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STARE DECISIS AND CERTIORARI ARRIVE TO BRAZIL: A COMPARATIVE LAW AND ECONOMICS APPROACH

*Maria Angela Jardim de Santa Cruz Oliveira**

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ABSTRACT

*Two important legal reforms in court procedure have taken place in Brazil recently: *súmula vinculante* (all courts now have to follow the reasoning of the Supreme Court in similar cases) and *requisito da repercussão geral* (the Supreme Court only hears cases that are of general importance). These two procedural rules respond to a long debate in the Brazilian legal community on how to address court congestion, the heavy workload of the Brazilian Supreme Court, and the role of the higher courts in establishing case law. We discuss the implications of these two important reforms from the comparative perspective (by explaining the similarities and differences with U.S. law, in particular *stare decisis* and the writ of *certiorari*) and from a law and economics approach (the likely consequences in terms of incentives for the Supreme Court, the court system, and the litigants more generally).*

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INTRODUCTION

Two important far-reaching legal developments have taken place in Brazil in the last couple of years. In contrast to the United States and the common law world more generally, the Brazilian legal system lacked a general principle of *stare decisis* and strong precedent.¹ Traditionally, strong precedent is nonexistent in civil law systems. The lack of strong precedent was particularly significant in Brazil given the inclination of Brazilian judges to be legally creative, and the numerous repetitive cases against governmental actions and measures.² At the same time, the absence of precedent reduced the power and the influence of the Supreme Court over the entire judiciary.³ Finally, the inexistence of formal precedent was perceived as a reason for court congestion, frivolous appeals, and general delays in dispute resolution.⁴

Precedent has recently been emulated by the new *súmula vinculante*.⁵ Before the existence of *súmula vinculante*, courts could apply different legal reasoning than that of the Supreme Court.⁶ Even when courts followed the Supreme Court decisions, the previous system did not bar appeals, allowing excessive and inefficient appeals, such as strategic appeals with the sole purpose of postponing the enforcement of an unfavorable judgment.⁷ The new

¹ Dana Stringer, Note, *Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way*, 44 COLUM. J. TRANSNAT'L L. 959, 966 (2006).

² *Id.* at 965–66.

³ Organisation for Econ. Co-operation & Dev., OECD Integrity Review of Brazil: Managing Risks for a Cleaner Public Service 87 (2011).

⁴ *Id.*

⁵ Introduced by Constitutional Amendment No. 45, the *súmula vinculante* is a one-sentence pronouncement issued by the Brazilian Supreme Court, with binding effect to all other courts, which clearly states the interpretation that the Brazilian Supreme Court has given to a constitutional issue after repeated decisions on the same matter. See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] amend. 45, art. 102, para. 2. For instance, *Súmula Vinculante Nº 12* translates to, “Charging enrollment fees to students in public universities violates article 206, IV, of the Federal Constitution.” S.T.F., Relator: Min. Gilmar Mendes, 14.8.2008, 2008, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], 22.8.2008, 1, 1. By December 2012, the Brazilian Supreme Court had issued thirty two *súmulas vinculantes*. List of Súmulas Vinculantes, SUPREMO TRIBUNAL FEDERAL, http://www.stf.jus.br/arquivo/cms/jurisprudenciaSumulaVinculante/anexo/Enunciados_Sumula_Vinculante_STF_1_a_29_31_e_32.pdf (last visited Oct. 22, 2012). See generally Maria Angela Jardim de Santa Cruz Oliveira, *Reforming the Brazilian Supreme Federal Court: A Comparative Approach*, 5 WASH. U. GLOB. STUD. L. REV. 99, 138–45 (2006) (describing Constitutional Amendment No. 45 and the *súmula vinculante* in greater detail).

⁶ Rogério B. Arantes, *Constitutionalism, the Expansion of Justice and the Judicialization of Politics in Brazil*, in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 231, 251–52 (Rachel Seider et al. eds., 2005).

⁷ *Id.* at 251.

system has effectively changed the balance of power in favor of the Supreme Court by enhancing its influence in establishing case law.⁸ In fact, the main criticism of the new *súmula vinculante* system seems to be that it reduces heterogeneity in legal doctrines across courts, therefore arguably impairing the independence of the lower courts.⁹

At the same time, in contrast to the United States, the Brazilian Supreme Court historically had little control over its docket because there was no equivalent to the writ of certiorari.¹⁰ Since 2007, a new requirement of *requisito de repercussão geral*—which translates to “general interest for admission of extraordinary appeals”—has been in force, which could in principle approximate the writ of certiorari.¹¹ Enabling the Supreme Court to select cases brings up questions about universal access to justice and possible strategic control of the docket.¹²

The legal implications of these two mechanisms, *súmula vinculante* and *requisito da repercussão geral*, can be extremely significant in a congested court system and in a system where activism by lower courts has been noticeably problematic in terms of legal certainty and effective application of the law.¹³ However, these mechanisms raise interesting questions about the internal balance of power between lower and higher courts. There are important repercussions for the functioning of the Supreme Court, in terms of influence in establishing legal doctrines and quashing inconsistent case law.

The Brazilian legal system has been under pressure for its perceived lack of effectiveness. For example, the quality of the court system has been

⁸ Organisation for Econ. Co-operation & Dev., *supra* note 3, at 87–88.

⁹ See, e.g., Arantes, *supra* note 6, at 252 (stating that the new *súmula vinculante* has been criticized and badly received by those sectors that want to use the courts strategically for political struggles or to avoid expensive claims).

¹⁰ *Cf. id.* at 251.

¹¹ Article 102, section 3 of Constitutional Amendment No. 45 provides that “[i]n an extraordinary appeal, the appealing party must demonstrate the general repercussion of the constitutional issues discussed in the case, under the terms of the law, so that the [Brazilian Supreme] Court may examine the possibility of accepting the appeal, and it may only reject it through the opinion of *two thirds* of its members.” CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] amend. 45, art. 102, para. 3 (emphasis added). As a consequence, the law implementing Constitutional Amendment No. 45 limits the Court’s jurisdiction to appeals of general social, economic, political, or legal interest or impact. Lei No. 11,418, de 19 de Dezembro de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.12.2006. If an appeal is not deemed to be of general interest or to have general impact, review is immediately declined by the Court. *Id.* art. 2, §5.

¹² See Arantes, *supra* note 6, at 251–52.

¹³ See Organisation for Econ. Co-operation & Dev., *supra* note 3, at 87.

documented by the World Bank as non-conducive to economic growth or attracting more foreign direct investment.¹⁴ The two new mechanisms, *súmula vinculante* and *requisito da repercussão geral*, might be regarded as a serious reform of procedure to promote more efficient courts and improve case law, thus enhancing legal certainty.

Our paper makes three significant contributions. First, it explains to an English-speaking audience these recent developments that can potentially revolutionize the Brazilian legal system and which, in our view, have not yet attracted the deserved attention among legal comparativists (in fact, there is no good literature in English about these two recent developments).

Second, we provide a contextual analysis of these two mechanisms from a comparative perspective, in particular by looking at the American principles of *stare decisis* and writ of *certiorari*. Under the traditional common law doctrine of *stare decisis*, judicial precedent is a source of law, while in civil law, at best, case law is regarded as law *de facto*.¹⁵ The doctrine of *stare decisis* has two principles, namely that lower courts are bound by superior courts (vertical *stare decisis*) and that higher courts are bound by their previous decisions (horizontal *stare decisis*),¹⁶ both for the sake of equality, predictability and legal certainty. In civil law systems, lower courts have freedom to depart from decisions by superior courts.¹⁷ However, judicial precedent exists when established by a significant number of decisions. For example, the French *jurisprudence constante*, the German *ständige Rechtsprechung*, the Italian *dottrina giuridica*, and the Spanish *doctrina jurídica* create effective precedent and allow appeal to the supreme court of a judicial decision that violates established case law.¹⁸

¹⁴ See WORLD BANK & INT'L FIN. CORP., DOING BUSINESS: ECONOMY PROFILE: BRAZIL, 89–94 (2012), available at <http://www.doingbusiness.org/~media/FPDKM/Doing%20Business/Documents/Profiles/Country/BRA.pdf>.

¹⁵ See Lewis A. Kornhauser, *Stare Decisis*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 509, 509 (Peter Newman ed., 1998).

¹⁶ BLACK'S LAW DICTIONARY 1537 (9th ed. 2009) (defining *stare decisis*, horizontal *stare decisis*, and vertical *stare decisis*).

¹⁷ See D. Neil MacCormick & Robert S. Summers, *Introduction* to INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 1, 2 (D. Neil MacCormick & Robert S. Summers eds., 1997).

¹⁸ See Robert Alexy & Ralf Dreier, *Precedent in the Federal Republic of Germany*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, *supra* note 17, at 17, 50; Jean Carbonnier, *Authorities in Civil Law: France*, in THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS 91, 102 (Joseph Dainow ed., 1974); *cf.* Michele Taruffo & Massimo La Torre, *Precedent in Italy*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, *supra* note 17, at 141, 180–81; Alfonso Ruiz Miguel &

The writ of certiorari is the mechanism by which the U.S. Supreme Court allows a case adjudicated at a lower court to be reviewed for legal error.¹⁹ Four out of the nine justices have to be favorable to the writ.²⁰ Higher courts in civil law jurisdictions have much less control over their docket.²¹ Nevertheless, most higher courts in civil law jurisdictions have developed procedural rules to decline particular cases under well-defined circumstances.²²

Our Recent Development explains the important Brazilian developments in the context of common law and civil law jurisdictions. The new *sumula vinculante* is different from stare decisis and certainly more important than related current civil law doctrines. The *requisito da repercussão geral* is not a writ of certiorari but, at the same time, is more ambitious than the standard practices in civil law higher courts.

We also emphasize the recent developments in Brazil from a Latin American perspective. The problems faced by the Brazilian Supreme Court are not significantly different from those faced in other jurisdictions such as Argentina or Chile. A comparison of how precedent and control of the docket has been addressed in those two countries is illustrative of alternative solutions.²³

Third, our Recent Development provides a law and economics perspective of the advantages and disadvantages of these two legal developments, with a special focus on the incentives for lawmaking for the Brazilian Supreme Court. American law and economics literature provides important arguments to support the existence of stare decisis and the writ of certiorari.²⁴ We critically summarize these arguments and assess them from the Brazilian perspective. The period of time that has elapsed since the enactment of these two measures also permits a more careful analysis of the new incentives.

Francisco J. La Porta, *Precedent in Spain*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, *supra* note 17, at 259, 272–73, 282–83.

¹⁹ BLACK'S LAW DICTIONARY 258 (9th ed. 2009).

²⁰ See *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955).

²¹ See *infra* text accompanying notes 192–211.

²² *Id.*

²³ See Nuno Garoupa & Maria A. Maldonado, *The Judiciary in Political Transitions: The Critical Role of U.S. Constitutionalism in Latin America*, 19 CARDOZO J. INT'L & COMP. L. 526 (2011) for a general framework concerning the functioning of Latin America Supreme Courts.

²⁴ See *infra* Part IV.

Part I of this Recent Development explains in detail the two legal developments, *súmula vinculante* and *requisito da repercussão geral*. Part II summarizes the comparative literature on precedents and mechanisms of certiorari. Part III introduces the law and economics perspective on legal precedents and certiorari. Part IV analyzes the *súmula vinculante* and the *requisito da repercussão geral* using the comparative literature and law and economics frameworks. We provide concluding remarks in Part V.

I. THE NEW LEGAL DEVELOPMENTS IN BRAZIL

A. *Súmula Vinculante*

The Brazilian Supreme Court's constitutional adjudication encompasses both the U.S. concrete (or decentralized) model of judicial review, as well as the European abstract (or centralized) model of constitutional review.²⁵ Although the binding effect of the Supreme Court decisions has been in place under abstract constitutional review since 1993,²⁶ the lack of binding effect of concrete judicial review has produced backlogs and overwhelmed the Court's docket.²⁷

After extensive debate on judicial reform in Brazil, Constitutional Amendment No. 45 introduced the *súmula vinculante* (meaning "binding pronouncement"), which endows the Supreme Court with the power of concrete constitutional adjudication with a binding effect.²⁸ Conceived by Justice Victor Nunes Leal,²⁹ the *súmula* was initially envisioned as a one-sentence pronouncement created by the Supreme Court in the 1960s to inform judges and lawyers about the Court's legal interpretation regarding repeat decisions in multiple individual claims on the same subject matter.³⁰

²⁵ See Oliveira, *supra* note 5, at 115–34, for a discussion of the centralized and decentralized models of judicial review.

²⁶ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] amend. 3, art. 102, para. 2 (1993) (Braz.). This arrangement follows the German model closely. See Oliveira, *supra* note 5, at 127.

²⁷ See *id.* at 111.

²⁸ See *infra* note 5.

²⁹ Justice Victor Nunes Leal (1914–1985) served on the Supreme Court from 1960 to 1969 when he was in effect ousted by the military dictatorship under *Ato Institucional N° 5*, which imposed upon him compulsory retirement. *Biografia*, INSTITUTO VICTOR NUNES LEAL, http://www.ivnl.com.br/index.php?option=com_content&view=article&id=10&Itemid=40 (last visited Oct. 22, 2012).

³⁰ Oliveira, *supra* note 5, at 110–11. Starting in 1964, to expedite judgments of similar questions over which the Court had already decided, the Supreme Court issued 736 *súmulas*. See List of Súmulas, SUPREMO TRIBUNAL FEDERAL, http://www.stf.jus.br/arquivo/cms/jurisprudenciaSumula/anexo/Sumula_do_STF_1_a_

Essentially, a *súmula* consisted of a one-sentence pronouncement with no binding effect but with persuasive authority.³¹ It was used for expediting judgments on similar questions that had been already decided by the Court, and for discouraging appeals that contradicted the *súmula*.³² The persuasive authority of the *súmula* was likely to induce legal certainty and reduce unpredictability for parties involved in litigation.³³ A practical consequence in the Court's operating procedures was that, if a *súmula* was applicable to a case, the Court was excused from writing an extensive opinion explaining its legal reasoning.³⁴ The first batch of *súmulas* was issued in 1964, as Table One shows.

