

University of Richmond Law Review

Volume 55
Issue 1 *Annual Survey*

Article 4

11-1-2020

Foreward

Jennifer L. McClellan
Senator, VA District 9

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>



Part of the [Courts Commons](#), [Judges Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Jennifer L. McClellan, *Foreward*, 55 U. Rich. L. Rev. 35 (2020).

Available at: <https://scholarship.richmond.edu/lawreview/vol55/iss1/4>

This Foreward is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

FOREWORD

*Senator Jennifer L. McClellan **

It seems cliché at this point to say 2020 was an unprecedented year. If 2020 were a movie, critics would have found the plot too far-fetched and with more twists than *Game of Thrones*. With a global pandemic, resulting economic crisis, the murder of George Floyd and resulting summer of civil unrest, the reckoning of 401 years of racial inequity, and one of the most consequential and contentious presidential elections in our nation's history—the world seemed to turn upside down multiple times. But before COVID-19 hit Virginia, a seismic political shift hit the Virginia General Assembly that rippled far and wide across the Virginia legal landscape.

Politically, the New Year dawned in the aftershock of regime change. The blue wave that started in 2017 culminated in 2019 with the trifecta of Democratic control of the Executive Branch, House of Delegates, and Senate for the first time since 1993—when I was an undergrad at the University of Richmond interning in the Governor's Policy Office. *Elections matter.*

With the shift in partisan control, hundreds of bills on just about every issue imaginable that had been bottled up in committees passed and became law. During the General Assembly's 2020 Session, nearly 4000 bills were introduced. I introduced forty-nine of them myself (not counting commending and memorial resolutions). One reporter assumed my heavy workload was because I might have been eyeing higher office, but the overwhelming majority were bills that I had introduced before, only to see them never make it out of committee. Why wouldn't I introduce them again now that I was in the majority for the first time in my fifteen sessions? Indeed, thirty-six of them became law, either as my own bill,

* Virginia State Senator, District 9. J.D., 1997, University of Virginia; B.A., 1994, University of Richmond.

as part of the budget, or through a House companion that I helped shepherd through the Senate. In short, persistence pays off.

In total, close to 1300 bills passed. And transformative legislation passed on just about every issue, including: (1) climate change and environmental justice; (2) criminal justice reform; (3) workers' rights, such as minimum wage, wage theft, and collective bargaining for local government workers; (4) reproductive health; (5) an overhaul and expansion of antidiscrimination laws for housing, employment, and public accommodations; (6) gun safety measures; (7) repealing vestiges of Jim Crow; (8) major health-insurance policy, such as creating a state-based insurance exchange and balanced-billing reform; (9) expanding access to voting; (10) ratifying the Equal Rights Amendment; and (11) redistricting reform.

I do not envy the *University of Richmond Law Review* editors, trying to fit everything into an *Annual Survey of Virginia Law* shorter than *War and Peace*—but everyone loves a challenge.

The partisan realignment is only one part of the story of the seismic shift 2020 represented in Virginia public policy and law.

One hundred fifty years after the first African American men were sworn into the General Assembly,¹ the 2020 General Assembly was the most diverse in its 401-year history. Glass ceilings were shattered as the House of Delegates elected Eileen Filler-Corn the first woman and first Jewish Speaker of the House and Suzette Denslow the first woman Clerk. The Senate elected Louise Lucas to be the first woman and African American President pro tempore. The House Majority Leader and Senate Democratic Caucus Chair were also African American women. The General Assembly now has forty-one women, twenty-one African Americans, four Asians, four Hispanics, and one multiracial member.² *Diversity matters.*

We have heard since we were in elementary school that American democracy is a government “of the people, by the people, for the people,” and Abraham Lincoln etched that phrase in our collective memory in the Gettysburg Address. However, we are rarely taught just how many people were shut out of the process from the beginning. Indeed, the first Virginia Constitution adopted in 1776

1. See S.J. Res. 78, Va. Gen. Assembly (Reg. Sess. 2020).

2. See *Legislators*, VA. PUB. ACCESS PROJECT, <https://www.vpap.org/general-assembly/legislators/?display=race&session=28&chamber=both> [<https://perma.cc/TX4C-3JGS>].

restricted the right to vote to white men who owned property.³ The story of our Commonwealth and nation over the past 244 years has been expanding “the people” who participate in government to reflect the full diversity of those who are governed.

