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A Constitutional Hope: an Alternative Approach to the Right of Privacy and Marijuana Laws Using Argentina as an Example

Kevin E. Szmuc

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A CONSTITUTIONAL HOPE: AN ALTERNATIVE
APPROACH TO THE RIGHT OF PRIVACY AND
MARIJUANA LAWS USING ARGENTINA AS AN
EXAMPLE

Kevin E. Szmuc

*“The right most valued by all civilized men is the right to be left
alone.”*

LOUIS D. BRANDEIS

TABLE OF CONTENTS

I.	INTRODUCTION.....	166
II.	CONCEPTS OF PRIVACY	169
	A. ONE CONCEPT, MANY IDEAS.....	169
	B. MEANING OF PRIVACY RIGHTS.....	171
III.	U.S. CASES THAT DEALT WITH PRIVACY RIGHTS AND MARIJUANA	174
	A. ALASKA.....	183
	B. HAWAII.....	186
	C. FLORIDA.....	188
	D. THE FEDERAL GOVERNMENT.....	189
IV.	ARGENTINA LEADING THE WAY?.....	192
	A. <i>FALLO BAZTERRICA</i>	193
	B. <i>FALLO MONTALVO</i>	196
	C. <i>FALLO ARRIOLA</i>	197
V.	SHOULD THE U.S. FOLLOW ARGENTINA?	201
	A. CURRENT STATUS OF ARGENTINA.....	201
	B. COULD THE U.S. BENEFIT FROM THE ARGENTINIAN APPROACH?.....	202
VI.	CONCLUSION	207

I. INTRODUCTION

Following the Colorado marijuana amendment,¹ a weed revolution began in the United States that led to legal reformation in several different states such as California,² Washington,³ Oregon,⁴ and Massachusetts.⁵ States and countries began to recognize the popularity of recreational marijuana and how the public demanded change. However, all of these changes in the law derived from either propositions by legislative initiative voted into law by the citizens of the respective states.⁶ None of these legal changes in marijuana law derived from judicial intervention and recognition of rights; the only U.S. state that has legalized marijuana for personal use is Alaska. At an international level, most countries that have legalized marijuana have done

¹ Jack Healy, *Colorado Stores Throw Open Their Doors to Pot Buyers*, N.Y. TIMES

(Jan. 1, 2014), <https://www.nytimes.com/2014/01/02/us/colorado-stores-throw-open-their-doors-to-pot-buyers.html>.

² *US election: California voters approve marijuana for recreational use*, BBC NEWS (Nov. 9, 2016), <http://www.bbc.com/news/world-us-canada-37917472>.

³ Martin, Jonathan, *Voters agree to legalize pot*, SEATTLE TIMES (Nov. 6, 2012), <http://blogs.seattletimes.com/politicsnorthwest/2012/11/06/marijuana-a-legalization-takes-commanding-lead/>.

⁴ *Measure 91: Oregon voters pass legalization of recreational marijuana*, FOX NEWS (Nov. 4, 2014), <http://www.kptv.com/story/27273055/measure-91-oregon-voters-decide-on-legalization-of-marijuana?autostart=true>.

⁵ Russell Blair, *Recreational Marijuana Passes In Massachusetts*, HARTFORD COURANT (Nov. 8, 2016), <http://www.courant.com/politics/elections/hc-legal-marijuana-referendums-20161108-story.html>.

⁶ Healy, *supra* note 1.

so through legislation. Two examples of this are Uruguay⁷ and Canada.⁸ Likewise, only one country recognized marijuana use within the scope of the right to privacy; that country is Argentina.

There are two common arguments that arising out of the social movement to decriminalize and legalize marijuana. The first argument is its comparison with alcohol; alcohol use carries some harm that is arguably worse than marijuana because of the addictive nature of alcohol and the violent tendencies a user might portray after severe use. Nevertheless, marijuana could also have certain harms for society such as a decrease in productivity, a decrease in motivation, and a probable cause of some forms of mental illness.

The second argument arises from common conscience that the criminalization of marijuana has extended a drastic toll in American society. The harms of the so called war on drugs have not only damaged society but have also greatly reduced the liberties of Americans, incarcerated many, and allowed for the proliferation of a black market and violence. Nevertheless, there has been no change in United States federal jurisprudence to allow for change at a federal level.

⁷ Ernesto Londono, *Uruguay's Marijuana Law Turns Pharmacists Into Dealers*, N.Y. TIMES (July 19, 2017) <https://www.nytimes.com/2017/07/19/world/americas/uruguay-legalizes-pot-marijuana.html>.

⁸ Bani Sapiro, *Canada Becomes Second Nation in the World to Legalize Marijuana*, CNN (June 20, 2018), <https://edition.cnn.com/2018/06/20/health/canada-legalizes-marijuana/index.html>.

There have been instances where the right to privacy has been extended to recognize the right to use marijuana at a state level, as is Alaska's 30-year-old Supreme Court decision⁹; however, Alaska's reasoning has been openly rejected in other states.¹⁰ Alaska has recognized the extension of right to privacy to the home and to the right to use marijuana within the home.¹¹ Likewise, other foreign nations have used a similar vehicle for the recognition of marijuana within the right to privacy, as did Alaska. Such is the case of Argentina.¹² Both, Alaska and Argentina, have constitutional provisions that offer an explicit right to privacy and the language of the right to privacy was recognized to allow for the use of marijuana within the home. Yet, there are other states within the United States in which the right to privacy is stated within their state constitution but courts have refused to recognize such a right to encompass the use of marijuana.¹³

Commonly, the courts define how far a right should extend by defining the scope of a right. Many states, like Alaska, confine the right to use marijuana as protected within the privacy of the home.¹⁴ Likewise is the case of Argentina, which also recognized the right to use and possess marijuana within the realm of right to privacy of the person and the home.¹⁵ However, other states have failed to extend the right to privacy to marijuana use and possession within the home

⁹ See generally *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

¹⁰ See e.g., *State v. Mallan*, 950 P.2d 178, 184 (Haw. 1998).

¹¹ *Id.*

¹² "Arriola," Fallos (A. 891. XLIV) (2009).

¹³ See *State v. Mallan*, *supra* note 10, at 184. ("[T]he purported right to possess and use marijuana is not a fundamental right")

¹⁴ *Ravin v. State*, *supra* note 9.

¹⁵ Arriola, *supra* note 12.

and instead did not recognize the fundamental right to privacy to not encompass marijuana use. The courts of these states believe that the fundamental right to privacy does not encompass the right to smoke marijuana or do any other recreational drugs.¹⁶ As of 2017, only eight states have legalized marijuana. Of those states, only one has pushed those efforts through the courts rather than the legislative process.

Even the states that do recognize smoking marijuana as within the penumbra of fundamental right to privacy have held that the right is not absolute, and is subject to limits.¹⁷ For example, in *Ravin*, the Court stated that absolute rights are to be “limited to the legitimate needs of the state to protect the health and welfare of its citizens.”¹⁸ Furthermore, because the right in *Ravin* is heightened due to the privacy within the home, the standard applied is of a heightened scrutiny.¹⁹

States that do not recognize the right to use marijuana often see cannabis use as outside the scope of the right to privacy; for example, the reasoning is that because it is not a fundamental right, the state can regulate it and there is no need to show a compelling state interest to regulate possession.²⁰

A problem arises because the disparity amongst states and nations in to what fundamental rights cover and why. The question then becomes: Is there any path to a recognized

¹⁶ *State v. Mallan*, *supra* note 13.

¹⁷ *See Ravin*, *supra* note 9.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See Mallan*, *supra* note 13; *See also Laird v. State*, 342 So. 2d 962, 965 (Fla. 1977).

constitutional right to use marijuana [or other recreational drugs]?

