

THE ERA CAMPAIGN AND MENSTRUAL EQUITY

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A robust national campaign for the Equal Rights Amendment conceded defeat in 1982 when ratification fell short by three of the 38 states needed to prevail. But in 2017, the Nevada legislature cast its vote to ratify the ERA, followed by Illinois in 2018, marking a revival. Now national movement leaders and legislators in several states—notably, Arizona, Florida, North Carolina, and Virginia—are rallying to achieve the 38-state threshold.¹

Over the nearly four decades in between, of course, much has changed in American life and law. The fight for gender equality under the law has made significant headway—from the evolution of Fourteenth Amendment jurisprudence in sex discrimination cases, to advances in employment and economic policies, to the now vibrant and potent era of activism defined by campaigns like #MeToo and #TIMESUP.

Well beyond the symbolic significance of enshrining gender equality in the Constitution, there are lingering legal and policy inequities the ERA would help rectify—among these, workplace discrimination, including on account of pregnancy; paid family leave; and increased protection from violence and harassment. Other benefits include the ability of Congress to enforce gender equality through legislation and, more generally, creation of a social framework to formally acknowledge systemic biases that permeate and often limit women’s daily experiences.

There is one issue, in particular—an emerging area of U.S. policymaking—that falls squarely at the intersection of these goals and outcomes, but is largely absent from ERA discourse thus far: menstruation and the emerging movement for “menstrual equity.” This essay describes the progress of that agenda through policy advocacy, litigation, and social activism, and explains why menstrual equity belongs in discourse about—and will be an invaluable asset for—the campaign to ratify the ERA.

Globally, the disparate impact of menstruation on women’s well-being is significant, though not widely known. On any given day, there are eight hundred

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¹ Maya Salam, *What is the Equal Rights Amendment, and Why Are We Talking About It Now?*, N.Y. TIMES (Feb. 22, 2019), https://www.nytimes.com/2019/02/22/us/equal-rights-amendment-what-is-it.html?rref=collection%2Fbyline%2Fmaya-salam&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=latest&contentPlacement=10&pgtype=collection [https://perma.cc/8E64-54NC].

million people on the planet who are menstruating, of whom at least five hundred million lack adequate resources—basic supplies, facilities, information, support—for managing their periods.² Stigma, often rooted in misogyny, is part of the cause. So too is disproportionate poverty among women and girls. The result is denial of key opportunities for equality—educational, economic, and social.

The United States is not immune to this problem—quite the contrary. It is only recently that we’ve begun to publicly understand and reflect in our laws that many populations here also struggle with compromised menstrual access and the burden of shame:

- For the nearly one in five American teenagers who live in poverty,³ lack of menstrual products and support can lead to compromised health, lost classroom time, and even disciplinary intervention.⁴
- Those experiencing homelessness report isolation and/or infection caused by using tampons and pads for longer than recommended or by improvising with items such as paper bags or newspapers.⁵
- Incarcerated individuals and those held in detention or correction systems lack agency to manage menstruation and often must beg or bargain for basic hygiene needs, which still may be denied, part of a degrading and dehumanizing power imbalance.⁶

Since 2015, a policy movement for menstrual equity in the U.S. has gained extraordinary bipartisan traction. Laws mandating menstrual access and affordable products have been enacted in major cities like New York, Chicago, and Los Angeles, in more than a dozen states, and even by the current U.S. Congress. In crafting and advancing this agenda, advocates have succeeded in convincing lawmakers that menstrual policy is a critical component of gender equity and equal opportunity.

Among the specific gaps that have been identified and are starting to be addressed through legislative or regulatory intervention:

² See UNICEF & WORLD HEALTH ORG., 25 YEARS: PROGRESS ON SANITATION AND DRINKING WATER: 2015 UPDATE AND MDG ASSESSMENT 45 (2015), http://files.unicef.org/publications/files/Progress_on_Sanitation_and_Drinking_Water_2015_Update_.pdf [<https://perma.cc/Z3M5-MTE9>]; Tanya Barron, *800 Million Women and Girls Are on Their Period Right Now—Let’s Talk About It*, IBT (Oct. 11, 2017), <https://www.ibtimes.co.uk/800-million-women-girls-are-theirperiod-right-now-lets-talk-about-it-1642606> [<https://perma.cc/E3SV-ZHGD>].

³ HEATHER KOBALL & YANG JIANG, NAT’L CTR. FOR CHILDREN IN POVERTY, BASIC FACTS ABOUT LOW-INCOME CHILDREN (2018), [<https://perma.cc/BKV5-QWCP>].

