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## Building a Strong Foundation: Justice John Simonett and Constitutional Law in Minnesota

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**BUILDING A STRONG FOUNDATION:  
JUSTICE JOHN SIMONETT AND  
CONSTITUTIONAL LAW IN MINNESOTA**

Dean Robert A. Stein<sup>†</sup>

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I am delighted to join in this Tribute to the remarkable judicial career of Minnesota Supreme Court Justice John E. Simonett—a great justice and, equally important, a great human being. I remember Justice Simonett with deep respect and affection. During my years as dean of the University of Minnesota Law School, I could always count on Justice Simonett to enliven any program with his erudite and pithy remarks, his wit, and his joyful presence. I remember particularly a Judges in Residence program in which Justice Simonett and Justice Anthony Kennedy of the Supreme Court of the United States were the stars of the program, with their thoughtful comments and witty repartee. Justice Simonett’s death was a loss to all who love the law, and it is highly appropriate that this Tribute recognizes and honors his numerous contributions to the law and our profession.

When we think of Justice Simonett’s remarkable and scholarly opinions, we think first about how eloquent they were, how they read so well, how they told stories about common people caught up

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in one of life's disputes, and how they developed and advanced the common law. But Justice Simonett's opinions also set forth a judicial philosophy of federal and state constitutional law in several cases that came to the Minnesota Supreme Court during his fourteen years as a justice.

## I. INTRODUCTION

Justice Simonett served the state during a time of unique developments in its constitutional law.<sup>1</sup> During the 1960s, the Warren Court aggressively recognized and applied various civil liberties claims against the states. The effect, as Justice Simonett once noted, was a "nationwide re-emergence of state constitutions."<sup>2</sup> As litigation in state courts increasingly focused on questions of federal constitutional law, it was only natural for lawyers and judges to look comparatively at similar provisions and guarantees within their state constitutions. In a large sense, then, Justice Simonett's tenure on the court<sup>3</sup> tracked a period of significant development of constitutional law in Minnesota.

Justice Simonett's constitutional opinions contributed much to this development, particularly toward how the Minnesota Constitution should be read and applied. Throughout his opinions, three important themes emerge. First, Justice Simonett steadfastly insisted that the constitution be read as a set of broadly applicable general principles that guides the legislature, rather than as imposing an inventory of detailed rules. Second, and relatedly, questions of constitutional law must attend to the specific facts before the court, as general principles can only apply with proper factual attention. And third, Justice Simonett maintained the Minnesota Constitution's independence from its federal counterpart, as evidenced by Minnesota's unique approach to equal protection, its heightened protection of religious liberties, and the final disposition of the famous *Cohen v. Cowles Media Co.* case.<sup>4</sup>

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1. See John E. Simonett, *An Introduction to Essays on the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 227, 227 (1994) (recalling that, during the 1950s, 1960s, and 1970s, lawyers found "few occasions to invoke the state constitution").

2. *Id.*

3. Justice Simonett served on the court from 1980–1994. *Biographies of the Justices of the Minnesota Supreme Court*, MINN. ST. L. LIBR., <http://www.lawlibrary.state.mn.us/judgebio.html> (last visited Nov. 26, 2012).

4. 479 N.W.2d 387 (Minn. 1992).

## II. THE CONSTITUTION AND GENERAL PRINCIPLES

One of the most distinctive features of Justice Simonett's vision of constitutional law was his steadfast refusal to read specific, bright-line rules into Minnesota's constitution. According to Justice Simonett, such situation-specific rules are the domain of the legislature, whose job it is to govern individual transactions and associations, or as he called it, "the mundane and the immediate."<sup>5</sup> Citing a case he did not author, Justice Simonett explained this distinction between legislation and constitutional law as the difference between the functions of a system and the conditions that allow that system to operate.<sup>6</sup>

For example, in *Wegan v. Village of Lexington*,<sup>7</sup> Justice Simonett dissented from the majority, which struck down as unconstitutional legislation imposing certain procedural requirements in order to file a dram shop claim related to the service of beverages exceeding 3.2% alcohol.<sup>8</sup> These statutory procedural requirements differed from those existing under Minnesota common law to bring similar claims related to the service of beverages containing less than 3.2% alcohol.<sup>9</sup> Justice Simonett largely agreed with the majority that the distinction between so-called "intoxicating" and "non-intoxicating" beverages suggested "constitutional infirmities."<sup>10</sup> He argued, however, that such specific rules could not be adequately reconciled through "piecemeal judicial legislation" and should be left for the legislature to remedy.<sup>11</sup>

A more explicit example of Justice Simonett's emphasis on constitutional guidelines is his majority opinion in *Schmidt v. Modern Metals Foundry, Inc.*, which upheld recent legislative amendments to the state's Workers' Compensation Act ("the Act").<sup>12</sup> In *Schmidt*, the plaintiff suffered disfiguring burns to

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5. Simonett, *supra* note 1, at 230.

