J. BLOG (Apr. 6, 2016), <http://www.kentuckylawjournal.org/index.php/2016/04/06/no-more-bloody-taxes-growing-opposition-to-the-tampon-tax> [<https://perma.cc/SB9A-359C>].

<sup>126</sup> Victoria Hartman provides a well-reasoned and convincing path forward for arguing against the constitutionality of the tampon tax. In her Note, she argues that tampon taxes fail the exacting scrutiny analysis and thus violate the Equal Protection Clause. See Hartman, *supra* note 5, at 338–52.

injunctive claim was rendered moot after the state repealed the tampon tax.<sup>127</sup> Were there a successful outcome, that outcome would have been limited to abolishing the tax on tampons. If true menstrual equity is the goal, legislative action appears to be the more impactful way. But first it must be established that the tampon tax cannot be justified.

## II. THE UNEASY CASE AGAINST THE TAMPON TAX

Despite the fact that the tampon tax is an unavoidable financial burden for the women who use menstrual hygiene products, most states still impose the tax. Section A of this Part examines the sociopolitical reasons why the tampon tax exists and continues to exist. Section B then moves on to a discussion of the arguments against repealing the tampon tax, making a key claim that repealing the tax is undesirable from a tax policy standpoint. Section C goes on to make the uneasy case against the tampon tax based on two rationales. First, exempting menstrual hygiene products from the sales tax provides a better measure of well-being. Because these products are necessities and not luxuries, their consumption does not make women better off than they were before, and thus there is no increase in well-being to be taxed. Second, the tampon tax is a discriminatory tax that uniquely burdens women and thus redistributes wealth from women to men.

### A. *Why the Tampon Tax Exists*

Critics of the tampon tax movement bristle at the suggestion that the decision to tax menstrual hygiene products, but not other less necessary products such as candy, is “a patriarchal privileging of candy over feminine hygiene.”<sup>128</sup> Even opponents of the tax appear to suggest that the decision is not the symptom of overt, malicious sexism, but rather a product of male-dominated legislatures. Former President Barack Obama, when asked about the tampon tax by YouTube personality Ingrid Nilsen, responded, “I have to tell you, I have no idea why states would tax these as luxury items. I suspect it’s because men were making the laws when those taxes were passed.”<sup>129</sup> Similarly, the founder of the United States-based campaign to end the tampon tax, Jennifer Weiss-Wolf, said: “I don’t imagine there has ever been a secret or nefarious plot to purposefully exclude menstruation from

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<sup>127</sup> Bridget Crawford, *Interview with Zoe Salzman, New York Attorney Challenging the “Tampon Tax,”* FEMINIST L. PROFESSORS (July 28, 2016), <http://www.feministlawprofessors.com/2016/07/interview-zoe-salzman-new-york-attorney-challenging-tampon-tax> [https://perma.cc/NC65-YVGA].

<sup>128</sup> Allen, *supra* note 27.

<sup>129</sup> Maya Rhodan, *President Obama Doesn’t Understand the “Tampon Tax” Either,* TIME (Jan. 15, 2016), <http://time.com/4183108/obama-tampon-tax-sanitary> [http://perma.cc/K25R-B3GB].

policymaking. Rather, it is simply the outcome of too few women at the decision-making table . . . .”<sup>130</sup>

This argument seems overly simplistic. While part of the problem might simply be that women were not at the proverbial table, there are deeper and possibly more nefarious reasons that menstrual hygiene products remain taxed in forty-two states. For example, California Governor Jerry Brown’s veto of the tampon tax repeal<sup>131</sup> cannot be explained by nonsalience—that the issue simply had not been thought about before in male-dominated legislatures. Likewise, nonsalience does not explain why an all-male Revenue and Taxation Committee in the Utah legislature defeated a bill that would have exempted feminine hygiene products from the Utah sales tax.<sup>132</sup> Even when confronted with the issue, lawmakers choose to do nothing. Perhaps it is the “siren call of nothingness,” as feminist tax scholar Edward McCaffery describes it, that compels lawmakers to adhere to the status quo.<sup>133</sup>

Another possibility for the prevalence of the tampon tax is a deep discomfort with menstruation. Professor McCaffery has shown how, beyond the deeply gendered biases of tax code, treatment of women in real-world markets create a continuous feedback loop that encourages women to stay home in the domestic sphere.<sup>134</sup> The same observation might be made with the tampon tax. Beyond the pecuniary impact of the tax itself, societal perceptions of menstruation also impose additional burdens on women. An analysis of public discourse on the tampon tax by Lea Hunter illustrates the

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<sup>130</sup> Bridget Crawford, *Interview with Jennifer Weiss-Wolf, New York Attorney and Menstrual Equity Advocate*, FEMINIST L. PROFESSORS (Nov. 22, 2016), <http://www.feministlawprofessors.com/2016/11/interview-jennifer-weiss-wolf-new-york-attorney-menstrual-equity-advocate> [<https://perma.cc/E4CV-EHXF>].

<sup>131</sup> Derek Hawkins, *With Governor’s Veto, California’s ‘Tampon Tax’ Will Survive, for Now*, WASH. 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> [<https://perma.cc/WV9K-6ELW>].

<sup>132</sup> Lee Davidson, *So-called ‘Tampon Tax’ Exemption Defeated*, SALT LAKE TRIB. (Feb. 11, 2016, 9:40 AM), <http://www.sltrib.com/home/3524704-155/so-called-tampon-tax-exemption-defeated> [<https://perma.cc/8BY8-XRG4>]; *Revenue and Taxation Committee, Utah House of Representatives*, BALLOTEDIA, [https://ballotpedia.org/Revenue\\_and\\_Taxation\\_Committee,\\_Utah\\_House\\_of\\_Representatives](https://ballotpedia.org/Revenue_and_Taxation_Committee,_Utah_House_of_Representatives) [<https://perma.cc/8YV3-L7RW>]. After the 2016 effort failed, the sponsor of the bill reintroduced it as House Bill 71, but that bill also died in committee. Hygiene Tax Act, H.B. 71, 62d Leg., Gen. Sess. (Utah 2017); Hope Woodside, *Bill to Exempt Hygiene Items Like Tampons from Sales Tax in Utah Stalls in Committee*, FOX 13 SALT LAKE CITY (Feb. 11, 2017, 9:50 PM), <http://fox13now.com/2017/02/11/bill-to-exempt-hygiene-items-like-tampons-from-sales-tax-in-utah-stalls-in-committee> [<https://perma.cc/WZ9R-4RYB>].

<sup>133</sup> EDWARD J. MCCAFFERY, *TAXING WOMEN* 269 (paperback ed., 1999) (“Nothing is always the easiest thing to do. Conservatives always have this advantage, this final trump.”).

<sup>134</sup> Broadly speaking, “[w]orking mothers bear the stigma at work of *being* working mothers.” *Id.* at 231. McCaffery points out, for example, that coworkers resent working mothers, and expect their time and loyalties to be divided. *Id.* at 229–49.

role of menstrual taboo, which refers to the constantly perpetuated myth that menstruation is unclean and unsafe:

Physically, menstrual blood is viewed as an abomination; it is unclean, disgusting, and more aversive than other bodily fluids. Visible marks of menstruation, such as leakage of menstrual blood, are a characterological flaw that discredits femininity and signals poor judgment. . . . [I]t is limited to women and girls who are thus marked “as different from the normative and privileged male body.”<sup>135</sup>

Unsurprisingly, then, Hunter finds that the movement to repeal is most successful when activists directly break the taboo, such as by referencing menstrual blood or bloody tampons.<sup>136</sup> This tactic “instantly genders the discussion” and “provides attention for the gendered nature of the experience.”<sup>137</sup> Indeed, Hunter notes that politicians who opposed repeal ignored the discriminatory aspect of the tax and appealed to fiscal concerns.<sup>138</sup> Similarly, Professors Crawford and Spivack trace the cultural roots of menstruation to argue that the tampon tax is unnoticed due to a “hysteria” that “magnif[ies] the natural event of menstruation to unreal and overwhelming proportions.”<sup>139</sup> They note that female bleeding is construed differently from male bleeding: whereas the latter signifies choice and control, the former is “not only involuntary but also punitive and indicative of weakness.”<sup>140</sup>

Together, these insights suggest that the reason for the persistence of the tampon tax may extend far beyond the simplistic explanation that women were not making the laws when the tampon tax was first put into place. The taboo surrounding menstruation explains not only why the tax has gone unnoticed but also why, after it *is* noticed, it remains. The idea that

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<sup>135</sup> Lea Hunter, *The “Tampon Tax”: Public Discourse of Policies Concerning Menstrual Taboo*, 17 HINCKLEY J. POL. 11, 12 (2016) (citation omitted).

<sup>136</sup> *Id.* at 17.

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

<sup>138</sup> *Id.* Hunter offers two such examples. John Howard, an Australian politician, rejected an exemption for tampon taxes “on the grounds that it would lead to too many other exemptions.” *Id.* at 15. Similarly, David Cameron, the former Prime Minister of the United Kingdom, obliquely pointed to the difficulty of changing the European VAT system. *Id.* Similarly, in vetoing the California bill that would have repealed the tampon tax, Governor Jerry Brown stated that the bill “creates a new tax break,” which he considered “important when the state’s budget remains precariously balanced.” Letter from the Office of Gov. Edmund G. Brown Jr. to the Members of the Cal. State Assembly (Sep. 13, 2016), [https://www.gov.ca.gov/wp-content/uploads/2017/09/AB\\_1561\\_Veto\\_Message.pdf](https://www.gov.ca.gov/wp-content/uploads/2017/09/AB_1561_Veto_Message.pdf) [<https://perma.cc/W8SC-9U5E>]; see also State Assemb. 1561, 2015–2016 Gen. Assemb., Reg. Sess. (Cal. 2016) (text of vetoed bill).

