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Book Review: Preserving the Constitution...

Preserving the Constitution: The Autobiography of Senator Sam Ervin. The Mitchie Company, 1984
\$19.95

Senator Ervin became a national celebrity in the course of the Watergate hearings. For many, he became the very symbol of the Constitution as a limit on arbitrary government power. This book explores the life and constitutional philosophy of this "simple country lawyer," as he liked to portray himself to the press.

Ervin's life was a study in paradox. In World War I, he lost his rank of second lieutenant as a result of leaving his post to take a nap, but then as a private was awarded the Distinguished Service Cross when he was wounded in a frontal attack on a machine-gun nest. He graduated from Harvard Law School, but he did not go to law school until after he had been admitted to the North Carolina Bar. Moreover, he went to law school backwards: he took the third-year courses, then the second-year courses, and finally the first-year courses. He became famous as a foe of presidential power, but voted against the War Powers Act, which was designed to curb presidential power to take the country to war. In a final irony, the man who swore him in as a senator when he took office in 1954 was Richard Nixon, whose presidency he helped to terminate two decades later.

Although his fame derives from his years in the United States Senate, Ervin held a variety of other governmental offices. He was a state trial judge. As a state legislator, he fought to defeat an antievolution bill. A good sense of his vigorous prose style is conveyed by his speech in opposition to the bill:

If my friends had been sitting in the Spanish legislature when Columbus undertook, with Queen Isabella's financial assistance, to make his first voyage of discovery to America, they would undoubtedly have proposed legislation to prohibit his sailing for fear he might fall off one of the four corners of the earth. . . . The monkeys in the jungle would undoubtedly be delighted to know that the North Carolina Legislature has absolved them from all

responsibility for the conduct of the human race in general and that of the North Carolina Legislature in particular. [p. 40]

After his term in the state legislature, he spent six years on the state supreme court, where he wrote 291 majority opinions, two concurrences, and eight dissents. In 1954, he became a United States senator.

Senator Ervin's constitutional views were as varied and as paradoxical as his career. In some settings, he was a strong supporter of civil liberties. He was a staunch opponent of preventive detention and no-knock searches. On the other hand, he devoted an entire chapter of this book to listing libertarian Supreme Court decisions, mostly from the Warren Court, with which he vehemently disagreed. He viewed virtually all federal civil rights laws as unconstitutional, and fought against the Equal Rights Amendment. Yet he also opposed school prayer and aid to parochial schools. And though he came to accept the Supreme Court's decision that segregation is unconstitutional, he opposed busing and most other methods of integration. How can this extraordinary set of views be explained?

Senator Ervin himself espoused a rather straightforward approach to constitutional interpretation. All that a judge — or senator — need do is read the Constitution carefully. As Ervin says at one point: "The Constitution is written in simple English words. English is my mother tongue, and I understand what it means when it speaks simply." [p. 166] When the text itself does not provide a final answer, a quick reference to history seems to suffice. For instance, "[h]istory indisputably demonstrates" the meaning of the equal protection clause.

These homilies do not go far in explaining Ervin's conclusions. After all, other dedicated supporters of the Constitution like Justice Hugo Black have read its text with devotion and studied its history with care. Yet their conclusions have often been quite different from Senator Ervin's. He seems to have been almost unique in his blend of civil libertarianism and opposition to civil rights.

The clue to understanding Senator Ervin's philosophy appears early in the book, when he explains the goal that guided him throughout his career:

My life's story is of little moment unless it explains why I spent 20 years in the Senate fighting unrelentingly for the principle of government fidelity to the Constitution, and convinces others that this principle must prevail in our land if the United States is to be a free Republic.

This principle is in mortal danger in America. During recent years, politically powerful groups of Americans have been obsessed by the foolish idea that all of the things they deem to be evil can be cured by the federal government. In its efforts to appease them, the federal government has given America too much government. [p. x]

Ervin was really the last of the Jeffersonians. He believed in small government, with its powers distributed between different branches and different levels to further safeguard against abuse. His strong stands in favor of civil liberties were motivated by a desire to limit the potentially tyrannical power of government. His attacks on civil rights legislation had precisely the same source: he feared that the federal government was acquiring too much power at the expense of the states. For the same reason, he opposed the Equal Rights Amendment, which he saw as another incursion of federal power into state sovereignty.

For better or worse, many of Senator Ervin's views were out of tune with great political movements of his time. It was his good fortune to end his career in a final battle against excessive government power in which the public and the press were on his side.

This book presents a fascinating portrait of an extraordinary American. It is also an important reminder that interpreting the Constitution is not merely the specialized job of federal judges and law professors, but is instead a responsibility of every citizen. 📖

Professor Farber teaches constitutional law at the University of Minnesota Law School, and is coeditor of the journal Constitutional Commentary.