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## The Ten Commandments and the Fourteenth Amendment



*Abstract: Proponents of civic displays of the Ten Commandments in the United States sometimes claim that such displays are justified because the Ten Commandments are foundational to American law. The Decalogue text represented in such displays typically omits Exodus 20:1–2, the verses in which God self-identifies as the God who brought Israel out of servitude in Egypt. This omission parallels a similar move that pushes the Fourteenth Amendment to the U.S. Constitution into the margins of American constitutionalism. Suppressing from view the context of the law’s meaning and authority in the movement from servitude to redemption, the civic displays resist one possible sense in which the Ten Commandments are indeed foundational.*

### 1. INTRODUCTION

Where does the text begin? Which portions of the text belong in the foreground of thought; which can be left to the background, or to the margins? Does newer text supersede older text, or leave its meaning and authority largely unchanged? Recent American civic displays of the Ten Commandments and judicial decisions about the constitutionality of such displays raise such questions thrice over: first about the Bible, then about the Constitution, then about the relation between the Bible and the Constitution.

This article addresses these questions within a contemporary American cultural context. Newer Ten Commandments displays can be motivated by different aims than older displays. The current defense of older displays may have meanings other than those that led to their creation. During the 1950s, when many stone Ten Commandments monuments were erected in civic spaces, the displays were meant in part to distinguish the content and ground of American public life from those

of “materialistic communism.”<sup>1</sup> In this context, it was important to proponents to show that the displays had interdenominational support from Protestants, Catholics, and Jews, as well as from nondenominational intermediate associations.<sup>2</sup> Such support helped express a foundational idea of freedom for which the Ten Commandments, like America, stood.<sup>3</sup> More recent Ten Commandments displays, such as those discussed by the U.S. Supreme Court in 2005, emerged within a “culture war” rather than a “cold war” context and have been part of a more specifically, explicitly, and exclusively Christian project.<sup>4</sup> I will focus here on the character of this Christian project, noting ways in which it both attends to and relocates what was initially a Hebraic source. Christian uses of the Hebrew Bible, of course, may have many different motivations and consequences. My concern here is with a particular Christian appropriation of a scriptural text, along with that appropriation’s assumptions about foundational American legal principles. In particular, I want to show how certain ways of treating the Bible and Constitution stand or fall together.

Those who create visual displays of the Ten Commandments and who wish to include the content of the commandments in the displays must make a decision about where the text begins and ends. But the need to individuate the text already arises from liturgical practice.<sup>5</sup> In making this text-framing decision, those who create American civic displays of the Ten Commandments typically omit verses and versions that stress the movement from slavery or servitude to redemption, God’s authority as agent of the people’s redemption, and the obligations of a people that has

<sup>1</sup> *Books v. City of Elkhart*, 235 F.3d 292 (2000), pp. 324–326 (Manion, J., dissenting).

<sup>2</sup> *Ibid.*, pp. 294–295.

<sup>3</sup> In 1958, while dedicating a granite Ten Commandments monument erected on the lawn in front of the municipal building in Elkhart, Indiana, a Protestant minister said: “Americans have inherited moral power from the founding fathers of our country... and if they will accept the precepts of the Ten Commandments, it will provide their redemption from today’s strife and fear.” Quoted in *Books v. City of Elkhart*, p. 295. The meaning of “redemption” in these words of dedication (see note 6, below) is colored by concern about “strife and fear,” presumably in the context of the cold war.

<sup>4</sup> *McCreary County, Kentucky, v. ACLU of Kentucky*, 545 U.S. 844 (2005), pp. 855, 857, 869–870; *Green v. Board of County Commissioners*, 450 F. Supp. 2d 1273 (E.D. Okla. 2006), pp. 1276, 1280. My descriptions of Christian textual practices and assumptions about the Ten Commandments are stylized. For a closer view of some of the participants in the recent Ten Commandments controversies, attentive to their own self-understandings, see Peter H. Irons, *God on Trial: Dispatches from America’s Religious Battlefields* (New York: Viking Press, 2007), pp. 182–233.

<sup>5</sup> The text must be individuated for the purpose of standing during recitation of the Decalogue in the synagogue service and for the purpose of individual reading after the service.

experienced servitude and deliverance.<sup>6</sup> The displays' creators apparently believe that the meaning and force of the commandments, indeed, their very integrity and coherence, do not require inclusion of or attention to these verses and versions. More generally, the civic displays appear to assume, and perhaps call upon the public to believe, that there is a given unity to the Ten Commandments, a unity that unproblematically survives when the (ostensible) text is lifted out of its Hebrew Bible contexts and inserted into both Christian and civic contexts.

Creators and defenders of the displays make a claim that is ambiguously historical, normative, or both: that the Ten Commandments are foundational to American law and government. However it is understood, this is a strong claim about the contemporary political significance of a Hebrew Bible text. Their specification of the text, however, weakens their claim. The passage from slavery to redemption and the obligations of a people that undertakes a new legal commitment to equal citizenship are central to the narrative and the *nomos* of American constitutionalism.<sup>7</sup> As edited and presented by its proponents to reflect a particular version of both Christian and constitutional narrative, however, the Ten Commandments text is removed from a context that strengthens its claims to foundational status.

