

THE INEXISTENCE OF A FUNDAMENTAL RIGHT TO DISPOSE OF OUR BODY PARTS: AN ARGUMENT FOR A PERFECTIONIST INTERPRETATION OF THE U.S. CONSTITUTION

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“...our squeamishness about dismemberment of corpses is akin to our horror at eating brains or mice. Time and exposure will cure us of these revulsions, especially when there are--as with organ transplantation--such enormous benefits to be won”, Léon Kass².

There is no country in the world where debates on constitutional interpretation are as passionate as in the United States. While originalism, which requires to interpret the Constitution according to the original intent³, can find an explanation in the spirit of common-law, disciples of the living Constitution insist on the necessity to adapt it to the present context. Although this last theory has been criticized a lot, and especially in the dissent of Renhquist in *Roe v. Wade*⁴, the United States Supreme Court does not seem to have opted for originalism. The theory of interpretation depends on the definition of the Constitution and it seems that originalists understand the Constitution as a contract, a compact between preexisting states, while disciples

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² Leon R. Kass, *Organs for Sale? Propriety, Property, and the Price of Progress*, 107 Pub. Int., 65, 65, 72-73 (Spring 1992).

³ For an overview of different types of originalism, study which is beyond the scope of this paper, see for example Colby and Smith, *Living Originalism*, 59 Duke L.J. 239 (2009); Fleming, *The Balkanization of Originalism*, 67 Md. L.rev. 10 (2007).

⁴ *Roe v. Wade*, 410 U.S. 113 (1973), Mr Justice Rehnquist's dissenting opinion: “the fact that a majority of the States ... have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not “rooted in the traditions and conscience of our people as to be ranked fundamental.” Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the “right” to an abortion is not so universally accepted as the appellant would have us believe.”

of the living Constitution see it more as an unilateral act from the people⁵. The Supreme Court Judges belong to the two theories⁶. For example, while Justice Scalia was known to privilege originalism as the “lesser evil”⁷, Justice Breyer is more inclined to interpret the Constitution as a living instrument⁸.

This has a significant impact on the Court’s ruling when individuals claim the Federal government or a state had violated one of their [unenumerated] rights. Indeed, the Court departed from a pure textualist method of interpretation of the Constitution and its case law shows the substantial role that it plays for the protection of fundamental rights that are not listed in the Constitution. But this finding relies closely on the theory of interpretation. While an originalist approach would find an unenumerated fundamental right in the Constitution only if it is “deeply rooted in this Nation’s history and traditions”⁹, the opposite approach would often find this right if it is inherent in the concept of liberty under the due process clause.

The recognition of such rights is even tougher when it deals with controversial moral issues, such as same-sex marriage or disposition of our body parts. The question is always the same: on what ground such controversial rights should be justified? Freedom to choose? Or moral goods? Or both?

⁵ Elizabeth Zoller, *LES GRANDS ARRETS DE LA COUR SUPREME DES ETATS-UNIS*, Dalloz, 2010, 922 p., p. 450-451.

⁶ In all their various components. For an analysis of the United States Supreme Court’s role in a democracy, *see*, in French, Anne Deysine, *LA COUR SUPREME DES ETATS-UNIS, DROIT, POLITIQUE ET DÉMOCRATIE*, Dalloz, 2015, 288 p.

⁷ See Antonin Scalia, *Originalims: The Lesser Evil*, 57 U.CIN.L.REV. 849 (1989).

⁸ Notion that is on the contrary a familiar interpretation of the European Convention of Human Rights by the European Court. For an analysis by Justice Breyer of the role of the Supreme Court in a globalized world, *see*, in French, Stephen Breyer, *LA COUR SUPRÊME, LE DROIT AMÉRICAIN ET LE MONDE*, Odile Jacob, 2015, 384 p.

⁹ *See* Chief Justice Renhquist opinion in *Washington v. Glucksberg*, 521 U.S. 702 (1997), holding that the right to assistance in committing suicide was not protected by the Due Process Clause, because this practice was offensive to the national traditions and practices and finding that the Washington's ban satisfied a rational basis test.

The United States Supreme Court, as well as some States superior Courts, have been confronted among other things to abortion¹⁰ and same-sex marriage cases¹¹, and might have to deal with plural unions. Cases related to organ donation do not clearly enlighten the reader on the nature of the rights over the body parts. In *Brotherton v. Cleveland*, the Court of Appeals for the 6th circuit hold that the widow's interests in her husband's corneas rose to level of "legitimate claim of entitlement" protected by due process clause¹². However, given the various cases, it is impossible to generalize that solution to all organs.

Post mortem donations involve several actors and then different potential rights holders: the deceased donor, his/her relatives and the recipient. A research of fundamental rights would require to determine if fundamental rights of a person could apply after his/her own death.¹³ It would also necessitate to determine the nature of the interests of relatives on the body of the deceased. This paper will not go into this analysis but will instead focus on the rights of the living donor on his/her own body¹⁴.

More precisely, the following developments will investigate the constitutionality of the federal ban of organs sales by looking for the existence on an eventual right to dispose of our body parts and especially to sell them.

Part I will contextualize the debate on the constitutionality of the federal ban of organ sales and introduce how constitutional interpretation led to the recognition of fundamental rights under the due process clause. **Part II** will focus on the government's role and will support the

¹⁰ See *Roe v. Wade*, 410 U.S. 113 (1973), See *Planned Parenthood v Casey* 505 U.S. 833 (1992).

¹¹ *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), *Obergefell v Hodges*, 192 L.Ed.2d 609 (2015).

¹² *Brotherton v. Cleveland*, 923 F.2d 477 (1991).

¹³ This was for instance one the arguments of the plaintiff in *Richards v. Holder*. According to him, the prohibition of the sale of his organs after his death was an infringement of the taking clause of the 14th Amendment of the Constitution. Nonetheless, the district court of Massachusetts affirmed that "he can make no showing that any independent source, such as state law or traditional common law principles, supports a constitutionally protected property interest in the sale of one's organs after death. ». 5.5.

¹⁴ Although the study of post mortem rights is not the subject of this paper, the determination of the rights to the living donor is a prerequisite to that study anyway.

promotion of public values in the field of biomedicine, especially the value of integrity and non-ownership of the human body and the value of solidarity, and rejecting the argument of state's neutrality. Then, **Part III** will analyze the role of Judges, arguing that challenges of the constitutionality of the National Organ Transplant Act ban on selling organs should be rejected for various reasons. Finally, **Part IV** will briefly discuss the potential upholding of the Act under both rational basis review or strict scrutiny.

I- INTRODUCTION: ORGAN TRANSPLANTATION AND FUNDAMENTAL RIGHTS

In 1931, Aldous Huxley invented in his famous novel "Brave new World" a dictatorial society where everyone had his/her own place among five socio-economic castes, a society where embryos were raised in hatcheries and conditioning centres.

