


9-1-2008

## The Immutability of Divine Texts

Liaquat Ali Khan

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# The Immutability of Divine Texts

*Liaquat Ali Khan\**

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## I. INTRODUCTION

Divine texts are the common heritage of human beings. They cultivate human spirituality. Too much time is spent finding faults with divine text and too little attention is paid to understanding their unity of purpose. While doubters question the authenticity of divine texts and while factions set one divine text against the other, divine texts are munificent in establishing the truth. The Hebrew Bible warns that among nations gone astray from the path of God, “the prophet is considered a fool, the inspired man a maniac.”<sup>1</sup> The Qur’an affirms: “We have sent thee revelation, as We sent it to Noah and the Messengers after him: We sent revelation to Abraham, Ishmael, Isaac, Jacob and the Tribes, to Jesus, Job, Jonah, Aaron, and Solomon, and to David We gave the Psalms.”<sup>2</sup> The New Testament declares, “All scripture is God-breathed.”<sup>3</sup> The Buddhist Dhammapada proclaims, “Blessed is the devotion of those who dwell in unity.”<sup>4</sup> The Bhagavad Gita’s call to unity is no less vivid when Krishna proclaims the following words: “As men approach me, so I receive them. All paths, *Arjuna*, lead to me.”<sup>5</sup> Hindu, Buddhist, Hebrew, Christian, Muslim, and other divine texts originate from the same source, what the Qur’an calls *ommu al kitab*, the mother

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1. *Hosea* 9:7. All biblical quotes are from the New International Version.

2. QUR’AN, *sura an-Nisa* 4:163. Unless otherwise noted, all Qur’an translations are my own; the M. Asad and Yusuf Ali translations of the Qur’an have been used for guidance. Both are available at <http://www.islamicity.com/QuranSearch/>. In keeping with tradition, the names of the suras have been included alongside chapter-and-verse citations.

3. 2 *Timothy* 3:16.

4. DHAMMAPADA XIV:194.

5. BHAGAVAD GITA 4:11–12. The text is a conversation between Krishna, the divine speaker of the Gita, and Prince Arjuna, who is getting ready for an imminent war.

book.<sup>6</sup> All divine texts are revealed to guide the peoples of the world. No divine text can be confined to any one nation, language, time, or space. Divine texts constitute one universal series.

In addition to cultivating human spirituality, divine texts forge manifold relationships with law. Divine texts themselves furnish laws. From time immemorial, divine texts have shaped diverse legal systems. Even in our own times, divine texts continue to inform national and international legal orders. In several Islamic countries, the Qur'an and the Sunna are the supreme law of the land and man-made laws incompatible with these texts are declared invalid. In secular legal systems, which have officially separated church and state, divine texts continue to inform the normative order. When a secular state allows the free exercise of religion, divine texts continue to supply additional, and sometimes more effective, norms for individual and social behavior.<sup>7</sup> When a legal system strictly draws away from divine texts, believers continue to follow scriptures in their personal and communal lives. An ideological system, such as that of the former Soviet Union, which deems divine texts to be incompatible with state ideology, may itself fail to survive. From all corners of the world, history testifies to the everlasting influence of divine texts.

Divine texts exercise influence via human languages. They rarely offer images or diagrams. They consist of words. It is not necessary, however, for divine texts to be in writing; a divine text may be an oral text. The Qur'an, for example, was revealed as an oral text and not as a written text. The oral form of a divine text almost always precedes its written form. Even after a divine text has been committed to writing, its written form may or may not supplant the oral form. The Qur'an continues to be an oral as well as a written text. Ever since its revelation, at any given point in time, hundreds of persons in Muslim communities memorize the entire Arabic text of

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6. See QUR'AN, *sura ar-Rad* 13:39.

7. Even secular judges rely on divine texts to reinforce their opinions. The academic legal literature continues to draw from divine texts even in areas that apparently seem incompatible with conventional theology. Nearly two decades ago, for example, a law professor proposed that feminist theories could benefit from the teachings of the Dhammapada, the Buddhist divine text, since self-awareness, the core teaching of this text, is critical for the liberation of women. Ruth Colker, *Feminism, Theology, and Liberation: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011, 1029 n.66 (1989).

the Qur'an, syllable by syllable. Known as *hafizeen*, they can orally recite the entire text of the Qur'an.<sup>8</sup> The tradition of oral memorization reinforces the immutability of divine texts.

The immutability of divine texts takes two distinct forms: linguistic immutability and substantive immutability. The two forms are not mutually exclusive since a divine text may be immutable in both language and substance. Linguistic immutability is tied to the language in which a divine text is revealed. Linguistic immutability means that the original language of the divine text cannot be lawfully altered. The Qur'an was revealed in Arabic, the native tongue of Prophet Muhammad. The Arabic text of the Qur'an is immutable.<sup>9</sup> The linguistic immutability of the Qur'an will be in jeopardy if the Arabic text is compromised. The Hindu texts and some Buddhist texts are preserved in Sanskrit. The Hebrew Bible is preserved in Hebrew. For the believers of these texts, Arabic, Sanskrit, and Hebrew are sacred languages. The preservation of the divine text in the sacred language shields against attempts to modify the text's substantive teachings. Even some translations of divine texts, such as the King James Version of the Bible, are considered sacred.

The second, and perhaps the more important, notion of immutability focuses on the core teachings of a divine text. Substantive immutability empowers human beings to teach and learn divine texts in any written or oral language. This empowerment, however, is limited. It recognizes no human authority to amend or repeal any message of divine texts. The truth of divine texts cannot be twisted to serve human desires: "If the Truth had been in accord with their desires, truly the heavens and the earth, and all beings therein would have been in confusion and cotruption!"<sup>10</sup> Substantive immutability is more meaningful in cases where a divine text has not

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8. During Ramadhan, it is customary to finish the entire text of the Qur'an in special night prayers, called *trahwib*. The prayers are led by a *hafiz*, one who has memorized the entire Arabic text of the Qur'an.

9. A divine text is immutable in that it undergoes no textual changes. An immutable text is one that is not amended. Nothing is deleted from it and nothing is added to it. An immutable text is also fixed in the order in which the words are laid out. In all these aspects, the Qur'an is and has remained an immutable text over a period of more than fourteen centuries. Although immutability has no essential relation with space or time, it may be linked to these two dimensions to clarify that movements in time and space do not cause any changes in the divine text.

10. QUR'AN, *sura al-Mu'minun* 23:71.

been preserved in the original language of the transmitter-prophet. Jesus, for example, spoke Aramaic, but his divine message was originally recorded in Greek and later translated into Latin.<sup>11</sup> For believers, this shift in language from Aramaic to Greek and from Greek to Latin and eventually to the vernacular is inconsequential since the substantive message of the New Testament has remained intact.<sup>12</sup>

Substantive immutability is imperative in the era of translations. For centuries, divine texts were confined to a few languages, primarily because clerical institutions had outlawed the translation of divine texts in non-canonical languages. The clerical resistance to vernacular translations has all but disappeared. Almost all divine texts have now been translated into major languages of the world. Multiple translations of a divine text even in the same language may use different words to convey the message. Good faith translations, however, do not alter the core teachings of the divine text. Furthermore, divine texts may be interpreted through cultural lenses. Diverse nations and generations may read the same divine text but draw meanings more appropriate to their respective cultural conditions. Notwithstanding translations, divine texts provide guidance for all nations of all times. Notwithstanding interpretations, the core themes of divine texts are immutable.<sup>13</sup>

For the purpose of this article, the authenticity of a divine text is not tested from an external viewpoint, that is, the viewpoint of those who do not believe in the claimed divinity of a particular text. In a leading First Amendment case, the United States Supreme Court ruled that the verity of religious beliefs, such as the miracles of the New Testament, are deep religious convictions; believers cannot be put to the proof of their faith.<sup>14</sup> This reference to the internal

11. The Vulgate, the Latin Bible, was the only version of the Bible in Western Europe for hundreds of years. FREDERIC GEORGE KENYON, *OUR BIBLE AND THE ANCIENT MANUSCRIPTS* 166, 170, 174 (1898).

12. Greece, however, prohibits any alteration in the text of the Holy Scripture. "The text of the Holy Scripture shall be maintained unaltered. Official translation of the text into any other form of language, without prior sanction by the Autocephalous Church of Greece and the Great Church of Christ in Constantinople, is prohibited." GREECE CONST. art. 3.

13. For interpretation purposes and for determining nuances, however, the original language of the divine text may be consulted.

14. *United States v. Ballard*, 322 U.S. 78, 87 (1944). For those who do not believe in God or God's Word delivered to humanity through prophets, divine texts are the figments of

viewpoint of believers as the ultimate proof of religious conviction is indispensable for defining divine texts. There is no external standard, acceptable to believers and doubters alike, for evaluating divine texts. Doubts about God, prophets, revelations, and the authenticity of a particular divine text do not undermine the text's divinity for its believers. Each religion's canon identifies divine texts.

This article invites doubters and believers to embrace the principle of respect in their approaches to divine texts. The doubters will continue to challenge the veracity of divine texts. They are aware, however, that denunciation of divine texts engages few believers into meaningful discourse and that defamation of religions does not diminish the influence of divine texts.<sup>15</sup> Even some believers display impertinence toward one another's divine texts. Such intolerant self-righteousness is wasteful. The principle of respect underlying the discussion in this article does not eschew the differing internal viewpoints among believers, nor does the principle throw religions into a melting pot or demand that all divine texts be considered equally authentic. Relying on the principle of respect, though drawing copiously from the Qur'an,<sup>16</sup> this article explores the timelessness, intertextuality, and universality of divine texts, as well as their priority over incompatible provisions of constitutions and international texts. This discussion demonstrates that divine texts steer human civilization onto the path of moral intelligence—the path of those who receive guidance and not of those who go astray.<sup>17</sup>

## II. SPIRITUAL TRADITIONS

The major divine texts with billions of adherents arose from two distinct, though historically intertwined, spiritual traditions: the

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human imagination. To make matters even more difficult, we find that there exists no single internal viewpoint. Among those who believe in God or God's revelatory Word, no consensus exists with respect to identifying divine texts. Even with respect to the same divine text, several competing internal viewpoints may coexist. A conception of divine text that does not comport with an internal viewpoint is called a heresy.

15. Liaquat Ali Khan, *Combating Defamation of Religions*, AM. MUSLIM (Jan. 1, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=954403](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=954403).

