

# A DOCTRINE OF PRECEDENT IN THE MAKING: THE CASE OF THE ARGENTINE SUPREME COURT'S CASE LAW

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## INTRODUCTION

In Argentina, federal courts, and the Supreme Court in particular, ground their decisions on past precedent. It is my view that once today's courts begin to use prior decisions as support for their own decisions, they must decide many problems peculiar to this way of grounding a decision: in precedent. The problem encountered is that the Civil Law tradition, to which Argentina belongs, cannot solve problems using tools created to deal with codes and legislative acts. The courts need specific weaponry for that purpose. I submit that one should prudently and intelligently look to the Common Law tradition in order to see how this approach copes with similar questions. In this essay, I will attempt to describe some characteristics of the Argentine legal process, specifically how the Supreme Court deals with cases. To aid in that description, I will highlight situations that show the need for a common theoretical framework and procedure to face that task.

In Part I, I present a brief historic account of Argentina to provide a minimum context for readers who have a scarce knowledge of the country. Those who already have a basic knowledge of the Country's history can comfortably skip this section. Part II identifies Argentina's legal culture as one belonging to the Civil Law tradition. But, at the same time, Argentina received a strong influence from the U.S. Constitutional Law and from 18th and 19th century American thinkers that acted on a fertile but very different soil. Argentina wanted to detach from its Spanish heritage, but all extant law and institutions were Spanish. Those features are indispensable to understand why Argentina is, in fact, a *tertium genus*, something in between both traditions. Part III is devoted to exploring how Argentine courts functioned at that time, the changes the legal community wanted to introduce, and the countries the courts were looking to for inspiration. Part IV examines how the court system, mainly at the Supreme Court level, implemented demands to treat judicial cases alike and to publicize judicial decisions (historically, the Court of Appeals' President kept judicial decisions secret). At the same time, through two paradigmatic examples, I attempt to show how the predominant civil law education of lawyers interferes with this peculiar way of grounding decisions, particularly with regard to notions such as holding, *obiter dictum* and *stare decisis*, and their bearing on the fact of the case.

## I. A BRIEF HISTORIC ACCOUNT OF ARGENTINA

### 1. *The Colonial Times*

In 1536, Pedro de Mendoza discovered and founded Argentina's first Spanish settlement in what we today call Buenos Aires. This settlement was short-lived and was soon destroyed by natives. In 1580, a fort was again erected, this time by Juan de Garay who then re-founded the city. For the next several hundred years, the Spanish crown ruled the land. Two centuries later, in 1776, Spain established the Viceroyalty of Río de la Plata, which covered Argentina, Uruguay, the southern part of Brazil, Paraguay, Bolivia and the northern part of Chile. In 1806 and 1807, Buenos Aires repelled two British invasions. A few years later, in 1810 and in the light of the fall of King Fernando VII of Spain at the hands of Napoleon Bonaparte, the local forces refused to be ruled by the Viceroy (which governed the Viceroyalty in the name of the deposed King) and voted for a new government occupied by local residents. The Spanish authorities resisted this action and war spread throughout and beyond the Viceroyalty. Finally, in 1816, local forces definitively defeated the royal troops and declared independence from Spanish reign. This creole army, led by General José de San Martín, also

supported and significantly contributed to the independence of Chile, Perú, Ecuador and Venezuela.

Several ideological trends emerged during this period. On the one hand, the inherited Spanish legal and political institutions remained the dominant ideology. On the other hand, the ideas of Montesquieu and the French Revolution, Rousseau, the Social Compact and liberal European principles began to influence some Argentine minds more inclined to a centralized government, as had been the rule since colonial times. At the same time, the powerful local Caudillos that in fact ruled the provinces were more inclined to populist, autonomous rule. These trends, opposite in many respects, soon paved the way to a clash that lasted approximately thirty-six years. This clash is characterized by the development of two frustrated national Constitutions (1819 and 1826), national anarchy, civil revolts and dictatorship (from 1829 to 1852) that restricted the press, neglected education, confiscated property and persecuted political opponents into execution or exile. In the midst of such conflict and despite the dictatorship rule, a young group of intellectuals gathered around poet, writer and public figure of the time, Mr. Esteban Echeverría, to discuss legal and political ideas and philosophy. These intellectuals comprised the so-called Generation of 1837, which was committed to liberal principles, private property and representative government, and laid the roots from which a unified and democratic nation could grow.

## *2. The Argentine Constitutional Framework*

In 1852, after Justo José de Urquiza defeated dictator Juan Manuel de Rosas (in power since 1829), young jurist, Juan Bautista Alberdi, prepared a draft national constitution. The document, “Bases and Starting Points for National Organization,”<sup>1</sup> is a profound study of Argentine history, and in its final pages offered a draft National Constitution that was modeled mainly upon the United States Constitution and European ideas. Alberdi’s draft strongly influenced the framers of the Constitution, which was finally approved in 1853. The Constitution, despite its novelty, maintained certain colonial political structures, following the path of previous Argentine constitutions. Thus, even though the Constitution established a federal system, it conferred large powers to the President, National Congress and

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1. JUAN BAUTISTA ALBERDI, BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACIÓN NACIONAL 15, IN X OBRAS SELECTAS (Librería de la Facultad de Juan Roldán ed. 1920). For a quick historical background that preceded the Constitution enacted in 1853, see JOAQUÍN V. GONZÁLEZ, MANUAL DE LA CONSTITUCIÓN ARGENTINA 24 (Ángel Estrada y ca., 1897); and JULIO B. LAFONT, 2 HISTORIA DE LA CONSTITUCIÓN ARGENTINA (El Ateneo ed. 1935).

Federal Courts, and facilitated a centralized government. Buenos Aires, the largest and wealthiest Province, did not agree with the Constitution's terms because of competing economic and political interests – a disagreement that brought about serious confrontations between Buenos Aires and other Provinces. As a result of that tension, Buenos Aires ultimately seceded from the confederation, giving birth to several years of political disputes and a civil war. Finally, once Urquiza's forces were defeated in the battle of Pavón in 1859, the Province of Buenos Aires agreed to join the Argentine Confederation.

As a predicate to membership, Buenos Aires required a Constitutional Convention to reexamine the National Constitution of 1853. In 1860, the National Convention adopted many of the Buenos Aires Constitutional Convention's proposed amendments, this time remarkably inspired by the United States Constitution. In this adoption, the amendments curtailed some national powers that favored provincial governments and narrowed the federal courts' jurisdiction.

### *3. The United States Influence on the Argentine Constitution of 1853-1860*

The U.S. Constitution, and the federal jurisdiction established therein, exerted a powerful influence on the Argentine Constitution.<sup>2</sup> Both the U.S. Constitution and Argentine Constitution of 1853-1860 establish a republican form of government based on the principle of separation of powers. The federal system adopted by the Argentine Constitution is an attenuated version of the American system: The National (or Federal) Government has certain powers and the Provinces retain all those powers not delegated to the former or expressly reserved by the Provinces for themselves.

The organization of the federal judicial power under the Argentine Constitution is strikingly similar to that of the United States Constitution. As in the United States, Argentina has both federal and provincial court systems with a National Supreme Court as the high court of the federal system. Specifically, Article 108 of the Argentine Constitution vests the judicial

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2. For a comprehensive study on the sources of the Argentine Constitution, see MANUEL JOSÉ GARCÍA-MANSILLA & RICARDO RAMÍREZ CALVO, *LAS FUENTES DE LA CONSTITUCIÓN NACIONAL Y LOS PRINCIPIOS FUNDAMENTALES DEL DERECHO PÚBLICO ARGENTINO* (2006). The fundamental documents of the United States (the Declaration of Independence, the Articles of Confederation, the U.S. Constitution and the constitutions of several states) have been known in the Río de la Plata since approximately 1811 due to the distribution of Thomas Paine's *COMMON SENSE AND OTHER WRITINGS*. See *LA INDEPENDENCIA DE LA COSTA FIRME JUSTIFICADA FOR THOMAS PAINE TREINTE ANOS HA 151-253* (Manuel García de Sena trans., 1811); Ricardo Zorraquín Becú, *La Recepción de los Derechos Extranjeros en la Argentina Durante el Siglo XIX*, *REVISTA DE HISTORIA DEL DERECHO*, INSTITUTO DE INVESTIGACIONES DE HISTORIA DEL DERECHO 325, 329 (1976).

power in one Supreme Court and inferior tribunals. According to Article 110, the justices of the Supreme Court and of the lower courts shall hold office as long as they maintain their good behavior and shall receive for their services a compensation that shall be determined by law and which, according to the Argentine Charter, cannot be diminished “in any way” during their tenure. Articles 116 and 117 further establish the jurisdiction of the federal courts. Article 116 is cast in terms nearly identical to Article III, Section 2 of the United States Constitution.

These similarities were not accidental. One reason the National Convention amended the 1853 Constitution in 1860 was to follow the track the United States Constitution, which at that time was generally acknowledged as the best ideological framework carried to fruition. Without the U.S. background, the Argentine Constitution would have contained many meaningless sections.

This same modeling similarly appears with respect to the Supremacy Clause, contained in Article 31 of the Argentine Constitution and Article VI of the U.S. Constitution. In both Constitutions, the Federal Constitution is specifically designated to be the supreme law of the Nation. But neither document expressly established who or what body is empowered to decide, with final authority, whether a piece of legislation, federal or provincial, speaking broadly, is contrary to the former. This notwithstanding, both Supreme Courts, based on similar reasoning, have considered that the power of judicial review was embodied in the Constitution. More specifically, the Argentine Supreme Court has heavily relied on the famous U.S. case *Marbury v. Madison*<sup>3</sup> and its progeny to affirm the power of courts to determine the constitutionality of legislation.

When interpreting Article 116 of the Argentine Constitution, the Argentine Supreme Court has referenced U.S. constitutional case law and discussions relating to Article III of the United States Constitution. In fact, in one of its earliest decisions rendered in 1865, the Supreme Court of Argentina stated that there was no basis to believe that the drafters of the Argentine Constitution had Spanish legislation in mind when drafting the Argentine Constitution. The Court stated that it was evident that the Argentine framers sought to imitate the Constitution of the United States. Therefore, the Court looked to United States constitutional principles and case law in order to properly determine the scope of Argentine federal courts' jurisdiction.<sup>4</sup>

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3. 1 Cranch 137 (1803).

4. *Gómez c. La Nación*, Corte Suprema de Justicia de la Nación [CJSN] [National Supreme Court of Justice], Apr. 24, 1865, Fallos 2:36 (1865) (Arg.).

Due to the foregoing reliance on United States Supreme Court precedent and bearing in mind that the first statute regulating Argentine Supreme Court appellate jurisdiction also drafted took into account the first United States Judiciary Act, Section XXV, of 1789,<sup>5</sup> several North American judicially created doctrines have also fructified in Argentine soil. Specifically, it is worth mentioning certain jurisdictional requirements that regularly serve the purpose of limiting the access to the federal judicial power. Among those requirements are the doctrines of standing (plaintiff must demonstrate that he or she has suffered or imminently will suffer an injury),<sup>6</sup> mootness (the dispute between the parties must be an actual one even though such controversy might have existed at one time),<sup>7</sup> ripeness (the dispute must not be premature for review or has not yet occurred),<sup>8</sup> advisory opinions (there must be an actual dispute between adverse litigants)<sup>9</sup> and political questions (conflicts that the court considers to be out of its constitutional reach and that

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5. In 1860, the government committed a young lawyer, Manuel Rafael García, to Washington D.C., in order to learn how the federal judiciary had been organized in the United States. As a result of that study travel García wrote a series of articles where he analyzed the Judiciary Act of 1789 and the sections that could be adapted to our system. President Mitre handed down some of those studies to *La Revista de Buenos Aires* for publication. See, for instance, *Estudios sobre Derecho Federal Jurisdicción de las Cortes de Distrito*, 260, 1 *La Revista de Buenos Aires* and *Estudios sobre la Justicia Federal Americana. En su Aplicación a la Organización Constitucional Argentina* 94, X *La Revista de Buenos Aires*. García also wrote a book on that very subject. See ESTUDIOS SOBRE LA APLICACIÓN DE LA JUSTICIA FEDERAL NORTE AMERICANA A LA ORGANIZACIÓN CONSTITUCIONAL NACIONAL (Imprenta de Andrés Bettini, Florencia ed., 1863).

6. *Compañía Sancinea de Carnes Congeladas c. La Municipalidad de la Capital*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 6, 1920, Fallos 132:101 (1920). (Arg.)

7. Law No. 27, art. 2, promulgated Oct. 13, 1862 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=116333>; de Oca, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 27, 1865, Fallos 1:455 (1864) (Arg.); Silverio Bejarano, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 31, 1872, Fallos 12:372 (1872) (Arg.); Vitón c. Ugarte, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 12, 1905, Fallos 103:53 (1905) (Arg.).

8. *Bermay y otro c. H.J. Navas y Cía. S.A.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 20, 2005, Fallos 328:3373 (2005) (Arg.); de Majo c. ANSeS, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 28, 2008, Fallos 331:2353 (2008) (Arg.).

9. See Senator Zapata statements as to the jurisdiction of the federal courts, Argentine Senate Chamber 222, year 1857. Dr. D. José Roque Pérez, en representación de la Provincia de Mendoza, reclama de una sanción del Senado de la República, que anuló la elección de un legislador hecha por la Legislatura de aquella, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], October 26, 1865, Fallos: 2: 253 (1865) (Arg.); Guillermo H. Moores y otros representantes de empresas de Tramways, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], August 5, 1886, Fallos: 30: 281 (1886) (Arg.); Procurador Fiscal del Juzgado Federal de Salta, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], February 10, 1930, Fallos: 156: 318 (1930) (Arg.).

must be decided exclusively and with finality by the political branches).<sup>10</sup> Apart from the foregoing cases, which may be raised by the court *sua sponte* or *ex officio*, the general rule is that constitutional issues must have been timely raised by the parties to the lawsuit, though this principle may have been narrowed in recent times.<sup>11</sup>

Furthermore, it must be highlighted that during the first twenty-five years of Argentine constitutional jurisprudence, express legislative commands required Spanish translations of many books on United States constitutional law authored by George T. Curtis, Luther S. Cushing, Frederick Grimke, James Kent, Francis Lieber, George W. Paschal, John N. Pomeroy, Joseph Story and the famous *The Federalist Papers*.<sup>12</sup> The Argentine Supreme Court frequently cited these works, as did inferior courts, newspapers, and the Argentine Congress.

However, there is a remarkable difference between the United States and the Argentine constitutional systems resulting from Article 67, Section 11 of the Argentine Constitution of 1853-1860 (today Article 75, Section 12). This provision expressly authorizes the Argentine Congress to enact national civil, commercial, penal, mining and labor codes and social security laws. Once the Argentine Congress enacts a code, the provinces are barred from regulating matters covered by the law. This provision is peculiar to the Argentine Constitution and recognizes its pedigree in European ideas. On one hand, Spanish law governed colonial Argentina, with some laws specially enacted for the colonies (*Leyes de Indias*, *Novísima Recopilación de Leyes de España*, *Ley de Partidas*, etc.). Thus, the argument goes as follows: In matters of civil, commercial, penal and mining concern, among others, Argentine culture dictated general rules for the whole country, despite its vast territory, and the federal system adopted. On the other hand, the code methodology was considered the best way to commit this enterprise due to French influences, particularly the Napoleon Code.

Argentina consequently enacted the Civil Code (in effect since 1871) that was considered, as in many other Civil Law jurisdictions, the spine of

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10. Cullen c. Llerena, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 7, 1893, Fallos 53:420 (1893) (Arg.).

11. See *infra*, Part IV.3.3.

12. See Law No. 55, promulgated Sept. 27, 1855 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=280931>; Law No. 109, promulgated Sept. 28, 1864 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=281084>; Law No. 375, promulgated June 17, 1870 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=281340>; Law No. 380, promulgated July 8, 1870 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=281345>; Law No. 501, promulgated May 28, 1872 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=281450>; Law No. 616, promulgated Sept. 3, 1873 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=281558>.



the law.<sup>13</sup> However, in order to attenuate its centralist force, this section contains a clause by which judicial cases grounded on those codes will be litigated in provincial courts if the case falls within their jurisdiction. So, provincial courts are sovereign in interpreting these codes and, according to Article 100 (Article 116 today) of the Constitution, cases arising under them will not be reviewed by the Argentine Supreme Court despite being enacted by Congress.<sup>14</sup>

As is apparent from this quick survey, and apart from those provisions that were taken from or inspired by Argentine colonial past and European ideas, the United States Constitution and U.S. constitutional law influence has been deep and remarkable since the start of Argentina's founding as a constitutional and independent state. This influence is notorious in Argentina's constitutional text and Supreme Court precedents, and on which I will retake further below.<sup>15</sup>

#### *4. European and Latin American Influences on the Argentine Constitutional Text*

The Executive Power, exercised by a President, is an idea taken from the United States Constitution. But Argentine presidency holds much more power than in the United States. This difference is due to the Framers' reliance on Argentina's centralist past and culture.<sup>16</sup> On the other hand, the

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13. The Civil Code and the Commercial Code were recently restated and fused in the National Civil and Commercial Code, in effect since August 1st, 2015.

14. See CONSTITUCIÓN NACIONAL [CONST. NAC.] ART. 116 (Arg.), <http://servicios.infoleg.gov.b.ar/infolegInternet/anexos/0-4999/804/norma.htm>. Article 116, translated into English, states as follows:

The Supreme Court and the inferior federal tribunals of the nation have jurisdiction over and decide all cases dealing with matters governed by the Constitution and the laws of the Nation, with the exception provided by article 75 (12); and by treaties with foreign nations; all suits affecting ambassador, public ministers and foreign consuls; with cases in admiralty and maritime jurisdiction; with cases to which the Nation is a party; with cases between two or more provinces; between one province and citizens of another province; between citizens of different provinces; and between one province or its citizens against a foreign State or citizens.

*Id.* ("Corresponde a la Corte Suprema y a los tribunales inferiores de la Nación, el conocimiento y decisión de todas las causas que versen sobre puntos regidos por la Constitución, y por las leyes de la Nación; , con la reserva hecha en el inciso 12 del artículo 75; y por los tratados con las naciones extranjeras; de las causas concernientes a embajadores, ministros públicos y cónsules extranjeros; de las causas de almirantazgo y jurisdicción marítima; de los asuntos en que la Nación sea parte; de las causas que se susciten entre dos o más provincias; entre una provincia y los vecinos de otra; entre los vecinos de diferentes provincias; y entre una provincia o sus vecinos , contra un Estado o ciudadano extranjero.").

15. See Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 AM. U. L. REV. 1483 (1997) (providing an exhaustive survey of Argentina's reliance on U.S. texts); GARCÍA-MANSILLA & CALVO, *supra* note 2.

16. ALBERDI, *supra* note 1, at 166.

Argentine Constitution of 1853-1860 contains a vast and generous declaration of individual rights and guarantees including the following: freedom of association, freedom of expression and freedom of the press without prior censorship (Article 14); the right to private property (Article 17, ¶ 1); the right to just compensation in cases of expropriation for causes of public use (Article 17, ¶ 2); freedom of the press (Article 23); and the right of defense and the right to be trialed by permanent courts and not by special “ad hoc” commissions (Article 18). The domicile, written communications and private papers shall not be violated, and an act shall establish in what cases and under what circumstances their search and occupation shall be authorized (Article 18). Further, no person shall be obligated to testify against himself (Article 18); and no person shall be arrested except upon a written order issued by competent authority nor shall be punished without a previous trial according to the law in effect at the time of the charged facts (Article 18).

The Constitution also guaranteed the abolition of slavery, humane treatment of prisoners and suppression of the death penalty for political crimes (Articles 15 and 18). The Constitution further establishes equal protection of the law for “all” of Argentina’s “inhabitants” (Article 16). These rights and guarantees are explicitly granted to foreigners, including the freedom of religion (Article 20). Article 19, inspired by French ideas, establishes that no person is obligated to perform what the law does not require, nor can any person be prohibited from doing what the law does not forbid. This Article also provides that private actions that neither offend public morality nor harm third persons are exempt from the magistrate’s judgment and reserved only to God. Moreover, Article 33, directly inspired in the Ninth Amendment of the U.S. Constitution and the natural rights doctrine, provides that the enumeration of all the above referred rights could not be construed as a denial of other unenumerated rights. It further guarantees the republican form of government, born from the sovereignty of the people’s principle.

As the foregoing discussion demonstrates, the Argentine Constitution contains a comprehensive Bill of Rights intended to wipe out old, specific and indigenous practices (e.g., the death penalty for political reasons, torture, inhumane treatment of prisoners, confiscation of property, trial by *ad hoc* commissions, etc.). Some of these rights were not expressly included in the United States Constitution at that time (1860) and others were mainly inspired by The French Declaration of the Rights of Man and of the Citizen of 1789.