Table One: *Súmulas* without binding effect³⁵

| <i>Súmulas</i> | Publication Date |
|----------------|-------------------|
| 1 to 370 | March 1964 |
| 371 to 404 | May 12, 1964 |
| 405 to 438 | July 6, 1964 |
| 439 to 472 | October 10, 1964 |
| 473 to 551 | December 10, 1969 |
| 552 to 600 | January 3, 1977 |
| 601 to 621 | October 29, 1984 |
| 623 to 736 | October 9, 2003 |

It is unclear why no *súmulas* were issued between 1984 and 2003.³⁶ In 2003, Justice Sepúlveda Pertence presented new proposals to the court en banc, and 113 *súmulas* were approved.³⁷ After 2004, however, it is very unlikely that the

736.pdf (last visited Oct. 22, 2012). The last batch of persuasive *súmulas* were issued in 2003. *Id.* at 260–74. Due to the *súmula*'s pedagogical and informative character, lower courts and even the Attorney General's office (*Advocacia-Geral da União*) started issuing their own *súmulas* to guide judges and government attorneys on controversial issues, as well as to expedite the proceedings of similar cases. *See, e.g., Súmulas, ADVOCACIA-GERAL DA UNIÃO*, http://www.agu.gov.br/sistemas/site/PaginasInternas/NormasInternas/ListarAtos.aspx?TIPO_FILTRO=Sumulas (last visited Oct. 22, 2012).

³¹ Oliveira, *supra* note 5, at 110–11.

³² *See id.* at 111.

³³ *See id.*

³⁴ *See id.*

³⁵ *See* List of *Súmulas*, *supra* note 30 (listing each *súmula* and its publication date).

³⁶ *See* Justice José Paulo Sepúlveda Pertence, Remarks at the SFC Plenary Session (Aug. 28, 2003) (transcript on file with authors) (discussing the *súmulas*).

³⁷ *Id.*

Supreme Court will ever again issue any other traditional *súmulas* due to the advent of the *súmula vinculante*.

Constitutional Amendment No. 45 authorized the Supreme Court to issue *súmulas vinculantes*, that is, pronouncements with binding effect.³⁸ Such pronouncements have binding effect not only on lower courts, but also on the federal, state, and municipal administrations.³⁹ As a result, once a *súmula vinculante* is enacted, there is no need for similar cases to go all the way to the Supreme Court to decide the issue, because lower courts are required to automatically apply the Supreme Court ruling.⁴⁰ It also bars appeals based on arguments contrary to the *súmula vinculante*.⁴¹ Consequently, the result should be that the Supreme Court's docket will not be overwhelmed with multiple similar cases, thus reducing its backlog and contributing to a quicker and more uniform disposition of cases.

This new mechanism aims to settle controversial issues that have raised serious legal uncertainty and brought about multiple similar cases on the same question.⁴² Because of the exceptional character of the binding effect of judicial decisions in traditional civil law jurisdictions, the Brazilian Constitution requires a two-thirds majority vote of Supreme Court justices to approve, modify, or annul a *súmula vinculante* through a special proceeding.⁴³ The Brazilian Supreme Court may *sua sponte* propose the enactment of a *súmula vinculante*.⁴⁴ Also, certain government actors or non-political individuals⁴⁵ may file a proposal of *súmula vinculante* to the Supreme Court.⁴⁶

³⁸ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] amend. 45, art. 102, para. 2.

³⁹ *Id.*

⁴⁰ Anna Bruno Silva, *Bringing Uniformity to Brazilian Court Decisions: Looking at the American Precedent and at Italian Living Law*, ELEC. J. COMP. L. 3-4 (December 2007), <http://www.ejcl.org/114/art114-3.pdf>.

⁴¹ *Id.* at 5.

⁴² *Id.* at 7 (citing J. ANCHIETA DA SILVA, A SUMULA DE EFEITO VINCULANTE AMPLO NO DIREITO BRASILEIRO 60 (1998)).

⁴³ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] amend. 45, art. 102, para. 3.

⁴⁴ See Lei No. 11,417 art. 2, de 19 de Dezembro de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.12.2006.

⁴⁵ See *id.* art. 3. Article 3 of Lei No. 11,417 lists those who have standing to request the enactment, review, or annulment of a *súmula vinculante*: the President of Brazil, the directing boards of the Senate, the Chamber of Deputies, and the state legislative assemblies; the Attorney General; the Federal Council of the Brazilian Bar Association; the Federal Public Defender; any political party represented in the Brazilian Congress; any confederation of labor unions; any national professional association; any state governor; superior courts; federal and state appellate courts; and municipalities in which concrete cases are being litigated. *Id.*

Furthermore, during the proceedings, third parties may offer briefs to express their views on the subject matter.⁴⁷

Different from the stare decisis doctrine of the U.S. system, which endows all U.S. Supreme Court rulings with the force of precedent, the Brazilian *súmula vinculante* confers binding effect on selected issues that have multiple lawsuits on the same question and only after reiterated decisions of the Brazilian Supreme Court.⁴⁸ Once approved, the *súmula vinculante* has immediate effect.⁴⁹ The Brazilian Supreme Court may, however, restrict the binding effect or decide that the effects take place at some other time based on exceptional public interest and legal certainty considerations.⁵⁰ So far, the Supreme Court has issued thirty two *súmulas vinculantes* which are easily available online to the general public.⁵¹ Table Two summarizes the publication dates of the current *súmulas vinculantes*.

Table Two: *Súmulas Vinculantes*⁵²

| <i>Súmulas Vinculantes</i> | Publication Date |
|----------------------------|--|
| 1 to 3 | June 6, 2007 |
| 4 to 6 | May 9, 2008 |
| 7 and 8 | June 20, 2008 |
| 9 | June 20, 2008 (republished June 26, 2008) |
| 10 | June 27, 2008 |
| 11 and 12 | August 22, 2008 |
| 13 | August 29, 2008 |
| 14 | February 9, 2009 |
| 15 and 16 | July 1, 2009 |
| 17 to 21 | November 10, 2009 |
| 22 to 24 | December 11, 2009 |
| 25 to 27 | December 23, 2009 |

⁴⁶ *Id.*

⁴⁷ *Id.* art. 3, § 2.

⁴⁸ Silva, *supra* note 40, at 3.

⁴⁹ *Id.*

⁵⁰ Karina Almeida Amarel, *A súmula vinculante e sua influência sobre o acesso à justiça constitucional no Brasil* [Binding Precedent and Its Influence on Access to Constitutional Justice in Brazil], 15 SCIENTIA IURIS 75, 79–80 (2011) (Braz.).

⁵¹ List of *Súmulas Vinculantes*, *supra* note 5.

⁵² *Id.*

| | |
|----------|-------------------|
| 28 to 31 | February 17, 2010 |
| 32 | February 24, 2011 |

The binding effect of the *súmula vinculante* may seem to have, at first glance, a narrower span than the U.S. doctrine of precedent, because it applies only to selected constitutional questions brought before the Brazilian Supreme Court. Nevertheless, the potential scope of the *súmula vinculante* may be much broader than the U.S. Supreme Court stare decisis doctrine. To illustrate, consider *Súmula Vinculante N^o 2*, which stipulates that any state law or regulation on drawing lots or sweepstakes, including bingos and lotteries, is unconstitutional.⁵³ The text of *Súmula Vinculante N^o 2* does not refer to any specific legislation, so it can be applied in relation to any existing or future regulation on bingos or lotteries in all states.⁵⁴ The Brazilian *súmula vinculante* is different from the American stare decisis doctrine in that the enunciation is a general statement in the abstract, which gives much more flexibility and leeway in terms of application, while the U.S. stare decisis doctrine implies that a similar set of facts or circumstances have to be met.

Precedents established by the U.S. Supreme Court bind other states even when they are not a party to a lawsuit.⁵⁵ However, these precedents are decided in the context of concrete review. In Brazil, the Supreme Court exercises both concrete and abstract review. In an abstract enunciation, the *súmula vinculante* theoretically indicates that the Supreme Court has a broader opening in deciding on alleged violations of its content, because the Brazilian judge does not have to assess whether the facts of the case are distinguishable from those of the cases that originated the *súmula vinculante*. Therefore, the abstract nature of the *súmula vinculante* enunciation, in principle, makes it easier for a judge to apply the enunciation without a thorough and detailed assessment of whether all facts of the cases are alike. However, whether this possible broader interpretation will actually come to fruition remains to be

⁵³ *Súmula Vinculante No. 2*, SUPREMO TRIBUNAL FEDERAL, <http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=2.NUME.%20E%20S.FLSV.&base=baseSumulasVinculantes> (last visited Oct. 22, 2012).

⁵⁴ *Id.*

⁵⁵ States that are not before the United States Supreme Court are also bound by its decisions. *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (holding that the state of Arkansas was bound by the decisions of the United States Supreme Court, and thus could not choose to ignore the precedent set by *Brown v. Board of Education*, 347 U.S. 483 (1954)).

seen.⁵⁶ Abstract review is much broader than concrete review since abstract review refers to all possible applications of a given law in all possible imaginable situations, whereas concrete review refers to one possible application in the one given situation before the court.⁵⁷

Another distinctive feature of the Brazilian system is that the *súmula vinculante* not only applies to Brazilian lower federal and state courts, but also to federal, state, and municipal administrative agencies.⁵⁸ Therefore, a party in an administrative proceeding before a government agency may invoke the application of a *súmula vinculante* and the agency must explain whether or not it applies to the plaintiff's case.⁵⁹ In case of denial, after the exhaustion of administrative proceedings, the plaintiff may file a direct request to the Supreme Court which, if a violation of the *súmula vinculante* is found, will order the agency to adjust its decisions to similar cases, under penalty of civil, administrative, and criminal liability.⁶⁰ Indeed, this system provides individuals with direct access to the Supreme Court for redress of violations of the *súmula vinculante* by government agencies.

B. *Requisito da Repercussão Geral*

The new requirement of *requisito da repercussão geral* that emulates the writ of certiorari was created by Constitutional Amendment No. 45.⁶¹ This new mechanism seems to finally provide the necessary tools to make the Brazilian Supreme Court more efficient and available to focus on meritorious cases in order to accomplish its institutional mission to safeguard the Constitution.

⁵⁶ Whether the Brazilian Supreme Court will apply the *súmula vinculante* restrictively or loosely depends on the complaints of violation that reach the Court in the future. Only after the Court receives a significant number of these complaints will any concrete assessment on this topic be possible.

⁵⁷ We do accept that the United States Supreme Court could, in principle, extend the *ratio decidendi* to a point that concrete review turns into abstract review and these differences are blurred. Cf. Alec Stone, *The Birth and Development of Abstract Review: Constitutional Courts and Policymaking in Western Europe*, 19 POL'Y STUD. J. 81, 88 (1990). However, we do not share the view that such possibility has been effectively followed by the United States Supreme Court.

⁵⁸ See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] amend. 45, art. 102, para. 2. The impact on federal, state, and municipal administrative agencies is particularly important and economically relevant since a significant percentage of the cases entertained by the Brazilian Supreme Court involve the state as either defendant or plaintiff. Carolina Arlota & Nuno Garoupa, *Addressing Federal Conflicts: An Empirical Analysis of the Brazilian Supreme Court, 1988–2010* (2010) (unpublished manuscript) (on file with authors).

⁵⁹ See Lei No. 11,417 art. 8, de 19 de Dezembro de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.12.2006.

⁶⁰ *Id.*

⁶¹ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] amend. 45, art. 102, para. 3.

Before elaborating on this new mechanism, we should not give the impression that this was the first time that a similar mechanism to the writ of certiorari was envisioned. Historically, there have been attempts to restrict the admissibility of extraordinary appeals to the Brazilian Supreme Court. During the military dictatorial regime (1964–1985), Constitutional Amendment No. 1 (October 1969) allowed the Supreme Court to prescribe in its internal rules requirements for extraordinary appeals.⁶² As a result, in 1975, the Supreme Court introduced in its internal rules the “relevant federal issue” requirement,⁶³ which was later explicitly included in the Constitution by Constitutional Amendment No. 7.⁶⁴ Inspired by the writ of certiorari, this requirement introduced the Supreme Court’s discretion in adjudicating cases, whereby extraordinary appeals were only admissible if the Court considered the federal question at issue to be relevant.⁶⁵ Although a salutary advancement in controlling the Court’s docket and limiting procrastinatory appeals, this innovation was perceived as authoritarian and non-democratic, due to the subjectivity and imprecision as to what could be considered relevant.⁶⁶ This mechanism was later eliminated when the new Constitution of 1988 created a separate court of last resort for federal questions as an attempt to address the burdensome caseload of the Supreme Court.⁶⁷

Nevertheless, the Supreme Court caseload kept gradually increasing after 1988. The Supreme Court received 21,328 filings in 1988, which climbed to 127,535 filings in 2006, with a peak of 160,453 filings in 2002.⁶⁸ The Supreme Court tried to cope with the increasing number of filings by imposing strict formal requirements through jurisprudential construction as a means to avoid frivolous and procratatory appeals (a standard approach in civil law jurisdictions). An example of this defensive case law was the Court’s interpretation that extraordinary appeals would only be admissible if the

⁶² Constituição da República Federativa do Brasil [Constitution of the Federative Republic of Brazil], Jan. 24, 1967, amend. 1, art. 119(III) (superseded by the 1988 Constitution).

