“THE PRESENT PROBLEMS INVOLVED IN MINNESOTA'S STATEHOOD”

By

Edward T. Young

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FOREWORD

By

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On the evening of December 3, 1908, Attorney General Edward T. Young delivered an address to the Minnesota Academy of Social Sciences at the Law School of the University of Minnesota. The curious title of his speech — “The Present Problems Involved in Minnesota’s Statehood” — becomes understandable about midway through it. He argued that there was “public sentiment” in the country for the federal government to assume constitutional power “to act in all matters affecting the public welfare, where . . . the states by reason of their limited jurisdiction are incompetent to handle the subject.” This “so-called new federalism” placed the very existence of Minnesota’s “statehood” in jeopardy. He scorned those such as President Theodore Roosevelt who wanted the supreme court to sanction an enlargement of federal powers because they “evidently have not studied the question closely enough to see the effect such a holding would have on our system of government.” His address—or lecture— would educate them, if they listened:

> **The federal constitution was made by the people and not by the courts, and by its terms it provides a method whereby changes may be made by amendments to be adopted by the states. This method should be followed whenever changes are necessary, because in whatever respect the federal powers may be enlarged, the reserved powers of the states must be correspondingly diminished, and therefore the consent of the states should be obtained in accordance with the terms of the original compact. There is another fundamental objection to the enlargement of the federal power by judicial construction of the federal constitution, which does not question the integrity of the**

> **courts nor their capacity to know what the changes should be. It is the objection that such a usurpation of power would destroy that respect of the people for the courts and the constitution, which is necessary to our national repose. The province of judicial construction as to either a constitution or a statute has always been well understood to be limited to the determination of the true meaning of the framers thereof. The security of the people in their lives, liberties and property rights, has always rested in the plainness of our laws and the certainty that the courts would interpret and enforce them according to their terms.**
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> **. . . .**
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> **But there is still a more vital objection to the theory of the advocates of the enlargement of federal power by judicial construction of the constitution. This divided sovereignty could not be continued, and this system of co-ordinate state and federal government maintained for a day, if both divisions of the government were exercising unenumerated powers. There would in such case be no possible way of determining which branch of the government had jurisdiction over any subject. . . . It is therefore clearly necessary that we either abolish the states and make of the general government a consolidated instead of a federal republic, or that in enlarging its powers we adhere to the original plan of limiting federal authority to the exercise of powers specifically enumerated, and give it the needed enlarged scope by amendments which will clearly define the additional powers granted. If we adhere to this plan, the federal government can never have general police powers.**

To Young the states occupied the center of the American system of government. But, in December 1908, he saw them under siege from three outside forces—the federal courts, the roads and the new nationalists—and it is this vision that makes his dire warnings understandable.

Only eight and a half months earlier, the United States Supreme Court issued its decision in *Ex parte Young*, 209 U. S. 203 (March 23, 1908), holding that a federal court in Minnesota had jurisdiction in a suit seeking to enjoin him from enforcing allegedly unconstitutional state laws. He was barred from enforcing rate reduction rules of the state Railroad and Warehouse Commission and several laws effecting rates, taxes and hours enacted by the state Legislature in 1907.[1] Henceforth,

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[1] **For the remarkable "inside" history of *Ex parte Young*, see Professor Richard C. Cortner's *The Iron Horse and the Constitution: The Railroads and the Transformation***

he feared, state regulators would be subject to continual federal oversight. Next, he recognized the railroads' victory in that jurisdictional battle was part of their larger strategy to halt all state regulation of them. Finally, he saw "the theory of the advocates of the enlargement of federal power by judicial construction of the constitution" threatened the primacy of the states in the federalist system required by the constitution and intended by the framers.

The litigation over the regulation of rates pended four more years, long past his term in office. [2] At last, on June 9, 1913, the United States Supreme Court sustained the states' regulatory and rate making authority in the *Minnesota Rate Cases*.[3] It was a personal triumph for Young, and a gratifying victory for the states.

General Young's address was published the next year: 2 *Publication of the Minnesota Academy of Social Sciences* 65-79 (1909). It has been reformatted; three footnotes added, and quotations indented. ◊

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of the Fourteenth Amendment **(Greenwood Press, 1993). Some of the most interesting parts of the three chapters of this book on *Ex parte Young* are based on records the railroads donated to the Minnesota Historical Society. Among them are communications between the law firms representing the Great Northern, other roads and the shareholders, and Hill and his associates about litigation tactics. Professor Cortner's book is indispensible reading for anyone interested in the legal history of Minnesota.**

[2] He was elected in 1904 and 1906. See "Results of Elections of Attorneys General, 1857-2010" 23-4 (MLHP, 2013). In 1909, after his last two year term ended, his successor, George T. Simpson, hired him to represent the state in the "rate case."