The constitutional question raised by these public displays—and, as we shall see, discussed by the U.S. Supreme Court—is whether they are consistent with the requirements of the Fourteenth Amendment to the U.S. Constitution. On their proponents' own textual assumption—that the Bible can be, and is, foundational to American law and government—the Fourteenth Amendment, adopted during Reconstruction in the aftermath of the Civil War, attests to the enduring significance of the concept of a new law or new covenant, undertaken in the movement from slavery to redemption. After all, the core meaning of the Fourteenth Amendment is that abolition is not enough and that the promise of the republic or

<sup>6</sup> See note 19 and corresponding text, below, for discussion of the verse omissions. "Redeem" and "redemption," of course, have many meanings. Neither the Exodus nor the Deuteronomy text of the Decalogue includes the words *ga'al* or *geulah*. In referring to "redemption," I have in mind God's agency in bringing Israel out of servitude in Egypt and into the realm of his legal authority, as suggested, for example, in Exodus 6:6–7. The use of "redeem" in the King James translation obscures distinctions in the Hebrew Bible and elides differences between various Christian and Jewish conceptions of redemption. The English word also sustains assertions whose moral and political meaning, in the context of their utterance, may not closely match ideas plausibly associated with the Hebrew Bible.

<sup>7</sup> Robert M. Cover, "Foreword: *Nomos* and Narrative," *Harvard Law Review* 97 (1983), pp. 33–40 (discussing "Redemptive Constitutionalism" and its role in antislavery argument); Ronald R. Garet, "With Radiant Countenance: Creation, Redemption, and Revelation," *Michigan State Law Review* (2009), pp. 289–306.

commonwealth requires due process of law, the equal protection of the laws, birthright citizenship, and protection of the privileges and immunities of citizenship for its realization.<sup>8</sup> It is both self-serving and yet oddly self-defeating for proponents of the displays to frame the biblical text in such a way as to suppress the contexts that (in a way) confirm or strengthen the defense of the displays as representing foundations.

Proponents of the displays in the twenty-first century appear to be exponents of a form of Christianity that sees no qualitative distinction between texts “old” and “new.” Though the Ten Commandments are located in the “old” part of the text (the Old Testament), their meaning and force survive in the “new” part of the text (the New Testament). Put somewhat differently, proponents regard as inessential any contexts that are suppressed or lost when the “old” is subsumed within the “new.” Proponents make similar assumptions in their role as constitutionalists. They assume that the Ten Commandments can and should be displayed in civic spaces because the commandments translate without loss into the content and authority of the republic’s (or state’s) foundational law. But this move requires that the opposite assumption be made about the relation between the “old” and the “new” *constitutional* texts. While the displays’ challengers celebrate the “new” constitutionalism of the Fourteenth Amendment, and see in that amendment a heightening and purifying of what had gone before, the displays’ proponents see no such change in dispensation.

## 2. TEXTUAL ASSIMILATION: TAKING “THE TEN COMMANDMENTS” INTO “BIBLE” AND “FOUNDATIONS OF AMERICAN LAW AND GOVERNMENT”

In 2005, the Supreme Court of the United States decided two cases involving civic displays of the Ten Commandments. In *McCreary County v. American Civil Liberties Union of Kentucky*, the court held that in the context of their legislative history, the decisions by two Kentucky counties to post the Ten Commandments on their courthouse walls violated the Establishment Clause.<sup>9</sup> In *Van Orden v. Perry*, the court upheld against

<sup>8</sup> The Fourteenth Amendment was adopted in 1868. Section 1 provides that “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

<sup>9</sup> *McCreary County v. ACLU of Kentucky*. The First Amendment to the U.S. Constitution includes the Establishment Clause, part of which reads, “Congress shall make no law respecting an establishment of religion.”

an Establishment Clause challenge the display on Texas state capitol grounds of a monument that included the Ten Commandments along with several symbols or signs (described by Chief Justice William Rehnquist, in his plurality opinion, as “An eagle grasping the American flag, [and] an eye inside of a pyramid.... Below the text [of the Ten Commandments] are two Stars of David and the superimposed Greek letters chi and rho, which represent Christ”).<sup>10</sup>

Although the Kentucky courthouse displays initially consisted exclusively of a framed, abridged text of the King James Version of the Exodus text of the Ten Commandments, the displays were expanded, in response to the ACLU’s legal challenge, to include additional representations. These included, inter alia, “a page from the Congressional Record... proclaiming the Year of the Bible... an excerpt from President Lincoln’s ‘Reply to the Loyal Colored People of Baltimore upon Presentation of a Bible’... [and] a proclamation by President Reagan marking 1983 the Year of the Bible.”<sup>11</sup> This revised version of the display included affirmations that the Ten Commandments are codified in the laws of Kentucky and that the “Founding Father[s] [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America’s strength and direction.”<sup>12</sup>

In response to the district court’s preliminary injunction ordering immediate removal of the display, the Kentucky counties installed in the courthouses a third display, which included both an expanded Ten Commandments text and copies of a number of civic texts, including the Magna Carta, the Declaration of Independence, a picture of Lady Justice, and others. The third display also included the following explanatory statement:

The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.” The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.<sup>13</sup>

<sup>10</sup> *Van Orden v. Perry*, 545 U.S. 677 (2005) (plurality opinion of Rehnquist, C.J.), p. 681.