Argentine legal culture is and has also been strongly influenced by Civil Law countries. French law is the root of Argentine civil law. Administrative

law is an area that received different influences from France, Spain and, in minor degree, Germany and Italy. Commercial law (commercial papers, corporations and bankruptcy) and Procedural law have historically incorporated multiple European influences, mainly from Spain and Italy. Moreover, Argentine scholars frequently rely on novel European developments in these areas.

### *5. Further Constitutional and Political Developments*

The so-called 1853-1860 Constitution remained in force with very small amendments until 1949 when Perón's government proposed and obtained several crucial reforms. After Perón was overthrown by a *coup d'état* in 1955, the revolutionary government nullified the reforms and reinstated the 1853-1860 Constitution. In 1957, a National Convention decided to maintain the 1853-1860 Constitution and introduced a new amendment that incorporated the so called "social" rights (for example, participation of employees in the companies' profits; same work-same salary right; right to associate to free and democratic workers unions; right to minimum wages; right to paid vacations; and right to pension.). It is noteworthy that the Supreme Court considers Article 14, the clause incorporating these rights, as non-self-operative. Thus, intervening laws are necessary for the rights to become effective. The Constitution was amended once again in 1994. This time, the basic structure of individual rights and institutions were left untouched, but the amendments incorporated new rights, institutions and the supremacy of some international treaties.<sup>17</sup>

## II. ARGENTINE CIVIL LAW TRADITION

It is commonly said that Latin American countries, Argentina among them, belong to the Continental, Civil or Roman Law tradition, as opposed to the Common Law tradition. Inherent in this comparison is the often repeated idea that in our legal systems a judgment is not a source of law. Instead, as the argument goes, a judgment decides a conflict between parties by applying pre-existing law – statutes, executive orders, administrative general regulations, municipal ordinances and many other general regulations enacted by the political branches of government, whether federal, provincial or municipal. So, the "law" applied by courts, generally speaking, emanates from the political branches, not from the judicial branches.

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17. Alejandro M. Garro, *Judicial Review of Constitutionality in Argentina: Background Notes and Constitutional Provisions*, 45 DUQ. L. REV. 409, 410-11 (2007); Néstor Pedro Sagüés, *An Introduction and Commentary to the Reform of the Argentine National Constitution*, 28 U. MIAMI INTER-AM. L. REV. 41, 56 (Keith S. Rosenn trans., 1996).

Lawyers today know that this notion is an exaggeration, for it does not accurately describe what judges actually do today. In fact, judges have a considerable margin of creation from principle, in cases not specifically regulated by statutory law. These principles evolve from controversies in a which solution depends on the application of standards or a reinterpretation of ambiguous or vague rules. Nevertheless, the preconception that judges only apply pre-existing law remains in force and continually operates in the background of legal understanding.

Related to the idea that judges only apply the law, is the concept that judges are, in Montesquieu's terms, "the mouth of the law;" a notion entrenched in this tradition and consolidated by the process of codification that followed the Napoleon Code of 1804.<sup>18</sup> According to the Napoleon Code, the judge's only function is to decide legal controversies by applying rules enacted by the legislator. The general opinion was that the legislative body was the authentic interpreter of the law.<sup>19</sup> This idea fructified not only because Argentine jurists of the time knew Montesquieu's Spirit of the Law, but also because after the independence, as in France after the 1789 Revolution,<sup>20</sup> the Bar greatly distrusted the Administration of Justice.

Finally, though a judgment is not a source of law, judges and continental lawyers share another legal concept, namely, *jurisprudencia*. Nevertheless, problems arise in attempting to grasp a precise meaning of *jurisprudencia*. Historically, the word was used as a synonym of science of the law,<sup>21</sup> but in today's common parlance, a very general use of this expression is connected to a collection of judicial decisions. Still, on certain occasions, it is employed to refer to the decision adopted in a previous case ("It exists *jurisprudencia* in the sense that . . ."). Other times, one will find the expression related to a previous decision rendered by a court of appeals *en banc*, deciding the meaning or scope of a statute or code's article (*jurisprudencia* or *sentencia*

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18. CHARLES-LUIS DE SECONDAT, BARON DE LA BREDE ET DE MONTESQUIEU, EL ESPÍRITU DE LAS LEYES 194 (Nicolás Estevanés trans., Heliasta 6th ed. 1984) ("Pero los jueces de la nación, como es sabido, no son más ni menos que la boca que pronuncia las palabras de la ley, seres inanimados que no pueden mitigar la fuerza y el vigor de la ley misma.").

19. Abelardo Levaggi, *La Interpretación del Derecho en la Argentina del Siglo XIX*, 7 REVISTA DE HISTORIA DEL DERECHO 23 (1980).

20. See generally JOHN P. DAWSON, THE ORACLES OF THE LAW 263 (William S. Hein & Co. ed. 1968) ("My thesis will be that modern French Theories as to the role of judges are not a reflection of Roman law but a reaction against the excessive power and pretensions of the French judiciary under the old regime.").

21. See Víctor Tau Anzoátegui, *Los Orígenes de la Jurisprudencia de los Tribunales en la Argentina* 319, in 6 REVISTA DE HISTORIA DEL DERECHO, INSTITUTO DE INVESTIGACIONES DE HISTORIA DEL DERECHO (1978), <http://inhide.com.ar/portfolio/revista-de-historia-del-derecho-no-6-ano-1978/>.

*plenaria*). Typically, authors do not spend time in clarifying in what sense they use the word.

In Argentina, prestigious scholars have given their own meaning to the word *jurisprudencia*. Carlos Nino, a legal philosopher, said that:

As to precedents, it is obvious that in our system (of European continental kind) they don't have a decisive relevance. In our country judges look for guidance in the *jurisprudencia* but generally speaking they don't consider that precedents have imperative force over future decisions. On the other hand, in our country the 'jurisprudencia' . . . is not established with only one decision, but it is necessary a set of consonant decisions.<sup>22</sup>

Palacio, a procedural law scholar, considered that "in its more accepted meaning, '*jurisprudencia*' refers to the consonant way in which judicial organs express when deciding similar cases . . . '*jurisprudencia*' lacks the degree of bindingness that a statute has."<sup>23</sup>

These ways of understanding *jurisprudencia* is very similar in other civil law jurisdictions.<sup>24</sup> In all of those jurisdictions, one finds two common ideas, namely, the necessity of repetition of similar cases decided alike and the merely persuasive character of those decisions. As Ruiz Miguel y Laporta has stated, "[A] judgment ignoring or not respecting jurisprudence [rectius, case law] is not considered unlawful, but simply subject to discussion and only to a possible reversal by the Supreme Court."<sup>25</sup> Generally speaking, the same can be predicated in Argentina. These are, in general terms, entrenched ideas that civil law countries commonly share. Of course, the reception and evolution of those ideas may have had a different impact in each jurisdiction. However, it is undeniable that those ideas are part of this legal tradition and operates consciously or unconsciously in its legal background.

As a byproduct of those beliefs, generally speaking and bearing in mind the exception that will be considered further, in the judicial field, continental jurists have systematically neglected the critical analysis and the rationale in

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22. CARLOS S. NINO, INTRODUCCIÓN AL ANÁLISIS DEL DERECHO 152 (Editorial Astrea 2d ed. 1980).

23. LINO E. PALACIO, DERECHO PROCESAL CIVIL 139-140 (Abeledo Perrot 3rd ed. 2011).

24. For a French approach to the multifaceted word *jurisprudence* see MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 37 (2009) ("The issue then becomes how the French define the term "*jurisprudence*". In French legal terminology *jurisprudence* may mean a court's (1) past decisions, (2) precedents, or (3) judicial doctrine on a particular legal issue.").

25. Alfonso Ruiz Miguel & Francisco J. Laporta, *Precedent in Spain* 274, in INTERPRETING PRECEDENTS (D. Neal MacCormick & Robert S. Summers eds., 1997). In this text, the authors mistakenly use the English word "jurisprudence" to mean case law. Here, I have preferred to use the Spanish word *jurisprudencia* to mean case law, because of the different meaning that the word "jurisprudence" has in common law countries.

support of judicial decisions.<sup>26</sup> Their interests and intellectual efforts have been directed to statutes and codes, its method of interpretation and jurisprudential developments derived from them.

The same has happened in Argentina. Even though courts frequently quote previous decisions, the way they tend to do so is manifestly irrelevant. One common way of doing it is as follows: after arriving to a legal conclusion, the Court may, between parentheses, add “see” or “same,” followed by the citation of one or several previous decisions rendered by the same or different court and the date of the decision, either published or not.<sup>27</sup> It does not take a huge effort to come to the conclusion that this kind of quotation lacks any analysis of the referred decisions and, on many occasions, they are difficult to find (courts do not always mention where the judgment is published, if it is at all). It’s safe to conclude, that in those cases, judgments play a mere ornamental function.

On other occasions, Courts use, cite, quote or rely on case-law in order to establish what is the *jurisprudencia* in any area of the law. But those uses frequently lack emphasis on the facts and on their relevancy or irrelevancy or on the different weight one can recognize to some reasons over others also mentioned in those cases. Even though there have been isolated Civil Law scholars that started analyzing the technical, logical or philosophical underpinnings of *jurisprudencia*, their analyses don’t seem to have permeated other areas of the law, the practice of courts or the Law Schools whatsoever. Otherwise, if I were wrong, we should have frequent *Civil Law* examples of judicial decisions in which judges deal skillfully with problems

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26. The neglect of precedent analysis can be easily observed in the judgments of European countries. As the Italian professor Michele Taruffo said:

Only occasionally and in important cases are precedents thoroughly discussed. Instead, the prevailing practice in Italy, Spain, Norway, Sweden, Germany, Poland and in EC courts seems to be one of merely quoting a precedent or a list of precedents as supporting materials . . . without developing any real argument based upon them. The decision is presented as implicitly supported by the bare quotation of precedents . . . almost without due attention to their specific content.

Michele Taruffo, *Institutional Factors Influencing Precedents*, in INTERPRETING PRECEDENTS 455 (D. Neal MacCormick & Robert S. Summers eds., 1997).

27. See *El Rincón de la Retama S.A. c. Izquierdo, Ricardo Mario*, CNCiv, Section A, Dec. 15, 2017, 2018-B LL, 309. (“Por último señalo que, incluso en los aspectos que continúan siendo regidos por la legislación derogada, las disposiciones del Cód. Civ. y Com. de la Nación constituyen una valiosísima pauta interpretativa, en tanto condensan las actuales tendencias doctrinales y jurisprudenciales y expresan además la intención del legislador de nuestros días (esta Sala, 25/6/2015, “C., Jéssica María c. B., Carlos Ricardo y otros s/daños y perjuicios”, *idem*, 30/3/2016, “E., Celeste Ester c. De.P., Virginia Gabriela y otro s/daños y perjuicios”, Expte. N° 11.725/2013; 11/10/2016, “R., Jorge Oscar c. A., Adrián Bartolomé y otro s/nulidad de acto jurídico” y “A., Adrián Bartolomé y otro c. R., Jorge Oscar s/restitución de bienes”, Exptes. N° 47.289//2001 y 38.328/2003; *idem*, CAC y C. Azul, sala II, 15/11/16, “Ferreira Rodríguez, Amelia c. Ferreira, Marcos y otra s/desalojo”, LA LEY, 2017-B, 109 y RCCyC 2017 (abril), 180; Galdós, Jorge Mario, “La responsabilidad civil y el derecho transitorio”, LA LEY, 16/11/2015, 3.”).

inherent to the analyses of cases, such as defining the holding or *ratio decidendi*, *obiter dicta*, and questions of similarity or dissimilarity of facts. And, needless to say, such a habit of careful analysis is generally still absent in our jurisdictions.

As Genaro R. Carrió, former Supreme Court's Chief Justice, clearly stated years ago:

[A] good technique to correctly support one case on a previous one has not developed among us. We have not been trained in handling the case law as a source of decisions. Contrarily, we are trained in handling statutes.<sup>28</sup>

The lack of expertise in handling cases denounced by Carrió is usually replaced mechanically with hermeneutics that are not strictly apposite to this practice. Carrió continued:

In spite of analyzing the facts of previous cases in order to verify what was really decided in them, we prefer to derive the solution of the present case from precedent's isolated paragraphs, many times taking them out of their context. Almost always the solution of the case is extracted from the statute and the so called 'doctrine'<sup>29</sup> (sic) of cases supposedly consistent with it is only mention to reinforce that independent inference's cogency.

Indeed, that is a defect not attributable to our judges and jurists. It is attributable to the beliefs lying at the base of our legal system, the Continental European system.

Those beliefs assign an excessive importance of the legislator's role and, at the same time, obscure the judges' role . . . They don't conceive another way of participating in the legal dynamics than enunciating general rules and no other way of supporting a decision than its syllogistic deduction from a general rule previously put.

From there it is frequent . . . that judicial decisions rest on exceedingly general grounds. There is a kind of attraction to the abstract, a wish to go farther than the facts of the case, using them as a springboard to jump towards constructions of a larger scope.<sup>30</sup>

Finally, legal education in Argentina has been, and still is despite some modern developments, characteristically continental. The principal operating legal concepts are mainly drawn from or developed by analogy to the civil law. And this way of reasoning permeates every area of the Law. Therefore, the general mode of reasoning of an Argentine average lawyers,

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28. GENARO R. CARRIÓ, RECURSO DE AMPARO Y TÉCNICA JUDICIAL 174 (Abeledo-Perrot 2d augmented ed. 1987).

29. In that context, the word "doctrine" (*doctrina*, in Spanish) may be understood as "holding." But the word *doctrina* is very ambiguous in Spanish and Carrió writes it between quotation marks to stress that character.

30. CARRIÓ, *supra* note 28, at 175-77.

professors and judges are not geared by precedents but by laws and scholarly works found in treatises, hornbooks or articles. A serious and systematic analysis of precedents is, generally speaking, ignored even though in the last years some courses on Constitutional Law have stressed the importance of the Supreme Court case law. This kind of incomplete, lame training has also been criticized by another distinguished scholar, Julio C. Cueto Rúa, who stated many years ago:

Actually, the law teaching in Argentine law schools only partially covers its duty because it stops in the middle of the road. The teaching of abstract structures must be completed with a thorough study of the techniques of interpretation and application and with a detailed study of the judicial experience. In these two latter respects, we are in debt with the students of our law schools.<sup>31</sup>

### III. THE FEDERAL JUDICIARY AND THE FOUNDATION OF A DIFFERENT TRADITION

#### 1. Introduction

This extended introduction is necessary to grasp some basic features of Argentine political history and of common beliefs shared today with countries belonging to the Civil Law tradition. Those shared beliefs are particularly strong in private law generally and in some areas of public law (*i.e.*, criminal and administrative law). Those beliefs also function as a filter through which other legal ideas and facts are understood.

However, the Argentine constitutional and federal landscape offers features that markedly differ from that tradition. One of those differences has already been mentioned and it recognizes the strong influence the American Constitution and some of its commentators had over the Argentine Constitution's framers and contemporary political actors, which is reflected in several Constitution Articles and structure.<sup>32</sup> In effect, the whole idea of judicial review, the Supreme Court as a final interpreter of fundamental law with power to declare unconstitutional legislation that opposes the Constitution, the operative character of constitutional guarantees and the structure of a federal government was ostensibly American.

That influence was also abundantly reflected in Supreme Court case law and in lawyers and politicians opinions to the extent that the U.S. constitutional practice, as Miller has shown, was considered a source of

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31. JULIO C. CUETO RÚA, THE 'COMMON LAW': SU ESTRUCTURA NORMATIVA - SU ENSEÑANZA 225, n.33 (1957).

32. See GARCÍA-MANSILLA & CALVO, *supra* note 2.



authority to interpret analogous Argentine constitutional or judiciary act clauses.<sup>33</sup> The other differential trait with the Civil Law tradition is going to be found in the Supreme Court's treatment of prior cases since its early beginnings. Its mode of reasoning clearly moved it away from the Civil Law tradition. The best way to grasp those differences is to focus on the Supreme Court, its recording of decisions and the way the Court adjudicated cases from its establishment until today.

## 2. *The Supreme Court Recording and Reporting of Cases*

Since its establishment in October 1863, the Argentine Supreme Court officially published its judgments and collected those reports in a set of volumes generally referred as *Fallos*.<sup>34</sup> This fact, today trivial, was very unusual in the XIX Century among Latin American countries. During its colonial past, judgments, which usually do not express any grounds but a short indication about the claim and the court's final decision, were secretly kept by the Court's President—their publication was forbidden.<sup>35</sup>

Contrarily, since 1863 Supreme Court's judgments were officially published by it, along with the appealed rulings rendered by inferior federal courts or by highest courts of the provinces. Sometimes, the Supreme Court decision was preceded by a Clerk's note summarizing the case. Besides, all the decisions of the year were later gathered in bound volumes with a subject-matter index in the back that referred to the cases in the volume.<sup>36</sup> In the

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33. Miller, *supra* note 15, at 1544.

34. The original full title of the Argentine Supreme Court records are *Fallos de la Corte Suprema de Justicia de la Nación y su relación de las respectivas causas*.

35. I will refer to this practice *infra* section III.4. Now, suffice it to say that this prohibition originated in a *Real Cédula* of Spanish King Carlos III of 1778, reiterated in the Spanish restatement of laws called *Novísima Recopilación* (1805) that was applicable in colonial and post-colonial times. LUIS MÉNDEZ CALZADA, *LA FUNCIÓN JUDICIAL EN LAS PRIMERAS ÉPOCAS DE LA INDEPENDENCIA* 472 (1944) ("During the last colonial days a rigorous secret as to the decisions' text was kept. Remember that item 13 of Audiencia de Buenos Aires Ordinances established '... that our President kept a Conference Book [Libro de Acuerdos] which briefly contained his opinions and his brethren's [Oidores]. The conference should be secret (Book forth, title fifth, Law 6, Nov. Recop.'). The *Audiencia de Buenos Aires* was the name given to the court of appeals. The only exception to this prohibition was the case of the Tribunal of Extraordinary Writs (*Tribunal de Recursos Extraordinarios*) that acted as a court of last resort in certain cases between 1838 and 1852. As will be shown later, this Court was legally obliged to publish its decisions, which had to be reasoned. *See id.* at 433 ("It is curious to note that it was during the very time of Rosas dictatorship that for the first time a legislative act established the obligation of grounding a judgment . . . Art[icle] 14 of that statute [a law promulgated on December 6, 1838] ordered: 'there shall not be any further appeal from the Tribunal's judgment, which shall be founded, and which will be notified to the Governor for its publication together with the antecedent judgments.'").

36. Nowadays, the Court does not publish the previous decisions of the courts which judgment is appealed. Neither massively publishes hard copies of volumes, except for just a few. All the

beginning those volumes were freely distributed among federal courts and public libraries, later they were distributed among the provincial courts and sold to the public. The Supreme Court's decision to proceed this way was expressly adopted following the U.S. Supreme Court practice.<sup>37</sup>

### 3. *Origins of a New Style of Adjudicating Cases*

In 1864, six months after its establishment, the Supreme Court of Argentina decided the *Tomkinson & Co.*<sup>38</sup> case, a customs dispute in which the Customs Office claimed that the plaintiff, an imports company, had made a false declaration as to the goods imported as required by the applicable statutory law. After expressly discarding plaintiffs argument that the customs declaration contained involuntary mistakes, the federal judge said: “[B]esides, apart from the reasons stated above, the instant case is already decided by the Supreme Court case law, because it is entirely identical to the Thomson Co. warehouse case where the Supreme Court upheld the Custom’s decision that ordered the payment[.]” Notwithstanding that this statement may be considered an *obiter dictum*, the language employed was compelling: “the instant case is already decided by the Supreme Court case law.”<sup>39</sup>

The plaintiff appealed to the Supreme Court and, among other assertions, contested the similarity of cases alleged by the inferior court. After reciting the relevant facts of the case, the parties’ arguments and the previous decision by the district court, the Supreme Court treated the question of similarity in the first place and endorsing the prior court ruling decided: “it is not inferable that the present case is of different nature than the *Tomkinson & Co.* case so as to decide it based on different principles.”<sup>40</sup>

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decisions can be obtained via the internet, from the Court’s web page ([www.csjn.gov.ar](http://www.csjn.gov.ar)). There is a specific office within the Supreme Court, namely, *Oficina de Jurisprudencia*, which prepares the case syllabus and the judgment for web publishing.

37. In the Preface of the first volume, the Court’s Clerk, José M. Guastavino, introduces the publication and says, among other things, that “[a]s it happened in the U.S., this publication will be in Argentina the great book, the great school which will attend everybody and particularly judges, legislators, lawyers and students to study decisional law, the Constitution and the perfection or imperfection of statutes.” José M. Gustavino, Preface, in *FALLOS DE LA SUPREMA CORTE DE JUSTICIA NACIONAL I*: iv (1863).

38. Tomás Tomkinson y Compañía y el Fiscal, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 26, 1864, Fallos 1:148 (1864) (Arg.).

