4. Conclusion

To what extent courts have become a major policy-maker or pacifier of political conflicts still is controversial. Pogrebinschi claims that the perception that politics have moved away from the representative branches to the courts in Brazil is mistaken because a few aspects of the relationship between the legislature and the judiciary have been ignored. She points out that, proportionally, the Brazilian Supreme Court has struck down a diminished number of statutes and normative provisions. Only a few legislative acts are subject to judicial scrutiny, and the STF denies most constitutional challenges addressed to the Court. In addition, Congress has fulfilled its legislative role by reacting to the STF's decisions. When the STF strikes legislation down, most often the representative branches propose and enact new measures to address the decision of the Court. She concludes that judicial review has not led to a contentious relationship between the courts and the Congress; it has not undermined political representation but contributed to the improvement of legislation and policy-making.

The idea of empirically studying courts and politics is recent in Brazil. The book contributes to the interdisciplinary dialogue between law and political science, but a substantial understanding of the dynamics of adjudication and methodological improvements are necessary. Nevertheless, it has some misunderstandings about the reality of adjudication and legal interpretation, and methodological problems. Some maneuvers of the Court elude her quantitative analysis because they may look subtle and deferential but have relevant political consequences. In terms of the methodology, the author should have expanded the scope of her study to include other jurisdictional hypotheses, made comparisons, and adopted a more sophisticated statistical analysis to prove her point.

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Alberto F. Garay. *La doctrina del precedente en la Corte Suprema.* AbeledoPerrot, 2013. Pp. 417. Price: ARS 862. ISBN: 9789502025100.

In his foreword to *La doctrina del precedente en la Corte Suprema*, Alejandro Garro, an Argentine academic who teaches at Columbia Law School in New York, claims that this monograph by Alberto F. Garay is the first book in Spanish to examine in depth the doctrine of precedent. It is certainly safe to say that Garay's book is the first lengthy contribution to the analysis of the doctrine of precedent in Argentine law. As such, it is, for Argentina, an equivalent of sorts of Sir Rupert Cross's book *Precedent in English Law*. This statement is in itself no small compliment.

I shall start by making clear that Argentina does not fit easily in any jurisdictional box. It is generally thought to be a civil law jurisdiction.[1] The Argentine legal system's perceived affiliation with the civil law tradition is linked to its clear Spanish and French influence.[2] This influence is also noteworthy in the area of administrative law. Nevertheless, the constitutional law of Argentina differs from its private and administrative law since Argentine constitutional law is radically inspired by the Constitution of the United States of America.[3] Indeed, our original constitution was basically a copy of the American one. So it comes as no surprise that the Argentine Constitution provided for a federal judicial system much like that of the United States. Nowhere in the written document, however, is *stare decisis* mandated for the decisions of the courts of the Argentine judicial system.

1 *See* Viviana Kluger, *Argentina*, *in* The Oxford International Encyclopedia of Legal History (Stanley N. Katz ed. 2009) *available at* http://www.oxfordreference.com/view/10.1093/acref/9780195134056.001.0001/acref-9780195134056.

2 *See id.*

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

One could argue that the written constitutions of the countries of the common law world do not, by and large, mandate *stare decisis*; and *stare decisis* is nevertheless widely accepted in that world. A case in point is the Constitution of the United States of America—precisely the document that Argentina's founding fathers emulated. Given that Argentina was strongly influenced by the United States with regard to its own constitutional law, one should not be distracted by the absence of a specific clause on *stare decisis* in the written constitution. This absence might have been overridden by a certain deference traditionally granted to American judicial practices, probably because of the "American origin" of the Argentine judiciary. It is the main credit of Garay's book that it includes a detailed discussion of the Argentine system of precedent, a unique piece within the civil law world.

As the author himself points out in the introduction, the book is the result of many years of study and reflection. I still remember that, as I was finishing law school twenty-five years ago, I had the pleasure to read the first of Garay's law review articles on the problem of the binding force of judicial decisions in the Argentine legal system. In fact, and although I did not find a clear explication of this in the book, the monograph is to a large extent an amalgam of several of the author's previously published works. This is both its forte and its weakness—as is likewise true, by the way, of a person's virtues and vices. It is its forte, because the book is far from an exercise in improvization: it grew slowly and progressively from the inner conviction of the author regarding the topic, so that a day came, naturally, to put it all into one single vessel. It is its weakness, because such ventures, which unfold over the years, can only be perfect if all the traces of their varied origin in several pieces that later comprise the vessel are erased, which cannot be said of *La doctrina del precedente*. At times, one senses that this or that chapter is "older," or has been written in a slightly different tone; other times, there are some avoidable repetitions, which I understand, again, to be an almost unavoidable, unintended side effect of the disparate assortment. The book, it must also be added when it comes to weaknesses, contains an excessive amount of transcriptions of judicial decisions, sometimes in footnotes, which would perhaps be more justified in a casebook but not, in my view, in a monograph such as this one. A special instance of this apparent waste of paper is an eighty-page appendix containing cases, some of which are very easily accessible elsewhere.