<sup>11</sup> *McCreary County v. ACLU of Kentucky*, p. 854.

<sup>12</sup> *Ibid.*, p. 853.

<sup>13</sup> *Ibid.*, p. 856.

This explanation assimilates texts into one another, or finds them already so assimilated. This textual assimilation is threefold. The first aspect of this assimilation is the human being's status as created by God and endowed with rights in and by that creation—a status that in American political traditions, for example, in Lincoln's arguments against slavery, is often associated with Genesis 1:27 (“So God created man in his own image, in the image of God created he him; male and female created he them”)—which is conflated with the revelation of the law, which is the subject of the Exodus text. Among other things, this conflation elides the difference between the moral force of the universal creation of humankind in God's image, the Noahide commandments (which are also universal in their reach), and the revelation of the law to the people of Israel at Sinai. Further, these conflated warrants for rights and obligations are assimilated into a compound sacred text—they are put forward not as Torah, but as “Bible” (namely, “Year of the Bible”), which Christians stake out as their own Scripture and on behalf of which they claim to speak. (The second version of the Kentucky display recalls that the Kentucky House of Representatives had “voted unanimously... to adjourn... ‘in remembrance and honor of Jesus Christ, the Prince of Ethics.’”<sup>14</sup> Furthermore, as the essential meaning of the founding resides in the conflated and compiled text called “Bible,” so does the essential meaning of “the civil and criminal codes of... Kentucky.”<sup>15</sup> More generally, the universalized and yet Christianized “Ten Commandments” are adduced as “Foundations of American Law and Government.”<sup>16</sup>

### 3. EDITING OUT THE NARRATIVES OF BONDAGE AND EMANCIPATION

The Ten Commandments texts included in the Kentucky and Texas monuments are in notable respects specifically Christian texts. Their appropriation within a (particular version of) Christian narrative is visible not only in the most obvious respects—the monuments' use of the King James Version, the framing of the text as “The Ten Commandments” rather than “ten words,” the elevation of this text, and the associated demotion or neglect of the oral Torah and of rabbinic Judaism's legal hermeneutics—but also in the editing of the text represented.<sup>17</sup>

<sup>14</sup> Ibid., p. 853.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid., p. 856.

<sup>17</sup> See Paul Finkelman, “The Ten Commandments on the Courthouse Lawn and Elsewhere,” *Fordham Law Review* 73 (2005), for its discussion of the different texts of the Ten Commandments in different religious traditions. Finkelman argues that simply

Both Kentucky's first version of the Ten Commandments text and its subsequent, ampler version begin at Exodus 20:3, "Thou shalt have no other gods before me."<sup>18</sup> Both versions omit the first two verses of Exodus 20, which situate the bestowal and force of the law within the narrative of emancipation, and within that aspect of the relation between God and Israel which centers on God's redemptive agency toward Israel: "And God spake all these words, saying, I am the Lord thy God, which have brought thee out of the land of Egypt, out of the house of bondage."<sup>19</sup>

This striking omission is significant on two levels. It serves the project of claiming universal normative significance or status for the commandments by disconnecting them from the particular relation between God and Israel, or, somewhat more precisely, God and Jewish historical identity and normative community. The biblical and political correlates of this move are the presentation of the text as if it were simply continuous with the creation of humankind in God's image and the founding assertion that "all men are created equal." Further, as should not be surprising, perhaps, the omission obscures or erases the memory of "We the People"<sup>20</sup> as a community that has lived in the house of bondage and that has been brought out of Egypt's land. This erasure directs attention away from the Civil War and Reconstruction and serves the display's historical concentration on the eighteenth-century founding as the moment when Bible and Constitution converge on one another and come to have the same essential moral meaning. (Though Lincoln is present in the revised Kentucky display, imagine how differently he would figure in its meaning had the display represented the Ten Commandments as including the full text of Exodus 20:2.)

in choosing one (version of the) Ten Commandments text over another, a state makes a religious choice and violates the Establishment Clause.

<sup>18</sup> *McCreary County v. ACLU of Kentucky*, pp. 851, 855.