39. *Id.* at 153 (“Que, además de las consideraciones espuestas [sic], el presente caso se halla ya decidido por la Suprema Corte de Justicia, pues es enteramente idéntico al de la casa de Tompson y compañía en el cual se confirmó la resolución de la Junta de Comisos, que condenaba al pago de la diferencia.”).

40. *Id.* at 156 (“Primero: que de la circunstancia espresada [sic] en la primera observación, no se deduce que el presente caso sea de distinta naturaleza y deba resolverse por otros principios[.]”).

Neither the Supreme Court nor the district court explicitly supported in custom, laws, or the Constitution their decision to follow the prior decision rendered in a similar case just because such a precedent existed, a weird path for justices that did not belong to the Common Law tradition. But it is apparent that for both courts the similarity of cases was reason enough, actually the first reason laid down by the Supreme Court, to decide both cases alike.

Besides, the Supreme Court did not explain why it stated in detail the facts of the case and previous procedural contingencies. As I have already stated, this was also a temperament that had not been regularly observed in the past. In any case, where was that practice rooted?

#### 4. *The Previous Legal Background and its Critics*

The first answer to that question, as I have inferred some years ago, is the strong bearing the U.S. Constitutional text and practice exercised over the framers of the Argentine Constitution. We should also bear in mind that the first Argentine judiciary statute of 1863, Law No. 48, that designed the federal courts jurisdiction, including the rules to apply to the Supreme Court from the district and provincial courts, was modeled after the U.S. Judiciary Act of 1789. The familiarity of the Justices and district judges with those texts and case-law may have decided them to borrow that practice for themselves.<sup>41</sup> However, a deeper historical research reveals other part of this story.

As stated above, many Spanish laws, substantive and procedural, remained in force well after the independence.<sup>42</sup> One of those rules, enacted by Carlos III, King of Spain in 1778, prohibited to state the reasons which supported the judgment in order to prevent, among other motives, the “*litigants’ ruminations.*”<sup>43</sup> As a consequence of the latter the most important court in Buenos Aires in colonial times, the *Audiencia de Buenos Aires* enacted a rule that stated “that our President shall hold a book of Audiencia’s conferences (under oath of having it secret) in which he briefly shall state his

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41. ALBERTO F. GARAY, *LA DOCTRINA DEL PRECEDENTE EN LA CORTE SUPREMA* 26 (2013).

42. *See supra* section. I.1.

43. Real Cédula de Carlos III de 23 de junio de 1778, Chapter V (“I order to cease the practice of motivating judgments limiting themselves to state the decision arrived . . . to prevent the harms experienced by the Mallorca Court [*Audiencia de Mallorca*] derived from grounding its decisions, giving room to the ruminations of the parties, time consuming because the judgment restates the proceedings and costs to the parties[.]”); *see* A. MURILLO VILLAR, *ANTECEDENTES HISTÓRICOS DE LA OBLIGACIÓN DE MOTIVAR LAS DECISIONES JUDICIALES EN EL DERECHO ESPAÑOL*, *TEORIA E HISTORIA DEL DIRITTO PRIVATTO* V, 45 (2012); CALZADA, *supra* note 35, at 442.

opinions and the Oidores [*i.e.*, his peers].”<sup>44</sup> Usually, the extension of courts’ judgments was extremely brief. They occupied one short paragraph in which the judge stated in just a few words the plaintiffs’ claim and the decision of the Court.<sup>45</sup> The decisions did not refer to prior cases either. Furthermore, the secrecy and writing style hardly gave room to the practice of supporting today’s decision in the one rendered yesterday in a similar case as did the Supreme Court and the federal court in *Tomkinson & Co.* case.

The legislation that had given room to this style was bitterly criticized by lawyers and journalists of the time who repudiated the Spanish legislation and its aftermath. In 1832, Valentín Alsina strongly argued against that practice. Some of his reflections were as follows:

If for the enactment of a statute it is necessary for the legislator to state its motives, much stronger is the necessity of that statement when it deals with the application of that very statute. This is the only way to prevent mistakes or arbitrariness, and to give effect to the judge responsibility, that in our system in force I believe it is unrealizable, chimerical and nominal. Nothing has the judge to be afraid of when he does not have to ground his decisions. The aggrieved party cannot complain of nor can she accuse him when ignores the foundations . . . . It will happen many times that in complicated affairs or very long proceedings, the judge renders his decision without reading [the record]: his laziness or mismanagement will always remain hidden and unimpeachable . . . . Explaining the Judge the grounds for his decision one obtains another valued advantage; namely to facilitate to the party the possibility to challenge it properly[.]<sup>46</sup>

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44. CALZADA, *supra* note 35, at 442.

45. *Id.* at 444.

46. See Valentín Alsina, *Reflexiones Breves sobre la conveniencia de que los jueces funden sus sentencias, y la de que se examinen y voten separada y consecutivamente las diversas cuestiones que haya en una causa*, in Víctor Tau Anzoátegui, *Acerca de la Fundamentación de las Sentencias en el Derecho Patrio*, 13 REVISTA DEL INSTITUTO DE HISTORIA RICARDO LEVENE 181, 192, 194 (1962), <http://www.derecho.uba.ar/investigacion/revista-historia-del-derecho/rihdrl-13-1962.pdf>. Most of the translations in this article are my own. Some of them had to be adapted to provide more clarity or to adapt ancient language. In note, I offer the original version in Spanish:

Si para la sanción de una ley importa que el legislador esponga [sic] previamente sus motivos, con más razón importa esa esposición [sic] cuando se trata de la aplicación de ella. Este es el único modo de evitar errores o arbitrariedades, y de hacer efectiva la responsabilidad judicial, que en nuestro actual sistema, la creo irrealizable, quimérica y nominal. Nada puede temer el juez cuando no tiene que fundar sus pronunciamientos. La parte agraviada no puede acusarle ni quejarse, cuando ignora los fundamentos; y cuando quizá la sentencia se funde en alguna razón o ley que ella ignoraba . . . . También sucederá muchas veces que en asuntos complicados, en procesos voluminosos [*rectius*, voluminosos], sentencie el juez aun sin leerles: su incuria o desidia quedarán siempre ocultas y siempre inacusables. Esponiendo [sic] el juez el fundamento de su auto, se obtiene otra ventaja inapreciable; cual es la de facilitar al litigante el impugnarle debidamente.

*Id.* In this piece, Valentín Alsina also criticized the absence of foundations of many criminal judgments and the incoherent way the Court of Appeals acted when deciding cases by majority vote. In order to eliminate the possibility that despite both votes agrees in the result however they

A similar critique was years later made by another young lawyer, Miguel Estéves Saguí.<sup>47</sup> Both Alsina and Estéves Saguí considered the practice of secrecy and of not expressing the decisions' grounds to be anti-republican and contrary to personal security, the latter a liberal ideal to be attained at that time.<sup>48</sup>

Contemporarily, in 1834, it appeared a journal to be published twice a week, under the direction of another lawyer, Bernardo Vélez.<sup>49</sup> In its first number, Vélez stated that "all the educated nations have taken care of keeping a collection of judicial decisions, because with that measure one gets very sensitive materials for the people."<sup>50</sup> After highlighting the importance of publishing the judgments' justifications and its deterrent effect against the filing of "unjust" law suits, he stressed the importance of making public judicial decisions in order "to present to judges, lawyers and the general

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lay contradictory reasons that supported that result, he proposed the judges treat each question under decision separately and subsequently, that is, he was proposing the adoption of the method developed by Condorcet.

47. See the doctoral thesis by Miguel Estéves Saguí, *Disertación sobre la necesidad indispensable de que se expresen los motivos y razones que se han tenido en vista para pronunciar las sentencias* (Biblioteca Nacional de Buenos Aires, Colección Candiotti, Tesis de jurisprudencia, T. III, 1836-1837).

48. CALZADA, *supra* note 35 at 458-59. Levaggi argues that all these critics incur in exaggeration and that their main thesis, i.e. the non-founding of judgments, needs several qualifications; see Abelardo Levaggi, *La Fundamentación de las Sentencias en el Derecho Indiano* 45, 73, in 6 REVISTA DE HISTORIA DEL DERECHO, INSTITUTO DE HISTORIA DEL DERECHO (1978). For a critical appraisal of the criminal judgments of the time, see OSVALDO BARRENECHE, *CRIME AND ADMINISTRATION OF JUSTICE IN BUENOS AIRES 1785-1853* (2006). Generally speaking, there was a profound dissatisfaction with the way the criminal and commercial justice was administered at that time. See RICARDO LEVENE, *LA ACADEMIA DE JURISPRUDENCIA Y LA VIDA DE SU FUNDADOR MANUEL ANTONIO DE CASTRO* 78 (1941), <http://www.derecho.uba.ar/investigacion/pdf/2018-levene-la-academia-de-jurisprudencia-y-la-vida-de-su-fundador-manuel-antonio-de-castro-1941.pdf>.

49. Vélez was a lawyer and journalist. Among the many activities developed (he was also a legislator and a Judge), he was Vice President (1828) and President (1830 and 1831) of the Academia de Jurisprudencia, a prestigious graduate law center of the time attended by most of the lawyers referred in this section. See Rodolfo Trostiné, *Noticia Preliminar*, in BERNARDO VÉLEZ: ÍNDICE DE LA COMPILACIÓN DE DERECHO PATRIO (1832) Y EL CORREO JUDICIAL (REEDICIÓN FACSIMILAR) (1834) CON NOTICIA PRELIMINAR DE RODOLFO TROSTINÉ xxv-xxvi (1946), <http://www.derecho.uba.ar/investigacion/pdf/2018-velez-bernardo-indice-de-la-compilacion-de-derecho-patrio-y-el-correo-judicial.pdf>.

50. 1 *El Correo Judicial* 2, Buenos Aires, Aug. 27, 1834, reprinted in Trostiné, *supra* note 49, at xlvi ("En todas las naciones cultas se ha cuidado con esmero de conservar la colección de las resoluciones judiciales, porque con esta medida se consiguen bienes demasiado sensibles para los pueblos.").

public a whole collection of cases . . . to guide themselves with certainty in other identical or similar cases that can happen.”<sup>51</sup>

Initially, publishers like Vélez encountered some distrust from the judges and the press, who considered the publication to be a “conspiracy against the administration of justice.”<sup>52</sup> Besides that, he had serious problems of getting the judgments, because the courts were reluctant to hand over the materials despite the fact that he had been expressly authorized by the government to get those decisions.<sup>53</sup> This was the reason why several publications, the one just mentioned among them, short-lived.<sup>54</sup> Nevertheless, the objective these endeavors sought signaled in a different direction from the Spanish past reflecting that lawyers needs and aspirations were changing. They aimed at the judgments and the necessity that they stated the reasons on which the decision rested. They stressed the crucial relevancy of published case-law in attaining the principle of treating like cases alike.

Despite the obstacles just mentioned, lawyers’ claims were at last heard and remedied. In 1838, Buenos Aires legislature created a new Court of last resort, the *Tribunal de Recursos Extraordinarios por Nulidad e Injusticia Notoria* (Court of Extraordinary Writs for Nullity and Manifest Injustice), which was obliged to express in the decision the reasons on which it based the judgment. Besides, those judgments should be published and available to the public.<sup>55</sup> The decisions so rendered usually had a modest expression of reasons but a long recital of facts, lawyers’ motions and previous judicial decisions. Nevertheless, they represented a serious improvement on style. Despite that innovation, said improvement would not last. After Governor Juan Manuel de Rosas’ defeat in 1852, political reasons – though not related to the founding of judgments – led to elimination of this Court.<sup>56</sup>

Notwithstanding the Court’s elimination, the necessity to count with better reasoned judgments and its availability to the public became a crucial legal issue. Lawyers begun to organize themselves to offer a more consistent

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51. Trostiné, *supra* note 49, at xlvi (“La recopilación de estas decisiones presenta á los jueces, á los letrados, y al público todo una colección de casos, y otros tantos ejemplares, para que puedan regirse con acierto en otros idénticos ó semejantes que puedan ocurrirles.”).

52. Trostiné, *supra* note 49, at xlvi.

53. *Id.*

54. Another journal, *El Correo Nacional*, had the same inconvenience in 1827. See Anzoátegui, *supra* note 21, at 323.

55. CALZADA, *supra* note 35, at 476.

56. The *recurso extraordinario de nulidad y de injusticia notoria*, had been strongly criticized since 1821. Its mere filing produced a stay of the judgment appealed and this caused the unending delay in finishing the lawsuits. See RICARDO LEVENE, VII HISTORIA DEL DERECHO ARGENTINO 436 (Guillermo Kraut ed., 1945); LEVENE, *supra* note 47, at 77.

and powerful battlefield on that question. Consistently, some of them launched new magazines which published judicial decisions, praised the importance to take into account what the judges said in their opinions and its exemplar character to solve future similar cases. The lawyers' cause soon disseminated and years later, in 1854, *El Plata Científico y Literario* published a note written by a young lawyer and editor-in-chief, Miguel Navarro Viola, in defense not only of grounding the judgments but also of taking into account the case-law to that effect. He said:

How much convenient it is for us to study our tribunals decisions, analyze the *causes célebres* on which they are rendered, criticize those very judgments and form with all these works a body of our own jurisprudence[?] Apart of being that a deterrent for the judicial power and a guarantee for today's people, that guarantee also plays an important role prospectively. The people know that a founded judgment that is rendered today, won't be capriciously contradicted tomorrow by another decision in an analogous case. And, so, the decisions publicity is a guarantee against capricious decisions.<sup>57</sup>

In the same vein, in 1859 the Buenos Aires Bar founded *El Foro*, a journal which published judicial decisions and critical comments on them. It is noteworthy that among the collaborators of this bi-monthly revue was Valentín Alsina, the author of the first critical note on the necessity of stating the grounding of decisions referred to above.<sup>58</sup> Among the editorial board staff were other members who years later would also be appointed Justices of the Supreme Court, such as José Barros Pazos (1863-1877), Marcelino Ugarte (1870-1872), José Dominguez (1872-1887) and Luis Sáenz Peña (1890-1892).<sup>59</sup> Miguel Estévez Saguí, author of an influential doctoral thesis already mentioned on the founding of judgments, written in 1837, was also a staff member.

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57. Miguel Navarro Viola, *Prospect 3*, in 1 EL PLATA CIENTÍFICO Y LITERARIO (1854).  
¿Cuánto más conveniente no nos es estudiar las sentencias de nuestros Tribunales, analizar las causas notables sobre que recaen, juzgar esas mismas sentencias, é ir formando de todos estos trabajos un cuerpo de jurisprudencia propia? Aparte de ser ello un freno para el mismo poder judicial, y una garantía para el pueblo en el presente, lo es también para su porvenir. Él sabe que una sentencia fundada que hoy se dé, no será mañana caprichosamente contrariada por otra en un asunto igual. Y esa garantía está toda en la publicidad.

*Id.*

58. See Alsina, *supra* note 46. The same Alsina was later appointed President of the Supreme Court in 1863 but he did not accept the post, alleging he was very tired for such a responsibility. Héctor José Tanzi, *El Nacimiento y los Primeros Pasos de la Corte Suprema de Justicia de la Nación (1853-1903): El Periodo de la Continuidad Institucional*, in 1 HISTORIA DE LA CORTE SUPREMA ARGENTINA 23, 41 (Alfonso Santiago ed., 2013).

59. See JONATHAN M. MILLER ET AL., CONSTITUCIÓN Y PODER POLÍTICO: JURISPRUDENCIA DE LA CORTE SUPREMA Y TÉCNICAS PARA SU INTERPRETACIÓN 1755 (1987); Tanzi, *supra* note 58, at 2031, app.

In a note dated in 1855, but published in 1869 in *La Revista de Buenos Aires*, one anonymous author (later revealed to be Miguel Navarro Viola),<sup>60</sup> went farther and claimed for publishing and recording judgments imitating England and the U.S. He stated:

But it is a fact that the best conceived and phrased code gives room to the competing interest of both parties and it is necessary an explanation of it as high as it is the law's origin. That explanation, that new decision, that true applied legislation, is formed by the Courts' decisions. Not any decision but judgments that carry with them the presumption of possible infallibility: the last judgment, that against which there is no other possible appeal according to the law. We found this body of judgments in England, in the United States and we found it in France, where a special journal is consecrated to such a task so useful to a modern bar . . . . What else could a litigant long for knowing what has been decided by the Court of last resort in cases similar to his and knowing his own luck beforehand?<sup>61</sup>

Months later, another lawyer, Vicente G. Quesada, also director of *La Revista de Buenos Aires*, submitted that provincial courts should imitate the national courts in their following precedents.<sup>62</sup> Quesada stressed – against

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60. See Vicente Quesada, *Jurisprudencia de las Sentencias*, XXI LA REVISTA DE BUENOS AIRES, HISTORIA AMERICANA, LITERATURA Y DERECHO 92 (1869); Quesada, *infra* note 67 and accompanying text.

61. Miguel Navarro Viola & Vicente Quesada, *Jurisprudencia de Sentencia*, in XIX LA REVISTA DE BUENOS AIRES, HISTORIA AMERICANA, LITERATURA Y DERECHO, 367, 368 (1869) (“Pero cuando es un hecho que el Código mejor concebido y mejor redactado abre ancha brecha á [sic] las pretensiones encontradas de los litigantes, se necesita una explicación tan alta como es elevado el origen de las leyes. Esa explicación [sic], esa nueva decisión, esa verdadera Legislación aplicada, la forman las sentencias de los Tribunales. No tampoco cualquier sentencia, sino sentencias tales que lleven consigo la presunción de infalibilidad posible: la última sentencia en un plkeito, aquella de que las leyes no admiten ya recurso alguno. Esta jurisprudencia de las sentencias la encontramos en Inglaterra, la encontramos en los Estados Unidos, la encontramos en Francia donde un periódico especial se halla consagrado a tarea de tan grande interés para el foro moderno . . . . Qué más querría un litigante, que saber lo que en casos análogos al suyo ha resuelto el último Tribunal y conocer su suerte de antemano?”).

62. Quesada, Navarro Viola and Miguel Estéves Saguí had been appointed co-Justices of the Supreme Court in 1865. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Jan. 9, 1865, Fallos 2:5 (1865) (Arg.). A co-Justice is a person that occasionally integrates the Supreme Court in cases where it is necessary to reach a certain majority to decide a case. These nominations were made once a year and they were later re-appointed several times. For a case in which Estéves Saguí acted as a co-Justice, see Enrique Yateman en representación de una Sociedad compradora de terrenos en Entre-Ríos contra el Gobierno de esta Provincia sobre cumplimiento de contrato, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 2, 1874, Fallos 15:7 (1874) (Arg.).



what it was considered anathema for others<sup>63</sup>— the higher court judgments' *inevitable* binding character in future analogous cases. He wrote:

The national justice case-law is the immovable base on which the laws' application resides. So, once a case is decided and the law applied with a determinate meaning, the people know that analogous cases will be governed by the inalterable holding of those cases.<sup>64</sup>

In the following paragraphs, Quesada relied on XIII Century Castilian law referred to customary law which stated, "We also say that in cases of doubt the law may be interpreted by the costume, so it must be understood as was previously understood by the others."<sup>65</sup> He considered that "the costume" referred in the Castilian law were judicial decisions. To reinforce his argument, he cited Law No. 5 which stated that the costume may be determined by "the opinion, without contradiction, of two persons who know and understand of judging."<sup>66</sup> Then, Quesada held:

These laws undoubtedly establish the case law as a legal means to decide legal controversies, and from here the importance of making public the judgments, not only because of their ratio decidendi but because like decisions of *two* [italics in original] cases make mandatory to decide the same in following analogous cases. Dr. Navarro Viola stated clearly the advantages of the case law and the necessity to take it as a rule of decision in deciding other cases in an article on this subject published in Volume XIX of this Revue.<sup>67</sup>

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63. Dalmacio Vélez Sárfield, a prominent figure of the time and author of the Argentine Civil Code of 1869, was among the strong opponents of a case law system. See Anzoátegui, *supra* note 21, at 321.

64. Vicente G. Quesada, *Jurisprudencia de las Sentencias*, in XXI LA REVISTA DE BUENOS AIRES, HISTORIA AMERICANA, LITERATURA Y DERECHO 92 (1869), [https://books.google.com.ar/books?id=P2FFAAAAYAAJ&printsec=frontcover&hl=es&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.com.ar/books?id=P2FFAAAAYAAJ&printsec=frontcover&hl=es&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false) ("La Jurisprudencia de las Sentencias en la justicia nacional es la base incommovible sobre la cual reposa la aplicación de las leyes. De manera que una vez resuelta una causa y aplicada la ley en un sentido dado, el pueblo sabe que los casos análogos serán regidos por la doctrina inalterable de la jurisprudencia de las sentencias.")

65. *Id.* at 106 ("Otro sí decimos que la costumbre puede interpretar la ley quando [rectius, cuando] acaeciese dubda [rectius, duda] sobre ella, que así [rectius, así] como acostumbraron los otros de la entender, así debe ser entendida y guardada.") (quoting Law No. 6, tit. 2, pt. 1).