More importantly, Garay's book makes a much-needed contribution to the debates in this part of the world. Following the longstanding tradition of Argentine jurists such as Julio C. Cueto Rúa, Genaro Carrió, and Julio Gottheil—forerunners of common law in Argentina—Garay begins by expounding the main legal traditions—a daunting but necessary preliminary to the rest of his enterprise. He goes on to explain how to read and to cite cases, something that it ought never to be taken for granted that your average civil lawyer will know. Along similar lines, the author teaches the reader how to find what matters in a given case and how to distinguish the ruling from *obiter dicta*. Garay offers examples, which is quite commendable (and here his transcriptions of cases are certainly justified). Throughout these initial chapters, Garay's experience as practitioner comes to the fore: it is clear that his vast experience as a litigator before the Argentine Supreme Court has equipped him in a way that befits the project of writing this book.

Chapter 7 deals with the key question around which the whole book revolves: To what extent is precedent binding in Argentina? Garay's position is clear: it should be binding to a much larger extent than it actually is in practice. He is highly critical of the prevailing practice of the Argentine Supreme Court, advocating for a return to the origins, when Argentine institutions were closer in form to their American counterparts. Garay's characteristic, acerbic wit shines more brightly (or more darkly one could say) in this chapter, one of the strengths of which is, on a different note, the acceptance of the distinction between the horizontal and vertical dimensions of precedent.

I should perhaps elaborate here on what the prevailing practice of precedent is at the

Argentine Supreme Court. I have labeled the Argentine system as the system of "soft obligation" in my own monographic contribution to Garay's topic.[4] Whereas in the United States there is an obligation to follow on point the decisions of higher courts of the same jurisdiction, in Argentina there is a soft obligation to do so. "Soft obligation" looks like an oxymoron but it summarizes the truth of the matter.[5] For even though there is no constitutional rule or custom providing for *stare decisis*, lower courts in Argentina—both federal and provincial[6]—look at the Argentine Supreme Court's decisions and, for the most part, follow them. Although lower courts agree that there is no constitutional obligation to follow higher precedent, it is indeed rare that a lower court would decide a case without first checking on the Supreme Court's view on the matter. And it is even rarer that a lower court would depart from that view—although on occasion it does.[7]

The Supreme Court itself reinforces this understanding of the Argentine judicial system. Although the Court has repeatedly asserted that there is no obligation for lower courts to follow its jurisprudence, this assertion is always accompanied with a warning: lower courts must not rebel against the authority of Supreme Court precedents; otherwise, their decisions shall be struck down.[8] In practice, this boils down to the notion that lower courts are bound to check on the Supreme Court's case law and are bound to follow its on point precedents. But if a given court finds good reason for departing from a supreme jurisprudence, it is entitled to do so. As per the prevailing doctrine of the Supreme Court for the last thirty years or so, a good reason is considered to exist when a lower court finds "new arguments" for deciding the case differently.[9] When this condition is met, the Supreme Court will likely uphold the lower court's decision if the ruling is judicially sound in light of the newly presented arguments.

Such a system of soft *stare decisis* is not really *stare decisis*;[10] and Garay's book fully stands behind this thesis (while simultane-

4 *See generally* Santiago Legarre, Obligatoriedad atenuada de la jurisprudencia de la Corte Suprema de Justicia de la Nación (2016).

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

6 Argentina is, at least in theory, a federal system much like the United States: its "provincias" are similar to states. They have, therefore, courts of their own: provincial courts. Furthermore, unlike state courts in the United States, these provincial courts apply some national law, as explained in Santiago Legarre, *A Departure from the Rationale Behind the American System in the Argentine Constitution*, 16 Rechtsgeschichte, Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte 85, 86–87 (2010).

7 *See* Julio C. Rivera Jr. & Santiago Legarre, *La obligatoriedad de los fallos de la Corte Suprema de Justicia de la Nación desde la perspectiva de los tribunales inferiores*, *in* La Primacía de la persona 1109 (Jaime Arancibia Mattar & José Ignacio Martínez Estay eds., 2009) (explaining this issue at length and with more nuances).