<sup>139</sup> Crawford & Spivack, *Tampon Taxes, Discrimination, and Human Rights*, *supra* note 5, at 506–07.

<sup>140</sup> *Id.* at 511.

menstruation symbolizes weakness and dirtiness is a symptom of sexism and gender discrimination that has seeped into the tax code—the tampon tax being a manifestation of that gender bias. In the California and Utah examples,<sup>141</sup> it is difficult to attribute the refusal to repeal to anything other than a direct—as opposed to unnoticed—target of menstruation. Contrary to what some might claim, the tampon tax “outrage” is *not* “overblown.”<sup>142</sup> Rather, that the tampon tax exists and continues to exist illustrates the failings of the legislative process. The natural impulse against such failures, then, might be to repeal the ill-advised legislation. The next Section shows why the answer may not be that easy.

### *B. Exemptions and the Sales Tax*

The tampon tax is a sales tax. Menstrual hygiene products are simply included in the tax base. As a matter of tax design, exemptions from the tax base are inefficient, and a clean tax base is desirable.<sup>143</sup> Preferences for certain types of consumption, such as housing and healthcare, create “messiness” in the tax base.<sup>144</sup> Repealing the tampon tax by granting an exemption from the sales tax, which is the dominant approach, is one such type of preference.

Generally, this messiness is undesirable for a number of reasons. First, each preference that benefits one person penalizes someone else, because tax rates have to be raised to make up for the lost revenue.<sup>145</sup> As Professors Slemrod and Bakija remind us, “Remember, *we are taxing ourselves*.”<sup>146</sup> One empirical model found an increase of 0.10 to 0.25 percentage points in the tax rate for each exemption.<sup>147</sup> Second, preferences “create an incentive to engage ‘too much’ in the lightly taxed activity and too little in other activities.”<sup>148</sup> This objection is not relevant here because, for the most part, women cannot decide to menstruate more often than they already do. Third, exemption preferences complicate the tax code.<sup>149</sup> An exemption from the

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<sup>141</sup> See *supra* notes 131–32 and accompanying text (discussing failed efforts to repeal the tax in California and Utah).

<sup>142</sup> Allen, *supra* note 27.

<sup>143</sup> See *supra* notes 51–54 and accompanying text.

<sup>144</sup> SLEMROD & BAKIJA, *supra* note 3, at 217 (noting that mortgage and healthcare deductions create messiness in the income tax base).

<sup>145</sup> *Id.* (“Every preference is a penalty for someone else because it requires tax rates to be higher than otherwise.”).

<sup>146</sup> *Id.* at 88.

<sup>147</sup> See Thomas Stratmann, *The Political Economy of Sales Taxes and Sales Tax Exemptions*, 171 PUB. CHOICE 207, 207 (2017).

<sup>148</sup> SLEMROD & BAKIJA, *supra* note 3, at 218.

<sup>149</sup> *Id.*

consumption tax base is a tax expenditure, and scholars have pointed out that tax expenditure provisions add complexity to the tax code by lengthening tax returns and imposing additional audit costs.<sup>150</sup> Repeal of the tampon tax may not lengthen returns for individual taxpayers but may cause manufacturers to seek to classify their goods as menstrual hygiene products. Moreover, transition to non-taxation of menstrual hygiene products will impose a one-time compliance cost on retailers. Thus, it is a central insight of optimal tax theory that taxes should be uniform across all final goods.<sup>151</sup> If the goal is to reduce the tax burden on low-income individuals, optimal tax economists counsel that redistributive income taxation may be a better way than granting exemptions.<sup>152</sup>

Finally, apart from tax design issues, one compelling argument against exemptions from the sales tax base is the “political slippery slope.”<sup>153</sup> As one policy analyst eloquently explains: “Loopholes accorded to one group breed additional loopholes, by fueling demand from other groups for equally favored treatment and by weakening congressional resolve to stem the tide of special requests.”<sup>154</sup>

From a tax policy standpoint, preserving the tampon tax is efficient because it maintains a clean tax base. Despite these compelling arguments against repeal, the next Section argues for repeal both because menstrual hygiene products are necessities that do not increase well-being, and because the tax discriminatorily redistributes wealth from women to men.

### C. *Why Repeal?*

Because messy tax bases are undesirable, any preference, such as an exemption for menstrual hygiene products, must have strong reasons supporting it.<sup>155</sup> Taking up this challenge, this Section proposes that, despite the aforementioned inefficiencies, the tampon tax cannot be justified, and thus needs to be repealed. In addition, this Section begins to sketch out the theoretical foundation for a women’s health credit, a proposal that will be more extensively examined in Part III.

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<sup>150</sup> See, e.g., STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 105–06 (1985).

<sup>151</sup> N. Gregory Mankiw, Matthew Weinzierl & Danny Yagan, *Optimal Taxation in Theory and Practice*, 23 J. ECON. PERSP. 147, 164–65 (2009).

<sup>152</sup> *Id.* at 166.

<sup>153</sup> William G. Gale, *Don’t Buy the Sales Tax*, BROOKINGS INST. (Mar. 1, 1998), <https://www.brookings.edu/research/dont-buy-the-sales-tax> [https://perma.cc/854M-KUZL].

<sup>154</sup> *Id.*

<sup>155</sup> MURPHY & NAGEL, *supra* note 43, at 125 (“As already noted, economists tell us that ‘cleaner’ tax bases are less distortionary and thus cost us all less. This puts the burden of proof on those who favor any particular exclusion or deduction from the tax base.”); SLEMROD & BAKIJA, *supra* note 3, at 218 (“[T]he burden of proof should rest on those who defend deviations from a clean tax base.”).



When considering an exemption, independent of judgments about fairness or broader philosophies of redistributive justice, the wisdom of differential treatment of individuals with different characteristics—in this case, sex—must be evaluated.<sup>156</sup> Because the tax uniquely burdens women, it redistributes wealth from women to men. The issue is not even one of fairness; rather, it is one of redistribution. Should we redistribute dollars from women to men through the tax system? After all, the tax code makes distinctions all the time, such as between married and unmarried persons. Does the distinction between males and females matter?

Professors Murphy and Nagel posit that fairness is “about after-tax results, not about their relation to the pre-tax situation.”<sup>157</sup> That is because pre-tax outcomes are “both entirely imaginary and morally irrelevant;”<sup>158</sup> people start from different points in life and may have innate characteristics, entirely apart from effort or hard work, that result in advantageous pre-tax outcomes.<sup>159</sup> Consider then two taxpayers, Amy and Ben, who make identical amounts of money and are equally well off in the no-tax world. The principle of horizontal equity, which states that individuals at the same level of income should pay the same amount of tax, would dictate that the same rate be applied to Amy and Ben. If there were a tax on tampons, Amy would pay more in taxes than Ben, because she has no choice but to buy tampons. Taxing goods that do not represent “the same share of total income for most people” violates horizontal equity.<sup>160</sup> A tax on tampons imposes a higher burden on Amy just because she uses tampons. But if we accept the proposition that pre-tax outcomes have no independent moral significance, then the horizontal equity argument is irrelevant.

Another argument might be that various exemptions already exist within the sales tax system. What’s one more? If states already exempt

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<sup>156</sup> MURPHY & NAGEL, *supra* note 43, at 162–63 (“The problem is that if the tax system, for whatever broad reasons, treats differently situated people differently, it becomes necessary to decide which are the differences that should matter.”).

<sup>157</sup> *Id.* at 164.

<sup>158</sup> *Id.* at 99.

<sup>159</sup> *See generally id.* at 31–37.

<sup>160</sup> SLEMROD & BAKIJA, *supra* note 3, at 89.

Viagra,<sup>161</sup> Rogaine,<sup>162</sup> and candy,<sup>163</sup> it only seems right that tampons be exempted, too. After all, the common concern that exemptions penalize someone else seems insignificant given the low amount of lost revenue from repealing the tampon tax. But this line of reasoning is dangerous, even when the exemption is for something as necessary as tampons. This is because the political system, as Professors Slemrod and Bakija argue, “is incapable of distinguishing legitimate arguments from illegitimate ones and often succumbs to the political clout of powerful pleaders.”<sup>164</sup> The slope is all too slippery.

The case for repealing the tampon tax must turn on other grounds. The key is the rhetoric of necessity that has permeated the movement to repeal, the legislative responses, and the legal responses to the tax.<sup>165</sup> If women *must* buy menstrual hygiene products to maintain a productive life, an exemption for such products would make the tax base “a more accurate measurement of well-being.”<sup>166</sup> This is a point often raised in the context of healthcare. For example, the legislature might choose to exempt certain necessities like prescription medication on the basis that medications only return the sick to health rather than increasing their well-being. Similarly, spending money on menstrual hygiene services merely returns women to their usual level of well-being, whereas spending money on a fancy car or expensive vacation

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<sup>161</sup> Viagra is classified as a prescription medication, which is typically exempt from sales taxes. *See, e.g.*, WIS. STAT. § 77.54(14) (2017) (exemption from sales and use tax for prescription drugs); *see also* Jordan Gass-Poore, *Citing Gender Bias, State Lawmakers Move to Eliminate ‘Tampon Tax,’* NPR (Mar. 6, 2016, 1:00PM), <http://www.npr.org/2016/03/06/467377295/citing-gender-bias-state-lawmakers-move-to-eliminate-tampon-tax> [<https://perma.cc/JHC9-8JY4>] (“Sales tax isn’t applied to Viagra in Wisconsin, but it is applied to tampons and pads.”).