16. The author is a believing Muslim and most familiar with Islamic divine texts.

17. QUR'AN, *sura al-Fatiha* 1:7.

Middle Eastern tradition and the Indo-Persian tradition.<sup>18</sup> For centuries, Greek, Roman, and other Western churches have sustained and developed the Christian thought derived from divine texts. Because the Protestant Reformation was a Western phenomenon rooted in the power dynamics of Europe,<sup>19</sup> Christianity, along with the Hebrew Bible and New Testament, are often identified with the West. But the truth remains that these divine texts originate from the Middle East.

The Middle Eastern divine texts—the Hebrew Bible, New Testament, and Qur'an—are connected to each other in numerous ways through the same stories, prophets, and angels.<sup>20</sup> All three texts are eschatological, predicting life beyond the end of history.<sup>21</sup> In this spiritual tradition, however, the believers of one divine text may or may not believe in the divinity of the other two texts. For Jews, the Hebrew Bible alone is the divine text. For many Christians, both the Hebrew Bible and the New Testament are divine texts. For a minority of Christians, only the New Testament is a divine text. For Muslims, the Hebrew Bible, the New Testament, and the Qur'an are all divine texts, emanating from the same One God.<sup>22</sup> Even when the believers of one divine text admit the divinity of other texts, they often claim that the other divine texts have been corrupted and altered.

Hinduism, Zoroastrianism, and Buddhism are the three dominant belief systems in Indo-Persian spiritual tradition.<sup>23</sup> Predominantly non-monotheistic, this tradition is established in India, China, Burma, Thailand, Korea, and Japan. India and Iran,

18. Christians, Muslims, and Jews together comprise most of the human race. George Fletcher groups these three religions and calls them Western religions. See George P. Fletcher, *Three Nearly Sacred Books in Western Law*, 54 *ARK. L. REV.* 1, 2 (2001).

19. See generally FREDERIC SEEBOHM, *THE ERA OF PROTESTANT REVOLUTION* (1894).

20. Additionally, the Baha'i faith's *Kitub-i-Aqdas* and the *Book of Mormon* are nineteenth-century divine texts that belong to the Middle Eastern spiritual tradition.

21. Will Herberg, *Judaism and Christianity: Their Unity and Difference. The Double Covenant in the Divine Economy of Salvation*, 21 *J. BIBLE & RELIGION* 67, 68 (1953) (the author's analysis of similarities between Judaism and Christianity can be, for the most part, extended to include Islam).

22. William Thomson, *The Renaissance of Islam*, 30 *HARV. THEOLOGICAL REV.* 51, 53 (1937) (stating that Islam and Judaism are religions of law, and that Islam and Christianity proceed from the same world view).

23. The *Guru Granth Sahib* is a relatively newer divine text for the Sikhs, a text that cuts across the Middle Eastern and Indo-Persian spiritual traditions.



the first homes of the Indo-Persian spiritual tradition, have been greatly influenced by the Middle Eastern religions. Iran is almost completely Islamic and traces of its home-grown Zoroastrianism are rare. Despite yielding large population and territory to Islam, India has for the most part remained Hindu. Even Buddhism could not transform India's Hinduism. Buddhism departed from India and is now typically identified with other Asian nations and cultures. Yet the origin, language, and historicity of Buddha's divine speech cannot be entirely separated from its Indian origin and contexts.

The Indo-Persian spiritual tradition is much more complex in recognition of deities, even though the presence of One High God is acknowledged.<sup>24</sup> Each religion within the tradition has its own sacred texts. The Vedas and Upanishads, among others, are the divine texts for Hindus,<sup>25</sup> the Avesta for Zoroastrians, and the Dhammapada, among others, for the Buddhists. The Hindu divine texts are not attributed to a single founder.<sup>26</sup> Through multiple transmitters, Hindu divine texts accumulated over several centuries what is known as *Sanatana Dharma*, i.e., the eternal law. Unlike Hindu divine texts, the Avesta is delivered through a single transmitter, Zoroaster, and the Dhammapada through a single transmitter, Gautama.<sup>27</sup> The Avesta presupposes One Good God, though at war with One Bad God, i.e., the Satan. There is no mention of One God in the Dhammapada, even though the text does refer to gods. A true Buddhist is more sacred than gods because even gods are not liberated.<sup>28</sup> For the believers, Gautama Buddha is above all gods. Buddha's words and works are preserved in numerous sacred scriptures, including Dhammapada.

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24. The first line of the *Rigveda (Aitareya Brahmana)* says that Visnu is the highest god. RIGVEDA BRAHMANAS 107 (Arthur Berriedale Keith trans., 1919).

25. Other Hindu divine texts are Puranas, Mahabharata and Ramayana. The Bhagavad Gita is an abridged version of the Vedas.

26. JOHN MUIR, ORIGINAL SANSKRIT TEXTS ON THE ORIGIN AND HISTORY OF THE PEOPLE OF INDIA 4 (1872).

27. Theravada Buddhism has scriptures written in Pali, a language related to Sanskrit. They are called Tripitakas, i.e., Three Baskets. The Dhammapada, or Verses of Righteousness, is a basic text for Theravada Buddhism. Mahayana Buddhism has its own scriptures written in Sanskrit. The most sacred text is known as Lotus Sutra. Mahayana also accepts the sacred texts in the Pali canon.

28. "Misers go not to the realm of gods." DHAMMAPADA XIII:177. "Even the gods emulate him whose senses are quiet as horses well-tamed by the charioteer, who has renounced self-will, and put away all taints." *Id.* at VII:94. This means the true Buddhist is above gods.

The modes of revelation in the two spiritual traditions are not identical. In the Middle Eastern tradition, God selects messengers to send His Word to humanity. Often, God speaks to messengers through angels. The Qur'an was sent to the Prophet Muhammad through Gabriel, the archangel. In the Indo-Persian tradition, the logistics of revelation are diffused and defy any simple model of communication between God and humanity. The origin of the Vedas cannot be located with certainty.<sup>29</sup> Even so, according to the internal viewpoint, the Vedas are not human inventions. They were revealed to sages. For centuries, the Vedas were transmitted by word of mouth.

The belief that a divine text is delivered through a single transmitter is found in both spiritual traditions. The Qur'an is transmitted through the Prophet Muhammad. The Dhammapada is delivered through Buddha. The Avesta records the conversation between the Prophet Zoroaster and Ahura Mazda (God).<sup>30</sup> The Hebrew Bible combines revelations conferred on scores of prophets, even though the Prophet Moses was the single transmitter of the Torah.<sup>31</sup> Almost all divine texts are first orally transmitted, for God speaks to prophets or inspires them to wisdom, but God dispatches no written scriptures. Sooner or later the orally transmitted divine texts are committed to writing. Often the first scribes of divine texts are holy persons. They are also known as apostles and prophets.

In the non-monotheistic tradition, divine texts are inspired by a legion of gods or the texts may teach the seekers how to acquire a stage of perfection that even gods would want to emulate.<sup>32</sup> In the monotheistic tradition, divine texts are the Word of God. This view is maintainable with respect to some divine texts. If narrowly conceived, however, the definition that divine texts are the Word of God may exclude substantial portions of some divine texts, and leave out some divine texts altogether.

29. Arvind Sharma, *The Eternality of the Vedas and the Qur'an: A Comparative Study*, 26 PHIL. E. & W. 269, 271 (1976) (suggesting that the Vedas never came about, but always were).

30. EDWARD WILLIAM WEST, PAHLAVI TEXTS 4 (1885).

31. The first five books, called the Pentateuch in Greek and consisting of Genesis, Exodus, Leviticus, Numbers, and Deuteronomy, constitute the Word of God.

32. DHAMMAPADA I:14.

*A. Word of God*

A broad definition of divine texts as the Word of God is most appealing to monotheistic believers. This definition, however, needs explanation. In the strict sense, the Word of God means what it says. The Word of God is God's own speech, transmitted to humanity through prophets. This modality of revelation raises the question: whether *everything* the transmitter-prophet says is the Word of God. An affirmative answer will completely merge the words of the transmitter with the Word of God. If every word that the transmitter utters is not the Word of God, the idea of merger will have to be reconsidered. The merger is still valid but only to the extent that when the prophet is speaking as the transmitter, the words he utters are the Word of God. However, when the prophet is not speaking as the transmitter, his words are his and not the Word of God. Furthermore, if the scribe of a divine text includes his own descriptions in the divine text, the scribe's words must be distinguished both from the words of the transmitter and the Word of God. In view of these distinctions, the Word of God is identified only with God's own speech.

To further finesse divine transmissions, a distinction may be made between inspired words and the Word of God. An inspired text speaks the truth. The author may have conceived the inspired text in a highly developed realm of spiritual intelligence. Yet an inspired text is not the Word of God. Highly intelligent persons may be inspired to speak or write the words of truth. These words of truth, however, are not uttered by God. Inspired words may be sanctified and considered divine but they are essentially human texts.

From the internal viewpoint of Islamic belief, these distinctions are crucial. The Qur'an is the Word of God, transmitted through the Prophet Muhammad over a period of twenty-two years. Every word of the Qur'an is God's direct speech. The Prophet was the exclusive transmitter of the Qur'an. However, not every word that he uttered in his life is the Word of God. When the Prophet Muhammad was speaking but not transmitting the Word of God, his words were called *ahadith*. His words and deeds are assembled in separate texts known as the Prophet's Sunna.

In Judaism, the Torah is the Word of God.<sup>33</sup> Moses was the transmitter of the Torah.<sup>34</sup> Prophets are the medium through whom other books of the Hebrew Bible were given to the people.<sup>35</sup> Later prophets and priests are interpreters of the Torah.<sup>36</sup> Priests are the guardians of the Torah.<sup>37</sup> They are not the agents through which God transmits Torah to the people.<sup>38</sup> The prophets are the law-bringers.<sup>39</sup> The kings enforce the text. The rabbis interpret the text. The rabbis do not receive revelation from God, but they have been charged to administer and interpret the revelations in the Torah.<sup>40</sup> Interpretations of the Torah might constitute sacred texts, but they cannot be confused with the Word of God. These distinctions made within Judaism distinguish for the believers the Word of God from the words of rabbis.<sup>41</sup>

If divine texts are defined strictly as the Word of God and nothing else, some divine texts may not easily match the definition. The four Gospels of the New Testament contain the Word of God.<sup>42</sup> But they also contain the words of Jesus and narratives of the apostles who wrote the Gospels.<sup>43</sup> For believers, the authors of the Gospels were apostles whose descriptions of Jesus, events following Jesus, and the words of Jesus were both accurate and credible.<sup>44</sup> Thus, even though the Gospels consist of texts originating from God, Jesus, and the narrators, the entire text is divine.<sup>45</sup>

The words of Jesus Christ in the four Gospels evidence the problem with strictly limiting divine texts to the Word of God.