66. *Id.* ("[S]abiéndolo el Señor de la tierra e non lo contradiciendo, é teniéndolo por bien, puedenla facer, é debe ser tenida, é guardada por costumbre, si en este tiempo mismo fueran dados concejaramente dos juicios por ella, de otros sabidores e entendidos de juzgar e non habiendo quién se los contralle[.]") (quoting Law No. 5, tit. 2, pt. 1).

67. *Id.* ("Estas leyes establecen indudablemente la jurisprudencia de las sentencias como un medio legal para decidir las causas litigiosas y de aquí nace la importancia de hacer públicos los fallos, no tan sólo por la doctrina legal que ellos contengan, sino porque con arreglo a lo resuelto en dos juicios debe resolverse en adelante todos los que sean análogos. El doctor Navarro Viola en su artículo sobre esta materia publicado en el tomo XIX de esta Revista, estableció con toda claridad

The *Corpus Iuris Civile* established the contrary principle in the “*non exemplis*” maxim (v.gr. decisions should be rendered in accordance, not with examples, but with the laws”),<sup>68</sup> and also in other Partida law.<sup>69</sup> But Quesada grounded his defense of the binding character of precedents on *Partidas* laws that clearly conflicted and run against them. He solved the contradiction in favor of the Partida laws mentioned by him and with express support in Navarro Viola’s defense of equal treatment to like cases. Similar ideas were held in the Provinces of Tucumán, Mendoza, Salta and Corrientes as well.<sup>70</sup>

### 5. The Bar Demanded Treating Like Cases Alike

As we have seen, the influential lawyers of the 1830s led a current of opinion that advocated for ameliorating the way justice was administered in the country. A sense of pragmatism, progress, equality, litigant’s right of defense and certainty clashed against abstract, old and unjust laws, secretly applied in rulings that didn’t express the reasons on which they rested. These lawyers proposed that judgments should be properly founded, public and published, as a guarantee against arbitrary adjudication. Some of them also proposed to elevate the courts of last resort caselaw to a higher standard of respect in order to treat equal cases alike, replicating the experiences of countries like England and the United States.

Although these ideas were rudimentarily exposed at that time, once we remember the influence the U.S. law exercised over the framers of the Argentine Constitution and on judges and Justices, we can better understand the *Tomkinson* case mentioned above. We now see the comprehensive intellectual background that explains why the Supreme Court decided the *Tomkinson* case based on precedent, apart from stating afterword other reasons. We can now understand why a group of judges educated mainly in Spanish law decided a case as a common law judge would have done it, that

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las ventajas de la jurisprudencia de las sentencias y la necesidad de que sirviera de norma en la resolución de los pleitos.”).

68. The translation is John P. Dawson’s. Dawson stressed the idea that the CORPUS IURIS CIVILIS “*non exemplis*” maxim, which established that judicial decisions were mere examples and need not to be followed, was embedded in a clause that was constructed as a parenthesis. He stated:

The impact of the maxim *non exemplis* might have been much less if the compilers of the *Corpus Iuris* had included texts that conflicted with it in a major way. There were a few late imperial constitutions preserved in the *Corpus Iuris* that did lay stress on judicial practice as an appropriate source of rules of procedure.

DAWSON, *supra* note 20, at 123. Curiously, in 1840, Vélez Sarsfield, the drafter of the Argentine Civil Code of 1869, acting as a lawyer, had opposed to the idea of following prior decisions on similar cases, invoking the “*non exemplis*” maxim and another Partida law that contradicted the one employed by Quesada.

69. See Anzoátegui, *supra* note 21, at 321-22, n. 5.

70. *Id.* at 324-25.

is, by invoking its similarity with an analogous case previously decided by them. In the following pages, I will examine how this approach evolved.

#### IV. HOW THE ARGENTINE SUPREME COURT DEALS WITH ITS OWN PRECEDENT

##### 1. Introduction

The way in which the Supreme Court adjudicated the *Tomkinson* case represented a novelty in Argentine constitutional adjudication. Looking backwards, until then no court had proceeded that way. Looking forward, that novelty was going to turn into an initiating experience. That precedential reliance was firmly embraced by the Supreme Court and, generally speaking, it became the usual way in which subsequent Court's compositions dealt with cases, either interpreting the Constitution or federal law: From then on, Supreme Court Justices would always take into account its own precedents.<sup>71</sup> In doing so, the Court had to face the same kind of problems that any common law court faced. The interesting thing is how the Supreme Court managed to solve those problems. So, the Court began a long journey of change, learning from its own and foreign experience. Let us see what resulted from that and how the Supreme Court behaves today when deciding cases.

##### 2. Different Styles for Speed Adjudication of Cases

The structure and style of judgments varies according to the necessities of the Court and the peculiarities of the case. Today, most cases are ruled on through extremely short decisions. The brevity resembles certiorari denials in the U.S. Even though the law specifically authorizes the Court to proceed in that way, this summary disposition of cases has received complaints from several scholars who argue, generally, that the said disposition is contrary to the due process of law. The Supreme Court has affirmed its constitutionality.<sup>72</sup>

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71. Miller, *supra* note 15, at 1559, n.556.

72. Articles 280 and 285 of the National Civil and Commercial Procedure Code expressly authorizes the Court to discretionary deny the extraordinary writ (the equivalent to the original writ of appeal before the Supreme Court, Judiciary Act, Section 25) in the absence of a sufficient federal question or when the questions presented result insubstantial or without transcendence. The Court is not obliged to express any reason of denial except the sole mentioning of Article 280. The Court has decided that Article 280 is constitutional. See *Asociación de Prestaciones Sociales para Empresarios c. Set Sociedad Anónima*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 21, 1999, Fallos 322:3217 (1999) (Arg.). *Contra*, MIGUEL A. EKMEKDJIAN, TRATADO DE DERECHO CONSTITUCIONAL 551 (1999); Juan Olcese, *La Institución del Certiorari Repugna al Concepto Nacional del Derecho de Defensa*, JURISPRUDENCIA

Other similar source of denial decisions are grounded on many unfulfilled formalities, fatal in character, imposed to the writ of appeal (called *recurso extraordinario federal*) by the rules of the Supreme Court enacted in 2007. Its fatal character has been strongly criticized too,<sup>73</sup> but nobody proposed a serious remedy to solve the Court's overloaded docket.

In the remaining bulk of cases, where the Court renders a decision on the merits, one may find judgments that in a few words dispose of cases based on precedent. According to one style, decisions are very short in length. They only assert that the present case is similar or analogous to a previous one, and because of that similarity the decision to adopt today must be equal to the one taken in yesterday's case. For instance, in *Lescano* the Court shortly said "[t]he questions involved in the present case, as far as this controversy is concerned, are substantially analogous to the one debated and decided in the case M.1380.XLI 'Medina, Orlando Rubén y otro c/ Solar Servicios On Line Argentina S.A. y otro s/ interrupción de prescripción,'" <sup>74</sup> decided on February 26, 2008, to which the Justices refer for the sake of brevity.

Short decisions like this one fail to explicit the relevant facts of both cases and the reasoning employed by the Court. Such a practice is contestable since the omitted process is the key element that justifies or not the result, but this deficit has not refrained the Court from so deciding and it hasn't received much scholarly complaints either. There are other judgments that after succinctly mentioning the relevant facts rely on previous precedent. For instance, in *Caballero*, the Court decided:

In its present composition, this tribunal agrees with the *ratio decidendi* of Fallos: 304: 1865 to which we must rely for the sake of brevity, taking into account the substantial similarity between this case and the questions presented and decided on that occasion. In effect, as the court

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ARGENTINA 980 (1997) (Arg.); Miguel M. Padilla., *El art. 280 del Código Procesal Civil y Comercial de la Nación y el derecho de acceso a la justicia*, LA LEY 358 (1992) (Arg.); Héctor E. Sabelli, *El rechazo sin motivación del recurso extraordinario cuando la cuestión federal es intrascendente, ¿es constitucional? (sobre el certiorari criollo)*, JURISPRUDENCIA ARGENTINA 1343 (2003) (Arg.); Gustavo L. Vitale, *Indefinición de la Corte Suprema de Justicia de la Nación en un Caso de Suspensión del Proceso a Prueba (el ilegítimo 'certiorari al revés')*, JURISPRUDENCIA ARGENTINA 1244 (2003) (Arg.).

73. See Germán González Campaña, *Acordada 4/07: Necesidad de Atenuar su Excesivo Rigor Formal*, LA LEY pt. VII (2017) (Arg.).

74. *Lescano, Demetrio y otro v. Estructuras Metalúrgicas Din S.A. y otro*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], June 3, 2008 (2008) (Arg.). This case is not published but, as any other unpublished case, can be found in the Supreme Court's website, [www.csjn.com.ar](http://www.csjn.com.ar).

of appeals moves away from art. 1 of decreto-ley 6277/58 . . . , we decide to reverse the appealed judgment.<sup>75</sup>

The case was governed by a legal rule, but the Court decides not to interpret the rule *de novo* but to rely on to the meaning assigned to that norm in the precedent. However, the decision has two peculiarities. One of them is the blunt expression “in its present composition” that relates to the fact that the Justices signing the precedent are different from the ones deciding the case today. Apparently for those Justices the mere change of personnel was a valid reason to alter the meaning attributed to a legal rule in a prior case.<sup>76</sup>

Unfortunately, after several years of not using that expression, it has reappeared in the Court’s case law what reveals that some Justices and scholars do think that new appointments in the Supreme Court authorizes to re-think, without qualifications, prior precedents.<sup>77</sup> The second peculiarity is that said reliance is not based on the very existence of a precedent on point. It is the present Court’s agreement with the decision taken therein what determines to follow the previous case decision. This is a sort of caveat, very usual in many judgments that affirm to rely on precedent. It is related to the soft character generally attributed to the precedent’s force, a characteristic that I will retake further.

### 3. Distinguishing Cases

#### 3.1. Introduction

One of the most striking common law techniques for lawyers educated in the Civil Law tradition is how common law courts deal with precedents’ facts and accordingly distinguish or not the present case from prior ones

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75. José Emilio Caballero c. C.R.J.P.P.F, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 21, 1985, Fallos 307(I):240, 243 (1985) (Arg.).

76. Due to the many coups d’état that happened in Argentine political life in the period 1930-1976, it was common that the Supreme Court’s composition was completely renovated with each coup. When democratic governments return to rule the country, they obviously replaced the *de facto* Justices with new ones. So, both groups of Justices used to employ that expression each time they saw fit. Apart from critiques that one can elaborate as to it, that expression became so usual that it was naturalized by the legal community and nobody said anything when that expression was later used, in democratic times, by a majority of Justices of a recently enlarged Supreme Court that overruled a prior leading case that has been rendered by Justices appointed by the preceding democratic government. See Ernesto Alfredo Montalvo, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 11, 1990, Fallos 313:1333, consideration 6 (1990) (Arg.); Alberto F. Garay, *La Corte Debe Sentirse Obligada a Fallar Conforme sus Propios Precedentes (Aspectos elementales del objeto y de la justificación de una decisión de la Corte Suprema y su relación con el caso ‘Montalvo’)*, JURISPRUDENCIA ARGENTINA 870 (1991) (Arg.).

77. Juan F. González Bertomeu, *¡Sin Precedentes!*, JURISPRUDENCIA ARGENTINA, SUPLEMENTO DE JURISPRUDENCIA DE LA CORTE SUPREMA DE JUSTICIA DE LA NACIÓN, ABELEDO PERROT 3 (2009).

based on their facts. Nothing of that sort compares in the civil law to the craftsmanship that many common law courts and scholars show in that enterprise, particularly, in difficult cases. Put it simply, the way they treat the facts of a case is sometimes astonishing for a civil law eye.<sup>78</sup> Every common lawyer knows this can be a problematic and imaginative process at times. But the law schools educate them in order to acquire familiarity with that task and to do it properly, intelligently, artfully once in the legal profession. An enterprise that, as a Cambridge law professor told me once, is not limited to the law school years but it is “a whole life experience.” Nothing of that sort happens in the Civil Law world.

Argentine Supreme Court case law, for instance, is full of precedents in which the Court, many times inferior courts and the parties to a lawsuit wrestle with similarities and dissimilarities. This activity has been performed from the very beginning by the Supreme Court and by district courts too: remember the analogy with a prior case discussed in the *Tomkinson & Co.* case decided in 1864.<sup>79</sup> This practice of comparing facts of cases is performed regularly since then and, in easy cases,<sup>80</sup> it is performed acceptably good. On the contrary, when dealing with the multitude of particulars offered by a line of past cases, courts -including the Supreme Court- inevitably make mistakes, sometimes clumsy mistakes through common law eyes. In my view this is the consequence of several reasons.

### 3.2. Some Reasons that Explain the Lack of Expertise in Dealing with

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78. To immerse oneself in KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1981) or *THE COMMON LAW TRADITION: DECIDING APPEALS* (William S. Hein & Co. Inc. ed. 1996), is some sort of science fiction for a regular civil law mind. As Professor Cappalli has rightly said, the common law is a method that “civilian lawyers (that is, lawyers who use the civil law) rarely come to understand . . . more than superficially.” RICHARD B. CAPPALLI, *THE AMERICAN COMMON LAW METHOD* 11(1996).

79. See *Tomás Tomkinson y Compañía y el Fiscal, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice]*, Apr. 26, 1864, Fallos 1:148 (1864) (Arg.); *Florez, José Ignacio c. Garmendia, Pedro, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice]*, Oct. 11, 1870, Fallos 9:434 (1870) (Arg.); *José R. Lozano pidiendo se declare inconstitucional un acto del Gobernador de Jujuy D. Teófilo S. de Bustamante, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice]*, June 2, 1874, Fallos 15:65 (1874) (Arg.). In *Lozano*, the Supreme Court succinctly affirmed the judgment below. The plaintiff had cited in support of his case a decision handed down by the Supreme Court four years before. The district court, after scrutinizing the facts of both cases, denied the similarity of facts alleged by the plaintiff.

80. This activity is “easy” when you have a precedent “on point”; it gets complicated when you have to compare the facts of the present case to the facts of, for instance, a line of cases which have differences that at first impression are not strictly or “sufficiently” similar (or vice versa). Those dissimilarities can also refer to the cases procedural settings.

### Facts

In Argentina the judicial practice of treating similar cases alike was the mid-nineteenth century response to the legal profession's demand of reasoned decisions, equal treatment of similar cases, respect to the parties right of defense and judicial transparency.<sup>81</sup> The influence that the style of the U.S. Supreme Court decisions had on the Argentine Supreme Court Justices may have also played an important role. Despite its auspicious beginnings, that practice did not evolve. Neither did it gain in sophistication as the cases offered more complicated factual situations, except in occasional cases scattered in the Court case-law. This under-development is also verifiable at the moment of justifying a decision with support in prior cases, something that I will postpone for the moment. I agree with Carrió in that "we have not developed a good technique to correctly ground a decision in a previous one."<sup>82</sup> For Carrió, the lack of such a technique is attributable to the beliefs lying at the base of the Civil Law tradition "that assign an excessive importance to the legislator role shadowing at the same time the judges' role."<sup>83</sup>

Besides that, since the sixteenth century – and skipping the enormous work developed by the Bologna school and the glossators since the eleventh century – the European jurists' and professors' interests centered not in the Justinian's *Digest* - more casuistic - but on the *Institutes* - more general - adopting its style and structure.<sup>84</sup> The study and teaching of law was centered almost exclusively on the interpretation of those texts from which scholars extracted principles and elaborated theories.<sup>85</sup> This theoretical works on Roman law that, as Samuel has observed "became very much easier to read and to absorb,"<sup>86</sup> gained popularity and prestige and soon this canonical-text-centered professorial activity became the predominant way in which the law was taught and learned in most of the European countries. These abstractions and generalizations gave room to the idea that legal reasoning is about general rules.

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81. *See supra* section III.3.

82. CARRIÓ, *supra* note 28, at 174.

83. *Id.* at 175.

84. GEOFFREY SAMUEL, A SHORT INTRODUCTION TO JUDGING AND TO LEGAL REASONING 12 (2016) ("Thus in France, the jurist Jean Domat (1625-1696) rearranged Roman Law in its 'natural order' so that the Roman Law was to be learned and applied, not through the reading and application of the original texts but through a set of principles.").

85. *Id.*

86. *Id.* Samuel supports his argument by reference to J. GORDLEY, THE JURISTS 145 (2013). Samuel's remark retains vitality even today.

These ideas, reinforced by the nineteenth century process of codification after the French Civil code and Montesquieu famous *dictum* relegating the judges' role to a sort of a mechanical activity ( judges did not make the law; they just apply it; the law is made by the legislatures), later took root in Latin American soil. What counted, then, were laws, texts and the scholar's "scientific" elaborations about them.<sup>87</sup> The law will be viewed idealistically. So, as Carrió concluded, "another way of reasoning, a way more closely related to the factual situation that a judge confronts, appears to them as something a bit vulgar, mere casuistry, a petty enterprise."<sup>88</sup> As a consequence of those beliefs, the legal education a law student received and still receives is predominantly centered in scholarly works found in articles, manuals (hornbooks) and treatises annotating codes or statutes, general works that – apart from their intrinsic value as theoretical works – are written with abstraction to the case-law.<sup>89</sup> If cases are occasionally used, it is just to exemplify a specific situation.

Therefore, students lack any specific instruction to (i) identify with precision *inter alia* the facts of a case; (ii) reason from one case to another one and so forth nor (iii) connect those facts with the reasons on which the decision rests. Finally, (iv) to make a rule explicit from a judicial decision. So, unless it is part of their natural abilities or personal way of perceiving the world, under this kind of legal education students don't develop a skill to deal with particular cases because their objects of study are rights, duties, powers and theories about them. Accordingly, when today's civil law judges (and their clerks) that received that kind of instruction take into account prior decisions – a daily experience at the Supreme Court- the weaponry they have to face that activity is mostly inapposite because, as it was said, it is apt to wrestle with statutes, codes and theories about legal institutions. In other

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87. See also Genaro R. Carrió, *Sobre las Creencias de los Juristas y la Ciencia del Derecho*, 1 ACADEMIA REVISTA SOBRE ENSEÑANZA DEL DERECHO NO. 2, 111, 115 (2004). One could take a step further and add to such a short list the "Civil Law" as such, which is a subject-matter that transcends texts of a code or of a statute. However, its consideration is beyond my purpose in this essay.

88. CARRIÓ, *supra* note 28, at 177. This value judgment as to the case-law would have probably disturbed Sir Frederick Pollock idea of the case-law. FREDERICK POLLOCK, *The Science of Case- Law*, in JURISPRUDENCE AND LEGAL ESSAYS BY SIR FREDERICK POLLOCK 169 (1961).

89. In 1985, the school of law of the University of Buenos Aires began a process of reform in the way the law was taught and learned. Among the teaching methods, the reform gave room to the gradual implementation of the so-called case method. This also opened the door to publishing books that offer cases as materials of study (calling them casebooks would be misleading). Nevertheless, fifteen years later the prevailing method was still the dogmatic and magisterial. See Laura Clérico, *Nota sobre los Libros de 'Casos' en el contexto del Método de Casos*, in 1 ACADEMIA: REVISTA SOBRE ENSEÑANZA DEL DERECHO, NO. 2, 13 (2004).



words, their tools are fit to work with general rules and abstract theories about certain areas of the law “uncontaminated” by facts.

As a by-product of that education, continental lawyers, generally, and Argentine judges and Justices, legal clerks, professors and lawyers in particular, develop a “natural” tendency to generalize. That tendency -and I am still referring to the average lawyer, judge or professor- leads them to interpret or to analogize a prior decision or a group of decisions with a high degree of generality. Thus, that tendency to generalize may affect the operative facts of a case or the reasons, that is, the justification on which the decision rests or both. When this exaggerated generalization affects the operative facts, the court rapidly jumps to a much more general category of which the particular facts of a case are an example, skipping other intermediate possible categories.

The same tendency also manifests itself when the moment to ground the present decision arrives. Once in that stage, judges frequently generalize in excess the reasons on which a past decision lies (reasons that are probably written in an already broad language) and sometimes disconnect them from the specific facts of the case.<sup>90</sup> I do not naively pretend that only civil lawyers and judges generalize. It is very well known that in common law jurisdictions judges and lawyers need to generalize in order to extract the rule of a case.<sup>91</sup> It is also a reality that in the common law jurisdictions one may find decisions which go farther than necessary in its reasoning. Nevertheless, (i) the difference of degree among their generalizing tendency is very big<sup>92</sup> and (ii) the absence of an accepted doctrine or theory from which to criticize the way courts deal with cases, give courts a power that goes unchecked.

