



There Are *Many Things* That You Can Do When the Supreme Court Is Wrong

William H. Rehnquist

In *Gannett v. DePasquale*, 443 U.S. 368 (1979), the U.S. Supreme Court held that the public has no constitutional right of access to pretrial judicial proceedings. Much constitutional jurisprudence has poured over the dam since then, some of which might be read as overruling most or all of *Gannett*. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *id.* at 15 (Stevens, J., joined by Rehnquist, J., dissenting). But back in 1979 *Gannett* was the law. Daniel Patrick Moynihan (a U.S. Senator) was not happy about it. His disappointment with the decision inspired him to write an article in which he eloquently prescribed three remedies for erroneous Supreme Court decisions: debate, litigate, and legislate. See *What do you do when the Supreme Court is Wrong?*, 57 PUBLIC INTEREST 3, 19-24 (1979). That article, in turn, inspired William H. Rehnquist (a member of the Supreme Court and of the *Gannett* majority) to write a letter to the Senator, which is reproduced on the next couple of pages.

— *The Editors*

William Rehnquist was a member of the U.S. Supreme Court when he wrote this letter. There is a copy in Box 285, Papers of Harry A. Blackmun, Library of Congress, Manuscript Division, Washington, DC.

William H. Rehnquist

October 15, 1979

The Honorable Daniel Patrick Moynihan
United States Senate
Washington, D.C. 20510

Dear Senator Moynihan:

I greatly appreciated receiving the copy of "The Public Interest", Fall, 1979, containing your article "What Do You Do When the Supreme Court Is Wrong?" I think your article is certainly written in the spirit of the quotation from Dean Griswold with which it begins, and my effort is of the same nature. I gather you agree with Justice Blackmun on the merits of the Court's decision in *Gannett v. DePasquale*, and that you also disagree with the line of cases stemming from *Everson v. Board of Education* (1947) and the series of challenges to the public funding of various aspects of parochial education which followed that one. It is not my purpose here to go into the merits of any of these cases, but the title of your article "What Do You Do When the Supreme Court Is Wrong?" was sufficiently provocative that it prompted me to reply, not in the vein of a letter to the editor for publication, but in the vein of a letter to the author.

One of the most difficult tasks which the judges of any court charged with the interpretation of constitutional questions face is the frequently limited consequences of their decision. In short, there are *many things* that you can do when the Supreme Court is wrong. In *Gannett*, for example, the publisher there in question certainly could have gone to the legislature in Albany, where I cannot imagine he does not have considerable influence, and persuaded the New York State legislature to pass a law requiring the opening up of all judicial proceedings with specified exceptions. Or he could bring another "test case" in the New York Courts which might persuade the highest court of the State of New York to reach a different result, which should fully satisfy his interests. All that was said in *Gannett* — indeed, all that can ever be said by a constitutional court in a decision deciding that a certain practice does not violate the United States Constitution, is that state courts or state legislatures are free to allow it or prohibit it as they see fit. It is only in cases where the Supreme

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Court of the United States says that a state or federal law is *unconstitutional*, such as *Lochner v. New York*, referred to at page 6 of your article, that a single state is without redress to assist itself, and must look for help from a changed Court or a constitutional amendment.

I by no means disagree with the statement that you quote at page 21 of your article from Robert G. McCloskey that “the Supreme Court has seldom, if ever, flatly and for very long resisted a really unmistakable wave of public sentiment.” Yet despite the correctness of the statement, it seems to me wholly at war with the principle upon which Constitutions are adopted: they are designed to allocate certain functions of government to one institution, certain to another, and to preserve inviolate from the action of any institution certain declared rights of each individual. If a “really unmistakable wave of public sentiment”, unaccompanied by a corresponding constitutional amendment, is enough to wipe out that particular provision of the Constitution, it seems to me we would be far more candid if we were to return to the parliamentary system followed in the United Kingdom, where after Parliament speaks, the only duty of the court is to interpret the enacted words of Parliament in the statute. I am by no means suggesting that this system is inferior to ours, but only that it is a different one.

Again, thank you for sending me a copy of your thoughtful article. Since you quoted the dissent of Mr. Justice Blackmun in *Gannett*, I am taking the liberty of sending him a copy of my letter to you.

Sincerely,

/s/ William H. Rehnquist

Copy to Mr. Justice Blackmun