Argentina's Supreme Court's decisions that took place over a period of two decades might suggest a path to recognition of marijuana use within the scope of the right to privacy and that might also put a halt to the failures of the war on drugs. Argentina's Supreme Court went back and forth amongst three decisions over a 20 year period. In its last decision, *Fallo Arriola*, the Court decided to extend the constitutional right to privacy to the personal use of marijuana.²¹ *Fallo Arriola* deals with two consolidated cases that are the fruit of two separate arrests for marijuana possession on the same day; one arrest was within the home and another while as the person was driving.²² Argentina's Supreme Court employed strict judicial review of the legislation that allowed courts to recognize a right to use marijuana part of the right to privacy, and to evaluate restrictions on that right in light of the failure of the war on drugs.

The Argentine Supreme Court's approach may have some lessons for the U.S., where the war on drugs has also been costly for the tax payers and a social failure at the same time. However, the approach employed by the Argentinian Supreme Court might also present some problems as any other approach that includes an intrusive judicial review would. In the U.S., for example, said approach might revive the long-discredited *Lochner* doctrine of intrusive judicial review of legislation presenting some institutional issues.

²¹ Arriola, *supra* note 12.

²² *Id.*

This note will analyze the differences amongst states and nations like Alaska, Florida, Hawaii, the U.S. federal courts, and Argentina that contain provisions within their constitution guaranteeing the right to privacy and it will then explore whether the Argentinian Supreme Court's approach has lessons for U.S. courts in dealing with these issues, and what those lessons are. Furthermore this note will analyze the reasons as to why the court has ruled one way or the other. Thus, the purpose of this note is not to advocate for the legalization of marijuana, but to explore and analyze the idea of a more broad application of the right to privacy proves to be more beneficial for the United States jurisprudence.

First, this note will analyze the different concepts of privacy, what defines and shapes the right to privacy such as, its different meanings, and the limits to the right to privacy; For example, the application of a balancing approach. Then, this note will examine different U.S. State and Federal decisions and the scope of said decisions. Next, this note will analyze in detail the different cases that stem from Argentina's Supreme Court regarding the issue of the right to privacy. Finally, this note will analyze the positive impacts of having a broader approach to the fundamental right to privacy and will adopt such an analysis to answer the following question: should the U.S. follow Argentina's approach?

II. CONCEPTS OF PRIVACY

A. ONE CONCEPT, MANY IDEAS

The notion of privacy encompasses strikingly different ideas. The text of the Constitution of the United States does not include any specific provisions that state the right to

privacy as one explicit right.²³ The Bill of Rights, does include certain provisions that could imply the existence of the right to privacy.²⁴ For example, the Third Amendment prohibits quartering of soldiers, thus protecting a right to privacy of the home.²⁵ So does the Fourth Amendment, protecting against government intrusion within the home and the person of unreasonable searches and seizures.²⁶ Furthermore, the Fifth Amendment furthers the right to privacy when it comes to personal information, protecting individuals from self-incrimination.²⁷ Lastly, the language of the Ninth Amendment "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,"²⁸ thus leaving an ample means of interpretation for what might implicate the right to privacy.²⁹ Hence, the United States constitution does not explicitly include a right to privacy, but a right to privacy can be construed through constitutional language.³⁰

²³ James C. Nelson, *Keynote Address: The Right to Privacy*, 68 MONT. L. REV. 257, 258 (2007).

²⁴ *Id.*

²⁵ Jana Nestlerode, *Re-"Righting" the Right to Privacy: The Supreme Court and the Constitutional Right to Privacy in Criminal Law*, 41 CLEV. ST. L. REV. 59, 63 (1993).

²⁶ *Id.*

²⁷ E. Greer Hardwicke, *Searches and Seizures-Privacy of Home-Right to Prescribe for One's Self*, 25 TEX. L. REV. 548 (1947).

²⁸ U.S. CONST. AM. 9.

²⁹ Nestlerode, *supra* note 25, at 65.

³⁰ *Id.*

B. THE MEANING OF PRIVACY RIGHTS

The right to privacy tends to protect two types of rights that are held by the individual person.³¹ First, it protects against informational dissemination of the private individual that can lead to a tort action.³² For example it can limit the information about an individual that can potentially be disseminated in favor of protecting the individual's privacy.³³ This is often referred to as informational privacy. For example in Alaska the right to privacy, originally, had a strictly informational privacy purpose.³⁴ The right to privacy is explicitly mentioned in the Alaskan constitution under Article I section 22 of the state constitution.³⁵ The right reads "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."³⁶ This section was added to the constitution through an amendment in 1972 due to fear and concerns of the newly computerized technology developed at the time.³⁷ The voters ratified this amendment after legislative introduction.³⁸ Likewise was the case of Hawaii, which in the 1968 convention, the delegates sought amended the provision to

³¹ Nelson, *supra* note 23, at 258.

³² *Id.*

³³ *Id.*

³⁴ Gordon Harrison, *Alaska's Constitution: A Citizen's Guide*, ALASKA'S LEGISLATIVE AFFAIRS AGENCY, Fifth Ed., 38 (June 2012), http://w3.legis.state.ak.us/docs/pdf/citizens_guide.pdf.

³⁵ ALASKA CONST. ART. I, § 22.

³⁶ *Id.*

³⁷ Harrison, *supra* note 34, at 38.

³⁸ *Id.*

include language against invasion of privacy and wiretapping.³⁹

Secondly, the right to privacy can protect the individual from government invasion of life shaping choices and personal relations.⁴⁰ Thus, the right of privacy protects the individual from other individuals within society and also protects individuals from government intrusion.⁴¹ Such government intrusions tend to happen when the government regulates life-shaping choices and also when they regulate the privacy within the home.⁴² Usually, under this penumbra of the right to privacy involves the issue of life shaping choices, home-related rights, and no harm to others.

The Constitution of the United States does not explicitly state a right of privacy within its text; however, the Supreme Court has found the right to privacy to be implied within the First, Third, Fourth, and Fifth Amendment. For example, there is the case of *Griswold*, which recognized the fundamental right to privacy as a constitutional guarantee of the U.S. Constitution.⁴³ Later cases have recognized the fundamental right to privacy under other penumbras, such as the Fourteenth Amendment substantive due process as a liberty right.⁴⁴ However, the right to be left alone and to consume marijuana in the home has not been recognized

³⁹ *Id.*

⁴⁰ Nestlerode, *supra* note 25, at 61.

⁴¹ *Id.*

⁴² Hardwicke, *supra* note 27, at 549.

⁴³ *Griswold v. Connecticut*, 381 U.S. 479 (1965). (Protection within the home is extended to protect the privacy of marriage).

⁴⁴ See e.g. *Lawrence v. Texas* 539 U.S. 558 (2003). (Recognizing the right to homosexual sexual private conduct as liberty protected under the 14th Amendment).

within the scope of the United States Constitution; nevertheless it was recognized under the constitution of various States under its right to privacy provision.⁴⁵

The Supreme Court of the United States, has recognized the existence of a right to privacy in the home and to make certain life shaping choices. For example the right to privacy within the home is recognized in *Griswold*, where the right to privacy within the home is recognized for the right to use contraceptives and struck down a Connecticut law that banned the use of contraceptives.⁴⁶ Hence, the Supreme Court upheld the right to use contraceptives as within the right to privacy.⁴⁷ Furthermore, the court in *Stanley* recognized the right to privacy in the home to have and read pornographic material.⁴⁸ Likewise, in *Lawrence*, the right to privacy within the home was recognized to include homosexual act.⁴⁹

Furthermore, when it comes down to life-shaping choices, rights such as the right to marry persons of the same sex may be implicated.⁵⁰ The right to seek an abortion may be implicated.⁵¹ In these types of cases, as seen in different Supreme Court cases, the government is subjected to a strict scrutiny test to determine if the government has a compelling

⁴⁵ See e.g. *Ravin v. State*, 537 P.2d 494 (Alaska 1975). (Holding that Alaska's Constitutional right to privacy provision protects the right of adults to possess and use small amounts of marijuana in the home).

⁴⁶ *Griswold*, *supra* note 43.

