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A Blood-Red-Herring: Why Revenue Concerns Are Overestimated in the Fight to End the "Tampon Tax"

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A BLOOD-RED-HERRING: WHY REVENUE CONCERNS ARE OVERESTIMATED IN THE FIGHT TO END THE “TAMPON TAX”

*Suzanne Herman**

*“i am
not wounded i am bleeding to life
we need a god who bleeds now
whose wounds are not the end of anything”*

– Ntozake Shange

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INTRODUCTION

Thirty states imposed a retail sales tax on menstrual products in 2020.¹ This number is down from 40 in only the last five years.² The various ways states exempted menstrual products and their motivations for doing so make the “tampon tax” an outlier in state sales tax and budget policy.³ A unique combination of mainstream revenue-building and anti-women⁴ lawmaking created an inequitable tax, but reformers brought about a sea change using other unique combinations: bipartisan support for exemption resulted in unlikely political allies;⁵ youth-lead internet campaigns created noise around, of all topics, sales tax;⁶ threats of litigation showed state legislatures that the tampon tax may be worth more dead than alive;⁷ and in the wake of the COVID-19 pandemic, the U.S. government changed its tune on whether menstrual products are “necessities.”⁸ Overall, the menstrual equity movement is seeing significant progress for the first time in nearly a decade.⁹ As knowledge of the issue increases, revenue justifications for taxing menstrual products appear flimsy. Under stricter scrutiny from legislatures, policy makers, and the general public, the sales tax on menstrual products cannot stand.

This Note describes the tax on menstrual products as it currently exists in the United States, focusing on how recent changes have laid the foundation for total repeal. Part I provides relevant background

1. *See 30 States Have Until Tax Day 2021 to Eliminate Their Tampon Tax*, TAX FREE PERIOD., (Apr. 15, 2020), <https://www.taxfreeperiod.com/blog-entries/were-demanding-that-30-states-become-tax-free-period-by-tax-day-2021> [<https://perma.cc/XH4Y-NWVT>].

2. *See Mission & History*, PERIOD EQUITY, <https://www.periodequity.org/mission-and-history> [<https://perma.cc/4L3L-PRJ5>] (last visited Dec. 26, 2020).

3. *See infra* Section I.B.

4. It is important to note that not all women menstruate and not all people who menstruate are women. This Note will use “women,” “girls,” and “people” to refer to the groups impacted by the tampon tax.

5. *See* Jennifer Weiss-Wolf & Steve Andersson, *Republican or Democrat — We Can All Agree on Axing the Tampon Tax*, NEWSWEEK (Apr. 15, 2019, 7:51 AM), <https://www.newsweek.com/tampon-tax-republican-democrat-opinion-1391763> [<https://perma.cc/492E-4KJL>].

6. *See infra* note 180 and accompanying text.

7. *See infra* note 111 and accompanying text.

8. *See infra* note 143 and accompanying text.

9. *See* Laura Strausfeld, *Three Female State Leaders Can — and Should — Remove the Tampon Taxes in Their States Today*, SPOT, <https://blog.mylola.com/menstrual-equity/three-female-state-leaders-can-and-should-remove-the-tampon-taxes-in-their-states-today/> [<https://perma.cc/P6VL-XXKAY>] (last visited Dec. 26, 2020).

on retail sales tax and the so-called “tampon tax” and discusses the menstrual equity movement in the United States and internationally. This Part also outlines the movement’s common arguments and its successes in effecting reform. Part II explores why the tax on menstrual products still exists, evaluating theories of general tax policy, revenue building, and sex discrimination. Part III argues that the “tampon tax” continues to exist mainly due to a cloud of ignorance and stigma, not sound tax policy; policy changes around menstrual products in the wake of the COVID-19 pandemic prove how institutional ignorance has hindered reform. This Part suggests that coalition building and a youth-centered legal campaign are integral to menstrual product tax repeal. The recent groundswell towards repeal — legislatively, by ballot-initiative, and from within the Internal Revenue Service (IRS) itself — with support from an unlikely union of advocates, demonstrates that lawmakers are becoming cognizant of the gross inequity and are moving to correct it.

I. WHERE WE STAND IN THE FIGHT FOR MENSTRUAL EQUITY

A. What We Tax Signals What We Value

In the early twentieth century, jurisdictions worldwide began to impose taxes on retail purchases known as “consumption taxes.”¹⁰ Retail sales taxes in the United States emerged in the 1930s.¹¹ At the time, states needed a new income source to supplement property taxes, which no longer produced sufficient government revenue.¹² Retail sales taxes allowed states to cover their service obligations and assist local governments during the Great Depression’s economic turmoil.¹³ By 1969, 45 states and the District of Columbia adopted a state sales tax on products sold within their borders.¹⁴ Today, only five states — Alaska, Delaware, Montana, New Hampshire, and Oregon — do not collect statewide retail sales taxes.¹⁵ Since local governments can

10. See KATHRYN JAMES, *THE RISE OF THE VALUE-ADDED TAX* 1 (2015) (discussing the creation of modern consumption taxes like the retail sales tax and the VAT).

11. See Vivien Lee & David Wessel, *The History and Future of the Retail Sales Tax*, BROOKINGS INST. (July 16, 2018), <https://www.brookings.edu/blog/up-front/2018/07/16/the-history-and-future-of-the-retail-sales-tax/> [https://perma.cc/9PPE-ZDHX].

12. See *id.*

13. See *id.*

14. See *id.*

15. See JANELLE CAMMENGA, TAX FOUND., *STATE AND LOCAL SALES TAX RATES*, JANUARY 2019, at 2 (2019),

impose their own sales tax on top of the state sales tax, the combined aggregate state and local sales tax rates range from 4.35% (Hawaii) to 9.46% (Tennessee).¹⁶ Nationwide, state sales tax generates more revenue than state income tax.¹⁷ Many state budgets are funded in greatest part by their sales tax.¹⁸

Retail sales taxes raise significant revenue for individual states, but they also introduce a problem for low-income consumers — taxing what a consumer uses rather than what they earn results in a regressive rather than progressive tax.¹⁹ Progressive taxes require individuals with higher incomes to pay a higher percentage of their income.²⁰ Retail sales tax is regressive: individuals with lower incomes spend a higher percentage of their overall income on retail taxes,²¹ compared to individuals with higher incomes.²² To ease the burden on individuals with lower incomes, legislatures in every state with retail sales taxes have codified broad categories of exemptions in their state tax code.²³ In doing so, legislators typically identify two explanations for why certain products should be tax exempt. First, legislators often seek to exempt “necessary” products,²⁴ which often include food, clothing, and prescription drugs.²⁵ Exempting necessities primarily benefits

<https://files.taxfoundation.org/20190130115700/State-Local-Sales-Tax-Rates-2019-FF-633.pdf> [<https://perma.cc/6DNZ-BFPW>].

16. See JARED WALCZAK & SCOTT DRENKARD, TAX FOUND., STATE AND LOCAL SALES TAX RATES, MIDYEAR 2018, at 2–3 (2018), <https://files.taxfoundation.org/20180713135343/Tax-Foundation-FF600.pdf> [<https://perma.cc/9DCW-5RZ5>] (Colorado has the lowest rate at 2.9%, and California has the highest rate at 7.25%. Hawaii has the lowest combined state and local rate at 4.35%, and Tennessee has the highest combined rate at 9.46%).

17. See *2019 State Government Tax Tables*, U.S. CENSUS BUREAU (2019), <https://www.census.gov/data/tables/2018/econ/stc/2019-annual.html> [<https://perma.cc/UB8R-AXKX>] (reporting 2019 state sales and gross receipts tax collections of more than \$505 million, but just over \$470 million in state income tax collections).

18. See *id.*

19. See Howard Chernick & Andrew Reschovsky, *Yes! Consumption Taxes Are Regressive*, 43 CHALLENGE 60, 60 (2000).

20. In the United States, progressive taxes include the federal and state income taxes and estate taxes, as high-income households disproportionately bear these tax burdens. See *Are Federal Taxes Progressive?*, TAX POL’Y CTR. (May 2020), <https://www.taxpolicycenter.org/briefing-book/are-federal-taxes-progressive> [<https://perma.cc/XFC5-L6WY>].

21. Retail sales taxes are a flat rate for all consumers. See *id.*

22. See *id.*

23. See Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICHMOND L. REV. 439, 448–49 (2019).

24. See *id.*

25. See *id.*; see also KATHERINE LOUGHEAD, TAX FOUND., SALES TAXES ON SODA, CANDY, AND OTHER GROCERIES, 2018, at 2 (2018),

low-income consumers who pay a higher overall percentage of their income to purchase these products, thereby combating the retail tax system's regressive nature.²⁶

In addition to exempting “necessary” products, legislators often enact exemptions to cater to important business interests within their states — states often exempt their large or influential industries' products.²⁷ States with large tourism sectors or states aiming to boost tourism revenues often exempt products sold at popular attractions.²⁸ Unlike exemptions for “necessary” products, this type of exemption primarily benefits producers or business owners with enough time and resources to lobby for them.²⁹ While “the typical statutory division between taxable and non-taxable [retail] items roughly tracks the distinction between ‘necessities’” and non-necessities (sometimes termed “luxuries”)³⁰ over time, states have created unique tax codes

<https://files.taxfoundation.org/20180706104150/Tax-Foundation-FF598-Groceries-Soda-Candy.pdf> [<https://perma.cc/Q4JS-3FLV>] (“One of the most prevalent sales tax exemptions among states is the ‘grocery’ exemption: 38 states and the District of Columbia carve out full or partial sales tax exemptions for goods classified as groceries.”); Sarah Larimer, *The ‘Tampon Tax,’ Explained*, WASH. POST (Jan. 8, 2016, 6:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2016/01/08/the-tampon-tax-explained/> [<https://perma.cc/A6SG-ZYMY>].