First seen as a danger against human rights, States enacted biolaw to protect the individuals against the abuses of science, especially in reaction to the medical experiments committed without consent during the WWII¹⁵.

The issue moved from this idea of human rights *versus* biomedicine to human rights *within* biomedicine, and biolaw reflects this utility of new technologies to serve people's needs, especially by the implementation in the statutes of derogations to human rights previously recognized¹⁶. Above all, new technologies innovations made possible some treatments previously inaccessible and created a special relationship between individuals and medical

¹⁵ By giving a framework before an intervention on the human body for other purposes than the own health of the person, see the Nuremberg code of 1947.

¹⁶ Bertrand Mathieu, *La bioéthique, ou comment déroger au droit commun des droits de l'Homme*, LA SOCIETE INTERNATIONALE ET LES ENJEUX BIOETHIQUES, Sandrine Maljean-Dubois (dir.), Pédone, 2006, pp. 85-94.

professionals in which some argue the State should not interfere, in an attempt to remove those ethical issues from the public debate. Some liberals would argue that in those circumstances of moral disagreement the State should stay neutral.

This brings us to the question to which this paper will propose an answer: in the field of biomedicine, is there a fundamental right to dispose of one's body parts?

More specifically, this paper will focus on the National Organ Transplant Act's prohibition of organ sales and will determine if that prohibition infringes a fundamental right of an individual to sell his/her organs.

A. The National Organ Transplant Act and the Constitution

Traditionally, the organization and establishment of legislation for organ transplantation was a classical state power. Indeed, it is part of health, which is not specifically enumerated within the Federal government's power by Article I section 8 of the Constitution. In 1984, Congress applied its interstate commerce powers¹⁷ and adopted the National Organ Transplant Act (NOTA) with the objective to reduce the organ shortage. The Act created the Organ Procurement and Transplantation Network (OPTN), private organization under contract and supervision of the federal government and in charge, among other things, to establish and manage a national list of patients waiting for transplantation and matching donors. The exchanges of organs between the different organ procurement organizations (OPO) of different states is the basis of the power of the Congress in the field which decided to prohibit organ purchases. Section 274 (e) of the NOTA states that "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce".

¹⁷ U.S. Const. art. I, §8, cl. 3, stating that Congress shall have power "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."

It is worth noting that the act only concerns organs, including bone marrow but not blood or plasma¹⁸. This had been and still is one of the arguments against the consistency of the Act.¹⁹

Like every country in the world, except Iran, the United States forbade individuals to sell their organs, restricting a liberty interest of persons in its territory²⁰.

Is that prohibition limiting if not infringing a fundamental right?

As it has previously been said, there is not any explicit enumeration of such a right to sell our body parts in the Constitution. Nonetheless, the way to frame the right that we are looking for matters a lot, if we want to avoid the risk of automatically rejecting the existence of a fundamental right because of an “overprecision” of its content²¹.

Nonetheless, the doctrine progressively developed by the United States Supreme Court shows that it has given up the idea that constitutional interpretation might rely only on strict originalism, but needs to adapt to the context.

Several authors have argued that the NOTA was unconstitutional though, because it would infringe a right to self-defense in the medical field, that could be deduced from the Second amendment of the Constitution and other dispositions²², or a “negative right to safe and effective care to protect life and liberty”²³. Some others minimize the effects of a potential ability to sell organs: “While the possibility of financial gain may be a factor in a decision

¹⁸ NATIONAL ORGAN TRANSPLANTATION ACT § 301, 98 Stat. at 2346-47.

¹⁹ While it might be inconsistent on that point, this paper will focus on the prohibition of organ sales as such, independently of the necessity to amend it to make it more consistent. *See also Flynn v. Holder*, 684 F.3d 852 (9th Cir. 2011), holding that the cells removed during peripheral blood stem cell apheresis did not meet the definition of “bone marrow” included in NOTA, and therefore NOTA did not criminalize compensating the donor.

²⁰ The NOTA does not have extraterritorial effect, which has been deplored by some scholars, *see for example Glenn Cohen, Transplant Tourism: The Ethics and Regulation of International Markets for Organs*, 41 J.L. MED. & ETHICS 269 (2013).

²¹ In *Bowers v. Hardwick*, 478 U.S. 186 (1986), Justice White looked for “a fundamental right upon homosexuals to engage in sodomy”. Framing the potential right that way (precision of the kind of sexual activity as well as restricting it to homosexuals) it was very unlikely that he had been able to find it. This does not seem an objective way to determine the existence of a right.

²² *See for example Eugene Volokh, Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813 (2007).

²³ John A. Robertson, *Paid organ donations and the constitutionality of the National Organ Transplant Act*, 40 HASTINGS CONST. L.Q. 221 (Winter 2013).

to donate, this possibility is such a minimal risk that undue inducement hardly seems to be the proper term”²⁴ and that “coercion or compulsion by third-parties who might profit in some way from the designated compensation is also highly speculative. None of these concerns should satisfy heightened scrutiny in the plaintiffs' as-applied challenge to the amended statute”²⁵.

The study of contemporary controversial United States Supreme Court cases divides commentators on the essence of fundamental rights: while some readings attribute the origin of such rights to the liberty and autonomy components of the due process clause, others believe that their real source is in moral readings of the Constitution.

The objective of this paper is to argue that moral goods are both the source and the limits of a fundamental right to dispose of our body parts. It will provide an interpretation of some of the United States Supreme Court cases, as well as some State Supreme Court's cases relying on privacy that will lead to the conclusion that the constitutionality of the NOTA should not be successfully challenged on the basis of an only liberal interpretation of the “liberty” of the due process clause. If I agree with Fleming & McClain, or Macedo on the necessity of the interconnection between moral and autonomy arguments, I shall defend, in this field of bioethics, a position near Sandel's one, arguing that if arguments based on autonomy need to be taken into account, it is within the sphere of human goods²⁶. I will reject both pure liberal and utilitarian morals as a justification of an absolute right to dispose of our body parts.

²⁴ Ezekial Emanuel, *Undue Inducement: Nonsense on Stilts*, 5 AMER. J. BIOETHICS 9-13 (2005), cited by Kristy Lynn Williams, Marisa Finley, J. James Rohack, *Just Say No to NOTA: Why the Prohibition of Compensation for Human Transplant Organs in NOTA Should be Repealed and a Regulated Market for Cadaver Organs Instituted*, 40 AMERICAN JOURNAL OF LAW & MEDICINE, 275, 2014.

²⁵ Kristy Lynn Williams, Marisa Finley, J. James Rohack, *Just Say No to NOTA: Why the Prohibition of Compensation for Human Transplant Organs in NOTA Should be Repealed and a Regulated Market for Cadaver Organs Instituted*, 40 AMERICAN JOURNAL OF LAW & MEDICINE, 275, 2014.