⁴ Anna North, *Schools Don’t Know How to Handle Girls’ Menstrual Periods and their Education is Suffering Because of It*, VOX (May 4, 2018), [<https://perma.cc/VF74-BE4V>].

⁵ Janet Upadhye, *This Is How Homeless Women Cope with Their Periods*, BUSTLE (Oct. 18, 2016), [<https://perma.cc/29EW-3G86>].

⁶ Chandra Bozelko, *Prisons that Withhold Menstrual Pads Humiliate Women and Violate Basic Human Rights*, THE GUARDIAN (June 12, 2015), [<https://perma.cc/SZ86-XR2Q>].

1. Menstrual products generally are not designated as allowable budgetary expenses for publicly funded shelters or crisis and emergency centers.

In 2016, U.S. Congresswoman Grace Meng (D-NY) persuaded the Federal Emergency Management Agency of the Department of Homeland Security to allow shelters and crisis centers to purchase menstrual products with federal grant funds.⁷ Those covered by this rule include people who are impacted or displaced by natural disasters.⁸

2. Menstrual products are not provided in a consistent or fully accessible way in correction and detention facilities.

Colorado mandated funding in its budget for tampons in state prisons starting in 2017.⁹ Several states—Connecticut, Kentucky, Maryland, New York, and Virginia, among them—passed laws in 2018 mandating that state prisons and local jails provide free menstrual products.¹⁰ Arizona did so by a Department of Correction rule after legislation stalled.¹¹ And in the U.S. Congress, the FIRST STEP Act, a broad prison reform bill which includes a menstrual access provision, was enacted on December 21, 2018.¹²

3. The IRS tax classification status of menstrual products as a non-medical device has prevented them from being included in Health Savings or Flexible Spending Account pre-tax allowances.

Under the Restoring Access to Medication and Modernizing Health Savings Accounts Act of 2018 (H.R. 6199), sponsored by Congresswoman Lynn Jenkins (R-KS) and passed by the House in July 2018, menstrual products would be covered as

⁷ Press Release, Congresswoman Grace Meng, FEMA to Permit Homeless Assistance Providers to Purchase Feminine Hygiene Products – Such as Tampons and Pads – With Federal Grants, Mar. 1, 2016, <https://meng.house.gov/media-center/press-releases/meng-fema-to-permit-homeless-assistance-providers-to-purchase-feminine> [<https://perma.cc/L8YF-H3JL>].

⁸ *Id.*

⁹ Jesse Paul, *Women in Colorado prisons will get free tampons under amendment that offers “a small piece of dignity,”* DENVER POST (May 3, 2017), <https://www.denverpost.com/2017/05/03/colorado-prisons-free-tampon-amendment/> [<https://perma.cc/G25R-79BX>].

¹⁰ BRAWS: BRINGING RESOURCES TO AID WOMEN’S SHELTERS, PERIODS, POVERTY, AND THE NEED FOR POLICY: A REPORT ON MENSTRUAL INEQUITY IN THE UNITED STATES 11 (2018), https://cdn.ymaws.com/www.law.udc.edu/resource/resmgr/LegClinic/2018_periods_policy_report.pdf [<https://perma.cc/2XE8-WBVR>].

¹¹ Amy Held, *Arizona Department of Corrections Changes Sanitary Pad Policy Following Backlash*, NAT’L PUB. RADIO (Feb. 15, 2018), <https://www.npr.org/sections/twotwo-way/2018/02/15/586134335/arizona-department-of-corrections-changes-sanitary-pad-policy-following-backlash> [<https://perma.cc/EJX7-GM92>].

¹² Eleanor Goldberg, *Women Often Can’t Afford Tampons, Pads in Federal Prisons. That’s About to Change.*, HUFFPOST (Dec. 20, 2018), https://www.huffingtonpost.com/entry/the-new-criminal-justice-bill-provides-free-tampons-pads-in-federal-prisons_us_5c1ac0a0e4b08aaf7a84ac38 [<https://perma.cc/QBJ9-ZFWY>].

a qualified expense by Flexible Spending and Health Savings accounts, repealing the limitation otherwise posed by the IRS classification.¹³

4. Menstrual health interventions, including availability of products, are not addressed in laws governing schools or workplaces.

