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CONSTITUTIONAL PRECEDENTS IN JAPAN: A COMMENT ON THE ROLE OF PRECEDENT

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INTRODUCTION

Japan is a civil law country, and the precedent of the Supreme Court is not binding on either the Supreme Court itself or lower courts. Judges are supposed to return to the text of the statute for each legal dispute and apply the rules to specific cases. Judicial decisions are not "law" to be applied by the courts.[1]

Despite this assumption, judges have followed the precedent of the Supreme Court most of the time. The Supreme Court will follow its precedent in normal situations, and the lower courts will usually follow the precedent of the Supreme Court as well. Thus, although the precedents are not legally binding, they have a de facto binding power.[2]

In this Comment, I will focus on constitutional law precedents to illustrate the Supreme Court of Japan's approach toward its own precedent.[3] As Professor Itoh pointed out in his Article, the theory of precedent may be a convenient measure to justify or rationalize the outcome the Supreme Court has already reached.[4] Yet, precedent plays a very important role in constitutional adjudication, constraining the decision making of the Supreme Court.

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1. NOBUYOSHI ASHIBE, KENPŌ [CONSTITUTION] 374 (4th ed. 2007); TOSHIHIKO NONAKA, MUTSUO NAKAMURA, KAZUYUKI TAKAHASHI & KATSUTOSHI TAKAMI, KENPŌ I [CONSTITUTION I] 13 (4th ed. 1996); HIDEKI SHIBUTANI, KENPŌ [CONSTITUTION] 666 (2007); MIYOKO TSUJIMURA, KENPŌ [CONSTITUTION] 17 (3d ed. 2008); NORIHO URABE, KENPŌGAKU KYOUSHITU [STUDIES ON THE CONSTITUTION] 327–28 (rev. ed. 2000).

2. Some commentators argue that, given the ambiguity of the de facto binding effect, it is better to acknowledge that precedents are legally binding in Japan. KOUJI SATŌ, KENPŌ [CONSTITUTION] 27 (3d ed. 1995); HIDENORI TOMATSU, KENPŌ SOSHŌ [CONSTITUTIONAL LITIGATION] 398–401 (2d ed. 2008). However, many disagree, especially with respect to the binding effect upon lower courts, since the Japanese Supreme Court has the power to nominate lower court judges for reappointment and practically controls them. YOUICHI HIGUCHI, KENPŌ I [CONSTITUTION I] 510 (1998).

3. According to the Saibanshohō [Judiciary Act], Law No. 59 of 1947, art. 10, only the grand bench can make a judgment inconsistent with the previous judgment of the Supreme Court in its "interpretation and application of the Constitution" and other statutes. As a result, the petty bench cannot overturn the precedent of the Supreme Court.

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

A. Precedents of the Supreme Court

The precedents of the Supreme Court are tremendous authority for later Supreme Court inquiries. After the Supreme Court established the "purpose and effect test" to determine the permissibility of government involvement with Shinto under the separation of state and religion principle in the *Tsu City Ground-breaking Ceremony Case*,[5] for instance, the Supreme Court has consistently applied this purpose and effect test in subsequent cases.

Article 20 of the Japanese Constitution provides for the principle of separation of state and religion in addition to protecting freedom of religion. At issue in the *Tsu City Ground-breaking Ceremony Case* was the constitutionality of the city's hosting and using public funds for a ground-breaking ceremony by a Shinto priest in accordance with the Shinto ceremony style. The Supreme Court held that government involvement with religion that has either a purpose of advancing the religion or an effect of promoting the religion is precluded by the Constitution[6] It then concluded that hosting the ground-breaking ceremony and paying public money was not a constitutional violation because the ground-breaking ceremony was commonly practiced before construction.[7] The ceremony had neither the purpose nor effect of promoting Shinto.[8]

The Supreme Court later cited the *Tsu City Ground-breaking Ceremony Case* precedent and applied the purpose and effect test in subsequent cases. In one case, the Supreme Court held that the participation of Self-Defense Force (SDF) officers in the joint enshrinement of a deceased SDF officer at the Shinto shrine, despite opposition from the deceased's wife, did not have the purpose or effect of promoting or advancing Shinto.[9] In another case, the Supreme Court held that using public funds to move a memorial stone enshrining deceased soldiers, providing property for free use, and allowing the participation of school officials in the annual memorial service held at the memorial stone did not have the purpose or effect of promoting or advancing Shinto.[10] The

5. Saikō Saibansho [Sup. Ct.] July 13, 1977, Sho 46 (gyo-tsu) no. 69, 31 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 533 (grand bench).