[3] *Minnesota Rate Cases*, 230 U. S. 252 (1913). The opinion was written by Justice Charles Evans Hughes, with Justice Joseph McKenna concurring.

THE PRESENT PROBLEMS INVOLVED IN MINNESOTA'S STATEHOOD

By

Edward T. Young

I have been asked to discuss the present problems involved in Minnesota's statehood. You have just listened to an exhaustive and scholarly address by Judge Elliott, on the subject of the structure of the American government, and to an equally meritorious discussion by Judge Brown of that great subject, the police power, and its distribution between the states and the nation.

Judge Elliott has shown that the term "government" as employed in this country means that complex system of public administration carried on by the simultaneous operation of the political machinery necessary to the making and enforcement of the laws of those primary republics which we call the states—the jurisdiction of each of which is limited to its own territory—and the corresponding political machinery of the federal republic, having jurisdiction throughout all the states as to the subjects specially enumerated and committed to it by the federal constitution. These two agencies operate at the same time in the same territory, and act directly on the same persons and property; they are each exercising a definite and limited part of the national sovereignty, and the two together constitute one government, the intention being that each should be supreme and exclusive within its sphere, and that all subjects of governmental cognizance should be within the jurisdiction of the one or the other. Ours is the only great government in which the sovereignty is divided and different portions thereof assigned to different governmental instrumentalities, and the surprising thing with reference to its operation in practice is, not that some conflict has arisen as to the true location of the jurisdictional boundary line between the two partial sovereignties, but that such an apparently impracticable plan of administration has not resulted in disruption.

Judge Brown has pointed out that the police power is indefinable. It is that inherent attribute of sovereignty which enables a government to do whatever may be necessary for the purpose of promoting the public welfare. When the federal constitution was framed the police power and all other latent and unenumerated powers were left with the states, and the federal government was endowed only with certain general enumerated powers which affected the welfare of the people of all the states alike; no federal power was intended to be left to implication, except such incidental powers as might be necessary to make those granted effectual. If the states and the federal government were distinct

sovereignties, each would have inherent police power, but as they were formed to be co-ordinate parts of the government of one sovereign people, the police power had to be definitely located in order to guard against conflict.

There is in this country at the present time, however, a school of federalist statesmen, among whom President Roosevelt is entitled to a front rank, who are and for some time have been demanding of the supreme court a new construction of the federal constitution, so as to hold, contrary to the well known and frequently expressed intention of its framers, that the federal government has latent powers as well as those enumerated, in the exercise of which it has authority to act in all matters affecting the public welfare, where in its opinion the states by reason of their limited jurisdiction are incompetent to handle the subject. In other words, the claim is being made that the fundamental plan of the fathers should be so far changed by judicial construction as to invest the federal government with general police powers, the same as the states. There is a perceptible trend of public sentiment in favor of this so-called new federalism on the part of those who evidently have not studied the question closely enough to see the effect such a holding would have on our system of government. The most conservative student of public affairs must admit that the great material changes which have taken place in the country in the last century have produced conditions which make an enlargement of the federal power in certain directions not only desirable but necessary. The only legitimate room for controversy that exists as to that question, relates to the manner in which the change could be accomplished. The federal constitution was made by the people and not by the courts, and by its terms it provides a method whereby changes may be made by amendments to be adopted by the states. This method should be followed whenever changes are necessary, because in whatever respect the federal powers may be enlarged, the reserved powers of the states must be correspondingly diminished, and therefore the consent of the states should be obtained in accordance with the terms of the original compact. There is another fundamental objection to the enlargement of the federal power by judicial construction of the federal constitution, which does not question the integrity of the courts nor their capacity to know what the changes should be. It is the objection that such a usurpation of power would destroy that respect of the people for the courts and the constitution, which is necessary to our national repose. The province of judicial construction as to either a constitution or a statute has always been well understood to be limited to the determination of the true meaning of the framers thereof. The security of the people in their lives, liberties and property rights, has always rested in the plainness of our laws and the certainty that the courts would interpret and enforce them according to their terms.

We have always aimed to make our laws so plain that every one could understand them, and because of their plainness, every citizen is presumed to know the law. If the courts may by "construction" make a constitution or law mean something different from what it says or what was intended by its framers, the power of self government would be destroyed, and the courts justly the most respected branch of our government at present, would be converted from judicial tribunals into despotic law-makers, and their decrees would receive about that same degree of respect which is generally accorded to despots.

