

A Fundamental Right to Bleed

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INTRODUCTION

Teachers are requiring students to refer to menstrual “pads as ‘penguins’ and tampons as ‘turtles.’”¹ Students are bleeding through their pants because their teachers restrict when and where they can use the bathroom.² Correctional officers at prisons are distributing menstrual products only in exchange for sex.³ Inmates are bleeding all over their cells because they cannot afford tampons at the commissary.⁴ Homeless menstruators are choosing between spending money on food or bleeding through their only pair of pants.⁵ States are taxing tampons, but not condoms or Viagra.⁶

Archaic and degrading practices such as these occur throughout the United States today.⁷ Despite menstruation being a natural bodily process, it is considered a time where menstruators are “irrational, fragile,

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¹ Margaret E. Johnson, Emily Gold Waldman & Bridget J. Crawford, *Title IX & Menstruation*, 43 HARV. J.L. & GENDER 225, 235 (2020).

² See *id.* at 234.

³ Mitchell O’Shea Carney, *Cycles of Punishment: The Constitutionality of Restricting Access to Menstrual Health Products in Prisons*, 61 B.C. L. REV. 2541, 2546–47 (2020).

⁴ See Margaret E. Johnson, *Menstrual Justice*, 53 UC DAVIS L. REV. 1, 57–60 (2019).

⁵ See, e.g., DePaul’s Ctr. for Journalism Integrity and Excellence, *Women Forced to Choose Between Food and Menstrual Products*, WTTW (Nov. 20, 2019, 6:04 PM), <https://perma.cc/5HGF-UZLG>.

⁶ Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICH. L. REV. 439, 441 (2019) [hereinafter Crawford & Waldman, *Unconstitutional Tampon Tax*].

⁷ See generally Johnson, *supra* note 4 (discussing menstrual injustice and how it stems from the stigmas surrounding menstruation).

incompetent, and emotional.”⁸ Society views menstruation as “dirty and impure.”⁹ Although there are products to control menstruation, many people in this country do not have the means or access to them.¹⁰ Thus, many menstruators choose to skip school, work, and other social events to hide their menstruation or use makeshift products that can create long-lasting health risks.¹¹ A lack of access to adequate menstrual products results in menstruators “lack[ing] the ability to participate fully in civic society.”¹²

This Note will argue that access to adequate menstrual products is a fundamental right subject to strict scrutiny under the Fourteenth Amendment’s Due Process Clause. Because most governmental restrictions on such products will not survive a due process analysis, deeming access to adequate menstrual products a fundamental right would result in significant change by eradicating menstrual injustices and period poverty among the most vulnerable menstruators.

Part I of this Note will introduce the concept of menstruation and the shame and taboos surrounding it, as well as the concept of menstrual injustice and period poverty. It will also identify three vulnerable classes of menstruators that are especially affected by a lack of access to adequate menstrual products: students, prisoners, and the homeless. It will conclude with a description of four relevant analyses used to determine the constitutionality of a governmental restriction and the lack of access to adequate menstrual products. Part II will explain how deeming access to adequate menstrual products a fundamental right will trigger a strict scrutiny analysis under the Due Process Clause. It will also explain why similar arguments under the Equal Protection Clause (“EPC”) and the Eighth Amendment are unlikely to bring about substantial change. Part III argues why access to adequate menstrual products should be deemed a fundamental right based on U.S. Supreme Court precedent and the concept of human dignity. Part IV asserts that once access to adequate menstrual products is deemed a fundamental right, restrictions that are placed on students, prisoners, and the homeless through policies and taxes must be held unconstitutional. This Note concludes with several recommendations for how states can help end menstrual injustice and period poverty.

⁸ Johnson, *supra* note 4, at 19.

⁹ Johnson, *supra* note 4, at 16.

¹⁰ See generally Bridget J. Crawford & Emily Gold Waldman, *Period Poverty in a Pandemic: Harnessing Law to Achieve Menstrual Equity*, 98 WASH. U. L. REV. 1569 (2021) [hereinafter Crawford & Waldman, *Period Poverty*] (discussing period poverty).

¹¹ See Carney, *supra* note 3, at 2548–49; Johnson, *supra* note 4, at 5, 30–31; see generally Valerie Siebert, *Nearly Half of Women Have Experienced ‘Period Shaming,’* N.Y. POST, <https://perma.cc/GQ8F-7764> (last updated Jan. 3, 2018, 1:14 PM) (providing statistics on menstrual shaming).

¹² ACLU NAT’L PRISON PROJECT & PERIOD EQUITY, *MENSTRUAL EQUITY: A LEGISLATIVE TOOLKIT* 9 (2019) <https://perma.cc/WWB6-VMVJ>.

I. Background

A. *The Menace of Menstruators*

The menstrual cycle is a reproductive and biological process that occurs in a female body every month to prepare for a potential pregnancy.¹³ An average menstrual cycle lasts about twenty-eight days.¹⁴ On the first day of the cycle, the menstruation process (or “period”) begins.¹⁵ In this phase, if pregnancy did not occur during the last month’s cycle, hormone levels lower and the body sheds the tissue in the lining of the uterus that has formed since the menstruator’s last period.¹⁶ As a result, “[m]enstrual fluid contain[ing] blood, cells from the lining of the uterus (endometrial cells) and mucus” release from the vagina.¹⁷ Menstruators use menstrual products such as sanitary pads, tampons, menstrual cups, menstrual disks, period underwear, or medication to control the flow of their period.¹⁸ During menstruation, menstruators often have cramping, bloating, acne, sore breasts, tiredness, headaches, and mood swings.¹⁹ Some menstruators experience light bleeding, while others experience heavy bleeding.²⁰ An average period usually lasts between three to seven days.²¹ Menstruation occurs every month from the time of puberty to menopause, for an average of forty years.²²

For menstruators, “[a] regular monthly period . . . is considered healthy and a sign of proper body functioning.”²³ However, in this country, “there are cultural narratives of menstruation as shameful and taboo, and menstruators [are treated] as dirty, impure, and incompetent.”²⁴ The ancient Romans believed that menstrual blood had the ability to kill seeds, plants, and animals, and that it reduced a razor’s sharpness.²⁵ They also believed

¹³ See generally Nemours KidsHealth, *The Menstrual Cycle*, at 00:45–01:57 (Aug. 6, 2015), <https://perma.cc/N3NG-BLXL> (explaining the menstrual process).

¹⁴ *Id.* at 00:37–00:46.

¹⁵ *Id.* at 00:47–00:50.

¹⁶ Johnson, *supra* note 4, at 9.

¹⁷ Victoria State Gov’t Dep’t of Health & Jean Hailes, *Menstrual Cycle*, BETTER HEALTH CHANNEL, <https://perma.cc/3HA2-H35M> (last visited Feb 20, 2023) [hereinafter *Menstrual Cycle*].

¹⁸ Johnson, *supra* note 4, at 11; *Period Products: What Are the Options?*, IPPF (Nov. 18, 2020), <https://perma.cc/GFB5-TV6P>.

¹⁹ Corey Whelan, *10 Signs Your Period Is About to Start*, HEALTHLINE, <https://perma.cc/EP26-SGHH> (last updated Feb. 4, 2022).

²⁰ Johnson, *supra* note 4, at 10.

²¹ *Menstrual Cycle*, *supra* note 17.

²² Johnson, *supra* note 4, at 9–10.

²³ Johnson, *supra* note 4, at 9.

²⁴ Johnson, *supra* note 4, at 15.

²⁵ Johnson, *supra* note 4, at 16.

that a woman's contact with another's menstrual blood could result in a miscarriage.²⁶ Similarly, some Native American tribes believed that menstruators had the power to impair the benefits of medicine and were bad luck.²⁷ Early forms of Christianity required menstruators to live in isolation until their period was over to avoid spreading impurity to others.²⁸ Some Christian denominations continue to forbid menstruators from engaging in religious activities during menstruation.²⁹ Orthodox Judaism still forbids menstruators from physically touching their husbands during and shortly after menstruation.³⁰ Some Islamic denominations continue to prohibit menstruators from engaging in sexual activity while menstruating and often forbid them from participating in prayer.³¹

Views of menstruators as "impure [and] inferior" remain today.³² The term "menstrual injustice" represents "the oppression of menstruators, women, girls, transgender men and boys, and nonbinary persons, simply because they menstruate."³³ Because menstruation can vary by month, "menstruators are often caught off guard by the onset of their period."³⁴ Coworkers stigmatize menstruators for bleeding through clothes or being late to work due to menstrual pain.³⁵ Some menstruating children even skip school to avoid harassment from peers and restrictive bathroom policies.³⁶

The stigmas surrounding menstruation also exist in the media today.³⁷ Advertising for menstrual products continues to illustrate menstruation as a hygienic issue, rather than a biological process.³⁸ One of our country's recent leaders publicly acknowledged menstruation as something debilitating and embarrassing.³⁹ At a Republican Presidential Debate in

²⁶ Johnson, *supra* note 4, at 16.

²⁷ See, e.g., Johnson, *supra* note 4, at 16.

²⁸ Johnson, *supra* note 4, at 16; see *Leviticus* 15:19–20.

²⁹ Johnson, *supra* note 4, at 17.

³⁰ Johnson, *supra* note 4, at 17; *Leviticus* 15:19–27.

³¹ Johnson, *supra* note 4, at 18; see *Qur'an* 2:222.

³² Johnson, *supra* note 4, at 19.

³³ Johnson, *supra* note 4, at 5.

³⁴ Johnson, *supra* note 4, at 10 (noting how sixty-one percent of menstruators acknowledged that they have suffered from unanticipated periods in the past).

³⁵ Johnson, *supra* note 4, at 5.

³⁶ Johnson, Waldman & Crawford, *supra* note 1, at 229, 252, 254.

³⁷ Johnson, Waldman & Crawford, *supra* note 1, at 233 ("One recent study called the 'Tampon Experiment' demonstrated that the average individual sees menstruating women as 'less competent, [and] less likeable' than women who are not menstruating.").

³⁸ Coshandra Dillard, *Educators Can Help Reduce Stigmas Associated with Menstruation by Challenging Rigid School Policies and Advocating for Equitable Health Education*, 61 *TEACHING TOLERANCE*, Spring 2019, at 47, <https://perma.cc/KG7D-58KB> ("Advertisements use the word 'feminine' in the same breath as 'sanitary' and 'protection.'").

³⁹ See, e.g., Philip Rucker, *Trump Says Fox's Megyn Kelly Had 'Blood Coming Out of Her Wherever'*, *WASH. POST* (Aug. 8, 2015, 10:30 AM EDT), <https://perma.cc/X8BC-YTS8>.