6. *Id.*

7. *Id.*

8. *Id.*

9. Saikō Saibansho [Sup. Ct.] June 1, 1988, Sho 57 (0) no. 902, 42 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 277 (grand bench).

10. Saikō Saibansho [Sup. Ct.] Feb. 16, 1993, Sho 62 (gyo-tsu) no. 148, 47 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1687 (3d petty bench).

Supreme Court also held that providing a public subsidy to the local chapter of War Bereaved Association, an association of families of deceased soldiers that hosted the annual memorial service at the memorial stone, did not have the purpose or effect of advancing or promoting Shinto.[11] However, it was only in the *Ehime Tamagushi Case*[12] that the Supreme Court applied the purpose and effect test and concluded that the mandate of separation of state and religion had been violated. In that case, the Supreme Court found that the public spending for *tamagushi*—a twig of the sakaki tree wrapped with folded white paper, which is a religious offering to the Shinto shrine—had a deeper involvement with Shinto such that it had the effect of promoting Shinto by providing the impression that the Shinto shrine is special.[13]

These cases vividly show the impact of Supreme Court precedent upon later Supreme Court decisions. Of the four seperation of state and religion cases following the *Tsu City Ground-breaking Ceremony Case* examined above, all were decided using its precedential purpose and effect test, and three of the four resulted in the same outcome. Clearly, the Supreme Court is likely to follow its precedent if any precedent can be found.

B. Blindly Following the Precedents?

However, since the principle of stare decisis is not accepted in Japan, judges tend to make no sharp distinction between ratio decidendi and obiter dicta. Moreover, judges tend to simply follow the precedent without inquiring into the specific fact situations that led to the creation of the precedent. In other words, judges have a tendency to ignore the factual differences between the case that created the precedent and the case before them.

An example is the *Gifu Prefecture Youth Ordinance Case*.[14] At issue was the constitutionality of the Gifu Prefecture Youth Protection

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11. Saikō Saibansho [Sup. Ct.] Oct. 21, 1999, Hei 7 (gyo-tsu) no. 122, 1696 HANREI JIHŌ [HANJI] 96 (1st petty bench).

12. Saikō Saibansho [Sup. Ct.] Apr. 2, 1997, Hei 4 (gyo-tsu) no. 56, 51 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1673 (grand bench).

13. *Id.* Later, in the *Sorachibuto Shrine Case*, the Supreme Court held that providing public land for free use by the Shinto Shrine was a violation of the separation of state and religion, but it applied the totality of the circumstances test instead of the purpose and effect test. Saikō Saibansho [Sup. Ct.] Jan. 20, 2010, Hei 19 (gyo-tsu) no. 260, 64 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1 (grand bench). The Supreme Court did not explain why it did not apply the purpose and effect test and thus raised some speculation as to the future of the purpose and effect test.

14. Saikō Saibansho [Sup. Ct.] Sept. 19, 1989, Sho 62 (A) no. 1462, 43 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 785 (3d petty bench).

Ordinance, which banned the use of vending machines to sell books and magazines found to be harmful for minors. The ordinance listed books and magazines that were either sexually explicit or extremely brutal and were harmful for the healthy development of minors, and it prohibited their distribution if they were found to be harmful by the governor or if they fell into a prohibited category. The defendant company was prosecuted for violating this ordinance and challenged its conviction as an infringement of the freedom of expression protected in Article 21, paragraph 1 of the Constitution, and as a violation of the prohibition on censorship in Article 21, paragraph 2. The Supreme Court rejected the defendant's challenge with the following holding:

