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Harriet Lansing

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JUSTICE SIMONETT'S CONSTITUTIONAL WISDOM

Honorable Harriet Lansing[†]

Justice Simonett brought the power of his intellect, his experience, and his emblematic writing style to bear on constitutional issues in the same way that he brought these powers to all of his inspired analysis and reflection on appellate cases and legal doctrines.

His wide-ranging skills and talents defy easy description. But the comments of lawyers and colleagues and the words that spill over two hundred entries in a Westlaw “All Law Reviews, Texts & Bar Journals” search¹ provide some insight into his talent and character: a legacy of high wit and deep wisdom, a man of letters, an extraordinary gift for the written and spoken word, a man of uncommon decency and dignity, a man who made us all proud to be lawyers and judges, a man of uncommon common sense, a judge committed to getting the law straight and making it work, a judge who understood the whole legal structure and its effects on people, a judge wise in the ways of people, a judge who understood motives, a thoughtful and unfailingly courteous colleague, a highly literate and graceful writer, a judge who used powerful analogies, a popular speaker who recited poems with great rhetorical ability and enthusiasm.

[†] Judge, Minnesota Court of Appeals, 1983–2011; Senior Judge, 2011–present. Uniform Law Commission, Executive Committee Chair (President-elect), 2012–present. B.A., 1967, Macalester College; J.D., 1970, University of Minnesota Law School. When I was sworn in as a judge on the Minnesota Court of Appeals in 1983, John Simonett had been on the Minnesota Supreme Court for three years and continued to serve for another eleven years. Over those years of concurrent appellate service and beyond, I have been deeply grateful, not only for John Simonett’s sterling example and his kind friendship, but also for lighting many a Friday afternoon with the release of his remarkable opinions that read with the ease of literature and applied with the precision of carefully drafted architecture.

1. A search of “Simonett” in Westlaw’s “All Law Reviews, Texts & Bar Journals” database yields 217 responses, seventeen of which refer to John’s daughters, Judge Anne V. Simonett and Judge Martha M. Simonett. The remaining two hundred items relate to John.

Others described him in no less laudatory terms but with only one or two words, saying he was intellectually generous, respectfully curious, analytical, prudent, cerebral, fair, reasonable, gentle, engaged, deliberate, considerate, careful, precise, cautious, warm, wise, witty, philosophical, insightful, compassionate, kindly, and prescient. Many characterized him as one of Minnesota's finest judges; a judge who understood the value of an accessible and coherent body of legal doctrine; who knew the importance of judicial restraint; and who, despite his stellar talents, had a sense of humility and modesty. For someone unfamiliar with John Simonett and his work, this composite seems like impossible hyperbole. Doris Simonett, his spirited and accomplished wife, says John could only have shaken his head at such praise. But lawyers and judges who worked with John, and who relied on and applied his opinions, staunchly maintain that this list is only a beginning.

Many of these qualities of mind and heart are richly evident in Justice Simonett's opinions and his reflections on the United States and Minnesota Constitutions. Among Justice Simonett's writings is an article entitled, *An Introduction to Essays on the Minnesota Constitution*.² This article served as the lead-in to a series of articles on the re-emergence of the Minnesota Constitution, particularly in the area of individual rights.³ The article contains observations on both the United States and the Minnesota Constitutions.⁴ As with everything Justice Simonett wrote, it is well worth reading both for its fundamental observations and for its enlightening excursions. No one opinion or one article sets forth Justice Simonett's full thoughts on constitutions. So our efforts to describe his "constitutional wisdom" must necessarily be drawn from partial analyses, comments, holdings, concurrences and dissents, or, to use a word Justice Simonett chose in other circumstances, "excursions." In this Tribute, Dean Robert Stein describes Justice Simonett's approach to the relationship between the United States Constitution and the Minnesota Constitution, and Randall Tietjen provides a statistical and methodological look at Justice Simonett's decision making.

2. John E. Simonett, *An Introduction to Essays on the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 227 (1994).

3. *Id.*

4. *See id.* (discussing the re-emergence of state constitutions generally and identifying considerations for interpreting and applying the Minnesota Constitution).