<sup>162</sup> *See, e.g.*, NEW YORK ST. DEP’T OF TAX’N & FIN., TB-ST-193, SALES AND USE TAX (2014), [https://www.tax.ny.gov/pubs\\_and\\_bulls/tg\\_bulletins/st/drugstores.htm](https://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/st/drugstores.htm) [<https://perma.cc/AN6N-M9L8>] (explaining that both prescription and nonprescription drugs, such as dandruff shampoo, are sales-tax exempt); *see also* Annamarya Scaccia, *In New York, Tampons Are Still Taxed—But Rogaine Isn’t*, BROADLY (Mar. 7, 2016, 12:10 PM), [https://broadly.vice.com/en\\_us/article/tampon-tax-lawsuit-new-york](https://broadly.vice.com/en_us/article/tampon-tax-lawsuit-new-york) [<https://perma.cc/HGX9-GB8C>] (“Yet the agency classifies Rogaine, dandruff shampoo, adult diapers, and incontinence pads—items also used by men—as ‘medical supplies,’ and thus tax exempt.”).

<sup>163</sup> *See, e.g.*, CAL. REV. & TAX CODE §§ 6359(a)–(b)(1) (West 2018) (exempting food products, which include candy, from the sales tax). *See generally* Jennifer Dunn, *Sales Tax by State: Is Candy Taxable?*, TAXJAR (Feb. 13, 2017), <http://blog.taxjar.com/sales-tax-state-candy-taxable> [<https://perma.cc/364J-Z6QA>] (surveying sales tax on candy in each state).

<sup>164</sup> SLEMROD & BAKIJA, *supra* note 3, at 218.

<sup>165</sup> *See supra* notes 10 (tampon tax movement); 64–65 (legislative response); 105–08 (legal response) and accompanying text.

<sup>166</sup> SLEMROD & BAKIJA, *supra* note 3, at 218. Well-being is an important concept in tax policy debates about whether individuals with the same level of well-being should be taxed at the same level (horizontal equity) and whether individuals with different levels of well-being should be taxed at different levels (vertical equity). *Id.* at 59–60. As discussed in Section I.A, sales taxes are regressive and thus violate vertical equity. Repealing the tampon tax improves horizontal equity by accounting for the fact that menstrual hygiene products do not increase, but simply restore, women’s well-being.

makes that person better off than someone else without such consumption. The latter is a personal choice between various channels of gratification; the former is a necessity that does not increase women's welfare. Defenders of the tampon tax thus miss the point that our hypothetical taxpayers, Amy and Ben, do not have the same opportunities to consume and to save. Accordingly, imposing a tax on tampons will not serve redistributive goals. If the theory of the consumption tax is fairness to savers, there is no justice for women who *cannot* substitute consumption for savings.

The idea that tampons are a necessity is not to be confused with the separate idea that the tax is uniquely a tax on women; either is a sufficient justification for a tampon exemption. The tampon tax's sole applicability to women is a rationale necessary to overcome one failing of the necessity justification. Even though items like prescription medication and menstrual hygiene products are necessities, the legislature may nevertheless choose to include them in the tax base due to efficiency concerns and to mitigate the impact of this inclusion through cash transfers or direct assistance programs.

A tax that uniquely burdens a protected group<sup>167</sup> raises different concerns than necessity. It is true that the tax system discriminates against certain groups all the time, such as against non-homeowners by providing mortgage interest deductions to homeowners. Discrimination on the basis of sex, however, is an entirely different matter because sex is immutable.<sup>168</sup> Justice Antonin Scalia once proclaimed, "A tax on wearing yarmulkes is a tax on Jews."<sup>169</sup> Similarly, a tax on tampons is a tax on women. Menstruation is a source of inequality between men and women. It is estimated that a woman spends over \$18,000 on menstruation-related products<sup>170</sup> during her

<sup>167</sup> Sex-based classifications are "subject to scrutiny under the Equal Protection Clause." Craig v. Boren, 429 U.S. 190, 197 (1976) (quoting Reed v. Reed, 404 U.S. 71, 75 (1971)). The Supreme Court has shied away from subjecting sex-based classifications to strict scrutiny; rather, the Court held that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* Scholars have characterized this test as intermediate scrutiny. E.g., Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1079 (2011). For an extended analysis of the constitutionality of the tampon tax, see Hartman, *supra* note 5, at 347–53.

<sup>168</sup> In *Frontiero v. Richardson*, the Supreme Court stated that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." 411 U.S. 677, 686 (1973). This Court would have subjected sex-based classifications to strict scrutiny, *id.* at 688, but the decision was not controlling, see Barnes & Chemerinsky, *supra* note 167, at 1079 ("But within a few years, it was apparent to the Justices that there was not a fifth vote for strict scrutiny.").

<sup>169</sup> *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993).

<sup>170</sup> Jessica Kane, *Here's How Much A Woman's Period Will Cost Her Over A Lifetime*, HUFFINGTON POST (published May 18, 2015, 12:05 PM; updated Dec. 6, 2017), [http://www.huffingtonpost.com/2015/05/18/period-cost-lifetime\\_n\\_7258780.html](http://www.huffingtonpost.com/2015/05/18/period-cost-lifetime_n_7258780.html) [https://perma.cc/8XFG-MMVK]. This estimate includes items meant to reduce symptoms associated with menstruation, such as painkillers for cramps. See *id.*

lifetime, and \$1700 on tampons alone.<sup>171</sup> This is money that only women must spend. As a society that has enshrined equal protection and due process in the Constitution,<sup>172</sup> hopefully we can all agree that the government should not treat women differently from men. Sex, like religion, is inherently suspect as a category of unequal treatment.<sup>173</sup> Whereas it might be acceptable to treat Amy and Ben differently because Amy prefers to sail expensive yachts while Ben prefers to watch free television at home, a tax on tampons is entirely a tax on menstruation, as a proxy for sex, much like a tax on yarmulkes, as a proxy for religion, is entirely a tax on Jews. A gender-neutral sales tax system does not mean gender-neutral treatment.<sup>174</sup>

Because the tax is uniquely a tax on women, it has the effect of redistributing wealth from women to men. Women shoulder the burden of paying the tax, and those dollars are then redistributed throughout society in the form of public goods.<sup>175</sup> It is precisely because of this disproportionate burden that it might make sense to tax items like toilet paper but not tampons. Samantha Allen of *The Daily Beast* points out that sales tax exemptions are nuanced and that only two states specifically exempt toilet paper.<sup>176</sup> But everyone—male or female—uses toilet paper. In contrast, only women use tampons; there is no redistribution from women to men caused by a toilet paper tax, unless women for some reason use drastically more toilet paper than men. Seductive as it may be, Allen’s argument thus holds no water.

Indeed, the fact that the tampon tax remains—especially after attention has been drawn to the tax—signals to women that their periods are “luxuries” that should be taxed, that their sex is an undesirable one. This, in turn, will likely have a negative effect on tax morale. Tax morale, broadly speaking, is a term for “nonpecuniary factors” for tax compliance.<sup>177</sup> For example, people might be intrinsically motivated to pay taxes due to feelings of pride or altruism toward others.<sup>178</sup> Or they might view taxes as one term of a contract

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<sup>171</sup> *Id.*

<sup>172</sup> See *supra* notes 121–22 and accompanying text.

<sup>173</sup> This is not to say that sex-based classifications and religion-based classifications are subject to the same level of scrutiny. See *supra* notes 167–68; see also *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (noting that policy that affects free exercise of religion “triggers the most exacting scrutiny”). Sex and religion are, nevertheless, suspect classes.

<sup>174</sup> Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2031 (1996) (“[G]ender-neutral language does not guarantee gender-neutral treatment . . .”).

<sup>175</sup> Unless tax dollars are redistributed solely to women, the fact that women pay the tampon tax and men do not means that some benefit is necessarily shifted to men.

<sup>176</sup> Allen, *supra* note 27.

<sup>177</sup> Erzo F. P. Luttmer & Monica Singhal, *Tax Morale*, 28 J. ECON. PERSP. 149, 149–51 (2014).

<sup>178</sup> *Id.* at 155.

between the governing and governed and thus be more inclined to pay if they perceive the government as legitimate and the tax system as fair.<sup>179</sup>

Similarly, a sales tax system that treats women unfairly and disproportionately might lower tax morale. The tampon tax has remained nonsalient for a long time, as illustrated by the gap between the *Geary* decision in 1980<sup>180</sup> and recent renewed attention to it. It is difficult to view a tax of which one is unaware as unfair. But now that the tax is becoming more and more salient, women might conclude that the tax system—and government overall—does not serve their interests and refuse to pay taxes. This is a phenomenon that has been traced as far back as the 1870s, during which women suffragists refused to pay tax because they could not vote—a contemporary form of “no taxation without representation.”<sup>181</sup> It is important to distinguish lower tax morale caused by the unfairness of the tax itself from that caused by the recent publicity of the tampon tax. That is, publicity merely brings attention to the tax; the inherently discriminatory feature of the tax is what affects tax morale. It remains to be seen the extent to which the tampon tax will affect tax morale, but tax morale should be an important factor in evaluating the call for repeal.