But there is still a more vital objection to the theory of the advocates of the enlargement of federal power by judicial construction of the constitution. This divided sovereignty could not be continued, and this system of co-ordinate state and federal government maintained for a day, if both divisions of the government were exercising unenumerated powers. There would in such case be no possible way of determining which branch of the government had jurisdiction over any subject. The federal constitution would not enlighten us as to what subjects were within federal cognizance, and as that constitution very properly provides that where federal authority exists as to any subject, it is the "supreme law of the land," and state authority as to such subject must be regarded as inoperative, the effect of holding that the federal government might at its option assume control over any subject would be to entirely destroy the state governments. It is therefore clearly necessary that we either abolish the states and make of the general government a consolidated instead of a federal republic, or that in enlarging its powers we adhere to the original plan of limiting federal authority to the exercise of powers specifically enumerated, and give it the needed enlarged scope by amendments which will clearly define the additional powers granted. If we adhere to this plan, the federal government can never have general police powers.

It is clear from what has been said that outside of purely local questions such as taxation or the development of our natural resources, the statehood of Minnesota presents only the same problems that confront the states generally.

One of the most difficult questions which the states at the present time have to handle arises out of the exercise of their police powers in the regulation of commerce.

Though ours is yet a new country the rapid development of our natural resources and the multiplication of our industrial undertakings have already made this the greatest commercial nation of the world. Minnesotans contributed its share to the country's commercial

greatness, and has also contributed its share to the effort to solve some of the govern-mental problems to which these conditions have given rise.

At the foundation of commerce and all industrial life lies transportation, so that as a result of our commercial and industrial growth our railroad development has exceeded that of all other countries combined, and as a consequence we have been not only the most active, but the pioneers in the matter of the regulation of railroad rates.

The decision of the Granger Cases about thirty years ago by the federal supreme court settled the abstract question of the right of govern-mental regulation of railroads.[4] By that decision the railroads were declared to be common carriers, subject to the obligations resting on such carriers under the common law; their roads were declared to be public highways, and that it was obligatory upon them to furnish the public reasonable service at reasonable rates. But the settlement of these general principles was only a beginning in solving the problems involved. When, in the formation of our government, the sovereignty was divided, commerce was one of the subjects that was split, and jurisdiction was expressly given to the federal government over commerce beginning in one state and ending in another, and control was left in the states, over commerce beginning and ending within their respective borders. Exclusive control over interstate commerce is therefore exercised by the federal government under the constitutional grant of authority, and exclusive control over intra-state commerce is exercised by each of the states under its police power.

The great railroad lines have been constructed across the continent without regard to state lines. Each of these railroads is operated as a system, and its business, both passenger and freight, is managed from one central office. In forming its operating divisions no regard is paid to state boundaries, and on most of its trains and sometimes on every car of a train, both interstate and intra-state business are carried. There are therefore passenger and freight rates for the intra-state business of each of the states through which the road passes, subject to regulation by the respective states in which they begin and end; and

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[4] *The Granger Cases* is the name give to eight related cases decided by the United States Supreme Court on March 1, 1877, the most famous being *Munn v. Illinois*, 94 U. S. 113 (1877). Of the others, one arose in Minnesota state court: Winona & St. Peter Railroad v. Blake, 94 U. S. 180 (1877); two from Wisconsin: Chicago Milwaukee & St. Paul Railroad v. Ackley, 94 U. S. 179 (1877), and Stone v. Wisconsin, 94 U. S. 181 (1877); and four were appeals from a federal court: Chicago, Burlington & Quincy Railroad v. Iowa, 94 U. S. 155 (1877), Piek v. Chicago & North-Western Railway Co. (and Lawrence v, Chicago & North-Western Railway Co.), 94 U. S. 164 (1877), and Southern Minnesota Railroad v. Coleman, 94 U. S. 180 (1877)(decided with Winona & St. Peter Railroad v. Blake, supra.) .