26. See Crawford & Waldman, *supra* note 23.

27. For example, Georgia is the home state of Coca-Cola and one of only a few states to exempt soda from retail sales tax. See *A State Innovation: The Coca-Cola Company*, GA. HIST. SOC'Y, <https://georgiahistory.com/a-state-of-innovation-the-coca-cola-company/> [<https://perma.cc/VNZ8-K46K>] (last visited Feb. 2, 2021); Katherine Loughead, *Sales Taxes on Soda, Candy, and Other Groceries, 2018*, TAX. FOUND. (July 11, 2018), <https://taxfoundation.org/sales-taxes-on-soda-candy-and-other-groceries-2018/> [<https://perma.cc/7KJV-2X7B>]. Indiana, a burgeoning producer of sunflower seeds, exempts the snack from retail sales tax. See IND. DEP'T OF REVENUE, INFORMATION BULLETIN #29 SALES TAX 10 (2019), <https://www.in.gov/dor/files/sib29.pdf> [<https://perma.cc/PPH2-XR9D>]; Marvin L. Swearingin, *Sunflower Production in Indiana — Questions and Answers*, AGRONOMY GUIDE, PURDUE U. COOP. EXTENSION SERV., <https://www.extension.purdue.edu/extmedia/ay/ay-227.html> [<https://perma.cc/WS2C-R6HF>] (last visited Feb. 2, 2021).

28. For example, Utah exempts admissions to college athletic events, Kansas exempts products sold by the National Hot Rod Association, and New Mexico exempts products sold at minor league baseball stadiums. See N.M. STAT. ANN. § 7-9-13.3 (West 2001); KAN. DEP'T OF REVENUE, SALES TAX AND COMPENSATING USE TAX 5 (2020), <https://www.ksrevenue.org/pdf/pub1510.pdf> [<https://perma.cc/AF6R-EGK9>]; Associated Press, *Report: Tax Exemptions Cost Utah \$426 Million Last Year*, DESERET NEWS, <https://www.deseret.com/2017/4/16/20610431/report-tax-exemptions-cost-utah-426-million-last-year> [<https://perma.cc/Y9QB-WJGH>].

29. See *supra* note 27 and accompanying text.

30. Crawford & Waldman, *supra* note 23, at 452. Using the term “luxury” to differentiate necessity from non-necessity can be confusing. A good referred to as a “luxury” in the United States (where there is not a per se “luxury tax”) could be

with a hybrid system of exemptions offering benefits to both low-income consumers and wealthy producers.³¹ This dual exemption system benefits certain products and interests, but also creates financial problems. By excluding certain categories from the retail sales tax, exemptions necessarily narrow the available tax base for individual states and cause them to lose revenue.³² Legislators and academics struggling to define the exact boundary between “necessities” and non-necessities often debate whether any products should be exempted as a necessity in the first place.³³

B. Introducing the Tampon Tax

Blurring the line between necessities and non-necessities — by creating exemptions for special interests — draws attention to items that are not exempted but may be entirely necessary to the lay consumer. The “tampon tax” is a term commonly used to refer to the fact that tampons, pantliners, menstrual cups, and other menstrual products are subject to a value-added tax or retail sales tax in many countries, states, and cities.³⁴ Unlike food, clothing, and prescription drugs, menstrual products are not considered necessities.³⁵ Proponents of a tax exemption argue that tampons, sanitary napkins, menstrual cups, and comparable products constitute basic, unavoidable necessities for women and thus should be made tax exempt.³⁶ Advocates for eliminating the tax on menstrual products also argue that the tax is “systematic discrimination” against women, girls, and all

anything from a stapler to a diamond ring, so long as it is not a necessity for retail sales tax purposes, like groceries and clothing often are. *See supra* note 25 and accompanying text.

31. *See* Crawford & Waldman, *supra* note 23, at 453.

32. *See* NICOLE KAEDING, TAX FOUND., TAMPON TAXES: DO FEMININE HYGIENE PRODUCTS DESERVE A SALES TAX EXEMPTION? 1 (2017), <https://files.taxfoundation.org/20170425105103/Tax-Foundation-FF547.pdf> [<https://perma.cc/U3ZS-5FXE>].

33. *See id.*

34. *See* Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, WIS. L. REV. 491, 500–06 (2017).

35. *See supra* note 25 and accompanying text.

36. *See* Strausfeld, *supra* note 9 (“Sales taxes on consumer products have always been considered the most regressive of all taxes. A sales tax that disproportionately impacts the lowest income and most impoverished segment of the population . . . i.e., women — and applies to goods that are medically necessary *every month* for this group is uniquely punitive and shameful.”) (alteration in original); *Women and Poverty in America*, WOMEN’S LEGAL DEF. & EDUC. FUND., <https://www.legalmomentum.org/women-and-poverty-america> [<https://perma.cc/V6JR-9LKM>] (last visited Dec. 29, 2020).

people who menstruate.³⁷ As succinctly as possible, the argument goes as follows: people who menstruate, on average, use approximately 12,000 tampons or pads in a lifetime.³⁸ The sales tax revenue made from menstrual products is a lifetime economic burden that overwhelmingly falls on women and disproportionately affects low-income women³⁹ who may be forced to choose between purchasing menstrual products and other necessities.⁴⁰ For people who menstruate, period products are essential to their ability to participate normally in society for approximately a quarter of each year. Without access to these products, women and girls often miss work or school, causing them to lose potential income or fall behind in class.⁴¹ The inability to afford menstrual products also leads to unsanitary practices and health issues from reusing old products or creating makeshift ones.⁴²

Prior to 2015, roughly when menstrual equity came into the United States' spotlight as a popular reform effort,⁴³ only ten states did not

37. See ACLU & PERIOD EQUITY, THE UNEQUAL PRICE OF PERIODS: MENSTRUAL EQUITY IN THE UNITED STATES 1–2, https://www.aclu.org/sites/default/files/field_document/111219-sj-periodequity.pdf [<https://perma.cc/M2SH-YVGE>] (last visited Dec. 29, 2020); Erwin Chemerinsky & Jennifer Weiss-Wolf, *Op-Ed: Taxing Tampons Isn't Just Unfair, It's Unconstitutional*, L.A. TIMES (July 11, 2019, 3:05 AM), <https://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-weiss-wolf-tampons-tax-20190711-story.html> [<https://perma.cc/BMW9-MYEE>].

38. See Susan Dudley et al., *Tampon Safety*, NAT'L CTR. FOR HEALTH RSCH., <https://www.center4research.org/tampon-safety/> [<https://perma.cc/H6SN-YTKH>] (last visited Dec. 29, 2020).

39. See ACLU & PERIOD EQUITY, *supra* note 37, at 2.

40. See *id.* at 1.

41. See *id.* at 3 (“Children may suffer lifelong consequences because they lack access to menstrual products. Even missing just a few days of school can lead to significant performance gaps that are exacerbated by poverty and racism. Absenteeism is also linked to social disengagement, feelings of alienation, and adverse outcomes even into adulthood.”).

42. Examples include homeless women using rags or paper bags in lieu of menstrual products and incarcerated women bartering for tampons they cannot afford from commissary. See JENNIFER WEISS-WOLF, PERIODS GONE PUBLIC: TAKING A STAND FOR MENSTRUAL EQUITY 63–91 (2017) [hereinafter WEISS-WOLF, PERIODS GONE PUBLIC]; Chandra Bozelko, *Prisons That Withhold Menstrual Pads Humiliate Women and Violate Basic Rights*, GUARDIAN (June 12, 2015), <https://www.theguardian.com/commentisfree/2015/jun/12/prisons-menstrual-pads-humiliate-women-violate-rights> [<https://perma.cc/R3L4-EB59>]; Janet Upadhye, *This Is How Homeless Women Cope with Their Periods*, BUSTLE (Oct. 18, 2016), <https://www.bustle.com/articles/190092-this-is-how-homeless-women-cope-with-their-periods> [<https://perma.cc/9R8Z-87HP>].

43. See WEISS-WOLF, PERIODS GONE PUBLIC, *supra* note 42, at 75.

have a sales tax on menstrual products.⁴⁴ These states either lacked a retail sales tax altogether or exempted menstrual products as “medical supplies.”⁴⁵ Early legislative victories for repeal were won in Illinois, Connecticut, and the District of Columbia.⁴⁶ Beginning in 2016, litigators filed lawsuits in three additional states that taxed menstrual products — New York, Florida, and Ohio — arguing that the continued taxation of menstrual products violated the Equal Protection Clause of the Fourteenth Amendment.⁴⁷ Within three years, these lawsuits produced exemptions for menstrual products in all three states.⁴⁸ In 2018, Nevada voters approved a ballot initiative in favor of eliminating the sales tax on pads.⁴⁹ Since the launch of the Tax Free. Period. legal campaign by the non-profit Period Equity in June of 2019, Rhode Island, Ohio, and Utah have bowed to legislative advocacy efforts and eliminated the tax.⁵⁰ That same year, California, while not permanently exempting the products, extended its temporary state exemption already on the books for an additional two years, to July 2023.⁵¹ Period Equity most recently sued the State of Michigan for unconstitutional taxation of menstrual products in a suit that is currently unfolding.⁵² Presently, 30 states still tax menstrual products, compared to 40 just five years ago.⁵³

44. See Natalie Gontcharova, *Does Your State Have a Period Tax?*, REFINERY29 (Nov. 20, 2019, 11:00 AM), <https://www.refinery29.com/en-us/tampon-tax-us-states> [<https://perma.cc/NZ8Q-3PG7>].

45. See Crawford & Waldman, *supra* note 23, at 446–49.

46. See *id.* at 450–51.

47. See *id.* at 461–68.

48. See *id.*

49. See *Feminine Hygiene Products Are Now Exempt from Sales and Use Tax*, ST. NEV. DEP’T TAXATION, <https://tax.nv.gov/FAQs/Feminine-Hygiene-Products/> [<https://perma.cc/2TJY-E9XF>] (last visited Dec. 29, 2020); Maya Salam, *Goodbye, Tampon Tax (at Least for Some)*, N.Y. TIMES (Nov. 9, 2019), <https://www.nytimes.com/2018/11/09/health/tampons-tax-periods-women.html> [<https://perma.cc/QAN6-HHC2>].

50. See *30 States Have Until Tax Day 2021 to Eliminate Their Tampon Tax*, *supra* note 1.

51. See *id.*

52. The law firms Schiff Hardin LLP and WilmerHale, along with Period Equity, filed a class action complaint against the State of Michigan on behalf of three named plaintiffs in August 2020. See Complaint, *Beggs v. Michigan*, No. 20-000149-MT (Ct. of Claims Aug. 11, 2020) [hereinafter *Beggs* Complaint].