When one is trained in distinguishing minutely the facts of a case and in making up different applications a rule can have – as a common lawyer normally is – that person necessarily takes consciousness of a myriad of situations that the application of a principle can face and how that principle or rule -judicially created- takes different formulations according to the

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90. In private conversations with Supreme Court law clerks – most of whom conforms the real muscle and memory of the Supreme Court – they usually recognize the difficulties faced in their first months or years at the moment of analogizing cases or of justifying a draft opinion with support in past decisions. To reason inductively, from one case to another one, was almost a completely new experience. They must re-educate themselves in a different way of thinking about a case and its solution without any theoretical or doctrinal help apart from some scattered local articles on the subject. Unfortunately, they keep that experience almost secretly. I do not know of any article or public exposition where they have said so.

91. CAPPALLI, *supra* note 78, ch. II-V; Neil H. Andrews, *The Precedent System: Rule-Making at Common Law*, ch. I-III (forthcoming 2019).

92. One realizes that difference not only in decisional law but also when you compare provisions of a code with any American restatement of the law. The degree of detail found in the latter is alien to the former.

relevant facts which it is meant to control and the justifications offered to support it.<sup>93</sup> The same detailed analysis of the specific facts of the case at hand must be made when one has to subsume them in a rule or principle statutorily created. That approach minute to the particular facts of the case also relates to a doctrine, the doctrine of precedent, and forms part of it. So, because of her education, a common lawyer is inclined to think case by case, in a piecemeal approach.<sup>94</sup> She develops a “natural” constraint against generalizing in excess, apart from particular theories that try to offer a more expansive view.<sup>95</sup>

Argentine law has not formally incorporated the doctrine of Precedent. It is true that since its establishment and from time to time, the Supreme Court has employed several common law techniques and even some practices that are considered controversial in the common law world.<sup>96</sup> However, those uses lack consistency and regularity and neither the Supreme Court nor the

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93. The Supreme Court of Argentina also “creates” rules and frames remedies. A typical example is Angel Siri, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 27, 1957, Fallos 239:459 (1957) (Arg.), where the Supreme Court, with support on the freedom of the press and of expression clause, articulated in Article 14 of the Argentine Constitution, held that when a journal has been closed down by the police and there is no indication that such a closure has been ordered by a judicial authority any court is obliged to entertain the journal claim and immediately order to lift the closure irrespective of whether there exist a specific legal action to that effect or not. In the case, the journal’s owner claim has been made within a habeas corpus proceeding that involved his detention by the police. After his release, the state court refused to lift the closure because that claim could not be entertained in a habeas proceeding. In this ruling it is interesting to observe how the Court language generalizes a freedom of the press and of expression case to any case in which what is at stake is the violation of “constitutional guarantees.” See generally CARRIÓ, *supra* note 28. Following the generalization tendency, this case is considered as creating a right of action to protect constitutional rights, action or writ usually called “amparo” in Latin America. After ten years of this decision, the government enacted Law No. 16.986, which legally instituted the “amparo” to protect individual rights against governmental arbitrary action. See Law No. 16986, B.O. Oct. 20, 1966 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/45000-49999/46871/norma.htm>.

94. CAPPALLI, *supra* note 78, at 23. This constraint is also related to the notions of holding and *obiter dictum*. *Id.* at 25.

95. MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* (1991); FREDERICK SCHAUER, *THINKING LIKE A LAWYER* (1991).

96. In *Tellez v. Bagala*, the Court gave retro-prospective effect to a prior ruling rendered one week prior. *Tellez c. Bagala*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 15, 1986, Fallos 308:552 (1986) (Arg.); Juan Luis Strada, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 8, 1986, Fallos 308:490 (1986) (Arg.). Full prospective overruling, a technique resisted in the U.S. and in the U.K., was utilized by the Argentine Supreme Court in two cases in which the Court declared the federal laws in question unconstitutional. Nevertheless, neither of the petitioners benefitted from this result. See Carlos Alberto Rosza, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 5, 2007, Fallos 330:2361 (2007) (Arg.); Administración Federal de Ingresos Públicos c. Intercorp S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], June 15, 2010, Fallos 333:935 (2010) (Arg.).

academia, despite some exceptions, has developed a systematic approach to them.<sup>97</sup>

When one focuses on the judicial decision in itself, as the Doctrine of Precedent punctiliously does, one discovers many techniques and principles developed and perfected through the Centuries to cope with some aspects of a decision (*i.e.*, how to deal with facts and to distinguish the relevant from the irrelevant; how to reason from one case to another, the relative importance of the reasons stated in favor of deciding in a certain way according to its level of proximity with the decision taken, the more or less importance of the decision verbiage depending on the system where the doctrine is used, the court applying precedent powers, the idea of incremental growth of the law through the judges work, etc.).

Many of those techniques and principles that the continental law has historically neglected and still neglects, could be relevant for the civil decisional law as long as they refer to (i) modes of reasoning legal problems (ii) ways of justifying legal decisions, and (iii) the use of reasons and reasoning employed in past cases as examples of reasoning to use (or not to use) in present cases. As a general proposition nothing should prevent civil law judges or lawyers, from getting help from these common law tools when performing the same kind of activities, treating them systematically and adapting them in case of being necessary or more convenient to their legal and constitutional frameworks. And this proposition should apply particularly in Argentina, where the Supreme Court has emphasized so strongly on the decisive importance of treating like cases alike.

Let me briefly show how the tendency to generalize in excess has manifested in some leading cases.

### 3.3. The Case of Sua Sponte Judicial Review

According to Article 116 of the National Constitution, federal judges have the power to decide “cases,” that is, a particular situation conformed by certain set of facts. Law No. 27 states that courts can only decide actual controversies submitted by aggrieved parties. I have already said that the Supreme Court adopted the American doctrine of “cases and controversies” to interpret Article 116, and that judges have jurisdiction to declare unconstitutional legislation that opposes the Constitution. This is the black

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97. See CARLOS COSSIO, *EL DERECHO EN EL DERECHO JUDICIAL: LAS LAGUNAS DEL DERECHO, LA VALORACIÓN JURÍDICA Y LA CIENCIA DEL DERECHO* (2002); SANTIAGO LEGARRE, *LA OBLIGATORIEDAD ATENUADA DE LA JURISPRUDENCIA DE LA CORTE SUPREMA* (2016); CARRIÓ, *supra* note 28, at 174-75.; GARAY, *supra* note 41, at 26; RÚA, *supra* note 31, at 224-25.

letter law and generally speaking nobody questions that.<sup>98</sup> However, despite the vitality of those principles, the controlling force of facts is often ignored: courts act as if the case were the springboard on which to jump and rule on a whole area of the law in question.

Since the middle of the twentieth century, several Argentine scholars have defended the general duty of judges to declare *sua sponte*<sup>99</sup> the unconstitutionality of any law applicable in a case that in their judgment is in opposition to the Constitution.<sup>100</sup> This argument is cast in very general terms, and refers to any situation in which a court, either first instance, appeal or highest court, considers that the law applicable to the case at hand is in opposition to a constitutional clause.<sup>101</sup> The argument runs against an undisturbed interpretation of Article 2 of Law No. 27 against that possibility, entrenched ideas concerning standing to sue, the opportunity to raise a constitutional question and an uninterrupted line of cases that denied that that power.<sup>102</sup>

Contrary to that background, in *Banco Comercial de Finanzas*<sup>103</sup> the Supreme Court admitted the possibility for courts to raise constitutional questions *sua sponte*. In this case, the highest provincial court had vacated the previous judgment for having declared unconstitutional the applicable

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98. See CARLOS JOSÉ LAPLACETTE, *TEORÍA Y PRÁCTICA DEL CONTROL DE CONSTITUCIONALIDAD* (2016).

99. In Argentina we refer to control of constitutionality *ex officio*.

100. See ALBERTO B. BIANCHI, *CONTROL DE CONSTITUCIONALIDAD: EL PROCESO Y LA JURISDICCIÓN CONSTITUCIONALES* 207 (1992); RAFAEL BIELSA, *LA PROTECCIÓN CONSTITUCIONAL Y EL RECURSO EXTRAORDINARIO* 98 (2nd ed. 1958); GERMÁN J. BIDART CAMPOS, *EL DERECHO CONSTITUCIONAL DEL PODER II* 325 (2nd ed. 1967); RICARDO HARO, *CONTROL DE CONSTITUCIONALIDAD* 81 (2003); see also Néstor P. Sagüés, *El Control de Constitucionalidad de Oficio ¿Deber de los Jueces Argentinos?*, 2013-D LL 35 (2013) (arguing that judges act *sua sponte* and declare that a law is contrary to the Constitution but puts some caveats to that action).

101. My aim here is to highlight how lawyers, professors and judges do not realize or neglect the importance of the facts of the case and how from those particular facts the Court elaborates a solution for “any case” of *sua sponte* review of legislation. For those interested in a critique of the doctrine, see LUIS F. LOZANO, *LA DECLARACIÓN DE INCONSTITUCIONALIDAD DE OFICIO* (2004); Alberto F. Garay, *Controversia sobre el Control de Constitucionalidad de Oficio*, 2008-II JA 1404 (2008); Alberto F. Garay, *Sobre el Control de Constitucionalidad de Oficio, Nuevamente*, 2014-IV JA, 19/11/14 (2014).

102. See Alberto F. Garay, *El Recurso Extraordinario y la Vindicación de Derechos constitucionales y Federales*, in III *TRATADO DE LOS DERECHOS CONSTITUCIONALES* 981 (Julio César Rivera (h), José Sebastián Elías, Lucas Sebastián Grosman & Santiago Legarre eds., 2014); LAPLACETTE, *supra* note 98, at 107.

103. *Banco Comercial de Finanzas*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 19, 2004, Fallos 327:3117 (2004) (Arg.); In a previous case, only a plurality of the Justices agreed to the *sua sponte* power. See Rita Mill de Pereyra y otros c. Provincia de Corrientes, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 27, 2001, Fallos 324:3219 (2001) (Arg.).

law without the request of the interested party. The Supreme Court reversed the highest court judgment. The Court justified the possibility to declare unconstitutional a law without the request of interested party was as follows:

It is worth remembering that it is true that courts cannot give abstract opinions in matters of constitutionality. But the need for an express request from an interested party does not necessarily flow from that principle, because the control of constitutionality entails a question of law and not of fact, and Judges have the power to supplement the law that parties do not invoke or invoke erroneously -a power contained in the old adage *iura novit curia*-<sup>104</sup>. This power entails the duty to keep the supremacy of the Constitution (Article 31, Magna Charta) applying the highest-ranking norm, in case of collision, that is to say, the constitutional norm, and disposing the one of inferior rank.<sup>105</sup>

As it emerges from the previous transcript, the Supreme Court did not consider the specific fact and procedural setting of the case. It spoke completely in an abstract way about “*the control of constitutionality*,” “*iura novit curia*” and the “*supremacy clause*.” It did not make any qualification at all. And the case demanded qualifications because (i) the law in question had already been declared unconstitutional by the Supreme Court in the past,<sup>106</sup> (ii) the provincial intermediate court which acted *sua sponte* had grounded its decision in the Supreme Court precedent which had declared the law unconstitutional in a similar case and (iii) the highest provincial court had acted contrary to said Supreme Court ruling.<sup>107</sup>

The aforementioned circumstances showed that the case was so particular that it deserved to be treated in its own terms. To go beyond the specific facts of the case, beyond its particular procedural setting, and talk generally about the judges’ power to *sua sponte* declare a law unconstitutional was unnecessary and inapposite.<sup>108</sup> At the same time, several scholars celebrated the decision claiming that from now on it would be possible for judges to declare laws unconstitutional without the request of

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104. This adage did not specifically address questions of judicial review of legislation. Originally, it has served judges to apply a law not invoked by the interested party to solve the case. It has never been used to invalidate a law on constitutional grounds, when the interested party did not request that invalidation. See *Mill de Pereyra*, Fallos 324:3219 at 3262 (Moliné O’Connor, dissenting).

105. *Id.* at 3224.

106. *Id.* at 3221, 3223. The leading case was *Banco Sidesa S.A.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], July 15, 1997, Fallos 320:1386 (1997) (Arg.).

107. *Mill de Pereyra*, Fallos 324:3219, at 3225.

108. The Supreme Court added, always in general terms, that the *sua sponte* review of legislation did not offend the right of defense “*of the parties*” neither did it violate the principle of separation of powers. *Id.* at 3224-25.

aggrieved parties. One of them, C. Drake, stated that “our supreme tribunal has given room to the mechanism of the unconstitutionality *sua sponte* allowing judges to face this question without party request[.]” W. Carnota affirmed that in the light of the decision convincing arguments the debate about the Judges duty to act *sua sponte* and declare unconstitutional any law “appears as legal archeology.”<sup>109</sup>

Three years later, the academic enthusiasm waned. The Supreme Court enacted a set of Rules regulating the writ of appeal before it.<sup>110</sup> By Rule 3.d the appellant was obliged to state when and under what terms the federal question had been introduced by him or her in the case, a requirement historically attached to this appeal by the Supreme Court case-law. But that “formality” seemed unnecessary and even contradictory with the *Banco Comercial de Finanzas*’ holding, according to one scholar. If judges – including the Supreme Court Justices – are in the obligation to act *sua sponte*, her argument goes, they are obliged to identify and decide all the constitutional questions a case, any case, could have irrespective of the party’s requests.<sup>111</sup>

Apart from the impracticality of this general proposal – courts are generally overloaded – and putting aside the case of class actions, it is noteworthy the way in which most scholars everybody neglects the particular facts and the procedural setting of the case and the unnecessary generality of the reasons stated. It’s as though the *sua sponte* power has cast a spell that has made them blind to the facts.

### 3.4. The Cases of Drug Possession for Personal Consumption

There are cases in which the conditions under which a certain behavior has occurred are crucial to adjudge it as legal or illegal, constitutional or unconstitutional. Drug possession for personal consumption is one of those cases. In *Bazterrica*, the Supreme Court declared 3-2 that a law criminalizing

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109. Walter Carnota, *La Fundamentación de la inconstitucionalidad de oficio*, 2005-A LL 67 (2005) (Arg.); see Carlos E. A. Drake, *Control oficio de constitucionalidad*, 2006-1 LNBA 26 (2006). The same generality can be observed in Leandro Fernández, *Nuevos horizontes en el control de constitucionalidad*, 2005-C LL 482 (2005) (Arg.).

110. See Rule 3.b, Acordada No. 4 (2007), published in Fallos 330:1315 (2007). However, in *Jorge Luis Rodríguez Pereyra c. Ejército Argentino*, the Supreme Court, ignoring Rule 3.b Acordada 4 (2007), seemed to strongly endorse the *sua sponte* power of review. Jorge Luis Rodríguez Pereyra c. Ejército Argentino, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Nov. 27, 2011, Fallos 335:2333 (2012) (Arg.). Two years later, in *Mansilla*, the Court further weakened this approach. Carlos Mansilla c. Fortbenton Co Lanoratories S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 6, 2014, Fallos 337:179 (2014) (Arg.).

111. See Fabiana B. Berardi, *De la articulación de la cuestión federal en tiempos de control de oficio*, 2005-III JA 446 (2005) (Arg.).

mere possession of narcotics for personal consumption was unconstitutional.<sup>112</sup> The majority vote – formed by a plurality opinion of two Justices and one concurrent opinion – considered that the law violated the constitutional right to privacy. The three Justices agreed in the result but stated independent reasons. However, the facts of the case were mentioned exclusively by the concurrent Justice, who referred to a bunch of particulars in a couple of lines, namely, what narcotics were at stake (marijuana and cocaine) and its (scarce) quantity.<sup>113</sup> No Justice stated under what circumstances the drugs had been found by the police- a relevant fact to determine the privacy of the behavior.

The rest of the lengthy concurrent vote and the plurality opinion dealt entirely with the politics of generally incriminating the mere possession of drugs (also, in general) for personal consumption, the experience of other countries dealing with the same issue, criminal theories involved, United Nations works, philosophical underpinnings of protecting strictly personal decisions that do not compromise other people, etc. The Justices wrote as if this single case would present the Court all the possible factual permutations and combinations. Of course, the dissent stated the contrary position in the same general terms.

After this decision was rendered, liberals effusively celebrated it but there was an important opposition on the part of many non-liberal social forces, politicians and academics, undoubtedly fed by the generality with which the majority had spoken. One would have thought that, due to the generality of the reasons stated, the majority votes had already decided the whole question. However, subsequent cases showed the importance of distinguishing on the facts of each case and re-directed the analysis to the path from which it had never deviated.<sup>114</sup>

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112. Gustavo Mario Bazterrica, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 23, 1986, Fallos 308:1392 (1986) (Arg.).

113. *Id.* at 1429 (Petracchi, J., concurring) (“el apelante dedujo recurso extraordinario, sosteniendo que dicha norma viola la garantía establecida en la primera parte del art. 19, de la Constitución Nacional, especialmente en atención a la exigua cantidad de sustancia hallada en poder del procesado (3,6 grs. de marihuana y 0,06 grs. de clorhidrato de cocaína[.]”) (translated as “the appellant filed the writ of appeal holding that said statutory norm violated the guarantee established in Article 19, National Constitution, especially taking into account the scarce quantity of substance found in the defendant[.]”).

114. *See* Alejandro Carlos Capalbo, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 29, 1986, Fallos 308:1392 (1986) (Arg.); María M. Noguera y otras, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Feb. 17, 1987, Fallos 310: 294 (1987) (Arg.); Gustavo Adolfo Von Wernich, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 24, 1987, Fallos 310:2836 (1988) (Arg.); Nancy G. Giménez y otros, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 1, 1988, Fallos 311:185 (1988) (Arg.); García, Alejandro M. y otros, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Nov. 1,

So, what initially appeared as a general *carte blanche* in favor of drug possession and consumption turned into a standard that would stress the conditions (not endangering nor harming third parties' rights or goods) under which the possession of drug for personal consumption was discovered.

Four years later, and after a legislative reform that *inter alia* reduced the punishment to be applied in drug possession for personal consumption cases,<sup>115</sup> the Court decided the *Montalvo* case.<sup>116</sup> A new majority in the enlarged Supreme Court<sup>117</sup> overruled *Bazterrica* completely, ignoring that long line of subsequent cases in which the Court, case by case, had restricted *Bazterrica*'s reach carving out an important number of exceptions to the leading case's holding.<sup>118</sup> The *Montalvo* Court also based its decision on reasons and assertions as general as the ones employed in *Bazterrica* and failed to describe minutely the facts of the case. Again, the Court spoke *ex cathedra*.

Thirteen years after *Montalvo*, and once again with a new majority, the Supreme Court re-considered the issue and, in *Arriola*,<sup>119</sup> overruled *Montalvo*. Late Justice Petracchi, author of the concurring vote in *Bazterrica*, referred to his original opinion. Two recently appointed Justices and another concurring vote that formed the majority bulk followed Petracchi's vote in *Bazterrica*, without adding or clarifying anything about the facts of that case and their bearing on the facts of the present one. Late Justice Fayt, dissenting in *Bazterrica* and with the majority in *Montalvo*, recasted his vote now in favor of protecting the liberty at stake. But the only one that highlighted the poor description of facts in *Bazterrica* and *Montalvo*, the pernicious generality in which those cases were drafted, the relationship

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1988, Fallos 311:2228 (1988) (Arg.); Myriam Gerstein, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 20, 1988, Fallos 311:2721 (1988) (Arg.); Fiscal c. Ideme, Daniel y Galesi, Alberto, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 25, 1989, Fallos 312:587 (1989) (Arg.); Sergio H. Di Capua, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 5, 1989, Fallos 312:1892 (1989) (Arg.); Emilio F. Rossi, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 19, 1989, Fallos 312:2475 (1989) (Arg.).

115. See Law No. 23737, art. 14, B.O. Oct. 11, 1989 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/138/norma.htm>.

116. Ernesto Alfredo Montalvo, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 11, 1990, Fallos 313:1333 (1990) (Arg.).

117. The number of Supreme Court Justices had been augmented from five to nine in 1990. See Law No. 23774, art. 21, B.O. Apr. 16, 1990 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/175/norma.htm>. Years later, that number was again reduced to five. See Law No. 26183, art. 21, B.O. Dec. 18, 2006 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/120000-124999/123154/norma.htm>.

118. See *supra* note 114.

119. Sebastián Arriola et al., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 25, 2009, Fallos 332:1963 (2009) (Arg.).



of the “case” with judicial review, the limits of the judicial power and the relevance of subsequent cases’ facts in order to get a holding, was the concurring vote of the late Justice Carmen Argibay.<sup>120</sup>

As it emerges from the cases restated above, the tendency to generalize, inherent in the civil law education, leads the Court to underestimate the precise facts of a case, categorizing them in very broad terms. The foregoing conclusion must be completed with another consequence of the education received. Contrary to common law doctrine,<sup>121</sup> in the Argentine Supreme Court (and in any court in Argentina) judicial language plays a very important role in that practice.