2016, the moderator, Megyn Kelly, asked then-presidential candidate Donald Trump about derogatory comments that he had made about women.⁴⁰ In an interview shortly after the debate, Trump stated how “[y]ou could see the blood coming out of her eyes, blood coming out of her wherever. In my opinion, she was off base.”⁴¹ Social media also reflects menstrual injustice.⁴² In 2015, poet Rupri Kaur posted a photo on Instagram of her lying in bed, fully clothed, with a red stain on the crotch of her pants.⁴³ Instagram took the photo down not once, but twice, claiming that it violated “community guidelines,” which “formally forbid nudity, illegal activity[,] and images that glorify self-harm.”⁴⁴ Instagram reuploaded the photo and apologized for its “mistake” only after Kaur wrote a “sternly worded open letter” on Facebook exposing Instagram’s arbitrary policies.⁴⁵ Society continues to “expect[] menstruators to hide menstruation, to be shamed by menstruation, and to be solely and invisibly responsible for the care of and the effects of their menstruation.”⁴⁶

B. *The Effect of a Lack of Access to Adequate Menstrual Products on Vulnerable Classes*

Students, prisoners, and those who are homeless strongly feel the impacts of menstrual injustices.⁴⁷ “Period poverty” is the result of not having enough money to buy menstrual products, the lack of access to adequate menstrual products, the lack of education about menstruation, and the long-held stigmas surrounding menstruation.⁴⁸ As a result of period poverty, menstruators in vulnerable classes have a difficult time participating in society while they are menstruating because the inability to afford and access menstrual products “affects a person’s freedom to work and study, to be healthy, and to participate in daily life with basic dignity.”⁴⁹

Menstruators who lack the means, access, or education about menstruation often end up making their own products to control their periods.⁵⁰ A 2019 study involving low-income women found that one-third admitted that they had “used other things to make homemade tampons and

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See, e.g., Caitlin Dewey, *Why Did Instagram Censor This Photo of a Fully Clothed Woman on Her Period?*, WASH. POST (Mar. 27, 2015, 3:01 PM EDT), <https://perma.cc/NL8C-X2SU>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Johnson, *supra* note 4, at 6.

⁴⁷ Johnson, *supra* note 4, at 5.

⁴⁸ Crawford & Waldman, *Period Poverty*, *supra* note 10, at 1572.

⁴⁹ JENNIFER WEISS-WOLF, PERIODS GONE PUBLIC: TAKING A STAND FOR MENSTRUAL EQUITY 16 (2017).

⁵⁰ See Johnson, *supra* note 4, at 55.

pads like rags, tissues, toilet paper, paper towels, diapers, and adult incontinence products.”⁵¹ For menstruators who do not even have access to these items, their only option may be to bleed through their clothes, of which many low-income menstruators only have a limited supply.⁵² Low-income menstruators who do have access to adequate menstrual products often use the same products for longer than is recommended or opt to reuse them.⁵³

There are health risks associated with these practices.⁵⁴ Failing to change a tampon regularly or leaving a makeshift product inside the vagina for too long can result in toxic shock syndrome, “a rare but life-threatening condition caused by bacteria getting into the body and releasing harmful toxins.”⁵⁵ Similarly, wearing the same pad for longer than is recommended can result in severe bacterial infections, such as yeast infections.⁵⁶ Failure to practice adequate menstrual health may also lead to sepsis, cervical cancer, ovarian cancer, and infertility.⁵⁷

1. Menstrual Injustice in Schools

Menstrual injustice disproportionately impacts menstruating students, a vulnerable class, who are granted little privacy during the school day and often financially rely on their parents.⁵⁸ The inability to afford and access products, such as pads and tampons, is but one issue that menstruators face in the school environment.⁵⁹ Dress codes, restrictions on bathroom use, little privacy from faculty and other students, and society’s emphasis on “silence and stigma” when it comes to menstruation make having a period in school frustrating and burdensome.⁶⁰ Some schools even instruct their students to use code words for pads and tampons to keep menstruation a secret and place signs in bathrooms encouraging menstruators to keep period products out of sight.⁶¹ Schools that do provide free menstrual products to students often keep the products in the nurse’s office, which may deter students from

⁵¹ Johnson, *supra* note 4, at 55.

⁵² Johnson, *supra* note 4, at 56.

⁵³ ACLU NAT’L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8.

⁵⁴ Carney, *supra* note 3, at 2548.

⁵⁵ *Toxic Shock Syndrome*, NAT’L HEALTH SERV., <https://perma.cc/VE49-AVWE> (last updated Sept. 27, 2019); accord Carney, *supra* note 3, at 2548.

⁵⁶ Lauren Shaw, *Bloody Hell: How Insufficient Access to Menstrual Hygiene Products Creates Inhumane Conditions for Incarcerated Women*, 6 TEX. A&M L. REV. 475, 484 (2019).

⁵⁷ Carney, *supra* note 3, at 2541; ACLU NAT’L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 9.

⁵⁸ See Johnson, Waldman & Crawford, *supra* note 1, at 234, 252–53 (noting that about fifty-one percent of students in public schools live in poverty and are eligible for free lunches).

⁵⁹ See Johnson, Waldman & Crawford, *supra* note 1, at 234.

⁶⁰ Johnson, Waldman & Crawford, *supra* note 1, at 241, 260; see, e.g., Johnson, *supra* note 4, at 47 (“One girl described the school as treating them like ‘animals.’”).

⁶¹ Johnson, Waldman & Crawford, *supra* note 1, at 235–36.

obtaining them because they either fear embarrassment or the risk of bleeding through their clothes before they can get there.⁶² Restrictive bathroom policies in Chicago charter schools recently led to numerous menstruating students getting urinary tract infections and bleeding through their pants.⁶³ At the same schools, the dress codes require students to wear khakis, which make blood stains even more prominent.⁶⁴ Because of the shame surrounding menstruation, even when students are able to use the bathroom to take care of their menstrual needs, many are sure to open their menstrual products quietly so as to keep their menstruation a secret.⁶⁵ Students may even skip school to avoid the harassment and embarrassment of bleeding through their clothes or asking school staff for products.⁶⁶

There is also a lack of adequate education related to menstruation in many schools and society in general.⁶⁷ Failing to educate society on menstruation “contribute[s] to a culture that treats menstruation as something shameful and something to be hidden,” which perpetuates “menstruation-based harassment.”⁶⁸ Further, many schools that do provide menstrual education only provide it to certain students based on gender, which can exclude transgender students who are also menstruating.⁶⁹ Therefore, scholars argue that expanding menstruation-related education is a crucial step in achieving menstrual justice.⁷⁰

2. Menstrual Injustices in Prisons

Menstrual injustice also disproportionately impacts the vulnerable class of imprisoned menstruators.⁷¹ The First Step Act, passed in 2018, requires that all federal prisons provide imprisoned menstruators with free and accessible menstrual products.⁷² However, it does not apply to state prisons.⁷³ In most state prisons, there is no free or unlimited access to

⁶² Johnson, Waldman & Crawford, *supra* note 1, at 251, 253–54 n.150.

⁶³ Dillard, *supra* note 38, at 46.

⁶⁴ Dillard, *supra* note 38, at 46.

⁶⁵ Dillard, *supra* note 38, at 47.

⁶⁶ See Johnson, Waldman & Crawford, *supra* note 1, at 241, 254; *Morning Edition: Periods! Why These 8th-Graders Aren't Afraid to Talk About Them* (NPR broadcast May 15, 2019) (transcript and audio at <https://perma.cc/QGG4-22KB>).

⁶⁷ Johnson, Waldman & Crawford, *supra* note 1, at 258, 261 n.195, 270 n.238 (explaining how many states do not require menstrual education in schools, and when they do, it is often at an age where most menstruators have already experienced their first period).

⁶⁸ Johnson, Waldman & Crawford, *supra* note 1, at 236.

⁶⁹ Dillard, *supra* note 38, at 47.

⁷⁰ See Johnson, Waldman & Crawford, *supra* note 1, at 258–61.

⁷¹ See Carney, *supra* note 3, at 2542, 2545–46.

⁷² First Step Act of 2018, Pub. L. No. 115–391, § 611, 132 Stat. 5194, 5247.

⁷³ Carney, *supra* note 3, at 2542–43 (“Thirty-eight states currently do not have any legislation requiring prisons to provide adequate supplies of pads or tampons, and instead leave the

menstrual products; instead, correctional officers are responsible for giving them out.⁷⁴ Some state prisons limit menstruating inmates to about ten pads per month even though medical experts recommend changing “pads every four to eight hours.”⁷⁵ Given the length of an average period, ten pads per month results in inmates wearing the same pad for up to seventeen hours (depending on the individual’s flow).⁷⁶ Some prisons allow menstruators to receive more pads, but only if they pay for an appointment to get a doctor’s note—which most inmates cannot afford.⁷⁷ Although tampons are often for sale in the commissary, many menstruating prisoners cannot afford them.⁷⁸ In prisons that pay inmates for working prison jobs, each inmate makes about \$0.14 an hour, requiring an inmate “to work sixty-four hours in order to afford a sixteen-count box of tampons” from the commissary, which can be insufficient for a single period.⁷⁹

In prisons where correctional officers are responsible for giving out menstrual products, the officers often use this power as a form of control, forcing inmates to beg for them.⁸⁰ Some officers even condition receipt of menstrual products on sexual acts.⁸¹ Further, prisons provide pads that “are generally of such poor quality that women are unable to use them effectively” and are “generally wingless and low-absorbency.”⁸² Thus, menstruators will bleed through their uniforms, which in some prisons subjects them to punishment.⁸³ Correctional officers sometimes force inmates to wear the stained uniform for a long period of time before getting a new one, subjecting them to “humiliation and health concerns.”⁸⁴ Lack of access forces menstruating inmates to create makeshift products, often using toilet paper, stuffing from mattresses, or dirty rags.⁸⁵ These practices increase the health risks associated with poor menstrual hygiene as discussed above.⁸⁶

distribution of menstrual health products to individual prison officials.”).

⁷⁴ Carney, *supra* note 3, at 2545.

⁷⁵ Carney, *supra* note 3, at 2545.

⁷⁶ Carney, *supra* note 3, at 2545–46.

⁷⁷ Carney, *supra* note 3, at 2546.

⁷⁸ Carney, *supra* note 3, at 2547.

⁷⁹ Carney, *supra* note 3, at 2547–48 (“The average commissary charges \$0.56 per tampon, whereas tampons are available on Amazon.com for as low as \$0.19 per tampon.”).

⁸⁰ See, e.g., Johnson, *supra* note 4, at 46–47 (“One woman, Ms. Whaley, recounted at the New York Rikers Island jail facility . . . ‘a correction officer threw a bag of tampons into the air and watched as inmates dived to the ground to retrieve them, because they didn’t know when they would next be able to get tampons.’”).

