

# PRECEDENT IN ARGENTINE LAW

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## I. INTRODUCTION

This paper has four main traits. First, it is explanatory, in that it aims to introduce the reader to judge-made law in Argentina. Insofar as the reader is more or less uninformed of that part of the world—my part of the world—this explanation might escort him into a new world indeed.

Second, this paper is also descriptive in that critical analysis is generally avoided. Of course, at least in the social sciences, it is not possible to describe without to some extent criticizing.<sup>1</sup> So while portraying the Argentine status quo and while addressing topical questions—such as, “Is there precedent in Argentina, really?”—I will simultaneously, albeit sometimes surreptitiously, address other questions, such as whether the Argentine legal system, as it currently stands, make sense without *stare decisis*.

Third, it follows from these first two traits that this paper is introductory in nature. I will therefore hold to a Latin motto that I have found extremely useful for these occasions: *Non multa sed multum*, a Medieval saying that captures the essence of the distinction between the English words “many” and “much.” I will focus on a very limited number of interesting and important questions (“much”) rather than surf on the surface (the rhyme between these words is telling) of myriad topics (“many”). Last, this paper is short and, therefore, limited in its scope. Not only do I have space constraints, but brevity is also quite a natural

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1. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 11 (1980).

consequence of the first three traits that I have identified.<sup>2</sup>

The theme of the Third International Congress of the World Society of Mixed Jurisdiction, where this paper was originally presented, was “Methodology and Innovation in Mixed Legal Systems.” Playing with familiar words for all of us at the Congress, I shall say that even if there does not seem to be much *innovation* in my *methodology*, this paper may nevertheless produce fruitful results. For a person who simply ignores, or ignores by and large, what is going on in Argentina with regard to this topic, this paper may hopefully entail some innovation. And, if the methodology is sound, that reader will also be able to understand the extent to which the Argentine Republic, although traditionally considered a civil law domain, has relevant elements in common with a mixed jurisdiction.

## II. DECODING ARGENTINA

Argentina is generally thought to be a civil law jurisdiction.<sup>3</sup> The Argentine constitution was enacted in 1853 and is still in force.<sup>4</sup> The constitution vested in the federal Congress the power to make and subsequently develop what in our country is termed “*derecho común*,” or substantive law (e.g., legislation on civil, commercial, criminal, and other matters).<sup>5</sup> In our legal system, *derecho común* has a similar standing to common law in the United States. Indeed, the literal translation of *derecho común* is “common law,” though this may be mere coincidence for they differ considerably in many aspects.<sup>6</sup>

The Argentine legal system’s perceived affiliation with the civil law tradition is linked to its Spanish and French influence,

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2. Time constraints were in force when this paper was delivered at The Third International Congress of the World Society of Mixed Jurisdiction (June 20-23, 2011) [hereinafter *The Jerusalem Congress*]. Each presenter was assigned twenty minutes.

3. See Viviana Kluger, *Argentina*, in THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY (Stanley N. Katz ed., 2009).

4. The Argentine constitution has gone through several amendments since 1853.

5. The original wording of the 1853 Article 64, paragraph 11, included among the powers of the federal Congress the power “[t]o lay down the civil, commercial, criminal and mining Codes.” Art. 64, CONSTITUCION NACIONAL [CONST. NAC.] (Arg.). At present, this provision is included in Article 75, paragraph 12. See Art. 75, par. 12, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). The Commercial Code was enacted in 1862, and the rest of the codes ensued.

6. For starters, “*derecho común*” is statutory law; common law is judge-made law.

as reflected in the term *derecho común*.<sup>7</sup> This influence is also noteworthy in administrative law. Nevertheless, the constitutional law of Argentina differs from its private and administrative law since Argentine constitutional law is radically inspired by the Constitution of the United States of America.<sup>8</sup>

Indeed, the original Argentine constitution was basically a copy of the American one. So it comes as no surprise that the Argentine constitution provided for a federal judicial system much like that of the United States. The written document, however, does not mandate the decisions of the courts of the Argentine judicial system *stare decisis*. But one could argue that the written constitutions of the countries of the common law world do not, by and large, mandate *stare decisis*; nevertheless, *stare decisis* is widely accepted in those jurisdictions.<sup>9</sup> Case in point: the Constitution of the United States of America.