33. Willis J. Beecher, *Torah: A Word-Study in the Old Testament*, 24 J. BIB. LIT. 1, 4 (1905).

34. John Calvin also believed that Moses wrote all the books of Pentateuch, by the inspiration of the Holy Spirit. DONALD K. MCKIM, CALVIN AND THE BIBLE 2-3 (2006).

35. Beecher, *supra* note 33, at 6.

36. *Id.* at 5.

37. *Id.* at 6.

38. *Id.* at 6-7.

39. *Id.* at 5-6.

40. *Id.* at 7-8.

41. *See, e.g., id.* at 8.

42. *See* IRVING FRANCIS WOOD, THE SPIRIT OF GOD IN BIBLICAL LITERATURE 34 (1904).

43. *Id.* at 124.

44. *Id.* at 13-15.

45. *Id.* at 31.

Consider the following statement: "Blessed are the meek, for they will inherit the earth."<sup>46</sup> These are the words of Jesus.<sup>47</sup> The question arises whether these words are the Word of God or merely the words of the transmitter, i.e., Jesus. If whenever Jesus spoke he was transmitting the Word of God, all words of Jesus constitute the Word of God. This belief does not require that one also believe that Jesus is the Son of God. However, those who believe that Jesus is the Son of God may additionally argue that because of his unique relationship with God, words of Jesus are the Word of God. Those who believe that Jesus is God face no difficulty in merging the words of Jesus with the Word of God.

The four Gospels also contain many eyewitness accounts of the acts of Jesus that do not fit a strict definition of the Word of God. Consider the following words: "As soon as Jesus was baptized, he went up out of the water. At that moment heaven was opened, and he saw the Spirit of God descending like a dove and lighting on him."<sup>48</sup> This text is perhaps an eyewitness's description rendered to Matthew, or Matthew perhaps describes this event based on some other reliable evidence. This text may also be the inspired text of a holy person who was not an eyewitness but believes the information to be credible. These words may also be the Word of God, revealed to the apostle or some holy person at the time Jesus was baptized. If the believers take this text to be the Word of God, the inquiry ends from an internal viewpoint. If the believers take this text to be reliable description of a holy event the description is sacred but not the Word of God.

Now consider the next verse that follows the one discussed above. It states: "And a voice from heaven said, This is my Son, whom I love; with him I am well pleased."<sup>49</sup> The words "This is my Son, whom I love; with him I am well pleased" are the words of the Father from heaven. These are the Word of God. It is, however, unclear how to analyze the prefatory words "And a voice from heaven said" in the verse. These prefatory words are descriptive words of the person or the persons who heard God's announcement

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46. *Matthew* 5:5.

47. *See Matthew* 5:1-2.

48. *Matthew* 3:16.

49. *Matthew* 3:17.

about His beloved Son. Since this prefatory portion of the verse introduces God's words, it may be considered an eyewitness account.

The Word of God, words of Jesus, and eyewitness accounts found in the Gospels may be categorized separately to distinguish the Word of God from other words in the Gospels. A strict definition of divine text as only the Word of God may categorize words of Jesus separately and hold them to be the inspired text, just as in Islam the Prophet Muhammad's sayings are separated from the Qur'an and are compiled as *ahadith*. However, this separation makes no sense to Christian believers who take the words of Jesus as the Word of God. For such believers, however, eyewitness accounts of events involving Jesus may or may not be the Word of God.

If eyewitness accounts are excluded from the definition of the Word of God, substantial portions of the New Testament will constitute apostolic narratives, which would be sacred but would not be the Word of God. These narratives are sacred because they are accurate and furnish information surrounding the life of Jesus, but not the Word of God because the narrative is uttered neither by God, nor by Jesus. This conclusion would be unacceptable to Christians who take the entire New Testament to be the Word of God.

The belief that the entire text of the four Gospels is the Word of God is based on the notion that what Jesus did is as divine as what Jesus said.<sup>50</sup> Jesus' words and works merge to create a unified divine text.<sup>51</sup> John's Gospel proclaims: "In the beginning was the Word, and the Word was with God, and the Word was God."<sup>52</sup> With the coming of Jesus, the exclusivity of God's Word was unlocked. The divine text was expanded to include works because "The Word became flesh and made his dwelling among us."<sup>53</sup> For Christians, the entire life of Jesus is divine. Every single detail related to Jesus is God's will.<sup>54</sup> Therefore, any and all descriptions of events related to

50. See R.A. TORREY, *THE FUNDAMENTAL DOCTRINES OF THE CHRISTIAN FAITH* 79-84 (1918).

51. *Id.* at 76.

52. *John* 1:1.

53. *John* 1:14.

54. Editorial, *Jesus and Christianity*, 38 *BIBLICAL WORLD* 363, 365 (1911) (arguing that Christianity, past, present, and future, is "always turning back to the great Master whose name it bears").

Jesus constitute the divine text. The description of Jesus healing the son of a royal official, the description of Jesus feeding the five thousand at Passover, these and other narratives, constitute the Word of God because the narratives are about Jesus. Likewise, the narratives about Jesus' nativity, infancy, and youth constitute the Word of God. The divinity is in the truth of description, what Saint Augustine calls "reliable intimations" and "trustworthy testimonies."<sup>55</sup> Most important, the makers of the text have experienced a purifying closeness with Jesus. For all these reasons, each apostle's entire text acquires the attributes of the Word of God.<sup>56</sup>

The Word of God may be defined as any text inspired by God. This open definition does not require that divine texts be the actual words from God's mouth. God may directly speak to prophets and apostles or send them oral texts through angels. If God speaks to transmitters or sends oral texts through angels, the received speech is indeed the Word of God. If God inspires prophets to say or inscribe divine words, though God supplies no words of His own, the inspired words may be included in the Word of God. This more inclusive definition of the Word of God may explain why, in addition to the Gospels, the epistles in the New Testament are also considered as the Word of God. This expansive definition, however, will confuse matters in Islam because Islam draws a bright line between the Word of God and words of the Prophet. The Qur'an is the Word of God. The words of the Prophet are the Prophet's Sunna. As discussed below, the Prophet's Sunna is not the Word of God but it is *al-hikma*, the wisdom text.<sup>57</sup>

### B. Wisdom Texts

Closely related to divine texts are wisdom texts. The distinction between the two genres is fuzzy, since they are similar in many aspects. Each genre contains truth and guidance for human beings.

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55. ST. AUGUSTINE, THE HARMONY OF THE GOSPELS, Bk. 1 (M.B. Riddle ed., S.D.F. Salmond trans.), in VI A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH (Philip Schaff ed., 1886), available at <http://www.ccel.org/ccel/schaff/npnf106.html>.

56. In some versions of the New Testament, however, the Word of God is set out in italics or colored text.

57. See QUR'AN, *turn al-Baqara* 2:151.

Even the style of narration and the mode of persuasion appear to be identical. Divine texts nurture our spiritual identity, teaching us the rewards of honesty, gratitude, humility, love, patience, charity, good deeds, and the ills of arrogance, miserliness, sloth, unchecked passions, and predation. Wisdom texts may also teach the same. Both genres instruct individuals and societies to live successful and morally intelligent lives.<sup>58</sup> They also warn cultures and communities from falling into ignorance. However, wisdom texts are essentially human products. They are not revealed.<sup>59</sup> Divine texts themselves acknowledge the existence of wisdom texts.

Some books of the Hebrew Bible are known as wisdom books.<sup>60</sup> These books are not claimed to be revealed,<sup>61</sup> thus affirming a fundamental distinction between divine texts as the Word of God and wisdom texts as human knowledge purified through the filters of reason and experience. The sages who delivered the Hebrew wisdom books claimed no supernatural inspiration. They relied on reason and experience to gather and transmit wisdom in oral and written texts. Wisdom may not be confused with mere memorization of wise sayings or a mechanical application of reason; a wise saying in the mouth of a fool has no effect.<sup>62</sup> The saying of the wise, however, lays open the secrets of human behavior in both general and specific contexts. Even divine texts are most accessible to the wise.

In Islam, the Prophet's Sunna is known as *al-hikma*, that is, the texts of wisdom. The Qur'an itself makes the distinction between the Word of God (*al-kitab*) and the word of wisdom (*al-hikma*).<sup>63</sup> The Qur'an is *al-kitab*, a divine text transmitted through the Prophet Muhammad. The Prophet's Sunna is inspired and has connections with the Qur'an. It explains and gives applications of the Qur'an. Whenever the Prophet transmitted the Qur'an, the Prophet's speech delivered the Speech of God. Every word in the Qur'an is revealed, not merely inspired. However, not every word that the Prophet Muhammad said was revealed. The Prophet's words must not be

58. See Ronald E. Murphy, *Hebrew Wisdom*, 101 J. AM. ORIENTAL SOC. 21 (1981).

59. See RAYMOND EDWARD BROWN, *THE CRITICAL MEANING OF THE BIBLE* 8 (1981).

60. Job, Proverbs, Ecclesiastes, Psalms, and Song of Solomon are classified as wisdom books. See Murphy, *supra* note 58, at 22-25.

61. BROWN, *supra* note 59, at 8.

62. See *Proverbs* 26:7-9.

63. See QUR'AN, *sura al-Imran* 3:164.



confused with the text of the Qur'an. This core belief among Muslims makes it important to distinguish the Qur'an from the Prophet's Sunna. The Prophet Muhammad lived the life prescribed in the Qur'an to demonstrate that the Qur'an is no utopian ideology that can be preached, but not practiced. For Muslims, however, the text of the Qur'an is separate from and superior to the Prophet's Sunna.

Although both the Qur'an and the Prophet's Sunna constitute the basic code from which Islamic law is derived, the Qur'an and the Sunna are not coequal in normative hierarchy. The norms of the Sunna are subordinate to the norms of the Qur'an. While the Qur'an's text is studied for both the word and the meaning, the Sunna is studied predominantly for meaning. Thus, Muslims may define divine texts loosely to acknowledge both the Qur'an and the Prophet's Sunna, but they do not confuse the Word of God with the word of wisdom, nor do they collapse the distinction between *al-kitab* and *al-hikma*.

The word of wisdom has been given not only to prophets but also to some who were not prophets. For example, an entire chapter of the Qur'an is named after Luqman,<sup>64</sup> a pre-Islamic legend, whose sayings were a source of wisdom.<sup>65</sup> Luqman was not a prophet and his wisdom was not derived from revelation. The Qur'an tells us that God bestowed wisdom on Luqman,<sup>66</sup> clarifying a simple but significant point: useful knowledge may come through sources other than revelation, such as observation, research, and analysis.<sup>67</sup>

Wisdom texts are durable; however, they may eventually submit to the authority of divine texts. They do not compete with divine texts but may coexist with them. The wisdom texts that explain or interpret divine texts form a special relationship with divinity and acquire sacredness. Sometimes, wisdom texts even pave the way for

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64. See QUR'AN, *sura Luqman* 31:1-34.