⁸¹ Carney, *supra* note 3, at 2546–47.

⁸² Carney, *supra* note 3, at 2547.

⁸³ Carney, *supra* note 3, at 2547.

⁸⁴ ACLU NAT’L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8.

⁸⁵ Carney, *supra* note 3, at 2548.

⁸⁶ Carney, *supra* note 3, at 2548–49.

Imprisoned menstruators also suffer additional humiliation during strip searches after prison visits, where they are required to remove any menstrual products and are usually not provided with replacements.⁸⁷ Thus, prisons force these menstruators back to their cells with stained clothes.⁸⁸ Such practices have deterred many menstruators from scheduling visits with either family or lawyers while menstruating in order to spare such an “erosion of dignity,” which emphasizes the disproportionately negative impact that menstrual injustice has on prisoners.⁸⁹

3. Menstrual Injustices Among the Homeless

Over 560,000 individuals living in the United States today suffer from homelessness—210,000 of them are women.⁹⁰ Unsurprisingly, menstrual injustice disproportionately impacts the vulnerable class of homeless menstruators.⁹¹ If employed, most homeless individuals work low-income jobs.⁹² Such jobs are usually not as flexible as higher paying jobs and management may not excuse menstruation-related issues, which could result in “reprimands, pay reductions, suspensions or terminations.”⁹³

The price of menstrual products and pain relief is another menstrual injustice that homeless and low-income individuals face.⁹⁴ Economic realities force them to pick between buying menstrual products or saving their money to pay for other necessities.⁹⁵ The average menstruator spends about \$20 a month on period products, which is about \$18,000 a lifetime.⁹⁶ Food stamps, WIC benefits, and Medicaid do not cover menstrual products.⁹⁷

Many homeless people (including those living in shelters) lack access to sanitary bathrooms with soap and water, making it difficult to practice

⁸⁷ Johnson, *supra* note 4, at 45–46 (highlighting how a correctional officer called one woman “disgusting” as blood ran down her legs during a strip search).

⁸⁸ Johnson, *supra* note 4, at 45–46.

⁸⁹ Johnson, *supra* note 4, at 9, 46; accord Carney, *supra* note 3, at 2541–42.

⁹⁰ Kim, *Female Homelessness and Period Poverty*, NAT’L ORG. FOR WOMEN (Jan. 22, 2021), <https://perma.cc/6W2G-CANP>.

⁹¹ See Johnson, *supra* note 4, at 9 (“Menstrual injustice is . . . the erosion of dignity for menstruators, including those . . . who are homeless without products, water, and privacy to attend to their periods.”).

⁹² See Johnson, *supra* note 4, at 53.

⁹³ Johnson, *supra* note 4, at 53 (explaining how menstruators may arrive late to work or not at all due to an unanticipated period or menstrual pain, which is an often occurrence for many menstruators).

⁹⁴ Johnson, *supra* note 4, at 55.

⁹⁵ Johnson, *supra* note 4, at 53.

⁹⁶ Kim, *supra* note 90.

⁹⁷ Johnson, *supra* note 4, at 55.

adequate menstrual health.⁹⁸ Further, they often do not have access to laundry facilities to clean any makeshift products or stained clothing.⁹⁹ This puts most, if not all, homeless menstruators at risk of serious health conditions such as toxic shock syndrome and bacterial infections.¹⁰⁰ The inability to afford mild painkillers forces homeless menstruators to suffer through menstrual pain on the streets.¹⁰¹ Although some homeless shelters provide menstrual products, they are often low in quality and limited in supply, and many homeless menstruators cannot obtain transportation to stores that sell them at lower prices.¹⁰² Further, even when they can obtain menstrual products, many are afraid to use public restrooms because they fear assault.¹⁰³ Homeless menstruators therefore suffer significantly from menstrual injustice and period poverty, both of which are influenced by the “tampon tax.”¹⁰⁴

C. *The Tampon Tax*

Many states impose a sales tax on menstrual products—the “tampon tax.”¹⁰⁵ Some states have added a sales tax of up to ten percent on such products.¹⁰⁶ States that tax menstrual products do not consider them to be basic necessities, such as food or medication, but rather, a luxury.¹⁰⁷ Thus, the tampon tax “places an additional burden on people who menstruate and discriminates against them by making items crucial for everyday life unaffordable for some.”¹⁰⁸

Although some states do not recognize menstrual products as eligible for a sales tax exemption, these same states consider “roughly analogous male or unisex products [tax] exempt on grounds of ‘necessity.’”¹⁰⁹ Wisconsin taxes menstrual products but deems drugs to treat erectile

⁹⁸ Johnson, *supra* note 4, at 56.

⁹⁹ Johnson, *supra* note 4, at 55–56.

¹⁰⁰ Kim, *supra* note 90.

¹⁰¹ Kim, *supra* note 90; see Jennifer Weiss-Wolf, *The Era Campaign and Menstrual Equity*, 43 HARBINGER 168, 169 (2019) [hereinafter Weiss-Wolf, *The Era Campaign and Menstrual Equity*] (noting how homeless menstruators often suffer from isolation due to inadequate access to menstrual products).

¹⁰² Johnson, *supra* note 4, at 56, 70.

¹⁰³ Johnson, *supra* note 4, at 56, 70 (highlighting the importance of having a private and safe place to practice menstrual hygiene, especially for those homeless menstruators who are transgender).

¹⁰⁴ See generally Johnson, *supra* note 4.

¹⁰⁵ Johnson, *supra* note 4, at 37.

¹⁰⁶ Johnson, *supra* note 4, at 37.

¹⁰⁷ ACLU NAT’L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 10.

¹⁰⁸ Leah Rodriguez, *The Tampon Tax: Everything You Need to Know*, GLOBAL CITIZEN (June 28, 2021), <https://perma.cc/B25F-WT4Z> [hereinafter Rodriguez, *The Tampon Tax*].

¹⁰⁹ Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 442.

dysfunction and condoms as tax-exempt necessities.¹¹⁰ California taxes menstrual products but deems face wash, lotion, and baby oil as necessities.¹¹¹ Until recently, New York taxed menstrual products but not “Rogaine, dandruff shampoo, foot powder, chapstick, and so many other less medically necessary products also used by men.”¹¹² Opponents of the tampon tax have noted how “products ‘used to stop the flow of blood from nonfeminine parts of the body are “medical supplies,” while tampons and pads, used to stop the flow of blood from the uterus, are not.”¹¹³ Other states tax menstrual products but not “Pixy Stix, golf club memberships, arcade game tokens, garter belts, and gun club memberships.”¹¹⁴ Still others exempt “bingo supplies, cotton candy . . . and tattoos,” all apparently more “necessary” than controlling a natural bodily function.¹¹⁵ Recognizing that “[a] society signals its values through the decisions . . . about whom and what to tax,” these state legislatures have made clear their stance on menstruation.¹¹⁶

D. Relevant Analyses to Determine the Constitutionality of a Governmental Restriction

1. The Fourteenth Amendment’s Equal Protection Clause

The Equal Protection Clause (“EPC”) is one vehicle used to analyze whether governmental action is unconstitutional.¹¹⁷ The first requirement for an equal protection analysis is that the harm complained of must be the result of governmental action, as the EPC does not apply to private action.¹¹⁸ If the first requirement is met, the next step is to determine what level of scrutiny the court should use in determining whether the government violated the EPC.¹¹⁹ If the government action complained of creates a certain classification of people, either on its face or in its effect, it may be entitled to strict scrutiny—the highest degree of scrutiny.¹²⁰ Courts apply strict scrutiny to governmental action that discriminates against a class of people based on

¹¹⁰ Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 441.

¹¹¹ Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 441.

¹¹² Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 462.

¹¹³ Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 462; accord Hannah Recht, *What Life Would Look Like Without the ‘Tampon Tax’*, BLOOMBERG (Oct. 30, 2018), <https://perma.cc/T7VE-ZYSF> (noting how Band-Aids are often tax exempt in states that continue to tax menstrual products).

¹¹⁴ ACLU NAT’L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8.

¹¹⁵ See ACLU NAT’L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 15.

¹¹⁶ Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 483.

¹¹⁷ See generally, e.g., Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 121 (1989) (“This article describes the basic structure of equal protection analysis.”).

¹¹⁸ *Id.* at 123.

¹¹⁹ *Id.* at 124.

¹²⁰ *Id.* at 123–24.

their membership in a suspect class (i.e., on account of race, religion, national origin, or alienage) or infringes on a group's fundamental rights.¹²¹ A strict scrutiny analysis is the most plaintiff-friendly, and requires "the government [to] demonstrate a compelling interest, and . . . that a challenged statute or regulation is . . . narrowly tailored to protect that interest."¹²²

If the government action complained of discriminates on the basis of gender or illegitimacy, the court must apply intermediate scrutiny.¹²³ To pass intermediate scrutiny, "the government must prove both that it has acted to further an actual important interest and the classification is substantially related to that interest."¹²⁴ The third level of review, rational basis, is the least stringent form of judicial review and therefore the most likely to uphold governmental action.¹²⁵ It applies to any classification not covered by strict scrutiny or intermediate scrutiny.¹²⁶ Under rational basis review, "the classification [must] be a rational means for furthering a valid government purpose."¹²⁷ If the challenged governmental action survives the applicable means-end analysis, it will be deemed constitutional.¹²⁸ However, if it fails the applicable means-end analysis, the court will deem it unconstitutional and determine a remedy for the plaintiff.¹²⁹

2. The Fourteenth Amendment's Substantive Due Process Clause

Substantive due process is another vehicle that can be used to deem a governmental action unconstitutional.¹³⁰ A substantive due process claim "involve[s] the states' power to regulate certain activities."¹³¹ A substantive due process analysis is used to determine whether a governmental regulation of an activity exceeds that which is allowed under the Constitution.¹³² Similar to an equal protection analysis, different levels of scrutiny apply for different types of rights.¹³³ Fundamental liberty interests are rights subject to strict scrutiny, where the government must show that the "infringement is narrowly tailored to serve a compelling state

¹²¹ *Id.* at 124.

¹²² Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. REV.* 1267, 1283 (2007).

¹²³ Galloway, *supra* note 117, at 125.

¹²⁴ Galloway, *supra* note 117, at 142–43.

¹²⁵ Galloway, *supra* note 117, at 160.

¹²⁶ Galloway, *supra* note 117, at 124.

¹²⁷ Galloway, *supra* note 117, at 126.

¹²⁸ Galloway, *supra* note 117, at 126.

¹²⁹ Galloway, *supra* note 117, at 126.