⁶³ See *id.* amend. 7, art. 119(III) § 1; see also Fátima Nancy Andrighi, Minister of the Superior Court of Justice, Speech at the Superior Court of Justice 1–2 (October 16, 2000) (transcript available at http://bdjur.stj.gov.br/xmlui/bitstream/handle/2011/633/Arguicao_Relevancia.pdf?sequence=4).

⁶⁴ *Id.*

⁶⁵ Andrighi, *supra* note 63, at 2.

⁶⁶ *Cf. id.* at 4.

⁶⁷ See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 103-A. The *Superior Tribunal de Justiça* was created with thirty-three justices in 1988. Maria Angela Jardim de Santa Cruz Oliveira & Nuno Garoupa, *Choosing Judges in Brazil: Reassessing Legal Transplants from the United States*, 59 AM. J. COMP. L. 529, 538 (2011).

⁶⁸ See *infra* tbl. 3.

alleged constitutional violation had already been brought at the appellate court level.⁶⁹ Regardless of such attempts, the number of cases brought before the Supreme Court kept increasing. The caseload of the Supreme Court was inundated with multiple cases on similar questions, overburdening the Court and demanding longer waiting periods for litigating parties.⁷⁰

With such an astonishing caseload, reforming the Supreme Court was paramount. During judicial reform talks, the idea of having a mechanism like the writ of certiorari grew stronger as a technique to achieve a more efficient and steadfast judiciary in Brazil by reducing the cases that would reach the Supreme Court and strengthening lower court decisions.⁷¹

Within this context, Constitutional Amendment No. 45 enacted the new requirement of *requisito da repercussão geral* whereby the Supreme Court may find extraordinary appeals inadmissible for lack of relevancy by a two-thirds vote of its members.⁷² In response to previous criticism against discretionary jurisdiction, Constitutional Amendment No. 45 deferred to the legislature to define what can be considered relevant. Therefore, in 2006, Lei No. 11,418 clarified that the Supreme Court will consider whether a constitutional question is relevant from an economic, political, social, or legal viewpoint, if the importance transcends the parties' subjective interests in the litigation.⁷³

By itself, this general importance test should not expedite proceedings because this test does not directly impact the number of cases reaching the Supreme Court. The Court still needs to analyze each individual case to declare whether or not the issues are relevant. Nevertheless, a very interesting aspect of this new requirement pertains to the use of technology in courts. In deciding whether a constitutional issue is of general importance, the Supreme Court uses an electronic voting system, called the *plenário virtual* (which translates

⁶⁹ Andrea Metne Amaut, *Recursos Extraordinários: Prequestionamento e Prestação Jurisdicional Incompleta*, PROCURADORIA GERAL DO ESTADO DE SÃO PAULO, <http://www.pge.sp.gov.br/centrodeestudos/bibliotecavirtual/regulariza2/doutrina8.html> (last visited Oct. 23, 2012). This interpretation is commonly known as *requisito do prequestionamento*, which translates to "previous questioning" requirement. *Id.*

⁷⁰ Keith S. Rosenn, *Judicial Review in Brazil: Developments under the 1988 Constitution*, 7 SW. J.L. & TRADE AM. 291, 291 (2000).

⁷¹ Cf. Arantes, *supra* note 6, at 250–52.

⁷² CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] amend. 45, art. 102, para. 3.

⁷³ See Lei No. 11,418 art. 2, de 19 de Dezembro de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.12.2006.

to “virtual plenary”).⁷⁴ Once the rapporteur electronically votes whether a case has general importance or not, the remaining justices will have twenty days to also electronically vote on this preliminary requirement.⁷⁵ The vote is “yes” or “no,” without providing further reasoning, and is available for public view on the Court’s website.⁷⁶ This electronic voting system facilitates the decision-making process, and responds to previous concerns raised during the judicial reform talks that this new test would burden the Court’s proceedings and provoke delays.

The most interesting feature of this new mechanism, however, is that it impacts the functioning of multiple individual cases with similar claims. In these cases, the lower courts, instead of sending all extraordinary appeals to the Supreme Court, will select one or more cases that are representative of the constitutional controversy, and stay the remaining ones until the Supreme Court decides on the issue.⁷⁷ If the Supreme Court finds that the constitutional issue is not relevant, this decision will be applied to all appeals with an identical question and the remaining related appeals in both the lower courts and the Supreme Court will automatically be considered as non-admissible.⁷⁸ On the other hand, if the Supreme Court resolves that the constitutional question is relevant and decides the case on the merits, the lower courts will themselves apply the Supreme Court ruling to the related appeals.⁷⁹ The Supreme Court may, in deciding a relevant constitutional question, admit third parties to express their views on the case, as spontaneous amici curiae submissions.⁸⁰

⁷⁴ See *Plenário Virtual [Virtual Plenary]*, SUPREMO TRIBUNAL FEDERAL, <http://stf.jus.br/portal/jurisprudenciaRepercussaoGeral/listarProcessosJulgamento.asp> (last visited July 27, 2012).

⁷⁵ Emenda Regimental Nº 21, de 30 de Abril de 2007, REGIMENTO INTERNO DO SUPREMO TRIBUNAL FEDERAL [R.I.S.T.F.] (Braz.), available at <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=jurisprudenciaRepercussaoGeral&pagina=regulamentacao> (amending Article 324 of the *Regimento Interno do Supremo Tribunal Federal*).

⁷⁶ See, e.g., *Plenário Virtual*, *supra* note 74.

⁷⁷ See Lei No. 11,418 art. 2, de 19 de Dezembro de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.12.2006.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* For more detail on the role of amici curiae before the Brazilian Supreme Court, see André Pires Gontijo & Christine Oliveira Peter da Silva, *O Papel do Amicus Curiae no Estado Constitucional: Mecanismo de Acesso de Transdisciplinaridade no Processo de Tomada de Decisão Constitucional [The Role of Amicus Curiae on Constitutional State: Mechanism of Transdisciplinary Access on Constitutional Decision-Making Process]*, in ANAIS DO XIX ENCONTRO NACIONAL DO CONPEDI: DIREITOS FUNDAMENTAIS E TRANSDISCIPLINARIDADE 84 (Encontro Nacional do CONPEDI ed., 2010), available at <http://www.conpedi.org.br/manaus/arquivos/anais/fortaleza/Integra.pdf>.

This general importance test, along with the particular proceedings of identical cases in lower courts, has strongly impacted the Supreme Court docket from 2007, when this mechanism was first implemented. The highest percentage of the docket of the Supreme Court relates to its extraordinary appellate jurisdiction.⁸¹ This concrete judicial review attribution encompasses extraordinary appeals (*recursos extraordinários*) and interlocutory appeals against the denial of admissibility of extraordinary appeals (*agravos de instrumento*), both of which amount to 95.3% of the Court's docket in 2006, 88.7% in 2008, 76.9% in 2010, and 54.9% in 2011.⁸² Table Three, below, shows a sharp decline in the Court's docket since the mechanisms of *súmula vinculante* and *requisito da repercussão geral* entered into force in 2007. From 2007 to 2008, there was a 40.8% decrease in the number of cases accepted by the Supreme Court, followed by a 36.1% falloff in 2009. In 2010, the variation in relation to 2009 was only 4.0% which, together with a 7.1% decrease in 2011, may indicate stabilization in the number of cases accepted, after the initial impact of these new mechanisms.

Table Three: Statistics of the Supreme Court docket since 1988⁸³

| Year | Number of filings (<i>processos protocolados</i>) | Number of cases accepted (<i>distribuídos</i>) | Number of judgments |
|------|--|---|------------------------|
| 1988 | 21,328 | 18,674 | 16,313 |
| 1989 | 14,721 | 6,622 | 17,432 |
| 1990 | 18,564 | 16,226 | 16,449 |
| 1991 | 18,438 | 17,567 | 14,366 |
| 1992 | 27,447 | 26,325 | 18,236 |
| 1993 | 24,377 | 23,525 | 21,737 |
| 1994 | 24,295 | 25,868 | 28,221 |
| 1995 | 27,743 | 25,385 | 34,125 |
| 1996 | 28,134 | 23,883 | 30,829 |
| 1997 | 36,490 | 34,289 | 39,994 |
| 1998 | 52,636 | 50,273 | 51,307 |
| 1999 | 68,369 | 54,437 | 56,307 |
| 2000 | 105,307 | 90,839 | 86,138 |

⁸¹ *RE e AI - % Distribuição*, SUPREMO TRIBUNAL FEDERAL, <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=REAIProcessoDistribuido> (last visited Oct. 23, 2012).

⁸² *Id.*

⁸³ *Movimento Processual*, SUPREMO TRIBUNAL FEDERAL, <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=movimentoProcessual> (last visited July 27, 2012).

| | | | |
|--------------------|---------|---------|---------|
| 2001 | 110,771 | 89,574 | 109,692 |
| 2002 | 160,453 | 87,313 | 83,097 |
| 2003 ⁸⁴ | 87,186 | 109,965 | 107,867 |
| 2004 | 83,667 | 69,171 | 101,690 |
| 2005 | 95,212 | 79,577 | 103,700 |
| 2006 | 127,535 | 116,216 | 110,284 |
| 2007 | 119,324 | 112,938 | 159,522 |
| 2008 | 100,781 | 66,873 | 130,747 |
| 2009 | 84,369 | 42,729 | 121,316 |
| 2010 | 71,670 | 41,014 | 103,869 |
| 2011 | 64,018 | 38,109 | 97,380 |

Table Four summarizes the Court's statistics concerning the application of the *requisito da repercussão geral*. The figures are remarkably stable in the period 2008–2011.

Table Four: *Requisito da Repercussão Geral*⁸⁵

| | 2007 | | 2008 | | 2009 | | 2010 | | 2011 | | Total |
|---|-------|----|--------|----|--------|----|--------|----|--------|----|---------|
| Cases filed with a preliminary request for <i>repercussão geral</i> | 4,792 | | 25,942 | | 21,410 | | 22,643 | | 25,497 | | 100,284 |
| Issues analyzed under a standard of <i>repercussão geral</i> | 20 | | 126 | | 99 | | 119 | | 157 | | 521 |
| | Yes | No | Yes | No | Yes | No | Yes | No | Yes | No | |
| | 14 | 6 | 99 | 27 | 67 | 32 | 81 | 38 | 116 | 41 | |
| Cases with <i>repercussão geral</i> decided on the merits | 0 | | 27 | | 26 | | 19 | | 38 | | 110 |

⁸⁴ The decline of lawsuits from 2002 to 2003 was due to thousands of requests for desistance of appeals (all discussing similar questions on the national severance-pay fund) after an agreement was reached. For detailed information on this event, see Oliveira, *supra* note 5, at 113–14.

⁸⁵ *Números da Repercussão Geral*, SUPREMO TRIBUNAL FEDERAL, <http://stf.jus.br/portal/cms/verTexto.asp?servico=jurisprudenciaRepercussaoGeral&pagina=numeroRepercussao> (last visited July 27, 2012). Note that the 2007 column only pertains to the Court's second semester of 2007. *Id.*

II. COMPARATIVE ANALYSIS OF PRECEDENTS AND CERTIORARI

A. *General Overview*

The simplest definition of legal precedent is that future judges are bound by decisions in prior cases, vertically (lower courts are bound by the decisions of superior courts) and horizontally (higher courts are bound by their previous decisions).⁸⁶ Furthermore, courts are obliged to follow precedent even when they think the outcome is not correct.⁸⁷ In other words, the obligation to follow precedent applies even if it instructs a judge to reach what it is not commonly understood as the right decision.

There are several important consequences of establishing a legal system bound by precedent. Precedent applies to similar cases. Hence, courts need to develop rules to distinguish cases (if precedent applies to a “similar” case, a court needs to define “similarity” in a consistent way) and to determine reasoning (*ratio decidendi*) to be applied in similar cases by all judges.⁸⁸ At the same time, there must be legal rules to frame and regulate possible departures from precedent. The standard approach is that a judge who wants to depart from a previous precedent carries the burden of proof.⁸⁹ When the rules of departure are extremely limited and heavily constrained, we have an absolute precedent.⁹⁰ Conversely, when those rules are more generous and flexible, precedent is no longer strictly binding; it is merely indicative or persuasive.⁹¹

The interaction of precedent and the rules regulating departure and distinguishing cases allows for a more complex contour of the legal

⁸⁶ See FREDERICK F. SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 37 (2009); Amy Coney Barrett, *Stare Decisis and Due Process*, 74 *COLO. L. REV.* 1011, 1015 (2003); Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 *CORNELL L. REV.* 401, 402 n.6 (1988); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 *VAND. L. REV.* 647, 664 n.84 (1999); E.M. Wise, *The Doctrine of Stare Decisis*, 21 *WAYNE L. REV.* 1043, 1043–44 (1975). See generally Larry Alexander, *Constrained by Precedent*, 63 *S. CAL. L. REV.* 1 (1989) (discussing the situation where a court is constrained by a precedent it considers incorrect); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 *STAN. L. REV.* 817 (1994) (discussing the doctrine of hierarchical precedent); Frederick Schauer, *Precedent*, 39 *STAN. L. REV.* 571 (1987) (presenting a comprehensive theoretical discussion of the doctrine of precedent).

⁸⁷ See Wise, *supra* note 86, at 1044.

⁸⁸ See Aleksander Peczenik, *The Binding Force of Precedent*, in *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY*, *supra* note 17, at 461, 462–64.

⁸⁹ See Schauer, *supra* note 86, at 587.

⁹⁰ See *id.* at 592.