> Among the arguments made by respondent counsel Manabu Yamaguchi and counsel Kouji Iguchi, with respect to argument on appeal on violation of article 21, paragraph 1 of the Constitution, since it is apparent that the ban on selling books harmful to minors under article 6, paragraph 2, article 6-6, paragraph 1, main text, article 21, paragraph 5 of the Gifu Prefecture Youth Protection Ordinance (hereinafter cited as said ordinance) does not violate article 21, paragraph 1 of the Constitution in light of each of our grand bench precedents (Supreme Court, March 13, 1957, 11 KEISHŪ 997; Supreme Court, October 15, 1969, 23 KEISHŪ 1239; Supreme Court, October 23, 1985, 39 KEISHŪ 413), the argument has no merit. With respect to argument on violation of article 21, paragraph 2, of the Constitution, since it is apparent that the designation of books as harmful to minors under the said ordinance is not a prohibited censorship under that paragraph in light of each of our grand bench precedents (Supreme Court, December 12, 1984, 38 MINSHŪ 1308; Supreme Court, June 11, 1986, 40 MINSHŪ 872), the argument has no merit . . . .[15]

However, among the three cases cited as precedent to reject the argument that the ban violated Article 21, paragraph 1, the first two were concerned with the ban on distribution of obscenity under the Criminal Code,[16] and the third was concerned with the criminal punishment for sexual intercourse with minors under a local youth protection ordinance.[17] None

15. *Id.*

16. Saikō Saibansho [Sup. Ct.] Mar. 13, 1957, Sho 28 (A) no. 1713, 11 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 997 (grand bench); Saikō Saibansho [Sup. Ct.] Oct. 15, 1969, Sho 39 (A) no. 305, 23 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1239 (grand bench).

17. Saikō Saibansho [Sup. Ct.] Oct. 23, 1985, Sho 57 (A) no. 621, 39 SAIKŌ SAIBANSHO KEIJI

of these was concerned with the criminal ban on materials found to be harmful to minors. Two cases were also cited as precedent to reject the argument that the ban violated Article 21, paragraph 2, but the first was concerned with the customs regulation banning importation of obscene materials,[18] and the other was concerned with judicial injunctions against publication of materials found to be defamatory.[19] Neither of these was concerned with the power of the governor to designate certain materials as harmful to minors and to prohibit their distribution to minors. Nor were any of the precedents concerned with the criminal punishment of a defendant who violated the ban on distribution of materials designated by the governor to be harmful to minors.

The *Gifu Prefecture Youth Ordinance Case* holding indicates that the Supreme Court has a tendency to rely upon precedent regardless of differences in fact situations. In other words, precedent in Japan tends to be viewed as a general framework, separated from specific fact situations. Since the precedents are not binding, there is no urgent legal necessity to distinguish ratio decidendi from obiter dicta. But because of the Japanese judges' de facto reliance on precedent, the tendency to rely upon precedent despite the factual differences might give more authoritativeness to the precedent.

C. Overruling the Precedents without Explaining Why

The Supreme Court sometimes explicitly overturns precedent. In such cases, the Supreme Court usually does not explain why overruling precedent was necessary, except to express the reasons that the Supreme Court now believes in a different conclusion.

For example, the Supreme Court overturned its precedent in the *Confiscation of the Third Party Property Case*[20] by holding that the defendant could challenge the constitutionality of the government's confiscation of property, which the defendant possessed but was owned by a third party, without affording an opportunity for a hearing with the third-party owner. In a previous decision,[21] the Supreme Court held that

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HANREISHŪ [KEISHŪ] 413 (grand bench).

18. Saikō Saibansho [Sup. Ct.] Dec. 12, 1984, Sho 57 (gyo-tsu) no. 156, 38 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1308 (grand bench).

19. Saikō Saibansho [Sup. Ct.] June 11, 1986, Sho 56 (O) no. 609, 40 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 872 (grand bench)

20. Saikō Saibansho [Sup. Ct.] Nov. 28, 1962, Sho 30 (A) no. 2961, 16 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1593 (grand bench).

21. Saikō Saibansho [Sup. Ct.] Oct. 19, 1960, Sho 28 (A) no. 3026, 14 SAIKŌ SAIBANSHO KEIJI

defendants should not be allowed to invoke the infringement of the rights of a third party to challenge the constitutionality of government action. In the subsequent case, the Supreme Court emphasized, however, that when confiscation was imposed upon the defendant, it deprived him of the right to occupy the property and put him in the position of being held liable for damages to the third party, thus justifying the defendant's ability to challenge the confiscation order.[22] The Supreme Court thus explicitly overruled its precedent.[23] The Supreme Court never explained why it was justified in overruling the precedent.