6. *Id.* at 229–30 (quoting *Bd. of Supervisors v. Heenan*, 2 Minn. 330, 332 (1858)).

7. 309 N.W.2d 273 (Minn. 1981).

8. *Id.* at 281 (holding that the commencement-of-suit and notice-of-claim provisions of MINN. STAT. § 340.951 (1980) "violate the equal protection clause of the United States and Minnesota Constitutions"). Section 340.951 has been recodified as MINN. STAT. § 340A.802 (2010).

9. *Wegan*, 309 N.W.2d at 277 (describing Minnesota's recognition of a common-law negligence claim for the "unlawful sale of 3.2 beer").

10. *Id.* at 285 (Simonett, J., dissenting).

11. *Id.*

12. *Schmidt v. Modern Metals Foundry, Inc.*, 424 N.W.2d 538, 542 (Minn. 1988) (holding that the Act did not violate the certain remedies clause of

multiple parts of his body.<sup>13</sup> But the Act's amended schedule for determining an employee's compensation did not cover the injuries Schmidt sustained on his foot, back, and leg.<sup>14</sup> Prior to the Act's recent amendments, such injuries were eligible for compensation.<sup>15</sup> Schmidt argued that the legislature's decision to eliminate this coverage violated Minnesota's constitutional guarantee of "certain remedy in the laws for all injuries or wrongs."<sup>16</sup>

Justice Simonett's majority opinion explicitly emphasized that the "certain remedy clause is a constitutional declaration of general principles,"<sup>17</sup> and that the legislature's judgment with respect to particular remedies could only be constitutionally deficient if the overall compensatory scheme was unreasonable.<sup>18</sup> In other words, because the constitution does not inventory particular rules, it is *constitutionally* insignificant that the plaintiff received less compensation than he would have under the old schedule.

Perhaps the clearest example of Justice Simonett's vision of constitutional law is his four-sentence dissent in *State v. Hamm*.<sup>19</sup> In *Hamm*, the defendant challenged the constitutionality of a statute providing for six-person juries in misdemeanor and gross misdemeanor criminal trials.<sup>20</sup> The majority held that the term "jury" has always been assumed to incorporate a twelve-member requirement.<sup>21</sup>

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Minnesota's constitution).

13. *Id.* at 539 (describing the location and nature of the plaintiff's injuries).

14. *Id.* at 541 ("[T]he new schedule does not compensate for some symptoms a burn victim may have . . . or for some cosmetic disfigurement . . .").

15. *Id.*

16. *Id.* at 539 (quoting MINN. CONST. art. I, § 8). Article I, section 8, of the Minnesota Constitution is otherwise known as the "certain remedy clause."

17. *Schmidt*, 424 N.W.2d at 540.

18. *Id.* at 541 ("[T]o mount a successful attack on the new disability schedules, [the employee] must do more than raise objections to some aspect of the schedules; he must make a showing that the overall compensation scheme is not a reasonable substitute.")

19. 423 N.W.2d 379, 390 (Minn. 1988) (Simonett, J., dissenting), *superseded by constitutional amendment*, MINN. CONST. art. I, § 6 ("In all other criminal prosecutions, the legislature may provide for the number of jurors, provided that a jury have at least six members.")

20. *Id.* at 380 (majority opinion) (distinguishing between the provisions of MINN. STAT. § 593.01 (1986), providing for six- and twelve-member juries in misdemeanor and felony trials, respectively).

21. *Id.* at 382 ("[A] 12-person jury is written into the constitution by decision of this court as if it were expressly stated in the original constitution itself.")