²⁶ “Human good” as “constructive” moral arguments by opposition to restrictive morals based on stigma for example. It would allow a formative project of the government relying on “sound ideals” (according to the expression of Steven Wall, *LIBERALISM, PERFECTIONISM AND RESTRAINT*, Cambridge University Press, 1998, 244 p.), “reasonable” moral arguments (Fleming and McClain, *ORDERED LIBERTY- RIGHTS, RESPONSIBILITIES AND VIRTUES*, 2013, p. 113.).

In that sense, this is an argument for a perfectionist view of the Constitution, directed to the individual, but also to the individual regarding society.

Liberal perfectionism is both a political theory based on the idea that “government should actively help citizens to live good and valuable lives”²⁷ and a theory of interpretation of the Constitution. Regarding perfectionism as interpretation, Cass Sunstein makes a distinction between “first order perfectionism” (“interpretive perfectionism” as Fleming and McClain frame it²⁸) and “second order” perfectionism”, that would be a theory with the aim to improve the constitutional system²⁹. While the last one is the goal of every constitutional theory, Sunstein rejects the first one, preferring minimalism. This paper endorses those two “orders” of perfectionism, excluding a minimalist role of judges in this specific field of biolaw and fundamental rights. It conceives the Constitution not only as a Charter of negative rights but also as a “Charter of positive benefits” as Fleming and McClain described it³⁰, which is not always compatible with minimalism.

B. The justification of a fundamental right under the doctrine of the substantive due process clause

Enumerated rights have often been found through the interpretation of the due process clause and the equal protection clause of the Constitution. If it existed, the right to dispose of our organs would be more likely to be found through the interpretation of the “liberty” or “property” component of the due process clause. While interpreting the Constitution to find those rights, it seems that the Court uses both liberal and moral arguments. This observation

²⁷ Steven Wall, *LIBERALISM, PERFECTIONISM AND RESTRAINT*, Cambridge University Press, 1998, 244 p., p. 8.

²⁸ Fleming and McClain, *ORDERED LIBERTY- RIGHTS, RESPONSIBILITIES AND VIRTUES*, 2013, p. 209.

²⁹ See Cass R. Sunstein, « Second-Order Perfectionism », in *Fordham Law Review*, Vol. 75, 2007, 2867-2883.

³⁰ Fleming and McClain, *ORDERED LIBERTY- RIGHTS, RESPONSIBILITIES AND VIRTUES*, 2013, p. 114. « the realization of the Constitution’s ends and the very maintenance of the constitutional order requires a formative project of cultivating civic virtues in responsible citizens”, referring also to the work of Michael Sandel. p. 115.

will be helpful for a research of the existence of the fundamental right in the field of organ donation.

1. *The United States Supreme Court and the meaning of “liberty” and “property”*

From the liberty component of the due process clause, the Supreme Court has deduced the existence of several rights: the right to citizenship,³¹ the right to family integrity³², the rights to same-sex intimate association³³ and marriage,³⁴ and more broadly the right to privacy³⁵. In the field of health and body integrity, and especially compulsory vaccination, the Court has considered in *Jacobson v. Massachusetts*, that “there [were] manifold restraints to which every person is necessarily subject for the common good”³⁶. In *Buck v. Bell*³⁷, the Court upheld a statute requiring pre-hearing before sterilization as conform to the process requirements of the due process clause.

In *Skinner v. Oklahoma*³⁸, faced to a sentence to forced sterilization in accordance with an Oklahoma statute, the Court considered that it violated the due process clause.

The right to privacy had been especially the basis of decisions related to education, whether to strike down a statute that prohibited the teaching of German to children until the ninth grade³⁹, or compelled children to attend public schools⁴⁰. From school it came to relationships and intimacy especially with the decision *Griswold v. Connecticut*, which struck down a statute prohibiting the possession, sale and distribution of contraceptives to married couples⁴¹, or

³¹ *Afroym v. Rusk*, 387 U.S. 253 (1967).

³² *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

³³ *Lawrence v. Texas*, 539 U.S. 558 (2003), overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986).

³⁴ *Obergefell v. Hodges*, 576 U.S. ____ (2015).

³⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³⁶ *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905).

³⁷ *Buck v. Bell*, 274 U.S. 200 (1927).

³⁸ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

³⁹ *Meyer v. Nebraska* 262 U.S. 390 (1923).

⁴⁰ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁴¹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Lawrence v. Texas, in which the Court found unconstitutional a state law prohibiting homosexual sodomy, until the recognition of same-sex marriage in *Obergefell*. The right to privacy has also allowed the Court to deal with bioethical issues and with its decision *Roe v. Wade*⁴², holding that a woman's right to terminate her pregnancy was encompassed in the right to privacy, the Court gave to "liberty" its freedom of conscience aspect. Although this jurisprudence and its potential effects (the "slippery slope" argument) have been criticized, this is an important basis for the recognition of new fundamental rights under the substantive due process clause.

The right to sell organs could also be attached to another disposition of the (substantive) due process: "property".

Federalists' had the desire to implement John Locke's view that the end of society is "the preservation of their property"⁴³. Locke's theory embraced not only tangible property but also a man's right "in his own *Person*"⁴⁴.

While the interests on the human body have sometimes been qualified as quasi-property rights, or "property interests" by some Courts⁴⁵, the United States Supreme Court never have reached such a conclusion. There is a distinction between the deprivation of property when property

⁴² *Roe v. Wade*, 410 U.S. 113 (1973). Although the meaning of liberty according to *Roe v. Wade* has been criticized, the major holding of *Roe v. Wade* has not been overruled by the later decision *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), especially because "Liberty finds no refuge in a jurisprudence of doubt"

⁴³ John Locke, *SECOND TREATISE OF CIVIL GOVERNMENT* (1690), cited by Walter F. Murphy, James E. Fleming, Sotirios A. Barberb, Stephen Macedo, *AMERICAN CONSTITUTIONAL INTERPRETATION*, 5th ed, at 1195.

⁴⁴ *Id.*, at 1196.

⁴⁵ On the rights over body parts of the deceased, see *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir.1991), finding a constitutionally-protected interest in a deceased person's corneas. But see *Albrecht v. Treon*, 617 F.3d 890 (6th Cir. 2010) holding that parents had no property interest in their deceased son's brain. See also *Evanston Ins. Co. v. Legacy of Life, Inc.*, 645 F.3d 739 (5th Cir. 2011), Supreme Court of Appeals of West Virginia. *RITTER et al. v. COUCH et al.*, Oct. 29, 1912. : "while a dead body is not property in the strict sense of the common law, it is a quasi-property, over which the relatives of the deceased have rights which our courts of equity will protect.", but see *Colavito v New York Organ Donor Network, Inc*, 860 N.E.2d 713 (2006), at 53: "plaintiff, as a specified donee of an incompatible kidney, has no common law right to the organ".

interests are defined by States⁴⁶, and the doctrine of substantive due process, upon which the Court could develop its definition of “property” while finding fundamental rights.