Given that Argentina was strongly influenced by the United States with regard to its own constitutional law, one should not be distracted by the absence of a specific clause on *stare decisis* in the written constitution. This absence could be explained by the deference traditionally granted in Argentina to American judicial practices, given the “American origin” of the Argentine judiciary. One of the main purposes of this paper is to explore whether, and to which extent, *stare decisis* is among the practices that were adopted in Argentina. To answer this question it will be useful to establish an often-overlooked, yet critical, distinction. A colleague and I have coined this distinction in terms of two dimensions of *stare decisis*: horizontal and vertical.<sup>10</sup>

### III. DIMENSIONS OF STARE DECISIS

*Stare decisis* is a legal principle by which judges are obliged to respect the precedents established by prior decisions.<sup>11</sup> There

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7. See Kluger, *supra* note 3.

8. See Santiago Legarre, *Common Law, Civil Law, and the Challenge from Federalism*, 3 J. CIV. L. STUD. 167, 172 (2010).

9. Perhaps in order to avoid this apparent paradox, Seán Donlan intimated at *The Jerusalem Congress* that it would be better to use the expression “bindingness of precedent” rather than *stare decisis*.

10. Santiago Legarre & Julio C. Rivera, Jr., *Nature and Dimensions of Stare Decisis*, in *ESSAYS IN HONOR OF SAÚL LITVINOFF* 561 (Olivier Moréteau, Julio Romanach Jr., & Alberto Luis Zuppi eds., 2008).

11. Of course, the rule is more sophisticated and it involves key, familiar notions such as analogy, distinguishing, *ratio decidendi*, holding, and *obiter dictum*. The

is an important distinction within stare decisis that is often overlooked between horizontal and vertical stare decisis. First, “horizontal stare decisis” describes the obligation of a given court to follow decisions of courts on the same level or hierarchy. In other words, with horizontal stare decisis, the court bound and the court binding share the same ranking in the judicial system. Indeed, they sometimes are the same court at two different points in time. Second, the obligation of a given court to follow decisions of a superior court can be categorized as “vertical stare decisis.” Put another way, with vertical stare decisis, the court bound and the court binding are located at different levels of the judicial system.

Vertical stare decisis is the “central case”<sup>12</sup> of the stare decisis rule because, in the absence of compliance by the lower court, there is a high likelihood that the lower court’s decision will be overruled. This works as a kind of sanction against the non-complying court. On the other hand, horizontal stare decisis is a test case for the stare decisis rule since the threat of sanction for non-compliance is absent. The persistence of the duty to obey, even without the threat of overruling, shows that the courts follow the duty for reasons other than the sheer fear of a sanction.<sup>13</sup>

In some countries, such as the United States, horizontal stare decisis does not apply, strictly speaking, to constitutional matters at the Supreme Court level.<sup>14</sup> It is important to make clear, however, that this exception is not relevant for vertical stare decisis on constitutional matters. With vertical stare

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most authoritative work on stare decisis is Sir Rupert Cross’s *Precedent in English Law*. See RUPERT CROSS & JIM W. HARRIS, *PRECEDENT IN ENGLISH LAW* (J.W. Harris ed., 4th ed. 1991).

12. The “central case” is “the state of affairs referred to by a theoretical concept in its focal meaning. . . . So there are central cases, as Aristotle insisted, of friendship [and of stare decisis!], and there are more or less peripheral cases (business friendship, friendship of convenience, cupboard love, casual and play relations, and so on . . .).” FINNIS, *supra* note 1, at 10-11.