Justice Simonett disagreed, arguing that even if the framers of Minnesota's constitution did have in mind the specific number twelve, they chose not to insert "the number . . . into the document."<sup>22</sup> Clearly invoking Chief Justice John Marshall's famous proclamation in *McCulloch v. Maryland*,<sup>23</sup> Justice Simonett argued that "[w]e are construing a constitution and, within that context, it appears the framers chose not to spell out the size of the jury, preferring to leave the number to the good judgment of future generations."<sup>24</sup> Justice Simonett preferred not to read into the constitution a specific rule for twelve-member juries, not just because it does not explicitly appear in the document, but because constitutions reflect the intentions of a sovereign people, not a specific legislative body.<sup>25</sup> In his view, therefore, broad principles should remain broad so as to best allow the legislature to enact specific rules that give effect to the people's intent. Thus, in *Hamm*, Justice Simonett believed the court should respect the legislature's creation of a six-member misdemeanor trial jury so long as it met the people's general definition of a jury.

### III. FACTUAL ANALYSIS IN CONSTITUTIONAL LAW

One way Justice Simonett distinguishes between constitutional law and the common law is the former's tendency to focus more on ideas than the latter, which is primarily fact oriented.<sup>26</sup> Still, Justice Simonett consistently emphasized the need to attend to the factual details of a particular case in order to correctly apply general constitutional principles. As he once wrote, "[T]ugging against the law's abstractness is the law's need to be grounded in fact."<sup>27</sup> Two of Justice Simonett's opinions in particular—*Bolin v. Minnesota Department of Public Safety*<sup>28</sup> and *Hegenes v. State*<sup>29</sup>—demonstrate his

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22. *Id.* at 390 (Simonett, J., dissenting).

23. 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget that it is a constitution we are expounding.")

24. *Hamm*, 423 N.W.2d at 390 (Simonett, J., dissenting).

25. *See* Simonett, *supra* note 1, at 229 (arguing that constitutional interpretation must give effect to "the intention of the sovereign people, not the legislature").

26. *Id.* at 230 (arguing that while constitutional law relies on a document of broadly applicable guidelines, the common law "is free to develop its own rules . . . , building on its own precedent, modifying and changing that precedent as the need arises, and sticking close to the facts").

27. *Id.* at 232.

28. 313 N.W.2d 381, 385–87 (Minn. 1981) (Simonett, J., dissenting).

29. 328 N.W.2d 719 (Minn. 1983).

insistence on welding law to fact, particularly in equal protection cases.

In *Bolin*, the court held unconstitutional a “resign to run” policy, which required any highway patrolman who wished to run for county sheriff to resign his post, causing him or her to lose all accumulated seniority.<sup>30</sup> The majority held that the requirement violated equal protection because highway patrolmen running for sheriff were subject to requirements not applicable to other officers running for sheriff or other highway patrolmen running for different elected positions.<sup>31</sup> These classifications were impermissible because the state interest pursued—maintaining harmony between individual patrolmen and local sheriffs—could be achieved by allowing for a temporary leave of absence rather than a full resignation.<sup>32</sup>

Justice Simonett disagreed with this conclusion. Although the “resign to run” rule did treat highway patrolmen differently from other officers, Justice Simonett argued that the rule reflected professional responsibilities and daily duties unique to highway patrolmen.<sup>33</sup> Highway patrolmen were, in his view, justifiably subject to differential treatment because they had a peculiar relationship with local sheriffs and were therefore not “similarly situated” with other types of law enforcement officers.<sup>34</sup> According to Justice Simonett, the real, factual differences between classes of law enforcement officials justified dissimilar treatment.

Justice Simonett’s majority opinion in *Hegenes* similarly focused on factual distinctions justifying differential legal treatment. In that case, a taxpayer contested the constitutionality of the state’s differential treatment of nonhomestead residential properties of three or fewer units and nonhomestead residential properties of more than three units.<sup>35</sup> The court upheld the statute, holding that there are real differences between small and large residential

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30. *Bolin*, 313 N.W.2d at 381–83 (majority opinion) (describing the “resign to run” policy).

31. *Id.* at 384.

32. *Id.*

33. *See id.* at 385 (Simonett, J., dissenting) (“There is no other class of state employees or law enforcement group quite like [the Minnesota Highway Patrol].”).

34. *See id.* (describing how, unlike other law enforcement officers, highway patrolmen are statutorily required to cooperate with local sheriffs, are “obligated to follow [the sheriff’s] rules,” and routinely use the sheriff’s equipment and facilities).