On one hand, cases related to contested organ donation are brought by relatives against removals performed after death on the body of deceased, which is a difference with the situation of a living person who would contest his/her inability to sell an organ, and on the other hand, they are brought under the 14th Amendment against states, while the NOTA is a federal law which would require a claim under the Fifth Amendment. Traditionally, the unconstitutional deprivation of property of the due process clause under the Fifth Amendment implies that property interests were recognized in federal law. There is not such a recognition by federal law. The application of the substantive due process theory could give a constitutional definition of “property” that would be the basis of a claim against the NOTA. Nonetheless, the United States Supreme Court did not apply its substantive due process theory to “property” as it did for “liberty”, which is criticized by some authors⁴⁷.

In the absence of a clear fundamental right of property defined by the Supreme Court, deducing a fundamental right to sell an organ on this basis is highly hypothetical.

In light of these information, and given the state of the doctrine of the Supreme Court, it seems more relevant to look for the roots of a potential right to dispose of body parts the right to privacy under the substantive due process clause.

⁴⁶ See *Bd. Of Regents v. Roth*, 408 U.S. 564 (1972), at 577: « Property interests [...] are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.»

⁴⁷ See Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 591, 609 (1997) “Under existing law, substantive due process fully protects a citizen's liberty interest in engaging in political expression but affords substantially less protection to her property interest in reputation or bodily integrity”, at 557. If the Supreme Court considered the existence of substantive due process for property, it did not give any clear definition of it. See *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) at 673 (suggesting that there could be fundamental property interests in holding that the interest of a business firm protected by a statutory cause of action for false advertising is not “property” within the meaning of the Due Process Clause).

2. *The place of morals in existing cases as a justification of a fundamental right*

Cases related to same-sex intimate association and marriage enlighten the interconnection between morals and liberty to justify a fundamental right. Analyzing this relation by making an analogy with those cases is relevant because in both situations, the recognition of a right is subject to moral disagreement⁴⁸. Let's focus on three cases: *Lawrence v. Texas*, where the Supreme Court found that state laws banning homosexual sodomy were unconstitutional,⁴⁹ *Goodridge v. Department of Public Health*, where Massachusetts Supreme Judicial Court ruled that gay and lesbian people were no longer excluded from marriage⁵⁰, and *Obergefell v. Hodges*, where the United States Supreme Court recognized same-sex marriage⁵¹. While Scalia could have deplored “the slippery slope” towards the ends of all moral legislations,⁵² the three decisions are from being only based on liberal arguments. Indeed, the common point between *Lawrence* and *Goodridge* for example is that the opinions use both liberal and “Republican” arguments, although pretending that moral views are not the question, because “[Judges’] obligation is to define the liberty of all, not to mandate [their] own moral code.”⁵³ Instead of emphasizing the traditional opposition between autonomy and morality, Justice Kennedy in *Lawrence* and Chief Justice Marshall in *Goodridge* both seem to find a moral justification of autonomy. The opinion in *Goodridge* for instance insisted a lot on the moral dimension of marriage as a reason of the requirement of its extension to gay people⁵⁴.

⁴⁸ The main difference is that while in those cases, morals and liberal arguments can both justify the alleged fundamental right, I'll use the same arguments to *deny* the recognition of a right to dispose of our body parts which would include a right to sell our organs.

⁴⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003)

⁵⁰ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003)

⁵¹ *Obergefell v. Hodges*, 772 F. 3d 388 (2015)

⁵² See dissent of Justice Scalia in *Lawrence*.

⁵³ *referring to Lawrence v. Texas*, quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850, (1992).

⁵⁴ For example, the opinion states that “Marriage is a vital social institution” which “brings stability to our society”, “Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an (...) union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions », which the Court does not find compatible with individual autonomy and equality.

The fact that Kennedy use the concept of “emerging awareness” in *Lawrence*⁵⁵, as well as the description of marriage in *Obergefell* as a “keystone of the Nation's social order”⁵⁶ is also indicative of the insufficiency of liberal arguments to justify fundamental rights in circumstances of moral disagreement. This approach seems logical: this is the evolution of social mores that led to these claims for equality in rights. It would be anachronistic to pretend that all fundamental rights in all of their dimensions have always been “deeply rooted in the Nation’s history”⁵⁷, disconnecting them from society and preventing any Court to engage in the “slippery slope” consisting in ending all moral legislations. Marriage for instance is a society-made right which became fundamental and then progressively subject of claims for equality from persons traditionally excluded from it. In that sense, Scalia might have been right that it could lead to the recognition of plural unions⁵⁸. Nonetheless, this would be forgetting the interconnection with liberal arguments. If morals can limit liberty, liberal arguments can also limit moral arguments. And moral arguments can both be the source of a right and source of its limitations⁵⁹. This is what this paper will try to demonstrate in the specific field of organ donation hereafter by discussing the role of the government in this field of biomedicine first, and then the role of Courts.

⁵⁵ At 2474.

⁵⁶ At 2590.

⁵⁷ See *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁵⁸ See the dissent of Justice Scalia, with whom The Chief justice and Justice Thomas joined in *Lawrence v. Texas*, at 599: “This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.” See also the opinion of Chief Justice Roberts, with whom Justice Scalia and Justice Thomas joined, dissenting, at 2621: “from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one ».

⁵⁹ Regarding morals as source of limitation of the recognition of fundamental rights, the absence of consideration of the liberal argument led the Court in *Bowers* to uphold a statute incriminating same-sex sodomy. There is a serious need to take into account both liberal arguments and moral arguments. As Part III will argue, there are also liberal arguments that oppose to the recognition of a fundamental right to dispose of one’s organs. In that sense, and conversely to the Court’s holding in *Bowers*, the liberal argument will also be mobilized as such and as a way to make a distinction within morals, between what could be considered as a human good or value and can be enforced by the government in its “formative project”, and what is only the instrument of an oppressive majority.

II- THE NECESSARY PROMOTION OF PUBLIC VALUES BY THE GOVERNMENT IN THE FIELD OF BIOMEDICINE

Liberal arguments are insufficient to justify a right to dispose of our body parts including a right to sell organs. First, the neutrality argument recommended by liberals to justify a fundamental right seems to be both inapplicable and undesirable in this specific area (A). Second, there is in the field of organ donation a need for a government's formative project that is both required by human rights, objective values, and the need of social cohesion (B).

A. *The irrelevance of the argument of neutrality*

Because there are inevitably various conceptions of the good in a given society, the principle of state neutrality oppose to the promotion of one vision over another. Ronald Dworkin formulated it in a well-known sentence: “[G]overnment must be neutral on what might be called the question of the good life,” and this meant that “political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life⁶⁰”.

