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“AN INARTICULATE PREMISE INTUITIVELY FELT”

Randall Tietjen[†]

I was asked to offer some assessment or measure of Justice Simonett’s constitutional decision making, and I foolishly agreed. I only started practicing law a few years before Justice Simonett retired from the court, so I have no personal experience on which to rely. I only met him a couple of times, briefly, and we never talked about weighty subjects like constitutional law. He is someone I knew only by reputation. Doris Simonett once interviewed me on her *Law in Action* cable show. Based on that experience, I can probably say that I have spent more time talking with Doris than with her husband.

Once in the mid-1990s, I conducted a two-hour oral history of Walter Rogosheske for the supreme court. Walter was a dear, dear man. Many of you must have known him. He was John Simonett’s next-door neighbor in Little Falls. He had been a trial-court judge when Justice Simonett was practicing law there, and later, Justice Simonett took Walter’s seat on the supreme court—a seat known as the Little Falls seat. Walter spoke very highly—glowingly, lovingly—of John Simonett, but knowing Walter was not a substitute for knowing John Simonett.

So to get to know Justice Simonett I did what I would now recommend all lawyers do, especially lawyers around my age or younger who never knew him: I dug into his writings. (And I collected some data, which I’ll get to later.) I read all of his speeches, those that I could find. He gave a great many speeches. Many of them have been collected by the State Law Library, copies of which Tom Boyd kindly loaned to me. And I read all of his articles and essays—what you might call his non-judicial writings. And, of course, I read many of his opinions, particularly in the area

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of constitutional law. I also watched a video of an oral history of Justice Simonett—a wonderful interview—that was conducted by his daughter Martha in 1997.

Before I get into what I found, I’ll tell you this: if you do what I did, you will be inspired to be a better lawyer. I can almost guarantee it. You will find in Justice Simonett someone you cannot help but deeply admire. You will find a lawyer whom you will immediately like and whom you will likely never forget. You will find a lawyer who had a deep appreciation for all of humanity—someone who had as much admiration for the skills and wisdom of a talented carpenter and repairman as he did for any intellectual, but someone who was, himself, a great intellectual. You will immediately appreciate his love of history and of literature and poetry. He quoted these to great effect in his speeches and writings. And he quoted them in a way that you know came from a lifetime of reading and not from *Bartlett’s*. You will also see a clarity and style in his writing that is worth trying to imitate. And you will see an enviable wit—in the classic American style. What a marvelous thing it must have been to have John Simonett as a father.

But what did I learn about Justice Simonett as a jurist and as a constitutional decision maker? Well, I decided to approach this subject, in part, like a social scientist might—an amateur social scientist. I have always enjoyed the articles that the American Judicature Society publishes in its magazine—where the authors try by some statistical measurement to determine what type of decisions a court is turning out and on what basis and how the judges are getting along together. So, I started my investigation of Justice Simonett by looking at his decisions over his entire career on the court, from 1980 to 1994. I’ll tell you some of what I found.

By my count (using LexisNexis), he was responsible for approximately 355 majority opinions (this excludes orders that list him as author, of which there are nearly two hundred).¹ In his first full calendar year on the court—1981, when the court was turning out hundreds of opinions a year—he was responsible for forty-six

1. See *Summary of Opinions by John E. Simonett*, in *THE JUDICIAL CAREER OF JOHN E. SIMONETT* ch. 4 (Marvin Roger Anderson & Susan K. Larson eds., 1998), available at <http://www.lawlibrary.state.mn.us/judges/simonettopinions.pdf> (containing a useful list of Justice Simonett’s opinions and some statistics that differ somewhat from my own numbers, which are based on LexisNexis searches).

majority opinions. That was his highest number in any calendar year. With the exception of 1984, when he turned out forty-two majority opinions, his numbers decreased over time, but the number of decisions by the court overall also decreased, as the court of appeals came into being. In his last full year on the court, in 1993, he turned out twenty-one majority decisions, writing no dissents and only two concurrences.