65. Dimitri Gutas, *Classical Arabic Wisdom Literature: Nature and Scope*, 101 J. AM. ORIENTAL SOC. 49, 57-58 (1981).

66. QUR'AN, *sura Luqman* 31:12.

67. The researched and analytical knowledge of sciences, medicine, economics, history, and other disciplines that illuminates the phenomena of nature and human civilization furnishes new wisdom texts. These texts may or may not be immutable. Some may be false and erroneous. Some wisdom texts, however, survive the vagaries of time and the scrutiny of scholars and acquire the traits of immutability.

the arrival of divine texts. They prepare cultures and communities to receive the immutable divine truth. For example, the wisdom texts of Ancient Egypt are no longer functional texts of the present-day Egyptian culture. They are neither systematically learned, nor taught; and rarely are they cited even in scholarly literature. These texts are lifeless in part because they have yielded to universal divine texts, the Bible and the Qur'an, which have permeated the Egyptian culture and imagination.<sup>68</sup>

### III. THE UNIVERSALITY OF DIVINE TEXTS

This section demonstrates that divine texts are universal, that they cannot be confined to any one time, place, linguistic interpretation, or clerical magisterium. A divine text resists the monopolies of groups and nations that claim an exclusive relationship with the text. A divine text also frustrates the attempts of those who discount its universality. Both monopolization and discounting are popular trends with respect to divine texts. These trends do not escape scholarly works. In 1885, for example, Justin Smith, a believer in the New Testament, discounted Hindu Upanishads and Buddhist Dhammapada saying that these texts contain only "scraps of wisdom" and only a few scattered "bright and true" sayings, "page after page of what is either absurd or transparently false."<sup>69</sup> Alexander Campbell argued that the Gospels have replaced the Hebrew Bible, just as "the American legislatures

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68. Despite ascendancy of the Qur'an, the Egyptian wisdom texts have not disappeared. The Internet has revived them. See, e.g., Ancient Egyptian Books of Wisdom, <http://egypt.thetao.info/texts.html> (last visited Aug. 2, 2008). A reading of these texts reveals that the pre-Islamic Egyptian culture that produced them was on its way to receive and accept a divine text. Consider the following instruction in an Egyptian wisdom text. "The evildoer, throw him (in) the canal, / And he will bring back its slime." THE INSTRUCTION OF AMENEMOPE, ch. 2., <http://egypt.thetao.info/amenemope.htm> (last visited Aug. 2, 2008). This instruction emphasizes perhaps the incorrigibility of evildoers and their propensity in exploiting any life events to commit wrongs. The wisdom of the instruction lies in its universal validity as it captures a universal truth of human condition. The Qur'an states this universal truth in numerous verses, emphasizing the point that some evildoers are beyond redemption. "In their hearts is a disease," says the Qur'an, "and God increases their disease." QUR'AN, *sura al-Baqara* 2:10.

69. Justin A. Smith, *Studies in Archaeology and Comparative Religion*, 5 THE OLD TESTAMENT STUDENT 75, 82 (1885).

have re-enacted the best parts of the British common law.”<sup>70</sup> Christian critics of the death penalty make a similar argument to show that mercy, love, and forgiveness, the values of the Gospels, have replaced the Torah’s values of obedience and justice.<sup>71</sup>

The peoples of the world may study divine texts for several purposes. They may read divine texts as history, literature, or revelation. Although divine texts contain historical information and are revealed as elegant literature, their main purpose is to deliver universal guidance. Secular criticism characterizes divine texts as “myths and fables.”<sup>72</sup> When a divine text is praised for its literary qualities or is condemned for lack of historical veracity, these criticisms miss the point that universal guidance is the main purpose of divine texts.<sup>73</sup> Divine texts endure secular criticisms and emerge even more appealing to believers. Studying divine texts as books of history or literature might be the foremost secular purpose. Seeking guidance and spiritual strength from divine texts are the aspirations of lay and expert believers.

Generations, nations, communities, linguistic groups, hermeneutic experts, and clerical institutions may claim exclusive relationships with one or more divine texts. These exclusive relationships may even be accepted for a time. Eventually, however, divine texts liberate themselves from any and all controlling ties. They defy monopolies. Divine texts refuse to give in to exclusive appropriations because divine texts are revealed for all the peoples of the world of all times. Barriers that restrict their free universality fall. For example, the New Testament, originally conceived as a text exclusively for early Christians, is now a text used throughout the world providing moral guidance. It is a universal text because Christ’s message is “a light for the Gentiles . . . to bring salvation to the ends of the earth.”<sup>74</sup> The Qur’an, New Testament, and the

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70. Thurston Howard Reynolds II, *Natural Law Jurisprudence of the Sermon on the Law*, 31 OHIO N.U. L. REV. 231, 234 (2005).

71. Jill Jones, *The Christian Executioner: Reconciling “An Eye for an Eye” with “Turn the Other Cheek”*, 27 PEPP. L. REV. 127, 129–30 (1999).

72. George H. Schodde, *The Theological Study of the Old Testament*, 3 THE OLD TESTAMENT STUDENT 304, 304 (1884).

73. *Id.* at 304–08.

74. *Acts* 13:47.

Hebrew Bible, in the words of the Qur'an, are all guidance for the whole of humanity.<sup>75</sup>

There is some confusion about the universality of the Hebrew Bible, known as the Tanakh among Jews, the Old Testament among Christians, and the Torah among Muslims.<sup>76</sup> Revealed in Hebrew, the Bible is a divine text for all the peoples of the world. The Hebrew Bible itself reveals its universality when Moses and Aaron beseech in the following words: "O God, God of the spirits of all mankind, will you be angry with the entire assembly when only one man sins?"<sup>77</sup> The Qur'an confirms the universality of the Torah in the following words: "Say: 'Who then sent down the Book which Moses brought?—a light and guidance to all mankind.'"<sup>78</sup> Historically, the Hebrew Bible originated among the people who spoke Hebrew. Some lay or expert believers may claim that the Hebrew Bible was sent only for Israel and no one else. This exclusive ownership, however, could not survive the test of time. Early in Christianity, the Greek Orthodox Church incorporated the Hebrew Bible and the Gospels into one unified text, claiming that both divine texts come from the same God. The Catholic Church followed suit, maintaining that the Hebrew Bible and the apostles of the Gospels were guided and inspired by the same God.

The rationalization for the universality of divine texts varies from theologian to theologian. Thomas Aquinas argued that Christ did not abolish laws of the Hebrew Bible but removed their ceremonial precepts.<sup>79</sup> For Calvin, the history of the Jews paved the way for the coming of the Christ and pre-enacted the laws to be perfected through the Gospels. To him, the spiritual continuity between the Torah and the Gospels was no mere coincidence, but part of God's plan to reveal the unity of covenants.<sup>80</sup> Professor Ellen Davis, an Episcopalian Christian, argues that the Gospels presuppose, defer,

75. QUR'AN, *sura aal-Imran* 3:3.

76. These names could be confusing since each name expresses specific beliefs. The word Torah, for example, may mean the first five books of the Hebrew Bible.

77. *Numbers* 16:22.

78. QUR'AN, *sura al-Anam* 6:91.

79. See THOMAS AQUINAS, 8 *THE SUMMA THEOLOGICA*, Q. 107, art. 2., in *BASIC WRITINGS OF SAINT THOMAS AQUINAS* 960–63 (Anton C. Pegis ed., 1945).

80. See T.H.L. PARKER, *CALVIN'S OLD TESTAMENT COMMENTARIES* 74–75 (1986).

and allude to the Torah.<sup>81</sup> No understanding of the Gospels is profound without studying the Torah.<sup>82</sup> The Jews no longer enjoy a monopoly on the Hebrew Bible. It has become an essential divine text for hundreds of millions of Christians across times and across the world.

### A. Beyond Situatedness

“Situatedness” is human reality located at the coordinates of time and space. From a situatedness perspective, divine texts arise within specific temporal and spatial contexts.<sup>83</sup> The Qur’an was for the most part revealed in response to resolve concrete issues that the Prophet Muhammad faced in the last twenty-two years of his life. The verses requiring the testimony of four witnesses as proof for adultery,<sup>84</sup> for example, were revealed when the Prophet’s wife, Aisha, was accused of committing the offense.<sup>85</sup> The Qur’an’s laws of the battlefield were revealed when the Prophet Muhammad was fighting wars. Even though the Qur’an describes the events of past prophets—including Abraham, Moses, and Jesus—and describes future events, such as the Day of Judgment when humanity would be held accountable,<sup>86</sup> the Qur’an’s text is interwoven with events in the seventh century cities of Makka and Medina.

Situatedness may be pleaded in support of two different claims. One claim dismisses the universal application of divine texts, arguing that a divine text may contain great wisdom but it cannot be the source of guidance for times that bear no resemblance to the times when the text was revealed. The other claim demands that believers disregard changing contexts of times and always comply with divine

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81. See ELLEN F. DAVIS, *WONDRIOUS DEPTH: PREACHING THE OLD TESTAMENT* 1–6 (2005).

82. See *id.*

83. In the case of some divine texts, such as the *Vedas*, historical information about their situatedness may be inadequate, incomplete, or altogether unavailable.

84. See QUR’AN, *sura an-Nisa* 4:15; *sura al-Noor* 24:4, 6–9. These verses were revealed when a husband accused his wife of committing adultery. See 6 BUKHARI 271 (providing the context in which these verses were revealed).

85. See 6 BUKHARI 274 (the facts of false accusation stated and the verses of the Qur’an revealed to affirm innocence).

86. There are numerous verses mentioning the Day of Judgment. See, e.g., QUR’AN, *sura al-Baqara* 2:85; *sura al-Imran* 3:185 (“And only on the Day of Judgment shall you be paid your full recompense.”).

laws. Consider these dual situatedness claims regarding the Qur'an's prescription of cutting the hands of thieves.<sup>87</sup> The dismissal claim suggests that the Qur'an's prescription is no longer universal, and perhaps never was, and that it must be confined to moral values of seventh-century Arabia. The compliance claim will argue that the modern notions of cruel and unusual punishments cannot overrule the laws of the Qur'an. The universality principle is the faith of the believers. Situatedness is the philosophy of critics. Accordingly, the universality principle rejects the constraints of situatedness while situatedness seeks to invalidate universal applications of divine laws.