¹³⁰ See generally Nat'l Paralegal Coll., *Substantive Due Process - Fundamental Rights*, LAWSHELF EDUC. MEDIA, <https://perma.cc/GE9J-9UR4> (last visited Feb 20, 2023) (providing an overview of a substantive due process analysis).

¹³¹ *Id.*

¹³² See generally *id.*

¹³³ 16C C.J.S. *Constitutional Law* § 1876, Westlaw (database updated Nov. 2022).

interest.”¹³⁴ A right is deemed fundamental if it is “‘deeply rooted in this Nation’s history and tradition’ . . . and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor our justice would exist if they were sacrificed.’”¹³⁵ The U.S. Supreme Court deemed most of the rights enumerated in the Bill of Rights as fundamental, and both the federal and state governments cannot infringe on these rights without a compelling reason to do so.¹³⁶ However, the U.S. Supreme Court has recognized other fundamental rights that, although not explicitly mentioned in the Constitution, also receive the highest protection.¹³⁷ A governmental restriction on any non-fundamental right is subject to rational basis review, where the government must prove that the restriction is merely “rationally related to a legitimate governmental end.”¹³⁸

3. Application of the *Turner* Standard Under the Fourteenth Amendment

In *Turner v. Safley*, the U.S. Supreme Court held that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”¹³⁹ Thus, a lower standard of scrutiny is applied in claims based on the infringement of fundamental rights in the prison context—one which is highly deferential to prison officials.¹⁴⁰ In applying the *Turner* standard, the courts rely on four factors to determine the reasonableness of a regulation.¹⁴¹ “First, there must be a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it.”¹⁴² Many courts will hold the regulation unconstitutional if it does not meet this first prong.¹⁴³ Second, courts will consider “whether there are alternative means of exercising the right that remain open to prison inmates.”¹⁴⁴ Third, courts consider “the impact accommodation of the asserted constitutional right will

¹³⁴ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

¹³⁵ *Id.* (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

¹³⁶ *McDonald v. City of Chicago*, 561 U.S. 742, 764–65 (2010).

¹³⁷ *See, e.g.*, U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (deeming as fundamental the right to engage in intimacies in the home); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 532 (1925) (deeming as fundamental a parent’s right to make decisions regarding their child’s upbringing).

¹³⁸ 16C C.J.S. *Constitutional Law*, *supra* note 133, § 1876.

¹³⁹ 482 U.S. 78, 89 (1987).

¹⁴⁰ *See id.* at 87, 89.

¹⁴¹ *Id.* at 89–91.

¹⁴² *Id.* at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

¹⁴³ *Carney*, *supra* note 3, at 2558.

¹⁴⁴ *Turner*, 482 U.S. at 90.

have on guards and other inmates, and on . . . prison resources generally.”¹⁴⁵ Lastly, the court will consider whether there are alternative regulations that would allow the prisoner to still exercise their fundamental rights.¹⁴⁶

4. Eighth Amendment

The Eighth Amendment to the U.S. Constitution prohibits “cruel and unusual punishments.”¹⁴⁷ The U.S. Supreme Court held in 1976 that intentionally disregarding a prisoner’s “serious medical need[]” violates the Eighth Amendment.¹⁴⁸ To succeed on such a claim, a prisoner must prove both “deliberate indifference” (subjectively viewed) and “serious medical need[]” (objectively viewed).¹⁴⁹ To prove deliberate indifference, the prisoner must show that the prison officials knew or should have known that their actions were going to cause the prisoner a risk of serious harm.¹⁵⁰ To prove a serious medical need, courts look to a variety of factors and consider both present and future harm.¹⁵¹

II. Why Deeming Access to Adequate Menstrual Health Products a Fundamental Right Matters

A. *Deeming Access to Adequate Menstrual Health Products a Fundamental Right Would Require All Governmental Restrictions to Survive Strict Scrutiny*

Restrictions and taxes continue in many states, despite arguments by scholars that the tampon tax and restrictive policies in public schools, prisons, and homeless shelters are unconstitutional under the EPC and the Eighth Amendment.¹⁵² Deeming access to adequate menstrual products a fundamental right would trigger the heightened standard of strict scrutiny in both equal protection and due process arguments.¹⁵³ Because strict scrutiny is more plaintiff-friendly, it is more likely that courts will deem state-initiated restrictions to adequate menstrual products

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 90–91.

¹⁴⁷ U.S. CONST. amend. VIII.

¹⁴⁸ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

¹⁴⁹ *Carney*, *supra* note 3, at 2563.

¹⁵⁰ *Carney*, *supra* note 3, at 2563–64 (“[A]ctual knowledge of risk is required.”).

¹⁵¹ *Carney*, *supra* note 3, at 2565–66.

¹⁵² *See generally* *Carney*, *supra* note 3, at 2544 (arguing that such restrictions on menstrual products in prisons violates Equal Protection and the Eighth Amendment); ACLU NAT’L PRISON PROJECT & PERIOD EQUITY, *supra* note 12 (arguing for the advancement of menstrual equity).

¹⁵³ *See* *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997); Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT’L AFFS. 72, 72–73 (Fall 2019), <https://perma.cc/VN8B-RS6E>.

unconstitutional.¹⁵⁴

In a strict scrutiny analysis under the Due Process Clause, the U.S. Supreme Court can uphold state sales tax on menstrual products and menstruation-based restrictions in public spaces only if the government can prove that such policies narrowly serve a compelling governmental interest.¹⁵⁵ For the reasons set forth in Part IV, the government cannot meet this strict standard.¹⁵⁶ As set out in the next sections, because analyzing such restrictions under the EPC or the Eighth Amendment triggers lower standards of scrutiny and unpredictability, deeming access to adequate menstrual products a fundamental right is the best approach to abolish these restrictions and the “indifference[s] toward (or squeamishness about) the . . . biological process of menstruation.”¹⁵⁷ Doing so will help rid the long-held stigmas surrounding menstruation and further equality.¹⁵⁸

B. *Analyzing a Lack of Access to Menstrual Products as Sex Discrimination in Violation of the EPC Triggers a Lesser Standard of Scrutiny and Results in Unpredictable Outcomes Within the Prison Context*

Menstrual justice advocates argue that taxing and otherwise limiting access to adequate menstrual products is unconstitutional sex discrimination.¹⁵⁹ They argue that a tax on tampons is a “tax on women” because women explicitly purchase such products, and thus, intermediate scrutiny applies.¹⁶⁰ These scholars contend that “[t]here is no exceedingly persuasive justification for taxing menstrual hygiene products more heavily than other necessities.”¹⁶¹ Restrictions to accessing adequate menstrual products “perpetuate[s] the legal, social, and economic inferiority of women” and is thus unconstitutional.¹⁶²

While such arguments have their strengths, they also have weaknesses.¹⁶³ An argument based on sex-based discrimination, which triggers intermediate scrutiny, is not as strong an argument as one that recognizes that access to adequate menstrual products is a fundamental right, which would trigger strict scrutiny.¹⁶⁴ Strict scrutiny is more plaintiff-

¹⁵⁴ See *Glucksberg*, 521 U.S. at 720–21; Alicea & Ohlendorf, *supra* note 153, at 79.

¹⁵⁵ See *Glucksberg*, 521 U.S. at 721.

¹⁵⁶ See *infra* Part IV.

¹⁵⁷ Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 444–45; see Carney, *supra* note 3, at 2579–93; *infra* Part II(B)–(C), Part IV.

¹⁵⁸ See generally ACLU NAT’L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8–16.

¹⁵⁹ See, e.g., Carney, *supra* note 3, at 2541.

¹⁶⁰ Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 444.

¹⁶¹ Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 481.

¹⁶² *United States v. Virginia*, 518 U.S. 515, 534 (1996).

¹⁶³ See, e.g., Johnson, *supra* note 4, at 26.

¹⁶⁴ See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); Alicea & Ohlendorf, *supra* note 153, at 72–75.

friendly than intermediate scrutiny and therefore less likely to allow intrusions by the government and more likely to make substantial change.¹⁶⁵

Further, an argument based on sex discrimination proposes that any state action that restricts adequate menstrual products (such as the tampon tax) merely creates a classification between men and women.¹⁶⁶ However, menstruators are not limited to only women, but also include those who are nonbinary, transmen, intersex, and genderqueer.¹⁶⁷ Similarly, not all cis women menstruate—pregnant, menopausal, and breastfeeding women may not menstruate, as well as women who have organ or hormone issues, or women who take certain medications.¹⁶⁸ A distinction between men and women does not encompass the entire class of menstruators.¹⁶⁹ Such an argument under the EPC will likely further society's feminization of menstrual products by failing to recognize that menstruators do not only consist of cis women.¹⁷⁰ Deeming access to adequate menstrual products a fundamental right rather than analyzing restrictions to such products as sex discrimination under the EPC will therefore protect more, if not all, menstruators.¹⁷¹

Applying an equal protection analysis in prison contexts has its own weaknesses, as “courts are split on whether intermediate scrutiny or the *Turner* standard applies to sex-based equal protection claims,” and the U.S. Supreme Court has yet to decide the issue.¹⁷² Thus, arguing that the failure to provide prisoners with access to adequate menstrual products is sex discrimination based on equal protection will lead to different results in different jurisdictions depending on what standard is applied.¹⁷³ Inconsistent rulings across jurisdictions would adversely impact a population of people that are already stigmatized and have minimal protections.¹⁷⁴ Deeming access to adequate menstrual products a fundamental right would allow any prison restrictions on such products to be analyzed under a due process analysis, thereby bypassing the unpredictability of an equal protection analysis.¹⁷⁵ Thus, analyzing restrictions to menstrual products under the Due Process Clause is a more

¹⁶⁵ See *Glucksberg*, 521 U.S. at 721; Alicea & Ohlendorf, *supra* note 153, at 72.

¹⁶⁶ See Johnson, *supra* note 4, at 26.

¹⁶⁷ Crawford & Waldman, *Period Poverty*, *supra* note 10, at 1573.

¹⁶⁸ Mary Ellen Ellis, *No Menstruation (Absent Menstruation)*, HEALTHLINE, <https://perma.cc/73KM-PV9F> (last updated May 29, 2020).

¹⁶⁹ See Johnson, *supra* note 4, at 26.

¹⁷⁰ See Johnson, *supra* note 4, at 27.

¹⁷¹ See Johnson, *supra* note 4, at 26.

¹⁷² Carney, *supra* note 3, at 2555, 2575.

¹⁷³ See Carney, *supra* note 3, at 2554–55.

¹⁷⁴ See generally Johnson, *supra* note 4, 35–40, 75–76.