53. See *The History of the Tampon Tax*, TAX FREE. PERIOD. (Mar. 18, 2020), <https://www.taxfreeperiod.com/blog-entries/historytamponntaxadvocacy> [<https://perma.cc/6ERZ-HQTP>].

C. The Tampon Tax Abroad

In recent years, the international community has also shifted towards exempting menstrual products, citing a wide range of rationales. In 2004, Kenya eliminated its national sales tax on menstrual products due to their prohibitive cost.⁵⁴ In 2011, the country also ended an import duty on pads, further reducing consumer costs.⁵⁵ In 2018, the Constitutional Court of Colombia unanimously ruled to strike down the 5% tax on tampons and pads on gender equality grounds.⁵⁶ As of January 1, 2020, the German Parliament cut the tax on menstrual products from 19% (for luxury goods) to 7% (for daily necessities).⁵⁷ Ireland, the only European Union country that provides free menstrual products, sets another shining example.⁵⁸

Effective means of change internationally, like at home in the United States, include grassroots activism and social media campaigns. For example, before the German Parliament reformed the tax code, campaigners published *The Tampon Book*, a book filled with 15 tampons as a means to protest the unreasonable tax.⁵⁹ Since books were taxed at 7%, far less than the original 19% tax on tampons, the book was a clever and effective way of getting around the higher rate.⁶⁰

54. See Vicky Hallett, *What Kenya Can Teach the U.S. About Menstrual Pads*, NPR (May 10, 2016, 10:00 AM), <https://www.npr.org/sections/goatsandsoda/2016/05/10/476741805/what-kenya-can-teach-the-u-s-about-menstrual-pads> [https://perma.cc/FE7C-9UJ3].

55. See Gina Reiss-Wilchins, *Kenya & Menstrual Equity: What You Didn't Know*, HUFFPOST (Mar. 29, 2017), https://www.huffpost.com/entry/kenya-menstrual-equity-wh_b_9557270 [https://perma.cc/J5PQ-5L2R].

56. See Justicia, *Corte Constitucional Tumba IVA del 5% a Toallas Higiénicas y Tampones*, TIEMPO (Nov. 14, 2018, 9:06 PM), <https://www.eltiempo.com/justicia/cortes/corte-constitucional-tumba-iva-a-toallas-higienicas-y-tampones-293498> [https://perma.cc/DT45-QMFL].

57. See Nadine Schmidt & Sheena McKenzie, *Tampons Will No Longer Be Taxed as Luxury Items, After Landmark German Vote*, CNN (Nov. 8, 2019), <https://edition.cnn.com/2019/11/08/europe/tampon-tax-germany-luxury-item-grm-intl/> [https://perma.cc/CDT3-8Z2Q].

58. See Elizabeth Howcroft, *Scottish Parliament Approves Free Sanitary Products for All Women*, REUTERS (Feb. 25, 2020, 8:16 AM), <https://www.reuters.com/article/us-britain-scotland-sanitary/scottish-parliament-approves-free-sanitary-products-for-all-women-idUSKBN20J1NZ> [https://perma.cc/PEL8-NVXV].

59. See Alison Flood, *No Luxury: Book Containing Tampons Is Runaway Hit*, GUARDIAN (June 21, 2019), <https://www.theguardian.com/books/2019/jun/21/no-luxury-book-containing-tampons-is-runaway-hit> [https://perma.cc/9BU3-NRZ9].

60. See Melissa Eddy, *Tampons to Be Taxed as Essential, Not Luxury, Items in Germany*, N.Y. TIMES (Nov. 12, 2019),

The change in Germany stemmed from a fast-moving campaign designed to highlight that the tax code does not justify the extra cost; the tampon tax amounted to discrimination ingrained in its financial system.⁶¹ In May of 2014, a petition in England sparked a nationwide movement to reduce the value-added tax on menstrual products to zero.⁶² Canada eliminated its national Goods and Services Tax on menstrual products in July of 2015 after an extensive reform campaign.⁶³ In December 2015, the French parliament voted to reduce the national tax on menstrual products from 20% to 5.5% as a direct response to a feminist collective of activists.⁶⁴ In 2017, the hashtag #LahuKaLagaan (“tax on blood”) went viral in India as activists and lawmakers pressed for elimination.⁶⁵ Since 2017, Australia, South Africa, and Malaysia have also eliminated their versions of the tampon tax.⁶⁶

The impressive amount of change enacted abroad left many U.S. repeal activists wondering why the United States was lagging.⁶⁷ Part of the answer is the hyper-localized nature of the United States’ tax system. In many of the countries discussed above, a national Value-Added Tax (VAT) system is the norm.⁶⁸ Under a VAT system,

<https://www.nytimes.com/2019/11/12/world/europe/tampon-tax-germany.html>
[<https://perma.cc/HW6V-TTYM>].

61. *See id.*

62. *See* Alice Hearing, *Tampon Tax: How Laura Coryton Started the ‘Stop Taxing Periods’ Campaign While Still a Student*, INDEP. (Feb. 23, 2016, 3:28 PM), <https://www.independent.co.uk/student/student-life/tampon-tax-how-laura-coryton-started-the-stop-taxing-periods-campaign-while-still-a-student-a6891336.html> [https://perma.cc/GQF6-PQ6L].

63. There had been multiple attempts since 2004 to pass bills that would eliminate the tampon tax. Calls for the government to remove the tax culminated with an online petition called “No Tax on Tampons” that garnered 75,000 supporters. *See* Jason Fekete, *Federal Government Taking the Tax off Tampons, Effective July 1*, OTTAWA CITIZEN (May 28, 2015), <https://ottawacitizen.com/news/politics/federal-government-taking-the-tax-off-tamp-ns-effective-july-1> [https://perma.cc/ZF4V-GLY4].

64. *See Tampon Tax: France MPs Back VAT Cut on Sanitary Products*, BBC NEWS (Dec. 11, 2015), <https://www.bbc.com/news/world-europe-35070148> [https://perma.cc/QP2G-3Y57].

65. *See* Vitamin Stree, *From Hashtag to PIL: How #LahuKaLagaan Got Everyone’s Attention on Menstruation*, YOUTH KI AWAAZ (Dec. 1, 2017), <https://www.youthkiawaaz.com/2017/12/saniary-napkins-are-not-a-luxury-period-lahu-kalagaan/> [https://perma.cc/4FKZ-VTUQ].

66. *See The History of the Tampon Tax*, *supra* note 53.

67. *See* WEISS-WOLF, PERIODS GONE PUBLIC, *supra* note 42, at 65 (“How do Americans feel about potentially allowing what amounts to a ‘third-world crisis’ to unfold in their country? Could this really be happening, right here, in our own communities?”).

68. *See* Crawford & Spivack, *supra* note 34, at 497.

tax is imposed at each stage in the production and distribution process, the final stage being when the product is sold to the retail customer.⁶⁹ Individual countries cannot change or eliminate the VAT on their own; the European Union Parliament must approve any reduction in VAT rates in European Union countries.⁷⁰ The United States, meanwhile, regulates sales tax even at the city level.

Although the subnational feature of the tampon tax in the United States makes it more complicated to reform, it also creates a unique opportunity for scholars and activists to consider which strategies for repeal do and do not work. The idea of “laboratories of democracy,” sometimes also referred to as “progressive federalism” and popularized by Justice Louis Brandeis, empowers state and local governments to act as laboratories and “try novel social and economic experiments without risk to the rest of the country.”⁷¹ The United States has been “experimenting” with tampon tax reform for the last five years. The successes and failures build upon one another to provide a model to other parts of the country, which could ultimately result in nationwide repeal. As this Note will show, the common element among these various state experiments involves lifting the veil of institutional ignorance surrounding menstrual equity.

II. WHY DOES THE TAMPON TAX STILL EXIST?

When Laura Strausfeld, co-founder of Period Equity, first noticed the tampon tax over 30 years ago — upon learning that the Chapstick she had purchased at the drug store was exempt because it had a “medicinal” purpose, but not the tampons she bought — she was shocked it was ever permitted to begin with.⁷² This Part puts forth the possible explanations as to why the tampon tax exists at all. It discusses the theory that the tampon tax is intentional, sexist discrimination. It also examines the theory that Congress has yet to repeal the tax because it is a low priority in the overall fight for menstrual equity. Most importantly, this Part lays out the theory of revenue building: that the tampon tax is an indispensable part of state budgets. These explanations both overlap and exist in tension with one another, but

69. *See id.* In the European Union, for example, the VAT allows for four categories of taxation: (1) exempt, (2) zero tax, meaning subject to taxation but no tax is charged, (3) “reduced rate” of not less than 5% for items deemed “necessities,” and (4) “standard rate” of 15% or more for “luxuries.” *See* Council Directive 2006/112, art. 99, 2006 O.J. (L 347) 1, 24 (EU).

70. *See* Crawford & Spivack, *supra* note 34, at 497.

71. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 387 (1932).

72. *See* Strausfeld, *supra* note 9.

only by understanding the merits of each can progress towards repeal be made.

A. The “Unfairness” Argument

At the foundation of the tampon tax repeal movement is the contention that taxing menstrual products, used overwhelmingly by women, is fundamentally unfair compared to tax exemptions for products used primarily by men. For example, Wisconsin exempts spermicidal condoms and erectile dysfunction drugs from taxation but taxes tampons and pads.⁷³ Viagra, which has no approved uses for women, is tax exempt in some states, as is Rogaine hair treatment.⁷⁴ Both are tax exempt as medical products.⁷⁵ In addition to the unfairness argument as it exists along gender lines, proponents of repealing the tampon tax note that comparable medical devices are not taxed equitably. The Food and Drug Administration (FDA) designates tampons as a Class II “medical device,” in the company of contact lenses, condoms, and pregnancy test kits.⁷⁶ However, this has not historically put menstrual products on an equal tax footing with other medical items. California treats various skin cleansers, moisturizers, and baby oil as tax-exempt medical necessities,⁷⁷ but

73. See WIS. STAT. § 77.54(14) (2017) (exempting from sales tax “drugs”); WIS. ADMIN. CODE TAX § 11.09(2)(b) (2018) (defining “drugs” to include “prescription medicines”); *id.* § 11.09(2)(k) (defining “drugs” for purposes of section 77.54(14) of the Wisconsin Statutes to include “medicated condoms”).