He was not an active dissenter. That distinction—during Justice Simonett's years on the court—might be said to go to Justice Yetka, who nearly every year between 1980 and the 1990s filed more dissents, I believe, than any other justice, although in some years George Scott or Rosalie Wahl, and later Jeanne Coyne, would top him. In 1982, for example, Justice Yetka filed thirty-seven majority opinions and dissented twenty-eight times. During Justice Simonett's years on the court, Justice Yetka filed or joined a total of 180-some dissents, while Justice Simonett, over his career, filed or joined a dissent just forty-seven times, if you count those in which he was also concurring in part. The number of Justice Simonett's dissents were in line with Chief Justice Amdahl's; when they were on the court together, they each dissented roughly the same number of times: zero to five or six times each year (although Justice Simonett dissented eight times in 1981, including one dissent where he also concurred in part).

The numbers on concurrences are a little different. Justice Yetka, I believe, concurred only forty-three times (including when he concurred in part and dissented in part) over the years in which he and Justice Simonett were both on the court. Justice Simonett and Justice Wahl concurred or joined a concurrence roughly the same number of times, with Justice Simonett coming in at forty-six and Justice Wahl at forty-eight, also counting those concurrences in which they were also dissenting in part.

Now, I'm just giving you some raw statistics, of course (and, depending on how the opinions are counted, someone else might come up with other numbers). To search for explanations for these numbers would be a much more complicated task. The explanations might vary from year to year and from case to case. There are lots of reasons why a justice might dissent and concur in a decision. Judges, I'm sure, have different ideas about when a dissent or concurrence is proper or necessary. Ideological differences—fundamental differences in ideas about how our system of laws and justice should work, the rights people should

enjoy, and the role of the courts—I would assume account for many differences between majority and dissenting opinions.

With respect to concurrences, Justice Simonett offered an interesting explanation in his oral history on when he might write a concurring opinion. He said that if he wrote a dissent, it was unlikely that five years later the court would say, “You know what, we were wrong. We adopt the earlier dissent of Justice Simonett.” But if he wrote a concurrence—ah, if he wrote a concurrence—five years hence he might have some influence on the direction of the law.

Now how often, you might be wondering, did other justices dissent from Justice Simonett’s opinions? Of the 355 majority opinions that Justice Simonett wrote, 280—some involved no dissent of any sort, although some of those involved concurrences. So roughly eighty percent of the time, Justice Simonett wrote for a unanimous court. I don’t know how that record compares to his colleagues on the court. That would have taken some lengthy calculations for which I didn’t have time. But unanimity eighty percent of the time is a much better record than the U.S. Supreme Court, as a whole, can achieve. Ruth Bader Ginsburg published an essay in the *Minnesota Law Review* a year or so ago on the role of the dissent. She reported that the U.S. Supreme Court, overall, was able to achieve a dissent-free opinion only nineteen percent of the time in one recent term.²

Who were the most active dissenters from Justice Simonett’s majority opinions? Perhaps this is no surprise: Justices Yetka and Wahl—they dissented twenty-nine and thirty-four times, respectively. So, a little less than ten percent of the time either Justice Yetka or Justice Wahl or both were dissenting from Justice Simonett’s opinions. (Of course, they were not the only ones who dissented.) That number doesn’t strike me as a particularly high percentage.

So now what about Justice Simonett’s opinions on constitutional law? I found approximately fifty-three majority opinions on constitutional law. Of course, what represents a constitutional-law opinion is not necessarily a simple matter in itself. Justice Simonett wrote decisions on issues of standing and jurisdiction, for example, that might, under someone’s definition,

2. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 1 (2010).

constitute opinions on constitutional law, having to do with the concept of due process. I excluded those from my count and looked for opinions concerning his interpretation or application of some specific provision of the federal or state constitution, in response to some statute or rule or government action.

In addition to fifty-three majority opinions, I found two concurrences (although he joined a few others) based on some constitutional analysis, and only three dissents (although, again, he joined a few others). Often what Justice Simonett did with a concurrence or dissent—with a couple of notable exceptions—was offer a means of resolving the matter without reaching the constitutional issue. This is consistent with Judge Lansing's remarks about Justice Simonett's approach to the constitution. He seemed to have a cautious view of the role of constitutional law in judicial decision making.