<sup>19</sup> Exodus 20:1–2. Although none of the Kentucky displays included these two verses, the Texas stone monument display (and others like it) begins with "I am the Lord thy God," a fragment of Exodus 20:2. While the Texas monument and others like it do not include a citation of Exodus, the Kentucky counties' third version of their display initially included this reference (see *McCreary County v. ACLU of Kentucky*, pp. 851–852, 855–856, and 856 n. 6). Similarly, a display of the Ten Commandments outside an Oklahoma courthouse includes a citation to "Exodus 20," although the display's text omits the first two verses and "could best be described as a butchered paraphrase of the KJV." *Green v. Board of County Commissioners*, pp. 1277–1278. The book name Exodus, without more, already refers to the people's being brought out from Egypt. Omission of the framing verses in Exodus 20:1–2 otherwise conceals this memory, history, and context.

<sup>20</sup> "We the People of the United States... do ordain and establish this Constitution..." U.S. Constitution, preamble.

The monuments as displayed in Kentucky and Texas no doubt send—and are meant to send—cultural and political messages; they make a political argument. But they conceal an important line of reasoning within the Torah texts—that is, they conceal a textual argument for the obligating force of the law’s norms. The argument goes: we are obligated by virtue of being spoken to, addressed, by the very God who brought us out of the house of bondage. While the obligation to honor the Sabbath, for example, takes its initial force from God’s work of creation, it now acquires additional force from our status as having been servants, and as having been released from servitude. Exodus 20:11 (omitted from the displays, though it might have conformed to Kentucky’s representation of the ethics of creation) presents the first argument. The version of the Ten Commandments in Deuteronomy 5, however, specifically makes the second argument in verse 15: “And remember that thou wast a servant in the land of Egypt, and that the Lord thy God brought thee out thence through a mighty hand and by a stretched out arm: therefore the Lord thy God commanded thee to keep the Sabbath day.” Taken together with the preceding verse, 14, the text argues: because we were brought out of the house of forced work by God’s outstretched arm, all the more meaningful is the obligation to refrain from work on the day that God has blessed and hallowed; as we were strangers in the land and servants, so we are obligated to provide the day of rest to the strangers within our gates and to our own servants.<sup>21</sup>

#### 4. REVISIONISM: RESTORING THE NARRATIVES AND FINDING THE “FOUNDATION” IN THAT RESTORATION

Fixing the Ten Commandments text for purposes of civic displays such as those at issue in *McCreary* and *Van Orden* forces a question about civic narrative. Is the civic narrative centrally about the eighteenth-century founding? Or does the story’s meaning and trajectory depend centrally on Reconstruction—the vexed, sometimes violent, and deeply contested effort to bring about national reunion on new ground and a new

<sup>21</sup> To similar effect, Exodus 22:21 and 23:9, Leviticus 19:33–34, and Deuteronomy 10:18–19, 16:11–12, and 24:17–22 make all or part of the following arguments:

1. Because you were strangers in Egypt, you shall treat the stranger among you as one of your own.
2. Because you were strangers in Egypt, you know what it is to be a stranger, and accordingly you shall treat the stranger as one of your own.
3. Because you were strangers in Egypt, and because God redeemed you therefrom, you are subject to God’s authority and to God’s command that you treat the stranger as one of your own.



reinterpretation of American constitutionalism? Does Scripture direct attention, that is, to the regime of republican liberty installed in the eighteenth-century constitution, or stress the “new birth of freedom” in a constitution renewed by adoption of the Reconstruction Amendments?<sup>22</sup>

Were the Reconstruction Amendments central to Americans’ understanding of who they are legally and politically, that is, to their sense of themselves as standing on “The Foundations of American Law and Government,” it would have been necessary (if they tended to think of the Bible as belonging to those foundations) to include the omitted Torah texts within any public political display of “The Ten Commandments.” And those of us who acknowledge the obligating force of the arguments made in the omitted texts might be drawn, for parallel reasons, to the Reconstruction Amendments, whether or not we regard the former as standing in a “foundational” relation to the latter. But the U.S. Supreme Court, in appraising the constitutionality of the Kentucky and Texas displays, was situated in relation to all of these texts in a special way, not shared in lay understandings and not rendered salient in ordinary civic life. The court could reach the question of the displays’ conformity with the Establishment Clause only because section 1 of the Fourteenth Amendment is understood to have “incorporated” the Establishment Clause against the states.<sup>23</sup> In the argument structure of its holdings, then, the court found itself compelled to go through the door of Reconstruction. For if “American Law and Government” still conformed to their eighteenth-century design, Kentucky and Texas would be quite free not only to display the Ten Commandments in courthouses and on capitol grounds but to apply some further degree of coercive state power to the observation and recognition of these texts.

Quite strikingly, though, in upholding the Texas display, the *Van Orden* court passes lightly over Reconstruction as if it hardly matters. Though the *McCreary* court does better, because it notices that the challenged display strangely omits the Fourteenth Amendment from its set of purportedly foundational texts,<sup>24</sup> *McCreary* does not emphasize that

<sup>22</sup> The Reconstruction Amendments are the Thirteenth, Fourteenth, and Fifteenth Amendments. Together with the first Civil Rights Acts, they were adopted in the aftermath of the Civil War and were meant to secure a domain of fundamental rights and to require equality before the law.