### III. A BETTER SOLUTION: THE WOMEN’S HEALTH CREDIT

The previous Part examined arguments for and against the tampon tax and concluded that it should be repealed. Specifically, the tax discriminates against women by placing a disproportionate burden on them—one that they cannot choose to avoid. This Part now shifts gear to take up Anne Alstott’s challenge of translating competing feminist goals—equal treatment, encouraging women’s market work, and assistance to caregivers who are typically women<sup>182</sup>—“into concrete policy prescriptions.”<sup>183</sup>

First, the concept of equal treatment means “the application of the same legal rules to men and women.”<sup>184</sup> In the context of the tampon tax, this would mean repeal. Although theoretically men and women have to pay the tax on tampons, only women *must* buy tampons, so the legal rules are unequally applied in practice.

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<sup>179</sup> *Id.* at 157. To illustrate, consider this example: when Britain moved to a poll tax from a property tax, tax evasion increased, probably because the poll tax was considered unfair and unrelated to ability to pay, insofar as it imposed a fixed amount on every taxpayer. *Id.* at 158.

<sup>180</sup> See *supra* Section I.C for background information on *Geary*.

<sup>181</sup> Carolyn C. Jones, *Dollars and Selves: Women’s Tax Criticism and Resistance in the 1870s*, in CRITICAL TAX THEORY: AN INTRODUCTION 13, 14–17 (Anthony C. Infanti & Bridget J. Crawford eds., 2009).

<sup>182</sup> Alstott, *supra* note 174, at 2003.

<sup>183</sup> *Id.* at 2004.

<sup>184</sup> *Id.* at 2003.

The second goal of encouraging women's market work overlaps with the first goal, in that "eliminating legal biases against women's market work could lead them to work more."<sup>185</sup> As is often noted, the lack of access to menstrual hygiene products results in women missing work and school out of self-consciousness about the sight and smell of blood or worries about bullying.<sup>186</sup> Women also reuse sanitary products or extend the length of use, which may lead to an increased risk of infections that will also keep women from working or attending school.<sup>187</sup> Although repeal would eliminate the legal bias against women, it only partially reduces the financial burden of menstruation. Even without the tampon tax, women may nevertheless be unable to afford menstrual hygiene products that will enable them to participate in the market.

That leads us to Alstott's third goal, assistance to caregivers, which means providing cash grants or other forms of direct assistance to women to "improve their economic security and social status."<sup>188</sup> Some reforms may be more effective than others in achieving underlying feminist goals.<sup>189</sup> For example, Alstott argues that the equal treatment justification for individual filing—as opposed to joint filing—is symbolic and will not eliminate the bias against women as second earners in a household.<sup>190</sup> Rather, an expanded dependent care tax credit and family allowances are better compromises between the three competing goals.<sup>191</sup> In the menstrual equity context, repeal coupled with a women's health credit will eliminate the legal bias against women, increase women's participation in the workforce and schools, and assist them with the financial costs of menstruation.

With this as background, the rest of this Part will evaluate each proposal for reform: (A) repeal, (B) free tampons, (C) coverage of feminine hygiene

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<sup>185</sup> *Id.* at 2007.

<sup>186</sup> See, e.g., Inga T. Winkler & Virginia Roaf, *Taking the Bloody Linen out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality*, 21 *CARDOZO J.L. & GENDER* 1, 8 (2014) (noting that girls in developing countries often miss school during menstruation and sometimes drop out after the onset of menstruation). Solving this problem is one of the justifications cited for legislation in New York City that would provide free menstrual hygiene products in schools, prisons, and homeless shelters. See *infra* Section I.B. Mayor Bill de Blasio stated, "Students should be able to concentrate on their studies . . . without the indignity of inadequate access to tampons and pads." *de Blasio Press Release*, *supra* note 82. First Lady of New York City Chirlane McCray also stated, "No young person should miss class or be embarrassed at school because she needs a tampon or pad." *Id.*

<sup>187</sup> Cf. Winkler & Roaf, *supra* note 186, at 8 ("One study found a higher incidence of reproductive tract infections in cases of inadequate menstrual hygiene management, in particular for socio-economically deprived women.").

<sup>188</sup> Alstott, *supra* note 174, at 2003.

<sup>189</sup> *Id.* at 2005.

<sup>190</sup> *Id.* at 2016–17.

<sup>191</sup> *Id.* at 2081.

products in welfare programs and the ACA, and (D) a tax credit. Because *Geary* has illustrated the ineffectiveness of a court-based solution,<sup>192</sup> this Part will focus only on legislative prescriptions. Ultimately, this Part concludes that a tax credit combined with repeal is the best solution.

### A. Repeal

As illustrated in Part I, the dominant form of reform has been repeal. Indeed, repeal is what most activists seek.<sup>193</sup> Part II then evaluated arguments for and against the tampon tax and concluded that it cannot be justified and therefore must be repealed. Setting aside, however, the claim that the tampon tax is a form of gender discrimination, the effects of repeal must also be examined.

Repeal does not necessarily remove any financial burden at all because of tax shifting.<sup>194</sup> That is, suppliers could raise the price of tampons by the amount of the tax break, such that the consumer still pays the same amount she would have paid before repeal. Thus, who ultimately enjoys the benefit of repeal—tax incidence<sup>195</sup>—is relevant; if consumers do not enjoy the tax break and the goal is to benefit them, repeal would be pointless. However, economic theory and empirical analysis likely discredit this argument. A study analyzing data from New Jersey’s repeal of the tampon tax finds that the benefit of the repeal goes to the consumer in the form of reduced prices.<sup>196</sup> Interestingly, the study also suggests that low-income consumers benefit more than high-income consumers do: whereas high-income consumers share the benefit with suppliers, low-income consumers enjoy a price decline larger than the size of the tampon tax.<sup>197</sup> The authors, however, caution that the difference in benefits across income levels may be overstated because it does not account for opportunity costs incurred to obtain the purchase price, such as searching for coupons.<sup>198</sup> Nevertheless, this difference is a possible

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<sup>192</sup> See *supra* Section I.C.

<sup>193</sup> See *supra* notes 1–4 and accompanying text (campaigns to end the tampon tax); see also *supra* Section I.B (concluding that repeal is the dominant legislative response).

<sup>194</sup> Tax shifting is “[t]he phenomenon that taxes that are ostensibly levied on one group of people may end up being borne by others.” SLEMROD & BAKIJA, *supra* note 3, at 76.

<sup>195</sup> See *id.* (“[W]ho ultimately ends up bearing the burden is called by economists *tax incidence*.”).

<sup>196</sup> Christopher Cotropia & Kyle Rozema, *Who Benefits from Repealing Tampon Taxes? Empirical Evidence from New Jersey*, 15 J. EMPIRICAL LEGAL STUD. 620, 629, 633 (2018). Prices declined by 7.3% after repeal, which was more than the then-applicable tax of 6.9%. *Id.* at 633.

<sup>197</sup> *Id.* at 622. Specifically, prices declined by 3.9% for high-income consumers and by 12.4% for low-income consumers. *Id.* These statistics support the hypothesis that only suppliers with monopoly or market power can successfully raise prices. At the low-end, generic segment of the market, the products are likely somewhat homogenous, so producers would lose sales by raising prices, whereas brand differentiation at the higher end may allow producers to absorb some of the increased surplus, but not all.

<sup>198</sup> *Id.* at 623.

distributional consequence of repeal that could justify repeal, especially when the goal is to help low-income women afford menstrual hygiene products.

Assuming one cares about redistributive justice, another especially compelling argument against repeal is that it would have regressive consequences. At the very least, all women across the economic spectrum will benefit by the same amount from a repeal. This is not at all regressive, but repeal is not necessarily progressive either,<sup>199</sup> as eliminating a regressive tax merely restores the pre-tax baseline. The situation, however, is complicated by the rise of “premium” tampons, such as biodegradable, 100% organic cotton tampons or tampons with resealable wrappers and better leak protection. These “premium” tampons carry a “premium” price tag. The brand Lola, which boasts of toxin-free, dye-free, and synthetic-free tampons, charges \$10 for a box of eighteen tampons.<sup>200</sup> Another brand, Cora, provides BPA-free plastic applicators, organic cotton tampons, and attractive lipstick-sized cardboard capsules for stashing the tampons at \$16 for a box of twenty-four tampons.<sup>201</sup> In contrast, Tampax Cardboard tampons—presumably named to differentiate them from their more expensive, premium sister, the Tampax Radiant—cost \$5.47 for a box of forty tampons.<sup>202</sup> The premium tampons cater to high-income women who can afford them; it is unlikely that female minimum-wage earners, for example, would want to pay more than three times the price of an average box of tampons for something that serves the same purpose. Furthermore, high-income women have fewer children and consequently are more likely to be on their periods.<sup>203</sup> When these other

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<sup>199</sup> If further research shows that the tax break is unevenly distributed between low-income and high-income consumers, repeal could actually have some progressivity because low-income women would receive a larger benefit. See *supra* notes 195–98 and accompanying text for a discussion of the tax incidence of repeal. Even so, that must be balanced against the regressivity, discussed in this paragraph, resulting from the use of high-end products.

<sup>200</sup> LOLA, <https://mylola.com> [<https://perma.cc/RDA5-YD2T>].

<sup>201</sup> CORA, <https://cora.life> [<http://perma.cc/XP9F-CMHP>].

<sup>202</sup> *Tampax Tampons with Cardboard Applicator, Super, 40 Count*, WALMART, <https://www.walmart.com/ip/Tampax-Tampons-with-Cardboard-Applicator-Super-40-Count/876493> [<https://perma.cc/RP2V-TCRB>].