⁹¹ See *id.* at 592–93.

implications. Three possible approaches to precedent are usually considered.⁹² The strictest form is absolute precedent, formally binding, and with few possibilities for departure.⁹³ The next form is flexible precedent, not formally binding but having the force of persuasion that effectively constrains courts.⁹⁴ Finally, the weakest form is merely a supportive statement that courts should consider when deciding a case.⁹⁵ Whereas the strictest form is usually associated with Anglo-American *stare decisis*, the weakest form is more common in civil law jurisdictions.⁹⁶ For example, in France, it is known that a judgment based on a precedent but lacking a code source is not lawful.⁹⁷

The legal understanding of *stare decisis* has evolved in the common law world.⁹⁸ Precedent did not exist before the seventeenth century due to lack of information and knowledge about case law decided by other courts.⁹⁹ Since then, over time, the binding force of the case law developed by the higher courts was recognized.¹⁰⁰

In the United States, *stare decisis* follows the hierarchical structure of courts. The U.S. Supreme Court as well as state supreme courts have expressed their power to overrule precedent.¹⁰¹ U.S. courts also tend to depart when they consider precedent outdated, if it produces undesirable results or if it is based on poor legal reasoning.¹⁰²

In Britain, before *Beamish v. Beamish*¹⁰³ and *London Tramways Company v. London County Council*,¹⁰⁴ courts were influenced but not strictly bound by precedent. After these landmark decisions, the absolutism of *stare decisis* was set and imposed accordingly, as was reaffirmed *Admiralty Commissioners v.*

⁹² Peczenik, *supra* note 88, at 463.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Cf. id.* at 463–64.

⁹⁷ See *infra* text accompanying notes 140–45.

⁹⁸ See J. DAVID MURPHY & ROBERT RUETER, *STARE DECISIS IN COMMONWEALTH APPELLATE COURTS* 1–4 (1981).

⁹⁹ See Wise, *supra* note 86, at 1048.

¹⁰⁰ Cf. Mary Garvey Algero, *The Sources of Law and The Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775, 784–86 (2005).

¹⁰¹ *Id.* at 786.

¹⁰² *Id.*; see also James F. Spriggs, II & Thomas G. Hansford, *The U.S. Supreme Court's Incorporation and Interpretation of Precedent*, 36 LAW & SOC'Y REV. 139, 154–55 (2002).

¹⁰³ [1861], IX H.L.C. 274, 338–39; see also MURPHY & RUETER, *supra* note 98, at 3.

¹⁰⁴ [1898], A.C. 375 (H.L.) (Westlaw); see also MURPHY & RUETER, *supra* note 98, at 3.

Valverda.¹⁰⁵ Notwithstanding, British courts were still faced with a significant question concerning if a fundamental principle should prevail over precedent. This legal issue was addressed inconclusively in *London Transport Executive v. Betts*¹⁰⁶ and later in *Myers v. Director of Public Prosecutions*.¹⁰⁷ In 1966, the House of Lords issued a well-known Practice Statement (developed later by case law) that abolished the rigid adherence to precedent and introduced the possibility of departing from previous precedent when it is correct to do so.¹⁰⁸ However, the English Court of Appeal is subject to absolute stare decisis with few exceptions as explained by *Young v. Bristol Aeroplane Company*.¹⁰⁹ This principle has generally been upheld, as it was in *Farrell v. Alexander*.¹¹⁰

In Canada, departure from precedent was considered exceptional under *Stuart v. The Bank of Montreal*.¹¹¹ The principle remained unchanged until *Binus v. The Queen*,¹¹² when it was allowed under “compelling reasons” (although precedents established by the Privy Council have not been formally binding since 1957).¹¹³ Since then, it has been clarified that the Canadian Supreme Court is not bound by stare decisis.¹¹⁴ Provincial supreme courts have evolved to follow similar flexible models, possibly with the late exception of the Ontario Court of Appeal.¹¹⁵

In Australia, there have been questions about the binding use of English precedents since the 1940s.¹¹⁶ English precedents no longer formally bind Australian courts, although as a matter of practice, Australian courts frequently use English decisions.¹¹⁷ The New Zealand Court of Appeal has taken a similar position.¹¹⁸ Both the Australian High Court and the New Zealand Court of

¹⁰⁵ [1938], A.C. 173, 194–95 (Westlaw); see also MURPHY & RUETER, *supra* note 98, at 5.

¹⁰⁶ [1959], A.C. 213, 232 (Westlaw); see also MURPHY & RUETER, *supra* note 98, at 6.

¹⁰⁷ [1965], A.C. 1001, 1021; see also MURPHY & RUETER, *supra* note 98, at 6.

¹⁰⁸ Practice Statement (Judicial Precedent) [1966], 1 W.L.R. 1234 (Westlaw); see also MURPHY & RUETER, *supra* note 98, at 6–7.

¹⁰⁹ [1944], 1 K.B. 718; see also MURPHY & RUETER, *supra* note 98, at 43.

¹¹⁰ [1976] 31 P. & C.R. 1, 11; see also MURPHY & RUETER, *supra* note 98, at 15.

¹¹¹ [1909], 41 S.C.R. 516, 535 (Can.), *aff'd* [1911] A.C. 120; see also MURPHY & RUETER, *supra* note 98, at 19–20.

¹¹² *Binus v. The Queen* [1967], S.C.R. 594, 601 (Can.); see also MURPHY & RUETER, *supra* note 98, at 22.

¹¹³ Andrew Heard, *Canadian Independence*, SIMON FRASER UNIV. n.50, <http://www.sfu.ca/~aheard/324/Independence.html> (last visited Oct. 15, 2012).

¹¹⁴ Cf. MURPHY & RUETER, *supra* note 98, 19–55.

¹¹⁵ *Id.* at 24.

¹¹⁶ *Id.* at 57.

¹¹⁷ *Id.* at 57–58.

¹¹⁸ *Id.* at 66.

Appeal struggle to foster uniformity of common law and statutory concepts, therefore drawing on many occasions from decisions of the Privy Council, the House of Lords, and the Supreme Court of Canada.¹¹⁹

Another relevant example is Singapore. The Singaporean Court of Appeal decided that the decisions of the Privy Council of the United Kingdom no longer bind in 1992.¹²⁰ However, English law tends to be followed *de facto*.¹²¹

Some mixed jurisdictions do not seem to depart from the English understanding of *stare decisis*. In Scotland, the judicial practices were developed in analogous ways to the English after the 18th century.¹²² There is judicial precedent binding in all Scottish courts, in a manner not very different from English courts.¹²³ Although there has been controversy in South Africa, the predominant view seems to be that South African law contains an “undeniable infusion of English law.”¹²⁴ In other mixed jurisdictions such as Louisiana and Quebec, the common law doctrine of *stare decisis* does not apply.¹²⁵ Judicial precedents are merely a persuasive source of law, a binding authority weaker than *stare decisis*.¹²⁶ However, some legal scholars point out that this makes little practical difference.¹²⁷ Other legal scholars refer to a “systemic respect for jurisprudence”.¹²⁸

¹¹⁹ See Simon Bronitt, *Australia*, in HANDBOOK OF COMPARATIVE CRIMINAL LAW 50, 53 (Kevin Jon Heller & Markus D. Dubber eds., 2011).

¹²⁰ Eugene K.B. Tan, *Law and Values in Governance: The Singaporean Way*, 30 HONG KONG L.J. 91, 96 (2000) (citing Practice Statement (Judicial Precedent) [1994] 2 S.L.R. 689).

¹²¹ See *id.*; see also Eugene KB Tan, ‘We’ v ‘I’: *Communitarian Legalism in Singapore*, 4 AUSTRL. J. ASIAN L. 1, 23 n.22 (2002).

¹²² See David M. Walker, *Judicial Decisions and Doctrine in Scots Law*, in THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS, *supra* note 18, at 202, 202.

¹²³ See *id.* at 209–11.

¹²⁴ Ellison Kahn, *The Role of Doctrine and Judicial Decisions in South African Law*, in THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS, *supra* note 18, at 224, 224; accord *id.* at 236.

¹²⁵ See Kathryn Venturatos Lorio, *The Louisiana Civil Law Tradition: Archaic or Prophetic in the Twenty-First Century?*, 63 LA. L. REV. 1, 6 (2002); Catherine Valcke, *Quebec Civil Law and Canadian Federalism*, 21 YALE J. INT’L L. 67, 84 (1996).

¹²⁶ According to Mack E. Barham, *A Renaissance of the Civilian Tradition in Louisiana*, in THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS, *supra* note 18, at 38, 49, this is partly because civil law is useful to enable judges to seek justice by applying jurisprudential reason to particular cases. The declaratory value of precedent has been driven in Louisiana by the self-interest of legal academics, but also by judges who seem to favor the return to primary sources. *Id.* at 39–40, 55.

¹²⁷ See, e.g., Jean-Louis Baudouin, *The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec*, in THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS, *supra* note 18, at 1, 1–22. Baudouin’s thesis is that courts in Quebec and Louisiana pass judgments using a common-law format: they develop interpretation of the civil code with the same rules applied to the

The Commonwealth literature points to unresolved issues in stare decisis. In particular, the hierarchy of decisions of different-sized panels and the precedential effect of “split court” decisions are unclear.¹²⁹ The same literature reflects the advantages and disadvantages of the current interpretation of stare decisis.¹³⁰ On the plus side, legal scholars mention the legal certainty and predictability generated by precedent, acknowledgment that change of law should be done by the legislature and not the courts, and belief that potential correction of errors should be allocated to the highest court and not to the lower courts.¹³¹ On the minus side, the standard arguments include absurdity and injustice in many decisions, and the significant costs imposed due to the legal charade of identifying differences across cases to avoid precedent.¹³² Finally, legal scholars have recognized that the progressive development and application of fundamental principles requires a weaker role for precedent, which is inconsistent with strict adherence to stare decisis.¹³³

Case law is a primary source of law in the common law, while in the civil law world, codes provide the fundamental law, statutes further develop the codes, and courts merely provide interpretation.¹³⁴ In such a context, it is traditionally said that there is no precedent in civil law. It is true that in civil law, there is no absolute precedent in the common law sense. It would be unthinkable and inconsistent in a civil law system for precedents to be used to undermine the code law. Instead, legal precedents are often deemed reasonable because the courts have arrived at the correct interpretation of a particular aspect of code law. Other courts should be expected to follow such precedent not because the precedent is case law, but rather because the precedent declares the correct interpretation of code law. Hence, precedents cannot exist without a

interpretation of an ordinary statute; they use precedents established by common law; they make reference to foreign common-law interpretations of civil law (for example, provisions of Quebec Civil Code based on English statutes); and they rely on the importation of common law doctrines in the application of civil law (for example, in property law). *Id.*

¹²⁸ See Algero, *supra* note 100, at 781.

¹²⁹ See MURPHY & RUETER, *supra* note 98, at 78.

¹³⁰ See generally *id.* at 93–102 (providing arguments for and against stare decisis, after having surveyed stare decisis in English, Canadian, Australian, and New Zealand appellate courts).

¹³¹ See *id.* at 93, 97.

¹³² See *id.* at 98–99.

¹³³ See *id.* at 100.

¹³⁴ See William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 684, 704–05 (2000).

clear code source. Furthermore, they are declaratory in the sense that they do not create law, but clarify the correct interpretation of the law.¹³⁵

It is in this framework that we can understand the active development of the general principles of law by many civil law courts. Codes are abstract: They must be interpreted in specific circumstances.¹³⁶ For example, tort law has been systematically developed in France by case law, given the historical absence of specific codification French civil law.¹³⁷ In Germany, important legal developments such as *culpa in contrahendo* were pursued by courts before codification in 2002.¹³⁸ The development of tort law by French and German courts has to be framed in light of declaratory precedents.

The French doctrine of precedent is known as *jurisprudence constante*.¹³⁹ Strictly speaking, precedent is not and cannot be a source of law.¹⁴⁰ Article 5 of the French Civil Code prohibits judge-made law (*arrêt de règlement*).¹⁴¹ Courts are denied the power of making law.¹⁴² Therefore, judges are never, and cannot be, bound by precedent.¹⁴³ Exclusive reference to precedent is, in fact, illegal.¹⁴⁴ However, legislation commands lower courts to follow “decisions of all the chambers of the Court of Cassation sitting together, or of the plenary Civil Law Chamber, when a case is remanded for determination according to instructions.”¹⁴⁵

¹³⁵ See James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 15 (1993).

¹³⁶ See Claire M. Germain, *Approaches to Statutory Interpretation and Legislative History in France*, 13 DUKE J. COMP. & INT'L L. 195, 195–96 (2003).

¹³⁷ See Edwin M. Borchard, *French Administrative Law*, 18 IOWA L. REV. 133, 139 (1933).

¹³⁸ Rodrigo Novoa, *Culpa in Contrahendo: A Comparative Law Study: Chilean Law and the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 22 ARIZONA J. INT'L & COMP. L. 583, 585 (2005); Peer Zumbansen, *The Law of Contracts*, in INTRODUCTION TO GERMAN LAW 179, 195–96 (Mathias Reimann & Joachim Zekoll eds., 2005).

¹³⁹ See Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 INT'L REV. L. & ECON. 519, 522–23 (2006).

¹⁴⁰ See *id.* at 522.

¹⁴¹ CODE CIVIL [C. CIV.] art. 5 (Fr.); accord A.N. Yiannopoulos, *Jurisprudence and Doctrine as Sources of Law in Louisiana and in France*, in THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS, *supra* note 18, at 67, 73.

¹⁴² See Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1335 (1995).

¹⁴³ See *id.* at 1336–38.

¹⁴⁴ CODE DE PROCÉDURE CIVILE [C.P.C.] art. 455 (Fr.); accord Michael Troper & Christophe Grzegorzczuk, *Precedent in France*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, *supra* note 17, at 106–07, 115.