74. See Linda Qiu, *Are Pads and Tampons Taxed but Viagra and Rogaine Not?*, POLITIFACT (Jan. 22, 2017), <http://www.politifact.com/punditfact/statements/2017/jan/22/ashley-judd/are-pads-and-tampons-taxed-viagra-and-rogain-not/> [<https://perma.cc/X2D8-AMXN>]; see also Patricia Garcia, *So Tampons Are Taxed, but Rogaine Isn't? What You Need to Know About the Recent “Tampon Tax” Lawsuit*, VOGUE (Mar. 3, 2016), <https://www.vogue.com/article/tampon-tax-movement-lawsuit-gender-bias> [<https://perma.cc/A5A9-XPYC>].

75. See Crawford & Waldman, *supra* note 23, at 462, 465.

76. See JUDITH A. JOHNSON, CONG. RSCH. SERV., FDA REGULATION OF MEDICAL DEVICES 36 n.232 (2016), <https://fas.org/sgp/crs/misc/R42130.pdf> [<https://perma.cc/9Q5H-QG6K>]; Crawford & Waldman, *supra* note 23, at 454; *Product Classification*, U.S. FOOD & DRUG ADMIN., <https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfPCD/classification.cfm?ID=HIL> [<https://perma.cc/9KEQ-HA65>] (last visited Jan. 5, 2020).

77. See CAL. REV. & TAX. CODE § 6369(b) (West 2010) (exempting from sales tax “medicines,” the definition of which includes “any substance or preparation intended for use by external or internal application to the human body in the diagnosis, cure, mitigation, treatment, or prevention of disease and commonly recognized as a substance or preparation intended for that use”); CAL. CODE REGS. tit. 18, § 1591(a)(9)(B) (2016) (defining a “medicine” as “[a]ny substance or preparation intended for use by external or internal application to the human body in the diagnosis,

without legislative intervention, California will return to taxing tampons and pads at the normal rate in 2023.⁷⁸ Until the change in the law in 2016, New York's broad "medical supplies" sales tax exemption covered products ranging from dandruff shampoo to foot powder to bandages, but not tampons and pads.⁷⁹

Sexism in the tax code is not a new phenomenon. A common example is the U.S. federal income taxation system's long history of implicitly applying a "marriage penalty" that disadvantages women by favoring single-earner families and undervaluing childcare expenses.⁸⁰ Similarly, many scholars have argued that the U.S. system of joint taxation inappropriately subjects wives' market earnings to a higher marginal tax rate than an individual filing system would.⁸¹ A couple's capacity to pay taxes is a function of the cost of earning income. Housekeeping and childcare, traditionally done by women, are forms of imputed income lost by gainful employment.⁸² Thus, the very nature of the tax code, some say, values homemakers over working women.⁸³

Some tax experts propose that the United States would be better served by a consumption tax base, instead of its current income tax base, precisely because it is simpler and requires no problematic

cure, mitigation, treatment or prevention of disease"). Additionally, the code gives as examples of tax-exempt "medicines" baby lotion, oil, and powder, and also medicated skin creams. *See id.* § 1591(b)(1).

78. *See Mission & History*, *supra* note 2.

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

80. *See* EDWARD J. McCAFFERY, TAXING WOMEN 1 (1997) ("The tax system's strong bias in favor of single-earner families . . . pushes against stable families at the lower-income levels, against working wives at the upper-income ones, and, by limiting satisfactory options, against many families in between. Everywhere women, especially working wives and mothers, are left stressed and unhappy.").

81. *See* Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2009 (1996) ("Although the joint return applies a formally gender-neutral tax rate schedule to a couple's aggregate income, wives are often viewed as 'secondary' workers, because they typically earn less than husbands and their jobs often are perceived as more dispensable. The result under joint filing is that a married woman's initial marginal tax rate is determined by her husband's earnings [W]ives, as secondary earners, face a marginal tax rate schedule that begins in the tax rate bracket determined by their husband's earnings.").

82. *See* Grace Blumberg, *Sexism in the Code: A Comprehensive Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49, 56 (1972).

83. *See id.* at 58 ("[A] wife would pay a higher rate on that part of her earnings that represent net profit to her family but would not pay any tax on that portion of her income consumed by the cost of assuming gainful employment.").

recognition event.⁸⁴ Under a pure retail sales tax, the aggregate tax base is the total value of final sales to consumers.⁸⁵ However, neither system completely avoids sex-based discrimination, as the tampon tax signals.⁸⁶ What most differentiates the state-based, retail sales tampon tax from “unfair” features of the income-based federal code is its glaring nature. It does not take academic knowledge of income taxation to notice that one is being charged more at the drug store counter for tampons than condoms.

B. The “Not a Priority” Argument

Another common response to the tampon tax repeal movement is what this Note refers to as the “Not a Priority” counterargument. The idea here is that at a time when homeless women are resorting to using socks and paper bags to manage their periods, schoolgirls in underfunded districts are afraid to go to class because they may visibly bleed in front of their classmates, and incarcerated people do not get adequate leakage protection from pantliners sold at commissary,⁸⁷ perhaps menstrual equity advocates should push for access, not tax reform.⁸⁸ Menstrual product access bills are on the rise, with undoubtedly positive effects.⁸⁹ However, since the tampon tax is a

84. See JOEL SLEMROD & JON BAKIJA, *TAXING OURSELVES: A CITIZEN’S GUIDE TO THE DEBATE OVER TAXES* 350 (5th ed. 2017).

85. See *id.*

86. See *infra* note 105 and accompanying text.

87. See WEISS-WOLF, *PERIODS GONE PUBLIC*, *supra* note 42, at 67, 79, 86.

88. A prime example occurred in Georgia, where in 2019, lawmakers allocated \$1.5 million of the 2020 budget for providing free menstrual products to schools and community centers in low-income neighborhoods after sidelining a proposal in the same year aimed at lifting the State’s 4% tax on menstrual products. House Speaker Jan Jones said, “allocating \$1 million to the Georgia Department of Education more directly addresses the need of young girls missing school because their family doesn’t have the money to purchase menstrual pads or tampons.” Maya T. Prabhu, *Georgia Oks Providing Menstrual Products to Low-Income Girls, Women*, ATLANTA J.-CONST. (Apr. 10, 2019), <https://www.ajc.com/news/state-regional-govt-politics/georgia-oks-providing-menstrual-products-low-income-girls-women/8wRDKwffieuHFslCsg0TML/> [https://perma.cc/VU2Q-45Q4].

89. See WEISS-WOLF, *PERIODS GONE PUBLIC*, *supra* note 42, at 91. Enacted May 23, 2019, L.D. 628 (H.P. 457) ensures access to menstrual products in Maine’s jails and correctional and detention facilities. See ME. REV. STAT. ANN. tit. 30-A, § 1565 (West 2019). New York State passed N.Y. Public Health Law Section 267 in 2018, which states, “[a]ll elementary and secondary public schools in the state serving students in any grade from grade six through grade twelve shall provide feminine hygiene products in the restrooms of such school building or buildings. Such products shall be provided at no charge to students.” N.Y. PUB. HEALTH LAW § 267 (McKinney 2018).

colorable constitutional violation,⁹⁰ hierarchical arguments like this one are less persuasive.

The tampon tax should also be framed within the larger “pink tax” issue. Unlike the tampon tax, the pink tax is not a literal tax but instead has come to refer to gender-based price discrimination with economic impact more generally.⁹¹ A much broader set of items than menstrual products, explicitly marketed towards women, face a significant markup compared to their male equivalents.⁹² The name stems from the observation that many of the affected products are pink.⁹³ The pink tax itself exists within the larger context of the wage gap. Consider Michigan, where a tampon tax lawsuit is currently underway.⁹⁴ Michigan has the fourth-largest gender pay gap in the country, with Michigan women earning \$0.79 for every dollar earned by men.⁹⁵ Black and Latinx women in Michigan earn less: \$0.64 and \$0.58, respectively.⁹⁶ Thought about in this way, a menstruating person in Michigan is likely earning less than their male counterpart and using a higher percentage of this smaller wage to purchase products their male counterpart either does not use (menstrual products) or which are priced higher than his (i.e., “women’s” razors as opposed to “men’s”).⁹⁷

The argument — that, considering fixed time and resources, activists hoping to alleviate the financial burden menstrual products pose should focus on access instead of tax — is a strong one, but it is not as clear-cut as it may appear. The compounded effect of pay inequity, price-discrimination, and sexist tax policies highlight the tampon tax’s true threat.

C. Revenue Building

The primary concern when it comes to repealing any tax is monetary. Tax regimes prefer, whenever possible, to tax inelastic behavior.⁹⁸ A

90. See *infra* note 105 and accompanying text.

91. See Candice Elliott, *The Pink Tax: What’s the Cost of Being a Female Consumer in 2020?*, LISTEN MONEY MATTERS (July 17, 2020), <https://www.listenmoneymatters.com/the-pink-tax/> [<https://perma.cc/A3C4-8XVF>].

92. See *id.*

93. See *id.*

94. See *generally* Beggs Complaint, *supra* note 52.

95. See *Michigan*, NAT’L WOMEN’S L. CTR., <https://nwlc.org/state/michigan/> [<https://perma.cc/4SFX-Y3VR>] (last visited Dec. 30, 2020).

96. See *id.*

97. See Elliott, *supra* note 91.

98. See Will Kenton, *Inelastic*, INVESTOPEDIA (Sept. 30, 2020), <https://www.investopedia.com/terms/e/inelastic.asp> [<https://perma.cc/S8NE-4VAE>] (“Inelastic means that when the price goes up, consumers’ buying habits stay about the

woman's need for menstrual products is far from elastic. An example of this problem presented itself recently in Tennessee, where lawmakers publicly worried that women would "hoard" menstrual products if they were included in the state's "Tax Free Holiday" and therefore deprive the state of revenue.⁹⁹

There are two overlapping rebuttals to the presumption that the tampon tax has not been repealed primarily due to budgetary concerns. First, as a matter of literal dollars and cents, it is simply untrue that states rely on the revenue made from taxing menstrual products. Menstrual products are a trivial portion of sales tax budgets.¹⁰⁰ Consider Tennessee, again, as an example. Although legislators were outspoken in their concern for the state's budget related to the tampon tax, the \$7.4 million in estimated annual Tennessee tampon tax revenue makes up only 0.02% of the state's total revenue.¹⁰¹ In 2017, California Governor Jerry Brown rejected a tampon tax exemption bill because "the state's 'precariously balanced' budget couldn't withstand such a loss."¹⁰² His successor, Gavin Newsom, ultimately decided to exempt the products until 2023.¹⁰³ In addition, states allow industry interests to guide their sales tax policy, denying themselves more lucrative revenue sources than taxed menstrual products could ever provide.¹⁰⁴

same, and when the price goes down, consumers' buying habits also remain unchanged.").