Human history demonstrates that nations and generations abandon divine texts, declaring them irrelevant and outmoded; however, nations and governments are not able to ultimately rid themselves of the divine texts. Even when a divine text is not completely abandoned, the nation or generation may engage in serious deviations from its core teachings. The rise of secularism has officially separated the law of the state from the law of divine texts. In some nations, this separation has led to active governmental persecution of divine texts. Such deviations are rarely permanent. Subsequent generations may repeal antagonistic laws or rebel against the abandonment of divine texts. The communist Soviet Union banned the teaching of divine texts;<sup>88</sup> Marxist ideology, however, failed to supplant divine texts. And in numerous Muslim countries, the ideologies of eighteenth- and nineteenth-century colonialism and secularism are under active deconstruction today.

### *B. Beyond Words*

A divine text is the Word of God, but no divine text must be reduced to words. Word fixation or "verbomania"<sup>89</sup> is no way to benefit from divine texts. Consider the word forgiveness. All divine texts teach forgiveness. The Qur'an promises that "he who forgives and seeks reconciliation shall be rewarded by God."<sup>90</sup> Jesus teaches

87. QUR'AN, *surah al-Ma'idah* 5:38.

88. The Soviet teacher was not supposed to be neutral toward religion; "he must be not only a non-believer himself, but an active *propagandist of atheism (bezbozhiye)* amongst others." Kupava E. Birkett, *Anti-Religious Propaganda in Schools*, 1 SOVIET STUD. 392, 396 (1950).

89. Peter Goodrich, *Satirical Legal Studies: From the Legists to the Lizard*, 103 MICH. L. REV. 397, 470 (2004) (explaining legal realists' skepticism of law as words).

90. QUR'AN, *surah ash-Shura* 42:40.

Peter to forgive “not seven times, but seventy-seven times.”<sup>91</sup> In receiving these messages, forgiveness must not be reduced to an intellectual construct. Forgiveness is no mere word to be relished in solitude. It is no mere mantra to be chanted in temples. Forgiveness is deed. It is experience. It is spiritual emotion. Its true understanding lies in the experience of forgiving and in the emotion of receiving forgiveness. The nuances of forgiveness are not to be searched in textual interpretations. The nuances sprout from imaginative acts of forgiveness. A believer who practices forgiveness as a way of life need not know the Hebrew, Aramaic, or Arabic word for forgiveness. Chuang Tzu declares: “Words exist because of meaning; once you’ve gotten the meaning, you can forget the words.”<sup>92</sup> Barren intellectualization of these words yields neither truth nor understanding.

The universality principle demands that divine texts be accessible to all believers. Almost all divine texts are scribed in specific languages—often, though not always, in the language of the prophet-transmitter. Jesus spoke Aramaic,<sup>93</sup> but the four Gospels were first scribed in Greek. The Qur’an was revealed and scribed in Arabic, the language that the Prophet Muhammad spoke. The power of the word is inextricably bound to the original language of revealed texts. To be able to read and understand a divine text in its original language is a gift not given to all the peoples of the world. As a divine text reaches diverse nations speaking diverse languages, the original language of the divine text may be revered but is rarely understood. For example, most of the people in Indonesia, the largest Muslim nation in the world, do not speak Arabic. Likewise, more than a billion Christians do not speak Greek. If a divine text is confined to its original language, its accessibility to the peoples of the world remains limited.

Translations, however, threaten the textual immutability of divine texts. As noted in the introduction to this article, the immutability of a divine text may be understood textually or substantively. Textual immutability focuses on the language of the

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91. *Matthew* 18:21–22.

92. 26 CHUANG TZU, in *THE COMPLETE WORKS OF CHUANG TZU* 303 (Burton Watson trans., 1968).

93. See generally Carl H. Kraeling, *The Jewish Community at Antioch*, 51 *J. BIBLICAL LITERATURE* 130 (1932).

divine text. Substantive immutability focuses on the message of the divine text. Prohibitions against translations stem from the fear that a divine text will lose its message if it is freely translated into the vernacular. The fear, however, is exaggerated. There is no wisdom in preventing the peoples of the world from understanding divine texts in their own languages. The forbidders of translations overlook the fact that divine texts do not perpetuate but eradicate ignorance.

With the relaxation of translation barriers, divine texts are now universally accessible. Almost all divine texts have been, or are being, translated into the major languages of the world. When a divine text is translated, translations are not immutable in the same sense as the original text. If a translation is inaccurate, it will soon be discarded in favor of a more accurate translation. If a translation is accurate but inelegant, it may also fail to survive or be replaced with a more accurate and elegant translation. There might be more than one accurate and elegant translation of a divine text in the same language. These multiple translations in the same language may vary in their choice of words, sentence construction, and textual effects—all authentic and acceptable. The textual immutability of the original language can rarely be transferred to the translated languages. However, the primary purpose of the translation is to convey the substantive message of the divine text in clear, simple, and possibly beautiful diction.

A divine text may be understood, contextualized, and extended to rule upon new realities, using several distinct methodologies. A verse of the divine text may be interpreted to promote spiritual freedom, social welfare, compassion, merciful justice, or any other purpose. Purpose-based interpretations promote universal understanding of divine texts, regardless of the language in which a divine text is read. Contrast this methodology with a purely linguistic analysis of divine texts. When gloss is created through an expert reading of the words of a divine text, anomalies occupy hermeneutics. The linguistic analysis creates a monopoly in favor of those who understand the sacred language of the divine text, denying legitimacy to others who do not speak the sacred language but have a far superior understanding of the divine text. In the hermeneutics of the Qur'an and the Prophet's Sunna, for example, Arabic-speaking scholars may claim a superior understanding of



divine texts. Such linguistic claims are proprietary. Ownership claims with respect to divine texts are rarely recognized.

When ownership claims are superimposed over divine texts, forces of dissent and disobedience infiltrate the religion. For example, the canon of the Roman Catholic Church that the mass must be delivered in Latin survived for several centuries. As late as the twentieth century, Pope Pius XII (1939–58) defended the canon in the following words: “The use of the Latin language . . . is a manifest and beautiful sign of unity, as well as an effective antidote for any corruption of doctrinal truth.”<sup>94</sup> Despite the good intentions of the Church, the canon invited protest and rebellion. The Protestant revolution and the Thirty-Years War paved the way for the emergence of a new and more flexible canon that the believers should be able to pray in the language they understand. The linguistic democratization of divine texts continued to gain momentum and legitimacy. Eventually, though centuries later, the Church repealed the Latin-only canon. The popularity of the vernacular mass throughout the world has not dismantled the Catholic Church’s authority.<sup>95</sup>

### C. Cultural Ties

The lay population from which the prophet-transmitter arose may claim special ties with the divine text, yet special cultural ties to a particular text do not undermine the fact that divine texts are for all of humankind. For example, the inhabitants of Makka and Medina, the two cities where Muhammad lived and established his ministry, believe they have cultural ties with the Qur’an. These ties are justified to the extent that inhabitants of these cities live where Muhammad was born, where he preached, and where he fought for his life.<sup>96</sup> The Qur’an was revealed piecemeal in response to events that occurred in these cities. The Ka’ba, the house of God that

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94. Encyclical from Pope Pius XII, on the Sacred Liturgy to leadership of the Church ¶ 60 (Nov. 20, 1947), available at [http://www.vatican.va/holy\\_father/pius\\_xii/encyclicals/documents/hf\\_p-xii\\_enc\\_20111947\\_mediator-dei\\_en.html](http://www.vatican.va/holy_father/pius_xii/encyclicals/documents/hf_p-xii_enc_20111947_mediator-dei_en.html).

95. Clyde Weber Votaw, *Martyrs of the English Bible*, 53 *BIBLICAL WORLD* 296 (1918) (reporting how the church in the sixteenth century and before resisted the idea that the people might read the Bible in their own language).

96. Gustav Weil et al., *An Introduction to the Quran*, 5 *BIBLICAL WORLD* 181 (1895) (narrating the Prophet’s life in the cities of Makka and Medina).

Abraham built, is located in Makka. Muhammad is buried in Medina. Makka and Medina are the cities that millions of Muslims visit every year to perform the Hajj, the annual Muslim pilgrimage, one of the five pillars of Islam.<sup>97</sup> Profuse contacts with the Qur'an, the Prophet's Sunna, Islamic history, and Muslims confer a special status on these holy cities and on the people who live there. The inhabitants of these cities may rely on all these contacts to claim a special bond with the divine text.

The concept of cultural ties may even spill over into the larger Arab world. Since the Qur'an was revealed in Arabic, Arabic-speaking countries may believe they have a deeper relationship with the Qur'an. This belief, though generally harmless, may be misconstrued to imply that Muslims who do not speak Arabic are deficient in understanding the divine text. This line of thinking may convert special ties into an ideology of cultural hierarchy under which the divine text and the Arab culture are considered inseparable. Under this ideology of cultural hierarchy, the Muslims of the world may be asked to look toward Arabic countries, particularly Saudi Arabia, for receiving guidance on textual interpretations of the Qur'an and the Prophet's Sunna.

Islamic history, however, demonstrates that the ideology of cultural hierarchy has failed to establish any long-lasting control over the interpretation of the Qur'an and the Prophet's Sunna. Muhammad's family and his companions profoundly influenced the development of Islamic jurisprudence. However, the gravitational center of Islam was in a constant motion toward forging a universal civilization. The great Imam, Abu Hanifa, who established the largest school of jurisprudence, lived in Iraq and was not an Arab.<sup>98</sup> The greatest compiler of the Prophet's Sunna, Imam Bukhari, was born in a country now called Uzbekistan.<sup>99</sup> Imam Al-Ghazali, the greatest law professor and jurist that the Islamic civilization has produced, one who interpreted the Qur'an and the Sunna with

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97. QUR'AN, *sura al-Imran* 3:96-97. The House of God in Makka is blessed. It is mandatory for all Muslims to make the pilgrimage. *Id.*

98. Liaquat Ali Khan, *Free Markets of Islamic Jurisprudence*, 2006 MICH. ST. L. REV. 1487, 1500 (discussing the contributions of Abu Hanifa).

99. Ali Khan, *Islam as Intellectual Property*, 31 CUMB. L. REV. 631, 657 (2000) (discussing the contributions of Imam Bukhari).

unprecedented rigor, was born in the northern part of Iran.<sup>100</sup> The greatest Islamic university, which has for centuries led the study of Islamic jurisprudence, is established in Cairo, a citadel of the Pharos.<sup>101</sup> Great Muslim empires established in Spain, Turkey, and India universalized the message of the Qur'an. The message of the Qur'an has not been confined to the Arab culture. Very early in Islamic history, the Qur'an began to touch the people of the world regardless of their ethnic or linguistic identities.