13. H. L. A. HART, *THE CONCEPT OF LAW* 10-11, 16, 213, 217-18 (Oxford U. Press, 2d ed. 1994).

14. The reasons for the exclusion of constitutional questions from horizontal stare decisis at the level of the Supreme Court are provided in Justice Brandeis’s famous dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932). At *The Jerusalem Congress*, Vernon Palmer was struck by my choice of the word “exclusion” in this context. Perhaps it is more felicitous to say, as I do in the text to this footnote, that horizontal stare decisis does not apply, *strictly speaking*, to constitutional matters at the level of the Supreme Court.

decisis, courts are bound by the decisions of superior courts regardless of the subject matter.

The exclusion of constitutional questions from horizontal stare decisis at the level of the United States Supreme Court reinforces the idea that, while vertical stare decisis functions more as a matter of principle, horizontal stare decisis is more a matter of policy. Famous dicta written by Justice Brandeis of the United States Supreme Court, such as “[s]tare decisis is not . . . [a] universal inexorable command”<sup>15</sup> and “[s]tare decisis is usually the wise policy,”<sup>16</sup> are better understood with the premise that horizontal stare decisis is a matter of policy. It is the “wise policy,” but only “usually.” It is a “command,” but not an “inexorable” one. Regardless of their seemingly universal grandeur, these phrases were coined (and subsequently cited *ad infinitum*) in cases dealing with horizontal stare decisis, not vertical stare decisis.<sup>17</sup> And that is because it is not true that vertical stare decisis is *usually* the wise policy; rather, it is something closer to an *inexorable command*. In essence, it is a matter of law, not a matter of policy, and a legal obligation rather than a moral guideline.<sup>18</sup>

Let us now turn to the Argentine legal system and analyze how precedent works at both the horizontal and vertical levels. If in the United States vertical stare decisis is a matter of principle, in Argentina it is merely a matter of “soft principle.” If in the United States horizontal stare decisis is a matter of policy, in Argentina it is a matter of policy, albeit a relaxed policy.

Whereas in the United States there is an obligation to follow applicable decisions of higher courts of the same jurisdiction, in Argentina there is a soft obligation to do so. “Soft obligation” looks like an oxymoron, but it summarizes the truth of the matter.<sup>19</sup> For even though there is no constitutional rule or custom providing for stare decisis, lower courts in Argentina, both

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15. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932).

16. *Id.* at 406.

17. See Legarre & Rivera, *supra* note 10, at 576 n.55 (providing a list of such cases).

18. John Finnis, *Natural Law and Legal Reasoning*, in ROBERT P. GEORGE, *NATURAL LAW THEORY* 134–57 (Oxford U. Press 1992).

19. In Spanish the right expression appears to be “obligatoriedad atenuada.” See Santiago Legarre & Julio C. Rivera, Jr., *La obligatoriedad atenuada de los fallos de la Corte Suprema y el stare decisis vertical*, 2009-E L.L. 820, 821 (2009) (Arg.).

federal and provincial,<sup>20</sup> look at the Argentine Supreme Court's decisions and generally follow them. Although lower courts consider that there is no constitutional obligation to do so, it is indeed rare that a lower court would decide a case without first checking on the Argentine Supreme Court's view on the matter. It is even rarer that a lower court would depart from that view, although on occasion one does.<sup>21</sup>

The Argentine Supreme Court itself reinforces this interpretation of the Argentine judicial system. Although the Argentine Supreme Court has repeatedly asserted that there is no obligation for lower courts to follow its jurisprudence, the assertion always comes accompanied with a warning: lower courts must not rebel against the authority of Supreme Court precedents; otherwise their decisions shall be struck down.<sup>22</sup> In practice, this boils down to the notion that lower courts are bound to check on the Supreme Court's case law and are bound to follow its on-point precedents. But if a given court finds good reason for departing from a supreme jurisprudence, it is entitled to do so. As per the prevailing doctrine of the Supreme Court for the last thirty years or so, a good reason is considered to exist when a lower court finds "new arguments" for deciding the case differently.<sup>23</sup> When a "new argument" exists, the Supreme Court will likely uphold the lower court's decision if the ruling is judicially sound in light of the newly presented arguments.