⁴⁷ *Id.*

⁴⁸ *Stanley v. Georgia*, 394 U.S. 557 (1969).

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

⁵⁰ *Obergefell v. Hodges*, 576 U.S. ____ (2015). (Recognizing fundamental right of privacy to life shaping choices recognizing right to marry extended to same sex couples).

⁵¹ *Roe v. Wade*, 410 U.S. 113 (1973). (Recognizing fundamental right of privacy to persons own body thus, allowing for abortion).

state interest to regulate such life shaping decisions.⁵² Likewise, when the government tries to regulate the privacy of the home, it is also subjected to strict scrutiny.⁵³

The right to privacy to make life shaping choices also had a presence within federal jurisprudence. For example, cases like *Obergefell* extended the right to marriage to same sex couple because marriage falls within the fundamental right to privacy to make life-shaping choices.⁵⁴ The Court applied a similar rationale in *Roe v. Wade*, giving a fundamental right to the body of the woman and a right to privacy in making life-shaping choices.⁵⁵ The right to privacy encompasses multiple concepts; however, it is at odds with the right to use marijuana.

When it comes to marijuana, there are two critical arguments that might exclude marijuana use from the right to privacy. First, the use of marijuana use has nothing to do with the right to informational privacy. The purpose of the amendments to State's constitutions such as Alaska, and Hawaii was informational right to privacy.⁵⁶ Marijuana clearly does not fall under this penumbra because it does not pertain to an informational right. Secondly, claiming that marijuana is a life shaping choice might be a broad interpretation to the right to privacy because it is not comparable to the right of reproduction or the right of whom to marry. This is because it is hard to overcome the state's compelling interest in controlling certain substances.

⁵² *Id.*

⁵³ *Griswold v. Connecticut*, 381 U.S. 479 (1965). (Recognizing the fundamental right of privacy within the home).

⁵⁴ *Obergefell v. Hodges*, *supra* note 50.

⁵⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

⁵⁶ See e.g. *Harrison*, *supra* note 34.

However, there are two auspicious grounds that could include the right to use marijuana. First that marijuana use causes no harm to others. Secondly, home related right to privacy might be a more favorable approach to decriminalize marijuana use. However, both arguments have a counter argument. First, although it may be plausible, this might have a broad approach that might potentially turn libertarianism into constitutionally required approach. This means that anything that does not harm others might be allow and might disregard any state interest to control or oversee certain activities. Secondly, this will strictly be limited to the home and would not protect use outside of the home.

A. LIMITS TO THE RIGHT OF PRIVACY

Each state that has recognized the right to privacy has established limits on such a right. For example, Florida has recognized a limit in the right to privacy when it comes to smoking marijuana when it determined that using marijuana is not recognized as fundamental.⁵⁷ In *Stanely*, the Court determined that the right to privacy within the home is not absolute and it's subject to limits.⁵⁸ For example, in *Stanley*, the court clearly stated that the Federal Government can "make possession of other items, such as narcotics, firearms, or stolen goods, a crime."⁵⁹ Hence, the court applied a rational basis test and determined that there was a rational state interest to control such as substance.⁶⁰ Additionally, the right to make life choices is not absolute, since in the case of *Casey*,

⁵⁷ *Laird v. State*, 342 So. 2d 962, 965 (Fla. 1977).

⁵⁸ *Stanley*, *supra* note 48.

⁵⁹ *Id.*

⁶⁰ *Id.*

the court gave deference to the government in regulating abortion in terms of the procedure and location.⁶¹ The fundamental right to privacy is present for the U.S. Supreme Court but subject to limitations.

Hawaii determines the limits to the right to privacy on the existence of a fundamental right and location in which the activity takes place. As a result, Hawaii has considered for example limits on the right to engage in prostitution,⁶² and same sex marriage.⁶³ Additionally, the Court applied the same reasoning to marijuana.⁶⁴ Hawaii's Supreme Court reasoning behind certain limits on rights is that there is a tradition within the State that allows for such a state intervention to regulate certain substances that the legislature recognized as illegal.⁶⁵ Likewise, the same can be said about activities in which there is a compelling state interest.⁶⁶

Likewise, in Alaska, the right to privacy has also been subject to limits and not deemed as absolute. One example is that Alaska has also placed limits on marijuana use while the Court made decisions regarding fundamental rights.⁶⁷ Alaska has placed limits on possession of Marijuana in public places because privacy is less substantial in public places.⁶⁸ Additionally, Alaska has also limited the right of personal privacy for possession of cocaine, for example, because of the

⁶¹ *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992).

⁶² See generally *State v. Mueller*, 671 P.2d 1351, 1360 (Haw. 1983).

⁶³ See generally *Baehr v. Lewin*, 875 P.2d 225, 227 (Haw. 1993).

⁶⁴ See generally *State v. Mallan*, 950 P.2d 178, 181 (Haw. 1998).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Gordon*, *supra* note 56.

⁶⁸ See generally *Belgarde v. State*, 543 P.2d 206 (Alaska 1975).

societal harmful effects that cocaine has.⁶⁹ Furthermore, Alaska has also limited the right to privacy to a balance with state interests.⁷⁰ For example, in *State v. Planned Parenthood*, a law prohibited minors from getting abortions without parental consent and doctors performing abortions without said consent were subject to criminal penalties.⁷¹ Although the Supreme Court of Alaska did not uphold the law because of other least restrictive means available, in dicta stated that a compelling state interests of protecting minors and helping parents fulfill their responsibilities.⁷² Hence, the limits in Alaska come about when there is a greater societal harm or the public might be directly exposed.

In the international sphere, the right to privacy has also been subject to limitations. Such is the case of Argentina, where the limits have shifted based on different interpretations of the court as the court' political ideology shifts.⁷³ Consequently, certain actions that might be allowed by one court might be overruled at a later date.⁷⁴ Additionally, certain limits to the right come from the principles contained within the right.⁷⁵ The right to privacy in the Argentine constitution has two clear principles.⁷⁶ The first is personal autonomy or privacy, and the second is the

⁶⁹ See generally *State v. Erickson*, 574 P.2d 1 (Alaska 1978).

⁷⁰ See generally *State v. Planned Parenthood*, 171 P.3d 577 (Alaska 2007)

⁷¹ *Id.* at 580.

⁷² *Id.* at 582

⁷³ Laura Saldivia, *The Constitutional Protection of Sexual Minorities in Argentina*, 9 SW. J. L. & TRADE AM. 331, 336 (2003).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

legality principle.⁷⁷ The personal autonomy principle is responsible for preventing state interference in personal affairs.⁷⁸ The second is the principle of legality, which is established by the language within Article 19 of the Argentine constitution stating “public order and morality.”⁷⁹ It is here where the right to privacy has been mostly limited throughout Argentine history.⁸⁰ Ample arguments as to what might be good for society may shape the right accordingly. Lastly, the right to privacy is limited to actions that might harm third persons.⁸¹

In contrast, a balancing approach usually weights the individual interest against the compelling government interest to achieve a certain goal and then decide which interest has more value and thus assign different values for different interests.⁸² Often, this approach requires the courts to look beyond the text of the constitution because the word balancing is usually missing from the constitutional texts.⁸³ Thus, the courts look at the interest itself even if words such as “unreasonable” are written in the text; what is measured are the “interests at stake.”⁸⁴

⁷⁷ *Id.*

⁷⁸ Saldivia, *supra* note 73.

⁷⁹ *Id.*

⁸⁰ *Id.* at 340 (see discussion regarding packing of court with justices that have similar political views as the governing political party of the time).

⁸¹ *Id.* at 338.

⁸² Thomas A. Balmer & Katherine Thomas, *In the Balance: Thoughts on Balancing and Alternative Approaches in State Constitutional Interpretation*, 76 ALB. L. REV. 2027, 2032 (2013) (quoting Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987)).

⁸³ *Id.* at 2028.