The Supreme Court also overturned its precedent in the *Parricide Case*[24] by holding that the parricide provision of the Criminal Code, which imposed a heavier penalty against parricide than regular homicide, was unconstitutional. The Criminal Code imposed a term of imprisonment of no less than three years and up to life imprisonment or the death penalty for defendants convicted of regular homicide,[25] while imposing only life imprisonment or the death penalty for defendants convicted of parricide.[26] The sentencing judge can choose a specific sentence from these options. If there were strong mitigating factors, the judge can impose a sentence of imprisonment for a term of not more than three years, and the judge can suspend the enforcement of the imprisonment sentence.[27] A defendant convicted of regular homicide thus may not have to go to jail. But with respect to a defendant convicted for parricide, the judge cannot choose a sentence of imprisonment for a term of not more than three years no matter what mitigating factors may exist. A defendant convicted of parricide thus must go to jail regardless of mitigating factors. In its previous decisions,[28] the Supreme Court rejected this constitutional challenge. Yet, in this case, the majority of the Supreme Court came to believe that the penalty imposed on parricide was unreasonably heavier than the penalty imposed on regular homicide, since the penalty would not allow for a suspension in the enforcement of the sentence regardless of

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HANREISHŪ [KEISHŪ] 1574 (grand bench).

22. Saikō Saibansho [Sup. Ct.] Nov. 28, 1962, Sho 30 (A) no. 2961, 16 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1593 (grand bench).

23. *Id.*

24. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Sho 45 (A) no. 1310, 27 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 265 (grand bench).

25. KEIHŌ [PEN. C.], art. 199 (amended in 2004 to impose death sentence, life imprisonment, or imprisonment for no less than five years).

26. *Id.* art. 200 (deleted in 1995).

27. *Id.* art. 25, para. 1.

28. *See, e.g.*, Saikō Saibansho [Sup. Ct.] Oct. 25, 1950, Sho 25 (A) no. 292, 4 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 2126 (grand bench).

whether there were significant mitigating factors.[29] The Supreme Court thus explicitly overturned its precedent.[30]

In the *Parricide Case*, the Supreme Court listed several reasons for reconsideration of the issue: the earlier case that upheld the provision indicated a concern that this provision might be too harsh; the Supreme Court had denied its application when there were mitigating circumstances; this provision, enacted before the Japanese Constitution, served the philosophical goal of securing respect for parents by imposing heavier criminal punishment, a tradition which came to be rejected in many countries; and this provision was not included in the new draft of the Criminal Code.[31] These are the reasons why the Supreme Court came to believe it was necessary to give a fresh look at the issue and to come up with a new constitutional rule.

D. Implicitly Overruling?

Sometimes, the Supreme Court makes a judgment inconsistent with its precedent, thereby implicitly overturning it. Such was the *Tokyo Public Safety Ordinance Case*.[32] Prior to this judgment, the Supreme Court upheld the Niigata Prefecture Public Safety Ordinance against an allegation of infringement of the freedom of expression in the *Niigata Prefecture Public Safety Ordinance Case*.[33] The Supreme Court held that an advance notification requirement for a public demonstration, as opposed to a general permit requirement, could be justified and that the government should be allowed to prohibit a demonstration if there was a clear and present danger to public safety.[34] Yet, in the *Tokyo Public Safety Ordinance Case*, the Supreme Court held that the Tokyo Public Safety Ordinance was constitutional, even though it was a comprehensive advance permit requirement.[35] The Supreme Court held that the advance permit requirement was not much different than the advance notification requirement and that the government should be allowed to prohibit the

29. Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, Sho 45 (A) no. 1310, 27 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 265 (grand bench).

30. *Id.*

31. *Id.*

32. Saikō Saibansho [Sup. Ct.] July 20, 1960, Sho 35 (A) no. 112, 14 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1243 (grand bench).

33. Saikō Saibansho [Sup. Ct.] Nov. 24, 1954, Sho 26 (A) no. 3188, 8 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1866 (grand bench).