In that sense, this theory goes against the idea of a perfectionist approach of state action.

That seems to be an inapplicable argument to defend a right to sell organs. Moreover, even if it this does not really apply to this study, it is worth noting that neutrality is, as such, an inconsistent argument when we are faced to a right already recognized. Therefore, neutrality should not be considered as an admissible argument in favor of the recognition of a right to sell organs.

⁶⁰ Ronald Dworkin, Liberalism, in *A Matter of Principle* 181, 191 (1985).

1. The neutrality principle and its applicability

Biolaw has been built on the necessity to protect individuals vis à vis scientific progress, which seems to make it one of the typical fields that should not be subject of government's neutrality.

Sandel classified the supporters of neutrality following 4 different views: the relativist, the utilitarian, the voluntarist, the minimalist.⁶¹ Regardless of the real intent of the proponent of neutrality, this principle seems unsuitable to biomedical issues.

The neutrality argument is the consequence of liberal toleration. As Fleming and McClain had shown, liberal toleration is criticized "both for being empty and too robust".⁶² It would be too empty because it would only require to let people alone, and too robust because it would therefore recognize too much freedom to individuals, which could harm the government's formative project⁶³. Sandel for example deplores the fact that liberal arguments lead to neutrality, described as "a naked public square denuded of religious arguments and convictions"⁶⁴. Both critics of emptiness and robustness apply to the government's project on the field of biomedicine. Liberal toleration would mean denying the public interest in organ donation and let the matter be privatized. The harm on the government's democratic project would not simply be moral, it would be factual: organ sales would necessarily impact the public health strategy of equitable allocation of this scarce resource. Unless the only buyer was the State, private sales would lead to discrimination based on financial resources and selection based on anything but equity. Unlike education for which the government's promotion of public values is not necessarily incompatible with liberal toleration in favor of families⁶⁵, there is few

⁶¹ Michael Sandel, *Moral argument and liberal toleration*, 77 CALIF. LAW REVIEW, 521, 1989, p. 522.

⁶² Fleming and McClain, ORDERED LIBERTY- RIGHTS, RESPONSIBILITIES AND VIRTUES, 2013, p. 112.

⁶³ *Id.*

⁶⁴ Michael Sandel, Justice (section on same sex marriage).

⁶⁵ Fleming and McClain, ORDERED LIBERTY- RIGHTS, RESPONSIBILITIES AND VIRTUES, 2013, p113-145.

room for diversity regarding organ sales. This is also one of the elements that can explain why liberal toleration would work for abortion, but not for organ donation process.

Therefore, government's neutrality is not desirable regarding organ donation. Moreover, writers divide on the question of the scope of neutrality⁶⁶, admitting the insufficiency of the concept to deal with all societal issues. This is also hard to achieve in practice, as Sandel argued using the example of abortion and the case *Roe v. Wade*: even when the Court claimed to be neutral, it was not⁶⁷.

Besides, the argument of neutrality needs to be rejected because of its inconsistency with regard of rights already recognized.

2. *The neutrality principle faced to an already recognized right*

There are some liberal theories which also see government's neutrality as the way to ensure equality between individuals or group of individuals. For instance, because of its inherently moral character, it would be both more consistent and equal to substitute to marriage another civil institution, which would be open to both heterosexual and homosexual couples. The argument of neutrality offers to step back to provide equality, but a levelling down of equality though. Because those libertarians deny the moral views as part of the justification of fundamental rights, they argue for a neutrality that seems inconsistent when a fundamental right has already be recognized. This shows that even when it appears to be the most justified, the seducing argument of neutrality is an imperfect one if we take for granted that in a healthy

⁶⁶ According to Waldron for example, "Different lines of argument for the liberal position will generate different conceptions of neutrality, which in turn will generate different and perhaps mutually incompatible requirements at the level of legislative practice", Jeremy Waldron, *Liberal Rights: Collected Papers (1981-1991)*, London; Cambridge University Press, 1993, p. 152.

⁶⁷ Michael Sandel, *Moral argument and liberal toleration*, 77 CALIF. LAW REVIEW, 521, 1989, p. 531.

democracy⁶⁸, the State should not purely and simply remove rights that it previously defined as fundamental.

In the case of biolaw, it appears to be even less justifiable to ask for neutrality!

These remarks, which aim to point the weaknesses of the argument of neutrality in general, only apply partially to the prohibition of organ sales. Indeed, organ donation laws authorize already a person to give an organ. And the question is not to step back (as soon as medical progress gave this possibility to individuals which had been authorized by law for a long time) but to deduce from the existence of the right to give a right to sell. An argument based on neutrality would be for instance “because everyone cannot give one of his/her organs, than nobody should be able to do it”. It would work better from the recipient’s perspective in his/her relationship with the donor: it could be “because I cannot obtain a kidney from a living donor [because for example, nobody wants to give it to me, conversely to other recipients], I should be able to obtain it by buying it”. And then the system would be changed from a system based on donation to a system based on sale for everyone, to ensure equality. The main difference with this argument regarding marriage is that in marriage the initial basis of the inequality in the access to a specific right is legal, whereas in such hypothetical situation, the difference between recipients is factual. In all aspects the argument of government’s neutrality seems imperfect. It is essential that all actors get involved in those issues through an active democratic process.

⁶⁸ Except under exceptional circumstances, when the State can limit if necessary and for a given time some liberties.

B. A call for perfectionism: the promotion of social cohesion

“[f]ew decisions are... more properly private, or more basis to individual dignity and autonomy than a woman’s decision... whether to end a pregnancy. A woman’s right to make that choice freely is fundamental”⁶⁹,

This definition of individual dignity must be supplemented by the conception of dignity as a framework principle defined by society. The principle of human dignity which is mentioned in biomedical laws (as a restriction to the access to the human body) looks like more this sort of common value than an individual liberty close to the notion of autonomy. Therefore, « *if we accept basic principles of dignity; we must respect the special responsibility of every person to make decisions about ethical values for themselves*”⁷⁰.

1. The promotion of the integrity of the human body

In *Life’s Dominion*, Dworkin makes a distinction between things which hold subjective value and things which value is objective⁷¹. The latter is applicable to things with intrinsic value, regardless of the fact we actually enjoy them or not⁷². Indeed, if the subjective value of a thing was the only interest at stake, then there won’t be any difficulty to deny a right on moral grounds⁷³.

As with abortion, the human body has an objective value. This objective value has been affirmed after the atrocities of the WWII by the international community, and by the United

⁶⁹ *Thornburgh v. American College of Obstreticians & Gynecologists*, 776 U.S 747, 772 (1986), quoted by Michael Sandel, *Moral argument and liberal toleration*, 77 CALIF. LAW REVIEW, 521, 1989, p. 527.

⁷⁰ Fleming and McClain, *ORDERED LIBERTY- RIGHTS, RESPONSIBILITIES AND VIRTUES*, 2013, p.42, referring to Dworkin.