⁸⁴ *Id.*

This approach appears within the case law of two states: Florida and Alaska. For example, in Florida, in the case of *Laird v. State*, the court applied a balancing approach.⁸⁵ The case dealt with a fundamental right to privacy and if that fundamental right allowed the possession of cannabis making the current state law inapplicable under Florida's constitution.⁸⁶ It balanced "whether there is a 'rational basis' for outlawing such an activity as opposed to a 'compelling state interest' in the subject matter of the legislation."⁸⁷ The Court determined that a compelling state interest existed and upheld the conviction for possession of marijuana.⁸⁸

Likewise Alaska and the Federal Supreme Court had a similar balancing approach when dealing with the right to privacy.⁸⁹ In the case of Alaska, in *Gray v. State* defendant was convicted for selling marijuana.⁹⁰ The court held that the state has the right to present evidence that shows a compelling state interest that justifies an intrusion into the right to privacy.⁹¹ Hence, Alaska recognized the right to introduce evidence that shows a compelling state interest allowing for

⁸⁵ *Laird v. State*, 342 So. 2d 962, 965 (Fla. 1977).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See *Gray v. State*, 525 P.2d 524, 527-528 (Alaska 1974) (holding held that under this amendment a statute, which impinges upon the right of privacy "may be upheld only if it is necessary to further a compelling state interest."); see also *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (stating "on one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order").

⁹⁰ *Gray v. State*, 525 P.2d 524, 527-528 (Alaska 1974).

⁹¹ *Id.*

the court to balance such an interest against the interest of the privacy rights in question. This same approach was seen in other cases in Alaska.⁹²

The Supreme Court of the United States also established guidelines to determine when a right is subject to balancing.⁹³ An example of this balancing test with regards to privacy is seen in *Griswold*, which recognized the right of privacy is recognized within the home.⁹⁴ In *Griswold*, the court held that the law in Connecticut prohibiting the use of contraception violated the right to privacy of the marriage.⁹⁵ Thus, the court held that the right of privacy of the couple was above the state's interest to regulate the use of contraception to promote population growth.⁹⁶ Here, the court engaged itself in a balancing to weight a compelling state interest with the individual privacy rights of the couple.

Hawaii in the application of the right to privacy has also stuck with the use of a balancing approach. However, Hawaii's approach, although influenced,⁹⁷ differs from the traditional balancing approach. Hence when "answer[ing] questions of constitutional law by exercising our own independent constitutional judgment based on the facts of the

⁹² See e.g. *Ravin v. State*, 537 P.2d 494 (Alaska 1975) (recognizing right to privacy to consume marijuana in one's home; the balance was on the right to privacy); See contra *Belgarde v. State*, 543 P.2d 206 (Alaska 1975) (when in public property there is a compelling state interest that weights more than the right to possess marijuana).

⁹³ See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *State v. Mallan*, 950 P.2d 178, 181 (Haw. 1998) (applies a similar balancing standard as used in *Griswold*, *Roe v. Wade*, and *Eisendstadt*)

case. Thus, [the court] review[s] questions of constitutional law under the right/wrong standard.”⁹⁸ In *Mallan*, the court applied the standard of review to constitutional questions; the Supreme Court of Hawaii decided to state the two approaches used to answer constitutional questions that involve fundamental rights.⁹⁹ Hence, Hawaiian courts apply two approaches that involve balancing to determine the constitutionality of certain activities.

The first approach states “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ are included in this guarantee of personal privacy.”¹⁰⁰ This means that the concept of what is fundamental is guided by tradition. Thus, once a right is deemed fundamental under Hawaiian tradition, it’s subject to strict scrutiny.¹⁰¹ If the right is not fundamental, it is subject to minimal rationality test.¹⁰²

The second approach by Hawaii is based on the United States Supreme Court decision *Stanley v. Georgia*.¹⁰³ This approach deals with privacy within the home.¹⁰⁴ In order to be able to interfere with the right to privacy when it implicates the home, the state must show a compelling state interest.¹⁰⁵ Hence, the second approach to determine what balancing test

⁹⁸ *Id.* (applying the constitutional right to privacy to the right to possess and use marijuana).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*; see also *Stanley v. Georgia*, 394 U.S. 557, 563 (1969) (dealing with the right to view pornographic material within the home).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

is required is to distinguish where the infringement on the right to privacy takes place; if it is in the home, it automatically puts the burden on the state to show a compelling state interest to allow for a balancing.

Lastly in Argentina, decisions that involve the right to privacy were still subject to a balancing, since judicial interpretation relies heavily on U.S. Supreme Court decisions.¹⁰⁶ Hence, "by way of example, the Argentine Supreme Court has adopted U.S. Supreme Court interpretations in matters regarding judicial review, the malice doctrine, conditions for a declaration in police stations, and political questions."¹⁰⁷ However, in *Fallo Arriola*, the right was interpreted more broadly because the court saw the ruling in *Fallo Montalvo*, as a failure.¹⁰⁸ Thus, the Court not only engage in a balancing of the compelling state interest to determine its decision but it also took into account whether the legislative purpose to restrict the sale of drugs was fulfilled by the previous Supreme Court decision.¹⁰⁹ Consequently, the court engaged in a balancing test and measured the means employed by the legislature to fulfill the state's compelling interest by limiting the individual's freedoms had achieved the intent of the legislature; for example, in the case of *Fallo Montalvo*, to stop the distribution and sale of marijuana.¹¹⁰

¹⁰⁶ Saldivia, *supra* note 73.

¹⁰⁷ *Id.*

¹⁰⁸ Arriola, *supra* note 12.

¹⁰⁹ *Id.*

¹¹⁰ *Montalvo*, CSJN 313 Fallos 1333 (1990).

III. U.S. CASES THAT DEALT WITH THE RIGHT TO PRIVACY AND MARIJUANA

A. ALASKA: LEADING THE WAY SINCE 1976

Alaska was the first state to recognize the right to possess small amounts of marijuana under its fundamental right to privacy in the state constitution.¹¹¹ However, under *Ravin*, the right did not stem from the right of a person to ingest marijuana, as there is a greater state compelling interest.¹¹² Hence, under *Ravin*, the right to possess and consume marijuana derived from special protection of the home since the court held that:

This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home unless the state can meet its substantial burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest.¹¹³

The court placed a distinction between what is for personal consumption and what is for sale, as it stated, “possession at home of amounts of marijuana indicative of intent to sell rather than possession for personal use is likewise unprotected.”¹¹⁴ However, no specific amount was stated at

¹¹¹ *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 511.

the time. The Court determined that the State's legitimate interests and the means applied were far outweighed by the rights found within the home.¹¹⁵

Furthermore, three years after *Ravin*, the court had to make a similar decision but about a different substance.¹¹⁶ In the case of *Erickson* a person was arrested in their home with possession of cocaine.¹¹⁷ The supreme court of Alaska made a distinction between cocaine and marijuana the court recognized that the right to privacy protected only of possession of marijuana because cocaine, unlike marijuana, could lead to death.¹¹⁸ Hence, the Alaska Supreme Court put a heavier weight on societal consequences than the right to use a substance under the right to privacy and stated that "neither the right to ingest a particular substance nor the more significant right to such autonomy in the home is absolute, since each must yield to the interests of other societal members in health and safety."¹¹⁹ The court set a clear limit on a threshold that would not be crossed; any drug that endangered life would not be recognized.¹²⁰ Although this puts a limit on home related privacy rights, it further legitimized the use of marijuana for personal use because by Alaska's Supreme Court recognition, marijuana is not seen as a fatal drug.

Nevertheless, Alaska's rationale does not call for legalization of marijuana. Alaska's Supreme Court did not recognized within the right to privacy the right to use or

¹¹⁵ *Id.*

¹¹⁶ *State v. Erickson*, 574 P.2d 1 (Alaska 1978).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 22; see also *Ravin* 537 P.2d at 504.