¹⁴⁵ Yiannopoulos, *supra* note 141, at 73 (citing “Laws of April 1, 1837” and “July 23, 1947”).

Jurisprudence constante is established by: (i) a sequence of cases that have been appealed to the *Cour de Cassation*; (ii) repetition of reasoning and interpretation (exceptionally it can be established by one decisive case at the *Cour de Cassation*); and (iii) the question to be clarified by precedent is merely related to a point of law (*pourvoi en cassation*).¹⁴⁶ Therefore, precedent under French law has four main attributes. It must reflect a continuous and permanent practice of the courts.¹⁴⁷ There is no obligation to follow it, although decisions will be reversed by higher courts if violated.¹⁴⁸ It focuses on jurisprudential activity of the *Cour de Cassation (arrêt de principe)*.¹⁴⁹ Finally, there is no horizontal effect, implying that if conflicts occur, there is no formal solution.¹⁵⁰

According to legal scholars, precedent is *de facto* law in France due to important practical reasons, namely that: (i) there is a need for continuity and stability of law, independent of individual judges coming and going; (ii) it provides for a significant economy of effort in establishing authoritative legal interpretation; (iii) the collegial organization of higher courts is likely to promote accuracy on applying the law; and (iv) it reinforces the needed judicial hierarchy for a functional legal system.¹⁵¹ Still, the formal discourse in French law is that judicially created norms are not law even when they function as such.¹⁵²

The Italian *dottrina giuridica* and Spanish *doctrina juridica* are not significantly different from the French *jurisprudence constante*. In Italy, judicial precedent focuses on general principles of law (*massima*).¹⁵³ Judicial precedent does not have to be followed.¹⁵⁴ Nevertheless, Italian lower courts regularly cite and apply general principles as interpreted by the highest court, especially on important legal issues.¹⁵⁵ Precedents have an interpretative value towards establishing “decision-rules” that assure uniformity in the law.¹⁵⁶

¹⁴⁶ See Jean Carbonnier, *supra* note 18, at 92–94.

¹⁴⁷ *Cf. id.*

¹⁴⁸ *Cf. id.*

¹⁴⁹ *Cf. id.*

¹⁵⁰ *Cf. id.*

¹⁵¹ See Yiannopoulos, *supra* note 141, at 75–76.

¹⁵² See Lasser, *supra* note 142, at 1346–50.

¹⁵³ Taruffo & La Torre, *supra* note 18, at 148.

¹⁵⁴ *Cf. id.* at 151–52, 154–55.

¹⁵⁵ See *id.* at 156; Francesco G. Mazzotta, *Precedent in Italian Law*, 9 MICH. ST. J. INT’L L. 121, 140–43 (2000).

¹⁵⁶ John Henry Merryman, *The Italian Legal Style III: Interpretation*, in THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS, *supra* note 18, at 163, 195–96.

However, they cannot be applied to the exclusion of code law since courts are expected to decide every case with reference to code law.¹⁵⁷ The decisions of the Constitutional Court and the Council of State have *erga omnes* effects and, in that sense, they constitute binding precedents.¹⁵⁸ In Spain, the Constitutional Court has clarified that judges are bound by statutory law and not by precedent.¹⁵⁹ However, for example, although courts cannot refuse to pass judgment, they can dismiss an appeal if a precedent exists that provides legal support.¹⁶⁰ At the same time, the rulings of the Spanish Supreme Court provide guidance to lower courts.¹⁶¹ The Spanish civil code recognizes that case law can be used in interpretation of statutes and general principles of law. In Portugal, the Constitutional Court has established that decisions by the Supreme Court are not binding; however, lower courts can use them to clarify statutory law.¹⁶²

The German *ständige Rechtsprechung* is developed in the same context. Precedent is valid in the sense of sociologically influencing courts, but not in the normative sense.¹⁶³ Constitutional Court decisions have the force of statute (*Gesetzeskraft*).¹⁶⁴ All others are not formally binding. However they are *de facto* valid (*faktische Geltung*).¹⁶⁵ Lower courts usually look at the Federal Court of Appeals and state courts of appeals for guidance.¹⁶⁶ As with the French doctrine, precedent must be established by permanent and continuous interpretation (*ständige Rechtsprechung*).¹⁶⁷ It focuses on leading rules (*Leitentscheidungen*).¹⁶⁸ There is no general rule of horizontal formal binding effect (except for decisions by the Constitutional Court).¹⁶⁹ The argument by

¹⁵⁷ See Taruffo & La Torre, *supra* note 18, at 158.

¹⁵⁸ Merryman, *supra* note 156, at 193.

¹⁵⁹ Alfonso Ruiz Miguel & Francisco J. Laporta, *Precedent in Spain*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, *supra* note 17, at 259, 269 (discussing S.T.C. Mar. 28, 1985 (B.O.E. No. 49) (Spain)).

¹⁶⁰ *Id.* at 263.

¹⁶¹ See Carlos Gómez-Jara & Luis E. Chiesa, *Spain*, in HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 119, at 488, 493.

¹⁶² Tribunal Constitucional [TC] [Constitutional Court], December 7, 1993, TC 810/93 (Port.), available at <http://www.tribunalconstitucional.pt/tc/acordaos/19930810.html>.

¹⁶³ See generally Alexy & Dreier, *supra* note 18.

¹⁶⁴ *Id.* at 26.

¹⁶⁵ *Id.* at 28.

¹⁶⁶ See Thomas Weigend, *Germany*, in HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 119, at 252, 256.

¹⁶⁷ Alexy & Dreier, *supra* note 18, at 50.

¹⁶⁸ *Id.* at 40, 51.

¹⁶⁹ *Id.* at 34, 39.

German legal scholars is that extracting a leading theory from a particular answer to a controversial question could be problematic.¹⁷⁰ Therefore the court needs to be allowed to frequently deviate from its own theory by introducing or qualifying distinctions and therefore actually developing law.¹⁷¹

The Asian civil law jurisdictions—including Japan, which has been influenced by the constitutional design of the United States—follow the German approach closely.¹⁷² There is no formal mechanism of precedent used by Japanese courts but, in practice, the Supreme Court's decisions are given significant weight and the lower courts rarely render rulings that are inconsistent with existing Supreme Court decisions.¹⁷³ Furthermore, the existing statutory law does not clarify the role of case law, although the prevailing legal doctrine is that precedents set by the Supreme Court are merely persuasive, and not law.¹⁷⁴ Furthermore, decisions by the highest prewar court (*Taishin'in*) are also accorded deference, although not formal precedent.¹⁷⁵ Violations of precedent are a reason for appeal.¹⁷⁶ Supreme Court precedents can only be modified by decisions *en banc*.¹⁷⁷

A similar pattern is followed by Taiwan. However, each year, the Taiwanese Supreme Court's Precedent Editing Committee selects important precedents from the Court's decisions.¹⁷⁸ The selected decisions are then edited

¹⁷⁰ See *id.* at 53–54 (describing the conflicting “zigzag” lines of precedent that are rare, but do exist, in German law).

¹⁷¹ *Id.*

¹⁷² See generally Tsung-Fu Chen, *Transplant of Civil Code in Japan, Taiwan, and China: with the Focus of Legal Evolution*, 6 NAT'L TAIWAN U. L. REV. 389 (2011); Lynn Parisi, *Lessons on the Japanese Constitution*, JAPAN DIGEST (November 2002), <http://iis-db.stanford.edu/docs/131/const.pdf>.

¹⁷³ See Hiroshi Itoh, *The Role of Precedent at Japan's Supreme Court*, 88 WASH U. L. REV. 1631, 1632, 1640 (2011).

¹⁷⁴ See generally Saibanshōhō [Court Act], Law No. 59 of 1947 (Japan), translation available at <http://www.japaneselawtranslation.go.jp/law/detail/?fi=3&re=02&dn=1&x=100&y=32&bu=4&ky=&page=19>; Shinegori Matsui, *Constitutional Precedents in Japan: A Comment on the Role of Precedent*, 88 WASH U. L. REV. 1669 (2011).

¹⁷⁵ John O. Haley, *Japan*, in HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 119, at 393, 396.

¹⁷⁶ KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, art. 405 (Japan), translation available at <http://www.japaneselawtranslation.go.jp/law/detail/?fi=3&re=02&dn=1&x=80&y=24&bu=16&ky=&page=5>.

¹⁷⁷ Court Act, *supra* note 174, art. 10, para. 3.

¹⁷⁸ *Structure and Functions of the Subordinate Organs of the Judicial Yuan*, JUDICIAL YUAN, <http://www.judicial.gov.tw/en/english/aboutus/aboutus04/aboutus04-04.asp> (last visited Sept. 28, 2012) (“If the Supreme Administrative Court makes an interpretation of the law in its judgment or ruling and it is determined that there is a need to have the interpretation compiled into a precedent, the Supreme Administrative Court will hold a joint conference attended by the President, Division Chief Judges and Associate Judges, and will, by resolution of the conference, report said precedent to the Judicial Yuan.”).

by the Committee.¹⁷⁹ By the time a precedent report is published, there will be no facts left in the decisions, but only interpretations of abstract legal concepts.¹⁸⁰ Although there are legal bases for this method, some justices of the Judicial Yuan have criticized the constitutionality of the method.¹⁸¹ Lower courts statutorily do not have the obligation to follow precedents.¹⁸² Nevertheless in practice, decisions by lower courts which are contradictory to the interpretations provided by precedent reports will normally be withdrawn or dismissed.¹⁸³ Therefore, the majority of lower courts follow the interpretations of the precedent reports.

In South Korea, court decisions do not have general binding effect over the lower courts. Judges in South Korea are not entitled to make case law by their decisions under a constitutional principle of power separation which implies that judges are not obliged to follow prior decisions by the superior courts.¹⁸⁴ However, higher court decisions have strong influence upon the lower court judges and administrative entities. Decisions by the Constitutional Court of Korea, however, have legally binding force, which is a unique power that distinguishes the Constitutional Court from other ordinary courts.¹⁸⁵

As a matter of systematization, legal scholars see two main differences regarding the role and conceptualization of precedent in common and in civil law jurisdictions, namely intensity and approach.¹⁸⁶ First, we must consider the degree of persuasion higher courts have upon lower courts. In civil law courts, lower courts only follow precedent if it is *jurisprudence constante*, if it does not contradict legislation, and if it is consistent with the context of their legal system.¹⁸⁷ The civil law lower courts feel that the precedent is strong if it

¹⁷⁹ *Id.*

¹⁸⁰ See *Interpretations*, JUDICIAL YUAN, <http://www.judicial.gov.tw/constitutionalcourt/en/p03.asp> (last visited Sept. 28, 2012), for examples of Taiwanese judicial interpretations.

¹⁸¹ E-mail Interview with Professor Wen-Chen Chang, National Taiwan University (Dec. 29, 2010).

¹⁸² See CHANG-FA LO, *THE LEGAL CULTURE AND SYSTEM OF TAIWAN* 42–43 (2006).

¹⁸³ *Id.*

¹⁸⁴ The Constitution grants judges a power to independently decide according to their conscience conforming to the Constitution and statute laws. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 103 (S. Kor). The Court Organization Act stipulates that a court decision by a superior court only binds the lower court of the same case from which the appeal was raised. Court Organization Act, Act. No. 3902, Dec. 4, 1897, art. 8, *amended by* Act. No. 8794, Dec. 27, 2007 (S. Kor.), *translation available at* <http://eng.scourt.go.kr/eboard/NewsViewAction.work?gubun=42&seqnum=1>.

¹⁸⁵ Constitutional Court Act, Aug. 5, 1988, arts. 47, 75 (S. Kor.).

¹⁸⁶ See Baudouin, *supra* note 127, at 13.

¹⁸⁷ *Id.*

satisfies these conditions, but not that it is binding *per se*.¹⁸⁸ For example, while one single decision by the higher courts could establish a precedent in common law, it cannot in civil law (with some minor exceptions).¹⁸⁹ Second, the civil law judge looks first at legislation and only uses precedent to supplement it, whereas the common law judge will look at precedent as a primary source of law.¹⁹⁰

As to the admission of an appeal by the highest courts, there is no formal civil law writ of certiorari. However, most jurisdictions rely on procedural rules that can be used to exercise some control and limit access. For example, in German law, access is subject to fundamental importance in principle (*grundsätzliche Bedeutung*), with some variation in constitutional law appeals.¹⁹¹ At the same time, a recent reform of the German Code of Civil Procedure has limited appeals in civil cases to disputes exceeding a certain amount, aimed at cleaning backlogs.¹⁹² Italy and Spain accept appeals to their constitutional courts but condition admission on the merits of a case.¹⁹³ Evidently, a heavier workload tends to be correlated with a stricter interpretation of merit or fundamental importance, while a lighter workload corresponds to a broader assessment of merit.

Another example is Japan where a discretionary appeal system is adopted. Based on the reasons for appeal, civil cases are divided into two categories: those that automatically have the right to appeal and those that must obtain the Supreme Court's permission in order to appeal.¹⁹⁴ Similarly in criminal actions, a distinction is made between cases that are automatically appealable

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 15.

¹⁹¹ VERWALTUNGSGERICHTSORDNUNG [VWGO] [CODE OF ADMINISTRATIVE PROCEDURE], March 19, 1991, § 124 (Ger.).

¹⁹² In 2001, a reform of the Code of Civil Procedure limited appeals in civil cases to disputes exceeding 20,000 Euros, effective until December 2011. Einführung der Zivilprozessordnung [ZPOEG] [Act to Introduce Code of Civil Procedure], Jan. 30, 1877, last amended by Gesetz [G] July 27, 2001, § 26, para. 8 (Ger.).