Of the fifty-three majority opinions written by Justice Simonett, most of them (some sixty-five percent) were civil cases, and the subject on which he wrote the most opinions was equal protection. Twenty or more of his majority and concurring opinions were on the subject of equal protection. His equal-protection analyses, you will see, if you take some time to read them, are models of clarity, and they have been cited often in later decisions.

From his fifty-three majority opinions on constitutional issues, there were fourteen dissents. The most active dissenters, as you might imagine, were Justice Yetka and Justice Wahl—mostly Justice Wahl. In virtually every constitutional case in which Justice Wahl dissented from a majority decision by Justice Simonett, Justice Simonett was upholding the constitutionality of a statute or criminal search or government takings, and Justice Wahl was disagreeing with the government's conduct or the legislature's statute. This is not that surprising, and I think it is some further evidence of what I would call their ideological differences.

When Justice Simonett was writing for the majority on a constitutional issue, he usually upheld the constitutionality of the statute being challenged or the conduct of the government action under review. This is what you would expect to see from a careful, thoughtful, moderate judge—cautious, deferential, and, at times, pragmatic in his decision making. Nothing earth shaking. Nothing rigid. No right wing. No left wing. And certainly no incivility or arrogance or cutting remarks about how the constitution should be interpreted, as we have seen among some justices of other courts.

But even a moderate has his limits when it comes to the constitutional conclusions he must reach, and Justice Simonett wrote approximately twelve decisions, either as majority opinions or concurring opinions, where he concluded that a statute or rule or government action was unconstitutional.

- He found an attachment statute violated procedural due process because it permitted attachment without any notice or hearing on the mere showing that the debtor owned or had an interest in property that might be applied to the satisfaction of a judgment.³
- Under the contracts clause, he found unconstitutional a statute that retroactively changed the age eligibility for a pension.⁴
- He found no rational basis for treating vendors of 3.2 beer any differently than vendors of intoxicating liquor.⁵
- He found that a criminal defendant’s right to represent himself required a new trial.⁶
- He decided that a residence-duration requirement for general assistance benefits violated the right to travel and equal protection.⁷

These were some of the rights he upheld and statutes he found unconstitutional. But he decided many other constitutional issues, including *Miranda* issues, substantive-due-process issues, separation-of-powers issues, search-and-seizure issues, establishment-clause issues, and full-faith-and-credit issues, among others. In almost every case, his decision was grounded in the Federal Constitution, almost never the state constitution.

I combed through these decisions to see if I could find some pattern or method or underlying philosophy in his constitutional decision making. I didn’t find one. At least not one that is easy to identify or articulate.

In some instances, he relied on the text of the Constitution; in some instances, on precedent. In some instances, he seemed to be influenced to some degree by the historical context of the constitutional language at issue, but he was never much concerned

3. Olson v. Ische, 330 N.W.2d 710 (Minn. 1983).

4. Christensen v. Minneapolis Mun. Emps. Ret. Bd., 331 N.W.2d 740 (Minn. 1983).

5. Johnson v. Moberg, 334 N.W.2d 411 (Minn. 1983).

6. State v. Richards, 456 N.W.2d 260 (Minn. 1990).

7. Mitchell v. Steffen, 504 N.W.2d 198 (Minn. 1993).

about discovering the "original intent." He sometimes cited commentators. He always, as Judge Lansing said, "showed his work." He let the reader see how he had reasoned through the issue.

This had me a little stumped. How could I summarize his philosophy of constitutional decision making? And then I read a marvelous essay that he wrote for the *William Mitchell Law Review* in 1984, several years after he was appointed to the bench.⁸ The subject of the essay was how the term "result-oriented" is used to characterize appellate decisions. But in the course of this essay, he wrote something very revealing about how appellate judges make their decisions. It confirms what we lawyers might have always suspected: that it's not as logical and predictable as some would have us believe. At the risk of reading too much to you, here, at some length, is what he said:

While the published opinion is the best evidence and normally the only evidence available of the court's thinking, it may not truly be revealing of what influenced the court. The typical appellate opinion in its published form marches along in an orderly fashion, but it should come as no surprise that the court, consciously or unconsciously, may not be setting out all the factors that entered into its decision. In their written opinions, judges are not necessarily expected to state the reasons for deciding as they did, but only to justify their decision with reasoning that is respectable and authorities that are appropriate.

