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March 22, 2009: A Restatement of the Establishment Clause

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Title: A Restatement of the Establishment Clause

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3/22/2009--The program yesterday at Duquesne Law School, a three-hour continuing legal education program featuring my work in the area of religion and American life, has led me to a recapitulation of my understanding of the meaning of the Establishment Clause of the first amendment. First, there is no political wall of separation between church and state. There could not be in a democracy. Believers are free to promote policies in the public square on any basis they like, including arguing that a particular policy reflects divine will. Thus, religious support for Proposition 8 in California, opposing gay marriage, should not be characterized as a violation of constitutional principle, imposing religion on people. We vote on policies in this country and if you lose, you lose because democracy has imposed a policy, not because religion has done so. Religious believers are even free to recommend policies that other people think violate constitutional rights, as long as we all understand that eventually that matter will be settled by the courts. On the other hand, there is a constitutional wall of separation between church and state, so that when government speaks, as in the Pledge of Allegiance, or putting up public Ten Commandments displays, it must speak in universal terms. Universal means that the message must be aimed at all, not that everyone agrees with the message. So, the government may not urge people to believe in God or accept the biblical account of Sinai. Thus, we are entitled to ask, "What is the universal message behind the sectarian language of the Pledge of Allegiance and the Ten Commandments?" I think there is such a universal message. The word God means far more than the Creator in the Bible. The word may stand for the claim of the universality and objectivity of fundamental values or the acknowledgment of gratitude for the ceaseless creativity of the universe. The Ten Commandments may stand for the claim that our rights are inherent in our humanity and need not be justified to human power. Even if some religious believers would take these sectarian images to be endorsements of their particular religious traditions, it would be a helpful to force the language of universal messages into these Establishment Clause controversies. Eventually, all Americans might come to agree that when the Government speaks, it must speak to all.