By way of overview, I want to comment on three underlying themes or functional approaches that I discern in Justice Simonett's constitutional jurisprudence. A broad word, jurisprudence, but by that I mean to include his comments and observations in briefs submitted to the supreme court when he was a practicing attorney; his opinions, concurrences, and dissents while he was on the court; and his reflective writings throughout his professional career.

The three recurrent themes or approaches are, first, the overarching importance of the doctrine of tripartite separation of powers; second, his strong adherence to the principle that constitutions should be applied with a considerable degree of caution and only when necessary; and third, his strongly held opinion that in developing the state constitution, "the court should proceed prudently, fashioning its own analytical formula when feasible, . . . not allowing rhetoric to outdistance facts," and creating a "distinctive, principled and credible body of state constitutional doctrine."⁵

A few examples on each of these themes or approaches illustrate his integrated framework on constitutional interpretation. First, from his earliest writings as an appellate adversary, he anchored his constitutional philosophy in what he considered "the great distinguishing characteristic of American constitutional government": the "doctrine of tripartite separation" of powers.⁶ In obtaining a unanimous reversal of a district court's decision upholding the State Board of Education's order to withhold state aid, he upbraided the Board for usurping "the judicial power of judgment and the legislative power of creating a penalty."⁷ The doctrine of separation of powers was the "hard sense and essence"⁸ of the issue, and no amount of "[p]atriotic generalizations and loose talk" was acceptable "as an excuse for an executive usurpation of power."⁹ In spirited argument he reminded the court that it is its function to guard against this behavior. He concluded that the long and short of it is that "[t]here is no need to belabor the obvious—that such philosophy [of ignoring the separation of

5. *Id.* at 242–44.

6. Brief for Appellant at 9, *State ex rel. Indep. Sch. Dist. No. 6, Morrison Cnty. v. Johnson*, 242 Minn. 539, 65 N.W.2d 668 (1954) (No. 36140).

7. *Id.* at 22.

8. *Id.* at 10.

9. *Id.* at 12.

powers] is one of anarchy. . . . [It] is the negation of government by law.”¹⁰

Although not quite so adamantly phrased as in his appellate advocacy, the primacy of the separation of powers doctrine remained a central tenet in Justice Simonett's decision making. In *State v. Merrill*, he asserted the importance of the court remembering its role in the balance equation: “[T]he role of the judiciary is limited to deciding whether a statute is constitutional, not whether it is wise or prudent legislation. We do not sit as legislators with a veto vote, but as judges deciding whether the legislation, presumably constitutional, is so.”¹¹ His allegiance to this principle was based not only on the fundamental authority of the state and federal constitutions, but also on a recognition of the institutional competencies of each branch and the inherent value of keeping the power equation balanced. This is evidenced by the cautionary language in his dissent in *Wegan v. Village of Lexington*, addressing the inequality of treatment between victims of accidents involving 3.2 beer sales and sales of more potent intoxicating liquor: “I would prefer we not disturb the Act until the legislature has had an opportunity to enact its own corrective measures. This seems preferable to piecemeal judicial legislation.”¹² And further, in *State v. Olson*, in which the court was asked to determine whether “brain death” equated to “death” as the term was used in criminal statutes,¹³ Justice Simonett, writing for the court, said:

In this instance, where the case before us does not require that we act, where the issue raised is of profound human interest, prudence dictates, we think, that the legislature should first be given an opportunity to consider the legal implications of brain death. The legislature, with its broad based representation, its committee hearings, and its floor debates, presents the kind of public forum this issue deserves.¹⁴

The second theme that Justice Simonett adhered to is the principle that “constitutions should be applied with caution, and only when necessary.”¹⁵ He observed in *An Introduction to Essays on the Minnesota Constitution* that constitutional law concerns itself with

10. *Id.* at 11–12.

11. 450 N.W.2d 318, 321 (Minn. 1990) (citations omitted).

12. 309 N.W.2d 273, 285 (Minn. 1981) (Simonett, J., dissenting).

13. 435 N.W.2d 530, 531 (Minn. 1989).

14. *Id.* at 535 (footnote omitted).