⁷¹ R. Dworkin, *LIFE’S DOMINION, AN ARGUMENT ABOUT ABORTION, EUTHANASIA AND INDIVIDUAL FREEDOM*, p. 71. Things can have all those kind of values together: personal (subjective), instrumental and intrinsic.

⁷² *Id.*

⁷³ *Id.*, p. 73 (on abortion).

States through the recognition of a right to bodily integrity by the Supreme Court, although not absolute⁷⁴.

The intervention on the human body became an admitted exception, under strict conditions (such as the voluntary, prior informed consent of the person, that I shall develop in Part III). In the specific case of organ transplantation, this exception has been conditioned by the requirement of another person⁷⁵.

Posner has argued that the main reason of organs sales prohibition was that this was highly offensive to nonparticipants⁷⁶, affirmation with which I agree since the integrity and the non-commodification of the human body are objective values, but he did not understand why they were so highly offensive. The division of goods made by Sandel in three categories provide an explanation to this offense. He distinguishes market goods, civic goods, and sacred goods.

The definition of the corruption of an exchange could be helpful to understand why the sale of organs is repugnant to society. Sunstein said that there was a corrupting exchange when “the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized”⁷⁷.

As Glenn Cohen explained, there are two options to determine if an exchange is “appropriate” or corrupting: the conventionalist (based on prevailing societal norms), and the essentialist (linked to objective essence of the good)⁷⁸.

Because I believe the anti-corruption argument can be made both ways regarding organ sales, it seems that in its interpretation of the Constitution, the Judge would be able to rely whether

⁷⁴ See *supra*.

⁷⁵ In 2007, the NOTA was amended to include the specific case of paired-donations, précising that organ exchanges were not prohibited by the federal act. See Charlie W. Norwood Paired Donation Act of 2007 Pub. L. No. 110-144, 121 Stat. 1813 (2007) (codified at 42 U.S.C. §§ 273b, 274e (2006 & Supp. IV 2011)).

⁷⁶ Richard Posner, quoted in <http://abovethelaw.com/2014/08/organ-fail/>

⁷⁷ Cass R. Sunstein, *Incommensurability and Kinds of Valuation: Some Applications* in Law, in *Incommensurability, Incomparability, and Practical Reason* 234, 238 (Ruth Chang ed., 1997).

⁷⁸ Glenn Cohen, *The Price of Everything, The Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689 (2003) at 693.

on the prevailing norms (and deference, which does not seem the best option⁷⁹, see *supra*) or the objective value of the human body.

Dworkin also makes a distinction between what we value incrementally and what we value once it already exists⁸⁰. The fact that the law already authorize people to give their organs, and for a long time, might then play in disfavor of the incremental value of human body integrity. This is nonetheless only an exception which cannot be disconnected from another valuable consideration: the solidarity basis of organ donation.

2. *The enforcement of the public value of solidarity*

Michael Sandel's book "What Money Can't buy" begins by an enumeration of all things that can surprisingly be bought in the United States. Surprisingly because buying such things like "the services of an Indian surrogate mother to carry a pregnancy", "the right to immigrate to the United States", or "if you are obese, lose fourteen pounds in four months"⁸¹ are things unlikely to be bought in many countries. Lawmakers in the United States have swept aside several ethical issues associated with those individual wishes by legitimating them through money. After all, both Ronald Reagan and Margaret Thatcher proclaimed that markets "held the key to prosperity and freedom", not government⁸². A language that everyone understands. In this movement of an "all aspects of life" commodification, organ transplantation remained based on solidarity. Some scholars relied on that particularity to denounce its inconsistency. It is true indeed that blood and plasma are excluded from the NOTA. Nonetheless, there is a strong

⁷⁹ Indeed, deference to prevailing social norms could lead to a moral relativism that would be dangerous in the biomedical field.

⁸⁰ Ronald Dworkin, LIFE'S DOMINION, AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM, p. 73.

⁸¹ Michael Sandel, WHAT MONEY CAN'T BUY- THE MORAL LIMITS OF MARKETS (2013). 3-5

⁸² *Id.*, p.6

government interest in promoting values that bring people together and to promote “seedbeds of virtue”⁸³. There are “some things that money cannot buy”⁸⁴.

Glenn Cohen has argued that within the Essentialist formulation of the corruption argument, we should rely more on the analysis of the exchange itself than only on the nature of the good.⁸⁵

While the objective value of the human body and its integrity previously described relied on the latter, the public interest in solidarity is more attached to the nature of the exchange. Exchanging a “sacred good” such as a body part with money⁸⁶.

There are two ways to analyze the transfer of the organ from a living donor to the recipient: an altruistic act or an exchange of goods and values which belong to different spheres.

The organ donor decides to make this anatomical gift to enable another person to receive the transplant and then, help that person. Whether his or her motivation is to improve the health of a loved-one, to gain self-esteem, or recognition from entourage, this gift is not incompatible with the notion of exchange as there is no gift which would be totally altruist⁸⁷. This is a value that constitutes a moral good that society is entitled to protect.

In that case, the exercise of a liberty interest to dispose of some body parts would take root in moral goods, while the limit of that liberty would take root in coercion.

To summarize, the government has both the power to prohibit organ sales in its formative project, but it is also desirable that it does enforce this “moral good” in its statute. Let’s now analyze the role of the Judge if confronted to a challenge of the NOTA.

⁸³ Fleming and McClain, ORDERED LIBERTY- RIGHTS, RESPONSIBILITIES AND VIRTUES, 2013, p112.

⁸⁴ *In re Baby M*, 537 A.2d 1227, 1249 (N.J.1988).

⁸⁵ Glenn Cohen, *The Price of Everything, The Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689 (2003) at 695-696.

⁸⁶ Such as the body part still integrated in the body. When the same body part has been detached from the human person, it entered in a world of exchanges where money is no longer prohibited.

⁸⁷ See Marcel Mauss, ESSAI SUR LE DON. FORME ET RAISON DE L’ECHANGE DANS LES SOCIETES ARCHAÏQUES, *Année Sociologique*, 1923-1924.

III- THE NECESSARY VALIDATION OF THE NATIONAL ORGAN TRANSPLANT ACT BAN ON SELLING ORGANS

Among the elements which gave its force to the opinion in *Goodridge* was probably its minimalism. Indeed, while saying no more than what was needed to resolve the case, Chief Justice Marshall probably reduced the risk of criticism. This seems to be one of the main differences with the opinion of Kennedy in *Obergefell*, which intended to be more symbolic as the long developments on the definition of marriage in the decision suggest. Minimalism can give a decision its strength but this is not always desirable. This is tied to the idea that Judges have an active role in a constitutional democracy⁸⁸.