A divine text originates from a specific culture but it is not a cultural artifact. It may directly address the people of a nation, but no nation may successfully claim exclusive ownership of the divine text. The prophet-transmitter may belong to an ethnic or racial category, but no divine text promotes any ethnic or racial legacy. The people may form special ties with divine texts, even though divine texts cannot reciprocate. Free of national, ethnic, racial, or cultural definitions, divine texts are God's gifts to all humanity. Some nations and communities may serve God more devotedly than others. Some generations may benefit from divine texts more than others. Nevertheless, no person, community, or nation possesses proprietary rights over the spiritual knowledge that divine texts impart.

#### *D. Clerical Ties*

Scholars, jurists, and theologians who acquire special expertise in interpreting divine texts may also assert special ties with divine texts, but these ties, like cultural ties to a divine text, do not lessen the application of divine text to lay individuals.<sup>102</sup> Likewise, an organized

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100. Nabih Amin Faris, *The Ihya Ulum al-Din of Al-Ghazzali*, 81 PROCEEDINGS OF AM. PHILO. SOC. 15 (1939) (discussing the importance of Al-Ghazzali's magnum opus).

101. Nasser Rabbar, *Al-Azhar Mosque: An Architecture Chronicle of Cairo's History*, 13 MUQARNAS 45 (1996) (explaining the intellectual and political significance of the mosque built in AD 970).

102. Under the organizing principle of the nation-state, the interpretations of secular law are subject to a highly defined Magisterium. In the United States, for example, the ultimate power to render enforceable interpretations of legal texts has been granted to federal courts, particularly the U.S. Supreme Court. The nine justices of the Supreme Court constitute the ultimate State Magisterium to declare what the law is. State supreme courts enjoy considerable authority to clarify state laws and their constitution. The U.S. Supreme Court's holdings may also be undone through constitutional amendments. Despite these escape values, the ultimate authority to supervise whether state and federal laws comply with the organized hierarchy of

church may establish institutional ties with divine texts, primarily for the benefit of lay believers. The Catholic Church furnishes a highly sophisticated and theologically well-defended Magisterium to interpret the Bible. The Catechism of the Catholic Church explains that the "task of giving an authentic interpretation of the Word of God . . . has been entrusted to the living, teaching office of the Church alone."<sup>103</sup> This entrustment is defended under the theological principle that the Church's Magisterium is derived directly from "Christ to the fullest extent."<sup>104</sup> The Church may delegate this power to lawful successors of the apostles, i.e., "the bishops in communion with the successor of Peter, the Bishop of Rome."<sup>105</sup>

Church Magisteria may be instituted for intellectual and spiritual purposes. The intellectual justification presumes that the exegetical complexity of divine texts requires knowledge and skills; and, therefore, persons highly educated in texts, who devote their lives in understanding their meaning, must guide lay believers. That is why lay believers may be forbidden from receiving guidance directly from divine texts. Church Magisteria may also presume that only inspired persons devoted to divine texts receive access to their meaning. Like other professional groups, such as physicians and lawyers, the clergy develops special knowledge of divine texts and employs the special knowledge to offer spiritual enlightenment, healing, redemption, and forgiveness. From critical perspectives, Church Magisteria may be portrayed as a source for generating power, prestige, and income.<sup>106</sup> The Protestant revolution challenged the Church

legal norms lies with the State Magisterium. This organized interpretative model of legal texts has attained near universality in that a State Magisterium is mounted on the top of the legal system in almost all nation-states. Unlike secular law, however, divine texts are subject to both identifiable Magisteria and free markets of interpretation.

103. CATECHISM OF THE CATHOLIC CHURCH, art. 2, § 85.

104. *Id.* § 88.

105. *Id.* § 85.

106. For example, the Catholic Church's Sacrament of Penance is a judicial procedure under which a duly ordained priest forgives the sins of a believer who confesses sins to the priest. The procedure delivers the penitent from the guilt of sin and in case of mortal sin from its eternal punishment. By sinning, the believer breaks the Law and drifts away from God. By forgiving, the ordained priest brings the penitent back to the fold. The believer through sincere sorrow and official forgiveness is reconciled with God. The power to forgive sins belongs to God, for God is most forgiving. According to the teachings of the Catholic Church, the power of the keys, that is, the power to forgive sins, has been delegated to the Church. The

authority to control believers' access to divine texts. The consequent translation of the Bible into the vernacular made it easier for lay believers to read and directly experience the Word of God.

A clerical Magisterium is compatible with the principle of universal access to divine texts, if the organized Church limits itself to providing guidance. Islam not only allows but encourages lay believers to read the Qur'an, and seek guidance, intellectual nourishment, and spiritual enlightenment. For interpretive purposes, however, the Shia Islam provides clerical hierarchy for the dispensation of advice over new legal and moral issues. The Shia hierarchy is not global but community-based. The Sunni Islam establishes no Magisterium. Muslim scholars are considered to be the Prophet's heirs, and the Qur'an constantly reminds readers that persons who lack knowledge are not on the same level as those who acquire knowledge. Yet, Muslim communities are free to interpret divine texts according to their own needs. The distinct schools of jurisprudence (*madhabs*) came close to organizing the hermeneutics of divine texts. Still, Islamic law has developed through the free markets of jurisprudence.<sup>107</sup> Eminent scholars issue opinions on questions of the day and compete for lay followers. The lay believers assess the propriety of the offered opinions, compare their relative worth, and scrutinize the qualifications of opinion-makers. The opinions that win the largest number of lay believers become Islamic rules of law. Minority opinions with substantial following coexist with dominant opinions, giving Islamic law universal plurality and diversity.<sup>108</sup>

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power to forgive is therefore no personal power of a man of piety or virtue or scriptural knowledge. The Council of Trent reaffirmed that Jesus transferred the power of the keys to the Apostles and to their lawful successors. Hence, the power belongs to the Church and to duly ordained priests who represent the Church and who exercise this power not as a personal prerogative but as a delegated power to forgive the sins of a baptized believer who confesses with honesty and wishes to reconcile with God. See The Council of Trent, Sess. XIV, chs. I, V (1551), in THE CANONS AND DECREES OF THE SACRED AND OECUMENICAL COUNCIL OF TRENT 92-100 (J. Waterworth ed. & trans., 1995).

107. See generally Ali Khan, *supra* note 98.

108. *Id.*

#### IV. THE TIMELESSNESS OF DIVINE TEXTS

This section demonstrates that divine texts are timeless. The message of divine texts does not depreciate with time. Non-believers dismiss divine texts, claiming temporality and old age root these texts in a remote time and place and erode their utility in solving the changing problems of diverse modern communities. To faith-filled believers, however, indictments of temporality will never impeach the ceaseless relevance of divine texts. There are generations that forsake the commandments of divine texts. But in the flow of time, the number of believers rises and falls. Generational desuetude of divine texts does not diminish their eternal validity. The immutability of divine texts lies in their infinite capacity to revive their message, reengage the peoples of the world, and offer guidance.

Divine texts are vibrant texts, not mere words locked in sacred languages. It is therefore vital not to conceive divine texts as physical objects, intellectual constructs, or hermeneutic compositions. Interpretative methodologies to understand divine texts may vary with time, and from culture to culture. Some portions of divine texts may seem archaic, others futuristic, and both irrelevant to the times we know. The constructs of time—past, present, and future—are inadequate tools to measure the dynamism of divine texts. Beyond methodologies and vagaries of time, divine texts must always be approached in pursuit of guidance for morally intelligent individual and communal life. Ungrateful, disrespectful, or overly critical approaches toward divine texts close the doors of guidance, just as willful children deprive themselves of the blessings of wise and caring parents.

##### *A. Beyond Methodologies*

Methodologies to derive meaning from texts are transient but divine texts are permanent. Just like interpretative models of legal texts,<sup>109</sup> the hermeneutic of divine texts is prolific and diverse. Some

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109. This truth is most obvious in the case of constitutional texts. In constitutional jurisprudence, distinct interpretative methodologies appear and become popular among scholars and judges, and then they disappear. Plain meaning, intentionalism, originalism, contextualism, intratextualism, and a legion of other interpretative models are employed to derive meaning from a constitutional text. Hundreds of scholarly articles refine interpretive

believers read divine texts in their plain meaning, without belaboring the text through gloss. Others see divine texts as metaphorical sources of legal imagination from which concrete rules may be derived for solving problems and guiding behavior. Some read divine texts as inspirational literature with no binding significance for actual behavior. Still others view divine texts as historical objects to be placed in museums.

Although divine texts may be characterized as an object, the text itself is not a historical object, but is timeless and immutable. Text as object is a thing, occupying space, like a stone or a carved piece of wood.<sup>110</sup> Old manuscripts of the Qur'an, some dating back to the era of its origin, have been found and preserved in various museums and libraries of the world. These historical objects are important to the study of calligraphy, quality of parchment, ink, and preservatives. These manuscripts might also be used to verify the consistency of text over the centuries. Nonetheless, a timeless text is not a historical object. The medium in which a timeless text is preserved does not lend immutability to the text. Nor does a timeless text come into being by assuring its physical existence in a retrievable medium for an indefinite future. While preservation of a divine text is necessary, it cannot alone make a text timeless.

Opposite to "text as object" is "text as interpretation." Text as interpretation challenges the objectivity and permanence of divine texts. If text is essentially interpretation having no objectivity apart from interpretation, divine texts are perforce human and mutable. Divine texts are human because interpretations are human. And since interpretation is the only means of reaching divine texts, the method can overpower the text. Furthermore, interpretations are transient. Since different interpretations derive different meaning from the same text, the text—despite its physical existence in a language, including the sacred language through which God spoke to the prophet-transmitter—is fluid. This fluidity of interpretation reduces the immutability of divine texts to a mere metaphor devoid of reality. Through such a lens, no divine text is immune from interpretation,

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methods to read the text and make sense of the gloss that judges invent to resolve constitutional cases.

110. An original copy of the Declaration of Independence, for example, is an object preserved and exhibited in the Rotunda for the Charters of Freedom in the National Archives Building Washington, D.C.

and its meaning and understanding cannot be severed from differing interpretations. Therefore, no divine text is timeless.

In actuality, divine texts lend themselves to interpretations. Within the Qur'an, some, but not all, passages require no interpretation. Over the centuries, Muslim religious scholars have interpreted provisions of the Qur'an in good faith and with humility. And yet their interpretations of the same provisions vary. Varied interpretations with respect to temporal texts, such as national constitutions, have been even more robust and contentious. No temporal or divine text free of interpretation has been created or found. This valid point, however, reaffirms, rather than refutes, the timelessness of divine texts. Only a dead text ceases to respond to changing times. That a divine text may have different meaning in different times demonstrates its dynamic timelessness. That no human interpretation can limit the scope or meaning of a divine text demonstrates the meta-human reality of divine texts.