<sup>203</sup> See Jason Weeden et al., *Do High-Status People Really Have Fewer Children?*, 17 HUMAN NATURE 377, 377 (2006) (“Women in the general population with higher adult income have fewer children . . .”). Note that some contraceptive devices, such as intrauterine devices (IUDs) and extended-cycle birth control pills, reduce the frequency of or prevent menstruation entirely. One study found no association between the use of long-acting reversible contraception and income level. Megan L. Kavanaugh et al., *Changes in Use of Long-Acting Reversible Contraceptive Methods Among U.S. Women, 2009–2012*, 126 OBSTETRICS & GYNECOLOGY 917, 919 (2015). There is data, however, that suggests low-income women are more likely to express interest in delaying or suppressing their periods, Anna Greenberg & Jennifer Berkold, *Menstruation and Menstrual Suppression Survey*, ASS’N OF REPROD. HEALTH PROF.’S 15 (Feb. 2006), [http://www.arhp.org/uploadDocs/2005menstruationsurvey\\_fullreport.pdf](http://www.arhp.org/uploadDocs/2005menstruationsurvey_fullreport.pdf) [<https://perma.cc/65DK-RHWU>], and also more likely to undergo sterilization, Maureen K. Baldwin et



factors are considered, repealing the tampon tax becomes regressive: the bulk of the benefit goes to high-income women who spend more on menstrual hygiene products.

This argument, however, misses the larger picture. It is true that the benefits of repeal mostly go to high-income women if we consider only dollar amounts. However, the marginal utility of a dollar is higher for a low-income woman than it is for a high earner. A woman with \$100,000 in her bank account is unlikely to notice the difference of another \$1, while an extra \$1 could mean the ability to afford a pregnancy test for a woman with \$20 in her account.<sup>204</sup> When marginal utility rather than dollar amounts is the metric, low-income women may benefit more from a repeal.

Moreover, the case remains that the tampon tax is discriminatory.<sup>205</sup> Repealing the tampon tax serves an equal treatment goal.<sup>206</sup> If the tampon tax unjustifiably places the tax burden solely on women and not men, then repeal would remove that burden and the tax system would once again treat Amy and Ben the same way.<sup>207</sup> Repeal also marginally encourages women's market work and slightly improves women's economic security. Compared to a tax credit,<sup>208</sup> which is provided only after one files for taxes yearly, repeal has immediate consequences: women save their money whenever they buy menstrual hygiene products now—even if it is dollars and cents—rather than later. The tampon tax presents a greater burden to low-income women than to high-income women because the marginal utility of the next dollar is higher for low-income women. In tax policy terms, this is a timing issue.

Even though repeal is part of the solution, it is not the whole solution. Repeal does not do much to provide assistance to women. At best, it slightly mitigates women's financial burden associated with menstruation; at worst, it is only symbolic. Repealing the tampon tax translates to a tax break of dollars and cents for each woman—a minimal amount compared to the

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al., *Lack of Insurance and Parity Influence Choice Between Long-Acting Reversible Contraception and Sterilization in Women Postpregnancy*, 86 *CONTRACEPTION* 42, 46 (2012). Observers have expressed concern that interventions targeted at increasing the use of IUDs and implants among low-income women would undermine reproductive autonomy. Anu Manchikanti Gomez et al., *Women or LARC First? Reproductive Autonomy and the Promotion of Long-Acting Reversible Contraceptive Methods*, 46 *PERSP. SEXUAL & REPROD. HEALTH* 171, 171 (2014). That low-income women are more interested in menstrual suppression drives home the point that the burdens of menstruation particularly affect them.

<sup>204</sup> Pregnancy tests from the dollar store are supposed to be just as reliable as name-brand tests—and yes, they cost only a dollar. Kristin Wong, *8 Things You Won't Believe Cost \$1*, *BANKRATE* (June 25, 2015), <http://www.bankrate.com/personal-finance/smart-money/1-buck-luck-8-things-you-can-buy-for-just-1/#slide=8> [https://perma.cc/3X9M-9CUN].

<sup>205</sup> See *supra* notes 167–74 for a discussion of why the tax is discriminatory.

<sup>206</sup> See Alstott, *supra* note 174, at 2003, for an explanation of the equal treatment goal.

<sup>207</sup> See *supra* notes 157–60; 173–74 and accompanying text.

<sup>208</sup> See *infra* Section III.D.

estimated \$18,171 women spend on menstruation-associated products over a lifetime.<sup>209</sup> A more comprehensive solution that does more to mitigate menstrual inequity is needed if the goals of equal treatment, encouraging women's market work, and assistance to caregivers—who are typically women—are to be met.

### B. Free Tampons

One way to reduce the impact of the tampon tax on low-income women is to provide them with free tampons. New York City has led the way by offering free menstrual hygiene products to women in homeless shelters and public schools.<sup>210</sup> Similarly, Representative Meng's federal proposal would require large employers to provide menstrual hygiene products and condition receipt of federal funds by prisons on adequate provision of such products to inmates.<sup>211</sup> The idea is that homeless women, public school students, and prison inmates are the most disadvantaged and most in need of governmental assistance with the financial costs of menstruation.

This proposal is better than repeal in the sense that it recognizes that low-income women may need financial assistance with their periods and are unlikely to find the impact of a tax break significant. The reform, however, is both overinclusive and underinclusive. Not all public school students are from low-income families. And not all low-income women are either homeless, students, or inmates. For example, women who make minimum wage in the workforce will not benefit at all.

A potential solution to the underinclusiveness of New York City's free tampons program would be to expand the program to provide free tampons for every woman—a free-tampons-for-all program. This solution would ensure that women never have to spend money on feminine hygiene products again, thus bridging the gender gap in a way that repeal alone cannot do.<sup>212</sup> Yet a free-tampons-for-all program creates many costly administrative complexities.<sup>213</sup> The agency administering the program would also have to create a sourcing and distribution network. If the feminine hygiene products are to be distributed at certain government locations, such as schools or agency offices, beneficiaries must not only undergo the hassle of traveling

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<sup>209</sup> Kane, *supra* note 170.

<sup>210</sup> See *supra* notes 75–82 and accompanying text.

<sup>211</sup> See *supra* notes 83–94 and accompanying text.

<sup>212</sup> See *supra* note 170 and accompanying text.

<sup>213</sup> An experiment involving Mexico's food assistance program studied the difference between in-kind and cash transfers. Jesse M. Cunha, *Testing Paternalism: Cash Versus In-Kind Transfers*, 6 AM. ECON. J.: APPLIED ECON. 195, 196 (2014). While there were minimal differences in health outcomes, the in-kind program cost at least 18% more than the cash transfer. *Id.* at 198.

to those sites but also face the stigma of receiving benefits in a public place, much like welfare recipients feel when they use their Electronic Benefit Transfer (EBT) card at grocery stores.<sup>214</sup> Even if the products are to be delivered directly to the recipient to avoid privacy and stigmatization issues, such a task would be logistically challenging.<sup>215</sup> The government would have to box and ship the products and maintain a database for addresses that could be easily and quickly updated. Recipients may not even have permanent addresses if they are homeless—or constantly getting evicted. Perhaps it is because directly providing goods en masse is so logistically and administratively challenging that a similar proposal to directly provide food to low-income individuals has been summarily dismissed by members of Congress.<sup>216</sup>

Another issue with a free-tampons program, whether expanded to include all women or not, is that it could restrict personal autonomy by limiting recipients' choices.<sup>217</sup> Some women could prefer tampons, while others could prefer sanitary napkins, even as others prefer pantyliners. Women could also prefer a certain brand that they are accustomed to using. Still others could prefer premium organic tampons.<sup>218</sup> Limiting women's decision-making autonomy over such an intimate area of their lives is

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<sup>214</sup> The EBT card is a payment system that allows recipients to use welfare benefits at retailers. *What Is Electronic Benefits Transfer (EBT)?*, U.S. DEP'T OF AGRIC. FOOD & NUTRITION SERV. (last published July 18, 2018), <https://www.fns.usda.gov/ebt/general-electronic-benefit-transfer-ebt-information> [<https://perma.cc/3AVB-SM5W>]; see also *infra* notes 229–32 and accompanying text for further discussion of the stigma associated with welfare.

<sup>215</sup> Similar criticisms have been made about the Trump Administration's proposal to replace food stamps with boxes containing government-purchased food items. Caitlin Dewey, *Trump Wants to Slash Food Stamps and Replace Them with a 'Blue Apron-Type Program,'* WASH. POST (Feb. 12, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/02/12/trump-wants-to-slash-food-stamps-and-replace-them-with-a-blue-apron-type-program> [<https://perma.cc/7BMF-ZKNR>]. Advocates and analysts expressed concerns with the shipping and logistical cost and administrative complications of delivering boxes of food directly to SNAP recipients. *Id.* Others painted the proposal as a “logistical nightmare,” and pointed out the stigma associated with going to a government agency to apply for and receive benefits. Erica Hunzinger et al., *Trump Administration Wants to Decide What Food SNAP Recipients Will Get*, NPR (Feb. 12, 2018), <https://www.npr.org/sections/thesalt/2018/02/12/585130274/trump-administration-wants-to-decide-what-food-snap-recipients-will-get> [<https://perma.cc/FBE5-7K7W>].

<sup>216</sup> Glenn Thrush, *Trump's 'Harvest Box' Isn't Viable in SNAP Overhaul, Officials Say*, N.Y. TIMES (Feb. 13, 2018), <https://www.nytimes.com/2018/02/13/us/harvest-box-snap-food-stamps.html> [<https://perma.cc/L7Q6-69QW>] (describing the proposal as landing “with a thud” after the agriculture committee chairmen in the House and Senate dismissed the idea).