35. *Hegenes v. State*, 328 N.W.2d 719, 720 (Minn. 1983).

properties.<sup>36</sup> Justice Simonett observed that a larger property may consume more of the state's fire and police resources than a smaller property and that smaller residences may "have proportionately more tax attributed to land value as compared to building value."<sup>37</sup> Such observations indicate that different sized residential properties are not "similarly situated" and, therefore, may be taxed differently by the state.<sup>38</sup>

As many of Justice Simonett's opinions demonstrate, equal protection of the law is a very broad principle, applicable in a variety of legal contexts. However, his application of that principle and his insistence that the legislature be deferred to when classes of citizens are not "similarly situated" demonstrates that such abstract and generally applicable principles can only be applied with sensitivity to the factual nuances before the court.

#### IV. INTERACTION WITH FEDERAL DOCTRINE

Another distinctive feature of Justice Simonett's constitutional jurisprudence was his balanced reliance upon, and distancing from, federal constitutional doctrine. While federal constitutional principles are instructive and at times may appropriately be relied upon to interpret Minnesota's constitution, "state constitutional doctrine must develop its own distinctive, principled approach."<sup>39</sup> This balanced independence from federal constitutional law is most apparent in Justice Simonett's equal protection jurisprudence, his analysis of Minnesota's liberty of conscience clause, and his *Cohen v. Cowles Media Co.* decision.

##### A. *Equal Protection*

At both the federal and state levels, equal protection of the laws generally means that the law shall not apply differently to

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36. *See id.* at 722 (holding that the distinction between large and small apartment buildings "is based on distinctions which are genuine and have a rational basis").

37. *Id.* at 721 (quoting *Hegenes v. State*, Nos. TC-0888, TC-1284, 1982 WL 1061, at \*4 (Minn. Tax Jan. 22, 1982)).

38. *See id.* at 722 (concluding that the taxpayer's argument that the types of property at issue are similarly situated is not persuasive).

39. *See Simonett, supra* note 1, at 239-42 (describing how Minnesota constitutional law has looked to federal doctrine for guidance while developing its own distinctive doctrines).

citizens who are “similarly situated.”<sup>40</sup> Equal protection is usually implicated by laws that facially distinguish between classes of citizens or create such classifications in application. In federal courts, such laws are analyzed under “strict scrutiny”<sup>41</sup> if they create classifications based on race, alienage, or country of origin.<sup>42</sup> On the other hand, if a law creates a classification that does not fall within one of these categories, or is not sufficiently analogous to one of them, federal courts will analyze the law under the deferential “rational basis review” standard.<sup>43</sup> Unlike the Federal Constitution, the Minnesota Constitution does not have an equal protection clause. However, it is clear that Minnesota does recognize a right to equal protection of the laws. Hence, in his concurring opinion in *State v. Russell*, Justice Simonett described equal protection in Minnesota as an “unenumerated constitutional right.”<sup>44</sup>

From a doctrinal perspective, Justice Simonett’s concurring opinion in *Russell*<sup>45</sup> demonstrated that the court had inconsistently

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40. See *State v. Russell*, 477 N.W.2d 886, 893 (Minn. 1991) (Simonett, J., concurring specially) (describing equal protection as assuring that “persons similarly situated are to be treated alike unless a sufficient basis exists for distinguishing among them”).

41. See *Johnson v. California*, 543 U.S. 499, 505 (2005) (“Under strict scrutiny, the government has the burden of proving that racial classifications are ‘narrowly tailored measures that further compelling government interests.’” (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995))).

42. See *Russell*, 477 N.W.2d at 894 (stating that under federal doctrine, courts apply a “heightened level of scrutiny” when “a statute classifies on the basis of race, alienage, [or] national origin”).

43. See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (“In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.”). The U.S. Supreme Court also recognizes an “intermediate” level of scrutiny, generally applicable when a law distinguishes on the basis of gender. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

44. *Russell*, 477 N.W.2d at 893 (Simonett, J., concurring).