In my nearly fifteen years as a legislator, I have observed that the life experiences and perspectives of policymakers impact the policies and laws they produce. Expanding those experiences and perspectives ensures the government will reflect the needs, desires, and expectations of more of the governed. The General Assembly’s 2020 Session and Special Session reflect this point through a number of transformative laws passed. Here, I present two examples.

I. REPRODUCTIVE RIGHTS

In 2010, I made history as the first member of the House of Delegates to be pregnant while in office—Senator Jill Vogel holds the distinction of being the first Virginia legislator ever. I was in my first trimester during the General Assembly Session, and vividly remember my first ultrasound. The doctor who administered my ultrasounds opened my eyes as to how the abortion restrictions considered in the General Assembly at that time would impact his patients:

(1) Suzie, a married thirty-something with a hole in her heart, who was on birth control, but got pregnant anyway. And Beth, a pregnant woman who developed cancer. Each faced the heart-breaking choice whether to terminate the pregnancy or sacrifice her own life.

(2) Mary, who underwent fertility treatments to have a child and got pregnant with octuplets. The odds of carrying her pregnancy to term were very low. However, if she reduced the pregnancy to two, the odds that those two would survive were greater than fifty percent.

(3) Amy, who suffered an incomplete or missed miscarriage, in which the fetus dies but remains in the uterus. Often, a surgical

3. See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 118 (William Peden ed., Univ. of N.C. Press 1954) (1787); *Property Requirements for Voting in Virginia, 1670–1850*, VIRGINIAPLACES.ORG, <http://www.virginiaplaces.org/government/voteproperty.html#three> [<https://perma.cc/8C8E-28HP>].

procedure or medical abortion is necessary to remove the fetus and placenta from the uterus.

(4) Robin, whose fetus developed the most severe form of spina bifida, with horrific deformities. Doctors suspected the baby was already paralyzed from the waist down and that paralysis would spread as he grew. He was not expected to survive.

I started telling these stories in committee meetings and on the House floor, and I often heard, “Well, that’s not really an abortion.” Actually, it is—and because Virginia law does not distinguish between these types of abortions, all abortion laws apply to them as well.

Under laws passed in 2012, prior to any abortion, a woman had to undergo a trans-abdominal ultrasound to determine gestational age—and be given an opportunity to view the ultrasound image and listen to the fetal heartbeat.⁴ In all of the stories I outlined, that is a devastating state mandate. It is also unnecessary, since in those cases, gestational age would already have been determined. The woman would then have to wait twenty-four hours before the procedure.⁵ If she purchased her insurance out of the healthcare exchange, or was covered by Medicaid, she may not have her procedure covered.

For abortions performed early in the pregnancy, that mandate was useless, since the fetus can be seen—and gestational age determined—only through a trans-vaginal ultrasound. The mandated ultrasound also added additional costs. Comprehensive reproductive healthcare, including safe, legal abortion, is a vital component of a woman’s overall health and must be protected.

On June 27, 2016, in its landmark decision in *Whole Woman’s Health v. Hellerstedt*, the Supreme Court of the United States affirmed that access to abortion is a fundamental constitutional right and clarified that the undue burden standard provides robust protections for abortion access.⁶

The Court held that abortion restrictions are unconstitutional unless the benefits they confer are sufficient to justify the burdens

4. See Act of Mar. 7, 2012, ch. 131, 2012 Va. Acts 189, 189–90 (codified as amended at VA. CODE ANN. § 18.2-76 (Repl. Vol. 2014)).