99. See Kelly Mena, *Tennessee Republican Lawmakers Push Back on Proposed Three-Day Exemption to 'Tampon Tax,'* CNN (Feb. 13, 2020, 5:07 PM), <https://www.cnn.com/2020/02/13/politics/tennessee-tampon-tax/index.html> [<https://perma.cc/MV3M-DLWJ>] ("Some of the Republicans on the committee — all of whom are men — pushed back against the proposal, saying women could potentially buy the items in bulk and cost the state thousands of dollars in revenue. Sen. Joe Hensley asked, 'Sen. Kyle, do you have a way to replace the funds?'").

100. See *Period Equity: U.S. Tampon Tax Revenues + Budgets*, PERIOD EQUITY (2020), https://docs.google.com/document/d/1bRT_uCB-tg_HArLiHcqHYG7lkKFVbTMAaZGB3M3R5TQ/edit [<https://perma.cc/SQF2-YP57>] (some notable examples include Texas, where even the \$24.9 million in estimated annual tampon tax revenue makes up only 0.01% of the state's total revenue, and Wyoming, where the tampon tax brings in a minuscule 0.004% of the State's total revenue).

101. See *id.*

102. Kristine Phillips, *'There's No Happy Hour for Menstruation': Tax Liquor Instead of Tampons, Lawmakers Say*, WASH. POST (Mar. 13, 2017, 11:45 AM), <https://www.washingtonpost.com/news/post-nation/wp/2017/03/13/theres-no-happy-hour-for-menstruation-tax-liquor-instead-of-tampons-lawmakers-say/> [<https://perma.cc/73AZ-9XVF>].

103. See *Mission & History*, *supra* note 2.

104. See *supra* note 27 and accompanying text.

Furthermore, lost revenue cannot fully explain the tampon tax if the tax is unconstitutional. The argument has been well made, most clearly by Professor Bridget Crawford of Pace University School of Law, that taxing menstrual products amounts to sex-based discrimination and therefore violates the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁵ If taxing menstrual products is not a proper consumption tax — because only half the population will ever “consume” the products in question — but instead is illegal sex-based discrimination, claiming that the tampon tax would deprive states of revenue becomes moot.

Crawford’s argument is a difficult one to make, however. The retail sales tax rule is to tax all commercial products; the exception is to create specific exemptions.¹⁰⁶ However, even the threat of an Equal Protection violation can create revenue problems of its own. States would be wise to compare what they would lose in sales tax revenue by exempting menstrual products with what they would spend if tampon tax challenges were brought in court. Facing a class action lawsuit filed by Period Equity, New York’s Democratic Governor Andrew Cuomo pushed through legislation to exempt all menstrual products from the state retail sales tax in 2016.¹⁰⁷ In 2017, Florida’s Republican Governor Rick Scott also signed legislation exempting menstrual products to avoid a class action lawsuit.¹⁰⁸ Ohio’s Governor Mike DeWine, also a Republican, signed legislation to eliminate the tax in November 2019, following a protracted battle in the state courts.¹⁰⁹ Ohio collects approximately \$3.2 million in retail sales taxes from menstrual

105. See Crawford & Waldman, *supra* note 23, at 439 (“[T]he tampon tax . . . is an impermissible form of gender discrimination under the Equal Protection Clause. First, menstrual hygiene products are a unique proxy for female sex, and therefore any disadvantageous tax classification of these products amounts to a facial classification on the basis of sex. There is no ‘exceedingly persuasive justification’ for taxing menstrual hygiene products, and so the tax must fail intermediate scrutiny. Even assuming arguendo that the tampon tax is not viewed as a tax on female sex, it is still unconstitutional because it cannot pass rational basis review.”). The argument is reminiscent of Justice Antonin Scalia’s famous quote in *Bray v. Alexandria Women’s Health Clinic*: “A tax on wearing yarmulkes is a tax on Jews.” *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993).

106. See Lee & Wessel, *supra* note 11.

107. See Crawford & Waldman, *supra* note 23, at 460–63.

108. See *id.* at 463–64.

109. See *id.* at 466–68; Danae King, ‘Pink Tax’ to End in Ohio, Though Advocacy Far from Over, COLUMBUS DISPATCH (Nov. 9, 2019, 1:38 PM), <https://www.dispatch.com/news/20191109/pink-tax-to-end-in-ohio-though-advocacy-far-from-over> [<https://perma.cc/47YC-39B6>].

products sold in the state.¹¹⁰ If the class action lawsuit brought there succeeded in its claim, and the court awarded the plaintiffs their proposed damages, the state would owe \$66 million.¹¹¹

Plaintiffs in all three lawsuits — in New York, Florida, and Ohio — argued that continued taxation of menstrual products violates the Fourteenth Amendment’s Equal Protection Clause.¹¹² Indeed, states have good reason to think a revision of their laws to exempt menstrual products from taxation is both good policy and necessary to stave off litigation. Tax Free. Period. vowed to file equal protection claims in every state that fails to exempt menstrual products.¹¹³ It is following through in Michigan at the time of this writing.¹¹⁴ Since taxes on menstrual products bring in only a fraction of a state’s revenue, legally defending the decision not to exempt menstrual products from taxation may not be worth the state’s financial and reputational costs. Exemptions may be a matter of legislative grace, but they should still be applied so that they do not disproportionately and unconstitutionally burden one group over another. The cost of defending their position may dissuade even skeptical legislatures.

Considering the growth and success of the tampon tax repeal movement in the United States and abroad, backed up by commonsense arguments about taxing similar products alike, it is worth taking a step back to consider the various reasons why this exemption does not already exist. Advocates focused primarily on the sex discrimination aspect of the tampon tax would say that longstanding sexism in the U.S. tax code is the culprit. Menstrual access advocates would refocus activism away from the tax in the first place. Those concerned with underfunded state budgets would likely

110. See OHIO LEGIS. SERV. COMM’N, FISCAL NOTE & LOCAL IMPACT STATEMENT, S.B. 26, 133rd GEN. ASSEMBLY, at 4 (2019), <https://www.legislature.ohio.gov/download?key=12593&format=pdf> [<https://perma.cc/UPA7-7TKZ>].

111. See Class Action Complaint at 9, 13, *Rowitz v. Ohio*, No. 2016-00197JD (Ohio Ct. of Cl. Mar. 14, 2016). Importantly, this \$66 million figure would not account for the revenue needed by the Office of the Ohio Attorney General to defend the case and would not account for the legal fees for the plaintiffs’ lawyers. See *id.* at 13.

112. See Crawford & Waldman, *supra* note 23, at 456–66.

113. See *About Tax Free. Period.*, TAX FREE. PERIOD., <https://www.taxfreeperiod.com/about-us> [<https://perma.cc/6VN6-7DP8>] (last visited Dec. 31, 2020) (“In June 2019, Period Equity and LOLA partnered to launch Tax Free. Period. Together, we set out to end the discriminatory tampon tax with a revolutionary new argument: Since the tampon tax only applies to people who menstruate, it is not just unfair, it’s also a form of sex-based discrimination — and therefore unconstitutional and illegal.”).

114. See *Beggs* Complaint, *supra* note 52.

try to increase the number of products included in retail sales tax, regardless of who uses them. This Note, however, proposes that it is institutional ignorance — a hybrid theory that draws on sex discrimination and overestimated revenue concerns — that truly explains why tampons are taxed in the United States. The next Part suggests that by embracing institutional ignorance as the primary force behind the tampon tax — evidenced in greatest part by the advances made in light of the COVID-19 pandemic — we gain valuable insight into how we can do away with the tax for good.

III. LIFTING THE VEIL OF INSTITUTIONAL IGNORANCE

This Note argues that the true reason the tampon tax still exists in 30 states and various countries abroad, despite positive momentum and fears of litigation, is simpler and more insidious than lost revenue: legislatures have simply never thought about it. This Part explains the concept of institutional ignorance as it relates to the fight to end the tampon tax. This Part also shows how the national response to menstrual inequity brought about by the COVID-19 pandemic proves institutional ignorance has been at play all along. Lastly, this Part lays out how momentum has and should be harnessed for maximum future impact.

A. Institutional Ignorance

When asked why he thought the tampon tax existed, President Obama famously replied: “I suspect it’s because men were making the laws when those taxes were passed.”¹¹⁵ Anecdotally, it is easy to agree that men seldom consider menstruation, and this affects policy.¹¹⁶ A general principle of tax policy, however, is to tax broadly and exempt sparingly.¹¹⁷ When the standard is to tax, and exemptions come about through lobbying,¹¹⁸ it matters greatly that (1) menstrual products have

115. AJ+, *President Obama Asked About Tampon Tax by YouTuber Ingrid Nilsen*, YOUTUBE (Jan. 19, 2016), <https://www.youtube.com/watch?v=8c2Ro54Alkk> [<https://perma.cc/VN8G-6TF6>].

116. See Mena, *supra* note 99; see also Amanda Tuab, *NASA Thought Sally Ride Needed 100 Tampons for 1 Week “Just to Be Safe.” From What?*, VOX (May 26, 2015, 2:50 PM), <https://www.vox.com/2015/5/26/8661537/sally-ride-tampons> [<https://perma.cc/V8FQ-SAKU>] (“[In preparation for Ride’s trip aboard the Space Shuttle] tampons were packed with their strings connecting them, like a strip of sausages, so they wouldn’t float away. Engineers asked Ride, ‘Is 100 the right number?’ She would be in space for a week. ‘That would not be the right number,’ she told them.” (alteration in original)).