¹²⁰ *State v. Erickson*, *supra* note 116.

possess marijuana in public places.¹²¹ The court came to that conclusion restating the principles stated earlier in *Ravin* that set some parameters:

Neither the federal or Alaska constitutions affords protection for the buying or selling of marijuana, nor absolute protection for its use or possession in public. Possession at home of amounts of marijuana indicative of intent to sell rather than possession for personal use is likewise unprotected.¹²²

Oddly however, a legislative initiative through ballot banning the use of marijuana through legislative initiative was deemed unconstitutional because “it conflicts with the right to privacy”.¹²³ However, the court concluded that the statute could be “preserved to the extent that it prohibits possession of four ounces or more of marijuana.”¹²⁴ Not only did the Court set an explicit amount, but by setting said amount, it also defined what the legitimate means to an end.

Finally, Alaska set an amount through legislative initiative and voted through ballot legalizing the use of marijuana and set the amount which is deemed for personal consumption, which is no “more than 1 ounce of marijuana

¹²¹ *Belgarde v. State*, 543 P.2d 206, 208 (Alaska 1975) (holding that the state may constitutionally prohibit Belgarde's possession).

¹²² *Id.*; see also *Ravin* 537 P.2d at 511.

¹²³ *Noy v. State*, 83 P.3d 538, 542 (Alaska Ct. App. 2003).

¹²⁴ *Id.*

on them. Nor can they harvest more than 4 ounces in their home” and limited marijuana use to 21 year olds.¹²⁵

B. HAWAII: A COMPELLING STATE INTEREST IS SUFFICIENT

Contrary to Alaska, Hawaii has denied the use of marijuana as a fundamental right protected under Hawaii’s constitutional provision under the fundamental right to privacy.¹²⁶ In the case of *Mallan*, Hawaii’s Supreme Court reasoned that the right to privacy can be limited to compelling state interests and no new approach to the right to privacy would be made to encompass marijuana use for recreational use.¹²⁷ Thus, the court in that case applied a rational basis test giving the legislature deference and determined that the defendant failed to show why a rational test is not appropriate and failed to rebut the presumption of constitutionality.¹²⁸ Furthermore, the court acknowledge the test applied in Alaska under *Ravin*, but did not agreed that it should encompass marijuana because of “social and cultural factors unique to Alaska” and were not inclined to apply such a reasoning.¹²⁹

Additionally, those compelling state interests are above religious interests when an illegal substance is in place and the state reserves its right to regulate such interests.¹³⁰

¹²⁵ Greg Botelho, *Alaska becomes latest state to legalize marijuana use*, CNN (Feb. 25, 2015) <http://www.cnn.com/2015/02/24/us/alaska-marijuana/index.html>.

¹²⁶ *State v. Mallan*, 950 P.2d 178, 184 (Haw. 1998).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *State v. Sunderland*, 168 P.3d 526, 527 (Haw. 2007).

Although Hawaii's Supreme Court reasoned that freedom of speech and expression is not violated when a substance intended for a religious practice is controlled (also using a right to privacy analysis), the state had the right as a police power to penalize possession.¹³¹ In the case of *Sunderland*, police went to the defendant's home pursuing an investigation of a missing child and saw paraphernalia and certain plants from a window and proceeded to arrest.¹³² Defendant defended his claim with two defenses, right to privacy and right of expression but both defenses failed and defendant was convicted.¹³³

Currently, Hawaii has allowed for the use of medical marijuana.¹³⁴ The current marijuana program, passed in 2015 as Act 241, allows for the growth of dispensaries.¹³⁵ Since 2000 marijuana had been legal for medical purposes and allowed for personal growth through Act 228.¹³⁶ However, for recreational use, marijuana under Hawaiian jurisdiction is strictly illegal scheduled as a class I hallucinogenic and penalizing any amount up to one ounce with a fine of \$1000 and up to 30 days of incarceration for the first offense.¹³⁷ Hawaii has strict limits and parameters to marijuana and does not recognize it even under the right to privacy.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Medical Marijuana Program*, HEALTH HAWAII (Jan. 1, 2018), <http://health.hawaii.gov/medicalcannabis/>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Hawaii Rev. Stat. § 712-1240; *see also* Hawaii Rev. Stat. § 706-663.

C. FLORIDA: NEED TO SHOW RATIONAL BASIS

Likewise, Florida has declined to recognize the use of marijuana in the home as a fundamental right that protected by the right to privacy.¹³⁸ Florida, in a similar manner that Hawaii, reasoned that the fundamental right to privacy is not covered by the right to possess and consume marijuana, even in the privacy of a home and that the reasoning by Alaska's Supreme Court in *Ravin* did not apply.¹³⁹ In the case of *Laird*, the defendants were charged with possession of five grams of marijuana and paraphernalia possession under state statute.¹⁴⁰ Defendants appealed their conviction by arguing that the right to privacy to consume marijuana within the home but the Florida Supreme Court did not accept that argument and held that the defendants did not show that there is no rational basis for this law.¹⁴¹ Thus, the Supreme Court of Florida set the limit to not recognizing marijuana use within the right to privacy.

Although the Court has failed to apply the reasoning of *Ravin*, localized movements did intervene through changes in local ordinances. Marijuana in Florida is illegal with consequences of up to a year of imprisonment and \$1,000 dollars in fines for possessions of up to 20 grams.¹⁴² However, in practice, different jurisdictions have decriminalized certain amounts of marijuana for personal use; for example, Miami-Dade commissioners voted on June 30th, 2015, to update the code, which enables police to treat marijuana arrest as a civil

¹³⁸ *Laird v. State*, 342 So. 2d 962, 965 (Fla. 1977).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 963.

¹⁴¹ *Id.*

¹⁴² Florida Criminal Code § 893.13.

citation with a fine of up to \$100 for possessions of 20 grams or less, thus avoiding a criminal record.¹⁴³

Furthermore, as of the 2016 elections, Florida legalized marijuana for medical purposes through a ballot initiative called the Florida Amendment 2, which won with over 70% of the vote.¹⁴⁴ The Florida Amendment 2 is limited in application since it is only limited for patients suffering from HIV, Aids, ALS, Crohn's disease, Parkinson's, multiple sclerosis, " or other medical conditions compared of the same kind or class as or comparable to those enumerated, and for which a physician believes that the medical use of marijuana would likely outweigh the potential health risks for a patient."¹⁴⁵ Like Hawaii, Florida is changing the marijuana laws but it is doing so at a legislative level and not using the right to privacy as a basis to justify change.

D. FEDERAL GOVERNMENT: MARIJUANA NOT COVERED BY THE RIGHT TO PRIVACY

The Supreme Court of the United States has not entertained the issue of the right to privacy to encompass a right to smoke marijuana; however, this issue has come up in certain appellate levels and has not survived the privacy

¹⁴³ Douglas Hanks, *Miami-Dade adopts \$100 fine for pot possession*, MIAMI HERALD (June 30, 2015), <http://www.miamiherald.com/news/local/community/miami-dade/article25858318.html>.

¹⁴⁴ *Florida Amendment 2 - Expand Medical Marijuana - Results: Approved*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/elections/results/florida-ballot-measure-2-expand-medical-marijuana>.

¹⁴⁵ FLA. CONST. ART. X, § 29.

challenge. For example as recent as 2014, in the case of *Krumm*, the court of appeals did not even entertain an argument challenging the schedule of marijuana as schedule I stating that this is a “vague assertion.”¹⁴⁶ Furthermore, the court rejected an argument alleging a violation of privacy in the case of *Kuromiya v. United States*.¹⁴⁷ In *Kuromiya*, the government’s Controlled Substance Act survived a privacy challenge under the tenth and ninth amendment because the right to use, possess, and sell marijuana is not fundamental.¹⁴⁸ Lastly, one of the first challenges under federal court to exclude marijuana use from a fundamental right to privacy is *Nat'l Org. for Reform of Marijuana Laws (NORML) v. Bell*.¹⁴⁹ In *NORML*, the organization brought a challenge against Controlled Substance Act arguing the right to privacy to in one’s home using the *Stanley* Standard.¹⁵⁰ However, the court stated that a significant part of the decision in *Stanley* dealt with the freedom of speech, and here there is no issue at stake, the Federal Government can “make possession of other items, such as narcotics, firearms, or stolen goods, a crime.”¹⁵¹

At a federal level, the Court has always leaned in favor of the federal government due to the supremacy clause. Federal law labeled marijuana has been a controlled substance since 1937 when the U.S. government passed the Marijuana Tax Act, which didn’t make marijuana illegal per

¹⁴⁶ *Krumm v. Holder*, 594 F. App’x 497, 501 (10th Cir. 2014).