That is one of the reasons why decisions repeat lengthy prior decisions paragraphs. Generally, this way of conceiving of precedents resembles what professor Llewellyn called the “*loose view*” of precedent. In his words:

That is the view that a court has decided and decided authoritatively *any* points or all points on which it chose to rest a case, or on which to choose, after due argument, to pass. No matter how broad the statement. No matter how unnecessary on the facts or the procedural issues, if that was the rule the court let down, then that the court has held.<sup>122</sup>

#### 4. *Holding and Obiter Dictum*

##### 4.1. The Notion of Holding or Ratio Decidendi of a Case

As it was shown above, the Supreme Court and the district courts use to ground their decisions in Supreme Court precedents. But to affirm that inferior courts follow Supreme Court precedents is a sort of vague statement because it does not explain what “a precedent” is for those courts. The way district courts used Supreme Court judgments or a line of them in the nineteenth century to give support to their decisions was sometimes cryptic,

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120. The same generality and disdain for the facts of the case can be observed, among many others, in a famous abortion case. See F. A. L. s/ Medida autosatisfactiva, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 13, 2012, Fallos 335:197 (2012) (Arg.).

121. Andrews, *supra* note 91, ch. III (“As mentioned, the judicial craft is not the same as legislative drafting. And so, the words (ipsissima verba) uttered by a superior court (whether oral and thus captured by a law reporter or written in a reserved judgment have no binding literal value as a set of words or series of propositions.”) (internal citations omitted). The same rule has been advanced in constitutional matters. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001). A trend that tries to offer a lighter view of that classic understanding on both sides of the Atlantic can be found in FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 179 (2009); and NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT (2008).

122. LLEWELLYN, *supra* note 78, at 74.

either just citing a certain case by the parties' names only,<sup>123</sup> or just affirming that the decision they were adopting was equal to the one taken by the Supreme Court earlier.<sup>124</sup> Generally, they did not make explicit a principle, rule or *ratio decidendi* emanating from the judgment.<sup>125</sup> The same can be said of the way the Supreme Court worked during that Century.

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123. See, for instance, D. Ricardo Vadillo contra Pedro Palma y hermanos, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], July 7, 1881, Fallos 23:366, 367 (1881) (Arg.) (“Este juzgado no tiene jurisdicción para conocer., artículo 14 de la Ley Nacional de jurisdicción y competencia; jurisprudencia hecha por la Corte Suprema fallo: 146, Volume 3, 2nd serie, p. 505) (translated into English as “[T]his court has no jurisdiction., Article 14 national law of jurisdiction and venue; Supreme Court precedent, fallo: 146, Volume 3, 2nd serie, p. 505.”).

124. Rodríguez Balmaceda y Cía., contra el Fisco Nacional, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 5, 1868, Fallos 6:159, 160 (1868) (“[T]he Supreme Court of Justice . . . , has decided for the second time, giving to the word ‘party’ used in the cited Article of the Constitution a restrictive interpretation and declaring that the Nation is not a ‘suable party’ (case 77, p. 43, Volume 2[.])” (“La Corte Suprema de Justicia . . . ha resuelto por segunda vez dando á la palabra «parte» del citado art. de la Constitución una interpretación restrictiva y declarando que la Nación no es ‘parte demandable’ (causa 77, pág. 43, del tom. 2, de la publicación de los Fallos por su Secretario.”); Don Ramón Dávila, contra Don Ricardo Valdez, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 6, 1881, Fallos 23:726, 727 (1881) (Arg.) (“[A]nd Supreme Court precedents in analogous cases”) (“y la jurisprudencia seguida por la Corte Suprema en casos análogos[.]”); D. Tristán A. Malbrán, contra D. Antonio Marechal, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Feb. 26, 1885, Fallos 28:28, 30 (1885) (Arg.) (“And finally, that the latter are doctrines that the Supreme Court has made prevail in several decisions rendered after the one cited by the defendant; see 2nd. serie, Vol. 3, p. 7 and Volume 4, p. 392.”) (“Y finalmente, estas son las doctrinas que con más acierto y en conformidad a la Constitución y leyes, ha hecho prevalecer en diversas resoluciones posteriores al fallo citado por el demandado, vease 2ª. serie, Tomo 3º, pág. 7 y tomo 4º, pág. 392.”).

125. Of course, there were exceptions. For instance, in *Agustín Richeri* the district court said: [I]n the decision published at page 476, Volume 2, 2nd series, the Supreme Court, has declared that national courts do not have a supervisory power over the Municipalities for the delay in deciding matters conferred to the latter; and the fact of delaying the payment of the salary is one of those cases.

*Agustín Richeri* contra la Municipalidad de Buenos Aires, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Feb. 12, 1880, Fallos 22:37 (1880) (Arg.) (“Que... la Suprema Corte, en el fallo publicado en la página 476, tomo 2, serie 2ª, ha declarado que la Justicia Nacional no puede ejercer superintendencia en las Municipalidades por tardanza de éstas en resolver lo que á ellas corresponde; y el hecho de retardar el pago del sueldo se halla en este caso.”); *see also* Don Herlado Eckell, contra Empresa del Ferro-Carril del Sud, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 14, 1885, Fallos 28:75, 76 (1885) (Arg.) (“It is the law, that all the consequences of a maritime accident . . . must be litigated exclusively before the district court with jurisdiction over the waters where the accident happened, and so it is decided by the Supreme Court in the case Mensajerías Fluviales con Don Santiago Cánepa cited by Eckel.”) (“Que es de estricto derrecho, que todas las consecuencias jurídicas de un siniestro maritime . . . corresponden privativamente al juez de sección en cuyas aguas ocurre el hecho, y así se halla resuelto or la Suprema Corte en el caso que cita Eckell de las Mensajerías Fluviales con Don Santiago Cánepa.”); Varios comerciantes extranjeros [sic] contra D. Samuel Palacios y Compañía, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 17, 1885, Fallos 28:78 (1885) (Arg.) (“[I]t barely deserves mentioning that our Constitution,

Something that emerges from the case law is that both district courts and the Supreme Court were more focused in finding the similarities between cases than in making a rule, principle or *ratio decidendi* explicit from de judgment. This focus on similarities was kept until today. But the practice to regularly make the rule of prior cases explicit did not develop. There are also twentieth and twenty-first century decisions in which the Supreme Court uses the expression “holding”<sup>126</sup> or in some other times uses *ratio decidendi*,<sup>127</sup> to aim at what the Court decided in a previous case. However,

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in its Article 100, taken from the North-American, Article 3, Section 2, and our law on jurisdiction and venue, art. 2, section 2, adapting what is established by the Judiciary Act of 1789, state the federal jurisdiction the cases between a citizen and a foreigner; and the Supreme Court, in applying this principle, has observed a rigorous uniformity.” (“2° que apenas merece mencionarse que nuestra Constitución, en su artículo 100, tomado de la Norte-Americana, artículo 3°, Sección 2ª., adoptando lo dispuesto en la ley Judicial de los Estados Unidos de 1789, atribuyen al fuero federal las causas en que sean partes un ciudadano y un extranjero; y la Suprema Corte de la Nación, en la aplicación de este principio, ha observado una rigurosa uniformidad. T° 8, Série [sic] 1ª, pág. 156. T° 9°, pág. 350. T° 11, Série [sic] 2ª, pág. 393Tómo 14, pág. 731.”).

126. María Gabriela Osswald s/solicitud en autos “Willner, Eduardo Mario c. Osswald, María Gabriela s/exhorto”, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 17, 1995, (Fayt and Petracchi, dissenting) Fallos 318:541 (1995) (Arg.); Armando Boto c. Obra Social Conductores de Transporte Colectivo de Pasajeros, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 6, 1997, Fallos 320:786 (1997) (Arg.); César Luis Walta, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Nov. 21, 2004, Fallos 327:3829 (2004) (Arg.); Silvia Amanda Sevilla, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 30, 2014, unpublished opinion (2014) (Arg.); Champion IBSA c. Estado Nacional, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], July 10, 2018, unpublished opinion (Rosenkrantz, dissenting) (2018) (Arg.).

127. See Víctor Peláez, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 19, 1995, Fallos 318:1967 (1995) (Arg.); Isacio Aquino c. Cargo Servicios Industriales S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 21, 2004, Fallos 329:5913 (2004) (Arg.); Casa Casmma S.R.L., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 26, 2009, (Argibay, concurring) Fallos 332:616 (2009) (Arg.); Horacio Osvaldo Benítez c. Plataforma Cero S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 22, 2009, Fallos 332:2815 (2009) (Arg.); Carlos Fabián Cerigliano c. Gobierno de la Ciudad Autónoma de Buenos Aires, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 19, 2011, Fallos 334:398 (2011) (Arg.); Elsa Alejandra Monroy c. Infantes S.R.L., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 17, 2013, Fallos 336:1468 (2013) (Arg.); Hugo Miguel Cristiani c. IOSE, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Nov. 18, 2014, unpublished opinion (2014) (Arg.); Orlando Mario Gómez c. Estado Nacional, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Nov. 27, 2014, Fallos 337:1337 (2014) (Arg.); Villar, Lisandro Nelson c. COMFER, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], June 16, 2015, unpublished opinion (2015) (Arg.); Norma Alicia Lentine de Sarnari c. Estado Nacional, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 17, 2018, unpublished opinion (2018) (Arg.).

those notions are used loosely, without much precision.<sup>128</sup> The idea of “holding” or of *ratio decidendi* has never been subjected to the sophisticated analysis that they have received in the Common Law.

As I said before, instead of looking for a certain *ratio* or holding and make it explicit it is very common to find judgments in which the Court quotes, extensively or briefly, portions of a prior decision containing (i) the reason or reasons on which the decision rests or (ii) purposes or goals expressed in it. In cases referred in (i), the Court uses to quote -sometimes extendedly-<sup>129</sup> some selected paragraphs of it which, for today's Court, conveys the reason or reasons considered relevant to decide both cases alike. Other times, as was stated above,<sup>130</sup> *brevitatis causae* (for the sake of brevity) the sole reason for deciding is the ambiguous and vague reference to “the foundations” of a specific prior case. But as in the past, in present time the Court does not consider itself routinely obliged to take a step further and extract a principle or rule from the prior decision.

It is obvious that styling decisions in this way gives the Court some flexibility, yet it does it at the cost of indeterminacy. Without the constraints of any prior canonical formulation and without the obligation to explicitly state the rule from a past case, the Court can easily follow the precedent in future cases, but it could also revise and adjust its factual predicate. The Court could also revise and adjust the reasons, or the language used in the precedent in order to broaden or narrow its reach. Finally, by the same token, the Court could distinguish it. It is no secret that leaving those possibilities open weakens the precedent's guiding strength but neither the Court nor the academia has driven their attention to it.

Another disadvantage of the “flexible” style just mentioned is that, in contested matters which confront individual or minority rights *vis à vis* the Executive or Congress, the new decision of the Court relying in such a wide

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128. A curious case that attests the loose use of the word “holding” is found in *Amelia Ana Villamil c. Estado Nacional*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 28, 2017, Fallos 340:345 (2017) (Arg.). The Court did not make the holding explicit. Instead, it said: “The aforementioned difference results immaterial because it was not part of the Larrabeiti Yañez holding (stated in consideration No. 5 of said judgment).” *Id.* (“En efecto, la diferencia mencionada resulta inmaterial puesto que ella no fue parte del holding de «Larrabeiti Yañez» (expresado en el considerando 5º de dicha sentencia.”). If one reads the case *Anatole Alejandro Larrabaciti Yañez c. Estado Nacional*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 30, 2007, Fallos 330:4592 (2007) (Arg.) one finds that consideration No. 5 is fifty-six lines long and has references to three previous cases, one statute, one code article and different facts.

129. *See Carlos Eugenio Mansilla c. Fortbenton Co. Laboratories S.A. y otros*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 6, 2014, Fallos 337:179 (2014) (Arg.).

130. *See supra* section IV.2.

foundation and favoring the latter can be perceived by the public as spurious, politically influenced and this perception would inevitably undermine the Supreme Court credibility.

But in any case, why is this so? Why doesn't the Supreme Court formulate the rule of the case? Or why does it feel comfortable with just referring to some portions considered important or relevant? Is the aforementioned flexibility a good enough reason? The flexibility is an important reason but not the only one. Another reason already mentioned is that the legal profession tends to consider that a judgment is not a source of law in the Civil Law tradition: sources of law are constitutions, statutes, executive orders and administrative regulations.

This idea is at the base of that tradition. Sources of law are binding on all; judicial precedents only bind the parties to a lawsuit and the *jurisprudencia* -taken here as a collection of prior similar cases decided alike by the highest court within a jurisdiction- may be persuasive but never binding. So, if judicial decisions are not sources of law, they do not deserve scholars' nor judges' attention. Besides, and this is something not to underestimate, the overriding majority of Supreme Court Justices has not received any kind of training in the doctrine of precedent. Their education is overwhelmingly Continental.<sup>131</sup>

These ideas are mechanically repeated in Argentina and they coexist with the fact that courts, and particularly the Supreme Court, often use precedents and distinguish facts and procedural settings of prior cases. What is more –as we have seen in the drug possession for personal use and the *sua sponte* power cases,<sup>132</sup> the Court often renders decisions as if it were legislating. Taken at face value, this way of deciding expands its denied law generating capacity and blurs the distinction between holding and obiter dictum, a distinction which, as we will see, the Court repeatedly holds.<sup>133</sup> On the other side of the counter, and reasserting the relevance of this practice, lawyers also rely on precedents to support their arguments and some scholars have developed theories and doctrines based almost exclusively on Supreme Court's case-law.<sup>134</sup>

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131. Exceptions to this predominance are evidenced by former Chief Justice Genaro R. Carrió and, today, Chief Justice Carlos F. Rosenkrantz. Both Chief Justices pursued graduate studies and taught at U.S. universities.

132. See *supra* sections IV.3.1 and IV.3.2.

133. DUXBURY, *supra* note 121, at 90 (“If, within the common law tradition, the distinction between ratio decidendi and obiter dicta were not recognized judges would be able to create a more or less unlimited amount of new law and courts would be overwhelmed by precedent.”).

134. ALEJANDRO CARRIÓ, GARANTÍAS CONSTITUCIONALES DEL PROCESO PENAL (6th ed. 2015) (Arg.); GENARO R. CARRIÓ, EL RECURSO EXTRAORDINARIO POR SENTENCIA ARBITRARIA (Abeledo Perrot ed., 2nd ed. 1978) (Arg.); GENARO R. CARRIÓ, RECURSO DE AMPARO Y TÉCNICA

Separation of powers has been another reason historically argued in the Civil Law against the Doctrine of Precedent. Courts do not create law because that function belongs to the legislatures. However, it is undeniable that nowadays the doctrine of separation of powers is not generally endorsed as strictly as it was in the eighteenth and nineteenth centuries. That way of conceiving the separation of powers has been scholarly and judicially abandoned decades ago since the emergence of the Administrative State in the second third of the twentieth century.

Finally, at least in some occasions the Supreme Court has incidentally applied rules and standards that weren't enacted previously by any legislature or constitutional convention. They were the Court's own creation.<sup>135</sup> It is evident that the powers wielded by the Supreme Court in those cases, many of them supported in U.S. Supreme Court case law, cannot be squared with that old-fashioned notion of separation of powers that deny the possibility for the court to incidentally "create law" in the course of adjudicating cases.

#### 4.2. The Expression *Obiter Dicta*

The first time the Supreme Court was obliged to distinguish between what was decided in a judgment and other observations made in it, was in 1871, in a lawsuit coming from a provincial court. In *Banco de Londres* case,<sup>136</sup> when the defendant answered the complaint, she questioned the constitutionality of the provincial law on which the plaintiff based his action. With support on that defense, the defendant asked for removal from the provincial court to a federal court, motion which was denied. Nevertheless, apart from that, it seems that in the decisions denying removal both provincial courts also defended the constitutionality of the provincial law. The Supreme Court decided that the provincial court's denial of removing the case to a federal court was appropriate for three reasons: (i) the plaintiff's original right of action was based on a provincial law; (ii) the suit did not arise under the Constitution and (iii) the "defendant's defense on the unconstitutionality

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JUDICIAL (Abeledo Perrot ed., 2nd ed. 1987) (Arg.); JORGE A. GONDRA, JURISDICCIÓN FEDERAL (Edición de la Revista Jurisprudencia Argentina 1944) (Arg.); ESTEBAN IMAZ & RICARDO REY, EL RECURSO EXTRAORDINARIO (Abeledo Perrot ed., 2nd ed. 1992) (Arg.); SANTIAGO LEGARRE, OBLIGATORIEDAD ATENUADA DE LA JURISPRUDENCIA DE LA CORTE SUPREMA (Ábaco de Rodolfo Depalma ed., 2016) (Arg.); FELIPE S. PÉREZ, LA CONSTITUCIÓN NACIONAL Y LA CORTE SUPREMA: CON LA JURISPRUDENCIA SOBRE LOS ARTÍCULOS DE LA CARTA POLÍTICA (1962) (Arg.); JULIO CÉSAR RIVERA (H), LA LIBERTAD DE EXPRESIÓN Y LAS EXPRESIONES DE ODIO (Abeledo Perrot ed., 2000) (Arg.); BARRANCOS Y VEDIA, GRAVEDAD INSTITUCIONAL (Abeledo Perrot ed., 1991) (Arg.).

135. See cases *supra* accompanying notes 93 & 96, at 42-43.

136. *El Banco de Londres y Río de la Plata del Rosario c. D. Casimiro Rivadaneira*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 30, 1871, Fallos 10:134 (1871) (Arg.).

of the provincial law, is not enough to deprive the provincial court of its jurisdiction to decide the cases governed by provincial laws and litigated between neighbors of the same province.”<sup>137</sup> The Court added:

[T]hat the question on the constitutionality of the law on which the plaintiff based his right has not been decided yet . . . for the words registered in the decision at page twenty one and page forty five . . . , are not dispositive of the question nor do they have *res judicata* effect.<sup>138</sup>

After several years, general expressions used in prior decisions gave the Supreme Court a second opportunity to fine-tune the notion of what weight the Court was willing to recognize to them. In this occasion the general expressions at issue did not belong to a provincial court judgment as in the prior case, but they were Supreme Court’s.

In *Elortondo*,<sup>139</sup> the defendant had questioned an expropriation statute on constitutional grounds. The government defended the law based, *inter alia*, on two Supreme Court precedents. The unconstitutionality defense had been rejected by the district court and the defendant appealed. The majority of the Supreme Court held that the amount of property taken by the law exceeded what was strictly needed for the construction of an important Avenue in the city of Buenos Aires, a narrow interpretation of the “public use” concept contained in Article 17 of the Constitution.<sup>140</sup>

For the dissent, the legislative decision was not reviewable by the Court. Besides, according to this vote, the opinion of the Court was in sharp contradiction with what the Court had said in several prior expropriation cases as to the ample leeway the government had at the moment of determining the amount of land to be taken. In the dissent’s terms: “[T]he ‘Ferro-Carril Central Argentino’ case is so conclusive, that if the established

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137. *Id.* at 137 (“[Q]ue la objeción de inconstitucionalidad hecha por el demandado a la referida ley, no basta para privar a los Tribunales de esa Provincia, de la jurisdicción que les compete para conocer y decidir en causas regidas por leyes provinciales, y seguidas entre vecinos de la Provincia misma[.]”).

138. *Id.* at 138 (“[Q]ue la cuestión sobre constitucionalidad de la ley invocada por el demandante no ha sido resuelta ni aun está debidamente sustanciada todavía, pues las palabras que a ese respecto se registran en los considerandos de los autos que corren a fojas veinte y uno y fojas cuarenta y cinco de los que se hallan agregados, no son parte dispositiva ni hacen cosa juzgada.”).

139. *Municipalidad de la Capital c. Isabel A. de Elortondo*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 14, 1888, Fallos 33:162 (1888) (Arg.).

140. CONSTITUCIÓN NACIONAL [CONST. NAC.] ART. 17 (Arg.), [http://www.infoleg.gob.ar/?page\\_id=63](http://www.infoleg.gob.ar/?page_id=63). Article 17 states, part: “The property is inviolable and no inhabitant of the Nation can be deprived of it, but by virtue of judicial decision grounded in the law. The expropriation for public use must be established by law and previously indemnified.” *Id.* (“La propiedad es inviolable, y ningún habitante de la Nación puede ser privado de ella, sino en virtud de sentencia fundada en ley. La expropiación por causa de utilidad pública, debe ser calificada por ley y previamente indemnizada.”).

precedents deserve any respect it is unconceivable how the constitutionality of this statute has been brought before this Court.”<sup>141</sup>

The majority, after distinguishing the present case (an urban expropriation), from the precedents in which the plaintiff relied (rural expropriations), without even mentioning the *Banco de Londres* case, added:

[B]ecause whatever it is the generality of the concepts used by the Court in those cases, they cannot be understood but as related to the circumstances of the case that caused them, being as it is a maxim of law, that general expressions used in judicial decisions must always be taken in connection with the case in which they are used, and if they go beyond the case they may be respected but they cannot oblige the court in any manner whatsoever for the subsequent cases.<sup>142</sup>

This paragraph never ceases to amaze me, because what the Court presented as a “*maxim of law*” was certainly not a maxim of Argentine or Spanish law, but closer to a Common Law maxim.