5. *Id.*

6. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016).

they impose.⁷ The Court also held that courts must consider credible, reliable evidence when assessing a state's justification for a law restricting abortion access, as well as how the law will impact real people, thus making it clear that states cannot rely on unproven assertions of medical benefit in defending abortion restrictions.⁸

Laws that restrict a woman's access to abortion harm the very women they purport to help. The laws related to shutting down women's reproductive health care providers make it increasingly difficult—and sometimes impossible—for a woman who has decided to end her pregnancy to access the safe, legal, high-quality care she needs.

A woman's ability to access health care, including abortion, should not depend on her income or her address. Virginia laws restricting access to abortion create sharp disparities in access to care that are troublingly reminiscent of the time before *Roe v. Wade*, when access depended on a woman's economic status, race, where she lived, or her ability to travel to another state. Leading medical experts and organizations strongly oppose medically unnecessary restrictions on women's healthcare services.⁹

For these reasons, I joined colleagues Jennifer Boysko, Kathy Tran, Charniele Herring, and Mamie Locke (among others) in introducing legislation year after year to remove these restrictions. They never made it out of committee.

However, this year, with a Democratic majority, Delegate Herring and I successfully passed the Reproductive Health Protection Act ("RHPA"), making Virginia the first state in the south to proactively remove abortion restrictions from the law.¹⁰ The RHPA removed medically unnecessary restrictions for a patient seeking access to safe and legal abortion, including mandatory ultrasounds, twenty-four-hour waiting periods, and targeted regulation of abortion providers laws that require abortion providers to be regulated

7. *Id.* at 2316.

8. *Id.* at 2313.

9. *Whole Woman's Health v. Hellerstedt*, CTR. FOR REPROD. RTS. (June 28, 2016), <https://www.reproductiverights.org/case/whole-womans-health-v-hellerstedt> [<https://perma.cc/ZGK9-R9K8>].

10. Acts of Apr. 9, 2020, chs. 898 & 899, 2020 Va. Acts __, __ & __, __ (codified as amended at VA. CODE ANN. §§ 16.1-77, 18.2-72, -76, 32.1-127 (Cum. Supp. 2020)).

like hospitals. It also allows nurse practitioners to perform first-trimester abortions.

II. DOMESTIC WORKERS BILL OF RIGHTS

My mother was born in the Gulf Coast of Mississippi during the Great Depression. Her grandmother, mother, and sisters were domestic workers for white families. My great-grandmother Elnora was a live-in domestic for one family. After her children left home, my grandmother Leona cared for a bedridden elderly woman. My aunts Lorena, Hazel, and Mina were domestics for white families all of their adult lives. And my mother worked part-time providing childcare during high school. As she tells it, “that’s all they could do.” As elsewhere in the south, employment options for Blacks—especially Black women—were limited.

This story is not unique to my family. For more than 400 years, the American economy has been built on the backs of domestic workers—first through slavery, and then through low-wage jobs that allowed others to work at jobs closed to Black workers. As worker protection legislation developed through the Progressive and New Deal eras, southern congressmen and state legislatures ensured domestic work and other jobs available to Blacks were excluded from protections.¹¹

In 2019, the Virginia General Assembly eliminated minimum wage exclusions for newsboys, shoe-shine boys, babysitters, ushers, doormen, concession attendants, and theater cashiers.¹² But

11. See James Lin, *A Greedy Institution: Domestic Workers and a Legacy of Legislative Exclusion*, 36 *FORDHAM INT’L L.J.* 706, 719–24 (2013); Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 *OHIO ST. L.J.* 95, 104–17 (2011); Danyelle Solomon, Connor Maxwell & Abril Castro, *Systemic Inequality and Economic Opportunity*, *CTR. FOR AM. PROGRESS* (Aug. 7, 2019), <https://www.americanprogress.org/issues/race/reports/2019/08/07/472910/systematic-inequality-economic-opportunity/> [<https://perma.cc/W3UQ-W83X>]; Julia Wolfe, Jori Kandra, Lora Engdahl & Heidi Shierholz, *Domestic Workers Chartbook: A Comprehensive Look at the Demographics, Wages, Benefits, and Poverty Rates of Professionals Who Care for Our Family Members and Clean Our Homes*, *ECON. POL’Y INST.* (May 14, 2020) (citing LINDA BURNHAM & NIK THEODORE, *NAT’L DOMESTIC WORKERS ALL., HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK* (2012)), <https://www.epi.org/publication/domestic-workers-chartbook-a-comprehensive-look-at-the-demographics-wages-benefits-and-poverty-rates-of-the-professionals-who-care-for-our-family-members-and-clean-our-homes/> [<https://perma.cc/FZ66-Q546>].

