

disrespectful, to treat it as not having yet quite established a settled doctrine for the country."¹⁰²

There is already some evidence that Congress has been less restrained in overruling the pronouncements of the Court. Between 1982 and 1986, Congress overruled at least twenty-three Supreme Court decisions—half within two years of the date of the decision.¹⁰³ These enactments cover a wide range of decisions. For example, in three separate instances, Congress directly overruled Court decisions concerning state and local liability under federal acts.¹⁰⁴ In addition, Congress has either passed or is presently considering five bills overruling Court decisions that ease limitations on prosecutions and sentencing.¹⁰⁵ In all, Congress

102. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1848-1858, at 401 (R. Basler ed. 1953).

103. *INS v. Phinpathya*, 464 U.S. 183 (1984), overruled by Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 315(b), 100 Stat. 3359, 3439-40; *Block v. North Dakota*, 461 U.S. 273 (1983), overruled by Act of Nov. 4, 1986, Pub. L. No. 99-598, 100 Stat. 3351; *United States v. New York Tel. Co.*, 434 U.S. 159, 166-68 (1977), overruled by Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 301, 100 Stat. 1848, 1868-72; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), overruled by Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845; *Smith v. Robinson*, 468 U.S. 992 (1984), overruled by Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796; *Lambert Run Coal Co. v. Baltimore & O.R.R.*, 258 U.S. 377 (1922), overruled by Judicial Improvement Act of 1985, Pub. L. No. 99-336, § 3, 100 Stat. 633, 637 (1986); *California v. Nevada*, 447 U.S. 125 (1980), overruled by Act of Dec. 23, 1985, Pub. L. No. 99-200, 99 Stat. 1663; *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972), overruled by Patent Law Amendments Act of 1984, Pub. L. No. 98-622, 98 Stat. 3383; *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), and *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), overruled by Act of Oct. 24, 1984, Pub. L. No. 98-544, 98 Stat. 2750; *Basic v. United States*, 446 U.S. 398 (1980), and *Simpson v. United States*, 435 U.S. 6 (1978), overruled by Department of Interior and Related Agencies Appropriations Act, Pub. L. No. 98-473, § 1004, 98 Stat. 1837, 2138-39 (1984); *Washington Metro. Area Transit Auth. v. Johnson*, 467 U.S. 925 (1984), overruled by Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 4, 98 Stat. 1639, 1641; *Diedrich v. Commissioner*, 457 U.S. 191 (1982), overruled by Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 1026, 98 Stat. 494, 1031; *United States v. Davis*, 370 U.S. 65 (1962), overruled by Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 421, 98 Stat. 494, 793-95; *Commissioner v. Standard Life & Accident Ins. Co.*, 433 U.S. 148 (1977), overruled by Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 211(a), 98 Stat. 494, 740-41; *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), overruled by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541, 98 Stat. 333, 390-91; *Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), overruled by Shipping Act of 1984, Pub. L. No. 98-237, § 7, 98 Stat. 67, 73-74; *Rowan Cos. v. United States*, 452 U.S. 247 (1981), overruled by Social Security Amendments of 1983, Pub. L. No. 98-21, § 327, 97 Stat. 65, 126-27; *Standard Oil Co. of Cal. v. Agsalud*, 454 U.S. 801 (1981), overruled by Act of Jan. 14, 1983, Pub. L. No. 97-473, § 301, 96 Stat. 2605, 2611-12; *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), overruled by Act of Dec. 29, 1982, Pub. L. No. 97-393, 96 Stat. 1964; *McCarty v. McCarty*, 453 U.S. 210 (1981), overruled by Department of Defense Authorization Act, Pub. L. No. 97-252, § 1002, 96 Stat. 718, 730-35 (1982); *City of Mobile v. Bolden*, 446 U.S. 35 (1980), overruled by Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134.

104. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

105. See H.R. 5269, 101st Cong., 2d Sess. (1990) (Racial Justice Act); 136 CONG. REC. H9001,

overruled more than twice as many decisions in the first four years after President Reagan's first appointment to the Supreme Court than in the entire decade preceding his election.¹⁰⁶ Although there has been no suggestion that the Court's rulings in all these cases were politically motivated, the accelerated pace of overrulings may reflect a dangerous view on the part of Congress that even proper pronouncements of the Court are entitled to less respect.

CONCLUSION

The risks of constitutional quibbling have been recognized for more than a century. In 1883, Justice Harlan complained about the Supreme Court proceeding "upon grounds entirely too narrow and artificial [sacrificing] the substance and spirit of the . . . amendments of the Constitution . . . by a subtle and ingenious verbal criticism."¹⁰⁷ Around the turn of the century, Dean Roscoe Pound asserted that the laissez-faire judiciary was at grave risk of being cut off from the populace. He stated that the Court, which once stood as a protection to the individual from the Crown and the State, now "really stands between the public and what the public needs and desires, and protects individuals who need no protection against society which does need it."¹⁰⁸ Today, many of these same objections are being directed at the Court: critics complain that the Court's decisions are "needlessly cramped" in order to accomplish other

H9008 (daily ed. Oct. 5, 1990) (statement of Rep. Harris) (proposing Racial Justice Act to overrule *McCleskey v. Kemp*, 481 U.S. 279 (1987)); S. 1970, 101st Cong., 2d Sess. (1990) (Biden Bill), 136 CONG. REC. S6873, S6875 (daily ed. May 24, 1990) (statement of Sen. Biden) (bill proposed to overrule *Stanford v. Kentucky*, 492 U.S. 361 (1989), and *Penry v. Lynaugh*, 492 U.S. 302 (1989), cases permitting the imposition of the death penalty on persons under age 16 or suffering from mental retardation); S. 148, 102d Cong., 1st Sess. (1991), 137 CONG. REC. S579-01 (1991) (Derrick-Hughes amendments to the Omnibus Crime Control Act of 1990) (proposed to overrule *McKellar v. Butler*, 110 S. Ct. 1212 (1990), and *Sawyer v. Smith*, 110 S. Ct. 2822 (1990), cases barring courts from applying newly articulated legal principles retroactively to reverse death sentences that became final prior to the ruling).

106. Compare note 79 *supra* with 11 cases overruled or modified by Congress between 1970 and 1980: *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), overruled by Pub. L. No. 91-353, § 3, 84 Stat. 467 (1970); *Alderman v. United States*, 394 U.S. 165 (1969), modified by Pub. L. No. 91-452, § 702, 84 Stat. 935 (1970); *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), overruled by Pub. L. No. 92-576, § 18(a), 86 Stat. 1263 (1972); *Bunte Bros. v. FTC*, 312 U.S. 349 (1941), overruled by Pub. L. No. 93-637, § 201(a), 88 Stat. 2193 (1975); *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975), overruled by Pub. L. No. 94-409, § 5(b), 90 Stat. 1247 (1976); *Alaska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), modified in part by Pub. L. No. 94-559 § 2, 90 Stat. 2641 (1976); *Wingo v. Wedding*, 418 U.S. 461 (1974), overruled by Pub. L. No. 94-577, § 1, 90 Stat. 2729 (1976); *Ex parte Peru*, 318 U.S. 578 (1943), overruled by Pub. L. No. 94-583, § 4(a), 90 Stat. 2892 (1976); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), overruled by Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978); *District of Columbia v. Carter*, 409 U.S. 418 (1973) overruled by Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1980); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), modified by Pub. L. No. 96-440, § 101, 94 Stat. 1879 (1980).

107. *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

108. Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 403 (1908).