45. In *Russell*, a group of defendants challenged the constitutionality of imposing a harsher maximum sentence for possession of crack cocaine than for possession of cocaine powder. *Id.* at 887 (majority opinion). At the time, possession of three or more grams of crack cocaine carried a maximum sentence of twenty years in prison. *Id.* Possession of cocaine powder, however, did not carry a maximum twenty-year sentence unless the offender possessed ten or more grams. *Id.* The defendants persuaded the trial court to find that “crack cocaine [was] used predominantly by blacks and that cocaine powder [was] used predominantly by whites.” *Id.* Thus, they argued, the law, in effect, tended to

assessed the constitutionality of laws challenged under equal protection. On the one hand, some cases had applied a test that was “co-extensive with the federal equal protection clause.”<sup>46</sup> Under this test, a statutory classification that has unintended discriminatory effects is constitutional so long as it is “rationally related to the achievement of a legitimate governmental purpose.”<sup>47</sup> On the other hand, other cases had applied a three-pronged, less deferential standard.<sup>48</sup> According to this test, equal protection requires challenged laws to have “(1) a legitimate purpose; (2) genuine and substantial distinctions, relevant to the purpose of the statute, between those included and those excluded from the statutory classification; and (3) a reasonable connection between the prescribed remedy and the needs peculiar to the class.”<sup>49</sup> The majority in *Russell* applied the latter test, causing Justice Simonett to reason that going forward this was the proper equal protection test under Minnesota’s constitution.<sup>50</sup> He worried, however, that application of the test lacked sufficient guidance, and therefore courts would continue to apply equal protection confusedly.<sup>51</sup>

Justice Simonett then presented a full equal protection test, which incorporated aspects of both the federal standard and the locally developed three-pronged test. First, if a statute creates a “suspect or quasi-suspect class” or indicates the legislature’s

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punish African American narcotics offenders more harshly than white narcotics offenders. *Id.* The defendants argued that this racial classification violated the Equal Protection Clause of the U.S. Constitution and article I, section 2, of the Minnesota Constitution. *See id.* at 887–88. The Minnesota Supreme Court held that, regardless of how federal doctrine would apply, the statute violated the Minnesota Constitution. *Id.* at 889. First, the court concluded that the State’s justification for treating the two drugs differently—emphasizing street-level narcotics distribution, which was apparently implicated at lower possession weights for crack cocaine than for cocaine powder—did not have a “genuine and substantial” relationship to the statutory distinctions. *Id.* The court also rejected the State’s arguments that crack cocaine was a more dangerous substance than cocaine powder, that the former was connected to more violence than the latter, and that therefore possession of crack cocaine deserved harsher penalties. *Id.* at 890.

46. *Id.* at 894 (Simonett, J., concurring specially).

47. *Id.*

48. *See id.*

49. *Id.*

50. *See id.* (“A majority of this court now returns to the three-factor uniformity clause test. I assume, therefore, this is now our equal protection test.”).

51. *Id.* (“A vital question remains, however: When and how is the test to be applied?”).

“discriminatory intent,” Justice Simonett would apply a heightened level of scrutiny.<sup>52</sup> Presumably, he had in mind something analogous to the “strict scrutiny” that federal courts apply when a law discriminates on the basis of race. If, however, the statute has an unintended “substantial discriminatory impact,” Justice Simonett would apply the three-pronged analysis described above.<sup>53</sup>

An important distinction between this approach and the federal standard is that when federal courts do not sense that the legislature intended to discriminate on the basis of race or other similarly protected classes, they are highly deferential to legislative wisdom. So long as there is some conceivable justification for a law, a federal court will uphold it—even if the identified justification was not the state’s *actual* justification.<sup>54</sup> Justice Simonett’s approach, however, emphasizes the “critical importance of racial equality in our multicultural society.”<sup>55</sup> Hence, where a federal court may be willing to justify a law on grounds that Congress never actually considered, Minnesota courts should be “less willing to conceive of the reasons for the distinctions made by the legislative classification.”<sup>56</sup>

In the parlance of federal courts, Justice Simonett’s framework applies strict scrutiny against facially discriminatory laws and something similar to an “intermediate level of scrutiny”<sup>57</sup> against laws that are discriminatory in effect. While this is similar to the federal approach, it rejects the application of pure rational basis review where laws unintentionally discriminate. In other words, Minnesota courts should give the legislature less deference, thereby encouraging it to be more considerate of the various ways that facially neutral laws may nevertheless create inequality.

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52. *See id.* at 895 (reasoning that because the statute before the court did not facially refer to race and because there was no fundamental right to deal drugs, “we have a facially neutral statute where, under federal analysis, heightened scrutiny is not available”).