Another pair of methodologies is equally inadequate to confine the dynamism of divine texts. The "text-per-author"<sup>111</sup> methodology maintains that no text should be interpreted without knowing its author's understanding. In constitutional jurisprudence, the text-per-author methodology is known as originalism.<sup>112</sup> Originalism is an interpretive method that curbs ascribing new meaning to old texts.<sup>113</sup> Originalism strives to fix the meaning of a text in the past in the understanding of its author who is no longer available to guide the readers. Originalism is anchored in sentiments favoring continuity with the past. Originalists fear that when a text is severed from the understanding of its author, its interpreters would impose their personal preferences and ideologies into the text, making interpretations indeterminate, willful, contentious, and even chaotic.

Originalism in the case of divine texts raises complex issues of God's purpose and the interpreter's intention. The Qur'an itself alludes to the difficulty of interpretation:

111. Text-per-author includes texts, such as statutes and constitutions, prepared by multiple authors.

112. See generally, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1 (1996).

113. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1317–20 (2006).



He (God) it is Who has sent down to thee the Book: In it are verses basic or fundamental (of established meaning); they are the foundation of the Book: others are allegorical. But those in whose hearts is perversity follow the part thereof that is allegorical, seeking discord, and searching for its hidden meanings, but no one knows its hidden meanings except God. And those who are firmly grounded in knowledge say: "We believe in the Book; the whole of it is from our Lord:" and none will grasp the Message except persons of understanding.<sup>114</sup>

This divides the Qur'an into two sets of reading: clear and allegorical. Clear verses pose no interpretive difficulty because a plain reading of such verses will yield meaning. Allegorical verses, however, pose the difficulty of interpretation. The Qur'an recognizes the possibility of mischief when interpreters begin to decode hidden meaning of allegorical verses. The Qur'an warns that some may interpret allegorical verses for no purpose besides sowing dissension. Others may indeed end up sowing dissension even though they employ no such intention in interpreting allegorical verses. To discourage both intended and unintended discord, the Qur'an prohibits speculation by saying that only God knows the meaning of allegorical verses.

Verse 3:7 has been a source of profound controversy in Islamic jurisprudence. Ibn Rushd (Averroes) read the middle portion of the verse as follows: "but no one knows its hidden meanings except God and those who are firmly grounded in knowledge."<sup>115</sup> According to Ibn Rushd, God has not retained the exclusive authority over allegorical verses. The persons of knowledge have also received the ability to decipher the meaning of allegorical verses.<sup>116</sup> This reading of the verse opens the hermeneutic door wide open for theological philosophy. Ibn Rushd concludes that only persons of understanding will grasp the entire message of the Qur'an.<sup>117</sup> Furthermore, if only God knows the meaning of allegorical verses and no human being,

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114. QUR'AN, *sura aal-Imran* 3:7.

115. The mainstream jurists place a period after God and sever the rest of the verse. Roger Amaldez, *Religion, Religious Culture, and Culture, in RELIGION AND CULTURE IN MEDIEVAL ISLAM* 93, 101 (Richard G. Hovannisian & Georges Sabagh eds., 1999).

116. See Ibn Rushd, *Kitab fasi al-maqal, in AVERROES: ON THE HARMONY OF RELIGION AND PHILOSOPHY* (George F. Hourani trans., 1976).

117. For specific scriptural support of this assertion, see QUR'AN, *sura aal-Imran* 3:7.

regardless of knowledge, has been given any access to the hidden meaning of allegorical verses, one may wonder for what exact purpose allegorical verses are revealed at all.

Ibn Rushd's hermeneutics—which has generated volumes of commentary in the Western literature and is foundational to the modern discipline of theological philosophy<sup>118</sup>—invites knowledgeable persons to strive to understand the meaning of allegorical verses. Presuming that truth does not oppose truth, Ibn Rushd argues that divine texts must be read to reaffirm demonstrative studies.<sup>119</sup> For example, divine texts cannot be read to reject scientific truth. No contradictions exist in God's universe. Contradictions that human beings find between divine texts and demonstrative studies prove that human knowledge, one way or the other, is limited. Ibn Rushd allows persons of knowledge to employ skills to show harmony between divine texts and demonstrative studies.<sup>120</sup> This burden of showing harmony bears so greatly upon scholars that there is a call for allegorical interpretation even of clear verses if their plain meanings depart from scientific truth.<sup>121</sup>

Though hermeneutic methods are inevitable for understanding the meaning and application of divine texts, no hermeneutic methodology should be enshrined with immutability. Legal methods of interpreting divine texts are transient. New legal methods may replace old legal methods. Likewise, substantive rules derived from divine texts with any legal methods can be elusive. New substantive rules derived with new legal methods may replace old substantive rules derived with old legal methods. When legal methods and derivative substantive rules are confused with divine texts themselves, great confusion enters into hermeneutic jurisprudence.

This vibrant whirlpool of hermeneutic methodologies does not diminish the timelessness of divine texts. What is timeless is the divine text that stands firm forever. Discordant interpretive

118. Specifically, Rushd directly influenced the work of Thomas Aquinas, whose influence on Catholic theology has been tremendous. See generally Charles Butterworth, *Averroës, Precursor of the Enlightenment?*, 16 J. COMP. POETICS 6 (1996); Harold Stone, *Why Europeans Stopped Reading Averroës: The Case of Pierre Bayle*, 16 J. COMP. POETICS 77 (1996); Harry A. Wolfson, *The Twice-Revealed Averroës*, 36 SPECULUM 373 (1961).

119. See Rushd, *supra* note 116, ch. 2.

120. See *id.*

121. See *id.*

methodologies are human efforts to understand divine texts. Even consensus methodologies erode and lose validity with time.<sup>122</sup> It is no fault of divine texts that they are open to multiple interpretations. The fault, if any, lies with methodologies and not with divine texts. Each methodology is human effort to strike a relationship of understanding with divine texts. Scientific methodologies practiced in good faith bear fruit in that they make divine texts accessible to lay believers. Conversely, mischievous and uneducated methodologies distort the understanding of divine texts. Even so, they cannot weaken God's message.

### *B. Temporality of Gloss*

Some texts are open-sourced, some close-sourced. An open-sourced text lends itself to be re-phrased and re-written. Even when an open-sourced text is not altered, it allows supplemental texts to become an integral part of the original text. A close-sourced text is subject to no changes whatever. It is complete. Most divine texts are close-sourced. Even among divine texts, some are more close-sourced than others. The Qur'an in the original Arabic language is completely close-sourced in that not a word can be added, deleted, or re-ordered in the text. By contrast, Hindu divine texts have been open-sourced. Vedas, Upanishads, and Puranas constitute an evolutionary series of divine texts, absorbing new revelation in complex and expansive ways. Every new revelation is accommodated; all that is revealed over the centuries is included. All gods, good and bad, enter the unbounded pantheon and make speeches. Every speech of every god is recorded. No durable structures, screens, or filters are mounted to exclude gods, seers, rites, revelations, or dogmas. In this limitless openness, there is no concept of heresy.<sup>123</sup>

When a text is open-sourced, it is vulnerable to change.<sup>124</sup> Openness to change, however, does not mean that the text will inevitably be changed in a fundamental way. For example, a national

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122. Ibn Rushd argues that unanimity on theoretical matters is rarely determined with certainty. *See id.*

123. *See* Marc Galanter, *Hinduism, Secularism, and the Indian Judiciary*, 21 PHIL. E. & W. 467, 472-73 (1971).

124. Most human texts are open-sourced. Constitutions, statutes, regulations, and case holdings are all are open-sourced texts. Even prototypical constitutions and universal texts are open-sourced.

constitution, though open to change, may for centuries undergo no changes. Even if a national constitution is re-written, its prototypical attributes may nonetheless be preserved. In other cases, an open-sourced text itself may not be altered. This unaltered text may nonetheless spawn new texts. The Universal Declaration of Human Rights (UDHR), for example, is unlikely to be altered in the foreseeable future. Yet the UDHR has spawned several covenants and conventions, which expand and refine the scope and meaning of the mother text.

Even close-sourced texts are open to interpretation. The Hebrew Bible, the New Testament, and the Qur'an are each closed-source texts, but have been explained through volumes of jurisprudence. The *midrash* around the Hebrew Bible, the *fiqh* around the Qur'an, and the canon law around the New Testament constitute the hermeneutic gloss that explains and extends the meaning of divine texts. Such confusion leads to stagnation of thought in Islamic jurisprudence (*fiqh*).<sup>125</sup> Muslim schools of jurisprudence began to confuse the immutability of divine texts with the immutability of gloss. And even though the great Imams and their disciples were virtuous and brilliant architects of *fiqh*, their interpretative rulings cannot be declared immutable. Their rulings must be given the utmost respect as precedents, but nothing binds succeeding generations to modify or even repeal their rulings if they are incompatible with scientific truth or other demonstrative studies.

As a general principle, divine texts must not be blended with the gloss that exegetes place on texts. Each generation of exegetes may interpret the divine text differently and place a different gloss on the text. This temporal gloss makes the divine text meaningful for each generation of believers. The gloss may also be cultural. As divine texts reach diverse cultures, each culture reads the divine texts through its own unique lenses. This diversity of cultural interpretations of the same divine text does not demonstrate that the text carries no core or that the text is completely malleable to cultural paradigms. Most divine texts are culture-sensitive and they allow interpretive space for cultural variations. No divine text, however, allows itself to be appropriated by any one culture. The

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125. Ali Khan, *The Reopening of the Islamic Code: The Second Era of Ijtihad*, I UNIV. ST. THOMAS L. REV. 341 (2003).

universality of a divine text lies in its diverse cultural applicability as well as its resistance to cultural absorption.

While divine text is timeless, gloss is temporal.<sup>126</sup> With time, even consensus interpretations of a divine text may lose approval. The deterioration of gloss does not affect the solidity of divine text. Some interpretations last longer than others. Even the longevity of gloss must not dilute the distinction between text and gloss. Texts are divine, gloss is human.

### *C. Temporality of Desuetude*

Legal texts are meant to be functional. In secular jurisprudence, obsolete texts gradually turn into historical artifacts, acquiring the attributes of ancient documents exhibited in museums or sold at auctions as pieces of art.<sup>127</sup> A legal text, once operational and fully valid, ceases to be the law through decades of nonuse, a concept known as desuetude.<sup>128</sup> If secular texts turn to dead letter through desuetude, it is argued that even unused portions of divine text must meet the same end.