<sup>217</sup> Paternalism in welfare policy is a major concern. See, e.g., Rebecca L. Goldberg, *No Such Thing as a Free Lunch: Paternalism, Poverty, and Food Justice*, 24 STAN. L. & POL'Y REV. 35, 75–78 (2013) (presenting a framework for evaluating paternalistic policies that affect marginalized groups). The issue of whether such paternalism is permissible has generated lively debate. *Id.* at 66–75 (cataloging arguments for and against paternalism). Permissible or not, policymakers should be cognizant of the issue of paternalism because it is often raised by stakeholders and advocates.

<sup>218</sup> See *supra* notes 200–02 and accompanying text for a discussion of premium tampons.

paternalistic, however well-intentioned, and could even imply that the government knows better than individual women which menstrual hygiene products suit them best.<sup>219</sup> Of course, the program could provide a wide variety of options, including premium products, to avoid the charge of paternalism. But that approach would be costly, especially because women will be likely to shift their preferences to premium tampons simply because those are now free. Furthermore, the provision of premium tampons would also entirely subsidize a personal consumption choice, which runs contrary to the proposition that we should tax consumption choices but not necessities.<sup>220</sup>

And finally, providing free tampons does not do anything to mitigate the financial burden caused by other products associated with and necessitated by menstruation, such as pantyliners, medications for the relief of menstrual cramps such as Midol, and new underwear.<sup>221</sup> These additional financial burdens, as well as financial burdens faced by women left out of the free provision of tampons, are best mitigated by a women's tax credit.

### C. Including Feminine Hygiene Products Within SNAP, WIC, and ACA

Durkin suggests expanding federal welfare programs to include feminine hygiene products as benefits.<sup>222</sup> The Supplemental Nutrition Assistance Program (SNAP) is a "national nutrition safety net" serving about one-seventh of Americans as of 2011.<sup>223</sup> It is only available to low-income individuals.<sup>224</sup> Women, Infants, and Children (WIC) complements SNAP by providing nutritional assistance to low-income pregnant women, postpartum

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<sup>219</sup> Anti-hunger advocates have raised similar objections to a proposal to prevent SNAP recipients from using their benefits to buy soda. Goldberg, *supra* note 217, at 60–61 ("These advocates are deeply critical of paternalism that singles out the poor; they make the equality-based argument that SNAP recipients should have the same freedom to buy the products of their choosing as other shoppers, and the related argument that these proposals 'imply[] that low-income people cannot be trusted to make their own decisions.'" (alteration in original) (footnotes omitted)).

<sup>220</sup> See *supra* text accompanying note 166 (differentiating between consumption choices and consumption borne out of necessity); *infra* text accompanying note 255 (same, but in the context of premium tampons).

<sup>221</sup> For an estimate of how much menstruation costs a woman over her lifetime, see Kane, *supra* note 170.

<sup>222</sup> Durkin, *supra* note 95, at 157–59.

<sup>223</sup> U.S. DEP'T OF AGRIC. FOOD & NUTRITION SERV., BUILDING A HEALTHY AMERICA: A PROFILE OF THE SUPPLEMENTAL NUTRITIONAL ASSISTANCE PROGRAM 1 (2012), <https://fns-prod.azureedge.net/sites/default/files/BuildingHealthyAmerica.pdf> [<https://perma.cc/GNJ7-PU3A>].

<sup>224</sup> See *id.* at 2 ("Generally SNAP households must have monthly gross income less than 130 percent of the Federal poverty guidelines (\$2,422 for a family of four in fiscal year 2012), monthly net income less than 100 percent of the poverty guidelines, and assets of less than \$2,000. Households with elderly (age 60 and older) and disabled members are exempt from the gross income limit and must have assets less than \$3,250.").

women, infants, and children.<sup>225</sup> Individuals eligible for SNAP are also eligible for WIC.<sup>226</sup> As Durkin points out, feminine hygiene products are not included in either SNAP or WIC, even though “both are designed to further the health, safety, and welfare of low-income communities.”<sup>227</sup>

It is indeed inconsistent that programs focused on improving health and welfare among low-income individuals omit feminine hygiene products, which are essential to the reproductive health of women and their ability to work and attend school. What is attractive about this proposal is that it makes use of an existing system—the universe of SNAP/WIC benefits is simply expanded to include feminine hygiene products. Thus, it eliminates compliance costs associated with building an entirely new distribution network as required for a free-tampons-for-all program.

Any solution that relies on SNAP and WIC, however, necessarily confines itself to solving the problem for only a small subset of women. If the concern is solely with the susceptibility of low-income women to the burdens of menstruation, then including feminine hygiene products within SNAP and WIC benefits is a good solution. But if the fundamental problem is the financial inequity caused by menstruation, then more must be done. After all, many women who do not qualify for welfare benefits may still struggle to afford feminine hygiene products,<sup>228</sup> and even those who can afford feminine hygiene products find themselves at a financial disadvantage to men.

Expanding SNAP/WIC benefits to include feminine hygiene products not only excludes women who do not meet the programs’ eligibility criteria

<sup>225</sup> *About WIC—WIC at a Glance*, U.S. DEP’T OF AGRIC. FOOD & NUTRITION SERV. (Feb. 27, 2015), <http://www.fns.usda.gov/wic/about-wic-wic-glance> [https://perma.cc/RVE5-29NW]. WIC and SNAP recipients receive an electronic card similar to a credit card that allows them to buy authorized foods. *See* U.S. DEP’T OF AGRIC., THE SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN (WIC PROGRAM) 1, <https://fns-prod.azureedge.net/sites/default/files/wic/wic-fact-sheet.pdf> [https://perma.cc/CFM7-WVH2]; *Am I Eligible for SNAP?*, U.S. DEP’T OF AGRIC. FOOD & NUTRITION SERV. (Apr. 8, 2018), <https://www.fns.usda.gov/snap/eligibility#How%20do%20I%20receive%20SNAP%20benefits?> [https://perma.cc/7CSL-4L6N].

<sup>226</sup> *WIC Eligibility Requirements*, U.S. DEP’T OF AGRIC. FOOD & NUTRITION SERV. (May 4, 2017), <http://www.fns.usda.gov/wic/wic-eligibility-requirements> [https://perma.cc/W7A2-N9ST].

<sup>227</sup> Durkin, *supra* note 95, at 158.

<sup>228</sup> Individuals and families above the poverty line still face economic insecurity. An analysis of America’s lower middle class, defined as families with children earning between 100 to 250 percent of the poverty line, shows that struggling lower-middle-class families still face food insecurity. MELISSA KEARNEY ET. AL, THE HAMILTON PROJECT, A DOZEN FACTS ABOUT AMERICA’S STRUGGLING LOWER-MIDDLE CLASS 10 (2013). For families living close to the poverty line, unanticipated setbacks could push them into poverty. *Id.* at 5. Recall that SNAP phases out at gross income exceeding 130% of the poverty line and at net income exceeding 100 percent of the poverty line. *See supra* note 224 and accompanying text. In effect, many families who are economically insecure do not qualify for SNAP benefits. Until the eligibility threshold for SNAP is radically expanded, co-opting the program to deliver menstrual hygiene products would be an inadequate solution.

but may also exclude some low-income women as well. The stigma associated with welfare benefits has been extensively documented.<sup>229</sup> Recipients could perceive welfare as demeaning<sup>230</sup> and feel self-loathing and shame when they receive welfare benefits.<sup>231</sup> As a result, even low-income women who qualify for SNAP/WIC may not apply for the benefits<sup>232</sup> and, consequently, will not benefit from the ability to buy feminine hygiene products with SNAP/WIC benefits.

Another significant proposal that Durkin advances is to include feminine hygiene products within the Affordable Care Act's (ACA) contraception mandate.<sup>233</sup> Durkin argues that oral contraceptives are often used for other medical conditions rather than for the sole purpose of preventing pregnancy.<sup>234</sup> Feminine hygiene products, like oral contraceptives, promote women's reproductive and overall health, and thus should be covered by the contraception mandate.<sup>235</sup> This proposal, along with the proposal to include feminine hygiene products in the SNAP and WIC programs, is appealing because it involves no out-of-pocket, upfront costs for covered females.

One major issue with the ACA proposal is that the contraceptive mandate has been rolled back by the Trump Administration.<sup>236</sup> The erosion of the contraceptive mandate means that fewer women would be covered.<sup>237</sup> Indeed, even without the newly issued directives from the Trump Administration, 28.2 million Americans already do not have health insurance coverage.<sup>238</sup> Uninsured women, therefore, would be excluded from the

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<sup>229</sup> E.g., Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515, 538–43 (2013) (documenting the welfare recipients' perception of stigma and noting that 80% of those who qualify for the Earned Income Tax Credit (EITC) receive it, while only 50% of those who qualify for Temporary Assistance for Needy Families (TANF), a welfare program, receive it); Susannah Camic Tahk, *The Tax War on Poverty*, 56 ARIZ. L. REV. 791, 828–29 (2014) (suggesting that, due to stigma associated with welfare, poor individuals are more likely to file tax returns to obtain benefits than to utilize welfare programs).

<sup>230</sup> See Tahk, *supra* note 229, at 828.

<sup>231</sup> Greene, *supra* note 229, at 541.

<sup>232</sup> *Id.* ("The universal sentiment of respondents was that they disliked being on welfare and wanted to avoid it at all costs."); see also *id.* at 523 (noting that welfare is so stigmatized that low-income families would rather resort to credit cards when an unanticipated setback occurs).

<sup>233</sup> Durkin, *supra* note 95, at 164.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> Robert Pear, Rebecca R. Ruiz & Laurie Goodstein, *Trump Administration Rolls Back Birth Control Mandate*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html> [https://perma.cc/UVT6-7PFK].