With regard to the existence of the right to dispose or sell our organs, minimalism is not desirable. One easy way against recognizing such a right would be to defer to the legislator, which here decided to prohibit it. But a more active role of the Judge, as protector of freedoms and the constitutional order, would be desirable in the field of biomedicine. Indeed, biomedical acts without consent for example should not be deferred. Another argument of minimalism regarding the justification of rights in circumstances of moral disagreement, could be used against the NOTA to challenge its constitutionality: this is called “desuetude”, and this is unlikely that it would succeed.

A. The rejection of the argument of desuetude under the due process clause

Sunstein gave a definition of desuetude in his reading of *Lawrence*: “*Without a strong justification, the state cannot bring the criminal law to bear on consensual sexual behavior if*

⁸⁸ See for example Judge Aharon Barak’s description of the role of a constitutional Judge : “I claim that the court has an important role in bridging the gap between law and society and in protecting the fundamental values of democracy with human rights at the center”, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*”, Harvard Law Review, at 47.

enforcement of the relevant law cannot longer claim to have significant moral support in the enforcing state or the nation as a whole” (...) it suggests that, at least in some circumstances, involving certain kinds of human interests, a criminal law cannot be enforced if it has lost public support”⁸⁹.

Although these are two different fields, Sunstein’s questioning applies to laws criminalizing consented acts. The NOTA could be analyzed that way, though it would be more accurate talking about acceptance than consent⁹⁰. And the prohibition is precisely what the critics are focusing on.

Could the questioning of the NOTA and the critics made of it regarding its inadaptability be considered a first step towards a recognition of its desuetude?

The first thing to mention is that the differences between the NOTA and the law challenged in *Lawrence* are important. Whereas in *Lawrence*, this was a state law that was challenged, the NOTA is a federal law. Even if it is not impossible, it seems that it would be harder to evaluate the desuetude of a federal law than of a state law. Sunstein and the Court were able to use comparative law between the federative states and foreign Courts regarding Texas sodomy law. The method of comparative law, at least between states would not be relevant here. Nonetheless, the comparison with foreign laws and foreign Courts cases is still interesting in our case. In this regard, it is worth reminding that selling organs is prohibited everywhere in the world except in Iran. Therefore, the comparative law won’t serve the idea of desuetude. Another difference would be the origin of the change. While the ban of sodomy could have been analyzed under the prism of desuetude because of the progressive social changes, there is not such social mores evolution regarding the free disposition of one’s body parts. Indeed, it seems that the evolution in the way to conceive the disposition of the body is more the fruit of

⁸⁹ Cass R. Sunstein, *What did Lawrence hold? Of Autonomy, Desuetude, Sexuality and Marriage*, Law & Economics Working Papers (2003) p.30.

⁹⁰ It is uncertain that the consent for one of the parties is fully valid, but this aspect of coercion will be dealt with later.

academia, and especially economists, than the people. Would this “elitist” perception of the NOTA as a desuet law be enough to characterize it as such, in the same terms as Sunstein described Texas law? The argument is uncertain.

Besides the unlikely invalidation of the NOTA based on desuetude, several other arguments oppose to such invalidation, whether based on the rights of the donor, or on the insufficiency of public health needs of the recipient to justify, as such, a right of the donor to sell his/her organs.

B. The unlikely recognition of a fundamental right to dispose of one’s body parts

Both liberal and moral arguments oppose to such a right. If autonomy is of primary importance in bioethics, it is obvious that autonomy cannot be a satisfactory justification of such a right. The consent can be coerced, and is never sufficient. Moreover, if moral views inherent to bioethics justified the right in the first place, they can also, and have to limit it. The sole moral utilitarian argument is not receivable.

1. The liberal argument of coercion

Previous developments have been dedicated to arguments against the recognition of a fundamental right to sell our body parts based on common human values. Nonetheless, “moral goods” are not the only source of opposition to such a right. Indeed, the recurrent argument of coercion is a liberal one. The argument of coercion means that offering valuable consideration to get an organ would prevent the potential donor to really exercise his/her autonomy. The prohibition of organ sales finds one of its justification in autonomy. It is worth noting that biomedical law protects the autonomy through the notion of consent. But the consent to this biomedical act, meaning to a removal of an organ from a healthy body for the [only] needs of a tierce person, cannot be assimilated to the consent in contracts. The idea that the risks are not

different than the risks in other contracts goes against the Kantian idea that "...humans cannot realize their true nature as free and rational beings if they are unduly influenced by the "coercive" effects of money⁹¹". In bioethics, this ability to make a free and rational choice is even more important than in other kind of exchanges.

Cohen classified the arguments of coercion in two formulations: the "voluntariness" formulation (Kantian idea above) and the "access" formulation (unequal access to the good)⁹² but this last formulation, based on the argument of fairness and equality relies less directly on liberal arguments than the "voluntariness" formulation.⁹³ Therefore, for the sake of this paragraph, I am focusing on the first one.

2. *The limits of autonomy: insufficiency of the consent.*

Assuming that the donor's consent to sell one of his/her kidneys was valid, without coercion, this sole consent won't be considered enough. This is one of the main differences between the consent to contracts in general and the consent in the biomedical field. The insufficiency of the consent had been affirmed in 2004 at the Amsterdam Forum On the Care of the Live Kidney Donor, where physicians and surgeons from the 5 continents met. They especially agreed on the refusal from the doctor to perform an organ removal despite the consent of the donor if it was dangerous for his/her health. In the same logic, society deplores transplant tourism and the exploitation of poor people to obtain their consent to organ donation⁹⁴.

⁹¹ See Immanuel Kant, *GROUNDING FOR THE METAPHYSICS OF MORALS* (James W. Ellington trans., 1981) (1785) (describing human beings as free, rational, and autonomous only to the extent they make choices free from the burden of inclination), cited by Glenn Cohen, Glenn Cohen, *The Price of Everything, The Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689 (2003) at 695-696.at 690.

⁹² *Id.* Glenn Cohen, at 690-691.

⁹³ "less directly" because even if the equitable access to a resource could be considered as a moral good, there is also a liberal interest in equality. The equality as part of liberty. But the link being more obvious with the voluntariness definition, I chose to develop only this point, as more persuasive for the sake of this paragraph. Even if also linked to coercion, we made a reference to that argument in another part of that work related to moral arguments.

⁹⁴ See United Nations Convention against Transnational Crime, New-York, November, 15, 2000, signed in 2000 and ratified in 2005 by the United States, which states that the victim's consent is inoperative.

3. *The limits of moral concerns: utilitarianism cannot be the justification of a fundamental right*

Articles advocating for the authorization of organ sales often begin by providing some data on organ shortage and the inefficiency of the system to prevent the increasing deaths of persons on the waiting list. Relying on this absence of satisfactory results and using the pragmatic matrix of Economists⁹⁵, scholars would then introduce payment for organs as the only way to remediate to the organ shortage.