117. See Lee & Wessel, *supra* note 11.

118. See *supra* note 27 and accompanying text.

few lobbyists,¹¹⁹ and (2) women are drastically underrepresented in the legislative bodies of the United States and territories.¹²⁰

Generally speaking, menstruation has been given very little consideration by the people who make the policies and laws by which we live. Besides remaining taxable in 30 states, menstrual products have not been designated as allowable budgetary expenses for publicly funded shelters or crisis and emergency centers,¹²¹ not been provided in a consistent or fully accessible way in correctional and immigration detention facilities,¹²² not covered by public health and nutritional benefits programs,¹²³ and not made uniformly available in schools or workplaces.¹²⁴ When governmental agencies address menstrual products, it is often with inconsistent word choice and a lack of understanding of their purpose. For example, the FDA bears responsibility for approving and disclosing the ingredients in menstrual products.¹²⁵ Until 1976, the FDA categorized tampons as “cosmetics” for regulatory purposes, which may explain some of the confusion over their status as non-necessities.¹²⁶ Even today, despite being categorized as medical devices, the only affirmative obligations required of menstrual products manufacturers are that they provide basic instructional labeling on packaging and keep records of adverse events caused by their products.¹²⁷ The FDA does not require transparency in menstrual product testing results or detailed disclosure about product ingredients on the packaging.¹²⁸ Within the U.S.

119. Manufacturers of tampons and pads have begun to lobby for tax reform, but it is a small and recent development. *See infra* notes 174–175.

120. Women make up 28.9% of all state legislators nationwide. *See Women in State Legislatures for 2019*, NAT’L CONF. ST. LEGISLATURES (July 25, 2019), <https://www.ncsl.org/legislators-staff/legislators/womens-legislative-network/women-in-state-legislatures-for-2019.aspx> [<https://perma.cc/GQ9E-A4YT>].

121. *See* Jennifer Weiss-Wolf, *U.S. Policymaking to Address Menstruation: Advancing an Equity Agenda*, 25 WM. & MARY J. WOMEN & L. 493, 496–97 (2019) [hereinafter Weiss-Wolf, *U.S. Policymaking*].

122. *See id.*

123. *See id.*

124. *See id.*

125. *See* FOOD & DRUG ADMIN., U.S. DEP’T OF HEALTH & HUM. SERVS., GUIDANCE FOR INDUSTRY AND FDA STAFF: MENSTRUAL TAMPONS AND PADS: INFORMATION FOR PREMARKET NOTIFICATION SUBMISSIONS (510(k)s) (2005).

126. *See* Crawford & Spivack, *supra* note 34, at 507.

127. *See* Weiss-Wolf, *U.S. Policymaking*, *supra* note 121.

128. *See* U.S. FOOD AND DRUG ADMIN., *supra* note 125. A bill introduced in the House in 2016 sought to force manufacturers to disclose the materials that comprise menstrual hygiene products, to no avail. *See* Crawford & Spivack, *supra* note 34, at 507; *see also* Roni Caryn Rabin, *Period Activists Want Tampon Makers to Disclose Ingredients*, N.Y. TIMES (May 24, 2017),

Department of Labor, the Occupational Safety and Health Administration mandates employers provide all workers with safe, sanitary toilet facilities and products required to wash and dry their hands.¹²⁹ Menstrual products are conspicuously excluded from this list of restroom necessities.¹³⁰ These discrepancies and omissions affect everyone, especially low-income populations, for whom access and agency are already most compromised.¹³¹ The same group that does not have a seat at the decision-making table is the one whose health is most jeopardized.

The institutional ignorance around menstruation is, of course, tied to social ignorance and stigma around the same. There is extensive work cataloging the adverse effects of stigmatizing a normal bodily function on women and girls around the globe.¹³² These engrained social stigmas reveal themselves in the language governmental agencies use. There are over 5,000 known euphemisms for periods.¹³³ Legislation that addresses menstruation and menstrual products often

<https://www.nytimes.com/2017/05/24/well/live/period-activists-want-tampon-makers-to-disclose-ingredients.html> [<https://perma.cc/7KAV-HWLB>]. In October 2019, New York State took matters into its own hands and enacted legislation, making it the first state in the nation to require menstrual product packages to contain a plain and conspicuous printed list of all the ingredients in the products. This was an act to amend the general business law in relation to menstrual product labeling. *See* 2019 N.Y. Sess. Laws ch. 362, S. 2387–B (McKinney) (codified at N.Y. GEN. BUS. LAW § 399–aaaa).

129. *See Restrooms and Sanitation Requirements*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T LABOR, https://www.osha.gov/SLTC/restrooms_sanitation/ [<https://perma.cc/NPF6-SCUD>] (last visited Jan. 1, 2021).

130. *See* Weiss-Wolf, *U.S. Policymaking*, *supra* note 121, at 496–97.

131. *See New Report on LGBTQ Poverty Shows Need for More Resources and Research*, NAT'L LGBTQ TASK FORCE (May 1, 2018), <https://www.thetaskforce.org/povertyreport/> [<https://perma.cc/UQA3-GRWK>]; Strausfeld, *supra* note 9 (“Wealthier women buy menstrual products, but frequently pay less because they’re able to buy them in bulk. The most expensive tampons and pads are sold in small numbers, which is how the cash-strapped are forced to purchase them. Note, too, that menstrual product users who may not identify as women — members of the LGBTQ community — also experience disproportionate poverty.”).

132. *See* Jill Litman, *Menstruation Stigma Must Stop. Period.*, PUB. HEALTH ADVOC. (June 5, 2018), <https://pha.berkeley.edu/2018/06/05/menstruation-stigma-must-stop-period/> [<https://perma.cc/UP4X-ZQSE>] (“[I]n Venezuela, many women are forced to sleep in huts for the duration of their menstruation. In rural Ghana, menstruating women are forbidden from entering a house with a man or cooking food Women face discrimination, harassment, and are looked down upon because of menstruation, as it is seen as a form of weakness rather than a necessary biological function.”).

133. *See id.*; *see also Top Euphemisms for “Period” by Language*, CLUE (Mar. 10, 2016), <https://helloclue.com/articles/culture/top-euphemisms-for-period-by-language> [<https://perma.cc/RH9T-B6FC>].

rely heavily on the outdated term “feminine hygiene.”¹³⁴ The most dangerous enemy of the fight for menstrual equity is institutional ignorance, which starts at home.

B. Menstrual Equity and COVID-19¹³⁵

The tragedy of the COVID-19 pandemic provides rare insight into the growing momentum behind the menstrual equity movement. Even though the FDA has classified tampons as a medical product since 1976, the IRS has viewed tampons differently.¹³⁶ Asserting that menstrual products do not play a role in treating a specific illness, the IRS excluded them from the Agency’s Health Savings Account (HSA) and Flexible Spending Account (FSA) allowances.¹³⁷ HSAs and FSAs allow employers to pay employee medical expenses not otherwise covered by insurance.¹³⁸ Applicable costs range from doctor visit co-pays to prescriptions to over-the-counter products,¹³⁹ including items as varied as contact lens solution, sunscreen, condoms, and aspirin — but the list has never included menstrual products.¹⁴⁰ Indeed, purchasing menstrual products with the accounts could

134. The term “feminine hygiene” is problematic for two reasons. First, it relies on the word “feminine,” which is exclusionary to trans men who menstruate. See Chella Quint, *Queeriods: How to Include Menstruators of All Genders in Public Health Messages About Menstruation*, PERIOD POSITIVE, <https://periodpositive.files.wordpress.com/2016/02/queeriods-lgbt-stem-poster-feb-2016.pdf> [<https://perma.cc/CL8H-W2JJ>] (last visited Jan. 1, 2021). Second, it implies that menstruation is de facto unhygienic and requires fixing. See Rose George, *The Vagina Is Self-Cleaning — So Why Does the ‘Feminine Hygiene’ Industry Exist?*, GUARDIAN (Sept. 4, 2018), <https://www.theguardian.com/society/2018/sep/04/the-vagina-is-self-cleaning-so-why-does-the-feminine-hygiene-industry-exist> [<https://perma.cc/7PV4-7WQ7>].

135. This Note was written during the COVID-19 pandemic. All information is current through September 2020.

136. See Weiss-Wolf, *U.S. Policymaking*, *supra* note 121, at 496–97.

137. See *id.*

138. HSA and FSA do this by allowing employers to deposit funds into pre-tax accounts for employees each pay period. See INTERNAL REVENUE SERV., U.S. DEP’T TREASURY, PUBLICATION 969: HEALTH SAVINGS ACCOUNTS AND OTHER TAX-FAVORED HEALTH PLANS 6 (2019) [hereinafter PUBLICATION 969].

139. See *id.* at 9; *Co-Payments: FSA Eligibility*, FSASTORE, <https://fsastore.com/FSA-Eligibility-List/C/Co-Payments-E150.aspx> [<https://perma.cc/D385-EYTB>] (last visited Jan. 9, 2020).

140. See Kimberly Leonard, *The \$2 Trillion Coronavirus Stimulus Bill Also Includes a Provision That’ll Help You Save on Pads and Tampons*, BUS. INSIDER (Mar. 26, 2020), <https://www.businessinsider.com/coronavirus-stimulus-bill-hsa-fsa-to-buy-pads-tamp-ns-2020-3> [<https://perma.cc/78BB-RJ73>]; *Condoms: FSA Eligibility*, FSASTORE, <https://fsastore.com/FSA-Eligibility-List/C/Condoms-E165.aspx> [<https://perma.cc/JS2Y-E27Y>] (last visited Jan. 9, 2020).

warrant a 20% penalty charge.¹⁴¹ Then, aiming to save money for businesses and individuals impacted by COVID-19, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act in June 2020.¹⁴² The stimulus package language renders menstrual products medical necessities within the Internal Revenue Code.¹⁴³ The law allows employees nationwide, for the first time, to pay for menstrual products through their HSA or FSA accounts or to count them as qualified medical expenses when calculating their tax bills.¹⁴⁴

The idea to change the tax code to recognize menstrual products as medical items is not new.¹⁴⁵ Advocates for tampon tax repeal have been pushing for a change similar to the CARES Act provision since at least 2015.¹⁴⁶ The U.S. House of Representatives passed a bill to include menstrual products as FSA- and HSA-approved items in 2018, but the Senate never brought it up for a vote.¹⁴⁷ It was not until an unprecedented, worldwide health crisis that the U.S. government publicly recognized that menstrual products are medically necessary and deserve updated tax treatment. In this context, Congress — which remains overwhelmingly male¹⁴⁸ and has skirted the subject for years¹⁴⁹ — took the necessary steps to remove the extra burden it had placed on people who menstruate.¹⁵⁰ The long-awaited change the CARES

141. See PUBLICATION 969, *supra* note 138, at 9.

142. See *The CARES Act Works for All Americans*, U.S. DEP'T TREASURY, <https://home.treasury.gov/policy-issues/cares> [<https://perma.cc/SM2N-KR4N>] (last visited Jan. 2, 2021) (“The CARES Act provides fast and direct economic assistance for American workers and families, small businesses, and preserves jobs for American industries.”).