<sup>237</sup> It is estimated that hundreds of thousands of women could lose benefits. *Id.*

<sup>238</sup> *Health Insurance Coverage*, CDC (last updated Mar. 31, 2017), <https://www.cdc.gov/nchs/fastats/health-insurance.htm> [https://perma.cc/BW3R-U5X9].

benefits of including feminine hygiene products within the ACA's contraceptive mandate.

#### *D. A Women's Menstrual Health Credit*

A society that aims to be just and egalitarian should not stop at repeal because that does not solve the financial disparity between women who must pay for menstrual hygiene products and men who do not. Rather, this Note proposes that repeal should be combined with a Women's Menstrual Health Credit that reaches women of all income levels.

Consider again Amy and Ben.<sup>239</sup> Even in a no-tax world, Amy has to spend extra dollars on menstrual hygiene products by virtue of her sex. She thus ends up with a lower amount of welfare than Ben, who might be increasing his welfare through saving or going to the movies. In order to truly make Amy and Ben equal, the government has to redistribute from Ben to Amy. Here, a horizontal equity issue arises again. It might seem unfair to tax Ben more than Amy, seeing as how they are at the same level of income. But if the market distribution is not presumptively just, then using pre-tax outcomes as the baseline from which to set tax rates cannot be correct under any egalitarian theory of redistributive justice.<sup>240</sup> Thus, it does not necessarily follow that Amy and Ben must be taxed at the same rates. Indeed, redistribution from Ben to Amy might be the correct outcome if our aim is to equalize their relative levels of welfare.

Redistribution might be implemented through direct programs, such as an expanded free-tampons-for-all program, or the tax system, through which a refundable tax credit could be provided to *all* women of menstruating age. In this case, the tax system is a better avenue. Because it is refundable, even women with no tax liability to absorb the credit would benefit. This Section proposes a women's menstrual health credit that would be sufficient to cover necessary costs associated with menstrual hygiene and health while also serving the goals of equal treatment, encouraging women's market work, and assistance to caregivers—who are typically women.<sup>241</sup>

Unlike a free-tampons-for-all scheme, which is too complex to administer and limits a woman's choice,<sup>242</sup> the tax credit involves lower administrative costs and provides personal autonomy. Tacking the credit

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<sup>239</sup> See *supra* notes 157–60, 173–74 and accompanying text.

<sup>240</sup> MURPHY & NAGEL, *supra* note 43, at 31–37.

<sup>241</sup> This proposal is essentially similar to Rep. Meng's proposal for a \$120 tax credit, except it is expanded to cover all women on the basis that all women—not just low-income women—bear the costs of menstruation. See *supra* text accompanying notes 88–94 for background information on the proposed credit.

<sup>242</sup> See *supra* Section III.B.

onto the existing federal or state income tax system still imposes administrative costs—but likely to a smaller degree. The difference is between an additional line on the tax return and devoting time and resources to buying and distributing tampons. Moreover, a tax credit provides women with more choice over an intimate, intensely personal aspect of their lives. Women have more freedom to choose how to spend that money, such as using it to cover the entire cost of a year’s supply by purchasing low-cost options or splitting it between tampons and medication for menstrual cramps. In contrast, a direct program might limit the choices that women have, such as between brands of tampons, or amounts and types of menstrual hygiene products.

While SNAP/WIC is stigmatizing,<sup>243</sup> the provision of government benefits through the tax system is less so. Instead of facing a two-tiered welfare system that separates recipients into “deserving” and “undeserving,”<sup>244</sup> women who receive a menstrual health credit through the tax system participate in a one-tiered tax system that treats them as equals to other taxpayers.<sup>245</sup> Everyone has to file tax returns at some point, but not everyone applies for welfare benefits, which involves a separate process and means testing.<sup>246</sup> In the context of the Earned Income Tax Credit (EITC), a refundable credit that is now the largest federal anti-poverty program,<sup>247</sup> commentators and recipients alike have praised the relative lack of stigma associated with administering benefits through the tax system.<sup>248</sup> Indeed, the take-up rate is higher among those eligible for the EITC than among those eligible for welfare benefits, potentially because the EITC carries less stigma.<sup>249</sup> A menstrual health credit promotes the feminist goal of equal treatment<sup>250</sup> because women would not be forced into a separate system

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<sup>243</sup> See *supra* notes 229–32 and accompanying text for a discussion of the stigma attached to SNAP and WIC.

<sup>244</sup> Susannah Camic Tahk, *The New Welfare Rights*, BROOK. L. REV. (forthcoming) (manuscript at 13–15) (on file with *Northwestern University Law Review*) (providing an overview of the two-tiered welfare state).

<sup>245</sup> See *id.* at 29 (arguing that the tax system “presents a one-tiered vision of equal citizenship”).

<sup>246</sup> Tahk, *supra* note 229, at 828.

<sup>247</sup> *Id.* at 794; see also Jennifer Bird-Pollan, *Who’s Afraid of Redistribution? An Analysis of the Earned Income Tax Credit*, 74 MO. L. REV. 251, 283 (2009).

<sup>248</sup> *Id.* at 262 (“[A] credit system run through the IRS and the income tax system avoids many of the stigmas associated with traditional welfare.”); Greene, *supra* note 229, at 535, 539 (noting that no respondent in a survey of EITC recipients reported feeling stigmatized); Tahk, *supra* note 229, at 828 (contrasting tax programs with nontax programs).

<sup>249</sup> Tahk, *supra* note 229, at 829; see also David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 1010 (2004) (noting food stamps have a low participation rate but the EITC has a high participation rate).

<sup>250</sup> See *supra* note 184.



simply to receive their menstrual health benefits. It would also reach more women, enabling more women to participate in schools and the labor market.<sup>251</sup>

A tax credit that is generous enough to cover the costs of other products associated with genital health would better reflect the realities of being a woman than a repeal plus free-tampons program or the welfare approach would, unless the program is willing to provide items like Midol. Such a broad tax credit would recognize the fact that women need items beyond tampons to live productive lives; for example, a woman who suffers from debilitating menstrual cramps might need medication just to be able to go to school or work. In some states, these medications may be exempt from the sales tax as a medical expense, but the fact remains that women still need to pay for such products, which are not covered by insurance because they are not prescription medications.

A tax credit also avoids the issue of classifying the exemption. A debate about whether vaginal creams or pregnancy tests should also be exempted if menstrual hygiene products are exempted—a concern raised by one commentator<sup>252</sup>—could be avoided entirely on the basis that women can now afford these products, sales tax or no sales tax. As previously mentioned, reinterpreting exemptions for medical supplies to include menstrual hygiene products might signal that periods are a disease or medical condition.<sup>253</sup> Indeed, a tax credit not only avoids this issue but also sends a message that the unique financial burdens of menstruation and, more generally, women's health are recognized by the government; such a message might have a positive effect on raising tax morale among women.<sup>254</sup>

More significantly, while an exemption or a direct program would provide more certainty of relief and require less action by low-income women, a tax credit better addresses the issue of regressivity.<sup>255</sup> This conclusion is independent of repeal, although this Note has concluded above that repeal is desirable. Consider a new set of hypothetical taxpayers, Betty and Bell. Betty, a highly educated and wealthy executive, buys \$500 worth of premium menstrual health products each year, paying \$50 in sales taxes assuming a 10% tax rate. Betty makes \$100,000 a year, so this translates to

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<sup>251</sup> See *supra* text accompanying notes 185–87.

<sup>252</sup> See Allen, *supra* note 27.

<sup>253</sup> See *supra* text accompanying notes 110–11.

<sup>254</sup> See *supra* text accompanying notes 177–81.

<sup>255</sup> Frederick W. Derrick & Charles E. Scott, *Sales Tax Exemptions and Credits: Time to Reevaluate*, 23 ATLANTIC ECON. J. 267, 268 (1995). However, the authors note that “credits are no more effective than exemptions in affecting regressivity if the credit reaches fewer than 70 percent of the low-income individuals.” *Id.*

0.55% of her income. Meanwhile, Bell, a working class woman, buys only the bare necessities—about \$100 worth of menstrual products each year, paying \$10 in taxes. She makes \$20,000 a year, so she also spends 0.55% of her income on her menstrual health. If we keep the tampon tax but provide a tax credit of \$100 to both Betty and Bell, Betty would have spent \$450 on her menstrual health, while Bell would have spent \$10. This translates to 0.45% of Betty's income versus 0.05% of Bell's income. The difference would be starker were there no tampon tax: before, both women would be spending 0.5% of their respective incomes; after, Betty would be spending 0.4% while Bell would be spending 0%. The difference cannot be attributed to gender discrimination, as it is Betty's choice to buy premium, fancy menstrual products that causes the difference. That is a consumption *choice*, not a necessity. A menstrual health credit takes both choice and necessity into account: it would remedy the financial disparity between men and women by fully paying for the bare necessities, while preserving women's decision-making autonomy to choose high-end products.

Unlike a women's menstrual health credit, a deduction would not address the issue of regressivity. Indeed, a deduction for menstrual hygiene products would itself be regressive. Consider again Betty and Bell. Because our current rate structure is progressive, Betty would face a higher marginal rate of taxation than Bell.<sup>256</sup> If they take the same deduction, Betty gets a larger tax break than Bell because her marginal tax rate is higher. Even worse, Bell will likely take the standard deduction, as it is unlikely that she will have enough deductions to itemize. This would mean that Bell would not get the benefit of a menstrual hygiene deduction at all.