¹⁹³ See Organic Law on the Constitution art. 43 (1979, 2) (Spain), translation available at <http://www.tribunalconstitucional.es/en/tribunal/normasreguladoras/Lists/NormasRegPDF/LOTC-en.pdf>; *The Italian Constitutional Court*, CORTE COSTITUZIONALE, http://www.cortecostituzionale.it/ActionPagina_324.do (last visited Sept. 29, 2012) (listing in section 5.7 the reasons why the court would deny hearing of an appeal).

¹⁹⁴ See MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] 1996, arts. 312, 318 (Japan), translation available at <http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=Code+of+Civil+Procedure&x=0&y=0&ky=&page=1>.

and those that are subject to the Supreme Court's discretion.¹⁹⁵ The Supreme Court decides whether or not to hear an appeal in all discretionary cases, such as those seeking unification of the interpretations of law, those without precedents interpreting the law, and those causing changes in the interpretations which have already been established by precedents.¹⁹⁶ Like the certiorari system in the United States, this mechanism is designed to give the Japanese Supreme Court the power to adjust its own caseload, and therefore to prevent the flooding of cases into the Court. Nevertheless, the system has not been very successful in deterring congestion.¹⁹⁷

South Korea has faced the same challenge. In the past, all appeals to the Supreme Court would have required permission to be reviewed at the Supreme Court.¹⁹⁸ This system, criticized for invading the constitutional right to trial, was abolished in 1990.¹⁹⁹ However, to reduce the burden on the Supreme Court from unreasonable or unnecessary appeals, in 1994 the congress adopted a new system which limits appeals to the Supreme Court.²⁰⁰ The new system allows the Supreme Court to dismiss an appeal without trial when the cause of appeal does not include significant violation of law (Constitution, acts, regulations, and orders), and, even though violation of law is a cause for appeal, when the cause itself is unreasonable, when it is irrelevant to the original verdict, or when it does not have any influence on the original verdict.²⁰¹ Furthermore, under this system, the Supreme Court is allowed to not provide reasons in the decision when the appeal is dismissed for the grounds above.²⁰² The Constitutional Court of Korea concluded in 1997 that this new system is constitutional because the right to trial under the Constitution does not require the Supreme Court to hear and review every appeal.²⁰³ The Court

¹⁹⁵ See KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, arts. 405–06 (Japan), *translation available at* <http://www.japaneselawtranslation.go.jp/law/detail/?ft=3&re=02&dn=1&x=80&y=24&bu=16&ky=&page=5>. If the reason for appeal is listed in Article 405 of the Criminal Procedure Code, the appellant only needs to file a petition for appeal, whereas if the reason for appeal is not listed in Article 405, the appellate must file a petition for *acceptance of* appeal under Article 406. *Id.* Article 405 only allows the appeal of decisions which are violations of the Constitution or contradictory to higher courts' precedents. *Id.*, art. 405.

¹⁹⁶ MINSOHŌ, art. 318; KEISOHŌ, art. 406.

¹⁹⁷ See, e.g., David Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545, 1577 (2009).

¹⁹⁸ Constitutional Court [Const. Ct.], 1997Hun-Ba37 501, 513–14, Oct. 30, 1997 (S. Kor.).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

further explained that one of the important roles of the appeals system is to reasonably distribute limited legal resources and this decision belongs to legislature.²⁰⁴ At the same time, this system meets the purpose by respecting the dignity of the Supreme Court as the highest court and by providing an objective and consistent standard over legal interpretation.²⁰⁵ Furthermore, the Trial of Small Claims Act limits appeals to the Supreme Court of claims smaller than a certain amount.²⁰⁶ The Constitutional Court of Korea unanimously concluded in 2009 that the act does not unconstitutionally invade the petitioners' right to trial.²⁰⁷ The Court said that, in the absence of special circumstances, it is within the legislature's discretion whether to allow all claims to appeal to the Supreme Court.²⁰⁸ Also, the Court explained that the limited legal resources of the Supreme Court should be invested for more serious and complicated cases. Therefore, the act's aim to resolve small claims efficiently is legitimate and it does not unreasonably or unconstitutionally treat petitioners.²⁰⁹ However, despite these devices to limit appeals to the Supreme Court, huge amounts of appeals are presented and reviewed by the Korean justices.²¹⁰

B. *The Context in Latin America*

The problems encountered by the Brazilian Supreme Court are not unique in Latin American. The absence of formal stare decisis and a mechanism of certiorari induced creative approaches in the region much the same way they did in Brazil. To some extent, *súmula vinculante* and *requisito da repercussão geral* are Brazilian legal inventions, but they can be understood better in the context of other similar developments in Latin America.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Soaek sakeon simpan beob [Trial of Small Claims Act], Act No. 2547, Feb. 24, 1973, *amended by, inter alia*, Act No. 7427, March 31, 2011, art. 3 (S. Kor.). The amount of the claim must be less than 20,000,000 Won (approximately USD \$18,000). Soaek sakeon simpan kyuchick [Small Claims Judgment Decree], Constitutional Court Decree No. 1779, July 1, 2002, *as amended* (S. Kor.), *available at* <http://www.law.go.kr/joStmdInfoP.do?lsiSeq=67520&joNo=0002&joBrNo=00> (click on "chomun" [content provision] button)

²⁰⁷ Constitutional Court (Const. Ct.), 2007Hun-Ma1433 505, 505, Feb. 28, 2009 (S. Kor.).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *See Statistics: Litigation*, SUPREME COURT OF KOREA, http://eng.scourt.go.kr/eng/resources/statistics_litigation_civil.jsp (last visited Feb. 11, 2013) (noting that the number of intermediate appeals of civil cases to the Supreme Court have increased from 33,511 in 2003 to 51,929 in 2011, and that the number of final appeals of civil cases to the Supreme Court have increased from 7,143 in 2003 to 11,500 in 2011).

The doctrine of *obligatoriedad atenuada* (which translates to “attenuated obligation”), or *presunción juris tantum de obligatoriedad* (which translates to “presumption *juris tantum* of obligation”), was developed in Argentina.²¹¹ Formally speaking, there is no vertical mechanism of precedent.²¹² However, through an evolving process of interpretation, the Supreme Court of Argentina has created a doctrine of effective vertical precedent. Beginning in 1948, the Court asserted its authority as authoritative interpreter of the Constitution, and announced that departures from its interpretation without contesting its foundations amount to contempt of that authority.²¹³ Later, the Court stated that for a deviation or departure to be valid, a lower court must provide new legal arguments that justify such action.²¹⁴ In 1985, the Supreme Court eventually consolidated its current doctrine and held that although the Court’s judgments are not strictly legally binding in analogous cases, inferior courts have the duty to abide by these judgments, unless the departure is justified by a new legal argument.²¹⁵ As a result, although the Argentinean approach differs from the strict binding obligation established by the doctrine of *stare decisis*, the Supreme Court was more successful in imposing its vertical hierarchical power absent for so long in Brazil. More recently, the Court expressed that compliance with binding precedent assures equality before the law, which mandates that analogous cases are given an equal solution, even if there is no formal law establishing such binding precedent.²¹⁶

A similar pattern can be found in Colombia. While the Constitutional Court creates precedent through its authoritative and binding constitutional interpretation *erga omnes*, the Supreme Court faces the standard problem of an

²¹¹ Santiago Legarre, *Precedent in Argentine Law*, 57 LOY. L. REV. 781, 785 n. 19 (2011); *Fallo de Hoy. Se declara la nulidad de las resoluciones por una deuda en concepto de Contribución que incide sobre la Actividad Comercial, Industrial y de Servicios de la Municipalidad de la Ciudad de Córdoba*, THOMSON REUTERS (Feb. 15, 2012), <http://thomsonreuterslatam.com/jurisprudencia/15/02/2012/fallo>.

²¹² See Santiago Legarre & Julio César Rivera, *La Obligatoriedad Atenuada de los Fallos de la Corte Suprema y el Stare Decisis Vertical*, 2009-E LA LEY 820 (2009).

²¹³ Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 6/10/1948, “Santin, Jacinto c. Impuestos Internos,” Fallos (1948-212-59) (Arg.).

²¹⁴ See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 17/11/1981, “Cesar Anibal Balbuena,” Fallos (1981-303-1770) (Arg.).

²¹⁵ See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 4/7/1985, “Cerámica San Lorenzo,” Fallos (1985-307-1094) (Arg.).

²¹⁶ Congreso de la Nación—Cámara de Diputados [House of Representatives], 13/7/2007, “Domingo Antonio Bussi,” (2007) (Arg.).

absence of a formal stare decisis doctrine.²¹⁷ The Supreme Court uses the *doctrina probable* (which translates to “probable doctrine”) as a flexible method to unify its jurisprudence and therefore create some effective precedent.²¹⁸ In 1887, it was legislated that in doubtful cases, the judges will apply the most probable doctrine.²¹⁹ Three uniform decisions of the Supreme Court, as a cassation tribunal, on the same point of law, constitute the *doctrina probable*.²²⁰ This statement was further developed by new laws in 1889, 1890 and 1896.²²¹ Recently, the Constitutional Court has confirmed the *doctrina probable* and reiterated the binding nature of the precedents of the Supreme Court established under such doctrine.²²² It also held that judges of lower courts, when departing from the *doctrina probable* established by the Supreme Court, must clearly and reasonably explain the legal basis to justify their departure from the *doctrina probable*.²²³

Similarly, in Chile, only the Constitutional Court creates formal precedents given the authoritative and binding *erga omnes* constitutional interpretation.²²⁴ The Supreme Court engages in concrete constitutional review (while the Constitutional Court exercises abstract review), but the decisions are only

²¹⁷ See generally Carlos Bernal Pulido, *El Precedente en Colombia*, 83 REVISTA DE DERECHO DEL ESTADO 87 (2008) (Colom.).

²¹⁸ See, e.g., Martha I. Morgan, *Taking Machismo to Court: the Gender Jurisprudence of the Colombian Constitutional Court*, 30 U. MIAMI INTER-AM. L. REV. 253, 280 n.106 (1999).

²¹⁹ L. 153/87, agosto 15, 1887, DIARIO OFICIAL [D.O.] art. 10 (Colom.).

²²⁰ *Id.*

²²¹ Legislation in 1889 set forth that three uniform decisions of the Supreme Court, as a cassation tribunal, on the same point of law, constitute the *doctrina probable* that judges could apply to analogous cases, which would not prevent the court from varying the doctrine if it determined that previous decisions were erroneous. L. 169/89, julio 3, 1889, DIARIO OFICIAL [D.O.] art. 4 (Colom.). Here, judges could decide whether or not to apply the *doctrina probable*. *Id.* The case number requirement was later modified in 1890, whereby two uniform decisions of the Supreme Court would now constitute the *doctrina probable*. L. 105/90, diciembre 2 1890, DIARIO OFICIAL [D.O.] art. 371 (Colom.). L. 105/90 went on to state that if there is no law applicable to an issue before the court, two uniform Supreme Court pronouncements pertaining to that issue may fill the legal gap. *Id.* Legislation in 1896, however, endorsed the initial approach taken by L. 169/89, codifying what is considered today as the *doctrina probable*. L. 169/96, diciembre 31, 1896, DIARIO OFICIAL [D.O.] art. 4 (Colom.).

²²² Corte Constitucional [C.C.] [Constitutional Court], agosto 9, 2001, Sentencia C-836/01, Gaceta de la Corte Constitucional [G.C.C.] (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2001/c-836-01.htm>.

²²³ *Id.*

²²⁴ Edith Z. Friedler, *Judicial Review in Chile*, 7 SW. J.L. & TRADE AMS. 321, 343–44 (2000).

binding *inter partes*.²²⁵ This division of labor in constitutional review has raised serious concerns and diluted the strength of precedent in Chilean law.²²⁶

In Venezuela, the Constitutional Chamber of the Supreme Court has the power to issue a binding precedent *erga omnes* in the context of abstract and concrete (*amparo*) constitutional review.²²⁷ Lately, the Chamber extended such power to judicial decisions by other courts when in contradiction with the Constitution.²²⁸ Such significant power is not shared by the Cassation Chambers of the Supreme Court.²²⁹

In Mexico, decisions of the Mexican Supreme Court are regularly cited by lower courts.²³⁰ Consistent rulings that have precedential weight are known as *jurisprudencia obligatoria*.²³¹ There are also Mexican Supreme Court decisions that do not have full precedential value, named *tesis aisladas*, but they have persuasive authority.²³² The precedent established by *jurisprudencia* is accepted once there are five consecutive and consistent decisions on a point of law by the Supreme Federal Court or federal collegiate courts.²³³ Before 1951, following the civil law tradition, *jurisprudencia* had no constitutional basis.²³⁴ However, several constitutional amendments changed the situation.²³⁵ The legal implications are that only federal courts can issue binding decisions

²²⁵ *Id.*

²²⁶ See generally Friedler, *supra* note 224 (surveying the Chilean Supreme Court's review of the Chilean Constitution).

²²⁷ Allan R. Brewer-Carías, *Judicial Review in Venezuela*, 45 DUQ. L. REV. 439, 442–43, 447 (2007).

²²⁸ *Id.* at 445.

²²⁹ *Id.*

²³⁰ See Woodfin L. Butte, *Stare Decisis, Doctrine and Jurisprudence in Mexico and Elsewhere, in THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS*, *supra* note 18, at 311, 328.

²³¹ See, e.g., M.C. Mirow, *Marbury in Mexico: Judicial Review's Precocious Southern Migration*, 35 HASTINGS CONST. L.Q. 41, 57 n.99 (2007).

²³² STEPHEN ZAMORA ET AL., *MEXICAN LAW* 85 (2004). See *id.* for more information regarding the Mexican legal system.