On January 1, 2018, laws went into effect in California and Illinois making menstrual products freely available in public schools.¹⁴ In the “Women’s Opportunity Agenda for New York” issued by Governor Cuomo in January 2018, a provision to require free menstrual products in public schools for students in grades 6-12 became law.¹⁵ And another nine states plus Washington, D.C. have proposed similar legislation: Connecticut, Maryland, Michigan, South Carolina, Tennessee, Virginia, Washington, West Virginia, and Wisconsin.¹⁶ In Congress, a bill was proposed in October 2018—the Giving Increased Resources to Learning Students (GIRLS) Act (H.R. 6953)—that would extend the use of funding from Title IV of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7112) for menstrual supplies.¹⁷

5. In thirty-five of the fifty states (as of January 1, 2019), menstrual products are not classified as a necessity and therefore are not sales tax exempt—a levy popularly known as the “tampon tax.”¹⁸

Of the fifteen states that currently do not tax menstrual products, five implemented this practice via a national petition and related advocacy campaign launched in 2015; these are Connecticut, Florida, Illinois, Nevada, and New York.¹⁹ The Washington, D.C. Council and the Chicago City Council have also passed and implemented ordinances to do the same.²⁰ Among the states that have proposed (but

¹³ Restoring Access to Medication and Modernizing Health Savings Accounts Act of 2018, H.R. 6199, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/6199> [<https://perma.cc/RQN4-QEGN>].

¹⁴ Katie Mitchell, *Free Tampons Are Coming to Public Schoolers In CA & IL, Thanks to New Laws*, BUSTLE (Jan. 11, 2018), <https://www.bustle.com/p/free-tampons-are-coming-to-public-schoolers-in-california-illinois-thanks-to-new-laws-7857412> [<https://perma.cc/FRA8-FWGA>].

¹⁵ Office of New York Governor Andrew Cuomo, Press Release, Governor Cuomo Unveils the 2018 Women’s Agenda for New York: Equal Rights, Equal Opportunity, Jan. 11, 2018, <https://www.governor.ny.gov/news/governor-cuomo-unveils-2018-womens-agenda-new-york-equal-rights-equal-opportunity> [<https://perma.cc/YND2-N9SC>].

¹⁶ BRAWS: BRINGING RESOURCES TO AID WOMEN’S SHELTERS, *supra* note 16, at 11.

¹⁷ GIRLS Act, H.R. 6953, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/6953> [<https://perma.cc/8XLF-PW83>].

¹⁸ Maya Salam, *Goodbye, Tampon Tax (at Least for Some)*, N.Y. Times (Nov. 9, 2018), <https://www.nytimes.com/2018/11/09/health/tampons-tax-periods-women.html> [<https://perma.cc/6QT6-3WPA>].

¹⁹ *Id.*

²⁰ See Avery Anapol, *DC no longer charging sales tax on feminine hygiene products*, THE HILL (Oct. 2, 2018), <https://thehill.com/homenews/state-watch/409548-dc-no-longer-charging-sales-tax-on-feminine-hygiene-products> [<https://perma.cc/C4HU-K4MC>]; see also Chris Isidore, *Chicago drops*

not yet succeeded) to fully exempt menstrual products from sales tax are: Arizona, California, Colorado, Georgia, Indiana, Louisiana, Maine, Michigan, Mississippi, Missouri, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin.²¹

Last summer, U.S. Congresswoman Carolyn Maloney (D-NY) stepped up as the first lawmaker to put forth the proposal that disparities caused by menstruation be included in the ERA platform. This is a strategic and well-timed call, one that the movement's leaders should heed.

Her announcement coincided with the release of her August 2018 report, *Earn Less, Pay More: The State of the Gender Pay Gap and 'Pink Tax' in 2018*.²² It followed a study issued by the U.S. Government Accountability Office showing that gender-based pricing—the insidious practice by which companies charge more for items marketed to women than similar gender-neutral products or those marketed to men—remains prevalent in the U.S.²³

She explicitly includes the tampon tax in her call for uniform national policies via the Equal Rights Amendment. Maloney states in her report: “The ERA would mean that women would no longer have to fight the pink tax product by product, or fight the gender pay gap job by job or employer by employer, and it would solve intractable problems that a piecemeal approach cannot.”²⁴

The tampon tax is just one such inequity. The range of menstrual access issues outlined above would also benefit from the sweeping reach of the ERA. Not only would their inclusion in the ERA help achieve more uniform outcomes, as Maloney indicates, but this would raise the visibility of matters of bodily integrity, health, and dignity in a way that fuels further innovation and intervention.

Interpretation of core federal civil rights legislation and the Constitution is also implicated in ways that could enhance menstrual access and health. Consider two recent examples:

- In 2017, a Georgia woman was fired from her job at a 911 call center after leaking menstrual blood on an office chair.²⁵ The federal district court dismissed her claim, finding that she had not adequately alleged discrimination on the basis of sex.²⁶ On appeal, the ACLU of Georgia argued

tampon tax, CNN (Mar. 17, 2016), <https://money.cnn.com/2016/03/17/pf/taxes/chicago-tampon-tax/index.html> [<https://perma.cc/K4TX-5JHC>].