34. *Id.*

35. Saikō Saibansho [Sup. Ct.] July 20, 1960, Sho 35 (A) no. 112, 14 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1243 (grand bench).

demonstration if there was a danger that the public safety might be disturbed, since a demonstration is always capable of turning into a riot.[36] The Supreme Court never mentioned the *Niigata Prefecture Public Safety Ordinance Case*, but it was apparent that the Supreme Court implicitly overturned the precedent. This decision failed to justify the practical overruling of the precedent.

The Supreme Court sometimes gives a new interpretation to precedent and, in so doing, implicitly overrules the precedent. The *Overseas Voters Case*[37] is a typical case. It was settled in the previous *Voting at Home Case*[38] that the public could seek damages against the government if a statute was found to be unconstitutional. The action of the Diet is a government action that could trigger governmental liability.[39] The question was when damages could be recovered. The *Voting at Home Case* held that damages would be awarded only when the Diet violated the unequivocal language of the Constitution, a highly exceptional situation that is hard to imagine.[40] The Supreme Court then concluded that abolishing and failing to reinstate a voting system that had allowed seriously disabled voters to cast votes at home was not a sufficiently blatant violation of the unequivocal language of the Constitution to permit a recovery of damages.[41] Lawyers and academics believed that this holding practically precluded the public from seeking damages against the government because of the conduct of the Diet.[42] In the *Overseas Voters Case*, the Diet failed to provide the opportunity for voters living abroad to vote; these voters did not have local addresses and were totally excluded from voting before 1998. The 1998 amendment gave them an opportunity to participate in proportional representation elections, but they were still excluded from voting in election districts. The Supreme Court held that the total exclusion of overseas voters from the election before 1998 and their exclusion from district elections after 1998 were both unconstitutional.[43] Then, the Supreme Court granted a damages award to

36. *Id*.

37. Saikō Saibansho [Sup. Ct.] Sept. 14, 2005, Hei 13 (gyo-tsu) no. 82, 59 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2087 (grand bench).

38. Saikō Saibansho [Sup. Ct.] Nov. 21, 1985, Sho 53 (0) no. 1240, 39 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1512 (1st petty bench).

39. *Id*.

40. *Id*.

41. *Id*.

42. ASHIBE, *supra* note 1, at 369 (criticizing the Supreme Court as practically precluding the possibility of reviewing the constitutionality of the inaction of the Diet); TOMATSU, *supra* note 2, at 156.

43. Saikō Saibansho [Sup. Ct.] Sept. 14, 2005, Hei 13 (gyo-tsu) no. 82, 59 SAIKŌ SAIBANSHO

all the plaintiffs, overseas voters, insisting that the damages award should be granted when the Diet's conduct is an apparent violation of constitutional rights or when the Diet fails to pass legislative measures necessary to secure the exercise of constitutional rights without justification for a long time where such measures are indispensable.[44] The Supreme Court then added that the thrust of the *Voting at Home Case* was not different from this holding.[45] The Supreme Court thereby radically reinterpreted, and practically overruled, its precedent to expand the scope of cases where damages may be recovered.

E. Overruling Due to Mere Change in the Composition of the Supreme Court?

The overruling in the *All Forest and Agricultural Public Workers, Police Office Act Amendment Opposition Case*[46] is more controversial. In Japan, all public workers, regardless of the nature of their jobs or their ranks, are prohibited from striking,[47] despite the constitutional guarantee of the right to strike in Article 28 of the Constitution. There is also criminal punishment for those who conspire, solicit, advocate, or plan such an illegal strike.[48] The earlier *All Postal Workers, Tokyo Central Post Office Case*[49] involved the criminal prosecution of union leaders of postal workers, who were public corporation workers, for soliciting an illegal strike. With respect to public corporation workers, the Public Corporation and State Managed Company Workers Labor Relation Act used to have a prohibition against strikes,[50] but no criminal punishment was imposed on

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MINJI HANREISHŪ [MINSHŪ] 2087 (grand bench).

44. *Id.*

45. *Id.*

46. Saikō Saibansho [Sup. Ct.] Apr. 25, 1973, Sho 43 (A) no. 2780, 27 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 547 (grand bench).