¹⁴⁷ *Kuromiya v. United States*, 37 F. Supp. 2d 717, 726 (E.D. Pa. 1999).

¹⁴⁸ *Id.* (*Stanley* recognized the fundamental right to privacy in one’s home to view and hold pornographic material).

¹⁴⁹ *Nat'l Org. for Reform of Marijuana Laws (NORML) v. Bell*, 488 F. Supp. 123 (D.D.C. 1980) (hereinafter *NORML*).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (Quoting *Stanley v. Georgia*).

se, but it did control and tax marijuana.¹⁵² In 1952, with the Boggs act, stiff penalties were included and by 1970, the Controlled Substances Act placed drugs into schedules and placed marijuana into schedule 1¹⁵³ which is the most restrictive category.¹⁵⁴ Thus, as medical marijuana became legal through the different states, federal challenges were successful within the Supreme Court.¹⁵⁵ For example, in *Raich*, a person using marijuana for medical purposes challenged a raid that took away her marijuana.¹⁵⁶ Nevertheless, the court in a 6-3 majority held that congress has the authority to prohibit the cultivation and use of marijuana even if it is under compliance with local California law.¹⁵⁷ Hence, the Supremacy Clause put federal law over state law.

The current status of marijuana at the Federal level looks grim because of the new vigor by the Trump Administration. The Trump Administration, under the guidance of Attorney General Sessions, has decided to stand its ground against marijuana.¹⁵⁸ The Trump administration has “freed prosecutors to more aggressively enforce federal laws against the drug in states that have decriminalized its

¹⁵² Scott C. Martin, *A Brief History of Marijuana Law in America*, TIME (April 20, 2016), <http://time.com/4298038/marijuana-history-in-america/>.

¹⁵³ *Id.* (Schedule I drugs are drugs that have a potential for abuse and no medical benefit; within the same category are heroin, LSD, and cocaine).

¹⁵⁴ *Id.*

¹⁵⁵ See *Gonzales v. Raich* 545 U.S. 1 (2005).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Charlie Savage & Jack Healy, *Trump Administration Takes Steps That Could Threaten Marijuana Legalization Movement*, N.Y. TIMES, (Jan. 4, 2018). <https://www.nytimes.com/2018/01/04/us/politics/marijuana-legalization-justice-department-prosecutions.html>.

production and sale.”¹⁵⁹ Hence, prior policy of the Obama era to leave the marijuana industry alone will be retracted and prosecutions against the business will ensure.¹⁶⁰ However, the investors and business owners pledge to defend their actions due to state law.¹⁶¹ It would be interesting to see who will prevail. Will arguments in favor of the 10th Amendment¹⁶² prevail or will the supremacy clause prevail¹⁶³ and interstate commerce¹⁶⁴? Past decisions seem to show that the Court gives deference to the federal government.

IV. ARGENTINA, LEADING THE WAY?

It is 1983. Democracy is back. After six years of military dictatorship, Argentina once again has open elections and a working constitution.¹⁶⁵ The fervor for privacy and liberty was big after a dictatorial military regime that left a toll 30,000

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² The 10th amendment reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

¹⁶³ The supremacy clause in Article VI section 2 of U.S. constitution reads: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

¹⁶⁴ The commerce clause in Article I, section 8, clause 3 of the U.S. Constitution reads: “[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

¹⁶⁵ *Bazterrica*, CSJN 306 Fallos 1392, 1416 (1986).

disappeared people.¹⁶⁶ Hence, that resulted in favorable atmosphere that considered the application of privacy rights to various facets of Argentine society, but how did the Argentina's Supreme Court decide to apply those rights? The answer is through judicial review.

A. *FALLO BAZTERRICA*: A WILLINGNESS TO APPLY JUDICIAL REVIEW

In 1986, the Argentine Supreme Court first flirted with the idea of judicial review. *Fallo Bazterrica* arose from a search in the private home of a guitarist who performed for one of Argentina's most famous musicians, Charlie Garcia. The case involved a 54 year old guitarist being found in possession of three marijuana cigarettes in his home, inside a small can.¹⁶⁷ Gustavo Bazterrica was convicted on a one year suspended sentence, fines, and costs. The court of appeals confirmed the sentence, but the Argentinean Supreme Court declared the law under which Bazterrica was convicted to be unconstitutional.

But how did the court reach this decision? Arguably, the court applied detailed judicial review. Ultimately, Argentina's Supreme Court held that the law was in conflict with the Article 19 of the Argentinian Constitution and decided to strike down the sentence by a vote of 3-2.¹⁶⁸ The Court argued that that the law at the time, Article 6 of Law 20.771, violated the constitution of Argentina, specifically Article 19.¹⁶⁹ The court engaged in a judicial review and

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

revoked a law passed earlier by the legislature.¹⁷⁰ Furthermore, in the application of said holding, the Court engaged in a balancing approach.¹⁷¹

The Court first recognized the existence of a private sphere, but also recognized the existence of the legislature in regulating what might be dangers to the public health.¹⁷² In its analysis, the Supreme Court first defined the private sphere as strictly defined within the Article 19 of the Argentine Constitution:

The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges. No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit.¹⁷³

The Court recognized that the legislature does have a right to interfere with certain conducts, but in order to regulate conducts that fall under the privacy sphere, there has to be a conduct that transcends the private sphere.¹⁷⁴

The Court defined conduct that transcends the private sphere as conduct that are “induction to consumption, utilization to prepare, facilitate, or hide a crime, the encouragement of public use, or use in public places or

¹⁷⁰ *Bazterrica*, CSJN 306 Fallos 1392, 1416 (1986).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Art. 19, CONSTITUCION NACIONAL [CONST. NAC.] (Arg.).

¹⁷⁴ *Bazterrica*, CSJN 306 Fallos 1392, 1416 (1986).

private places that could harm third parties.¹⁷⁵ The problem, the Court reasoned, is that the law prohibiting personal use or possession at the time assumed that possession alone implicated aforementioned actions that fell outside the scope of the guaranteed protections of Article 19.¹⁷⁶ Hence, the Court held that a law passed through the legislature could not assume that a protected right under the Argentine Constitution could, such as possession, to fall outside its protection by mere inference. The Court went on to balance possession of marijuana with the state's interest listed in Art. 19 of the constitution and later went on to invalidate said law as it violated the Argentine Constitution.¹⁷⁷

Furthermore, the Court held that there needed to be a conduct that jeopardizes the public health in order to incriminate.¹⁷⁸ The Court noted that criminal law did not serve this purpose as the legislature had already opted for programs that treated addiction.¹⁷⁹ Thus, a simple possession of three joints does not arise to the level of danger to the public health. Furthermore, the Court also recognized that addicts should not be punished but helped and reinstated into society; however, that analysis would be overturned a few years later in *Fallo Montalvo*.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Bazterrica*, CSJN 306 Fallos 1392, 1416 (1986).