8 Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 6.10.1948, Santín, Jacinto c. Impuestos Internos (recurso extraordinario), Fallos de la Corte [Fallos] 1948-212-51, 59 (Arg.).

9 On this question, the following case is emblematic and it has been consistently followed, at least in theory: Corte Suprema de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 4.7.1985, Cerámica San Lorenzo s. incidente de prescripción (recurso extraordinario), Fallos de la Corte [Fallos] 1985-307-1094 (Arg.).

10 Garro is of a similar view. *See* Alejandro M. Garro, *Eficacia y autoridad del precedente constitucional en América latina: las lecciones del Derecho Comparado*, 1 Revista Jurídica de Buenos Aires 22, 23 [1989] (Arg.). But the view that I share with Garro (and, of course, with Garay) is far from unanimous. Respected Argentine scholars think that, at the level of the Supreme Court, our system is substantially identical to *stare decisis*. *See, e.g.*, Germán Bidart Campos, II-B Tratado elemental de derecho constitucional 561 (3d ed. 2004); Néstor Pedro Sagüés, *Eficacia vinculante o no vinculante de la jurisprudencia de la Corte Suprema de Justicia de la Nación*, 93 El Derecho 891, 892 (1981) (Arg.); Alberto B. Bianchi, 1 Control de constitucionalidad 353 (2d ed. 2002).

ously suggesting reform, in favor of a system of stronger precedential force). With true *stare decisis*, a lower court could not legally depart from a prior on point precedent by claiming the existence of "new arguments." Instead, it is up to the higher court itself to consider whether those new arguments merit that its own precedent be overruled. At the same time, a system of soft vertical *stare decisis*, such as the Argentine system, differs from the typical civil law system. In the Argentine system, lower courts treat decisions of the Supreme Court as generating a *prima facie* obligation to obey; and the Supreme Court accepts the existence of this *prima facie* obligation. This is true despite the fact that the Supreme Court may release a lower court from that obligation when the lower court finds "new arguments" that call for a departure from a given precedent. I must note that the idea of "new arguments" is different from the common law idea of "distinguishing." Whereas the latter has to do with facts (and factual differences), "new arguments" have to do with law (and differences of legal interpretation).

Anyone who studies constitutional law in Argentina—teacher, student, lawyer—now owes a debt of gratitude to the author of *La doctrina del precedente en la Corte Suprema*. Hopefully in another twenty-five years he might delight us with a compilation of fresh reflections on the topic. It would be a good opportunity to measure the practical and institutional impact of a book whose clear ambition is to change significantly, and for the better, the Argentine judicial world.

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Santiago Legarre. *Obligatoriedad atenuada de la jurisprudencia de la Corte Suprema de Justicia de la Nación.* Ábaco, 2016. Pp. 198. ARS 410.00. ISBN: 9789505693047.

Santiago Legarre has devoted ten years of his academic career to studying both the *stare decisis* in the common-law system and what could be the "Argentine version" of the *stare decisis*, in the way it is exercised by the Argentine Supreme Court.

As a result of his research, Legarre has published several articles and essays that, in consolidated and updated versions, he now offers to us compiled in a book entitled *Obligatoriedad atenuada de la jurisprudencia de la Corte Suprema de Justicia de la Nación*, which translates to *The Mitigated Binding Force of the National Supreme Court's Jurisprudence*.

Both the title and the opening words of the book imply the author's conclusion on the issue. In his opinion, in the Argentine legal system there is no doctrine that could be regarded as a true "precedent," at least not in the way it is understood in common-law countries. Santiago Legarre argues that the Argentine legal system has a doctrine different from, but related to, the *stare decisis* doctrine of the common-law tradition. In Argentina, the binding force of the precedent is "mitigated" and must be subject to the same enabling requirements of the *stare decisis*.

It is not my intention to summarize the book in detail. I believe that the reader of this brief review will find an outline and a critique of its main arguments more useful.

My first observation is that, although the book is focused mainly on what I would call, with no disrespect, the "Argentine version of the *stare decisis*," the author has deemed it necessary to dedicate a good portion of the book to analyzing the quorum and majority rules applied by the Supreme Court in order to deliver a valid decision. According to Legarre, quorum and majority rules are the "enabling requirements" of the binding force of the rulings and, based on these enabling requirements, the author addresses this issue on the