12. Act of Mar. 8, 2019, ch. 331, 2019 Va. Acts 622, 622 (codified as amended at VA. CODE ANN. § 40.1-28.9 (Cum. Supp. 2019)).

domestic workers remained excluded from minimum wage, unemployment compensation, and workers' compensation laws. Moreover, domestic workers had no remedies for workplace harassment and discrimination or nonpayment of wages. Without these protections, many workers were forced to tolerate low or no pay and abusive situations. Indeed, according to the Economic Policy Institute, domestic workers are three times as likely as other workers to be in poverty and almost three times as likely to lack enough income to make ends meet.¹³

I can only imagine what life as a domestic worker was like for my great-grandmother, grandmother, and aunts in Jim Crow Mississippi. But for Lenka Mendoza, the lack of worker protections was all too real today. For the past two decades, Lenka has cleaned homes and hotels or worked as a nanny after moving to Prince William County from Peru. Her pay was often not enough to afford her own childcare. The working conditions at many of these jobs were bad, and she developed arthritis and respiratory issues from the cleaning chemicals. "Your hours are not recognized," she recalled earlier this year. "You only get paid for eight hours and you don't have the right to complain. Many of us are threatened for our migratory status." She also recounted the plight of a pregnant coworker who worked twelve-hour days, even when her husband was dying of cancer. "The only day she took off was the day her husband died, and they deducted it from her pay," she said. "He died that day, and the next day she had to go back to work."

Domestic workers are among the fastest-growing workforces in our nation; 60,000 of them work in Virginia. Over ninety percent are women, and half of all domestic workers are women of color. They are entrusted to care for our families and homes, and their work should be valued. Yet, the perspectives and experiences of domestic workers were rarely, if ever, centered in General Assembly policy discussions—until now.

Partnering with Care in Action, Delegates Wendy Gooditis, Marcia Price, and Kathy Tran and I introduced legislation in 2020 to create a Domestic Workers Bill of Rights, and on July 1, Virginia became the first southern state to begin extending worker protections to domestic workers.¹⁴ As enacted, Senate Bill 804 eliminated

13. Wolfe et al., *supra* note 11.

14. Zobia Nayyar, *Nonprofit Urges Va. Lawmakers to Protect Domestic Worker Rights*, WHSV (Jan. 30, 2020), <https://www.wHSV.com/content/news/Nonprofit-urges-Va-lawmakers>

the domestic worker exemption from Virginia's Minimum Wage Act and created a working group to study and make recommendations on how to extend other employment protections to domestic workers.¹⁵ For the first time, Lenka and other domestic workers were able to share their experiences with General Assembly members as we deliberated the Domestic Workers Bill of Rights with stakeholders as part of the workgroup convened by the Secretary of Commerce and Trade.

While Senate Bill 804 is a major step forward, our efforts exposed that we have a long way to go to convince policymakers to extend to domestic workers the same protections their employers enjoy.

Representation matters. In a government by, of, and for the people, the ability of policy to address the problems of the people depends on who participates. The more the Virginia General Assembly reflects the full diversity of the Commonwealth of Virginia, the more the laws passed will address the needs of all Virginians. We have come a long way, but we still have a long way to go.

-to-protect-domestic-worker-rights-567429771.html [https://perma.cc/A7GV-XAVX].

15. Act of Apr. 11, 2020, ch. 1147, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 40.1-28.9 (Cum. Supp. 2020)).