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Slipping the constitutional leash

By George Will – June 14th, 2013

In May 1918, with America embroiled in the First World War, Iowa Gov. William Lloyd Harding dealt a blow against Germany. His Babel Proclamation — that was its title; you cannot make this stuff up — decreed: "Conversation in public places, on trains and over the telephone should be in the English language." The proscription included church services, funerals and pretty much everything else.

Iowa's immigrant communities that spoke Danish, Dutch, Norwegian and French objected to this censorship of languages of America's wartime allies. Harding, however, said speaking any foreign language was an "opportunity [for] the enemy to scatter propaganda." Conversations on street corners and over telephone party lines — Iowa telephone operators did the metadata-gathering that today's National Security Agency does — resulted in arrests. Harding was ridiculed but Germany lost the war, so there.

The war validated Randolph Bourne's axiom that "war is the health of the state," but it killed Bourne, who died in December 1918 from the influenza epidemic it unleashed. Today, as another war is enlarging government's intrusiveness and energizing debate about intrusiveness, it is timely to remember that war is not the only, or even primary, cause of this.

Or, more precisely, actual war is not the only cause. Ersatz "wars" — domestic wars on various real or imagined vices — also wound the defense of limited government. So argue David B. Kopel and Trevor Burrus in their essay "Sex, Drugs, Alcohol, Gambling and Guns: The Synergistic Constitutional Effects."

Kopel and Burrus, both associated with Washington's libertarian Cato Institute, cite the 1914 Harrison Narcotics Act, which taxed dealings involving opium or coca leaves, as an early example of morals legislation passed using Congress's enumerated taxing power as a pretext. In 1919, the Supreme Court held that the law "may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue."

Its "effect"? The effect of suppressing the drug business obviously *was* its purpose. Nevertheless, the court held that even if "motives" other than raising revenue really explained Congress's exercise of its enumerated power, the law still could not be invalidated "because of the supposed motives which induced it."

"Supposed"? The court's refusal to reach a reasonable conclusion about the pretext Congress used in this case for trespassing on territory reserved to the states enabled the federal government to begin slipping its constitutional leash. In 1922, Chief Justice William Howard Taft warned that Congress could seize control of "the great number of subjects" reserved to the states by the 10th Amendment by imposing a "so-called tax" on any behavior it disapproved of:

“To give such magic to the word ‘tax’ would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states.”

So, a 1934 law imposed a $200 tax on the making and transfer of certain guns. Supreme Court Justice Harlan Fiske Stone complacently said that any act of Congress “which, on its face, purports to be an exercise of the taxing power” should be treated as such, without judicial inquiring into any “hidden motives” Congress had. “Hidden”?

Congress responded to this “abdication of judicial scrutiny” (Kopel’s and Burrus’s correct characterization) with the 1937 Marihuana Tax Act, another supposed tax law actually designed not to raise revenue but to legislate morality by changing behavior. The 1951 Revenue Act taxed “persons engaged in the business of accepting wagers” and required them “to register with the Collector of Internal Revenue.” The IRS was becoming the enforcer of laws to make Americans better behaved, as judged by their betters in the federal government.

There have been equally spurious uses of Congress’s enumerated power to regulate interstate commerce. In 1903, the court upheld, as a valid exercise of that power, a law suppressing lotteries by banning the interstate transportation of lottery tickets. Dissenting, Chief Justice Melville Fuller argued that the power to regulate persons and property in order to promote “the public health” and “good order” belongs to the states.

Seven years later, the Constitution’s commerce clause was the rationale for the Mann Act banning the transportation of females for the purpose of “prostitution or debauchery, or for any other immoral purpose.” Including, it turned out, noncommercial, consensual sex involving no unhappy victim.

Today, Congress exercises police powers never granted by the Constitution. Conservatives who favor federal “wars” on drugs, gambling and other behaviors should understand the damage they have done to the constitutional underpinnings of limited government.