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20. Argentina has, at least in theory, a federal system much like the United States. Our "provincias" are similar to states. Similarly, they have courts of their own: provincial courts. Furthermore, unlike state courts in the United States, these provincial courts apply some national law, as explained in Santiago Legarre, *A Departure from the Rationale Behind the American System in the Argentine Constitution*, in 16 RECHTSGESCHICHTE, ZEITSCHRIFT DES MAX-PLANCK-INSTITUTS FÜR EUROPÄISCHE RECHTSGESCHICHTE 85, 86–87 (2010).

21. See Julio C. Rivera, Jr. & Santiago Legarre, *La obligatoriedad de los fallos de la Corte Suprema de Justicia de la Nación desde la perspectiva de los tribunales inferiores*, in LA PRIMACÍA DE LA PERSONA 1109 (Jaime Arancibia Mattar & José Ignacio Martínez Estay eds., Legal Publishing-AbeledoPerrot 2009) (explaining this issue at length and with more nuances).

22. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 6/10/1948, "Santín, Jacinto c. Impuestos Internos / recurso extraordinario," Fallos de la Corte [Fallos] (1948-212-51, 59) (Arg.).

23. On this question the following case is emblematic and it has been consistently followed, at least in theory: Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 4/7/1985, "Cerámica San Lorenzo s. incidente de prescripción/ recurso extraordinario," Fallos de la Corte [Fallos] (1985-307-1094) (Arg.).

Such a system of soft vertical stare decisis is not really stare decisis.<sup>24</sup> With true stare decisis, a lower court could not legally depart from a prior on-point precedent by claiming the existence of “new arguments.” Instead, it is eventually for the higher court, itself, to consider whether those new arguments deserve an overruling of its own precedent. At the same time, a system of soft vertical stare decisis, such as the Argentine system, differs from the typical civil law system. In the latter, “there is no such thing as precedent,” as a Louisiana judge cleverly put it.<sup>25</sup> Instead, in the Argentine system, lower courts treat decisions of the Supreme Court as generating a prima facie obligation to obey; the Supreme Court accepts the existence of this prima facie obligation. This is true despite the fact that the Supreme Court may release a lower court from that obligation when the lower court finds “new arguments” that call for a departure from a given precedent. Even though the “new arguments” idea would require an independent, more elaborate explanation, which would include examples, I note here that it is different from the common law idea of “distinguishing.” Whereas the latter has to do with facts (and factual differences), “new arguments” have to do with law (and differences of legal interpretation).

Let us now analyze how the policy of horizontal stare decisis works in Argentina. As I have already expressed above, this policy is somewhat more relaxed in Argentina than in the United States. But it is still a policy that makes Argentina a unique piece within the civil law world.

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24. Professor Garro, an Argentine colleague who teaches at Columbia University in New York City, is of a similar view. Alejandro M. Garro, *Eficacia y autoridad del precedente constitucional en América latina: las lecciones del Derecho Comparado*, 1989-I REVISTA JURÍDICA DE BUENOS AIRES 22, 23 (1989) (Arg.). This is also the view of Alberto F. Garay and Alejo Toranzo, even if their reasons are not identical to mine. See *Los efectos de las sentencias de la Corte Suprema de Justicia de la Nación*, 2005-IV J.A. 1093, 1094 (2005) (Arg.). But the view that I share with Garro, Garay, and Toranzo is far from unanimous. Respected Argentine scholars think that at the level of the Supreme Court our system is substantially identical to stare decisis. See, e.g., GERMÁN BIDART CAMPOS, II-B TRATADO ELEMENTAL DE DERECHO CONSTITUCIONAL 561 (Ediar, 3rd ed. 2004); Néstor Pedro Sagüés, *Eficacia vinculante o no vinculante de la jurisprudencia de la Corte Suprema de Justicia de la Nación*, 93 E.D. 891, 892 (1981) (Arg.); ALBERTO B. BIANCHI, 1 CONTROL DE CONSTITUCIONALIDAD 353 (Ábaco, 2d ed. 2002).