also passenger and freight rates for the inter-state business carried by the same roads, subject to regulation by the federal government. While it is not necessary that they be identical for equal distances it is plain that there must be a fair and proper relation between the rates on each kind of commerce, otherwise one class of business would be unjustly compelled to bear a part of the burden properly belonging to the other. Each passenger and the shipper of each kind of freight is entitled to a reasonable rate, and the railroad company on its part is entitled out of all its business to a fair income above the expense of operation and maintenance. If a state should prescribe rates so low that its intra-state business would be unprofitable to the company, it would have to refuse to put in the rate, or in order to protect itself from loss it would have to advance its interstate rates. On the other hand if the interstate rates were made too low, the shippers of intrastate business on that line would have to pay unreasonable rates in order that the company might be able to show a profit at the end of the year. Each sovereignty must therefore jealously guard the rights of both the shippers and carriers under its jurisdiction. The courts have declared that each rate must be reasonable in and of itself, but this rule is easier to state than to apply. There are so many things to consider with reference to the reasonableness of each rate, that also must be considered with reference to all others, that the question seems almost inextricably involved in complications. Each rate ought to contribute its share to the general expense of operating the system of road, and the general profit of the enterprise. There are large and expensive terminals at commercial centers made necessary in part by intra-state business and in part by interstate traffic.

A part of the expense of the maintenance, and the income on the capital invested in these terminals, as well as a part of the general expenses of the entire system of road must be allotted to each kind of commerce in determining what the rates thereon should be. The character of the road-bed, the rails, the bridges, the number of engines and the volume of the general equipment, used indiscriminately in both kinds of commerce, must be taken into consideration, and their proportionate use in each kind of commerce be ascertained. The same train and crew carrying intra-state business also carries business that is interstate, and the proportionate expense of such train service must be allotted before the true relation between the rates can be ascertained, or a rate be fixed on either kind of commerce which is reasonable in and of itself. Many of the same difficulties arise where we attempt to get at the separate expense of the passenger and freight business.

All of these perplexing problems do not grow out of the division of the jurisdiction over commerce between the states and the nation. They

would have to be solved even if the federal government had complete control over the whole subject of commerce. Rates on a railway system are not and could not be made on a mileage basis from one end of the line to the other, except on through business. The great bulk of the business of a railroad is carried on local rates radiating from certain commercial centers, affected to some extent by local density of the traffic and competitive conditions. These difficult problems requiring an apportionment of the cost of the service between interstate and intra-state business, are but a part of the general question of the difference in cost between short haul and long haul business.

But in addition to all these questions, when a state undertakes to regulate rates on the intra-state business of an interstate carrier, there must be determined the extremely difficult question of the basis upon which the railroad is entitled to an income. Not only must the proportionate part of the gross value of the company's property which is devoted to its intra-state business be ascertained, but the question is yet to be decided how railroad property is to be valued for the purpose of income. Assuming all of the property of the company to be located in the state devoted exclusively to intra-state business, must the income of the company be predicated on the original cost of the construction of the road, or is there some other element to be taken into account in determining the basis upon which income must be computed.

In the suits involving the regulation of rates now pending in this state, we contend that the proper basis of income is the amount of the original investment, while the railroad companies claim that the land used for their right of way, yards and terminals constantly increases in value the same as adjacent property, and that such increased value must be added to the original cost, and an income be allowed them on what they are pleased to call the present cost of reproduction of the road and its appurtenances. The affirmative or negative answer to the claim made by the state or to the claim made by the railroad company in this regard must depend on a determination of what is the true relation of a railroad to the state.

The claim of the railroad companies is based on the theory that a railroad is a private enterprise except to the extent that its property is devoted to a use in which the public have such an interest as to give it the right to fix minimum rates. The claim of the state is based on the theory that the business of a railroad is governmental in its character, and that in the performance of the business the railroad companies have no other or greater rights than the government would have had, had it undertaken the work itself. No one who has given the subject any

thought can doubt that under their general power to construct highways, the several states might have constructed the railroads within their borders, and might have operated them for the common good of the people. The state alone possesses the power of eminent domain, whereby property may be taken against the will of the owner for highway or other public purposes. It would be an outrage on the right of private ownership of property, if the state should use that power for any other purpose than for acquiring property strictly for the use of the public.

Instead of constructing the railroads themselves, the several states adopted the plan of creating these corporations known as railroad companies, and endowing them with this governmental power of eminent domain so as to enable them to acquire the right of way, yards and terminals necessary for their enterprises. The states did not intend to abuse this major power of sovereignty by so granting it to aid a private enterprise; on the contrary it was granted with the full understanding that the corporation receiving it was about to engage in the performance of a governmental function and would use this governmental power in furtherance thereof.