²¹ JENNIFER WEISS-WOLF, PERIODS GONE PUBLIC 137 (2017).

²² CAROLYN MALONEY, EARN LESS, PAY MORE: THE STATE OF THE GENDER PAY GAP AND ‘PINK TAX’ IN 2018, (2018), <https://maloney.house.gov/sites/maloney.house.gov/files/Pink%20Tax%20report%20FINAL.pdf> [<https://perma.cc/RK7P-6X2L>].

²³ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-500, GENDER-RELATED PRICE DIFFERENCES FOR GOODS AND SERVICES (2018), <https://www.gao.gov/assets/700/693841.pdf> [<https://perma.cc/CEE2-CUWF>].

²⁴ MALONEY, *supra* note 22, at 2.

²⁵ Press Release, American Civil Liberties Union of Georgia, ACLU Settles Case on Behalf of Woman Alleging She was Fired for Getting her Period at Work (Nov. 9, 2017), <https://www.acluga.org/en/news/aclu-settles-case-behalf-woman-alleging-she-was-fired-getting-her-period-work> [<https://perma.cc/4Q3B-ECXV>].

²⁶ *Id.*

that menstruation and menopause should be included under Title VII of the Civil Rights Act’s prohibition of workplace discrimination on the basis of sex—in particular, under “pregnancy, childbirth, and related medical conditions.”²⁷ Ultimately the case was settled, so the potency of that argument and the use of pregnancy discrimination law as a tool for advancing menstrual equity remains untested.²⁸

- The ACLU of Michigan filed a federal class action lawsuit in 2014 on behalf of eight incarcerated women against Muskegon County’s jail.²⁹ Among the claims—from unsafe physical conditions to abusive protocols carried out by male guards—was refusal to provide a timely and adequate supply of menstrual products.³⁰ The court found that only deprivation, but not a delay, in receiving menstrual products would amount to a legal violation of rights under the Eight Amendment’s prohibition of cruel and unusual punishment.³¹

The above examples highlight already existing policy and legal considerations that the ERA could further refine and bolster. There are myriad others yet to be examined—ranging from determining the breadth of the Americans with Disabilities Act and Family and Medical Leave Act to cover menstruation, to the expanding the scope of public medical and nutritional benefits programs. The ERA is a potent tool for ensuring that our laws provide a remedy for disparities posed by menstrual health and access.

Back in 1978, at the height of ERA organizing, Gloria Steinem penned an essay for *Ms. Magazine*, *If Men Could Menstruate*, which was a brilliant exploration of what it means to turn the table on patriarchy and oppression.³² “So what would happen if suddenly, magically, men could menstruate and women could not?” Steinem posits. “Clearly, menstruation would become an enviable, worthy, masculine event.” She goes on to describe all the ways society would normalize and celebrate menstruation:

“Men would brag about how long and how much.”

“Sanitary supplies would be federally funded and free.”

“Generals, right-wing politicians, and religious fundamentalists would cite menstruation (‘*men*-struation’) as proof that only men could serve God and country in combat (‘You have to give blood to take blood’), [or] occupy high

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Semelbauer v. Muskegon Cty.*, No. 1:14-CV-1245 (W.D. Mich. Sept. 11, 2015).

³⁰ *Id.*

³¹ *Id.*

³² Gloria Steinem, *If Men Could Menstruate*, *Ms. Magazine* (Oct. 1978), http://www.mylittleredbook.net/imcm_orig.pdf [<https://perma.cc/P2M3-DFQU>].

political office ('Can women be properly fierce without a monthly cycle governed by the planet Mars?')."

And ...

"How would women be trained to react? One can imagine a staunch and smiling masochism. 'The ERA would force housewives to wound themselves every month' – Phyllis Schlafly."

Indeed.

Linking menstruation to the renewed fight for the ERA would ensure that this particular core need is addressed within the umbrella of protections that the Amendment would provide – and that our laws and policies do not ignore, overlook, or even exacerbate this critical aspect of women's health and lives. Conversely, the popular and bipartisan nature of this advocacy offers politically salient arguments to the campaign to ratify the ERA. After all, Steinem's "wish list" item for federally and publicly funded menstrual products has now become a reality! It is a winning combination.

Aligning these messages offers a chance to fully acknowledge that we cannot achieve true gender equality without considering menstrual equity—both are necessary to advance economic equity, ensure educational and employment opportunities, and accelerate the push for women's agency and equality.