<sup>23</sup> See *McCreary County v. ACLU of Kentucky*, p. 853. “Incorporation” is a form of textual assimilation or annexation.

<sup>24</sup> The *McCreary* court points out that “[i]n a collection of documents said to be ‘foundational’ to American government, it is at least odd to include a patriotic anthem [the national anthem], but to omit the Fourteenth Amendment, the most significant structural provision adopted since the original Framing.” *McCreary County v. ACLU of Kentucky*, p. 872.

the Kentucky display's unconstitutionality rests precisely on the "new" Fourteenth Amendment foundation. In this way, the court in *Van Orden* and *McCreary* actually repeats the textual-editorial move made by proponents and defenders of the Kentucky and Texas displays. As the proponents erase the memory of emancipation from bondage as inessential to their Christian and civic understanding of the Ten Commandments, so the justices erase the memory of emancipation from bondage as inessential to their understanding of the Bill of Rights—the Ten Amendments.<sup>25</sup> As such, whether the justices conclude that the displays are constitutional or unconstitutional, their analysis actually runs in stride with that of the displays' proponents.

Suppose, however, that the justices were more vividly aware of Reconstruction and approached cases raising First Amendment (or, for that matter, substantive due process)<sup>26</sup> claims against the states as occasions to remember the movement from slavery to redemption and legal authority. Suppose, more specifically, that the justices understood the obligating force of the Fourteenth Amendment's guarantees of equal protection and due process, and of the privileges or immunities of U.S. citizenship, as dependent on "our" status as emancipated. Such judicial recognition that constitutional rights have, as it were, a twin foundation—first in creation and then in redemption—would enact a revisionist version of the proposition that there exists a foundational relationship between the Hebrew Bible and fundamental American law.

Such a revisionist program would profoundly affect lines of identification and links of memory. It might lead some Christians who identify their faith narrative with their civic narrative to position a Hebraic memory more centrally within their sense of themselves and of their responsibilities. Such Christians, feeling deeply that "we too were strangers, and the Lord brought us forth with a mighty hand," would have powerful motivations, both constitutional and biblical, to provide for "strangers" not only through private acts of giving but through public political decisions dismantling institutions that perpetuate inequality.<sup>27</sup>

<sup>25</sup> Although the apparent issue raised by both cases is whether the challenged Ten Commandments displays violate the Establishment Clause of the First Amendment, the actual issue is whether the displays violate the Fourteenth Amendment. While the First Amendment restrains the federal government, the Fourteenth Amendment restrains the states.

<sup>26</sup> "Substantive due process" is a phrase often used to describe courts' use of the Due Process Clause of the Fourteenth Amendment to require states to enforce rights that otherwise have no specific textual warrant.

<sup>27</sup> If display proponents located the Ten Commandments text more fully in Hebrew Bible context and gathered Jewish memory more closely to their Christian identity, they might become more aware of reservations in normative Jewish tradition about whether

As the revisionist program might lead some Christians for whom the Ten Commandments unite governmental and religious foundations to position themselves more fully within a Hebraic memory, so it also might lead some Christians to position themselves within an African-American memory: “We were chattel slaves, until the new law of Reconstruction brought us out of the house of bondage and into the light of a new promise.” But such appropriations of memory, however well intentioned, share problematic features with appropriations of texts. They are nonconsensual displacements and relocations of sensitive sources of meaning. While civic displays typically lend themselves to more than one interpretation, it would be plausible for Jews to read displays in the context of the revisionist program as saying to them in the voice of the displays’ proponents: “Not only do we republish your Torah in our Bible, and identify what we call the Ten Commandments as the essential canon within your canon, but we also invoke the memory—your memory—of emancipation from the house of bondage and stand in your shoes as those whose moral and religious duties are a function of that relationship.” And it would be similarly plausible for black Americans to hear in the revisionist displays a voice saying: “Our story is your story. It is the story of emancipation from bondage. (An incomplete emancipation to be sure, as we take your memory as ours without your consent).”

##### 5. “AND NOT AS MOSES, WHICH PUT A VAIL OVER HIS FACE”

The contemporary Christian public political project of drawing attention to the Ten Commandments as foundational to American law and government ought to be reviewed in light of Paul’s theological appraisal of the revelation at Sinai. Viewers of the “Ten Commandments” monument on the Texas capitol grounds may or may not know that the two tablets of stone, exhibited in the two upper corners of the monument above the (edited) KJV Exodus text,<sup>28</sup> are described by Paul as representations of “the ministration of death.” In his second letter to the Corinthians, Paul

or how to represent the Ten Commandments. Steven Wilf, “The Ten Commandments Cases: A View from Within,” *Connecticut Law Review* 40 (July 2008), pp. 1338–1341.

We might say about representations of the Ten Commandments what Franz Rosenzweig said about the Star of David (recall that the Texas display included two such stars). The symbol “leads the Christian into the outside,” its rays refracting into “that which is outermost” rather than into “that which is innermost.” “the great now of the remembered experience,” in which “Every person must know that the Eternal One led him himself out of Egypt.” Franz Rosenzweig, *The Star of Redemption* (Madison, Wis.: University of Wisconsin Press, 2005), p. 420.