15. Simonett, *supra* note 2, at 231 (footnotes omitted).

enduring and broadly stated principles and that many narrower issues are better resolved by application of statutory law or incremental development of the common law.¹⁶ He noted with approval that the supreme court had recently declined “to rule that the ‘cruel or unusual’ clause of the Minnesota Constitution guarantees proportionality in criminal [sentencing].”¹⁷ For the court to do otherwise would essentially “constitutionalize the sentencing guidelines.”¹⁸

He gave meaning to this cautionary approach in his succinct concurrence in *State v. French*.¹⁹ In that case, which involved an issue arising under the Minnesota Human Rights Act that related to unmarried cohabitation in rental property and the violation of the landlord’s right to the exercise of religion under the freedom of conscience provision of the Minnesota Constitution, Justice Simonett stated simply: “Because the issue of statutory construction is dispositive here, I do not reach the constitutional questions.”²⁰

Similarly, in *Bolin v. State*, which dealt with an equal protection challenge by a state trooper who wanted to run for public office, Justice Simonett, in a dissent joined by others, said, “While it may be unnecessarily harsh to require a trooper to pay his own moving expenses to a new post, this item does not rise to the stature of a constitutional infirmity.”²¹

The third underlying theme or functional approach relates to the interweaving of the United States and Minnesota Constitutions as the court developed the state constitutional provisions. Justice Simonett was particularly mindful of the process that the court would employ in determining which constitution to use, the order in which the constitutions would be applied, and the methodology of the application.²² In *An Introduction to Essays on the Minnesota Constitution*, he pointed to two recent cases, *State v. Hershberger*²³ and *Cohen v. Cowles Media Co.*,²⁴ in which the Minnesota Supreme Court had initially declared a law to be unconstitutional under the Federal Constitution only to have the United States Supreme Court

16. *See id.* at 230.

17. *Id.* at 232.

18. *Id.* (quoting *State v. Stirens*, 506 N.W.2d 302, 305 (Minn. 1993)).

19. 460 N.W.2d 2 (Minn. 1990) (Simonett, J., concurring).

20. *Id.* at 11.

21. 313 N.W.2d 381, 387 (Minn. 1981) (Simonett, J., dissenting).

22. Simonett, *supra* note 2, at 234.

23. 444 N.W.2d 282 (Minn. 1989), *vacated*, 495 U.S. 901 (1990).

24. 457 N.W.2d 199 (Minn. 1990), *rev'd*, 501 U.S. 663 (1991).

disagree and remand for further consideration.²⁵ In *Hershberger II*, the court decided to apply the Minnesota Constitution's liberty of conscience provision to again find the law unconstitutional,²⁶ whereas in *Cohen II*, the court declined to extend the protection of the free press clause beyond the federal protection.²⁷

Justice Simonett expressed concern that

the court should proceed prudently, fashioning its own analytical formula when feasible, and not allowing rhetoric to outdistance facts. Care should be taken in creating precedent because any precedent in constitutional law is perceived by the public to partake of the enduring and fundamental character of the constitution itself. And, finally, constitutional law and common law should be kept separate²⁸

These considerations surfaced in his concurrence in *Hershberger II*, when he wrote: "I join the court's opinion. Because this is the first occasion where our court has considered its liberty of conscience clause in any detail, aside from the plurality opinion in *State v. French* . . . , I should like to add an observation or two."²⁹ And in *State v. Russell*, he similarly wrote,

As this court develops an equal protection analysis under the state constitution, I find it important to develop our analysis in a principled manner, understandable to the legislature, the bar, and the courts. Because I share the dissent's concern that the court's opinion may be misconstrued as opening the door to substantive due process, I feel I should write.³⁰

These three approaches or principles are congruent with Justice Simonett's intellectual qualities: analytical, careful, precise, and cautious in building a sturdy architecture of thought on the court's approach to constitutional questions. These approaches are also in harmony with his personal judicial philosophy that is reflected in all of his opinions: a strong commitment to building an

25. Simonett, *supra* note 2, at 237.

26. *State v. Hershberger (Hershberger II)*, 462 N.W.2d 393 (Minn. 1990) (holding that application of a statute requiring display of a slow-moving vehicle emblem to Amish defendants violated their freedom of conscience rights protected by the Minnesota Constitution).