¹⁷⁵ See Carney, *supra* note 3, at 2555, 2575; see also 16C C.J.S. *Constitutional Law*, *supra* note 133, § 1876.

direct vehicle to declare such restrictions unconstitutional.¹⁷⁶

C. *Analyzing a Lack of Access to Menstrual Products as an Eighth Amendment Violation Requires the Plaintiff to Overcome a High Burden*

Scholars also argue that the lack of access to adequate menstrual products in prisons violates menstruators' Eighth Amendment rights because it constitutes a "deliberate indifference to serious medical needs of prisoners."¹⁷⁷ However, these same scholars have acknowledged how difficult it is to meet this standard.¹⁷⁸ Although restricting access to adequate menstrual products could lead to serious medical issues in the future (such as toxic shock syndrome), the prisoner would also have to prove that prison officials knew or should have known that their actions were going to cause the prisoner a risk of serious harm down the road.¹⁷⁹ This is an incredibly hard burden to overcome and would only succeed if the right facts existed.¹⁸⁰ Because this approach would only apply in the prison context and is inapplicable to claims involving other vulnerable classes, it is not as strong an argument that access to adequate menstrual products is a fundamental right under the Due Process Clause.¹⁸¹

ANALYSIS

III. Access to Adequate Menstrual Products is a Fundamental Right

A. *U.S. Supreme Court Precedent Demonstrates That Access to Adequate Menstrual Products Is Implicit in the Concept of Ordered Liberty*

A fundamental right is one which is "deeply rooted in this Nation's history and tradition"¹⁸² and is "implicit in the concept of ordered liberty."¹⁸³ Over the years, the U.S. Supreme Court has ruled certain rights so fundamental to our society that the government can interfere with those rights only if it has compelling grounds to do so.¹⁸⁴ The governmental interference will only survive if it is the narrowest means to achieve that compelling interest.¹⁸⁵ As noted above, the U.S. Supreme Court has held that

¹⁷⁶ See 16C C.J.S. *Constitutional Law*, *supra* note 133, § 1876; Carney, *supra* note 3, at 2555, 2575.

¹⁷⁷ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

¹⁷⁸ Carney, *supra* note 3, at 2591.

¹⁷⁹ Carney, *supra* note 3, at 2564, 2591–93 ("[A]ctual knowledge of risk is required.").

¹⁸⁰ Carney, *supra* note 3, at 2591, 2594.

¹⁸¹ See generally Carney, *supra* note 3.

¹⁸² *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

¹⁸³ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations omitted).

¹⁸⁴ Nathan S. Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause: Common Interpretation*, NAT'L CONST. CTR., <https://perma.cc/73LM-QUC9> (last visited Feb 20, 2023).

¹⁸⁵ *Glucksberg*, 521 U.S. at 721.

most of the rights listed in the Bill of Rights are fundamental, and any federal or state governmental interference with these rights is subject to the highest form of scrutiny.¹⁸⁶

The U.S. Supreme Court has also deemed rights not explicitly mentioned in the Constitution as fundamental.¹⁸⁷ All of these rights are traced to the concepts of human dignity, bodily integrity, privacy, and personal autonomy.¹⁸⁸ The Court has declared the right to marry a fundamental right, holding that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”¹⁸⁹ The right to make decisions regarding the care, education, custody, and upbringing of one’s children is also a fundamental right, as children are “not the mere creature[s] of the state.”¹⁹⁰ An individual also has a fundamental right to make the autonomous and personal choice as to whether to take birth control.¹⁹¹ The U.S. Supreme Court has also held that every individual has a fundamental right to refuse life-preserving medical treatment.¹⁹² The right to make certain familial decisions, such as whether to live with extended family, is also a fundamental right.¹⁹³ Further, the right to engage in intimate conduct within the home is protected, as the Court has long recognized and “respected [a] private realm of family life which the state cannot enter.”¹⁹⁴

Rights implicit in the concept of ordered liberty include “the right to be

¹⁸⁶ Chapman & Yoshino, *supra* note 184 (“The exceptions are the Third Amendment’s restriction on quartering soldiers in private homes, the Fifth Amendment’s right to a grand jury trial, the Seventh Amendment’s right to jury trial in civil cases, and the Eighth Amendment’s prohibition on excessive fines.”).

¹⁸⁷ Chapman & Yoshino, *supra* note 184 (“The idea of unenumerated rights is not strange—the Ninth Amendment itself suggests that the rights enumerated in the Constitution do not exhaust ‘others retained by the people.’”).

¹⁸⁸ See Maxine D. Goodman, *The Obergefell Marriage Equality Decision, with Its Emphasis on Human Dignity, and a Fundamental Right to Food Security*, 13 HASTINGS RACE & POVERTY L.J. 149, 150, 180, 192 (2016).

¹⁸⁹ *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citation omitted); *accord Obergefell v. Hodges*, 576 U.S. 644, 646 (2015).

¹⁹⁰ *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 535 (1925); *accord Troxel v. Granville*, 530 U.S. 57, 72 (2000) (refusing to grant visitation rights to a third party when the child’s fit parent opposed such visitation, as this infringed on the parent’s right to make decisions regarding the upbringing of the child); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (holding that parents have a fundamental right to control their children’s education).

¹⁹¹ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

¹⁹² *Cruzan ex rel. Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990).

¹⁹³ See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 500 (1977).

¹⁹⁴ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); see also *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“[T]wo adults who, with full and mutual consent from each other, engage[] in sexual practices . . . are entitled to respect for their private lives.”).

respected as a human being,” as well as rights related to “[s]elf determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity and respect.”¹⁹⁵ In determining whether a right is implicit in the concept of ordered liberty, the U.S Supreme Court may consider history and tradition, but these concepts “do not set its outer boundaries.”¹⁹⁶ Thus, the stigmas, shame, and humiliation that society historically attributed to menstruation are not dispositive factors in determining whether access to adequate menstrual products is a fundamental right.¹⁹⁷

If privacy and bodily integrity require a fundamental right to engage in consensual intimate relationships and to deny unwanted medical treatment, it follows that a menstruator has a right to access safe and adequate products to control a biological, bodily function.¹⁹⁸ Maintaining menstrual hygiene is a practice closely related to personal autonomy and bodily integrity because the only alternative is bleeding through clothes or developing serious, life-threatening infections.¹⁹⁹ For a society that is dependent on the reproductive system of a menstruator’s body for carrying and giving birth to future generations, it is illogical that menstruation, a reproductive process related to producing offspring, does not hold the same respect as giving birth.²⁰⁰ At “[t]he heart of reproductive justice is the right to ‘maintain personal bodily autonomy.’”²⁰¹ In fact, the mere concept of pregnancy has been the subject of many constitutional decisions.²⁰² Parents have a fundamental right to make decisions regarding their children’s care and upbringing, but many of these same parents lack access to adequate menstrual products to control a bodily process that they only have because they are not currently pregnant.²⁰³ Having to choose between bleeding through pants or using unsafe alternatives to control the blood flow because of lack of access to adequate products contradicts a menstruator’s constitutional right to bodily

¹⁹⁵ *McDonald v. City of Chicago*, 561 U.S. 742, 880 (2010) (Stevens, J., dissenting).

¹⁹⁶ *Obergefell v. Hodges*, 576 U.S. 644, 645 (2015).

¹⁹⁷ *See id.*

¹⁹⁸ *See Lawrence*, 539 U.S. at 578; *Cruzan ex rel. Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990).

¹⁹⁹ *Menstrual Hygiene Management Enables Women and Girls to Reach Their Full Potential*, WORLD BANK (May 25, 2018), <https://perma.cc/DKM8-RBKA> (“[I]t is evident that promoting menstrual hygiene management (MHM) is not only a sanitation matter; it is also an important step towards safeguarding the dignity, bodily integrity and overall life opportunities of women and girls.”).

²⁰⁰ *See Siebert*, *supra* note 11.

²⁰¹ ACLU NAT’L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 9.

²⁰² *See generally* *Roe v. Wade*, 410 U.S. 113 (1973) (concerning a woman’s right to abortion; a right that is still being debated today); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning the right to choose whether to take contraception).

²⁰³ *Cf. Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 534–36 (1925) (discussing “the liberty of parents and guardians to direct the upbringing and education of children under their control”).

integrity.²⁰⁴ Similarly, if marriage is deemed a fundamental right because it is “fundamental to our very existence and survival,” then it follows that access to adequate menstrual products is also a fundamental right, as menstruation is a part of the reproductive process that is necessary for maintaining humanity.²⁰⁵

B. *Access to Adequate Menstrual Products Should Be Deemed a Fundamental Right Because It Is Inherent in Human Dignity*

All fundamental rights are inherent in human dignity and the idea that “to treat people with dignity is to treat them as autonomous individuals able to choose their destiny.”²⁰⁶ In other words, “respect for [human] dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner.”²⁰⁷

Some legal commentators believe that “the [U.S. Supreme] Court relies on human dignity only to affirm negative rights, not positive ones that create obligations on the part of the State.”²⁰⁸ Even assuming that this is true, this argument fails here because deeming access to adequate menstrual products can be viewed as both a negative and a positive right.²⁰⁹ It is a negative right in that it would require all states to repeal the tampon tax and hold unconstitutional all prison and public school policies that restrict a menstruator’s access to menstrual products and bathrooms.²¹⁰ Although it could be argued that a right of access to adequate menstrual products is also a positive right, “[o]ur nation has already obligated itself to provide assistance to [those] in need, through programs such as TANF [Temporary Assistance for Needy Families], WIC [Special Supplemental Nutrition Program for Women, Infants, and Children], and food stamps.”²¹¹ States that have already mandated that menstrual products be freely accessible in public schools, prisons, and homeless shelters illustrate this existing

²⁰⁴ See *Cruzan ex rel. Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 269 (1990); Johnson, *supra* note 4, at 55–56.

²⁰⁵ *Loving v. Virginia*, 388 U.S. 1, 12 (1967); see *Menstrual Cycle*, *supra* note 17.

²⁰⁶ Goodman, *supra* note 188, at 155 (quoting Immanuel Kant, a German philosopher).

²⁰⁷ Goodman, *supra* note 188, at 157–58 (quoting Arthur Chaskalson, former Chief Justice of the Constitutional Court of South Africa).

²⁰⁸ Goodman, *supra* note 188, at 176.

²⁰⁹ Cf. Goodman, *supra* note 188, at 176 (asserting that a fundamental right to food security is not a positive right because the government is already committed to helping low-income families).

²¹⁰ See generally *Positive Rights vs. Negative Rights*, LEARN LIBERTY (June 29, 2011), <https://perma.cc/RN2L-WSPB> (linked from YouTube) (explaining how a positive right requires the government to take action, while a negative right requires the government to abstain from doing something).