The published opinion may march inexorably forward step-by-step toward a conclusion, but it is unlikely that the judge's mental processes proceeded in that manner. Rather than to march forward, it is likely that the human mind (to switch metaphors) tends to hover, until finally, it alights on a conclusion. "General propositions do not decide concrete cases," said Justice Oliver Wendell Holmes, adding, "[t]he decision will depend on a judgment or intuition more subtle than any articulate major premise." The key notion here is that of inarticulateness. What may seem to be reasoning backwards from a desired result may be a normal process of reasoning from an inarticulate premise intuitively felt

8. John E. Simonett, *The Use of the Term "Result-Oriented" to Characterize Appellate Decisions*, 10 WM. MITCHELL L. REV. 187 (1984).

but nevertheless real and meritorious.⁹

So there you have it: “an inarticulate premise intuitively felt.” An innate sense of what would be just and wise, might be another way to put it. This is something, I’ve come to believe, a person cannot usually possess until having lived fifty or more years.

Because constitutional law is often a matter of deciding how much individual liberty should be allowed, I would like to play for you a clip (but, here, provide a transcript) from the oral history of Justice Simonett in 1997, which was conducted by his daughter Martha, as I mentioned earlier. In this clip, Justice Simonett is describing the court’s decision in *State v. Hershberger*.¹⁰ I’ll leave it to him to describe the case, but note at the end of the clip his reference to a line by Robert Frost about “liberty” (or “freedom,” which may have been the word Frost used) defined as “being easy in the harness.” It was something he often used to describe the tension between the duties and responsibilities we have as citizens and the rights and privileges we should also enjoy.

J. Simonett: *State v. Hershberger*. There’s a community of Old Amish down in Fillmore County. They drive around their black buggies, and the state had a statute for slow-moving vehicles. They had to affix to the rear of the buggy this slow-moving vehicular sign. You’ve seen them, Martha, this—this fluorescent triangle—as you go through our home county of Morrison late in the evening and come over a gravel hill, and you see that hay wagon going home pulled by the tractor. We had more than one lawsuit involving accidents like that.

Anyway, so here was this slow-moving sign the legislature said all slow-moving vehicles had to have to promote safety on the highway. Well, the Old Amish refused. They were arrested. They wouldn’t put ‘em on. As they read scripture, it was forbidden to their religion. These were worldly symbols. And the tricky part of it was, it wasn’t all the Amish. There were a lot of the Amish down there that would put those triangular signs on their black buggies. Only these few, the Old Amish, would not. And the case wound its way up to our court and Justice Kelley wrote the decision, and he applied the First Amendment law of the United States Constitution and said that the statute violated—the Minnesota statute

9. *Id.* at 193–94 (alteration in original) (footnote omitted).

10. 462 N.W.2d 393 (Minn. 1990).

violated—the free exercise of religion and set aside the conviction.

So Fillmore County appeals the case to the United States Supreme Court. While it was up there pending, that court decided another case, and it reversed the Minnesota Supreme Court—think of that, Martha, we got reversed—and sent it back and said that the Minnesota statute did not violate the Federal Constitution, that this was a traffic statute, neutral in its application—general application to all. And you know, if you're driving to church on Sunday and you exceed the speed limit, do you think you can avoid being convicted on the grounds you were trying to get to church on time? [Pause.] I'm asking you a question, Martha.

M. Simonett: It's a rhetorical question.

J. Simonett: No. Anyway, they sent it back to us, and this time we took the case. It was argued again, assigned again to Justice Kelley, and we decided it under our state constitution and held that the statute as applied to the Old Amish violated our liberty of conscience clause in our state constitution. Well, I thought about that case a lot. I think it illustrates—it illustrates how the law will accommodate all the people in this country of such diverse interests and identities. It could just as well have gone the other way. It's only a few farmers down there. Safety first. But the law goes out of its way to accommodate these people in their individual beliefs. The individual counts in a democracy. I thought that case illustrated it very well. I thought about it a number of times and as far as I know there haven't been any car-buggy collisions down in Fillmore County. It works out well.

