Preface

Former New Jersey Superior Court Judge Andrew P. Napolitano recently asked the third-ranking Democrat in the US House of Representatives ‘where in the Constitution it authorizes the federal government to regulate the delivery of health care’. The congressman’s answer encapsulates what I argue is the prevailing ‘Washington attitude’: ‘There’s nothing in the Constitution that says that the federal government has anything to do with most of the stuff we do’. To this the congressman added: ‘How about [you] show me where in the Constitution it prohibits the federal government from doing this’ (Napolitano, 2009).

The ‘Washington attitude’ finds expression in two related ideas and impulses. First, the Congress is free to tax, spend, borrow and regulate as it sees fit, unencumbered by constitutional or moral constraints. Second, the burgeoning federal enterprise is animated by the politics of ‘wants and needs’, by ‘rights’ defined in opposition to republican self-government, and by a determination to address perceived ‘market failures’ and to compensate for ‘forbidden’ income and wealth inequalities.

The recent paroxysm of federal activity – the Troubled Asset Relief Program, the Energy Improvement and Extension Act of 2008, the Tax Extenders and Alternative Minimum Tax Relief Act of 2008, the American Recovery and Reinvestment Act of 2009, the Omnibus Appropriations Act, 2009, the ‘Cap-and-Trade’ bill and the metastasizing ‘health-care reform’ bills – is not a manifestation of a recent emergence of the ‘Washington attitude’. In fact, the ‘attitude’ is the product of a path-dependent process that has been influenced by a moral and political philosophy, a political economy and a constitutional jurisprudence that would be alien to the United States’ Founders’ imagination.

A recurring theme of the book is that their embrace of the Washington attitude has enabled politicians, economists and the Supreme Court variously to rationalize, to justify or to endorse an expansion of federal on-, off- and off-off-budget activity that ignores the federal government’s enumerated powers, usurps the states’ police powers, and substitutes impersonal agency rule-making for congressional accountability. If, as I argue, the resulting erosion of federalism and the separation of powers represents a threat to liberty, the body of discriminatory statutory and administrative law is irreconcilable with the Founders’ prior ethical commitment to
the moral equivalence of persons. For their part, the now-routine departures from ‘regular order’ and statutory budget process law effectively disenfranchise voters and ignore the moral imperative, embraced by the Founders, to promote the greatest possible equal political participation.

Finally, the metastasization of entitlements is a reflection of the politics of wants and needs, and of a rights conception that the Founders would reject. All of this is defined in opposition to the Founders’ procedurally based, consequence-detached republican self-government project. Stated differently, politicians, economists and the Supreme Court have given form and substance to Madison’s greatest fear:

what is of most importance is the high sanction given to a latitude in expounding the Constitution which seems to break down the landmarks intended by a specification of the Powers of Congress, and to substitute for a definite connection between means and ends, a Legislative discretion as to the former to which no practical limit can be assigned. (Madison [1819] 1999, p. 734)

Chapter 1, The Federal Enterprise, begins with a discussion of what I have styled the recent paroxysm of federal activity, and the Founders would likely characterize as the post-September 2008 ‘rage’ of federal legislation. The balance of Chapter 1 provides an adumbration of the entire corpus of federal on-, off- and off-off-budget activity.

While there is a sense in which a comprehensive survey of federal activity is valuable for its own sake, the book is motivated by a thought experiment: suppose that the Founders were with us today. Suppose also that the Founders, now our notional contemporaries, are aware of the scope and reach of federal activity (Chapter 1), of the character and content of the ‘Old’ and ‘New’ Supreme Courts’ constitutional jurisprudence (Chapters 3 and 4), and of the public philosophy and political economy that inform the ‘Washington attitude’ (Chapter 5). Suppose, finally, that the Founders engage in a critical appraisal of the federal enterprise. Informed by their moral and political philosophy, by their political economy and by their understanding of the Constitution and of the role of the Supreme Court (Chapter 2), the Founders would, I argue, conclude that much of what the federal government does is either unconstitutional, immoral, or both. While each chapter incorporates elements of this conceptual exercise, Chapter 6 answers the hypothetical question, ‘What would the Founders do?’