<sup>28</sup> See *Van Orden v. Perry* (appendix to dissenting opinion of Stevens, J.), p. 736.

explains in II Corinthians 3:3 that Christ has embodied God's ministry, "not in tables of stone, but in fleshy tables of the heart." In Paul's account:

[God] also hath made us able ministers of the new testament; not of the letter, but of the spirit: for the letter killeth, but the spirit giveth life. But if the ministration of death, written and engraven in stones, was glorious, so that the children of Israel could not steadfastly behold the face of Moses for the glory of his countenance; which glory was to be done away: How shall not the ministration of the spirit be rather glorious? For if the ministration of condemnation be glory, much more doth the ministration of righteousness exceed in glory. For even that which was made glorious had no glory in this respect, by reason of the glory that excelleth. For if that which is done away was glorious, much more that which remaineth is glorious. Seeing then that we have such hope, we use great plainness of speech: And not as Moses, which put a vail over his face, that the children of Israel could not steadfastly look to the end of that which is abolished: But their minds were blinded: for until this day remaineth the same vail untaken away in the reading of the old testament; which vail is done away in Christ. But even unto this day, when Moses is read, the vail is upon their heart. Nevertheless when it shall turn to the Lord, the vail shall be taken away. Now the Lord is that Spirit: and where the Spirit of the Lord is, there is liberty. But we all, with open face beholding as in a glass the glory of the Lord, are changed into the same image from glory to glory, even as by the Spirit of the Lord.<sup>29</sup>

This account can be evaluated on many levels: for the ways in which it sometimes draws on, sometimes alters Hebrew Bible narratives; in comparison to rabbinic commentaries on those narratives;<sup>30</sup> in comparison to other Christian scriptural treatments of the work of the Spirit. Paul's account can and should also be located within the larger social and intellectual history of the relation between supersessionism, Christian anti-legalism, and Christian anti-Semitism. Here I will comment only on two problems that Paul's account raises for contemporary Christian efforts to mount public displays of the Ten Commandments as "Foundations of American Law and Government." Both of these problems concern the Reconstruction Amendments, though in somewhat different ways.

Viewed through the lens of Reconstruction, which is the historical and textual medium by which the Establishment Clause becomes

<sup>29</sup> II Corinthians 3:6–18.

<sup>30</sup> See Daniel Boyarin, "The Subversion of the Jews: Moses' Veil and the Hermeneutics of Supersession," *Diacritics* 23:2 (1993), pp. 16–35.

applicable against the states, the constitutional issue raised by the Kentucky and Texas displays is whether they are consistent with equal freedom, perhaps especially with equal freedom in certain features of civic life essential to the negation of slavery. Viewed in that way, the constitutional question presents the mirror image of *Plessy v. Ferguson*.<sup>31</sup> Louisiana's segregationist Jim Crow statute in *Plessy* was upheld because, seen formally or abstractly, it did not discriminate (or not in relation to those features of civic life essential to the negation of slavery), because its rule of separation was symmetrical across the races.<sup>32</sup> Whites were to sit in the carriages set aside for whites, blacks in the carriages set aside for blacks.<sup>33</sup> The "Ten Commandments" cases present the inverse situation: Christians, far from segregating the Torah into a separate and allegedly equal space, have annexed it and purport to represent it as a shared moral and historical "foundation" for American law and government. But the answer that Justice John Harlan gives to the segregationist apology in his *Plessy* dissent<sup>34</sup> also answers the appropriationist apology here. The social meaning of Christian public representations of the Ten Commandments is not that of a generous and welcoming outreach. Neither blacks nor whites understood Louisiana's Jim Crow law as a gesture of solidarity and equal membership in civil society. I suspect that relatively few American Jews read civic displays of the Ten Commandments as an unambiguous gesture of equal membership, and that many read their solidaristic meanings as annexationist. And while many Christian proponents and defenders of the Ten Commandments displays may subjectively entertain generous and welcoming attitudes toward Jews, both history and Scripture affect how and what the displays mean in fact. Set in Pauline context, at least, the representation of the Ten Commandments in the civic displays is an emblem of a hierarchical relationship. Christians are making a show of what they assert that Jews do not truly understand.

<sup>31</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896). The principle upheld in *Plessy*, that legally mandated "equal but separate accommodations for the white and colored races" satisfy the requirements of the Fourteenth Amendment, was rejected in *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>32</sup> "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it." *Plessy v. Ferguson*, p. 551.

<sup>33</sup> *Ibid.*, pp. 540–541.

<sup>34</sup> See *ibid.* (dissenting opinion of Harlan, J.), pp. 552–564. Against the state's claim that the rule requiring racial separation was not responsible for blacks' interpretation of the rule as demeaning, Harlan argued that the social meaning and point of the rule was precisely to stigmatize and subordinate blacks. *Ibid.*, pp. 556–557.

