

Seeing Red

## Tampon tax discussion must include every person who menstruates.

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**Around the country and** the world, people are mobilizing for **menstrual equity**. Central to the policy agenda: accessible and affordable period products for everyone who needs them. As legislative interventions gain traction, advocates are also readying legal arguments to challenge unfair policies. Constitutional law scholar and dean of University of California-Berkeley Law Erwin Chemerinsky recently co-authored a *Los Angeles Times* **op-ed** proposing that the failure of states to exempt menstrual products from sales tax—the tampon tax—amounts to denial of equal protection under the Constitution.

In forging these claims, a question emerges: How can we recognize that barriers to menstrual access are a form of sex discrimination without erasing the lived experiences of **trans men and non-binary people** who menstruate, as well as women who don't? Some arguments that challenge discriminatory laws based on sex-linked characteristics have made the point that "only women" menstruate, get pregnant, or breastfeed. But that is not a full or accurate portrayal—and menstrual stigma and period poverty can hit trans and non-binary people particularly hard:

Trans people are **three times as likely** to be unemployed and more than twice as likely to be living in poverty as the general population. Those who are disabled, people of color, or undocumented immigrants are especially likely to be unemployed and living in poverty. While free menstrual products are not uniformly provided in women's restrooms, they are almost never available in men's restrooms, even for pay. Men's restrooms are also less likely to have a place to dispose of these products conveniently, privately and hygienically. Similarly, women's homeless shelters sometimes provide menstrual products, but men's typically don't. Some domestic violence shelters exclude trans and non-binary people—even though more than half have experienced intimate partner violence. Those shelters often provide a variety of types of support, including access to menstrual products for those who need them.

While access to menstrual products in women's prisons is **often inadequate**, it is far worse in men's prisons. Trans and non-binary people might be incarcerated in either.

Menstruation is not the only reason trans and non-binary people might need menstrual products. Trans women and non-binary people might also need pads and liners for months after vaginoplasty, and occasionally at other times. Some who take estrogen also experience period symptoms such as pain and nausea and might need medication to manage these symptoms. Those who experience endometriosis or adenomyosis, conditions that can cause continuous heavy bleeding, often face barriers to treatment, as well as an ongoing and often unmet need for pads and tampons.

Simply stated: because limited access to and the cost of menstrual products can hit trans and non-binary communities especially hard, as a matter of policy, a holistic agenda for menstrual

equity and access must include trans people. (There's a **Menstrual Equity Toolkit** for those interested in how to create one.)

But what about in the court of law?

The constitutional argument is straightforward. Any law that targets one sex—or one race, or one religion—is inherently discriminatory. In the context of the tampon tax, for example, Chemerinsky harkened to a famous remark by Supreme Court Justice Antonin Scalia that a tax on yarmulkes is a tax on Jews. By analogy, a tax on menstrual products is a tax on women—even though not all women menstruate, and some men and non-binary people do.

Legally, the focus is on the intention behind the action. Targeting something associated with one group can show intent. This doesn't require that all or only people from the targeted group do the activity.

Take yarmulkes again. Not all Jewish people wear yarmulkes, and some people who aren't Jewish do wear yarmulkes (for example, if attending a Jewish religious service). Still, if a legislature decided to tax people for wearing yarmulkes, or to impose sales tax on yarmulkes but not similar items, that would be anti-Semitism, and it would violate the constitution. Similarly, imposing a sales tax on menstrual products but not similar items is sexist, and violates the constitution.

Discrimination is illegal even when it affects members of multiple groups. Feminist scholars have long pointed out that sexism can harm people other than women. For example, Paula England **has highlighted** the tendency to devalue labor traditionally done by women, even when it is done by men. Ruth Bader Ginsburg famously **challenged a rule** that denied widowed fathers benefits that widowed mothers received. The rule discriminated against women workers, who couldn't earn the same benefits for their families that men did, and against men who wanted the opportunity to care for their children.

We don't need to erase trans or non-binary people to show that barriers to menstrual equity, such as the tax on menstrual products, are unconstitutional sex discrimination. This tax targets a bodily function associated with women for less favorable treatment. It relies on sexist ideas that women's needs are frivolous and unnecessary. It is irrational, and it directly affects cis and trans women, trans men, and non-binary people. It's unfair, unconstitutional and illegal.

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