The other side—I often use, you know, that line from Robert Frost when he says liberty—he defined liberty as being easy in the harness. And that's about it. You gotta give people room to do their own thing. Yet the people gotta remember that they wear a harness. The law imposes responsibilities as well as gives privileges. End of speech.

Hershberger is one of the cases in which Justice Simonett wrote a concurring opinion.

Now, there is just one other clip that I would like to play for you (but here, again, provide a transcript), and then I will be

finished. I would much rather listen to Justice Simonett than myself. This clip relates to the Minnesota Constitution.

As I mentioned, relatively few of Justice Simonett’s opinions involved the state constitution. My sense is that Justice Simonett—being a judge in the 1980s and early 1990s, when we were just on the cusp of a broader interest by state courts in their own constitutions as a source of protection for liberties—did not want to jump enthusiastically into the subject without some considerable thought.

He used to say that in his first years of practice he had the habit of taking his glasses off and carefully cleaning them for a bit after clients asked him a question. This gave him time to think, he said, without looking like he didn’t know the answer. He also said that he never would have been able to get through the first years of practice if he had worn contact lenses.

I think Justice Simonett’s approach to issues about the state constitution was similar. In his last years on the court, he was still polishing his glasses. He was still thinking about what direction we might want to go. The fact that he never seemed to believe it was urgent to interpret and apply the state constitution more broadly while he was still on the court is probably testament to his wisdom.

In any event, this last clip is just a fun story, but it involves a provision of our state constitution.

J. Simonett: Well, when we moved into this new Minnesota Judicial Center—if you look out on the plaza and—there’s a granite wall that extends in a north-south direction. It’s got open window spaces in it. And the architect called that on the plans the “Dedicatory Wall.” It’s going to be dedicated. And he explained that we’d have our names carved in stone forevermore in there. Think of that, Martha.

And we could have—the governor could have his name in there. And we could—maybe we could get legislative leaders. And the architect could have his name on the Dedicatory Wall. And we were—so we had a meeting and conference one day, and we had to narrow down the names. We only had so much wall. And I had the happy suggestion, at least I thought it was, I said, “Here, let’s have no names. Let’s have a quotation from our state constitution.” Now, everybody would say, “Hey, if we’re gonna quote a constitution, let’s quote the federal one.” But really, we’re a state supreme court. This

building here houses the state supreme court. And we should have some reminder to the public of this fact. They all agreed. And I said, "I have something in mind." And that's article I, section 8. I happen to have it right here. Article I, section 8: "Every person is entitled . . . to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the law." Hasn't that got a nice cadence to it?

M. Simonett: That says it all.

J. Simonett: No, it doesn't. No it doesn't, Martha. If you go out there and look at that wall, it—it says, where it says

M. Simonett: I will when we leave.

J. Simonett: "Every person is entitled," and then there's three dots. And then it's picked up, "to obtain justice," to indicate that something was left out. Ask me a question.

M. Simonett: And what was left out?

J. Simonett: Yes. This: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character." That was dropped.

M. Simonett: Why?

J. Simonett: Do you have a question, Martha?

M. Simonett: Why was it dropped?

J. Simonett: Well, I can remember, again, Justice Glenn Kelley, saying "Gosh," he said, "you know, that's a wonderful quote you got there." But the part I just—the clause I just read you is called the "certain remedies" clause. And there's a number of Minnesota Supreme Court decisions interpreting that. And it's precatory in its influence. It's inspirational. You can't take the language so literally to say that everybody has a certain remedy for every wrong that happens to you. It has to be a remedy within the body and tradition of the law. And Justice Kelley was worried if we put that up on the wall, people are going to read it before they came into court and say, "Here, I'm entitled to a remedy. Let's have it." See? And, so anyway—that's part of it.

M. Simonett: Oh, that's interesting.

J. Simonett: Yeah, it is. And I think in the last few years I was on the court that the state constitution was becoming more and more influential as the Federal Supreme Court tended not to expand civil liberties to the extent that

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some state supreme courts thought they might under their state constitutions.