The second problem Paul's account raises is this: if the Ten Commandments are indeed "foundational," as Christian proponents of the display projects claim, but if the meaning of the "foundational" text is to be found exclusively within a Christian supersessionist hermeneutic, how is that hermeneutic to unfold and do its work within public institutions—legislation, judging, administration? Though the problem is perfectly general in its scope, we can consider it in the specific, paradoxical context of analyzing and deciding challenges to the legal validity of the "Ten Commandments" displays. Suppose, for the sake of argument, that the proper thing for the reviewing court to do is to start just where the display proponents want it to start: with a "foundational Ten Commandments." Suppose that the true meaning of the Establishment Clause, made applicable against the states by the Fourteenth Amendment, is to be found in the true meaning of the Ten Commandments.

Imagine that the display text of the Ten Commandments hangs on the walls of the Supreme Court, as it was meant to hang on the Kentucky county courthouse walls. Imagine, in a dramatic moment, counsel for the government gesturing toward the "Ten Commandments" display text in just the way that former president John Quincy Adams gestured toward display texts of the Declaration of Independence in his oral arguments before the Supreme Court in the *Amistad* slave-trade case.<sup>35</sup> Adams, speaking on behalf of enslaved Africans, told the court: grant me that law, which is always before your eyes, and the case is decided for my clients.<sup>36</sup> "I know of no other law that reaches the case of my clients, but the law of Nature and Nature's God on which our fathers placed our national existence. That law, in its application to my clients, I trust will be the law on which the case will be decided by this Court."<sup>37</sup> But what would it mean to say that the true meaning of "The Ten Commandments," likewise taken to be the "law of our fathers," supplies the ground on which the

<sup>35</sup> John Quincy Adams, *The Amistad Case: The Most Celebrated Slave Mutiny of the Nineteenth Century* (New York: Johnson Reprint Corp., 1968), pp. 8–9. *The Amistad*, 40 U.S. (15 Pet.) 518 (1841), involved a revolt by African captives aboard the Spanish ship *Amistad*. The ship was brought to New York, where the enslaved sought their freedom, and the Spanish slave traders claimed the ship, its cargo, and the Africans or their salvage value. Though the court ultimately set the captive Africans free, it did not specifically embrace Adams' theory that the Declaration of Independence is "law" that requires this result.

<sup>36</sup> Adams, *Amistad Case*, pp. 8–9.

<sup>37</sup> *Ibid.* In referring to "our fathers," Adams at once asserted a special standing to make the argument and intensified the argument itself, for everyone in attendance knew that Adams' own father, John Adams, had served with Thomas Jefferson and Benjamin Franklin on the committee that drafted the Declaration of Independence.

constitutionality of the display of the “Ten Commandments” text itself is to be decided?

My tentative answer is that the narrative of emancipation from bondage, and of the revelation of the law within the time of wandering before coming home to the promised land, keeps us true to the meaning and moral force of Reconstruction. This is not a specifically Christian-theological meaning any more than the meaning of “created equal” to which Adams appeals in *Amistad* is a specifically Christian-theological meaning. Americans have learned to circulate among and between a universal-phenomenological meaning of their condition as created, particular theological accounts of that condition within the divine-human relationship, and particular American-historical documents, characters, and events. (Consider Lincoln’s description of the principle of “liberty to all” in the Declaration of Independence as the “apple of gold” framed by the Constitution’s “picture of silver.”)<sup>38</sup> I suggest, or perhaps more precisely I hope, that they learn to circulate in much the same way among and between a universal-phenomenological account of their condition as redeemed and as graced with law and with responsibility for law, particular theological accounts of that redemption and responsibility within the divine-human relationship, and particular American-historical documents, characters, and events (for example, the many ways in which enslaved Americans found in the language of Exodus names for their suffering and hope, critique and strength).<sup>39</sup>

## 6. BESTOWAL OF THE LAW AS SPEECH “FACE-TO-FACE”

“And the Lord spake unto Moses face-to-face, as a man speaketh unto his friend.”<sup>40</sup> The limitless radiance of this speech is reflected from and

<sup>38</sup> Drawing on Proverbs 25:11, “A word fitly spoken is like apples of gold in pictures of silver,” Lincoln wrote in 1861: “The assertion of that principle, at that time [1776], was the word ‘fitly spoken’ which has proved to be an ‘apple of gold’ to us. The Union, and the Constitution, are the picture of silver, subsequently framed around it. The picture was made, not to conceal, or destroy, the apple, but to adorn, and preserve it. The picture was made for the apple—not the apple for the picture.” Abraham Lincoln, “Fragment on the Constitution and the Union,” in *The Collected Works of Abraham Lincoln*, ed. Roy Basler (New Brunswick, N.J.: Rutgers University Press, 1953), vol. 4, p. 169. Here Lincoln’s biblical metaphor serves a constitutional argument that operates by textual annexation. The Constitution assimilates the second sentence of the Declaration of Independence.

<sup>39</sup> Eddie S. Glaude Jr., *Exodus! Religion, Race, and Nation in Early Nineteenth-Century Black America* (Chicago: University of Chicago Press, 2000).