53. *Id.* (“I would hold that where a facially neutral criminal statute has, in its general application, a substantial discriminatory racial impact, this court may then apply its three-factor rational basis test, even though there is no showing that the legislature intended this impact.”).

54. *See, e.g., Williamson v. Lee Optical*, 348 U.S. 483, 487–88 (1955) (stating that under rational basis review, “the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it *might be thought* that the particular legislative measure was a rational way to correct it.” (emphasis added)).

55. *Russell*, 477 N.W.2d at 894.

56. *Id.* at 895.

57. *See supra* note 43.

In later opinions, Justice Simonett continued to draw a distinction between Minnesota and federal equal protection standards. For example, writing for the majority in *Mitchell v. Steffan*, Justice Simonett declined to conduct a state equal protection analysis because the statute at issue violated even the more deferential federal standard.<sup>58</sup> However, consistent with the *Russell* framework, in *In re Blodgett*, Justice Simonett suggested that the state and federal equal protection analyses would be co-extensive in applying heightened levels of scrutiny when a legal classification implicates “the fundamental right of liberty.”<sup>59</sup> Although he did not have the opportunity to further develop the relationship between federal and state equal protection analyses, these opinions demonstrate that Justice Simonett’s incorporation and modification of the federal equal protection analysis continued to influence the court’s decisions in these areas.

#### B. *The Liberty of Conscience Clause*

In *State v. Hershberger*,<sup>60</sup> the court held that Minnesota’s liberty of conscience clause<sup>61</sup> was broader than the First Amendment right to freedom of religion.<sup>62</sup> Justice Simonett did not write an opinion in the Minnesota Supreme Court’s first hearing of *Hershberger*.<sup>63</sup> He did, however, author a concurring opinion after the U.S. Supreme Court remanded the case for reconsideration.<sup>64</sup> His *Hershberger II* concurrence offers a brief, yet clear, example of Justice Simonett’s balanced independence from federal doctrine.

In *Hershberger I*, the court was faced with the question of whether a local statute requiring slow-moving highway vehicles to bear a brightly colored triangle violated the rights of Amish horse-

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58. 504 N.W.2d 198, 203 (Minn. 1993) (holding that because use of a durational residency requirement to receive the full benefit of welfare funds violated the Equal Protection Clause of the United States Constitution, “[t]here is no need to consider whether [it] violates our state equal protection clause, and we do not reach that issue”).

59. See 510 N.W.2d 910, 917 (Minn. 1994) (“Because the fundamental right of liberty is involved, we assume the United States Supreme Court would require a heightened degree of scrutiny for federal equal protection analysis. And we think no less is required under our state constitution.” (citing *Russell*, 477 N.W.2d at 889 (majority opinion), 895 (Simonett, J., concurring specially))).

60. *State v. Hershberger (Hershberger II)*, 462 N.W.2d 393 (Minn. 1990).

61. MINN. CONST. art. 1, § 16.

62. U.S. CONST. amend. I.

63. *State v. Hershberger (Hershberger I)*, 444 N.W.2d 282 (Minn. 1989).

64. *Hershberger II*, 462 N.W.2d at 399–400 (Simonett, J. concurring).

drawn buggy drivers under either the First Amendment of the United States Constitution or the liberty of conscience clause of Minnesota's constitution.<sup>65</sup> The court held that prosecuting Amish buggy drivers violated the First Amendment.<sup>66</sup> It reasoned that under federal doctrine, the State may burden a sincerely held religious belief only through the least restrictive means to achieving the government interest in question.<sup>67</sup> The court concluded that although the State had a compelling interest in highway safety,<sup>68</sup> it failed to show that requiring the display of a modern symbol was the least restrictive means to that end.<sup>69</sup> The petitioners successfully persuaded the court that alternative warnings, such as simple reflective tape or red lanterns, would be as effective as orange triangles, but would not burden their religious exercise.<sup>70</sup>

The Supreme Court of the United States vacated *Hershberger I* without discussion<sup>71</sup> and remanded it for further consideration in light of the Court's recent decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>72</sup> In *Smith*, the Court held that when a generally applicable law is not religiously motivated and has only incidental effects on religious exercise, it does not violate the First Amendment simply because it is not the least restrictive means to achieve a compelling state interest.<sup>73</sup>

In *Hershberger II*, the Minnesota Supreme Court reached the same conclusion it reached in *Hershberger I*, except it derived its rationale from the text and history of Minnesota's liberty of conscience clause rather than the First Amendment.<sup>74</sup> The court

65. *Hershberger I*, 444 N.W.2d at 284.