25. The quote is part of an interesting survey of Louisiana judges. See Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775, 810 (2005).

Again, there is no constitutional rule or custom providing for horizontal stare decisis. However, at the appellate level, including the Supreme Court, courts tend to follow prior decisions and treat them, to some extent, as precedent. Whereas in a prototypical civil law court the tribunal would decide every case from scratch, an Argentine court would typically first look at its own precedent before rendering a decision. The statute on point would be the first and, at least in theory, the only concern of a civil law court. In practice, this is not so with an Argentine court. This is especially true of the Argentine Supreme Court, where a crucial element of litigation consists of pointing the Court toward its own prior on-point decisions.

Furthermore, there is no exception regarding constitutional matters at the Argentine Supreme Court (unlike what happens in the United States). The Argentine supreme tribunal has never held that constitutional matters are excluded from horizontal stare decisis. Horizontal stare decisis, however, has never been formally adopted by the Supreme Court. There has not been a “practice statement,” like the one provided by the House of Lords in the United Kingdom.<sup>26</sup> Nor has there been a uniform pattern on the question, like one can gather from the jurisprudence of the United States Supreme Court. Nevertheless, the tendency to follow prior decisions and to treat them as precedent exists.<sup>27</sup> So horizontal stare decisis is considered the de facto wiser policy, even if it is somewhat relaxed. This relaxation is even more noteworthy when political interferences occur.

#### IV. POLITICAL INTERFERENCES

Political interferences affect both horizontal and vertical stare decisis. They confirm the somewhat relaxed nature of the horizontal stare decisis policy, and they prove that the principle of vertical stare decisis is much weaker in Argentina than in the common law world.

Before explaining what I mean by “political interferences,” it might be useful to expose what might be the Achilles’ heel of the Argentine system of judicial review. Countries that have adopted

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26. [1966] 1 WLR 1234, *available at* <http://www.uniset.ca/other/cs2/19661WLR1234.html>. For an explanation of the “practice statement” see CROSS & HARRIS, *supra* note 11, at 102–08, 114–15.

27. See e.g., Alberto F. Garay, *El precedente judicial en la Corte Suprema*, 1 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO 51, 57-59; 76-77 (1997) (Arg.).



a system of judicial review—that is, the vast majority of Western countries—have either concentrated in one court (normally called the “Constitutional Tribunal”) the power to strike down legislation on account of its unconstitutionality, or granted that power to all the courts of the system, topping it with a Supreme Court whose decisions bind lower courts under the principle of vertical stare decisis (a system commonly called “decentralized”). Both systems grant (or purport to grant) a certain uniformity and clarity in the interpretation of constitutional law. The former, sometimes known as the German system, achieves this through the “*erga omnes*” effect of the decisions of the Constitutional Tribunal. The latter, sometimes called the American system, achieves this through the effect of vertical stare decisis on the decisions of the Supreme Court.<sup>28</sup>

Argentina has apparently chosen a third method of judicial review: a decentralized system, much like the American system, but without a formal recognition of vertical stare decisis. By so doing, it may well have forfeited those universal “*desiderata*” of uniformity and clarity that both systems strive to achieve. For it could happen—and it does happen—that the Argentine Supreme Court rules on a given constitutional point, but the lower courts do not follow suit. The soft obligation doctrine, which permits departure from higher precedent under certain circumstances, opens the door to this possibility. Furthermore, if the constitutional point in question is permeable to political interferences, there is a further reason to foresee tension on the horizon. When political interferences occur, the soft, vernacular version of vertical stare decisis is at its weakest.

Let me make clear that by “political interferences” I do not mean undue meddling in the judicial process by those who run the country, e.g. the political branches, executive and legislative. I am thinking now within the realm of legality. Even within it, some cases—sometimes termed “hot” cases by the press—are of such a pressing social relevance that ideology and public sentiment often times slip into the reasoning of the judge. It is in such cases that the principle of soft vertical stare decisis suffers most. So it could happen—and it has happened—that Argentine judges ignore or, even worse, blatantly contradict Supreme Court precedent.