²³³ José María Sema de la Garza, *The Concept of Jurisprudencia in Mexican Law*, 10 MEX. L. REV. (2009) (Mex.).

²³⁴ *Id.*

²³⁵ Article 107-XIII of the Mexican Constitution was amended in 1951 to establish that “statute law shall determine the terms and cases in which the *jurisprudencia* from Federal Judicial Branch Courts is binding, as well as the requirements for its modification.” *Id.* In 1967, this rule was subsequently transferred to Article 94 of the Constitution with an amendment meant to clarify the kind of norms that could be the object of *jurisprudencia*: “Statute law shall determine the terms in which the *jurisprudencia* from Federal Judicial Branch Courts on the interpretation of the Constitution, federal and local statutes and rulings, and international treaties entered into by the Mexican State is binding, as well as the requirements for its interruption and modification.” *Id.*

and that these binding decisions refer to the interpretation of the Constitution, federal and state statutes, and rulings and international treaties.²³⁶ Finally, “[s]tatute laws passed by the Federal Congress are the instruments that define the terms under which binding legal decisions can be produced.”²³⁷ The three legal implications listed above “are part of the current constitutional system of binding legal decisions in Mexican law.”²³⁸

Supreme Courts in Latin America have developed legal doctrines to decline appeals in the absence of formal certiorari. The Supreme Court of Argentina declines extraordinary appeals if the cases lack sufficient federal grievance or the issues raised prove to be unsubstantial or devoid of significance.²³⁹ The decision to invoke this refusal must be supported by the majority of justices.²⁴⁰ However, such doctrine is not immune to criticism even after its constitutionality has been explicitly recognized by the Court.²⁴¹ This doctrine has been a method used by the Court to control the large number of appeals that are filed every year.²⁴² Comparing the Argentinean form of certiorari to U.S. certiorari, while both procedural mechanisms are grounded on the sound discretion of the Court, the American version is a mechanism that grants access

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] [CIVIL AND COMMERCIAL PROCEDURE CODE] art. 280 (Arg.).

²⁴⁰ CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] [CIVIL AND COMMERCIAL PROCEDURE CODE] art. 281 (Arg.).

²⁴¹ Critics emphasize the conflict that exists between the *doctrina de la arbitrariedad* (which translates to “doctrine of arbitrariness”) and the *doctrina de gravedad institucional* (which translates to “doctrine of institutional gravity”), and the Supreme Court’s denial mechanism. *See generally* Claudia Beatriz Sbdar, *Presente y futuro del recurso extraordinario federal: El rol de la Corte Suprema de la Nación*, REVISTA IBEROAMERICANA DE DERECHO PROCESAL CONSTITUCIONAL 217 (July–December 2008). Through the *doctrina de gravedad institucional*, the Court made up for the lack of any admissibility requirement in an extraordinary case. *Id.* at 230. The premise of the argument is that extraordinary appeal deals with the Constitution, hence it is of extreme institutional gravity. *Id.* Likewise, under the *doctrina de la arbitrariedad*, the Court reviews sentences of lower courts that might lack sufficient legal basis. *Id.* at 229. Critics of the denial mechanism suggest that the Court now declines cases without having to base its decision on sufficient legal grounds, and therefore violates the doctrines previously recognized. *Id.* at 235. The Supreme Court has recently recognized the constitutional validity of the denial mechanism (through Articles 280 and 285 of the Civil and Commercial Procedure Code) because it allows the Court to perform more effectively its mission of safeguarding the Constitution by exercising its extraordinary jurisdiction more successfully in cases of transcendental importance. *Id.*

²⁴² *Id.* at 235.

to the Court, while the Argentinean version is a mechanism used to deny access to the Court.²⁴³

A Colombian certiorari has also recently been developed. Until 1996, appeals could only be rejected by the Supreme Court if they failed with some procedural rules.²⁴⁴ There was no procedural discretionary mechanism that allowed the Court to refuse admission of appeals once the cases met all the formal requirements. After 1996, discretion in selecting cases has been progressively granted with the aim of reducing congestion and delays.²⁴⁵ A similar approach has been largely taken by the Constitutional Court.²⁴⁶

Mexico, Chile and Venezuela have developed their own procedural rules to regulate admissibility of appeals to the Supreme Court (or in the case of Chile, to the Constitutional Court). For example, in Mexico, appeals to the Supreme Court have to be of general interest and relevant (*criterio de importancia y trascendencia*).²⁴⁷ These rules of extraordinary appeal are usually less generous than for other appeals, but they have largely failed in affording these courts greater control of their dockets.²⁴⁸

²⁴³ See Alberto B. Bianchi & Santiago Legarre, *El "Certiorari" en Acción (Hacia un Control de Constitucionalidad Basado en la Trascendencia)*, 1993-C LA LEY 841 (1993); Alberto J. Egües, *El Certiorari Argentino*, 1993-C LA LEY 661 (1993); María A. Gelli, *El "Writ of Certiorari" en Perspectiva*, 1994-B LA LEY 880 (1994); Jorge A. Rojas, *Las Nuevas Fronteras del Recurso Extraordinario Federal*, 2008-E LA LEY 858 (2008).

²⁴⁴ Cf. *infra* note 245.

²⁴⁵ L. 270/96, marzo 7, 1996, DIARIO OFICIAL [D.O.] art. 16 (Colom.), http://www.secretariasenado.gov.co/senado/basedoc/ley/1996/ley_0270_1996.html (last visited Sept. 24, 2012). In 2009, the law was amended, stating that the cassation chambers of the Supreme Court may select the decisions that are going to be subject to a judgment, for the purpose of unifying the jurisprudence, protecting constitutional rights, and controlling legal decisions. *Id.* (incorporating L. 1285/09, enero 22, 2009, DIARIO OFICIAL [D.O.] (Colom.)). As a result, this addition provides the three specialized chambers of the Court (civil, criminal, and labor) with the option of selecting the sentences upon which they decide to cast judgment, thus, rejecting the admission of sentences not selected for review. *Id.* In 2008, the constitutionality of these provisions was confirmed by the Colombian Constitutional Court. Corte Constitucional [C.C.] [Constitutional Court], julio 15, 2008, Sentencia C-713/08, Gaceta de la Corte Constitucional [G.C.C.] (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2008/c-713-08.htm>.

²⁴⁶ See generally Juan Carlos Guayacan, *La Selección de Sentencias Para la Unificación de la Jurisprudencia*, 19 REVISTA DE DERECHO PRIVADO 57 (2010), available at <http://foros.uexternado.edu.co/econstitucional/index.php/derpri/article/view/2489/2127>.

²⁴⁷ *La Reforma Constitucional en Materia de Amparo*, PODER JUDICIAL DE LA FEDERACIÓN, 1, 10, <http://www.cjf.gob.mx/reformas/documentos/tripticoReformaAmparo.pdf>.

²⁴⁸ See ZAMORA ET AL., *supra* note 232, at 192; Brewer-Carías, *supra* note 227, at 464–65; Friedler, *supra* note 224, at 346–47.

III. LAW AND ECONOMICS OF PRECEDENT AND CERTIORARI

A. *The Economics of Precedent*

Legal economists have provided for a rational theory of precedent. An earlier literature assessed the extent to which precedent improves the overall efficiency of the legal system. This approach is known as the “efficiency theory of the common law”, and is associated with Judge Richard Posner, who argues that the doctrines in common law provide a coherent and consistent system of incentives which induce efficient behavior.²⁴⁹ In this context, precedent is instrumental in guaranteeing and achieving efficiency.²⁵⁰ The efficiency of the common law generated discussion among legal economists quite early in the law and economics literature. According to some, efficiency is promoted by the prevalence of precedent (more efficient rules are more likely to survive through a mechanism of precedent).²⁵¹ However, this argument has faced serious challenges. For example, even if judges are ultimately efficiency-seeking, precedent and overruling must be balanced in an appropriate way. A judicial bias might distort the law in the short run but at the same time provide a mechanism to improve the law in the long run, depending on critical elements of the evolution of the common law.²⁵²

Precedents therefore constitute a fundamental aspect in explaining the evolution of a legal system. They have a public good nature which is likely to imply that they are not produced in the most efficient manner (since courts do not internalize future gains derived from a particular precedent much the same way judges do not internalize external gains from producing judicial opinions).²⁵³ Presumably, it is true that bad rules are challenged more often than good rules, so naturally court intervention through a mechanism of precedent could improve the overall quality of the law. However, this line of

²⁴⁹ RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 33, 743–54 (8th ed. 2011).

²⁵⁰ *Id.* at 754 (stating that a judge’s most efficient method for deciding cases and resolving issues is to follow precedent closely, and to let the legislature adapt the law to change).

²⁵¹ See generally John C. Goodman, *An Economic Theory of the Evolution of the Common Law*, 7 J. LEGAL STUD. 393 (1978); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977); Peter R. Terrebone, *A Strictly Evolutionary Model of Common Law*, 10 J. LEGAL STUD. 397 (1981).

²⁵² See generally Nicola Gennaioli & Andrei Shleifer, *Overruling and the Instability of Law*, 35 J. COMP. ECON. 309 (2007); Nicola Gennaioli & Andrei Shleifer, *The Evolution of Common Law*, 115 J. POL. ECON. 43 (2007).

²⁵³ See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 248 (1979).

reasoning is not without problematic shortcomings.²⁵⁴ In certain contexts, precedent could bias legal rules against efficiency.²⁵⁵ Precedent certainly generates path dependence that could undermine the process of evolutionary efficiency.²⁵⁶ Strong precedent could be socially valuable if lower court judges are significantly biased.²⁵⁷

Not surprisingly, legal economists have turned their attention to the establishment and evolution of precedent.²⁵⁸ However, there are significant economic advantages and disadvantages to adhering to the principle of absolute precedent that has been recognized by legal economists.

The advantages of absolute precedent listed by economic literature are the following:

(i) It provides for a substantial reduction of legal uncertainty since the outcomes are predictable, hence reinforcing the stability of the law.²⁵⁹ Legal certainty is important for business transactions and social interactions since it reduces transaction costs.²⁶⁰ By making law enforcement easier to predict and

²⁵⁴ See Nuno Garoupa & Carlos Gómez Ligüerre, *The Syndrome of the Efficiency of the Common Law*, 29 B.U. INT'L L.J. 288, 296–98 (2011); Nuno Garoupa & Carlos Gómez Ligüerre, *The Evolution of the Common Law and Efficiency*, 40 GA. J. INT'L & COMP. L. (forthcoming 2012), available at <http://ssrn.com/abstract=1805141>.

²⁵⁵ See generally Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583 (1992).

²⁵⁶ See Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 659 (2001).

²⁵⁷ See Thomas J. Miceli, *Legal Change: Selective Litigation, Judicial Bias, and Precedent*, 38 J. LEGAL STUD. 157, 164–65 (2009); Luca Anderlini et al., *Why Stare Decisis?* (Centre for Economic Policy Research, Discussion paper 8266, February 2011), available at <http://econ.lse.ac.uk/staff/felli/papers/Stare%20Decisis.pdf>.

²⁵⁸ See generally Scott Baker & Claudio Mezzetti, *A Theory of Rational Jurisprudence*, 120 J. POL. ECON. 513 (2012); Charles M. Cameron & Lewis A. Kornhauser, *Appeals Mechanisms, Litigant Selection, and the Structure of Judicial Hierarchies*, in INSTITUTIONAL GAMES AND THE U.S. SUPREME COURT 173 (Jon Bond et al. eds., 2006); Ben Depoorter et al., *Litigation, Judicial Path-dependence, and Legal Change*, 20 EUR. J.L. & ECON. 43 (2005); Patricio A. Fernandez & Giacomo A.M. Ponzetto, *Stare Decisis: Rhetoric and Substance*, 28 J.L. ECON. & ORG. 313 (2012); Vincy Fon & Francesco Parisi, *Litigation and the Evolution of Legal Remedies: A Dynamic Model*, 116 PUB. CHOICE 419 (2003); Ronald A. Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules*, 15 J. LEGAL STUD. 227 (1986); Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63 (1989); Kornhauser, *supra* note 15, 509–13; William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976); Georg von Wagenheim, *The Evolution of Judge-Made Law*, 13 INT'L REV. L. & ECON. 381 (1993).

²⁵⁹ Depoorter et al., *supra* note 258, at 44, note 3.

²⁶⁰ Heiner, *supra* note 258, at 229, 255 (arguing that people will benefit from following simple rules in decision-making, despite errors that may occur when such rules are applied on a case-by-case basis).

understand, it enhances legal compliance since it reduces the incidence of behavioral mistakes.²⁶¹

(ii) It promotes equality under the law since absolute precedent “[t]reat[s] like cases alike” (legal fairness).²⁶² The outcome of a particular litigation no longer depends on the individual judge or on a particular court.²⁶³ It reduces risk exposure and asymmetric treatment of identical business transactions or social interactions.²⁶⁴

(iii) It favors competent adjudication for different reasons. First, an absolute precedent enhances cognitive effectiveness for lower court judges.²⁶⁵ Second, it reduces error when judges are not experts in a particular area of the law.²⁶⁶ Third, due to the fact that accurate decisions are less likely to be made in isolation, judicial quality is enhanced.²⁶⁷

(iv) It induces a substantial reduction of workload for the court system (by helping the formation of convergent expectations across parties) and time consumed in adjudication (decisional effectiveness).²⁶⁸ Therefore, it reduces frivolous lawsuits and favors higher settlement rates.²⁶⁹

At the same time, economic literature has focused on noteworthy disadvantages of absolute precedent, namely:

(i) Absolute precedent can be the source of systematic judicial error, in particular when changes in values and in context are significant.²⁷⁰ Improvements in legal technology are frequently disregarded in a system with absolute precedent, therefore precluding the courts from benefiting from new advances.²⁷¹ When courts have imperfect decision-making due to complex

²⁶¹ Cf. Kornhauser, *supra* note 258, at 77–78.