²¹¹ Goodman, *supra* note 188, at 176.

obligation, as do the states that have abolished tampon taxes.²¹² That the federal government already requires federal prisons to provide free and accessible menstrual products to prisoners also illustrates this existing obligation.²¹³ Thus, even if the right to adequate menstrual products is viewed as a positive right, such a right is unlikely to burden the government with obligations outside of those it has already pledged itself to.²¹⁴

Even if creating a fundamental right of access to adequate menstrual products required the government to perform an obligation, “the Supreme Court has relied on human dignity to satisfy constitutional guarantees, even when doing so requires an affirmative obligation on the government’s part.”²¹⁵ Human dignity has been relied on in the prison context, where the U.S. Supreme Court has required federal and state prisons to provide prisoners with basic needs.²¹⁶ Similarly, the Court’s ruling in *Brown v. Board of Education* created an affirmative obligation on the part of the government to desegregate schools because segregation diminished Black children’s sense of human dignity to a point of no return.²¹⁷ That deeming access to adequate menstrual products a fundamental right may require some affirmative obligation on the government’s part does not defeat the argument.²¹⁸

Human dignity is necessary to participate freely in society.²¹⁹ In former President Franklin D. Roosevelt’s “Second Bill of Rights” speech, he acknowledged that “true individual freedom cannot exist without economic security and independence.”²²⁰ Lacking access to adequate menstrual

²¹² Rachel Epstein, *The Current State of the Tampon Tax—and How We’re Going to Eliminate It*, MARIE CLAIRE, <https://perma.cc/R355-TKCY> (last updated Dec. 23, 2021); Jamie McConnell, *Period Health Policies: Is Your State Working to Make Menstrual Equity a Priority?*, WOMEN’S VOICES FOR THE EARTH, <https://perma.cc/B5YC-68GE> (last updated Sept. 25, 2021).

²¹³ First Step Act of 2018, Pub. L. No. 115–391, § 611, 132 Stat. 5194, 5247; Carney, *supra* note 3, at 2542–43.

²¹⁴ Cf. Goodman, *supra* note 188, at 176–77 (arguing that guaranteeing a fundamental right to food security should be viewed as part of the government’s existing commitment to assisting low-income families).

²¹⁵ Goodman, *supra* note 188, at 178.

²¹⁶ See, e.g., *Brown v. Plata*, 563 U.S. 493, 511 (2011) (“A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”); cf. Goodman, *supra* note 188, at 178 (arguing for a fundamental right to food security by highlighting how the U.S. Supreme Court has created affirmative obligations on behalf of the government in the prison context).

²¹⁷ See 347 U.S. 483, 494 (1955); cf. Goodman, *supra* note 188, at 178–79 (arguing for a fundamental right to food security by highlighting how the Court’s decision in *Brown* was based on human dignity and created an affirmative obligation on the part of the government to desegregate schools).

²¹⁸ See Goodman, *supra* note 188, at 178.

²¹⁹ See Goodman, *supra* note 188, at 185.

²²⁰ Franklin D. Roosevelt, State of the Union Message to Congress (Jan. 11, 1944) (transcript at <https://perma.cc/A7GE-PG7J>) (“Necessitous [people] are not free [people].”).

products lessens a menstruator's sense of human dignity and prevents them from participating in society to the extent that those with access can.²²¹ Menstruators report missing work, skipping school, and denying prison visits due to the lack of access to menstrual products.²²² Because of this inaccessibility, many menstruators turn to alternatives that have serious health risks.²²³ Thus, "[i]n order to have a fully equitable and participatory society, we must have laws and policies that ensure menstrual products are safe and affordable and available for those who need them" to give all menstruators "[t]he ability to . . . participate in daily life with basic dignity."²²⁴

In deeming certain rights fundamental, the U.S Supreme Court has also relied on the concept of privacy, despite the word "privacy" not appearing anywhere in the Constitution.²²⁵ This right of privacy is "grounded in human dignity; it protects individuals against unwarranted government intrusion in [] homes, bedrooms, and private affairs."²²⁶ A menstruator who lacks access to menstrual products must choose between unsafe alternatives or bleeding through their clothing.²²⁷ Making such a decision should not be anything *but* private, for it involves the "deeply personal matter" of bodily autonomy.²²⁸ Either option is "degrading [and] humiliating."²²⁹ Thus, as a matter of human dignity, there should be a fundamental right of access to adequate menstrual products, so no menstruator is forced to choose between such devaluing alternatives.²³⁰

C. *Recognizing Menstruation as a Fundamental Right Will Help Cure Institutionalized Stigma and Shame*

The U.S. Supreme Court has based various decisions on human dignity to remedy certain social stigmas, humiliation, and shame.²³¹ One example is

²²¹ Cf. Goodman, *supra* note 188, at 181, 185 ("Without food security and the accompanying dignity, an individual lacks the ability to participate in political, economic, and cultural life.").

²²² Johnson, *supra* note 4, at 5.

²²³ See, e.g., Carney, *supra* note 3, at 2548–49.

²²⁴ WEISS-WOLF, *supra* note 49, at 16.

²²⁵ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965); cf. Goodman, *supra* note 188, at 187 (arguing for a fundamental right to food security by noting how the Court has deemed other rights fundamental that are not explicitly enumerated in the U.S. Constitution).

²²⁶ Goodman, *supra* note 188, at 188 (citations omitted).

²²⁷ See Johnson, *supra* note 4, at 55–56.

²²⁸ Inga T. Winkler & Virginia Roaf, *Taking the Bloody Linen Out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality*, 21 CARDOZO J.L. & GENDER 1, 14 (2014) ("Human dignity is closely related to the right of privacy.").

²²⁹ Goodman, *supra* note 188, at 157–58.

²³⁰ See Goodman, *supra* note 188, at 157–58.

²³¹ Goodman, *supra* note 188, at 190–91.

in the context of prison disciplinary practices.²³² In *Hope v. Pelzer*, the Court struck down a disciplinary practice used in a prison where the prisoner was handcuffed to a post and was not allowed to use the bathroom or to be given water.²³³ Another example is in Fourth Amendment²³⁴ and Fourteenth Amendment jurisprudence.²³⁵ In *Rochin v. California*, the police ordered medical professionals to pump the defendant's stomach to make him throw up drugs they suspected he had taken.²³⁶ In *Winston v. Lee*, the state tried to force the defendant to have surgery to remove a bullet from his body so that it could be used as evidence against him in his trial.²³⁷ In holding both practices unconstitutional, the U.S. Supreme Court emphasized that the "extent of intrusion upon the individual's dignitary interest in personal privacy and bodily integrity" grossly violated the individual's constitutional rights.²³⁸

The U.S. Supreme Court has used human dignity in other contexts to eradicate shame and humiliation.²³⁹ In holding that there is a fundamental right to engage in intimacies in the privacy of the home and that a criminal statute prohibiting sodomy was unconstitutional, the U.S. Supreme Court in *Lawrence v. Texas* relied on the concept of human dignity and the need to remedy the long-held stigmas and humiliation that resulted from such statutes.²⁴⁰ Similarly, in recognizing that the fundamental right to marry extends to same-sex couples, the Court in *Obergefell v. Hodges* took into account the stigmas, humiliation, and shame that not only same-sex couples feel, but also that their children experience as a result of laws prohibiting same-sex marriage.²⁴¹ Further, the Court's decision in *Brown v. Board of Education* mandating the desegregation of public schools emphasized the humiliation and shame that Black students endured as a result of segregation and how it "affect[ed] their hearts and minds in a way unlikely ever to be undone."²⁴²

A long history of taboo, shame, humiliation, and stigma surrounds

²³² See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 730 (2002).

²³³ *Id.* at 735.

²³⁴ See, e.g., *Winston v. Lee*, 470 U.S. 753, 760 (1985) (citing *Schmerber v. California*, 384 U.S. 757, 767 (1966)).

²³⁵ See, e.g., *Rochin v. California*, 342 U.S. 165, 174 (1952).

²³⁶ *Id.* at 166.

²³⁷ 470 U.S. at 755.

²³⁸ *Id.* at 761; accord *Rochin*, 342 U.S. at 173–74.

²³⁹ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 668, 670 (2015); *Lawrence v. Texas*, 539 U.S. 558, 575, 578 (2003).

²⁴⁰ 539 U.S. at 575, 578.

²⁴¹ 576 U.S. at 668, 670 ("The marriage laws at issue here thus harm and humiliate the children of same-sex couples.").

²⁴² 347 U.S. 483, 494 (1954).

menstruation.²⁴³ Deeming access to adequate menstrual health products a fundamental right and necessary for a safe and healthy menstruation will help remedy these long-held stigmas and beliefs.²⁴⁴ It will further gender equality by “challeng[ing] laws that are archaic, unfair, and discriminatory.”²⁴⁵ Holding such a right fundamental will also “communicate[] that [menstruators] are valued and necessary participants in all aspects of public life, and that they should no longer suffer . . . on account of their biology.”²⁴⁶

D. *Period Poverty Initiatives Around the World Support the U.S. Supreme Court Recognizing Access to Adequate Menstrual Products as a Fundamental Right*

In deeming other rights fundamental, the U.S. Supreme Court has considered practices and customs in other countries.²⁴⁷ For example, in holding that all individuals have a fundamental right to engage in consensual intimacies within the home, the Court in *Lawrence v. Texas* considered the European Court of Human Rights and its recent decisions regarding sodomy.²⁴⁸

Many countries around the world are acting against period poverty.²⁴⁹ In 2017, Scotland became the first country in the world to supply schools with free menstrual products.²⁵⁰ By 2020, Scotland was deemed the first country to provide free menstrual products for those who lack them.²⁵¹ Menstruators can obtain these products at “community centers, youth clubs, and pharmacies.”²⁵² Shortly thereafter, the Canadian province of Prince Edward Island required that menstrual products be freely accessible in both schools and homeless shelters.²⁵³ In 2021, New Zealand followed suit, announcing that menstrual products must be freely available in all schools.²⁵⁴ In 2019, the United Kingdom required prisons to provide free menstrual products to imprisoned menstruators, grounding such efforts in

²⁴³ Johnson, *supra* note 4, at 15–22.

²⁴⁴ Cf. Goodman, *supra* note 188, at 190–91 (arguing that recognizing a fundamental right to food security will help cure stigmas surrounding poverty).

²⁴⁵ ACLU NAT’L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 10.

²⁴⁶ Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 487.

²⁴⁷ See Goodman, *supra* note 188, at 199.

²⁴⁸ 539 U.S. 558, 576 (2003).

²⁴⁹ Leah Rodriguez, *20 Places Around the World Where Governments Provide Free Period Products*, GLOB. CITIZEN (Sept. 30, 2021), <https://perma.cc/AP7E-XNPJ> [hereinafter Rodriguez, *20 Places Around the World*].