143. See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 4402, 134 Stat. 281 (2020) (“Inclusion of Certain Over-the-Counter Medical Products as Qualified Medical Expenses.”).

144. See Leah Rodriguez, *US Government Acknowledges Period Products Are Necessities in COVID-19 Stimulus Bill*, GLOB. CITIZEN (Apr. 10, 2020), <https://www.globalcitizen.org/en/content/cares-act-covid-19-menstrual-products-fsa-hsa/> [<https://perma.cc/62KU-AVUH>]; see also FSASTORE, <https://fsastore.com/> [<https://perma.cc/6CGP-27ZC>] (last visited Oct. 29, 2020) (as of October 29, 2020, the banner on this page proclaimed: “Now Eligible! Feminine Care Products”).

145. See Rodriguez, *supra* note 144.

146. See *Mission & History*, *supra* note 2.

147. See Rodriguez, *supra* note 144.

148. See *supra* note 120 and accompanying text.

149. See *supra* Section II.B.

150. See Leonard, *supra* note 140. The legislative history behind Section 3702 is still murky. We know that the American Medical Association was a proponent of the change. See *AMA Adopts New Policies on Final Day of Annual Meeting*, AM. MED. ASS'N (June 15, 2016), <https://www.ama-assn.org/press-center/press-releases/ama-adopts-new-policies-final-day-annual-meeting> [<https://perma.cc/3TMT-JNK4>]. Congresswomen Grace Meng of

Act provision institutes is a clear signal that institutional ignorance, not faulty reasoning, has stymied the tampon tax repeal movement thus far.

The economic devastation the COVID-19 pandemic has wreaked has also amplified the tampon tax's unfair, regressive impact. The so-called "She-Cession" caused by COVID-19 has disproportionately harmed women.¹⁵¹ Women are on the pandemic's front lines, making up the vast majority of workers risking their lives to provide healthcare, childcare, and other essential services.¹⁵² The crisis has been particularly cruel to those employed in the service industry, such as restaurants and hospitality, where female employment is always high;¹⁵³ female unemployment has now reached a record peak.¹⁵⁴ Nationally, women made up 49% of the overall workforce but accounted for 55% of job losses in April 2020.¹⁵⁵ Women, who

New York's 6th District was likely another. See Press Release, Congresswoman Grace Meng, House Passes Meng Legislation Permitting Menstrual Hygiene Products to Be Purchased with Health Flexible Spending Accounts (July 27, 2018), <https://meng.house.gov/media-center/press-releases/house-passes-meng-legislation-permitting-menstrual-hygiene-products-to> [<https://perma.cc/9ZV3-D476>].

151. See Alisha Haridasani Gupta, *Why Some Women Call This Recession a 'Shecession'*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/05/09/us/unemployment-coronavirus-women.html> [<https://perma.cc/PF3N-GX4X>] ("Women accounted for 55 percent of the 20.5 million jobs lost in April, according to the Bureau of Labor Statistics, raising the unemployment rate for adult women to about 15 percent from 3.1 percent in February. In comparison, the unemployment rate for adult men was 13 percent.").

152. See HYE JIN RHO, HAYLEY BROWN & SHAWN FREMSTAD, CTR. FOR ECON. & POL'Y RSCH., A BASIC DEMOGRAPHIC PROFILE OF WORKERS IN FRONTLINE INDUSTRIES 3 (2020), <https://cepr.net/wp-content/uploads/2020/04/2020-04-Frontline-Workers.pdf> [<https://perma.cc/6CMB-X2K3>] (showing that 64.4% of all frontline workers are women, with women making up 76.8% of healthcare workers and 85.2% of childcare and social services workers); Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html> [<https://perma.cc/JU35-CJME>].

153. See Titan M. Alon et al., *The Impact of Covid-19 on Gender Equality* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26947, 2020).

154. See Chabeli Carrazana, *Coronavirus Pandemic Creates America's First Female Recession Amid Child Care, Unemployment Woes*, USA TODAY (Aug. 5, 2020, 2:57 PM), <https://www.usatoday.com/story/news/politics/elections/2020/08/03/coronavirus-pandemic-sets-women-back-amid-unemployment-child-care-crisis/5573123002/> [<https://perma.cc/Z63Y-H5MW>].

155. Women are also more likely to work in part-time, low-paying jobs, which means they were struggling before the pandemic. Many are now completely unemployed. See Clare Ewing-Nelson, *After a Full Month of Business Closures, Women Were Hit Hardest by April's Job Losses*, NAT'L WOMEN'S L. CTR. (May 2020),

constitute the vast majority of menstruators, need relief from as many sources as possible — this includes the tampon tax.¹⁵⁶

COVID-19 has underscored the logic behind repealing the tampon tax. The lawsuit that Period Equity recently filed against the State of Michigan capitalizes off of this energy.¹⁵⁷ In addition to claiming that Michigan’s tax on menstrual products disproportionately harms women and violates the equal protection guarantee of the U.S. Constitution, the complaint makes specific mention of Michigan’s gender-based wage gap and the outsized contribution of women to frontline work during the pandemic.¹⁵⁸ The complaint also captures the growing strength of the movement to repeal the tax by quoting Michigan Governor Gretchen Whitmer’s campaign statements describing menstrual products as a “basic medical necessity”¹⁵⁹ and asserting that Michigan must “[s]top taxing women for being women.”¹⁶⁰ The complaint poignantly quotes Dana Nessel, Michigan’s Attorney General and the person tasked with defending the tax, saying that her office “definitely consider[s] feminine hygiene products essential” in an article about menstrual product access during the pandemic.¹⁶¹

<https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/05/Job-Da-y-April-Factsheet.pdf> [<https://perma.cc/9FN2-LZ6R>] (“More than 1 in 3 (37%) of April’s job losses came in the leisure and hospitality sector, which includes businesses such as restaurants and bars. Women lost more than 4.1 million leisure and hospitality jobs, accounting for 54% of job loss in this sector, though they make up only 52% of the industry workforce . . . Women lost nearly 1.3 million jobs in retail trade, making up 61% of job losses in that sector, despite making up less than half (48%) of the retail trade workforce.”).

156. See Leah Rodriguez, *‘Periods Don’t Stop for Pandemics,’ Says Menstrual Equity Activist Amid COVID-19 Outbreak*, GLOB. CITIZEN (Mar. 17, 2020), <https://www.globalcitizen.org/en/content/period-poverty-coronavirus-homeless-shelters/> [<https://perma.cc/P4DS-LM9V>].

157. See *Beggs* Complaint, *supra* note 52.

158. See *id.* at 2.

159. See *id.* at 4; see, e.g., Gretchen Whitmer, *Whitmer Action Moment: Helping Women. Period*, MEDIUM (Feb. 23, 2017), https://medium.com/@gretchenwhitmer_12225/whitmer-action-moment-helping-women-period-276dc1e840e [<https://perma.cc/H3RU-6YDM>].

160. *Beggs* Complaint, *supra* note 52, at 4; Gretchen Whitmer (@GovWhitmer), TWITTER (Feb. 8, 2017, 5:30 PM), <https://twitter.com/govwhitmer/status/829457283620933632> [<https://perma.cc/QG9Z-YQ36>] (“MI Dems introduce bill to end sales & use taxes on feminine hygiene products. Stop taxing women for being women.”).

161. See *Beggs* Complaint, *supra* note 52, at 4; Sarah Lehr, *‘Periods Don’t Stop for a Pandemic’: Advocates Find New Ways to Get Pads, Tampons to Those in Need*, LANSING ST. J. (May 1, 2020, 10:22 AM), <https://www.lansingstatejournal.com/story/news/2020/05/01/advocates-find-new-ways->

Paying tribute to menstrual products' essential nature during a global disaster substantiates claims of institutional ignorance like almost nothing else could have. These acknowledgments lay the groundwork for more comprehensive reform.

C. Coalition Building

Fiscal conservatism has shaped the U.S. menstrual equity movement in distinct ways. Where international campaigns concerning access to menstrual products focus on broad values like enhancing survival and building equality, efforts to eliminate the tampon tax in the United States have built a base around more pedestrian values.¹⁶² It is not that advocates do not argue for the importance of tax parity.¹⁶³ Rather, to build successful coalitions, advocates often raise more conservative or libertarian arguments about eliminating imprudent taxes in general. For example, Illinois joined the states that have eliminated the tax in a bipartisan, nearly unanimously endorsed legislative measure.¹⁶⁴ A Democrat and a Republican co-sponsored the original bill; a majority-Republican legislature passed the final measure, and a Republican governor signed it into law.¹⁶⁵ In Wyoming, an all-male, anti-tax coalition promised to support all legislation that narrowed the tax base, giving new life to a stalled menstrual equity bill.¹⁶⁶ In a December 2019 special session, the Utah legislature passed a massive reform bill that included tampon tax repeal.¹⁶⁷ At the time, Utah ranked last for gender equality on policies including education, health, the wage gap, workplace environment, and political empowerment.¹⁶⁸

distribute-menstrual-supplies-amid-outbreak/3048244001/
[<https://perma.cc/XNV2-NWK9>].

162. See Weiss-Wolf & Andersson, *supra* note 5; *supra* Section III.C.

163. See *supra* Part II (describing litigation and legislative strategies to remove the tampon tax).

164. See Weiss-Wolf & Andersson, *supra* note 5.

165. See *id.*

166. Essential Health Product Dignity Act, S.B. 86, 2020 Leg., 65th Sess. (Wyo. 2020) was revitalized in the form of Essential Health Product Dignity Act, Draft H.B. 21-LSO-0055 v0.3 (Wyo. 2021).

167. See Jennifer Weiss-Wolf & Emily Bell McCormick, *Even Utah Is Ending the Discriminatory Tampon Tax. Who's Next?*, NEWSWEEK (Dec. 13, 2019, 9:49 AM), <https://www.newsweek.com/even-utah-ending-discriminatory-tampon-tax-whos-next-opinion-1477143> [<https://perma.cc/PE8H-VCT6>]. Sadly, this bill has since been repealed. See Benjamin Wood, *Utah Legislature Repeals Tax Reform in Pair of Overwhelming Votes*, SALT LAKE TRIB. (Jan. 28, 2020, 8:17 PM), <https://www.sltrib.com/news/politics/2020/01/28/tax-referendum-hits/> [<https://perma.cc/6U66-WSFL>].