66. *Id.* at 289.

67. *Id.* at 285 (“[T]he United States Supreme Court has considered three factors to predominate in an evaluation of a Free Exercise Clause claim: (1) Is the objector’s claim based on a sincerely held religious belief? (2) Does the government regulation burden the exercise of that religious belief? and, (3) Is the burden justified by a compelling state interest . . . ?” (citing *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 713–19 (1981))).

68. *Id.* at 288 (taking judicial notice that concern for highway safety is a compelling state interest).

69. *Id.* at 289.

70. *Id.*

71. *Minnesota v. Hershberger*, 495 U.S. 901, 901 (1990).

72. 494 U.S. 872 (1990).

73. *Id.* at 878–79 (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”).

74. *State v. Hershberger (Hershberger II)*, 462 N.W.2d 393, 399 (Minn. 1990) (“[I]f freedom of conscience and public safety can be achieved through use of an alternative to a statutory requirement that burdens freedom of conscience, . . .

interpreted the liberty of conscience clause to afford greater religious exercise rights than those enjoyed under the First Amendment.<sup>75</sup> Because the liberty of conscience clause expressly juxtaposes religious practice with public safety, it requires that “once a claimant has demonstrated a sincere religious belief . . . the state should be required to demonstrate that public safety cannot be achieved by proposed alternative means.”<sup>76</sup> Thus, just as in *Hershberger I*, the State failed to show that proposed alternatives were less effective at promoting highway safety and, therefore, Petitioners’ liberty of conscience right had been violated.<sup>77</sup>

In his concurring opinion, Justice Simonett came to similar conclusions as the majority. Specifically, he found that while the First Amendment does not apply against laws of general applicability, Minnesota’s liberty of conscience clause does.<sup>78</sup> The Minnesota Constitution places more restrictions on state action than the Federal Constitution.<sup>79</sup> At the same time, however, Justice Simonett suggested that, where appropriate, “[t]here is much to be said in construing the [liberty of conscience clause] in harmony with the nation’s First Amendment.”<sup>80</sup> Thus, as he emphasized in other opinions, Justice Simonett’s reading of the liberty of conscience clause advocated for both reliance upon and independence from federal doctrine.

### C. Cohen v. Cowles Media Co.

Perhaps the most famous opinion Justice Simonett authored was *Cohen v. Cowles Media Co.*,<sup>81</sup> which the Supreme Court of the

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[the liberty of conscience clause] requires an allowance for such an alternative.”).

75. *Id.* at 397 (“Whereas the first amendment establishes a limit on government action at the point of *prohibiting* the exercise of religion, [the liberty of conscience clause] precludes even an *infringement* on or an *interference* with religious freedom.”).

76. *Id.* at 398.

77. *Id.* at 399 (“As we found in *Hershberger I*, the state has failed to demonstrate that use of reflective tape and a lighted red lantern proposed by the Amish is an insufficient warning to other drivers of a slow-moving buggy.”).

78. *Id.* at 400 (Simonett, J., concurring) (describing the liberty of conscience clause as enumerating “a primordial right,” which is “more emphatic” than those recognized by the First Amendment).

79. *See id.* at 399–400.

80. *Id.* at 400.

81. *Cohen v. Cowles Media Co. (Cohen I)*, 457 N.W.2d 199 (Minn. 1990), *rev’d*, 501 U.S. 663 (1991).