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

human dignity.²⁵⁵

Other countries have also made efforts to abolish taxes on menstrual products.²⁵⁶ In 2004, Kenya became the first country to abolish the tampon tax.²⁵⁷ In 2018, South Africa followed suit.²⁵⁸ South Korea has recognized “menstrual leave” for employees for over twenty years.²⁵⁹ Although there has been some movement in the United States toward abolishing tampon taxes and providing free menstrual products in schools, prisons, and homeless shelters, there are many states that have not done so, and “there has been little success in addressing period equity on a national scale.”²⁶⁰ These progressive steps around the world to end period poverty and further human dignity support the argument that access to adequate period products is a fundamental right.²⁶¹ According to advocate Jennifer Weiss-Wolf, “[m]enstruation is something that we can no longer afford to marginalize’ . . . ‘[i]t will set us behind as a country if we don’t own that reality.’”²⁶²

IV. If Access to Adequate Menstrual Products Is Deemed a Fundamental Right, Restrictive Menstruation-Related Policies and Tampon Taxes Will Not Survive a Substantive Due Process Analysis

Deeming access to adequate menstrual products a fundamental right would subject any governmental restriction on them to strict scrutiny.²⁶³ Because strict scrutiny is the highest standard of review, the government’s intrusion on a fundamental right is less likely to be found constitutional.²⁶⁴ The governmental intrusion will not be upheld “unless the infringement is narrowly tailored to serve a compelling state interest.”²⁶⁵

The state actions at issue here are the tampon tax and the restrictive bathroom and menstruation-related policies implemented in public spaces—such as public schools, state prisons, and homeless shelters.²⁶⁶

²⁵⁵ Sushmita Roy, *Sanitary Products Will Be Free for Women in UK Detention Facilities*, GLOB. CITIZEN (Apr. 26, 2019), <https://perma.cc/ZR7T-GRMQ>.

²⁵⁶ See, e.g., Rodriguez, *20 Places Around the World*, *supra* note 249.

²⁵⁷ Gina Reiss-Wilchins, *Kenya & Menstrual Equity: What You Didn’t Know*, HUFFPOST, <https://perma.cc/G8S2-DS3R> (last updated Mar. 29, 2017).

²⁵⁸ Rodriguez, *20 Places Around the World*, *supra* note 249.

²⁵⁹ Rodriguez, *20 Places Around the World*, *supra* note 249.

²⁶⁰ Kaanita Iyer, *New Zealand Schools Will Offer Free Menstrual Products. Where Is the U.S. on Period Equity? Far Behind, Experts Say.*, USA TODAY, <https://perma.cc/6P79-AFKA> (last updated Feb. 22, 2021, 2:34 PM ET); see McConnell, *supra* note 212.

²⁶¹ See Rodriguez, *20 Places Around the World*, *supra* note 249.

²⁶² Iyer, *supra* note 260.

²⁶³ See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

²⁶⁴ See *id.*

²⁶⁵ *Reno v. Flores*, 507 U.S. 292, 302 (1993).

²⁶⁶ See generally Johnson, *supra* note 4.

History reveals that the U.S. Supreme Court is hesitant to consider a government interest rooted in sex-based stereotypes valid, which—when viewed in light of the long-held stigmas surrounding menstruation—the tampon tax and restrictive policies clearly are.²⁶⁷ Further, government interests that are based on administrative convenience do not constitute a compelling governmental interest.²⁶⁸ To be a compelling governmental interest, a restriction or regulation must be “essential or necessary rather than a matter of choice, preference, or discretion,” which does not apply to the tampon tax and restrictive bathroom and menstruated-related policies that are inflicted on students, prisoners, and the homeless.²⁶⁹

A. *Restrictive Bathroom and Menstruation-Related Policies in Schools Are Not Narrowly Tailored to Further a Compelling Governmental Interest*

A state may argue that restrictive bathroom and menstruation-related policies further the governmental interest of assuring that students are adequately monitored, that students spend more time in the classroom than the hallways or bathrooms, or that school dress codes help achieve uniformity.²⁷⁰ However, these are not compelling governmental interests, as it cannot reasonably be said that such policies are “essential or necessary rather than a matter of choice, preference, or discretion.”²⁷¹ This is evident by the schools that chose not to implement such policies and that operate just fine without them.²⁷²

Even if such governmental interests could be considered compelling, the policies are not “the most narrowly tailored, or least restrictive, means to achieve” them, as students actually report skipping school because of the policies.²⁷³ Instead of implementing dress codes and limiting bathroom breaks, schools can simply provide free menstrual products in every student bathroom.²⁷⁴ Opponents argue that such products are usually available in the nurse’s office and in dispensers in girls’ bathrooms.²⁷⁵ However, having to go to the nurse’s office to obtain such products is often embarrassing,

²⁶⁷ See Carney, *supra* note 3, at 2555–56.

²⁶⁸ Carney, *supra* note 3, at 2556.

²⁶⁹ Ronald Steiner, *Compelling State Interest*, FIRST AMEND. ENCYCLOPEDIA (2009), <https://perma.cc/7PVR-XJA2> (“Regulation vital to the protection of public health and safety . . . are examples of compelling governmental interests.”).

²⁷⁰ See generally 16C C.J.S. *Constitutional Law*, *supra* note 133, § 1876; Johnson, Waldman & Crawford, *supra* note 1, at 241.

²⁷¹ See Steiner, *supra* note 269.

²⁷² *But see* Johnson, Waldman & Crawford, *supra* note 1, at 235, 241.

²⁷³ Steiner, *supra* note 269; accord Johnson, Waldman & Crawford, *supra* note 1, at 241.

²⁷⁴ See Johnson, Waldman & Crawford, *supra* note 1, at 234, 251.

²⁷⁵ See, e.g., Johnson, Waldman & Crawford, *supra* note 1, at 270 n.238; Kaitlyn Krasselt, *Bill to Mandate Period Products Faces Opposition*, CT POST, <https://perma.cc/984X-UDL5> (last updated Mar. 6, 2020, 9:02 PM).

inconvenient, and likely wastes more time than if the products were easily accessible in bathrooms.²⁷⁶ Also, not only do schools fail to regularly refill such bathroom dispensers, but most cost money, which many students do not have.²⁷⁷ Such dispensers are likely only in girls' bathrooms, which excludes menstruators who do not identify as female.²⁷⁸ The fact that students often skip school because of restrictive policies directly contradicts the state's likely argument that such policies are necessary to monitor students and limit the time they spend outside of the classroom.²⁷⁹

Providing free menstrual products in each bathroom will help prevent menstruators from skipping school on account of their periods or from wasting class time to go to the nurse's office for a tampon.²⁸⁰ Thus, students will spend more time in the classroom.²⁸¹ Although distributing free products in schools will cost the government money, such a price "is negligible when compared to the cost of actually running" public schools and the positive impact it will have on student menstruators by illustrating that menstruation is not an impediment to education.²⁸² Many states have already mandated that such products be freely available in public schools, which shows that doing so will not cast too great a financial burden on the state.²⁸³ Because restrictive bathroom and menstruation-related policies in schools do not narrowly advance a compelling government interest, such policies would fail a strict scrutiny analysis and would be held unconstitutional.²⁸⁴

B. *Restrictive Menstruation-Related Policies in Prisons Cannot Overcome the Turner Standard*

As noted above, the "[U.S.] Supreme Court has never considered whether the *Turner* standard or intermediate scrutiny applies to equal protection claims based on sex discrimination within prisons, and lower courts are split as to which test to apply."²⁸⁵ Analyzing restrictions to menstrual products as infringing on a fundamental right under the Due Process Clause eliminates such unpredictability and inconsistency, as a court

²⁷⁶ See Johnson, Waldman & Crawford, *supra* note 1, at 253–54.

²⁷⁷ See Johnson, Waldman & Crawford, *supra* note 1, at 270 n.238 ("As society has moved away from a cash economy, it is possible to buy a soda from a vending machine by swiping a credit card, but menstrual hygiene product machines lie empty.").

²⁷⁸ See Crawford & Waldman, *Period Poverty*, *supra* note 10, at 1573.

²⁷⁹ See Johnson, Waldman & Crawford, *supra* note 1, at 241.

²⁸⁰ Johnson, Waldman & Crawford, *supra* note 1, at 254.

²⁸¹ Johnson, Waldman & Crawford, *supra* note 1, at 254.

²⁸² ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8; see Johnson, Waldman & Crawford, *supra* note 1, at 279.

²⁸³ See McConnell, *supra* note 212.

²⁸⁴ See generally Steiner, *supra* note 269.

²⁸⁵ Carney, *supra* note 3, at 2555.

would likely apply the *Turner* standard.²⁸⁶ Although the *Turner* standard is highly deferential to prison officials' determinations, menstruation-related policies in prisons will not survive judicial scrutiny.²⁸⁷ Further, even if a court decides to apply strict scrutiny within the prison context, such restrictions will fail for the same reasons they fail the lower *Turner* standard.²⁸⁸

Applying the first factor of the *Turner* standard reveals that these restrictions are not related to a legitimate prison interest, which "include security and safety, prisoner rehabilitation, and conservation of resources."²⁸⁹ States have argued that providing free menstrual products in prisons may allow prisoners to "repurpose them for off-label uses, such as using the cotton inside the product to make earplugs or using pads to clean their cells."²⁹⁰ However, such a risk does not implicate any safety or security concerns, as women are already allowed to have menstrual products.²⁹¹ Further, providing free access to menstrual products would not drain a significant amount of prison resources since the cost to do so is trivial in relation to operating a prison, as evidenced by the federal government and states that have already implemented such programs.²⁹² Second, although one could argue that there are "alternative means [for inmates] to exercise their [fundamental] rights" by buying products from the commissary, many inmates lack the means to do so.²⁹³ Third, considering that correctional officers are already in charge of distributing menstrual products in many prisons, "there is no negative ripple effect stemming from providing unlimited access to menstrual health products; prisons that currently engage in this practice serve as proof that there are no negative side effects."²⁹⁴ Lastly, providing free menstrual products is an obvious alternative to policies that restrict access to menstrual products, as evidenced by the federal government and other states that already do so.²⁹⁵ Because the prison policies that restrict a menstruator's access to adequate menstrual products do not survive the *Turner* standard under the Due Process Clause, such restrictions will be deemed unconstitutional.²⁹⁶

²⁸⁶ See Carney, *supra* note 3, at 2555–59; 16C C.J.S. *Constitutional Law*, *supra* note 133 § 1876.

²⁸⁷ See *Turner v. Safley*, 482 U.S. 78, 90 (1987).