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28. See MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 132 (Clarendon Press 1989).

Two examples are in order. First, an illustration related to the economy. In the *Bustos* case,<sup>29</sup> the Argentine Supreme Court upheld a government policy (issued under dramatic circumstances) of transforming deposits in U.S. dollars into deposits in the national currency at an arbitrary conversion rate that diverged widely from the U.S. dollar value in the free market. As a consequence of this policy, people who had deposits in banks would receive half, or less, of the prior value of their deposits.<sup>30</sup> The policy and the Court's decision supporting it aroused the outrage of many, and innumerable public demonstrations ensued. Countless lower courts disobeyed the Supreme Court's decision.<sup>31</sup> Even when those courts provided legal reasons, it was clear that the principle of soft vertical stare decisis was out of the question.

Second, an illustration less related to the economy. In *Bazterrica*,<sup>32</sup> the Argentine Supreme Court struck down a piece of legislation that made it a crime to possess drugs, such as marijuana and others, for personal use. It grounded the decision on privacy and autonomy. The Court's decision divided the public opinion in a highly passionate fashion. Many lower courts disobeyed; again, even if legal reasons were offered, no significant consideration of the soft vertical stare decisis principle had any place whatsoever in the discussions.

It goes almost without saying that the policy of horizontal stare decisis can be quashed by political interferences. The two examples just described above are instructive. The decision by the Supreme Court in *Bustos* silently overruled a prior decision on point by the same Court,<sup>33</sup> and it was partially overruled by a new case five years later.<sup>34</sup> Neither case contained much

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29. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/10/2004, "*Bustos c. Poder Ejecutivo Nacional / amparo*," Fallos de la Corte [Fallos] (2004-327-4495) (Arg.).

30. *Id.*

31. José Sebastián Elías, "*Massa*" y la saga de la "*Pesificación*": lo bueno, lo malo y lo feo, 2008-II J.A. 1326, 1327 (2008) (Arg.).

32. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 29/8/1986, "*Bazterrica, Gustavo s/ tenencia de estupefacientes/ recurso extraordinario*," Fallos de la Corte [Fallos] (1986-308-1412) (Arg.).

33. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 5/3/2003, "*Provincia de San Luis c. Estado Nacional/ acción de amparo*," Fallos de la Corte [Fallos] (2003-326-417) (Arg.).

34. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/12/2006, "*Massa c. Poder Ejecutivo Nacional/ recurso extraordinario*,"

discussion of horizontal precedent. Likewise, *Bazterrica* overruled a case on point that had been rendered four years earlier, only to be overruled itself by the *Montalvo*<sup>35</sup> case, decided (quite symmetrically) four years later. In a seemingly never-ending story, *Montalvo* was recently overturned in the *Arriola*<sup>36</sup> case, due primarily to personnel changes on the Supreme Court.<sup>37</sup>

These fluctuations show that horizontal stare decisis is hardly a policy at all in Argentina when it comes to what I have termed “political interferences.” Or, to put it less dramatically, the relaxed, vernacular version of the horizontal stare decisis policy is at its weakest when political interferences occur.

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Fallos de la Corte [Fallos] (2006-329-5913) (Arg.).

35. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/12/1990, “Montalvo, Ernesto s/ tenencia de estupefacientes/ recurso extraordinario,” Fallos de la Corte [Fallos] (1990-313-1333) (Arg.).

36. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 5/5/2009, “Arriola, Sebastián s/ tenencia de estupefacientes/ recurso extraordinario,” Fallos de la Corte [Fallos] (2009-332-1963) (Arg.).

37. See Santiago Legarre, *Tenencia de drogas para uso personal y estabilidad de la jurisprudencia: ‘Colavini’, ‘Bazterrica’ ... ¿y la Corte actual ‘estará a lo decidido’ en Montalvo?*, 2006-D L.L. 299, 312 (2006) (Arg.).