

# Michigan Law Review

---

Volume 84  
Issue 4 *Issues 4&5*

---

1986

## Preserving the Constitution: The Autobiography of Senator Sam J. Ervin, Jr.

Brent E. Johnson  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Legal Biography Commons](#)

---

### Recommended Citation

Brent E. Johnson, *Preserving the Constitution: The Autobiography of Senator Sam J. Ervin, Jr.*, 84 MICH. L. REV. 871 (1986).

Available at: <https://repository.law.umich.edu/mlr/vol84/iss4/30>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

**PRESERVING THE CONSTITUTION: THE AUTOBIOGRAPHY OF SENATOR SAM J. ERVIN, JR.** Charlottesville, Va.: The Michie Co. 1984. Pp. xiv, 436. \$19.95.

On June 11, 1954, Vice-President Richard Nixon administered the senatorial oath of office to Sam J. Ervin, a former justice of the North Carolina Supreme Court. Twenty years later, after a distinguished career as United States Senator from North Carolina, Sam Ervin bade farewell to his colleagues on Capitol Hill and quietly departed for his home in Burke County.

Sam Ervin's tenure in the Senate coincided with a period of tremendous social upheaval in the United States. American history will long remember the "red scare" orchestrated by a politically ambitious Joe McCarthy, the fight for racial equality led by such diverse figures as Malcom X and Martin Luther King, the debacle of American forces in Vietnam, and the popular disillusionment with American politics engendered by Watergate.

Senator Ervin played an integral role in the events of his time. As a junior member of the Senate, Ervin was appointed to the politically unpopular Senate Select Committee to study the censure of Senator Joe McCarthy. It was this committee's recommendation, along with Senator Ervin's passionate closing argument on the Senate floor,<sup>1</sup> that resulted in the political gelding of Joe McCarthy. As Chairman of the Senate Subcommittee on Constitutional Rights, Revision, and Codification of Laws, Senator Ervin conducted in-depth research into the constitutionality of many of the major civil rights bills and crime-con-

---

1. In his closing argument before the Senate, Ervin declared:

The Senate is trying this issue: Was Senator McCarthy guilty of disorderly behavior in his senatorial office? The American people are trying another issue. The issue before the American people transcends in importance the issue before the Senate. The issue before the American people is simply this: Does the Senate of the United States have enough manhood to stand up to Senator McCarthy?

The honor of the Senate is in our keeping. I pray that Senators will not soil it by permitting Senator McCarthy to go unwhipped of senatorial justice.  
P. 107.

trol legislation that passed through the portals of the Senate during the fifties and sixties. And, as the highly visible chairman of the Senate Select Committee on Presidential Campaign Activities (the "Watergate" Committee), Senator Ervin brought public attention to bear on the breach of trust committed by the Nixon Administration during the presidential campaign of 1972.

Sam Ervin's autobiography, *Preserving the Constitution*, recounts in vivid detail the political dynamics at work during this period of social upheaval in America. Yet *Preserving the Constitution* is not a history book. Rather, it is a strong indictment of both legislative and judicial activists who have committed "constitutional wrongs" in the name of civil rights, organized labor, crime prevention, and religion. It is a fervent plea for a "return" to constitutionalism in America from a man who devoted his adult life to "preserving the Constitution."

*Preserving the Constitution* encompasses a wide variety of both judicial decisions and legislation over which Sam Ervin expressed constitutional concerns.<sup>2</sup> Although a synopsis of Ervin's views on all of the constitutional issues raised in his autobiography is beyond the scope of this review, the general tenor of Ervin's criticisms can be discerned by an examination of his views on the highly politicized issue of civil rights.

In Sam Ervin's view, the judicial expansion of civil rights reached its constitutionally permissible zenith with the Supreme Court's decision in *Brown v. Board of Education*.<sup>3</sup> The Supreme Court decisions of the last three decades, therefore, are seen by Ervin as "judicial aberrations" which "rest on weak rationales; reflect the biases of the activist judges joining in them; are repugnant to realities; and thwart rather than promote good government and justice" (p. 141).

Ervin attacks the constitutionality of the major civil rights decisions handed down by the Supreme Court since *Brown* on two grounds. First, he argues that many of these decisions are repugnant to the fourteenth amendment in that, by creating special privileges for minorities, they embrace the "illusory notion that the Constitution is color conscious rather than color-blind."<sup>4</sup> In response to the argu-

---

2. These decisions include: *Roe v. Wade*, 410 U.S. 113 (1973), where according to Senator Ervin, the Supreme Court ignored "the constitutional doctrine in America that the Constitution reserved to the States the power to regulate abortions," p. 128; *Miranda v. Arizona*, 384 U.S. 436 (1966), where Ervin insists that the Supreme Court contravened 175 years of precedent "that the self-incrimination clause is not concerned with voluntary confessions of guilt, and that such confessions are freely admissible in criminal cases," p. 129; and *Furman v. Georgia*, 408 U.S. 238 (1972), where Ervin maintains that the Supreme Court, in interpreting the eighth amendment's prohibition against "cruel and unusual punishment," failed to obey the "canon established" for constitutional construction "that in construing ambiguous constitutional provisions, Supreme Court Justice [sic] must put themselves as nearly as possible in the position of their framers and determine by so doing what their framers intended them to mean," p. 136.