²⁸⁸ See Carney, *supra* note 3, at 2586–88. See generally 482 U.S. at 89–91.

²⁸⁹ See Carney, *supra* note 3, at 2558 ("If this first factor is not satisfied, many lower courts will end the inquiry and find for the plaintiff-prisoner."). See generally 482 U.S. at 89–91.

²⁹⁰ Carney, *supra* note 3, at 2584.

²⁹¹ Carney, *supra* note 3, at 2585–86.

²⁹² Carney, *supra* note 3, at 2586–87 (estimating that the prison industry's budget would increase by 0.0000093%).

²⁹³ Carney, *supra* note 3, at 2587–88.

²⁹⁴ Carney, *supra* note 3, at 2587 ("If anything . . . [it will] put[] all prisoners on equal footing.").

²⁹⁵ Carney, *supra* note 3, at 2587.

²⁹⁶ Carney, *supra* note 3, at 2586–88.

C. *Restrictive Bathroom and Menstruation-Related Policies That Affect the Homeless Do Not Further a Compelling Governmental Interest*

Many homeless menstruators lack both access to adequate menstrual products and safe and sanitary facilities to exercise menstrual hygiene.²⁹⁷ Many homeless shelters do not provide free menstrual products, and when they do, they are often low in both quality and supply.²⁹⁸ In opposition to providing free menstrual products in homeless shelters, the states will likely assert the significance of maintaining a high state revenue as a compelling governmental interest.²⁹⁹ However, the increased cost of providing these products in shelters is trivial “when compared to the cost of actually running the facilities.”³⁰⁰ The government provides toilet paper and soap in these restrooms, and “nobody suggests that it should stop doing that simply because it would be cheaper not to.”³⁰¹ Further, that the government “has already obligated itself” to assisting low-income individuals supports the argument that these products should be provided for free in homeless shelters.³⁰² Because administrative convenience is not a compelling state interest, such an argument against providing free products in homeless shelters would fail under strict scrutiny, especially because many states already do so.³⁰³

D. *The Tampon Tax Is Not Narrowly Tailored to Further a Compelling Governmental Interest*

State governments are likely to assert that taxing menstrual products is an essential form of state revenue.³⁰⁴ However, “the tax revenue from the tampon tax should not be enough to sustain its constitutionality, particularly given that it likely stems from discomfort with menstruation.”³⁰⁵ Even if state revenue from sales tax could constitute a compelling governmental interest, taxing menstrual products is in no way the narrowest means to achieve it.³⁰⁶ This is illustrated by the many states that have already abandoned the

²⁹⁷ See generally Bustle, *How Do Homeless Women Cope with Their Periods?*, (Oct. 18, 2016), <https://perma.cc/2HC5-JSF6>.

²⁹⁸ Johnson, *supra* note 4, at 56, 70.

²⁹⁹ See ACLU NAT’L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8.

³⁰⁰ ACLU NAT’L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8.

³⁰¹ ACLU NAT’L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8.

³⁰² See Goodman, *supra* note 188, at 176.

³⁰³ Carney, *supra* note 3, at 2556; see McConnell, *supra* note 212.

³⁰⁴ See, e.g., Jason Murphy, *Why We Should Continue Taxing Tampons*, THE NEW DAILY, <https://perma.cc/QJ7C-QVBP> (last updated May 28, 2015, 9:04 PM).

³⁰⁵ Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 483 (arguing that a governmental interest in state revenue would not even withstand rational basis review).

³⁰⁶ See Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 485–86.

tampon tax, which has “promote[d] the affordability of menstrual hygiene products to low-income consumers.”³⁰⁷

Most states that have abolished the tampon tax have done so by deeming menstrual products necessities and thus exempt from sales tax.³⁰⁸ Necessities usually include items as basic as medicine and food.³⁰⁹ In exempting “medical and health supplies” from sales tax, states have exempted Chapstick, Rogaine (used to treat hair loss), condoms, lotions, face washes, powders, and Viagra (used to treat erectile dysfunction).³¹⁰ By taxing menstrual products but not Viagra, these states consider men having sex more of a necessity than menstrual hygiene.³¹¹ Similarly, Band-Aids are usually deemed a necessity to control the flow of blood exiting the body, while menstrual products are not—though both products perform the same function.³¹² Because all “roughly analogous male or unisex products are exempt [from state sales tax] on grounds of ‘necessity,’” it follows that “a tax on menstrual hygiene products [is] a functional tax on women.”³¹³

Critics highlight these discrepancies and urge states to cease taxing products that are essential to control the “involuntary, biological” process of menstruation.³¹⁴ They note that tampon taxes exist as a “result of a combination of indifference, lack of understanding, and discomfort with discussions about or consideration of women’s biological processes.”³¹⁵ Indeed, President Barack Obama acknowledged this logical inconsistency: “I have to tell [you], I have no idea why states would tax these as luxury items. I suspect it’s because men were making the laws when those taxes were passed.”³¹⁶ This highlights how some of our own lawmakers—the very people responsible for defining what is and what is not acceptable in society—are ignorant when it comes to menstruation.³¹⁷ Even those who the media praise for their brilliance are ignorant of what menstruation entails.³¹⁸

³⁰⁷ Christopher Cotropia & Kyle Rozema, *Who Benefits from Repealing Tampon Taxes? Empirical Evidence from New Jersey*, 15 J. EMPIRICAL LEGAL STUD. 620, 622 (2018); see Epstein, *supra* note 212.

³⁰⁸ See Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 483.

³⁰⁹ Linda Qiu, *Are Pads and Tampons Taxed but Viagra and Rogaine Not?*, POLITIFACT (Jan. 22, 2017), <https://perma.cc/7PLA-YMW2>.

³¹⁰ Johnson, *supra* note 4, at 37; accord Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 441.

³¹¹ See Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 441.

³¹² See Recht, *supra* note 113.

³¹³ Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 442, 474.

³¹⁴ Johnson, *supra* note 4, at 37. See generally Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 442.

³¹⁵ Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 477.

³¹⁶ Daily Mail, *President Obama Is Shocked to Learn About Tampon Tax in U.S.*, at 00:35–00:46 (Mar. 15, 2018), <https://perma.cc/R3JD-96BD>.

³¹⁷ See, e.g., Amanda Taub, *NASA Thought Sally Ride Needed 100 Tampons for 1 Week “Just to Be Safe.” From What?*, VOX (May 26, 2015, 2:50 PM EDT), <https://perma.cc/L3C2-5VEQ>.

³¹⁸ See, e.g., *id.* (discussing how NASA engineers sent female astronaut Sally Ride with one

Such ignorance is directly attributable to society's failure to allow for open and candid discussion about menstruation.³¹⁹ Although some states have abolished sales tax on menstrual products, there are still many states that have not.³²⁰

Thus, if access to adequate menstrual products was deemed a fundamental right, the tampon tax would fail under strict scrutiny, because even if state revenue could be considered a compelling state interest, here "it strains credulity to argue that the tampon tax is the cornerstone of a state's sales tax system."³²¹ Further, the fact that states exempt items far less necessary than menstrual products illustrates that taxing such products is not the narrowest way to achieve a high state revenue.³²² This arbitrary and inexplicable sales tax on menstrual products places a burden on those who already cannot afford adequate products.³²³

CONCLUSION

Menstruation is an involuntary, biological process that half the population of the world experiences.³²⁴ However, due to restrictions in society, a significant portion of individuals who menstruate do not have adequate access to menstrual products.³²⁵ A lack of access to adequate menstrual products results in menstruators using products of lesser quality and for longer periods of time, which often results in severe health and hygiene issues and a struggle to engage actively in society.³²⁶ Because recognizing access to adequate menstrual products as a fundamental right would trigger higher judicial standards and less unpredictability in a substantive due process analysis, state taxes and restrictions on menstrual products are more likely to be held unconstitutional.³²⁷

Given that the tampon tax and policies restricting access to adequate

hundred tampons for her one-week trip into space "just . . . to be safe.").

³¹⁹ See *Let's Talk About Periods*, SPUNOUT, <https://perma.cc/266H-WY7E> (last visited Feb 20, 2023).

³²⁰ Johnson, *supra* note 4, at 38; Epstein, *supra* note 212.

³²¹ Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 480–83; see *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (stating the standard for strict scrutiny).

³²² See, e.g., Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 441; Johnson, *supra* note 4, at 37.

³²³ See Bonnie Azoulay, *What Is the 'Tampon Tax'?*, CORA (July 28, 2022), <https://perma.cc/R5T8-7K4K> (noting how food stamps, WIC and SNAP benefits do not cover menstrual products); see also Rodriguez, *The Tampon Tax*, *supra* note 108.

³²⁴ Christina Capatides, *The Bloody Truth About Getting Your Period in America*, CBS NEWS (May 23, 2019, 9:00 AM), <https://perma.cc/5H7Z-HZ43>.

³²⁵ See generally Johnson, *supra* note 4, at 57–60.

³²⁶ See, e.g., ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8–9; Johnson, *supra* note 4, at 55.

³²⁷ See *supra* Part II, Part III, Part IV.

menstrual products in schools, prisons, and homeless shelters will not survive a due process analysis, states should cease such practices.³²⁸ Menstrual products should be freely accessible in public schools, state prisons, and homeless shelters.³²⁹ Although many states have done so, there are still more states to go.³³⁰ Doing so is necessary to achieve menstrual justice and end period poverty, along with all of the stigmas and humiliation that have clouded society's view of menstruation for so long.³³¹ Federal assistance programs should be extended to cover menstrual products, thus easing the financial burden for those who cannot afford them.³³² As advocate Jennifer Weiss-Wolf asserts, "[i]n order to have a fully equitable and participatory society, we must have laws and policies that ensure menstrual products are safe and affordable and available for those who need them."³³³ Doing so will tell society not only that it is okay to talk about menstruation, but that it *should* and *must* be talked about.³³⁴

³²⁸ See *supra* Part IV.

³²⁹ See, e.g., *Dignity Vending Machines*, SHARE THE DIGNITY, <https://perma.cc/8UF3-B72U> (last visited Feb 20, 2023) (explaining how schools and homeless shelters in Australia have installed "Dignity Vending Machines" that dispense free boxes of menstrual products).

³³⁰ Epstein, *supra* note 212; McConnell, *supra* note 212 (listing the states that have made efforts to pursue menstrual equity).

³³¹ See generally Johnson, *supra* note 4.

³³² See generally Linda Carroll, *Even in the U.S., Poor Women Can't Afford Tampons, Pads*, REUTERS, <https://perma.cc/N4SX-J46L> (last updated Jan. 10, 2019, 5:37 PM).

³³³ WEISS-WOLF, *supra* note 49.

³³⁴ See generally WEISS-WOLF, *supra* note 49.