

Testimony of Norman C. Smith, Esq.
before the
House Human Services Committee
Regarding Proposal 5 – Proposed Article 22
addition to
Chapter 1 of the Vermont Constitution

Mdm. Chairman and Members of the Committee.

Thank you for allowing me to testify regarding Proposal 5 – Declaration of Rights; Right to Personal Reproductive Liberty

My name is Norman Smith. I was born and raised in St. Johnsbury, graduating from St. Johnsbury Academy in 1973. I attended the Massachusetts Institute of Technology, graduating in 1977 with a Bachelor’s Degree in Urban Studies and Planning. I then studied law at the Boston University School of Law, graduating in 1980. I clerked in 1980 – 81 for Albert W. Barney, Jr. , then Chief Justice of the Vermont Supreme Court. I now serve on the Vermont Supreme Court’s Probate Court Oversight Committee and Probate Court Rules Committee.

I am a sole practitioner in Essex Junction, where much of my practice focuses on probate, wills, trusts, powers of attorney, and advanced directives. I help and serve many elderly and disabled clients. Over the years I have managed the finances of several elderly clients who had no one who could help them. I have served as a court-appointed Guardian for several people.

Proposal 5's stated purpose is to protect “personal reproductive autonomy.” The proposed Amendment, however, does not define “personal reproductive autonomy.” What “personal reproductive autonomy” means, therefore, will not be determined by the people of Vermont through their Legislature; rather, it will be defined by the Vermont Supreme Court. Reproductive rights may well change over time. Reproductive rights are not limited to abortion. They could include the following:

1. **human cloning** for reproductive purposes;
2. **gestational surrogacy trafficking** (achieved by in vitro fertilization and then followed by human embryo transfer, and after birth the handing over of a born human child in exchange for payment);
3. **trafficking in human embryo creation** (creation of a human embryo by IVF and the subsequent sale or trade of such human embryos for implantation in another's womb for the purposes of reproduction);
4. **designer babies** (creation of designer embryos using gene editing techniques and the implantation and birthing of such genetically modified human beings);

Additionally, the word “autonomy” is not defined in the Proposal. This could raise the following issues:

1. Would this “autonomy” right undercut criminal prohibitions related to age of consent or sexual assault if a minor girl sought to become pregnant with the assistance of a man over the age of 18?
2. Would a minor girl's rights to “personal reproductive autonomy” be “infringed” if such a man were prosecuted for sexual contact with the minor?

Proposal 5 may also require state funding of any of the above treatments. The overbroad language of Proposal 5 might be used to argue that economically disadvantaged people have a constitutional right to in vitro fertilization, human cloning, gestational surrogacy, 3-parent embryos or any other reproductive technology, and that the State owes them a duty to subsidize or fund these practices. The State is already required to pay for abortions for those who qualify, as a result of a Vermont Court Decision based upon Vermont's Constitution. This is doubly troubling because we cannot predict what future reproductive technologies may be developed. This Amendment would leave it to the Vermont Supreme Court, not the Legislature, to make policy decisions about these issues.

The Proposal requires a “compelling State interest” in order to allow regulation. I have not been able to find a clear test for what constitutes a “compelling state interest.” It

would appear in the cases that I have reviewed that it is simply the Court which determines whether a regulation has a “compelling state interest.” So, this Proposal again leaves it up to the Vermont Supreme Court to determine whether a regulation has a “compelling state interest.” By requiring this standard, the Legislature is giving up its ability to regulate reproductive technologies that may be created in the future.

The cases also do not appear to provide a clear test for what a “least restrictive means” might be. In the cases I have reviewed, the Court simply makes a determination based upon its judgment of the facts in the case. Again, this Proposal leaves it to the Vermont Supreme Court to determine whether a regulation accomplishes its goals through a “least restrictive means.”

In closing, Proposal 5 is so open-ended and vague that many unintended consequences will result. Rather than the Legislature, the Vermont Supreme Court will make many policy decisions with respect to reproductive rights. I urge this Committee, and the House, to reject its adoption.

I am happy to take any questions if you have them.