Saving lives is a valid concern, a moral good. But a distinction in moral goods might be necessary when it comes to justify fundamental rights. The utilitarian argument cannot serve as a justification of a fundamental right, Human rights in biomedicine have even been historically the justification of limitation to the access to the body. Removals from living donors, through the requirements of consent, have been conceived as the exception. Arguing that this framed faculty to give a kidney had become a right to sell it is hazardous.

⁹⁵ Among Economists, see especially Gary Becker, *Nobel Prize-winning professor of economics at the University of Chicago* who defended the instauration of an organ market. In an article with Julio Elias, he raised the question of conflicting moralities (but without talking about fundamental rights): “Any claim about the supposed immorality of organ sales should be weighed against the morality of preventing thousands of deaths each year and improving the quality of life of those waiting for organs. How can paying for organs to increase their supply be more immoral than the injustice of the present system?”, <http://www.wsj.com/articles/SB10001424052702304149404579322560004817176>.

IV- LIVING ORGAN SELLER, NATIONAL ORGAN TRANSPLANT ACT AND CONSTITUTIONAL SCRUTINY

If the usual distinction between strict scrutiny for an interference in the exercise of fundamental right and rational basis review for other rights or interests is at least schematic⁹⁶, at worst illusory⁹⁷, it has the advantage to provide an analysis grid that facilitates its understanding. For the sake of this part, a quick analogy will be made with the cases already mentioned which reflect this conflict between autonomy and moral goods as a justification of a fundamental right⁹⁸.

A. The prohibition of organ selling withstands a rational basis review with a bite

While dealing with very different issues, the lessons of *Goodridge* might be useful to see how Judges deal with those conflicting interests, manipulating the classical two-tiers methodology (regarding the –substantive- due process clause). This way to proceed might be used in the context of the NOTA.

In the opinion in *Goodridge*, Chief Justice Marshall never wrote that the right to same-sex marriage was a fundamental right. On the contrary, he mentioned several times the “civil” nature of marriage⁹⁹, suggesting the standard of review that the Court would later pretend to apply: the rational basis review. Nonetheless, the review actually applied by the Court is higher than that: the Court qualified the state’s interest as “incorrect” and went further also in the

⁹⁶ Footnote 4 of the decision *United States v Carolene Products Co.*, 304 U.S. 144, (1938)

⁹⁷ See for instance Gerard Gunther, “Foreword: In Search for Evolving Doctrine on a Changing Court: A model for a Newer Equal Protection,” 86 HARV. L. REV. 1, 8 (1972) who wrote that under the Equal Protection Clause, the Supreme Court whether automatically invalidated statutes (the strict scrutiny), or automatically validated them (rational basis review), cited by Fleming and McClain, *ORDERED LIBERTY- RIGHTS, RESPONSIBILITIES AND VIRTUES*, 2013, p.237.

⁹⁸ In *Flynn*, the equal protection claim based on the difference between what the Act prohibits and what it does not, was rejected. The following paragraph relies more on the liberty interest to dispose and sell organs than on the ground of equality.

⁹⁹ In the first sentence of the opinion: « Marriage is a vital social institution », and the opinion often precise “civil” before “marriage”.

analysis of the adequacy between ends and means than a classical rational review. Among the alleged State's interests at stake in *Goodridge*, Massachusetts claimed an interest in conserving scarce resources for which a parallel with organ donation is possible. Indeed, transforming donations in a sale of organs could have an impact in the management of the allocation of organs by the government, especially in case of a deinstitutionalized market where the logic of supply and demand would supplant the equitable access to organs. In *Goodridge*, the Court found the protection of scarce resources "rational" but found the absolute ban did not show a rational relationship with autonomy.

Because it seems that the interest to dispose of our body is not a fundamental right, than there are few doubts that the reasons mentioned above would constitute a legitimate state interest. If there is no fundamental right, but only a liberty interest in the disposition of our body parts, then a prohibition of the sole sale of organs would likely meet the rational standard of review.

B. The prohibition could withstand a "non-fatal" strict scrutiny review

Notwithstanding all previous developments, and the critics of the "automaticity" of the invalidation of a statute that would infringe a fundamental right, it is still possible to make an argument against the automatic invalidation of the statute.

If the Court were to recognize the right to dispose of our body parts as a fundamental right, than a total prohibition would be suspect, above all if the Court framed that right as a "right to sell our organs". The interest of the government in such case would be purely and simply to prohibit a fundamental right because of society repugnance to organ sales, which has no chance to be compelling against a fundamental right. This is pretty unlikely though. Nonetheless, the recognition of such a right to dispose of our body parts would not be absolutely denied by the

NOTA, which only applies to a specific nature of exchanges, the exchanges for “valuable consideration”. Donations are still allowed. But this is true that both for moral and liberal arguments, the government would be seriously limiting that right. Would it be compelling? As previously said, there are some justifications to the prohibition that exceed social values, but found their basis on objective human goods and human rights. It might be possible that the government would then recognize a compelling state interest in the ban of monetary exchanges. Finding this compelling state interest might be the most challenging part of a classical strict scrutiny review because the interest would be necessarily to prevent commodification of the human body, but also coercion etc. The ban is not only a mean, it is also the interest, because of its roots within moral goods. Therefore, if the Court considered that interest as “compelling”, the finding of “narrowly tailored” and the “least restrictive” means would be met. The other option would be to consider that the ban of organs sales is not compelling as such, and the solution would be totally different. If the Court for example only relied on liberal arguments, such as coercion, to determine the state interest, it would probably conclude that the interest is compelling, but its conclusions on the “narrowly tailored” requirement for the means would be less certain, as it would also be for “the least restrictive”. Indeed, the Court would be able to find that alternatives such as an institutionally regulated market, with control on what the “donor” would get in return could be a better alternative. It could find that the “valuable consideration” prohibition is overbroad etc.

All of this is highly speculative at this point, but if the Court were to face the issue, it would be desirable that it takes both moral goods and liberal arguments in its interpretation of the Constitution.

V- CONCLUSION

Framing the question of organ sales and fundamental rights from the donor's perspective is unusual.¹⁰⁰ It is more frequent that commentators rely on the rights of the potential recipient to question the constitutionality of the NOTA. In that scenario, an individual would go to the Court to contest the constitutionality of the NOTA on the basis of a right to self-defense in the medical field¹⁰¹, the right to life etc. But the Court would still have to determine the eventual fundamental nature of those rights face to the government's interest to ensure a fair allocation of organs.

From the donor's perspective, the arguments in favor of organ sales seem to be against the tide of international practice. Above all, in its role of protector of fundamental rights in a constitutional democracy, the Supreme Court should rely on and assume its doctrine of using both moral and liberal arguments if confronted to the issue.

¹⁰⁰ At least from a living donor perspective. There were cases regarding the rights on the body parts of the deceased.

¹⁰¹ See for example Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813 (2007).