One major concern with providing government benefits through the tax system is timing.<sup>257</sup> In comparison to a system where women could access free tampons or buy them with insurance or SNAP/WIC benefits throughout the year, a menstrual health credit lacks that advantage because women would have to absorb the costs of feminine hygiene products up front and recoup their spending with a tax credit they receive at the end of the taxable year. Despite this disadvantage, a tax credit is the best way to reach the most women because many people *must* file tax returns.<sup>258</sup> Even for those who

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<sup>256</sup> For the 2017 tax year, Betty would face a marginal tax rate of 28%, while Bell would face a marginal tax rate of 15%, assuming both are single. *See* Rev. Proc. 2016-55, 2016-45 I.R.B. 707 (2017 tax brackets). Assume that each spends \$100 in menstrual hygiene products in 2017, and each claims that amount as a deduction. The value of the deduction is higher to Betty, because she would save \$28 (0.28 \* \$100), while Bell would only save \$15 (0.15 \* \$100).

<sup>257</sup> *See* Greene, *supra* note 229, at 560–61 (observing that unless unanticipated financial setbacks occur in conjunction with tax refund season, low-income families often turn to credit cards).

<sup>258</sup> Generally, taxpayers have to file a tax return if their gross income exceeds the sum of the standard deduction and the personal exemption. *See* IRS, I.R.S. PUB. NO. 501, CAT. NO. 15000U; EXEMPTIONS,

ordinarily might prefer to avoid the hassle of filing a tax return if they do not need to do so, the availability of the menstrual health credit plus other tax credits and deductions should incentivize them to file.<sup>259</sup>

Having concluded above that menstruation is a source of inequity that directly stems from biological sex,<sup>260</sup> it would not be fair to extend a tax credit only to low-income women and leave other women in the lurch. Concededly, this argument is a slippery slope, in that granting a women's health credit would open the door to other credits premised on reducing gender inequalities. But that is not in itself a devastating critique. To achieve large-scale change, small steps must be taken and small victories accomplished that set in motion successive initiatives. There are other inequalities associated with being a woman, such as being paid less than men.<sup>261</sup> The tax system *should* be used to remedy these inequalities. After all, the tax system is “not just a method of payment for government and public services: [it is] also the most important instrument by which the political system puts into practice a conception of economic or distributive justice.”<sup>262</sup> But, regardless of the foregoing, a line can be convincingly drawn. The inequity caused by menstruation is easily measured in dollars and cents, and the cause of that inequity is clearly solely driven by sex differences, i.e., women menstruate and men do not. In contrast, differences in salaries cannot be attributed *solely* to sex, and rather depend on a variety of factors such as

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STANDARD DEDUCTION, AND FILING INFORMATION (2018), <https://www.irs.gov/pub/irs-pdf/p501.pdf> [<https://perma.cc/BKJ7-4HT2>]. One must file a tax return to receive a refund, including tax credits. *Id.* Apart from the fact that most people have to file a tax return, the costs associated with filing a tax return are also lower than the cost of buying insurance. A taxpayer can always fill out paper forms and mail them for free, and a variety of free tax preparation software is available for those with more complicated tax situations. Brian Acton, *The Ultimate Guide to Filing Your Taxes for Free*, ABC NEWS (Jan. 26, 2017, 5:14 AM), <http://abcnews.go.com/Business/ultimate-guide-filing-taxes-free/story?id=45014235> [<https://perma.cc/4YT8-LP53>] (cataloging approximately twenty ways to file taxes at no cost).

<sup>259</sup> See Marsha Blumenthal, Brian Erard & Chih-Chin Ho, *Participation and Compliance with the Earned Income Tax Credit*, 58 NAT'L. TAX. J. 189, 201 (2005) (finding a higher likelihood of filing if eligible for EITC). Increasing the size of benefits available through the tax system could increase filing rates and take-up rates of tax credits. *See id.* at 210 (finding a positive association between the size of EITC and both filing a return and claiming the credit). Furthermore, wage earners should be able to claim the menstrual health credit on behalf of their dependents, so as to avoid the need for stay-at-home mothers and teenage daughters to file their own returns.

<sup>260</sup> *See supra* notes 167–174 and accompanying text.

<sup>261</sup> *See* Women's Bureau, *Breaking Down the Gender Wage Gap*, U.S. DEP'T. OF LABOR, [https://www.dol.gov/wb/media/gender\\_wage\\_gap.pdf](https://www.dol.gov/wb/media/gender_wage_gap.pdf) [<https://perma.cc/7TP9-V8F9>]. While these statistics are controversial, the point is not necessarily that there *is* a wage gap due entirely to gender, but that if there is one, the tax system is a good way to bridge that gap.

<sup>262</sup> MURPHY & NAGEL, *supra* note 43, at 3. Of course, each demogrant must be judged on its own merits so as to avoid impermissible discrimination and guard against malicious motivations. In the context of a women's menstrual health credit, there may be age discrimination issues because age brackets are likely a rational way to determine menstruation, which is a driving force for the credit. This statutory and constitutional question is beyond the scope of this Note and must be explored separately.

education levels and work experience. The pay gap stemming from gender alone, then, is difficult, if not almost impossible, to quantify. A motivated government might ignore the administrative inconvenience of such a calculation and forge ahead, but the task is daunting. A women's health tax credit, on the other hand, is a much more realistic possibility.

Related to the slippery slope critique is the idea that if we grant a tax credit for menstrual hygiene products, we should also grant one for male-specific items. The foremost response to this line of reasoning is that there are few, if any, male-specific items. The closest analogue might be Viagra, but even then, erectile dysfunction is a diagnosable medical disorder rather than a condition of being male. Some women, too, may have female-specific medical disorders such as uterine cancer. Thus, Viagra is usually covered under prescription medication exemptions.<sup>263</sup> A tax credit for Viagra or uterine cancer medications might be justified on the theory that medical bad luck is a source of inequality between taxpayers—beyond the scope of this Note—but not on the theory of sex inequality.

Finally, an objection might be made that the women's menstrual health credit is overinclusive and underinclusive.<sup>264</sup> Specifically, because eligibility for the tax credit is based on age, it would include nonmenstruating women such as pregnant mothers and women on extended-cycle birth control pills. It would also exclude women outside the age brackets who are menstruating. Yet many taxes and tax credits are guilty of the same thing. For example, the EITC is intended to help low-income working parents but does not provide an increase in the amount of the credit beyond three children.<sup>265</sup> The EITC also provides a small credit for childless workers.<sup>266</sup> When creating tax regimes, policymakers must draw lines somewhere, and any line drawing almost always creates some undesired exclusions and inclusions.

A women's menstrual health credit best advances each of the goals that Alstott articulated.<sup>267</sup> It ensures that women do not lose out financially compared to men by virtue of their periods. It encourages women's market

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<sup>263</sup> See *supra* note 161.

<sup>264</sup> The same criticism could be made of the proposal to provide free tampons in schools, prisons and homeless shelters, see *supra* Section III.B, or the proposal to expand SNAP/WIC benefits to include tampons, see *supra* Section III.C. The difference, however, is the degree of underinclusiveness. The tax credit would cover more women—low-income or otherwise—than a SNAP/WIC expansion or free-tampons program would cover.

<sup>265</sup> *Briefing Book: What Is the Earned Income Tax Credit (EITC)?*, TAX POL'Y CTR., <http://www.taxpolicycenter.org/briefing-book/what-earned-income-tax-credit-eitc> [<https://perma.cc/E3GX-ZMVS>].

<sup>266</sup> David R. Francis, *The Earned Income Tax Credit Raises Employment*, NAT'L BUREAU OF ECON. RES., <http://www.nber.org/digest/aug06/w11729.html> [<https://perma.cc/K42A-JGD2>].

<sup>267</sup> See *supra* notes 183–90 and accompanying text.

work by ensuring women can participate at work and school while on their periods. Finally, it improves women's economic security by compensating them for the financial burdens of menstruation.

To be clear, the foregoing does not mean that the tampon tax should not be repealed. Although a tax credit would not create a messy tax base like a repeal would, and would entirely remove the financial burden of menstruation, it still creates a timing issue, as discussed earlier. And from a political standpoint, an exemption for menstrual hygiene products is still desirable, despite its inefficiencies, both because it would benefit women who lack the time, motivation, or sophistication to file a tax return and because the tax is a form of gender discrimination that sends a message that women's periods are choices that should be taxed. Given the financial burdens of menstruation entirely apart from the tax itself, activists should demand more than repeal. A women's health credit that mitigates the impact of those burdens supplements repeal by serving an equal treatment goal and ensuring women's economic security and participation in the public sphere.

#### CONCLUSION

In the past few years, a movement to repeal the tampon tax has been gaining ground: Canada repealed its tax on menstrual hygiene products in 2015, and in the United States, Illinois, New York, and Connecticut followed suit. Proposals for repeal are being considered today. This Note, however, has shown that repeal is only half of the fight. In order to achieve a more equal footing between men and women, more needs to be done. The financial burdens of menstruation are one source of that inequality, and the tax code is an excellent tool to remedy it. As Professor Edward McCaffery once insightfully commented on the tax code:

[S]ociety *has* done things—many things, for many years—slanted against women. Calling it quits now is not fair, and it is certainly not “neutral,” whatever that would mean. It would seem only to mean that we would bury the sins of the past, by fiat, and leave them in place, unchallenged and unacknowledged, forever. It turns out that tax is not only the locus of many of our greatest sins, it is also an excellent place to look for change.<sup>268</sup>

That change is repealing the tampon tax and granting a women's health credit.

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<sup>268</sup> MCCAFFERY, *supra* note 133, at 274.

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