<sup>40</sup> Exodus 33:11. For further discussion of “face-to-face” and “mouth-to-mouth” communication and communion as central to bestowal, transmission, and application of the law, see Ronald R. Garet, “Mouth to Mouth, Person to Person,” in Maura A. Ryan

onto our faces even as we, precisely as we, continue to read and perform Reconstruction and negate the negation that is slavery. We learn in the terrifying and glorifying intimacy of law's bestowal and acceptance to understand in "face-to-face" the standard that friend-to-friend relationality sets unexpectedly and rigorously for stranger-to-stranger. "But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt: I am the Lord your God."<sup>41</sup>

Speaking in Congress on behalf of his draft of what would ultimately become the Fourteenth Amendment, Senator John Bingham asked: "Is it not essential to the unity of the Government and the unity of the people that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?"<sup>42</sup> Justice William Brennan, writing for the court in *Plyler v. Doe*, in the course of invalidating Texas' law authorizing local school districts to exclude children of undocumented aliens, answered Senator Bingham's rhetorical question: "the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State...."<sup>43</sup> To similar effect, explaining why a year's residency in a county cannot constitutionally be required as a condition for receiving free medical care from the county, the court said: "Not unlike the admonition of the Bible that, 'Ye shall have one manner of law, as well for the stranger, as for the one of your own country,' ... the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents."<sup>44</sup>

Levinas teaches:

It is not that there first would be the face, and then the being it manifests or expresses would concern himself with justice; the epiphany of the face qua face opens humanity. The face in its nakedness as face presents to me the destitution of the poor one and the stranger; but this poverty and exile which appeal to my powers, address me, do not deliver themselves over to these powers as

and Brian F. Linnane, S.J., eds., *A Just and True Love: Feminism at the Frontiers of Theological Ethics—Essays in Honor of Margaret A. Farley* (Notre Dame, Ind.: University of Notre Dame Press, 2007), pp. 197–229.

<sup>41</sup> Leviticus 19:34. See note 18, above.

<sup>42</sup> *Plyler v. Doe*, 457 U.S. 202 (1982), p. 214.

<sup>43</sup> *Ibid.*, p. 215.

<sup>44</sup> *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), pp. 261–262 (quoting Leviticus 24:22).



givers, remain the expression of the face. The poor one, the stranger, presents himself as an equal.<sup>45</sup>

Here I think we encounter in phenomenology a way station on the route that leads round and round from Torah texts to Midrash, to theology, to the interpretation of the Reconstruction Amendments, and again around the circle. Of course, we do not need to enter into this circularity to condemn slavery or to vindicate human dignity. We can do that easily within the ethics of creation. Lincoln, for example, argued at Lewistown:

These communities, by their representatives in old Independence Hall, said to the whole world of men: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." This was their majestic interpretation of the economy of the Universe. This was their lofty, and wise, and noble understanding of the justice of the Creator to His creatures. [Applause.] Yes, gentlemen, to all His creatures, to the whole great family of man. In their enlightened belief, nothing stamped with the Divine image and likeness was sent into the world to be trodden on, and degraded, and imbruted by his fellows.<sup>46</sup>

But Levinas explains that the condition or status of being stamped with an image, like that of Caesar on a coin, does not suffice.

That all men are brothers is not explained by their resemblance, nor by a common cause of which they would be the effect, like medals which refer to the same die that struck them.... It is my responsibility before a face looking at me as absolutely foreign... that constitutes the original fact of fraternity.... In this welcoming of the face (which is already my responsibility in his regard, and where accordingly he approaches me from a dimension of height and dominates me), equality is founded.... It cannot be detached from the welcoming of the face, of which it is a moment.<sup>47</sup>

If this is a possible reading of Paul, when he speaks of how "we all, with open face beholding as in a glass the glory of the Lord, are changed into the same image from glory to glory," then on that reading I gladly share in the ceaseless work of Reconstruction, of binding up the nation's

<sup>45</sup> Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority* (Pittsburgh: Duquesne University Press, 1969), p. 213.

<sup>46</sup> Lincoln, Speech at Lewistown (August 21, 1858), in Lincoln, *Collected Works of Abraham Lincoln*, vol. 2, p. 546.

<sup>47</sup> Levinas, *Totality and Infinity*, p. 214.

wounds, of carrying for the widow and the orphan,<sup>48</sup> of doing justice to the stranger, of overthrowing slavery in all its forms. On that reading the Establishment Clause is “incorporated,” as it were, by the Fourteenth Amendment—embodied in me, in my “fleshy tables.”

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<sup>48</sup> “With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation’s wounds; to care for him who shall have borne the battle, and for his widow, and his orphan....” Abraham Lincoln, Second Inaugural Address (March 4, 1865), in Lincoln, *Collected Works of Abraham Lincoln*, vol. 8, pp. 332–333. Compare Deuteronomy 10:18–19, 16:11–12, and 24:17–22.