United States subsequently reversed and remanded.<sup>82</sup> In *Cohen*, two local papers—the *Star Tribune* and the *Pioneer Press*—each published the identity of a source to whom individual reporters had previously guaranteed anonymity.<sup>83</sup> The plaintiff—Dan Cohen—consequently lost his job and filed a suit against the papers alleging breach of contract.<sup>84</sup> The publishers argued that judicially imposing liability for printing the name of a confidential source violated their First Amendment rights.<sup>85</sup>

Writing for the majority, Justice Simonett held, first, that the terms of this agreement were too indefinite to rise to the level of an enforceable contract<sup>86</sup> and, second, that enforcing the promise under a promissory estoppel theory would violate the papers' First Amendment rights.<sup>87</sup> Importantly, Justice Simonett concluded that imposing liability would chill aspects of political reporting, a harm that outweighed the element of injustice caused by Cohen's reliance on the promise of anonymity.<sup>88</sup>

The Supreme Court of the United States reversed and remanded the case, holding that the First Amendment does not prevent enforcement of generally applicable laws, such as breach of contract and promissory estoppel.<sup>89</sup> In other words, the fact that a media source is party to a transaction does not warrant applying "stricter scrutiny than would be applied to enforcement against other persons or organizations."<sup>90</sup>

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82. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991).

83. *Cohen I*, 457 N.W.2d at 200 ("Both reporters promised to keep Cohen's identity anonymous" but did not inform him that such promises were subject to "approval or revocation by their editors.").

84. *Id.* at 202 (explaining that because the information printed was *true*, Cohen's only available legal theories were "fraudulent misrepresentation and breach of contract").

85. *See id.* at 204 ("Lurking in the background of this case has been the newspapers' contention that any state-imposed sanction in this case violates their constitutional rights of a free press and free speech.").

86. *Id.* at 203 (holding that contract law is an "ill fit" to the news reporter's promise of confidentiality).

87. *Id.* at 205 ("[T]he promise of confidentiality under a promissory estoppel theory would violate defendants' First Amendment rights.").

88. *See id.* ("The potentiality for civil damages for promises made in this context chills public debate, a debate which Cohen willingly entered albeit hoping to do so on his own terms.").

89. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) ("[It is] beyond dispute that '[t]he publisher of a newspaper has no special immunity from the application of general laws.'" (second alteration in original) (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937))).

90. *Id.*

For those who emphasize the supremacy of the Federal Constitution, it is tempting to conclude that the U.S. Supreme Court effectively ended the constitutional dispute, leaving the state court to simply apply Minnesota's contract law. However, the U.S. Supreme Court explicitly recognized that even if the initial *Cohen* holding exceeded the scope of the First Amendment, the Minnesota Constitution may have more expansive free press protections.<sup>91</sup> Thus, Justice Simonett's second *Cohen* opinion<sup>92</sup> is important for understanding the free press protections unique to Minnesota as well as Justice Simonett's influence on the development of constitutional law in Minnesota.

In *Cohen II*, the court declined to read article I, section 3—the free speech provision of the Minnesota Constitution—more broadly than the First Amendment.<sup>93</sup> However, Justice Simonett's opinion did not hold that local press freedoms were co-extensive with the First Amendment. Rather, the court concluded that the facts presented by *Cohen* were simply too narrow to justify the creation of broadly applicable constitutional guidelines in the context of a reporter's confidentiality promise.<sup>94</sup> In this sense, although the court followed the Supreme Court of the United States' lead by permitting *Cohen* to proceed under a promissory estoppel theory, it did so in the name of Justice Simonett's ultimate goal for state constitutional law: giving "careful thought . . . to building a sound foundation."<sup>95</sup>

## V. CONCLUSION

Justice Simonett witnessed a revival of state constitutional law in Minnesota and across the nation. Across a variety of substantive areas, Justice Simonett helped develop and clarify the Minnesota Constitution's role. In particular, he promoted a theory of general principles, which permitted the state legislature greater latitude in

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91. See *id.* at 672 (“[P]erhaps the State Constitution may be construed to shield the press from a promissory estoppel cause of action . . .”).

92. *Cohen v. Cowles Media Co. (Cohen II)*, 479 N.W.2d 387 (Minn. 1992).

93. *Id.* at 391 (“We may, of course, construe our free speech provision to afford broader protection than the federal clause; however, we decline to do so in this case.”).

94. *Id.* (“The enforceability of promises of confidentiality given a news source is an issue of first impression, and this case presents only one variation of such promises. The full First Amendment implications of this new issue may not yet have surfaced.”).

95. See Simonett, *supra* note 1, at 228.

its law-making power. He also helped to give the state constitution its own content, independent of the U.S. Constitution, thereby advancing a uniquely Minnesotan body of law.

Justice John Simonett was a giant on the court in developing constitutional law in Minnesota. It is a pleasure to join in this Tribute to Justice Simonett by discussing his opinions in which these principles were established.