168. See Weiss-Wolf & McCormick, *supra* note 167.

The developments in each of these states make GOP strategist and political commentator Evan Siegfried's statements in the early days of the Trump presidency calling the tampon tax an easy lift for Republican-controlled statehouses and a way to combat "the falsehood that the party is engaged in a 'war on women'"¹⁶⁹ look prescient.

Reforming the tax treatment of menstrual products is a cause joined by anti-tax groups, feminist activists, and constitutional scholars. Add to this coalition many advocates seeking "menstrual access" for menstruators in schools, prisons, and women's shelters.¹⁷⁰ These groups support tax reform as a component in the fight for menstrual equity because it will decrease the cost of products.¹⁷¹ Environmentalists have a stake in menstrual equity broadly because the lack of transparency in the FDA creates no incentive for menstrual product manufacturers to use sustainable or toxin-free ingredients.¹⁷² Furthermore, if menstrual products are sales tax exempt, the public might be more likely to invest in menstrual cups, which are more expensive but reusable.¹⁷³ The menstrual product brand LOLA, whose tampons and liners are made from 100% organic cotton, actively

169. Evan Siegfried, *What Republicans Have to Learn from the Women's March*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/opinion/what-republicans-have-to-learn-from-the-womens-march.html> [<https://perma.cc/RU8R-RNRP>]; see also Weiss-Wolf & Andersson, *supra* note 5.

170. See *About ISTG, I SUPPORT GIRLS*, <https://isupportthegirls.org/> [<https://perma.cc/Z4FA-J46Y>] (last visited Jan. 3, 2021) ("Through an international network of Affiliates, I Support the Girls collects and distributes essential items, including bras, underwear, and menstrual hygiene products, allowing women and folk experiencing homelessness, impoverishment, or distress to stand tall with dignity."); *Georgia STOMP: Stop Tax on Menstrual Products*, GA. STOMP, <https://georgiastomp.com/> [<https://perma.cc/BVA7-D9L4>] (last visited Jan. 3, 2021) ("Our coalition includes people and organizations which solve problems on a daily basis that affect menstrual equity, like ensuring Georgians have access to the menstrual products they need no matter where they are or what their situation is."); *Reproductive Justice Inside*, NARAL: PRO-CHOICE MD., <https://prochoicemd.org/reproductive-justice-inside/> [<https://perma.cc/9KK8-KG4F>] (last visited Jan. 3, 2021) ("In the 2018 legislative session, the RJI coalition was instrumental in working to achieve the passage of . . . Senate Bill 598: Menstrual Hygiene Bill . . . requir[ing] that all correctional and detention facilities in Maryland . . . provide menstrual hygiene products to those in their care . . .").

171. See *Georgia STOMP: Stop Tax on Menstrual Products*, *supra* note 170.

172. See Rabin, *supra* note 128.

173. See Nina Avramova, *There's an Effective, Environmentally Friendly Option for People with Periods, and Few Know About It, Research Says*, CNN HEALTH (July 16, 2019, 6:30 PM), <https://www.cnn.com/2019/07/16/health/menstrual-cup-study-intl-trnd/index.html> [<https://perma.cc/ATW4-QC5H>].

supports tampon tax repeal.¹⁷⁴ Seventh Generation, a subsidiary of Unilever, made similar investments under the campaign heading “Generation Good.”¹⁷⁵ A strong coalition of varied advocates, appealing to a wide swath of interests, is a good sign for any movement. Reform efforts for tampon tax repeal pick up more and more supporters without losing any ground.¹⁷⁶

D. A Youth-Lead Movement

This reform effort’s ability to gain popularity with youth-centered media is a particularly positive indication of its potential success. In addition to Period Equity, other non-profits have devoted themselves full-time to eliminating the tampon tax. One organization that focuses on young women and girls is PERIOD.¹⁷⁷ Founded in 2014 by two high school students, this organization has registered over 700 chapters at high schools and colleges in all 50 U.S. states and over 40 countries to work on product distribution and repeal efforts.¹⁷⁸ LOLA¹⁷⁹ has been able to garner attention for the movement with celebrity support from women like Serena Williams, Karlie Kloss, and Lena Dunham.¹⁸⁰ In a Public Service Announcement made with Period Equity, model Amber Rose satirized the concept of menstrual products as luxuries by

174. See *About Tax Free. Period.*, *supra* note 113.

175. See *We’re on a Mission for Menstrual Equity*, SEVENTH GENERATION (June 4, 2019), <https://www.seventhgeneration.com/fmp/menstrual-equity-period-care> [<https://perma.cc/3VP6-QRXM>].

176. See Strausfeld, *supra* note 9 (“Year after year I observe people of every background and ideology express surprise about the tampon tax. Year after year, state legislators gain praise from constituents for proposing bills to eliminate it. [In 2019], 21 states introduced bills and 5 actually passed them. No one has gone on record opposing removal of the tampon tax.”).

177. See PERIOD, <https://period.org> (last visited Jan. 3, 2021).

178. See *id.*

179. See *About Tax Free. Period.*, *supra* note 113.

180. See Maggie Mallon, *Lena Dunham Shares Her Emotional First Period Story, and We Can All Relate*, GLAMOUR (June 8, 2017), <https://www.glamour.com/story/lena-dunham-first-period-story-tampons> [<https://perma.cc/9UQC-EMUE>] (“Don’t you want to be a part of something that’s saying “eff no” to period stigma?” Everything about LOLA — from their packaging to their Instagram to their product — is designed to tell us this is all OK.”); Caitlin Mullen, *Campaign Aims to Take Down the Tampon Tax Nationwide*, BIZWOMEN (June 11, 2019, 3:47 PM), <https://www.bizjournals.com/bizwomen/news/latest-news/2019/06/campaign-aims-to-take-down-the-tampon-tax.html?page=all> [<https://perma.cc/A2GU-TEEF>] (“Athlete Serena Williams and model Karlie Kloss — both of whom have invested in LOLA — are among those promoting the campaign’s message to spark conversation.”).

wearing a diamond-encrusted tampon around her neck.¹⁸¹ As part of its work on the Tax Free. Period. campaign, LOLA sponsored a nationwide “Tampon Tax Protest” in November 2019 in partnership with the entertainment website Refinery29 that attracted major press coverage.¹⁸² The protest was a collective action billed as the first step in initiating lawsuits against the then-33 states that taxed menstrual products.¹⁸³ During the protest, purchasers filed tax refund claims, either online or via LOLA’s Tampon Tax Protest Truck, which traveled to five southern states over the course of a week.¹⁸⁴ An annual art exhibit, *29Rooms Los Angeles*, featured installations created for the protest, which were then brought on the road.¹⁸⁵ Rallying social media, the internet, and a younger generation around tax reform is no small feat. This community’s enthusiasm for repealing the tampon tax highlights how the tide is turning, but inviting collaboration between young people and legislative advocacy needs to be an explicit goal in order to accomplish all it can. Ten states have exempted menstrual products in the last five years alone, and interest in reform is growing. Menstrual equity activists need to make youth outreach a priority, not just a lucky byproduct of changing times.

181. See Abigail Jones, *Amber Rose Opens Up About Period Problems and Breaks Down the Tampon Tax: Exclusive*, NEWSWEEK (Sept. 29, 2017, 8:10 AM), <https://www.newsweek.com/amber-rose-opens-about-period-problems-and-breaks-down-tampon-tax-exclusive-673928> [<https://perma.cc/XR8D-AHSU>].

182. See Olivia Harrison, *Does Your State Still Have A Tampon Tax? Here’s How to Fight It*, REFINERY29 (Nov. 21, 2019, 10:37 AM), <https://www.refinery29.com/en-us/2019/11/8831816/tampon-tax-free-period-protest-november-2019> [<https://perma.cc/U6XB-A32B>]; Erika W. Smith, *33 States Tax Tampons: Join the Fight to Make Periods Tax-Free*, REFINERY29 (Nov. 21, 2019, 11:55 AM), <https://www.refinery29.com/en-us/tampon-tax-protest-period-equity-lola> [<https://perma.cc/RQ68-GATK>] (“People can participate by joining a real-life protest at the Tampon Tax Protest Truck, which will make stops in Austin, Texas (November 20), New Orleans, Louisiana (November 22), Nashville, Tennessee (November 24), Atlanta, Georgia (November 26), and Greenville, South Carolina (November 27) — all states that tax period products. The protest also asks people in those states, as well as others that tax tampons, to mail their receipts to the state government and ask for a reimbursement.”).

183. See Smith, *supra* note 182.

184. See *id.*

185. See Emma Banks, *Your Period Shouldn’t Be Taxed — Here’s What You Can Do About It*, REFINERY29 (Nov. 14, 2019, 4:05 PM), <https://www.refinery29.com/en-us/end-tampon-tax-campaign-lola-period-equity> [<https://perma.cc/C8D8-HRE9>].

CONCLUSION

The tampon tax exists due to institutional ignorance. Alleged motives to retain revenue from a relatively small sales tax, especially when compared to exempt products in each of the states that maintain the tampon tax, are simply not convincing. The rising tide of bipartisan support, in conjunction with persuasive legal and ideological arguments from constitutional scholars and grassroots advocates, as well as growing media coverage, shows that the tax on menstrual products is on its way out. Federal and state governments have acknowledged the necessity of menstrual products in ways big and small, as represented by the CARES Act and the number of states eliminating the tampon tax by their own mechanisms.

Social-media influencers, celebrities, and Generation Zs have taken up the cause. They can be the last generation to require reeducation about menstrual equity. Perhaps our children will not have to struggle to make sense of the fact that tampons are not tax exempt while Viagra is. Perhaps they will never know the term “feminine hygiene.” The best way for reformers to usher in change, already well on its way, is to fight against institutional ignorance — including the private ignorance of the individuals who compose those institutions. The tampon tax can be eradicated by acknowledging institutional ignorance and enacting an education campaign aimed at coalition building and mobilizing youth. Once the veil is lifted, the problem cannot be ignored.