27. *Cohen v. Cowles Media Co. (Cohen II)*, 479 N.W.2d 387, 390–91 (Minn. 1992).

28. Simonett, *supra* note 2, at 242–43.

29. *Hershberger II*, 462 N.W.2d at 399 (citation omitted).

30. 477 N.W.2d 886, 893 (Minn. 1991) (Simonett, J., concurring specially).

accessible and coherent body of legal doctrine, a careful attention to getting the law straight and making it work, and solidly mooring each constitutional decision within the proper boundaries of a tripartite balance of power.

And, finally, it is important to comment not only on what Justice Simonett did as a judge, but also the way in which he did it. His opinions, concurrences, and dissents have been heralded for the careful and thoughtful guidance that he provided to the district courts, the court of appeals, his colleagues on the supreme court, and to the practicing bar. He had a gift for not only reaching a carefully thought-through result, but walking us through the entire resolution to see how he got there. He did precisely what our children's second-grade math teachers repeatedly admonished them to do: he showed his work. We came to understand what approaches he considered, which he pursued, which he rejected, and why he chose or rejected them. He provided guidance on what the jury instructions should be when the remanded case went back for trial. He showed us what the architecture should be going forward. Without ever putting a thumb on the scale of fact-finding, he would get the decision-making structure back on track and redirected in a way that would cure a disproportionate development in the law. He had the capacity to put doctrines, theories, and legal tenets where they belonged and to keep them there. He greatly respected the ingenuity and the creativity of lawyers, but he knew that it fell to the judiciary to keep the overall structure, particularly the common law, in proper shape and working to accomplish principled ends.

He did this with the utmost respect to the litigants, the lawyers, his colleagues on the supreme court, and his colleagues on the district courts and the court of appeals. He spent no time in a hierarchical posture admonishing "lower courts." He did not gratuitously disparage other reasoning processes. He created an atmosphere of shared inquiry and the combined search for the best answer. Although he was always clear in his own analyses, he recognized varying paths that could lead to the same result and accepted robust discussion and individual differences as a hallmark of the American tradition and a valuable tradition in American law. He often referred to James Bryce's observation about America that there was no country in the world that more fully applied Frederick the Great's principle "that everyone should be allowed to go to

heaven in his own way.”³¹ Justice Simonett embodied that spirit. His warm humanity showed a visceral understanding and acceptance of the human condition with all of its challenges, foibles, and aspirations.

I have always believed that in the end, it is the caliber, the performance, and the character of the individual judges that determine the reputation and the worthiness of a court. So I consider myself very lucky to have begun practicing law in the 1970s when the Minnesota Supreme Court included Justices Walter Rogosheske, Bob Sheran, Jim Otis, and Rosalie Wahl, joined in the early '80s by Jeanne Coyne, Doug Amdahl, and John Simonett. Justice Simonett was one of that great array of giants—the Minnesota version of Justice Oliver Wendell Holmes, or a blend of Holmes and Garrison Keillor: a walking version of down-home common law for which he gladly accepted stewardship. This stewardship for the development and the maintenance of the law was his legacy, and we in Minnesota have been the lucky recipients of his work. He often quoted the observation that Justice Holmes anchored in the first paragraph of his famous book, *The Common Law*, that “[t]he life of the law has not been logic: it has been experience.”³² But John Simonett seemed to have bridged that gap with a genius for successfully melding logic and experience in a workable structure. He believed that “[e]ach new generation of citizens must be taught the meaning of the judicial process, how it works, its justification, and its limits.”³³ And “[t]he process insists on a distinctive, principled and credible body of state constitutional doctrine.”³⁴ Justice Simonett has provided us with invaluable tools and materials to understand and protect state and federal constitutional doctrine and to carry on these teachings.

31. *E.g.*, *Hershberger II*, 462 N.W.2d at 399 n.2 (Simonett, J., concurring) (quoting 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 680 (1891)).

32. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

33. Simonett, *supra* note 2, at 243.

34. *Id.* at 244.