Additionally, the paragraph just translated may also sound familiar to the American ears, and this is due to the fact that it was undoubtedly taken from the opinion of the Court penned by Chief Justice John Marshall in *Cohens v. Virginia*.<sup>143</sup> Many times the Supreme Court of Argentina cited cases decided by the U.S. Supreme Court. Those foreign precedents, as Miller says, had a legitimating force when interpreting analogous constitutional clauses and for many influential thinkers they represented the correct understanding of the Argentine clauses.<sup>144</sup> I ignore why in this particular opportunity the Court silenced the paragraph’s reference and omitted to add italics to it, when the aforementioned reliance was that frequent and the notion referred was devoid of any particular political

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141. *Elortondo*, Fallos 33:162, at 199 (“[E]l caso del Ferro-Carril Central Argentino es tan concluyente, que no se concibe cómo la cuestión de constitucionalidad de esta ley ha podido traerse ante esta Corte, si algún respeto han de merecer los precedentes establecidos.”).

142. *Id.* at 196 (“[P]orque cualquiera que sea la generalidad de los conceptos empleados por el Tribunal en esos fallos, ellos no pueden entenderse sino [sic] con relación a las circunstancias del caso que los motivó, siendo, como ejemplo, una máxima de derecho, que las expresiones generales empleadas en las decisiones judiciales deben tomarse siempre en conexión con el caso en el cual se usan, y que en cuanto vayan más allá, pueden ser respetadas pero de ninguna manera obligan el juicio del Tribunal para los casos subsiguientes.”).

143. *P.J. Cohen & M.J. Cohen v. Virginia*, 19 U.S. 264, 399 (1821) (“It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”). This paragraph is offered by Murphy and Kernochan as an example of *obiter dictum*. HARRY W. JONES, JOHN M. KERNOCHAN & ARTHUR W. MURPHY, *LEGAL METHOD* 131 (1978 ed.).

144. See Miller, *supra* note 15, at 11, ch. V.



meaning that could have refrained the Court from disclosing its American pedigree.<sup>145</sup>

Finally, the notion of *obiter dictum* has been used many times by the Supreme Court with or without reference<sup>146</sup> to its formulation in *Elortondo*, and is currently employed by it.<sup>147</sup> One can fairly say that the identification of peripheral, tangential or in passing comments in a decision is an activity incorporated into Supreme Court practice.

## 5. The Binding Character of Supreme Court Precedents

### 5.1. Introduction

We have seen that the Supreme Court of Argentina has used its past decisions in support of today's since its very beginnings. District courts have

145. According to García-Mansilla and Ramírez Calvo, some scholars have a sort of bias against the U.S. that lead those scholars to minimize the powerful influence the United States Constitution and, specifically, the influence its liberal values had on the Argentine Constitution, thereby falsifying the historical truth. See GARCÍA-MANSILLA & CALVO, *supra* note 2, at 6.

146. An interesting case in which the Court did not refer to *Elortondo* but applied the notion of *obiter dictum*, claiming the power of the deciding Court to say what was the rule of law for which the precedent is made to stand, is Félix Antonio Degó, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 20, 1958, Fallos 242:73 (1958) (Arg.).

147. Luis y Jutto Vila y otros c. Provincia de Córdoba, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 6, 1937, Fallos 178:308 (1937) (Arg.); Margarita M. Fornasini de Ponce, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 23, 1951, Fallos 219:583 (1951) (Arg.); Compañía Azucarera Tucumana S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], June 2, 1975, Fallos 292:84 (1975) (Arg.); Eduardo Manuel Bocaccio, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 18, 1983, Fallos 305:1694 (1983) (Arg.); Horacio Verbitzky y otros, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], June 13, 1989, Fallos 312:916 (1989) (Arg.); Santiago Omar Riveros y otros, Dec. 11, 1990, (Petracchi and Oyhanarte, concurring opinion) Fallos 313:1392 (1990) (Arg.); Abaco Compañía Financiera S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 24, 1992, Fallos 315:449 (1992) (Arg.); C. J. A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 4, 1995, Fallos 318:2481 (1995) (Arg.); Sebastián Arriola y otros, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 25, 2009, (Argibay, concurring opinion) Fallos 332:1963 (2009) (Arg.); Unión de Usuarios y Consumidores c. E.N., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 1, 2013, Fallos 336:1612 (2013) (Arg.); Carolina Marite Muñoz y otro, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 6, 2014, Fallos 337:505 (2014) (Arg.); Isabel Lindow de Angio c. Gobierno de la Provincia de Santiago del Estero, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 3, 2015, Fallos 338:134 (2015) (Arg.); Leonel Ignacio Acosta, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 22, 2017, Fallos 340:1084 (2017) (Arg.); Recurso de Queja No. 1, Imputado: Carlos del Señor Hidalgo Garzón, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 4, 2018, unpublished opinion (Maqueda and Lorenzetti, concurring opinions) (2018) (Arg.).

also relied in Supreme Court precedents when deciding cases, generally taking for granted that Supreme Court decisions had to be followed. Among the federal cases that reached the Supreme Court during the nineteenth century, I could not find any district court decision that openly refused to follow Supreme Court precedents. On the contrary, the rhetoric employed by those courts allows me to infer that they considered themselves bound to follow Supreme Court precedents on point, notwithstanding the fact that there are not decisions in which a district court elaborates on this subject until 1883.<sup>148</sup>

The same can be said as to the way the Supreme Court worked during that Century.<sup>149</sup> Until today, I registered only one important nineteenth century case, *Sojo*,<sup>150</sup> rendered in 1887, in which the Supreme Court, in a split decision, 3-2, expressly overturned the decision in *Acevedo*.<sup>151</sup> Something not to disregard in the *Sojo* case is that the majority vote was conformed with the dissenter in *Acevedo* and two recently appointed Justices that hadn't participated in the *Acevedo* decision.<sup>152</sup> As we have seen above, it is precisely the binding character of Supreme Court past decisions what

148. One district court decision that expressly affirmed that inferior courts should follow Supreme Court decisions rendered in analogous cases and which proceeded accordingly is *Rodríguez Balmaceda y Cia. c. El Fisco Nacional*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 5, 1868, Fallos 6:159, 160 (1868) (Arg.). However, the district judge limited the scope of the ruling to questions of jurisdiction, stating “as to the reach of the Federal Justice, the district courts must subordinate their proceedings to the jurisdiction established in the resolutions of their Superior.” *Id.* (“y que los Juzgados de primera instancia deben subordinar sus procedimientos a la jurisdicción establecida por las resoluciones de su Superior en cuanto al alcance de la justicia Federal[.]”) (internal citations omitted); see *Magdalena Videla c. Vicente Aguilera*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 9, 1870, Fallos 9:53 (1870) (Arg.). The first decision that reached the Supreme Court in which a district court expressly affirmed, *obiter dictum*, that there was no “legal” obligation to conform its decisions to Supreme Court precedents but followed them, was rendered in 1883 in the *Pastorino* case. *Bernardo Pastorino c. Ronillón, Marini y Cia.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], June 23, 1883, Fallos 25:364 (1883) (Arg.); see *infra* note 189, at 73, and accompanying text.

149. Miller, *supra* note 15, at 1559 (“Traditionally, both the Argentine Supreme Court and lower courts took the Argentine Supreme Court’s precedents seriously. At least through the 1890’s Argentine Supreme Court precedents were regarded as binding on the lower courts . . . Regarding the Supreme Court itself, the Court regularly cited its own precedents and sought to follow them[.]”) (internal citations omitted).

150. Eduardo Sojo, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 22, 1887, Fallos 32:120 (1887) (Arg.).

151. Eliseo Acevedo, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 1, 1885, Fallos 28:406 (1885) (Arg.). The Court formed a quorum, with only three Justices out of five. The majority was signed by Domínguez and Federico Ibaguren. Frías voted in dissent.

152. Recently appointed Justices Victorica and Zavalía, and experienced Justice Frías formed the majority opinion of the Court. Justices Ibaguren and de la Torre (both in the majority decision in *Acevedo*) dissented. See *Sojo*, Fallos 32:120; *Acevedo*, Fallos 28:406.

Justice Zavalía – now in the majority overruling decision – will claim two years later in his dissent in *Elortondo*.

There is much literature on *stare decisis* in the common law world. As expected, not everybody offers the same idea about the binding effect of highest courts decisions. Besides, in the U.S. one important difference to take into account refers precisely to the subject matter. I am aware that *stare decisis* offers its weakest form in constitutional adjudication.<sup>153</sup> In Argentina we don't find such an abundant and varied offer. Yet, the problem has been expressly discussed judicially and academically in some occasions, as we'll see in the following pages.

## 5.2. The Supreme Court's Respect for its Own Precedents

### 5.2.1. Political Instability of the Past

Before speaking about *stare decisis* it is necessary to take a fast trip through Argentine political convoluted life in the twentieth century. Until 1930 one does not perceive that the Court has overruled its own precedents very frequently. There's being some changes in the case law, but they did not damage the Court's credibility.<sup>154</sup> Constitutional law scholars of the time did not attack the Court for rendering overruling decisions too often either.<sup>155</sup> Nevertheless, since 1930, political instability was a constant feature of Argentine life until 1983. In between those years, Argentina experienced six coups d'état (1930, 1943, 1955, 1962, 1966 and 1976).

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153. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV., 723, 741 (1988) (“Resort to *stare decisis* presents formidable problems. In the common-law area, the doctrine has been the target of unremitting attack throughout this Century . . . . If *stare decisis* cannot maintain a powerful grip on the common-law system that spawn it, it is not surprising that it appears to have fare still worse in the highly charged atmosphere of constitutional adjudication.”).

154. Santiago Legarre agrees with this assessment. See Santiago Legarre, *Precedent in Argentine Law*, 57 LOYOLA L. REV. 781, 788 (2011) (“[A]t the appellate level, including the Supreme Court, courts tend to follow prior decisions and treat them, to some extent, as precedent.”).

155. Probably the most famous cases of the first third of the 20th century were those that attacked the first rent control law. See generally Agustín Ercolano c. Julieta Lanteri de Renshaw, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 28, 1922, Fallos 136:161 (1922) (Arg.); José Horta c. Ernesto Harguindegui, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 21, 1922, Fallos 137:47 (1922) (Arg.); Leonardo Mango c. Ernesto Traba, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 26, 1925, Fallos 144:219 (1925) (Arg.). On the mortgage moratorium law, see Oscar Agustín Avico c. Saúl G. de la Pesa, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 7, 1934, Fallos 172:21 (1934) (Arg.).

In 1930 the Court was left untouched and in 1943 the military *junta* covered a vacancy in the Court appointing one Justice.<sup>156</sup> In 1947, Perón put into effect his own Court packing plan. As a consequence of it, the Supreme Court Justices were successfully impeached and replaced with members of the political party in government. The only exception was the Justice that had been appointed by the military government in 1943, who remained in Court. In 1949 a Constitutional Convention replaced the 1853-1860 Constitution with a completely new one.

In 1955, a new *coup d' état* overthrown the government and removed the Justices of the Supreme Court, appointing five new Justices. In 1957, the 1949 Constitution was abrogated by the *de facto* government and it reinstated the 1853-1860 Constitution. Also in 1957, a Constitutional Convention reinstated the 1853-1860 Constitution and added several amendments. The same replacements and appointments happened in 1966 and 1976 *coups d' état*, and new Justices were also appointed by the democratically elected governments in 1973 and 1983.

#### 5.2.2. *Stare Decisis and the Supreme Court Case Law: A Rule that Allows Exceptions*

As one can fairly infer from the previous survey, the political instability of Argentina in the period 1930-1983 should have had its counterpart in the Supreme Court case law. To say the least, it would be too much to ask a Supreme Court appointed by a democratic government to respect precedents established by its *de facto* predecessors.<sup>157</sup> The decisions of the later may be persuasive but never binding. Its spurious origin undermines its authority.

However, the political situation has been different since 1983. Governments have been freely elected by the people and Supreme Court appointments have been made in accordance with the Constitution. Generally speaking, and considering the historical background against which the Supreme Court acts, during this period there has been stability in the Court case law except for highly important cases that for different reasons may be considered worth of overruling by a circumstantial majority. In exceptional cases of the sort just referred the Justices don't appear to feel constrained by precedent.

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156. Juan Domingo Perón was the Vice President of that *de facto* government and, at the same time, was acting as Minister of War and Secretary of Labor.

157. The Supreme Court has either explicitly or implicitly overruled its own precedents many times, regardless of the legitimacy of the Courts that handed down those decisions. See Alberto F. Garay, *Federalism, the Judiciary and Constitutional Adjudication in Argentina*, 22 INTER-AM. L. REV. 161, 189, n.201 (1991).

In Argentina one may confirm Justice Scalia's assertion that "overruling of precedent rarely occurs without change in the Court's personnel."<sup>158</sup> The descriptive difference with Scalia's assertion rests in context: in the twentieth and twenty-first centuries the Argentine Supreme Court's personnel, many times the full Court's personnel at once, has been replaced more frequently than in the U.S. Supreme Court.<sup>159</sup> The drug possession for personal consumption saga, commented above, is a good example in a highly contested issue. The *Bazterrica* case<sup>160</sup> – decided by 1983 Supreme Court appointees – overruled *Colavini*,<sup>161</sup> a case that had been rendered eight years before by a Supreme Court composed of different Justices, all of them appointed by the 1976 *de facto* government. Five years later, in *Montalvo*,<sup>162</sup> a majority of the Court overruled *Bazterrica*.<sup>163</sup> Finally, the *Arriola* case,<sup>164</sup> overruling *Montalvo*, was decided in 2009 after two Justices of the *Montalvo* majority (plus other two Justices previously appointed by President Menem) were impeached during Néstor Kirchner's government.

If the Court renews its personnel very frequently and if there is not a strong tradition favorable to *stare decisis*, it only seems inevitable that the Supreme Court's case law will reflect this.<sup>165</sup>

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158. *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting).

159. See the list of Justices until 1987 in JONATHAN MILLER ET AL., *CONSTITUCIÓN Y PODER POLÍTICO: JURISPRUDENCIA DE LA CORTE SUPREMA Y TÉCNICAS PARA SU INTERPRETACIÓN* 1155-57 (1987); see *El Período de la Continuidad Institucional*, in 1 *HISTORIA DE LA CORTE SUPREMA ARGENTINA* 23, 41 (Alfonso Santiago ed., 2013).

160. See the cases cited *supra* note 112 and accompanying text.

161. Ariel Omar Colavini, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 28, 1978, Fallos 300:254 (1978) (Arg.).

162. See cases, *supra* note 116 and accompanying text.

163. However, that majority decision was obtained after President Menem's government enlarged the Supreme Court from five to nine members in 1990, appointing finally six new Justices due to two preexisting vacancies.

164. See cases, *supra* note 119 and accompanying text.

165. Garay, *supra* note 41. A quick survey of the last fifteen years shows the following overruling decisions: Banco Comercial de Finanzas S.A. (en liquidación Banco Central de la República Argentina), Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 19, 2004, Fallos 327:3117 (2004) (Arg.), *overruling* Ganadera Los Lagos S.A. c. Nación Argentina, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], June 30, 1941, Fallos 190:142 (1941) (Arg.); Isacio Aquino c. Cargo Servicios Industriales S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 21, 2004, Fallos 327:3753 (2004) (Arg.), *overruling* Juan Ramón Gorosito c. Riva S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Feb. 1, 2002, Fallos 325:11 (2002) (Arg.); María del Carmen Sánchez c. ANSeS, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 17, 2005, Fallos 328:1602 (2005) (Arg.), *overruling* Sixto Celestino Chocobar v. ANSeS, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 27, 1996, Fallos 319:3241 (1999) (Arg.); Alberto Damián Barreto y otra c. Provincia de Buenos Aires, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 21, 2006, Fallos 329:759 (2006) (Arg.), *overruling*

One of the first times the Court expressly treated its overruling power was in *Baretta*,<sup>166</sup> a case decided in 1939. Two years before *Baretta*, the Court had decided *Vila*<sup>167</sup> where it had designed a new standard under which to consider cases on provincial taxes levied by a Province allegedly contrary to several articles of the Constitution. After the *Baretta* Court decided to follow *Vila*'s holding, it also stated:

The Court's decision . . . must comply . . . with the conclusions reached in *Vila*, because the Tribunal could not move away from its case law but under causes sufficiently serious as to justify the change of criteria. It would be extremely inconvenient to the public[,] if precedents were not duly regarded and implicitly followed. And even if the latter does not mean that the authority of those antecedents are not decisive in every respect, nor that in constitutional matters the principle of stare decisis applies without any reservation[,] it is not less true that if the error and inconvenience do not clearly emerge from the decisions already rendered, then the solution of the instant case must be found in the referred precedents.<sup>168</sup>

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Beatriz Isabel de Gandía c. Provincia de Buenos Aires, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 6, 1992, Fallos 315:2309 (1992) (Arg.); Gobierno de la Ciudad de Buenos Aires c. Provincia de Tierra del Fuego, Dec. 18, 2007, Fallos 330:5279 (2007) (Arg.), *overruling* Gobierno de la Ciudad de Buenos Aires c. Casa de la Provincia del Chubut, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 5, 2003, Fallos 326:2479 (2003) (Arg.); Sebastián Arriola y otros, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 25, 2009, Fallos 332:1963 (2009) (Arg.), *overruling* Ernesto Alfredo Montalvo, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 11, 1990, Fallos 313:1333 (1990) (Arg.); César Alejandro Baldivieso, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 20, 2010, Fallos 333:405 (2010) (Arg.), *overruling* Norma Beatriz Zambrana Daza, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 12, 1997, Fallos 320:1717 (1997) (Arg.); Leopoldo Héctor Schiffirin c. Poder Ejecutivo Nacional, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 28, 2017, Fallos 340:257 (2017) (Arg.), *overruling* Carlos Santiago Fayt c. Estado Nacional, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 19, 1999, Fallos 322:1616 (1999) (Arg.).

166. Miguel Baretta c. Provincia de Córdoba, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 15, 1939, Fallos 183:409 (1939) (Arg.).

167. Luis y Justo Vila y otro c. Provincia de Córdoba, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 6, 1937, Fallos 178:308 (1937) (Arg.).

168. *Baretta*, Fallos 183:409, at 413 (“La sentencia . . . debe ajustarse . . . a las conclusiones de aquél, porque no podría el tribunal apartarse de su doctrina, sino sobre la base de causas suficientemente graves, como para hacer ineludible tal cambio de criterio. Sería en extremo inconveniente para la comunidad –dice Cooley citando al Canciller Kent, *Constitutional Limitations*, T. 1, pág. 116– si los precedentes no fueran debidamente considerados y consecuentemente seguidos. Y aun cuando ello no signifique que la autoridad de los antecedentes sea decisiva en todos los supuestos, ni que pueda en materia constitucional, aplicarse el principio de ‘stare decisis’, sin las debidas reservas –conf. Willoughby, *On the Constitution*, pág. 74– no es menos cierto que cuando de las modalidades del supuesto a fallarse, no resulta de manera clara, el error y la inconveniencia de las decisiones ya recaídas sobre la cuestión legal objeto del pleito, la solución del mismo debe buscarse en la doctrina de los referidos precedentes.”).

This case has been quoted or cited by the Supreme Court in many occasions.<sup>169</sup> If one takes into account the Supreme Court case law until 1930, the compromise assumed by the Court in *Baretta* and in many other cases handed down since 1983 in which it mentions or quotes with approval the principle announced in *Baretta*, one could assert that the Supreme Court tends to respect its own precedents. Thus, from all those cases and the regularity that they represent, one can make explicit a rule that command the aforementioned respect. Undoubtedly, that due respect would not be an inexorable command, as Justice Brandeis<sup>170</sup> and others have approvingly held many years ago, but a rule with exceptions is still a rule.<sup>171</sup>

The foregoing ideas were adopted by the Argentine Supreme Court in what appears to be a consistent line of precedents that started with a dissent<sup>172</sup> and years later became the opinion of the Supreme Court. In *Barreto*,<sup>173</sup> the Court held that the respect of its own precedents is not a rigid rule and allows some exceptions. After reciting the *Baretta* quoted paragraph, the Court considered that among the causes that authorize an overruling are (i) the erroneous character of the decision in question, (ii) the lessons of the experience and (iii) the changing historical circumstances.<sup>174</sup> The exceptions announced are expressly rooted in U.S. Supreme Court precedents.

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169. See *Sucesión Emilia Namen de Cheuan c. Dirección Nacional de Aduanas*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 20, 1995, unpublished opinion (1995) (Arg.); *Alberto Damián Barreto y otra c. Provincia de Buenos Aires*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 21, 2006, Fallos 329:759 (2006) (Arg.); *Arte Radiotelevisivo Argentino c. Estado Nacional*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Feb. 11, 2014, Fallos 337:47 (2014) (Arg.); *Eduardo Díaz García c. Swiss Medical ART*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 4, 2018, unpublished opinion (Rosatti dissenting) (2018) (Arg.); *Recurso de Queja No. 1, Imputado: Carlos del Señor Hidalgo Garzón*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 4, 2018, unpublished opinion (2018) (Arg.); *Daniel Alberto Tejada c. Asociart S.A.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 18, 2018, unpublished opinion (Rasatti dissenting) (2018) (Arg.).