47. Kokka kōmuinhō [National Public Workers Act], Law No. 120 of 1947, art. 98, para. 2; Chihō kōmuinhō [Local Public Workers Act], Law No. 261 of 1950, art. 37.

48. Kokka kōmuinhō [National Public Workers Act], Law No. 120 of 1947, art. 110, para. 17; Chihō kōmuinhō [Local Public Workers Act], Law No. 261 of 1950, art. 61, para. 4.

49. Saikō Saibansho [Sup. Ct.] Oct. 26, 1966, Sho 39 (A) no. 296, 20 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 901 (grand bench).

50. Kōkyōkigyōtaitō rōdōkankeihō [Public Corporation and State Managed Company Workers Labor Relations Act], Law No. 257 of 1948, art. 17. This statute was originally enacted as Kōkyōkigyōtai rōdōkankeihō [State Managed Company Workers Labor Relations Act] in 1948. In 1986, it was renamed as Kokueikigyō rōdōkankeihō [State Managed Company Workers Labor Relations Act]. In 2001, it was again renamed as Kokueikigyō oyobi tokutei dokuritsugyoseihōjin no rōdōkankei nikansuru hōritsu [Act Concerning Labor Relations in State Managed Company and Specified Independent Administrative Corporation], and in 2003 it became Tokutei

those who organized a strike. The government thus decided to impose criminal punishment on those union organizers under the Postal Act, which prohibited the refusal to perform post service.[51] In that case, the Supreme Court held that the right to strike could only be deprived after balancing the protection of the rights of public workers and the necessity of protecting the public.[52] The Supreme Court also held that criminal penalties should be minimized, allowing for punishment of the union leaders who solicited the illegal strike only when their strike was not for a legitimate purpose, when the strike was accompanied with violence, or when the strike was continued for an improperly long time.[53] This holding was praised for its sensitive attitude toward the rights of public workers.[54] The Supreme Court applied this holding to local public workers[55] and then to national public workers[56] as well.

Yet, seven years later, in the *All Agricultural and Forest Workers, Police Office Act Amendment Opposition Case*, the Supreme Court radically changed its attitude. In this case, the leaders of All Agricultural and Forest Workers, a union of the national public workers, were prosecuted for soliciting an illegal strike under the National Public Workers Act. The Supreme Court held that the strike by the public workers was inconsistent with the status and public nature of their jobs and might seriously impact the public by suspending public services.[57] The Supreme Court also held that the strike by the public workers undermined the principle of representative government since it could force the legislature to address the employment relationship under pressure.[58] The Supreme Court rejected the limiting construction on the criminal punishment for the solicitation of illegal strikes and concluded that union leaders could be punished.[59] The Supreme Court thus overturned the precedent that followed the *All Postal Workers, Tokyo Central Post Office*

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dokuritsugyoseihōjinno no rōdōkankei nikansuru hōritsu [Act on Labor Relationship of Specified Independent Administrative Corporation].

51. Yūbinhō [Postal Act], Law No. 165 of 1947, art. 79, para. 1.

52. Saikō Saibansho [Sup. Ct.] Oct. 26, 1966, Sho 39 (A) no. 296, 20 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 901 (grand bench)

53. *Id.*

54. ASHIBE, *supra* note 1, at 263; TSUJIMURA, *supra* note 1, at 320.

55. Saikō Saibansho [Sup. Ct.] Apr. 2, 1969, Sho 41 (A) no. 401, 23 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 305 (grand bench).

56. Saikō Saibansho [Sup. Ct.] Apr. 2, 1969, Sho 41 (A) no. 1129, 23 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 685 (grand bench).

57. Saikō Saibansho [Sup. Ct.] Apr. 25, 1973 Sho 43 (A) no. 2780, 27 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 547 (grand bench).