3. 347 U.S. 483 (1954).

4. P. 147. Particularly reprehensible to Senator Ervin is the Supreme Court's decision in

ment by judicial activists that minorities are entitled to preferential treatment in education and employment to compensate for past discrimination,<sup>5</sup> Senator Ervin appears content to rest on the platitude that "The remedy for discrimination is not the practice of more discrimination . . . ."<sup>6</sup>

Sam Ervin's most scathing criticisms of the judicial activists on the Supreme Court are reserved for the Court's recent decisions which have applied the Civil Rights Act of 1866<sup>7</sup> to private transfers of property<sup>8</sup> so as "to impose legal bondage on other Americans, and compel them to make contracts against their wills with the descendants of the slaves the Thirteenth Amendment emancipated" (p. 184). In refuting the judicial activists' dual assertions that the Civil Rights Act of 1866 applies to the sale of personal property and that the thirteenth amendment's enabling clause renders such an interpretation constitutionally permissible to abolish "all badges and incidents of slavery,"<sup>9</sup> Ervin relies on an argument of constructive legislative intent.

According to Senator Ervin, the Civil Rights Act of 1866, although enacted before the ratification of the fourteenth amendment, looks to the fourteenth amendment for its validity. As a consequence, the Act only applies to state actions and does not reach the purely private sale of property. Ervin reaches this conclusion by viewing the Reconstructionist Congress' enactment of the fourteenth amendment as partially intended to avoid an anticipated Supreme Court decision invalidating the Civil Rights Act of 1866 (p. 164).

Senator Ervin's tenure in the Senate was marked by his outspoken criticism of civil rights legislation, particularly the Voting Rights Act of 1965. The Voting Rights Act of 1965 suspended the power of the states of Alabama, Georgia, Louisiana, Mississippi, South Carolina,

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), which sanctioned the forced busing of school children to achieve racial integration. P. 182.

5. See *University of California Regents v. Bakke*, 438 U.S. 265, 344 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

6. P. 163. Senator Ervin cites the Supreme Court's decision in *The Civil Rights Cases*, 109 U.S. 3 (1883), as precedent for his view that preferential treatment of minorities violates the fourteenth amendment. In the *Civil Rights Cases*, the Court declared:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.

109 U.S. at 25.

7. 42 U.S.C. § 1982 (1982). This statute provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

8. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 160 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

9. *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

Virginia, and forty counties in North Carolina to employ literacy tests in determining voter qualifications on the ground that, by using these tests, the election officials of the affected states had violated the fifteenth amendment rights of blacks. In *Preserving the Constitution*, Ervin sets forth the grounds for his vehement opposition to this Act.

According to Senator Ervin, the Voting Rights Act of 1965 violated the fifth amendment's due process clause because it usurped the affected states' constitutional right to administer their own elections without providing them an opportunity to be heard (p. 171). Similarly, Ervin argues that the Voting Rights Act constituted an impermissible bill of attainder in violation of the Constitution because the Act found states and counties guilty of violating the fifteenth amendment and its supporting legislation without giving them a judicial hearing. Finally, the Act amounted to an unconstitutional ex post facto law because it punished the affected states for alleged acts of past discrimination through retroactive legislation.

Sam Ervin is fond of quoting the remark of the preacher in Ecclesiastes that "there is no new thing under the sun."<sup>10</sup> Perhaps this is a fitting epithet for his autobiography. For while *Preserving the Constitution* discusses a wide range of troublesome constitutional issues that have surfaced during the last twenty-five years, the book lacks the depth of analysis necessary to place it within the library of significant literature on constitutional law. Ervin all too often ignores the complexities of legal issues, dismisses viewpoints hostile to his own as "shallow minded" (p. 164), and substitutes a "parade of horrors" for thoughtful analysis.<sup>11</sup> Furthermore, Ervin tends to resort to diatribes in making his arguments, giving his autobiography a rather unscholarly flavor.<sup>12</sup> As a result of these defects, *Preserving the Constitution* fails to represent adequately the views of constitutional conservatives. It is a book to be reserved, perhaps, for a tranquil summer's afternoon when style can be appreciated even in the absence of substance.

— Brent E. Johnson

---

10. *Ecclesiastes* 1:9.

11. For example, see Ervin's discussion of the Equal Rights Amendment. Pp. 249-74.

12. For example, in discussing his views on abortion, Ervin equates "women who undergo abortions because they do not wish to be troubled by living children" with Adolph Hitler "who exterminated Jews because he did not wish to have them around." P. 128.