B. *FALLO MONTALVO*: REASONING THAT LIMITED
JUDICIAL REVIEW

Fallo Montalvo comes at a different political time of Argentina. The dissent in *Bazterrica* wrote the majority of *Montalvo*.¹⁸⁰ This is because in 1989 the number of justices increased from five (5) to nine (9).¹⁸¹ Accordingly, the neoliberal government at the time increased the number of justices from five to nine and filled the vacancies with judges aligned to their political ideology.¹⁸²

Fallo Montalvo dealt with an arrest for possession of Marijuana.¹⁸³ The court retracted itself from the previous ruling. The Court held that the law that criminalizes amounts for personal consumption is constitutional.¹⁸⁴ To reach that conclusion, the court gave deference to the legislators, as those are political questions, and not questions that should be addressed by the Court.¹⁸⁵ The Court continued by saying that it would be illegal to question the actions of those laws would be giving itself the powers of the legislature.¹⁸⁶ Furthermore, the Court also acknowledged that marijuana

¹⁸⁰ Laura Saldivia, *The Constitutional Protection of Sexual Minorities in Argentina*, 9 SW. J. L. & TRADE AM. 331, 336 (2003).

¹⁸¹ Yanina Guthmann, *La reforma del sistema de Justicia (2003): una mirada critica*, INSTITUTO GINO GERMANI (Jun. 15, 2018), http://webiigg.sociales.uba.ar/iigg/jovenes_investigadores/4jornadasjovenes/EJES/Eje%2010%20Derecho%20Ciudadania%20Democracia/Ponencias/GUTHMANN,%20Yanina.pdf.

¹⁸² *Bazterrica*, *supra* note 174, at 336.

¹⁸³ *Montalvo*, CSJN 313 Fallos 1333 (1990).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

falls outside of the protection of privacy.¹⁸⁷ To reach said conclusion, the Court first determined that actions that might offend the public health, the public order, or the public moral are not protected under Article 19 of the Argentine Constitution because said conduct affects the order and public health, which through deduction affects third parties.¹⁸⁸ Hence, according to the Court in *Fallo Montalvo*, whenever there is an action that might affect third parties, it is constitutional for the legislature to intervene.¹⁸⁹ Here, the balancing employed by the Court favored the state.

Additionally, the Court decided to avoid questioning the reasonableness the punishment.¹⁹⁰ Nevertheless, the court did engage in a balancing approach to evaluate the actions of the legislators.¹⁹¹ The Court continued stating that even if the consequences are hefty, it is not the job of the Court to examine that penalty.¹⁹² Hence, the Court disregarded the means as the aims for achieving a legislative outcome; i.e. eradicate narcotics.¹⁹³ Lastly, the Court agreed with the means applied by the legislature, as the aim is to reduce drug consumption, which is part of the public health as the Court states that addicts conform part of society such that their conduct affects society.¹⁹⁴

¹⁸⁷ *Id.*

¹⁸⁸ *Montalvo*, *supra* note 83.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Montalvo*, *supra* note 83.

¹⁹⁴ *Id.*

C. *FALLO ARRIOLA*: THE REBIRTH OF JUDICIAL REVIEW?

In 2009, the Argentine Supreme Court reintroduced the idea of judicial review. *Fallo Arriola* comes from a warrant issued by a judge because the police believed narcotics were being sold in a home.¹⁹⁵ While conducting the warrant in the home the police arrested seven people, five for possession of marijuana cigarettes and two for intent to sale.¹⁹⁶ Later that same day, two arrests follow due to possession of marijuana while driving.¹⁹⁷ However, the Supreme Court of Argentina reversed every conviction.¹⁹⁸ The Court starts off with an analysis on how consumption and addiction have grown instead of decreased as the law originally intended.¹⁹⁹ Furthermore, the court then analyzed the law in question that criminalized drugs, and ruled it unconstitutional as well as a violation of human rights because it went against the freedom of privacy established under Article 19 of the constitution.²⁰⁰ It is also important to note that even though the defendants were apprehended in different contexts, the Court did not make any distinctions between driving while on possession and possession within the home; the Court noted that mere possession within your person activates the constitutional protections (i.e. having some marijuana in your pocket is protected).

¹⁹⁵ Arriola, *supra* note 12.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Arriola, *supra* note 12.

The law in question that criminalized marijuana and every other was *Ley 23.737*.²⁰¹ Within said law, Article 18 established that if the defendant could prove dependence on such a substance, then sentencing would be suspended and proper treatment given.²⁰² Nevertheless, *Fallo Arriola* saw that remedial measure as not being a solution for the narcotic problems.²⁰³ Furthermore, within *Ley 23.737* within Argentina's penal code, the second paragraph of Article 14 gave mandatory sentencing between a month and two years when the amounts are deemed for personal use (the law does not specify amounts).

The Court first defined the criteria needed to regulate the private sphere. The Court noted that (1) each adult person is free to make decisions about the lifestyle that he or she wants without the State being able to intervene in that area, (2) it is not possible to penalize conducts carried out in private that do not cause danger or damage for third parties. Arguments based on mere abstract dangerousness, convenience or public morality do not pass the test of constitutionality, and (3) the conduct conducted in private is tendered, unless it constitutes a specific danger or causes damage to property or rights of third parties.²⁰⁴

Accordingly, the *Fallo Arriola* held the following: (1) the law criminalizing personal use went against constitutional right to privacy, (2) that the nineteen years of *Fallo Montalvo* had negative consequences in society such as that consumption increased significantly and that punishment

²⁰¹ COD. PEN. 23.737.

²⁰² *Id.*

²⁰³ *Arriola, supra* note 12.

²⁰⁴ *Id.*

towards the consumer did not decrease sales, but notably increased them, and (3) that it goes against the constitution to penalize private actions that do not hurt third parties or injure the well being of the jurisprudence.²⁰⁵

Thus, the court engaged in a balancing, but how so? The court determined that the means applied by the legislature were not tailored to the specific end, thus failing constitutional muster while at the same time recognizing home-related actions within the spectrum of the right to privacy; hence, the court applied a similar judicial review as it had done so in *Fallo Bazterrica*.

Unlike *Fallo Montalvo*, here the Court agreed that drug consumption does not always affect third parties.²⁰⁶ Furthermore, the court criticized the means applied by the legislature, and stated that a more favorable to combat drugs is through education and prevention.²⁰⁷ Additionally, the Court openly recognized judicial review and explicitly states that it is the job of the judiciary to depart from the legislation when said legislation infringes upon the rights of the individuals.²⁰⁸ Lastly, the Court noted that to punish criminally for tenancy of narcotics, the inferior courts should analyze if the rights of third parties were affected.²⁰⁹ Therefore, the analysis applied by the Court resembles *Fallo Bazterrica* with the distinction that it acknowledged the intent of legislature, but greatly criticized the means.²¹⁰ Like this, the Court was willing to apply a judicial review to question the

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Arriola, *supra* note 12.

²¹⁰ *Id.*

laws of the legislature and its infringement on constitutional guarantees. *Fallo Arriola* recognized an additional aspect to judicial review (not seen in *Bazterrica*): judicial evaluation of the efficacy of the legislature's chosen means of trying to deal with harms of drugs – said that simply outlawing them hadn't worked. However, this kind of evaluation has not been part of the U.S. Courts since the *Lochner* era.

V. SHOULD THE U.S. FOLLOW ARGENTINA?

A. CURRENT STATUS OF ARGENTINA

So what is the current situation of Argentina? The current status is a state of confusion.²¹¹ *Fallo Arriola*, only decriminalized personal use, but such a personal use is at discretion of the first instance judge in a case-by-case basis allowing police to continue detentions.²¹² For example, in December of 2009, a man was arrested for having two marijuana plants that were about two meters tall and weighed about 2,225 kg.²¹³ The court of appeals decided not to apply the precedent reached in *Fallo Arriola* because it considered that those amounts were for commercialization and not personal use.²¹⁴

²¹¹ *Sobre la reforma de tenencia de drogas en Argentina*, TNI (Jan, 3, 2018), <https://www.tni.org/es/countries/argentina/item/238-argentina>.

²¹² *Id.*

²¹³ *La Camara Federal de San Martin Ordeno Seguir Investigando el Caso*, CLARIN (Dec 24, 2009), https://www.clarin.com/ediciones-antteriores/cultivo-planta-marihuana-sobreseido-revocan-fallo_0_r1Gf2jwC6tl.html.