When property is acquired by the state for highway use it is entirely severed from the mass of business property, is unalienable for any purpose, and therefore has no market value. Speculation as to what its value might be if it were marketable would be a fruitless waste of time. In any inquiry as to the value of property in court, the market value is what is meant, so that if property is not and cannot become marketable there is no room for the inquiry. When any public service is carried on by the state or any of its political subdivisions for which a charge is made, the basis of the charge is the cost of the undertaking, and not a value theoretically enhanced by any subsequent speculative accretion representing no investment. On this subject Mr. Justice Brewer of the federal supreme court, in the recent case of Cotting vs. Goddard, 183 U. S. 79 [1901][5], in referring to the status of railroad companies says that when the owner of property intentionally devotes it to the discharge of a public service, thus deliberately undertaking to do that which is a proper work for the state, he should be assumed to have accepted all the conditions which attach to like service when performed by the state itself. After referring to the grant of the power of eminent domain to such corporations he says:—

> **"It thus enables them to exercise the powers of the state, and exercising those powers, and doing the work of the state, is it wholly unfair to rule that they must submit to the same conditions which the state may place upon its own**

[5] **Also known as *Cotting v. Kansas City Stock Yards, Co.***

exercise of the same powers in the doing of the same work?"

In the rate cases now pending in this state the following concrete propositions are affirmed by the railroad companies, and the decision of the cases will involve their settlement, to wit:

1st. That the state wide reduction of intra-state rates, either by the railway commission or the legislature, operates in practice so as to compel a corresponding reduction in interstate rates of the carriers in the same and adjacent territory; and that inasmuch as interstate rates are within the exclusive jurisdiction of the federal government, any action of the state which would affect them is void. (If this theory should be upheld the state would have no power over rates of any kind.)

2nd. They correctly claim that it is more expensive to do the local short haul business within a state than it is to do the interstate business carried on the same train, which usually involves longer hauls, but they refuse to disclose the actual difference in the cost, based upon any method of definite computation. They also refuse to disclose the exact difference in cost between the passenger and freight business, or the actual rate basing value of the portion of their property which is employed in the domestic business of the state. They claim that no accurate figures can be given on either subject, and that therefore the rate making power must depend as to these questions on the opinion evidence of the company's expert witnesses. The state claims that these matters can be made definite by a proper system of cost accounting.

3rd. That where rates are prescribed on a mileage basis for a whole state, if it is found that the rates are too low and therefore confiscatory as to any road, the rates are void as to all, even though some of the roads by reason of the favorable location of their lines and the volume of their business and the economy of their management, might be able to make more than a reasonable profit on the rates. The state claims that each road must be considered separately and the rates must stand or fall accordingly.

4th. They also claim that they are entitled to an income on the present cost of reproducing their lines in the state; that the cost of right of way and terminals, including the damages to adjacent lands, is ordinarily about three times as much as the same quantity of land would cost for ordinary business purposes, and that therefore they are entitled to take treble the value of an equal amount of adjacent lands as the present value of theirs. It is on this theory of valuation that they claim the rates

are so low that the companies cannot earn a reasonable income under them.

Many of these questions have never been squarely presented to the federal court, and until they are judicially determined the subject of rate regulations will be surrounded by uncertainties. In the famous Nebraska Rate Case, reported as "Smythe (sic) v. Ames," 169 U. S. 466 [1898],[6] speaking of the basis of railroad income, Mr. Justice Harlan said:—

> **"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of the public highway than the services rendered by it are reasonably worth."**

When these fundamental questions have been settled there will be little difficulty in determining what is a fair rate in any given case, and it is needless to say that in adjusting those questions the public should be actuated by a spirit of the utmost fairness, and should respect to the fullest extent the rights of property involved. In fixing rates the state must stop safely short of confiscation.

In this state we are particularly interested in the speedy restoration—if I may use that phrase—of friendly relations between the state government and the railroads. We feel that the state is asking for nothing as against the railway companies, but what is clearly fair and just, and so far as the state and the railways are unable to agree on the important

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[6] The plaintiff's name is Smyth.

basic questions involved, we desire a speedy judicial determination which will remove all danger of conflict in the future. In the matter of railroad regulation it is highly important that there should be entire harmony so far as is possible, between the officers of the state and the railroad companies. We believe that it is by friendly co-operation, rather than by conflict between the state and the transportation companies, that the public welfare in this rich and growing state can be advanced, and we therefore hope, with these very important questions now involved in pending litigation settled, that in their future relations the spirit of fairness will be manifested both on the side of the state and that of the railroad companies, and that with industrial peace established on a permanent basis, the people of the state may all unite in developing our great resources and in making this state one of the richest and most prosperous states of the Union. ■

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Posted MLHP: March 1, 2014.