²⁶² *Id.* at 74.

²⁶³ See generally Baker & Mezzetti, *supra* note 258.

²⁶⁴ *Id.*

²⁶⁵ Cf. Kornhauser, *supra* note 258, at 76–77.

²⁶⁶ Cf. *id.*

²⁶⁷ Cf. *id.*

²⁶⁸ *Id.* at 77.

²⁶⁹ See Yeon-Koo Che & Jong Goo Yi, *The Role of Precedents in Repeated Litigation*, 9 J.L. ECON. & ORG. 399, 417 (1993).

²⁷⁰ See Kornhauser, *supra* note 258, 69–71.

²⁷¹ Cf. *id.* at 71–72 (discussing lags in incorporating available information).

fact-finding and specificity, they are subject to less external monitoring if precedents cannot be challenged.²⁷²

(ii) It reduces flexibility to correct wrong decisions or internalize specific biases.²⁷³

(iii) It promotes and helps the ossification of case law, hence reducing the possibility of legal developments and enlarging the gap between law and society.²⁷⁴

(iv) It induces serious costs borne by lower court judges when trying to justify departure from precedent.²⁷⁵ These costs are more significant when the rationale behind the precedent (*ratio decidendi*) is unclear or less transparent.²⁷⁶

An economic analysis that recognizes important benefits and costs associated with absolute precedent indicates that a more flexible approach is closer to an optimal institutional design. In fact, if we ponder the advantages and disadvantages identified by legal economists, it is likely that the current legal understanding of stare decisis is more efficient than the notion of absolute precedent.

With respect to civil law jurisdictions, there has been very little comprehensive economic analysis of precedent.²⁷⁷ An immediate observation is that judicial precedents in civil law systems are less likely to satisfy the conditions for efficiency than flexible stare decisis, given that in civil law systems, the highest court must persuade the lower courts. However, a more systematic analysis reveals the complexity of the problem. The rate of litigation, the repetition of cases, and the preferences of the higher and lower courts shape the process of establishing judicial precedents that could be efficient under certain circumstances.²⁷⁸ Unfortunately, it is difficult to assess the extent to which such circumstances are actually satisfied.²⁷⁹

²⁷² *Cf. id.* at 72–73.

²⁷³ *Cf. id.* at 72.

²⁷⁴ *Cf. id.* at 71–72.

²⁷⁵ *Cf. id.* at 73.

²⁷⁶ *Cf. id.*

²⁷⁷ But see Fon & Parisi, *supra* note 139, for one of few such analyses.

²⁷⁸ *Id.* at 532–33.

²⁷⁹ *Cf. id.* at 533.

B. *Economics of Certiorari*

Legal economists have analyzed the writ of certiorari in the context of regulating appeals.²⁸⁰ The literature seems to conclude that some form of procedural rules to limit access to the highest court is economically justified.

The arguments in favor of the writ of certiorari include:

(i) The court can focus on more meritorious cases since an earlier selection of more meritorious cases for appeal is less costly in nature.²⁸¹

(ii) The writ of certiorari reduces the likelihood of wasting resources on frivolous appeals since parties may anticipate they are unlikely to pass the merit threshold to be admitted.²⁸²

(iii) The writ of certiorari promotes expediency in case law in two ways. For those cases that are not admitted into court, it clarifies the obligations of each party at an earlier stage.²⁸³ For those cases that are admitted into court, the backlog is minimal and so they can be decided in a timely manner.²⁸⁴

Meanwhile, the arguments against the writ of certiorari include:

(i) Some legal errors might not ever be corrected because the court does not reflect on them sufficiently when sorting out admission.²⁸⁵ However, the appealing parties are under pressure to expose legal errors in a more transparent and consistent way in order to convince the court that their case passes the merit threshold for admission.²⁸⁶

²⁸⁰ See generally Charles M. Cameron et al., *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101 (2000); Steven Shavell, *On the Design of the Appeal Process: The Optimal Use of Discretionary Review versus Direct Appeal*, 39 J. LEGAL STUD. 63 (2010); Steven Shavell, *The Appeals Process and Adjudicator Incentives*, 35 J. LEGAL STUD. 1 (2006); Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379 (1995).

²⁸¹ Shavell, *The Appeals Process as a Means of Error Correction*, *supra* note 280, at 417.

²⁸² *Id.*

²⁸³ *Cf. id.* at 419–20.

²⁸⁴ See Oliveira, *supra* note 5, at 111.

²⁸⁵ Shavell, *The Appeals Process as a Means of Error Correction*, *supra* note 280, at 419–20.

²⁸⁶ *Id.*

(ii) Petitions for certiorari increase group pressure costs to persuade the court to grant certiorari. Such effect is likely to make the earlier stage of an appeals process more costly.²⁸⁷

(iii) It enhances strategic judicial behavior on case selection to mold decision-making in the court. Judges could use case selection to forge coalitions, reveal preferences, or avoid difficult situations.²⁸⁸

Some form of writ of certiorari is efficient for the reasons explained above. The assessment, however, cannot escape the details. One needs to understand the behavioral incentives provided by the court's internal bargaining with respect to admission of an appeal. Inevitably it will depend on the extent to which lower courts do a good job in avoiding gross legal errors. At the same time, the court will be more exposed to external pressures, which could potentially create some waste of resources in lobbying and persuasion. Therefore the mechanisms by which a court deals with external pressure are relevant in this context. It is likely that a court largely made of "recognition"²⁸⁹ judges (such as in the common law world and in Brazil) reacts in a different way than a court largely relying on career judges (as in most civil law courts). Consequently we cannot understand economically a particular form of certiorari without recognizing the institutional context.

IV. DISCUSSION OF THE BRAZILIAN CASE

Both precedent and certiorari generate costs and benefits as the law and economics literature has recognized. Generally speaking, we have seen how a flexible precedent is more advantageous than either absolute precedent or no precedent rules. A mechanism of certiorari is efficient if it allows the court to focus on the more meritorious cases without imposing a burden in terms of legal errors by lower courts.

Following our comparative law discussion, every legal system necessarily has a body of previously decided cases and a set of rules to manage appeals,

²⁸⁷ James Lindgren & William P. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari of Appeals*, SUP. CT. REV. 259, 278–79 (1986).

²⁸⁸ Cf. Tonja Jacobi, *The Judicial Signaling Game*, 16 SUP. CT. ECON. REV. 1, 10 (2008).

²⁸⁹ Nuno Garoupa & Tom Ginsburg, *Hybrid Judicial Career Structures: Reputation Versus Legal Tradition*, J. LEGAL ANALYSIS 411, 411 (2011) (defining a "recognition" judge as a "judge appointed later in life in recognition of other career achievements").

though they might differ in the practices they adopt relative to that body of previously decided cases and those rules to manage appeals.

In fact, following previous insights, we could distinguish between the strength and the scope of stare decisis. “Strength” reflects the necessary burden for a court overturning a prior decision, while “scope” refers to the number of cases considered “similar” and hence governed by the prior decision.²⁹⁰ Civil law jurisdictions seem to favor a strong, narrow stare decisis while common law jurisdictions tend to adopt a weak, broad stare decisis. Brazil seems to go for a more unique combination.

Súmula vinculante, the Brazilian form of precedent, has some particularly distinctive characteristics. In a direct comparison with the United States’ stare decisis, it is enforced in a more abstract context. Thus, we can say it provides for a more flexible mechanism of precedent, but is potentially applicable to a larger set of situations (for example, even when state laws are not directly being litigated). It also has a broad enforcement, not just upon lower courts, but also in reference to the federal, state, and municipal administrations.

The advantages from an economic perspective are quite standard: enhancement of rule of law, reduction of frivolous claims, and improvement of judicial decision-making. Two aspects deserve specific attention: court creativity and reinforcement of court hierarchy.

When lower courts are creative and want to depart from precedent, there is a cost in terms of developing legal argumentation. For each individual case, an abstract approach presumably generates a less costly method of departure from precedent than a concrete approach since it should be easier to establish the necessary differences under the latter than under the former. However, an abstract approach potentially applies to a more diverse set of situations and cases. Therefore, it is not clear which system generates more costs.

The reinforcement of court hierarchy has structural legal properties that are attractive from a law and economics perspective. The Supreme Court is the appropriate venue for complex legal discussions without damaging legal certainty. The political dimension of judicial lawmaking is more effective if supervised by the Supreme Court, rather than left to confusing and opposing decisions by the lower courts, particularly in relation to multiple claims filed

²⁹⁰ See Kornhauser, *supra* note 15, at 510–12.

by different parties but similar in challenging the same substantive law. Nevertheless, the cost of “verticalizing” the court system increases if lower courts or if the administration rebel against the Supreme Court. Such cost is not significant when a legal system is already reasonably “verticalized,” as in the United States, but could be important in a legal system more “horizontalized,” as in Brazil.²⁹¹

The response of the lower courts and of the administration to the *súmula vinculante* should determine the extent to which the process of reinforcement of court hierarchy is excessively costly. The evidence of the last four years confirms a significant collaboration by lower courts beyond the standard rhetoric.²⁹² The implementation of these new mechanisms has required much dialogue between the lower courts and the Supreme Court. Such dialogue included meetings²⁹³ and the creation of a virtual forum on the internet²⁹⁴ to directly connect courts to talk about the practical management problems in the implementation of the general relevance test. This interaction is particularly useful to solve common problems and to inform the Supreme Court about multiple claims on the same subject matter on the lower courts’ docket. As explained before, when a case passes the relevance test, lower courts must hold similar cases while waiting for the Supreme Court’s decision.²⁹⁵ Therefore, it is important to map the most numerous similar cases so that the Supreme Court can list the case for hearing with priority to disburden lower courts’ dockets from the most pressing cases. Indeed, lower courts apparently have incentives to participate and dialogue in the implementation process of the relevance test. One incentive is to influence how to achieve the most efficient proceedings to manage this new mechanism. Most importantly, however, seems to be that a potential lack of cooperation would end up basically shifting the burden of heavy caseload of repetitive cases from the Supreme Court to lower courts, without addressing a common goal, which is to expedite justice and address long delays in case disposal before the judiciary.

²⁹¹ In reference to absence of rigid precedent constraining lower courts.

²⁹² For the argument against limiting the creativity of the lower courts, see Arantes, *supra* note 6.

²⁹³ Representatives of the federal and state appellate courts, as well as of the higher courts, came together during a seminar entitled *Repercussão Geral em Evolução*, which was organized by the Supreme Court and the Ministry of Justice in November 2010. *Notícias STF*, SUPREMO TRIBUNAL FEDERAL (December 20, 2010), <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=168521>.

²⁹⁴ *Notícias STF*, SUPREMO TRIBUNAL FEDERAL (Mar. 15, 2011), <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=173944>.

²⁹⁵ See *supra* note 77 and accompanying text.

As with the writ of certiorari, the mechanism of *requisito da repercussão geral* restricts appeals, but the management by lower courts (in terms of defining the criteria to establish when claims are “similar”) reduces the probability of significant legal errors. The Brazilian system seems more appropriate for minimizing the potential costs of not reviewing all appeals since the lower courts have an active role in choosing relevant cases to be presented to the Court for the *requisito da repercussão geral*; every representative case has more chance to be addressed by the Supreme Court under the Brazilian system than under certiorari.

At the same time, the introduction of the *requisito da repercussão geral* has apparently not changed political bargaining dramatically. Due to the accumulated backlog from the years before the reform, the Supreme Court decided to admit the *repercussão geral* mechanism in relation to multiple cases even when the Court had already consistently decided the controversy at issue. During the current transition from the previous system to the new general interest mechanism, the Court’s choice has been to augment the number of cases with general interest in order to dispose of similar old cases more efficiently. Since the implementation of the general interest mechanism in 2007 until 2011, the Supreme Court analyzed 521 requests of general importance.²⁹⁶ Out of these 521 cases, 377 (or 72.36%) were admitted, and only 144 (27.64%) were found inadmissible for lack of general interest.²⁹⁷ This policy can also be explained by the legal culture embedded in civil law traditions, where there is no practice of political bargaining in the admissibility of cases.

In theory, it is yet unclear how the Brazilian design will affect strategic judicial behavior in the Supreme Court. It could be used to force preference revelation, as it does in the United States, but at the same time since the “modal” cases are decided by lower courts, there is less room for Brazilian Supreme Court Justices to influence the substance of their dockets than there is for U.S. Supreme Court Justices to influence the substance of their dockets. The general perception seems to be that not much has changed in terms of behavior in the Brazilian Supreme Court, confirming that the mechanism of *requisito da repercussão geral* has not provided for the ideal framework to develop the standard political bargaining we observe in the U.S. Supreme

²⁹⁶ See *supra* tbl. 4.

²⁹⁷ *Id.*

Court. Such perception however can only be confirmed, if so, in years to come. More precisely, when the backlog becomes minimal and the practice of this new requirement is consolidated.

CONCLUSION

We have discussed two recent fundamental developments in Brazilian constitutional law: the introduction of precedent in concrete review (*súmula vinculante*) and the possibility of rejecting appeals if they do not satisfy a standard of general interest (*requisito da repercussão geral*). They are significantly different from the United States' principles of stare decisis and writ of certiorari. At the same time, they are definitively more substantive than equivalent institutions available in civil law systems. We have argued that, from a law and economics perspective, both mechanisms are likely to enhance the benefits of rule of law, legal certainty, and reduction of frivolous litigation and of court delays, without significantly incurring the standard costs of legal errors.