²¹⁴ *Id.*

However, several reforms were put into place to give guidance to the executive power.²¹⁵ The most recent update came about in the famous newspaper *Clarín*, in an article dated January 5, of 2018.²¹⁶ In that article it is stated how the reform to the penal code, which will be presented to congress by the current President Macri, will set amounts of what is deemed for personal use and will legalize personal use to be at par with the Supreme Court of Argentina.²¹⁷ This will give more clarity to the current status and set forth a clear way of implementation while at the same time respecting the decision of the Supreme Court.

B. COULD THE U.S. BENEFIT FROM THE ARGENTINE APPROACH?

i. YES, DEFINITELY

Ultimately, the U.S. would benefit (if not more than Argentina) from a new approach to the current War on Drugs, by adopting a more broad judicial review mechanism, as did the Argentine Supreme Court. Using the approach established by the Argentine Supreme Court would allow for the courts to take into consideration some of the failures of the war on drugs and force govern to divert resources elsewhere.

First, the to use the approach intended by the Supreme Court of Argentina, the United States Supreme Court should

²¹⁵ *Supra* note 211.

²¹⁶ *Proponen que en el nuevo Código Penal deje de ser delito la tenencia de drogas para consumo personal*, CLARIN (Jan 5, 2018), https://www.clarin.com/sociedad/nuevo-codigo-penal-dejaria-delito-tenencia-drogas-consumo-personal_0_Hk6csHT7M.html.

²¹⁷ *Id.*

allocate possession of marijuana within the scope of the right to privacy. Once the right is recognized, and the question is the limit, then some form of strict scrutiny is merited against government intervention. For example, the Court might have a legitimate interest in controlling the sale and distribution. Hence, the Court might allow for possession but not for growth. Another example might be the government interest in controlling marijuana reaching the youth; as a result, the government might also limit possession to places close or far from school zones. Using this approach might allow the government to have certain control, but at the same time allow the right to privacy to cover a broader spectrum.

Furthermore this approach would entail an evaluation of whether a chosen legislative means to a legitimate end. It wouldn't take the power away of the legislature to control the substance as it seems fitted for public health, but it would limit the power of the legislature to do away with certain rights.

ii. DANGERS OF APPLYING THE ARGENTINE APPROACH AND REVIVING LOCHNER

The approach adopted by the Argentinean Supreme Court might seem to revive doctrine applied in *Lochner*.²¹⁸ The United States' Supreme Court has engaged in the practice of Judicial Review on multiple occasions; but a landmark case that initiated the practice of Judicial Review is *Lochner*.²¹⁹ *Lochner* dealt with the means on which the legislature could regulate the amount of hours that bakers could work on a

²¹⁸ See *Lochner v. New York*, 198 U.S. 45 (1905).

²¹⁹ *Id.*

regular day.²²⁰ The legislature tried to limit those hours, however, the Supreme Court of the United States found that a right to contract existed and that the police power does not overcome a right to contract.²²¹ The Court acknowledged that the right to contract is not absolute, however, the court had a three prong test.²²² First, the Court determined if there is a liberty interest, i.e. a right to contract. Secondly, the Court determined that the state infringement must be related to a valid police power such as public health workers safety. Lastly, the State regulation must be necessary to achieve a valid purpose. In summary, the Court must first determine the right is absolute, if it is not absolute it must determine what is the aim of the regulation, once the aim is determined, the Court must see if said means are necessary and if it is the least restrictive alternative. If there are other means that are less restrictive, then the Court invalidates the law.

The aforementioned method utilized in *Lochner*, gives rise to some criticism. First, the problem with *Lochner* is that it was wrong in having an intrusive judicial review of means to ends; there needs to be more deference to legislative judgments. After all, the legislators were elected and are representative of the population. Furthermore, legislators have more ample sources to conduct research, studies, and debate before passing a law. A second problem with *Lochner* is that it was wrong in recognizing a right to freedom of contract; however, it was right in calling for intrusive scrutiny of legislative judgments if there is a valid constitutional right at stake. Said freedom to contract is not explicit within the

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

Constitution and the Supreme Court recognized said right from natural law.²²³

Adopting the approach used in *Fallo Arriola*, in light of the *Lochner* doctrine, might present negative and positive outcomes to the United States jurisprudence. As for the negative outcomes, first and foremost, it would be a backlash against democracy by undermining decisions made by legislators elected by the people. When legislators take actions within congress, it is likely that they have their constituents in mind. This is because in the United States democracy, elected officials are accountable to their voters. Thus, arguably if an elected official holds a political ideology and passes laws in a certain manner, it is possible and even likely that he does so with his constituents ideology in mind. This is because if a legislator does otherwise, it is possible that he might lose a reelection. Hence, it is fair to deduce that a legislator acts accordingly to the mindset of the constituents he represents. If the Court undermines said laws, then the Courts would not only be undermining decisions for the people by the people, but this would also be done by a public official that was not elected by the people and holds a life time seat in the Court. Furthermore, the Court might start recognizing rights that are non-existent in the constitutional text, such as it did in *Lochner*²²⁴, by simply referencing natural law. Hence, all sorts of rights might get recognized and it might get out of control.

²²³ See *Lochner*, *supra* note 218.

²²⁴ *Id.* (For example, the natural right to contract).

iii. LOCHNERIZING IS NOT SO BAD

However, Lochnerizing might allow courts to be able to apply and adopt the approach used in *Fallo Arriola*. First, an approach like the one used in *Fallo Arriola* would allow the court to consider and analyze social costs such as the failures and monetary losses of the war on drugs. The court would not only be able to consider the means applied by the legislature as legitimate, but it would also be able to assess the consequences of the desired results. In the case of the war on drugs, the Court would be able to analyze not only if drug consumption has decreased, but also the amount of deaths, the proportionality of the penalties for consumer, and alternate modes of discouraging use without resorting to harsh prison penalties. For example the Court in *Fallo Arriola* stated that the purpose of the law was an utter failure since it did not prevent consumption, in fact consumption increased.²²⁵ Secondly, the approach used in *Fallo Arriola* might be a tool to broaden the rights of the people. Sometimes, the state becomes too paternalistic; even a legislator might become too paternalistic with its constituents. Hence, an approach like the one utilized in *Fallo Arriola*, might make it easier for the Court to detect when recognized rights are being infringed. Furthermore, even if the Court is too activist, the general implementation of the Court's rulings are sometimes limited. For example, as discussed earlier, Argentina is currently limited as there is no new legislation following Court instructions. Likewise, in *Brown v. Board*, the holding of the Court took some time to be implemented and

²²⁵ Arriola, *supra* note 12.

a series of cases followed.²²⁶ Hence, the other branches could ultimately keep check the judiciary.

VI. CONCLUSION: LESSONS FROM ARGENTINA

Although the right to privacy has put certain limits on the reach of the state, most notably in the home, more advocacy and help of the court is needed. It is understandable that for a society to function certain rules ought to be followed, however, certain natural rights should be protected from certain government action.

There are two lessons to be learned. First, different judicial systems have different ways of operating. For example, an application of *Fallo Arriola* would function better if applied to the U.S. jurisprudence rather than Argentina's because of the legal system in place. The U.S. and the predominance of the common law, adhere to the use of precedents that are binding to lower courts. Contrary, in Argentina, following a civil law system, precedents are only highly persuasive and not binding to lower courts. Secondly, there is always dependence on other branches of government to implement decisions. This applies to Argentina and the United States. In Argentina, new legislation needs to be passed to implement a reformation in the law. In the United States, the other branches should carry out decision of the Supreme Court; however, as seen in *Brown*, that is not always the case. Although there are obstacles and concerns, the

²²⁶ See *Brown v. Board of Educ.*, 347 U.S. 483 (1954). (It took a few years for the integration of schools to occur because of resilience to the status quo in some jurisdictions).

abovementioned tactics could replace current forms of analysis in the U.S.