58. *Id.*

59. *Id.*

Case and gave a limiting construction to the National Public Workers Act,[60] while practically overturning the *All Postal Workers, Tokyo Central Post Office Case* decision. Later, the Supreme Court applied its new ruling to local public workers[61] and then to public corporation workers,[62] explicitly overturning the *All Postal Workers, Tokyo Central Post Office Case.*

Since the purpose of the strike in the *All Agricultural and Forest Workers, Police Office Act Amendment Opposition Case* was to oppose an amendment to the Police Office Act, which is not related to employee welfare, criminally punishing the leaders was not precluded under the framework of the *All Postal Workers, Tokyo Central Post Office Case*. Yet, the fact that the Supreme Court went on to both reexamine the whole framework and to implicitly overturn the holding suggested the adoption of a totally different constitutional jurisprudence by the new majority. Minority Justices in the *All Agricultural and Forest Workers, Police Office Act Amendment Opposition Case* strongly criticized the practical overruling of the *All Postal Workers, Tokyo Central Post Office Case* as unnecessary and pointed out that the majority opinion was nothing but the minority position rejected by the Supreme Court in that decision. This strongly suggests that the overruling was a result of a mere change in the composition of the Supreme Court.[63] It is apparent that this overruling was the result of strong criticism from conservative politicians in the ruling party in the Diet and the change in the composition of the Supreme Court that resulted from these criticisms. Academic commentators generally sided with the minority and criticized the Supreme Court for its overruling of the *All Postal Workers, Tokyo Central Post Office Case*.[64]

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60. *Id.*, *overruling* Saikō Saibansho [Sup. Ct.] Apr. 2, 1969, Sho 41 (A) no. 401, 23 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 305 (grand bench).

61. Saikō Saibansho [Sup. Ct.] May 21, 1976, Sho 44 (A) no. 1275, 30 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1178 (grand bench).

62. Saikō Saibansho [Sup. Ct.] May 4, 1977, Sho 44 (A) no. 2571, 31 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 182 (grand bench).

63. *Id.* (Jiro Tanaka, J., opinion).

64. TOMATSU, *supra* note 2, at 371, 372; TSUJIMURA, *supra* note 1, at 322.

CONCLUSION

As Professor Itoh noted in his Article, respect for precedent might be viewed as "another means by which the judiciary attempts to justify and rationalize conclusions prestructured by its deeply ingrained attitudes."[65] The Supreme Court follows its precedent when it is satisfied with it, but the Supreme Court is willing to modify or overturn precedent when it finds itself dissatisfied with it. There is no feeling among Justices that they have to follow precedent, even when they are somewhat unhappy with it, so long as there is no compelling reason for changing it. Yet, precedent does play a very significant role in constitutional adjudication even though it is not legally binding. When the Supreme Court overrules its precedent, it at least has to persuasively explain why it has overturned its precedent. Otherwise, the Supreme Court might face strong criticism from dissenters and academic commentators. To that extent, precedents constrain the Supreme Court.[66]

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65. Itoh, *supra* note 4, at1666. Political scientists generally point out that precedent does not have a strong impact upon the outcome of a decision. *See generally* Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971 (1996). Relying upon these works, Frederick Schauer argues that precedent rarely matters in the Supreme Court of the United States. Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 392 (2007). However, William A. Edmundson criticizes Schauer as exaggerating the lack of impact. William A. Edmundson, *Schauer on Precedent in the U.S. Supreme Court*, 24 GA. ST. U. L. REV. 403 (2007). I tend to share the view of Professor Edmundson. *See also* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2006). *But see* Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165 (2008) (arguing for the overruling of the current doctrine of stare decisis). To what extent the Supreme Court should give respect to precedent is a different matter. *See generally* Tom Hardy, *Has Mighty* Casey *Struck Out?: Societal Reliance and the Supreme Court's Modern Stare Decisis Analysis*, 34 HASTINGS CONST. L.Q. 4 (2007) (supporting the court's consideration of societal reliance in considering whether to follow precedents); Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411 (2010) (proposing to reformulate stare decisis by directly focusing on reliance interest).

66. I share a view that it is better to acknowledge that the precedents of the Supreme Court are legally binding in Japan. SHIGENORI MATSUI, NIHONKOKU KENPŌ [JAPANESE CONSTITUTION] 33 (3d ed. 2007). After all, respect for precedents is indispensable in any society that adheres to the rule of law. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992). Moreover, it is frequently suggested that the binding power of the constitutional precedents is not strong, even in the United States. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–07 (1932) (Brandeis, J., dissenting). There is no critical difference in the practical effect of the precedents between the United States and Japan.