170. *Burnet v. Coronado Oil & Gas Co.*, 286 U.S. 393, 405-06 (1932).

171. HERBERT L.A. HART, *THE CONCEPT OF LAW* 136 (Oxford University Press, 10th ed. 1971) (“It does not follow from the fact that such rules have exceptions incapable of exhaustive statement, that in every situation we are left to our discretion and are never bound to keep a promise. A rule that ends with the word ‘unless . . .’ is still a rule.”).

172. See *Ernesto Alfredo Montalvo*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 11, 1990, Fallos 313:1333 (Petracchi, J., dissenting) (1990) (Arg.).

173. *Alberto Damián Barreto y otra c. Provincia de Buenos Aires y otro*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 21, 2006, Fallos 329:759 (2006) (Arg.); see *Mabel Itzcovich c. Anses*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 29, 2005, Fallos 328:566 (2005) (Arg.); *Carlos Alberto Rosza y otro*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 23, 2007, Fallos 330:2361 (2007) (Arg.).

174. *Barreto*, Fallos 329:759, at 765.

### 5.2.3. *Is the Horizontal Stare Decisis a Sound Principle?*

Objections to the binding character of Supreme Court decisions abound in Argentina. Most of them are the same as those expressed two centuries ago in England by Hobbes or Bentham,<sup>175</sup> or in the twentieth century in the U.S. by Brandeis<sup>176</sup> and many more. All of them appeal to the decision's correctness (its "error") and, in the case of Brandeis, to the idea that to follow or not to follow a Supreme Court precedent is "a question entirely within the discretion of the court." The same ideas may have a different impact in a civil law mind. The ideas of the "decision's correctness" or "the discretion of the Court" – operating without the constraining principles of the Common Law in the background – taken to its full extension would authorize a Court to overturn a decision if simply thinks that the decision's holding is wrong.

In my opinion horizontal *stare decisis* is an indispensable tool in any court system. It fosters equal treatment, legal certainty, foreseeability and economy, values traditionally ascribed to the doctrine of precedent<sup>177</sup> and implicit in the idea of the supremacy of law that permeates the systems of Civil Law. "Nobody is above the law" is a repeated phrase in both legal traditions and that limit also operates on the Justices. I submit that such a limit may be rooted in the Constitution and in the precedents that interpret it.

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175. See DUXBURY, *supra* note 121, at 17 ("Bentham was forthright on this point: although we speak of a judge creating a rule when pronouncing a decision, this decision can be 'nothing more than a particular rule, bearing upon the individual person and things in question.' 'Rules? yes,' he asserted, 'Rules of law? No', for the binding force of the decision does not extend beyond the particular instance . . . . Hobbs appreciated that precedents may be treated as authoritative, but did not consider they must be: judicial reason, he claimed, is neither the artificial perfection of reason extolled by Coke nor the 'right reason' of the sovereign, but merely the natural reason of any competent person; judges are as prone to error as anyone else, and so while a judge today might well follow an example set by his forbears because he finds it satisfactory, he should not consider it binding – even 'though sworn to follow it' – if he considers it mistaken.").

176. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-07, 412-13 (1932) (Brandeis, J., dissenting) ("Stare decisis is not, like the rule of *res judicata*, a universal, inexorable command . . . . Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions . . . . In cases involving constitutional issues of the character discussed, this Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained, so that its judicial authority may, as Mr. Chief Justice Taney said, 'depend altogether on the force of the reasoning by which it is supported.'") (internal citation omitted); *Hertz v. Woodman*, 218 U.S. 205, 212 (1910) ("The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.").

177. RICHARD WASSERSTRÖM, *THE JUDICIAL DECISION: TOWARDS A THEORY OF LEGAL JUSTIFICATION* 56-74 (1961).



On the one hand, as I have showed in Part II above, the idea of treating similar cases alike has an ancient pedigree in Argentine history. This was a demand of the legal profession that the Supreme Court respected since its establishment in the nineteenth century. During those years, there weren't frequent overrulings. That principle was also respected by the district courts. At the same time the American Constitutional practice furnish the Argentine federal system with tools that presupposed the principle of *stare decisis*, the idea of precedent and of *obiter dictum*.<sup>178</sup> As a consequence of this respect, the case-law was stable until 1930s. So, one can fairly say that the need of stability in judicial decisions was implicit in the idea of Judicial Power consecrated in the Constitution. Obviously, you can't attain stability if the system does not articulate some kind of *stare decisis*. It is not a mere coincidence that during this period of legal stability the Argentine economy grew at a formidable rate and citizens enjoyed a high standard of living despite some corrupt political practices.<sup>179</sup>

On the other hand, the appointment of a new Justice cannot be viewed as a sufficient reason to overrule a decision because a dose of impersonality is of the essence of the judicial function, particularly when the Court is interpreting the Constitution.<sup>180</sup> If a simple change of personnel would be considered a sufficient reason to legitimate an overruling one could say that the Court is acting as if it were the Congress before new legislation. Simple majority rule and contingent value predilections can be argued for by legislators as inherent in their political capacity. Further, they can legitimately argue that the people voted them to implement those values through appropriate legislation.

But a Supreme Court Justice (or judges generally) can neither claim the same power nor the same representation as legislators. They do not carry a popular representation and their positions are for life (as long as they observe good behavior). Their decisions must be impartial and detached from any political affiliation. A Justice must not confuse the constitutional rights and powers with their personal preferences.

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178. Bear in mind the *Elortondo* case, analyzed *supra* section IV.4.2.

179. See Miller, *supra* note 15, at 1534.

180. The idea of impersonality is stressed by Monaghan as to the U.S. Supreme Court. See Monaghan, *supra* note 153, at 752. The Supreme Court of Argentina has returned to the bad habit of highlighting the presence of new Justices in the Supreme Court when overruling a prior decision. See Alberto Damián Barreto y otra c. Provincia de Buenos Aires y otro, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 21, 2006, Fallos 329:759 (2006) (Arg.) (“Tribunal’s members that subscribe this decision consider that the generalized notion of ‘civil cause’ that is in use since the 1992 precedent just mentioned must be abandoned.”) (“4°. Que los miembros del Tribunal que suscriben esta decisión consideran que debe abandonarse la generalizada calificación del concepto de ‘causa civil’ que se viene aplicando desde el citado precedente de 1992.”).

As Justices O'Connor, Kennedy and Souter said in *Casey*:

[O]ur obligation is to define the liberty of all, not to mandate our own moral code . . . . To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.<sup>181</sup>

Changes in the constitutional case law must be tolerated and may be made. But in order to implement them, special circumstances must concur. The Argentine Supreme Court, following the categories allowed by the U.S. Supreme Court has articulated them. Apart from the case of “error” – a category too much malleable as to consent to it without reservations – the remaining circumstances can be fairly tested. If the Justices behave with candor, and I stress upon the word candor, those categories may fulfill the purpose for which they were created.

#### 5.2.4. *The Vertical Reach of Precedent*

When the U.S. Supreme Court decides a constitutional issue, its holding binds every federal and state court addressing the same constitutional issue.<sup>182</sup> In Argentina the same rule is a matter of debate. Initially, federal courts appear to follow Supreme Court case-law. For instance, in the *Rodríguez Balmaceda*,<sup>183</sup> case the question was whether the Government could be sued. After considering an analogous case decided by the Supreme Court, the district judge stated that “as to the reach of the Federal jurisdiction, the district courts must subordinate their proceedings to the jurisdiction established in the resolutions of their Superior.”<sup>184</sup> The Supreme Court, after reciting the rule that stated that the Government couldn't be sued, rule mentioned by the district court, expressly referred to the same Supreme Court case cited by the district judge on support of its decision and affirmed the judgment.<sup>185</sup>

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181. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850, 864 (1992) (citing *Mitchell v. W T. Grant Co.*, 416 U. S. 600, 636 (1974) (Stewart, J., dissenting) (“A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve”); and *Mapp v. Ohio*, 367 U. S. 643, 677 (1961) (Harlan, J., dissenting).

182. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987).

183. *Rodríguez Balmaceda y Cía. c. el Fisco Nacional*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 5, 1868, Fallos 6:159 (1868) (Arg.).

184. *Id.* at 160 (“y que los Juzgados de primera instancia deben subordinar sus procedimientos a la jurisdicción establecida por las resoluciones de su Superior en cuanto al alcance de la justicia Federal[.]”) (internal citations omitted).

185. *Id.* at 161 (“No pudiendo ser demandada la nación ante los Juzgados Federales, como lo tiene ya declarado la Suprema Corte, en el caso citado por el Juez de Sección, y en otros análogos,

Two years later, in *Videla*,<sup>186</sup> the federal judge, after making explicit the holding of a prior Supreme Court's decision, stated that:

[T]he federal courts must conform their proceedings and resolutions to the Supreme Court's resolutions rendered in analogous cases . . . . The present case is identical to the case of Mr. de la Peña and his wife Elena Eiras . . . so the case must be decided in the same way, subordinating its decision to the Supreme Court declarations[.]<sup>187</sup>

The Supreme Court upheld the appealed judgment. The Supreme Court held: "in accordance with the grounds stated therein, the judgment is affirmed."<sup>188</sup> The brevity of the Supreme Court judgment raises problems of interpretation. For it is not altogether clear whether the Supreme Court approves the whole opinion, some parts of it or just the holding. In spite of that ambiguity, in my view, if the Court had considered that the "*subordination*" announced by the district court was a wrong assumption, it would have corrected it. Particularly, because it was the second time a district court declared that subordination. Besides, as I stated before, federal courts usually followed Supreme Court precedents to decide those cases under their jurisdiction.

Nevertheless, thirteen years later, another district judge stated a different argument that would change the judges' position as to Supreme Court's precedents. In *Pastorino*,<sup>189</sup> the plaintiff had argued that his claim was based on a Supreme Court precedent. The district court reviewed the precedent and concluded that it did not support the plaintiff's claim. Following that, the judge said:

On the other side, the Supreme Court resolutions only decide the concrete case under its consideration, and they do not legally obliged but to the parties to the lawsuit; the difference between the legislative function and the judicial one lays therein. If it is true that it exists a moral obligation of inferior judges to conform their decisions to the Supreme Court's in

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se confirma el auto apelado de fojas treinta y seis, con costas; y satisfechas éstas y repuestos los sellos, devuélvase.”).

186. Magdalena Videla c. Vicente García Aguilera, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 9, 1870, Fallos 9:53 (1870) (Arg.).

187. *Id.* at 54 (“[Q]ue los Juzgados Seccionales deben ajustar sus procedimientos y resoluciones, a las decisiones de la Suprema Corte, que en casos análogos dicte haciendo jurisprudencia . . . . Que siendo este juicio idéntico al de la señor de la Peña y su esposa Elena Eyras . . . , debe resolverse el caso del mismo modo, subordinándose a las declaraciones de la Suprema Corte.”).

188. *Id.* at 55 (“Y vistos: por su fundamento se confirma, con costas, el auto apelado de fojas catorce y vuelta, y satisfechas éstas y repuestos los sellos, devuélvase.”). At the time, the Supreme Court commonly used this formula.

189. Bernardo Pastorino c. Ronillón, Marini y Cia., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], June 23, 1883, Fallos 25:364 (1883) (Arg.).

analogous cases . . . that obligation is mainly grounded in the presumption of truth and justice that informs the wisdom and integrity that characterize to the magistrates that conform it. That obligation has the purpose of preventing useless appeals, but this does not take away from the judges the power to appreciate with its own criteria those resolutions and depart from them when, in its judgment, they do not conform to clear legal rules, because no court is infallible. Besides there are precedents than run counter previous ones decided in analogous cases.<sup>190</sup>

The judge's *dictum* is not entirely clear. It undoubtedly was an *obiter dictum* because that exposition was not necessary to reach the result. The district judge expressly recognized it in the following lines. The appeal to the "moral" obligation, in a Civil law country, clearly diminishes the force of the obligation. It is an obligation that is not established by statute or code rule. It is merely "moral," that is, an obligation to be fulfilled if, and only if, the obliged considers that it deserves to be fulfilled. So, the obligation depends entirely on the obligated willingness. But, be it as it may, this *dictum* seems to be limited to very anomalous cases in which the Supreme Court precedent is rendered contrary to "clear legal rules" ("*preceptos claros del derecho*"). The district judge paragraphs previously quoted did not have any serious repercussion in the Supreme Court. It laconically affirmed the lower court's decision "by its foundation" and only reversed it in a minor question of fact.

Many years later, in *Cermámica San Lorenzo*,<sup>191</sup> the Supreme Court introduced a very disturbing caveat. In this case, the inferior court had decided against a Supreme Court's precedent, without considering the statutory interpretation the Supreme Court had made therein and despite the fact that the aggrieved party had supported her defense on that precedent. The Supreme Court reversed, because the decision under consideration had decided against the precedent "without making new arguments that would justify a change in the position settled by the Court in its character of final

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190. *Id.* at 368.

Que por otra parte, las resoluciones de la Corte Suprema sólo deciden el caso concreto sometido á su fallo y no obligan legalmente sino en él, en lo que consiste particularmente la diferencia entre la función legislativa y la judicial; y si bien hay un deber moral para los jueces inferiores en conformar sus decisiones como la misma Corte lo tiene decidido en casos análogos, á [sic] los fallos de aquél Alto Tribunal, él se funda principalmente en la presunción de verdad y justicia que á [sic] sus doctrinas dá [sic] la sabiduría é [sic] integridad que caracteriza a los magistrados que la componen, y tiene por objeto evitar recursos inútiles, sin que esto quite a los jueces la facultad de apreciar con su criterio propio esas resoluciones y apartarse de ellas cuando á [sic] su juicio no sean conformes á los preceptos claros del derecho, porque ningún Tribunal es infalible y no faltan precedentes de que aquellos han vuelto contra resoluciones anteriores en casos análogos.

*Id.*

191. *Cerámica San Lorenzo*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], July 04, 1985, Fallos 307:1094 (1985) (Arg.).

interpreter of the Constitution and of the laws enacted as a consequence of it[.]”<sup>192</sup>

On one level, the decision is contradictory. The Supreme Court cannot hold that lower courts have no real legal obligation to follow Supreme Court precedents, while simultaneously holding that a lower court which departs from precedent must furnish novel grounds for disregarding it, or else the Supreme Court will reverse. It is obvious that if the lower court must provide “*new grounds*” in case of departure, it is because the precedent binds in the sense that, regardless your own contrary point of view on the matter, you have to follow the precedent on point.

Additionally, the Supreme Court cited three cases in support of its conclusion: *Pastorino*,<sup>193</sup> *Santín*<sup>194</sup> and *Pereyra Iraola*.<sup>195</sup> *Pastorino* calls for a moral obligation to follow precedent unless the latter shows a departure from “clear legal rules.” *Santín* accepts a departure from precedent based on “new and justifiable controverting grounds.”<sup>196</sup> And *Pereyra Iraola*, stresses that discarding Supreme Court precedents would damage the constitutional order.<sup>197</sup> It is evident that one cannot make explicit a rule that embodies the three cases. Still, to allow lower courts departure from precedent as long as they have “novel grounds” was an invitation to disagree. Because, in what sense of “novel” or “new” has an argument to be in order to satisfy *Cerámica San Lorenzo*?

This vague requirement gives great leeway to the rebellious judges’ imagination, it fosters unending litigation, deteriorates the Supreme Court credibility, it breeds uncertainty and it turns the law unstable. If you add to this short list the pernicious idea that for some scholars and judges the appointment of new Justices would legitimate *per se* a precedent’s overruling, you have created a chaotic system where anything or almost anything goes.

Dawson’s remarks about the French legal system are a perfect fit for those who oppose *stare decisis* in Argentina. As he put it:

An effective case-law technique employed by judges through the medium of the reasoned opinion, with the responsibilities that it should entail, has

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192. *Id.* at 1097 (“carecen de fundamento las sentencias que se apartan de los precedentes de la Corte sin aportar nuevos argumentos que justifiquen modificar la posición sentada, por el Tribunal, en su carácter de intérprete supremo de la Constitución Nacional[.]”).

193. See *Ronillón*, Fallos 25:364, at 368.

194. *Jacinto Santín c. Impuestos Internos*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 6, 1948, Fallos 212:51 (1948) (Arg.).

195. *Sara Pereyra Iraola c. Provincia de Córdoba*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 15, 1948, Fallos 212:160 (1948) (Arg.).

196. *Santín*, Fallos 212:51, at 59.

197. See *Pereyra Iraola*, Fallos 212:160, at 160.

the purpose and should have the effect of limiting the powers of judges. Its absence in France has resulted from a desire to limit the power of judges, but it has produced instead a much greater freedom for judges than we would consider tolerable.<sup>198</sup>

The same excessive freedom for judges has occurred in Argentina. In the following years after *Cerámica San Lorenzo* the Supreme Court had to overturn many lower court decisions that ruled against Supreme Court precedents.<sup>199</sup> However it is impossible to extract a rule from them. The standard is so vague that covers a too wide range of cases.

## V. CONCLUSION

For Argentines, the Doctrine of Precedent is, as such, a foreign tradition, respectable but alien to its legal system. Argentines consider that they belong to the Civil Law tradition. Both claims may be true, but they are incomplete. From the moment it was established, the Argentine Supreme Court had to answer an ancient demand of the legal community: to judicially treat like cases alike and in so doing to consider prior decisions. Those demands also included the publication of decisions. The Supreme Court took all these requests seriously. It recorded its decisions – taking as a model the U.S. Supreme Court tradition – and made them public. It decided cases taking into account previous decisions and the latter practice disseminated in the federal courts. So, Supreme Court decisions were also used by lower courts to ground theirs.

At one point, intuition and Logic were not enough to cope with the kind of problems that such a methodology entailed. At a certain point, without a systematic way of approaching those difficulties, the method could not evolve and got stuck. Legal certainty, stability, equality or fairness, foreseeability, and judicial economy are values underlying the Doctrine of Precedent, but they also belong to the idea of supremacy of laws, so cherished

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198. DAWSON, *supra* note 20, at 415.

199. Patricia Dorotea Cuello c. Lucena, Pedro Antonio y otro, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 7, 2007, Fallos 330:3483 (2007) (Arg.); Fernando Salmerón y otro c. La Cabaña S.A. Línea 242 y otros, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Feb. 3, 2009, unpublished opinion, (2009) (Arg.); Martín Villarreal c. The Security Group S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 12, 2009, Fallos 332:1098 (Lorenzetti, dissenting) (2009) (Arg.); Héctor Octavio Murillo c. Compibal S.R.L., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 30, 2008, Fallos 331:2149 (Lorenzetti, dissenting) (2009) (Arg.); Syngenta Agro S.A. c. Municipalidad de Córdoba, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 28, 2013, unpublished opinion (2013) (Arg.); see Santiago Legarre & Julio César Rivera, *La Obligatoriedad atenuada de los fallos de la Corte Suprema y el stare decisis vertical*, REVISTA JURÍDICA LA LEY, 2009-E LL 821, 828 (2009) (Arg.).

in the Civil Law tradition. I need not to recall that in the Civil Law tradition legal certainty was and still is a fundamental tenet to be attained mainly by way of statutes (or codes) enacted by legislatures. The original intent was to fetter judges. In that scenario, generality or equal treatment also played an important role. One of the ingredients of any statute should be its generality. They should apply evenhandedly to those cases falling within the legislative umbrella. Like cases should be treated alike.

If those values are still present in the Civil Law tradition at the legislative level, why they are considered irrelevant or ignored at the moment of applying it by the judicial power? In the preceding pages I have tried to show how those values are forgotten or baffled just because there is a blind resistance to adapt a refined technique developed through the Centuries in the Common Law world. The doctrine of precedent is not a panacea and it's under re-elaboration from time to time. But the doctrine furnishes a framework to deal with cases that the Civil Law tradition does not have.

In my view, when a legal order leaves its judges at liberty to interpret the law or the Constitution contrary to Supreme Court's precedent, such legal order is betraying the system to which it belongs. The idea of one Supreme Court at the top of the federal judicial system consists, basically, in empowering that Court with the final word. Constitutional cases should not be re-litigated anew each time any federal or provincial court deems it appropriate. The "new grounds" exception commented above, undermines the constitutional scheme. As to horizontal stare decisis, the exceptions to that rule give enough room to accommodate the constitutional meaning to the years to come. In the end, it is power we are talking about. And power must have limits.

So, recognizing that precedents are more than just "persuasive" sources of law is a more accurate and fair description of a Supreme Court's power. The values underlying the law of the Constitution limit the Legislative power, as in fact it does, and must also limit the judicial power. Seeing this opens the door to seeing the limits to that power. Refusing to see it allows unequal treatment of equal cases and leaves us at the mercy of uncontrolled power.