Divine texts are organic and endless. Communities cannot pick and choose what portions of the divine text they will obey and what portions they will ignore. Yet, in any given period of time, the entire divine text may or may not be fully operative. Some divine laws may not be enforced, and some may be partially enforced. This selective

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126. In constitutional jurisprudence, the distinction between text and gloss is often ignored as gloss takes on a life of its own. In the United States, for example, Supreme Court cases are so voluminous that gloss rather than text constitutes the bulk of constitutional law. Moreover, the movement of constitutional law takes place through gloss and not text, since text is rarely amended but gloss is continually refined and modified. Each generation of the Supreme Court Justices may divine new rules and modify the old ones by interpreting the same text of the Constitution.

127. Even old copies of quasi-operative legal texts, such as the Magna Carta, are treated as art objects. In an auction, H. Ross Perot bought a seven-hundred-year-old copy of the Magna Carta for \$1.5 million. Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 386 n.59 (1995). However, the Magna Carta is still invoked in judicial decisions. See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300 (1989) (O'Connor, J., concurring in part and dissenting in part).

128. Desuetude was a Roman concept adopted by several legal traditions. In the United States, West Virginia is the only jurisdiction that recognizes desuetude as a valid legal defense. This defense may also be converted into a due process or equal protection defense. Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209-12 (2006).

enforcement of divine laws is not necessarily a sign of disobedience or lack of faith. Nor does selective enforcement jeopardize the integrity of divine texts. Furthermore, desuetude is rarely a reliable means to bring about social change.<sup>129</sup>

The Qur'an's law to cut off the thief's hand is an example of a divine text applied differently throughout time, yet it maintains its integrity and timelessness.<sup>130</sup> This punishment is now rarely enforced in Muslim countries.<sup>131</sup> One may demonstrate that this law is experiencing nonuse. The nonuse of a portion of the divine text, however, cannot be the basis to declare that the portion is losing its normative validity. Different generations passing through different conditions of life strike variant relationships with divine texts. The Qur'an's law for severing the thief's hand is not a law without exceptions. If the thief repents and amends his behavior, the Qur'an itself promises God's forgiveness<sup>132</sup>—a suggestion that enforcement of the law may take a more forgiving approach toward minor thefts and non-habitual thieves. Even though forgiveness is an inseparable part of punishment for theft, some generations may strike a closer relationship with forgiveness than punishment. A forgiving generation of Muslims may not enforce the hand-cutting punishment. Under the norms of forgiveness, a thief may not only escape the ultimate punishment but may also be proactively rehabilitated for the good of the community. Lesser punishments may be prescribed to deter even habitual thieves. This nonuse of the ultimate punishment does not undermine the divine law's abhorrence for theft. The nonuse simply reflects the morality of a

129. Ali Khan, *Lessons from Malcolm X: Freedom by Any Means Necessary*, 38 HOW. L.J. 79, 108 (1994) ("Desuetude is not a powerful legal means of social change, however, because non-use of oppressive statutes is tenuous. Even when a statute is not enforced, the target group remains under a constant threat that the defunct statute might come alive again without notice.").

130. QUR'AN, *sura al-Ma'idah* 5:38 ("A thief, whether a man or a woman, shall have his or her hands cut off as a penalty for whatever he or she has earned, as an example set by God. God is Powerful, Wise.").

131. M. Cherif Bassiouni, *Crimes and the Criminal Process*, 12 ARAB L. Q. 269, 279 (1997) (explaining the mitigation factors that prevent the imposition of the penalty); see also Sam S. Souryal et al., *The Penalty of Hand Amputation for Theft in Islamic Justice*, 22 J. CRIM. JUSTICE 249 (1994) (arguing that the penalty is necessary for maintaining a spiritual and peaceful society).

132. QUR'AN, *sura al-Ma'idah* 5:39 ("God will relent towards anyone who repents following his wrongdoing, and reforms; God is Forgiving, Merciful.").

generation of believers to be more forgiving than just. If social conditions worsen and theft spreads as a barbaric and cruel practice disrupting a community's peace and enjoyment of property, a Muslim community will probably revive the exceptional punishment that the Qur'an has sanctioned.<sup>133</sup>

As a general principle, the concept of desuetude does not apply to divine texts.<sup>134</sup> The unused portions of divine texts do not lose validity for times to come.<sup>135</sup> Willful generations that disregard divine laws cannot rely on desuetude to predict that future generations will also abandon the laws. Some generations are more religious than others. Generations gone astray give birth to devout generations and vice versa, just as, in the words of the Qur'an, "the night flows into the day and the day flows into the night."<sup>136</sup> The Qur'an itself enlightened the age of ignorance and persuaded hardened nonbelievers to accept God's message. The theory that enlightenment, science, and the comforts of life minimize the fear of God and dispel the sway of divine texts has meager supportive evidence. The evolution of human civilization traces no linear movement toward less and less use of divine laws or toward eventual abandonment of divine texts.

## V. THE INTERTEXTUALITY OF DIVINE TEXTS

Divine texts are texts *in pari materia*.<sup>137</sup> They are intertextual. They are revealed at different times to different prophets in different

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133. Desuetude is rarely a defense in criminal prosecution even in secular legal systems. See Stephen L. Pepper, *Counseling at the Limits of Law: An Exercise in Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1554-55 (1995) (noting that statutes that undergo desuetude may be revived at any time and a responsible lawyer cannot take desuetude as a reliable basis to counsel clients).

134. Secular laws too, after undergoing decades of desuetude, can be "spectacularly revived." Danielle Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 184 (2006) (noting that a provision of the Civil Rights Act of 1866 was "spectacularly revived" in the 1960s and 1970s).

135. While writing this article, I found the following statement in a fortune cookie at a Chinese restaurant in Topeka: "The laws sometimes sleep, but they never die." The statement's author is unknown.

136. QUR'AN, *sura az-Zumar* 39:5.

137. There are no systemic rules of statutory interpretation that require legal professionals to read all statutes as internally coherent and harmonious. The canon of construction, known as *pari materia*, is a small effort to find harmonies among statutes that are related in purpose

communities. But they have a common purpose. Divine texts reinforce each other's truth and jointly establish a universal normative order for the guidance of humanity. They aim at suppressing our inclinations toward mischief and wrongdoing. They institute diverse and pluralist communities founded on truth, justice, and mercy. Accordingly, divine texts must be studied not as books in conflict but mutually supportive decrees. Rejecting any claimed disharmonies between the Hebrew Bible and the New Testament, the Qur'an presents the idea of intertextuality in the following verse: "And in their footsteps We sent Jesus the son of Mary, confirming the Law that had come before him: We sent him the Gospel: therein was guidance and light, and confirmation of the Law that had come before him: a guidance and an admonition to those who fear God."<sup>138</sup> Divine texts confirm, rather than contradict, one another. Subsequent divine texts affirm the truth of antecedent divine texts and may point out any corruption and distortions that human beings might have introduced into the spiritual message.

The Qur'an's references to other holy texts and the belief in God demonstrates the intertextuality of divine texts. The Qur'an intimates that God possesses the "Mother Text" containing revelations full of dignity and wisdom.<sup>139</sup> The Qur'an specifically names three divine texts: the Torah (Hebrew Bible), the Injeel (New Testament), and the Zaboor (David's Psalms). These texts, in addition to the Qur'an, originate from one and the same Mother Text.<sup>140</sup> However, it would be inaccurate to assert that the Qur'an recognizes no other divine texts. The concept of Mother Text, read with other verses of the Qur'an, includes all revelations of all divine texts, and not just the revelations found in the Middle Eastern spiritual tradition—for all revelations originate with God. The Mother Text denotes that divine texts are spiritually related, all manifesting the same One God. To lay emphasis on intertextuality, the Qur'an instructs believers:

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and policy. The policy justification for the canon might be found in legislative intent: by enacting two or more statutes for a common purpose, the legislature introduced no contradictions among them. See William N. Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1039 (1989).

138. QUR'AN, *sura al-Ma'idah* 5:46.

139. QUR'AN, *sura as-Zukhruf* 43:4.

140. QUR'AN, *sura ar-Rad* 13:39.



Say ye: "We believe in God, and the revelation given to us, and to Abraham, Ishmael, Isaac, Jacob, and the Tribes, and that given to Moses and Jesus, and that given to (all) prophets from their Lord: We make no difference between one and another of them: And we bow to God in submission."<sup>141</sup>

While listing specific prophets, the verse concludes by accepting all prophets who received revelation from God. Divine texts are cast in separate languages, and they contain distinctive teaching methodologies. The differences among them do not refute their unity. The proof of their unity lies in shared messages they deliver to humanity. The evidence of their relatedness lies in their normative content.

### *A. Evident Intertextuality*

The intertextuality among divine texts is evident and binds divine texts in a plain manner obvious to lay readers. The Hebrew Bible, the New Testament, and the Qur'an all share evident intertextuality. They refer to the same historical events, recognize the same prophets, and speak to humanity in a more or less similar normative language. This intertextuality exists primarily because these texts share the same spiritual tradition. Similarly, Hindu, Zoroastrian, and Buddhist divine books are intertextual as they share the same Indo-Persian spiritual tradition and are derived from one common stock, the Vedas.<sup>142</sup>

Intertextuality may be found even across spiritual traditions. The Hebrew Bible specifically mentions Cyrus, the King of Persia and a follower of Zoroaster, who issued a decree to build the House of God in Jerusalem.<sup>143</sup> And it was God, says the Bible, who moved the heart of Cyrus and appointed him to build the temple.<sup>144</sup> Cyrus was God's shepherd<sup>145</sup> and anointed.<sup>146</sup> These open and repeated references to a Zoroastrian King from Persia demonstrate the

141. QUR'AN, *sura al-Baqara* 2:136.

142. Avesta are the ancient scriptures of Zoroastrianism. See A.V.W. Jackson, *Avesta: The Bible of Zoroaster*, in 1 THE BIBLICAL WORLD 420, 420 (1893). These scriptures are the divine texts for Parsis of India and other small communities scattered throughout the world.

143. *Ezra* 5:13.

144. *2 Chronicles* 36:22-23; *Ezra* 1:1-2.

145. *Isaiah* 44:28.

146. *Isaiah* 45:1.

generosity of divine texts to acknowledge divine kings and prophets across historical boundaries and spiritual traditions.

In exploring the intertextuality of divine texts, one need not look for linguistic connections because divine intertextualism is thematic rather than linguistic. The themes of virtue, patience, compassion, and sharing, for example, permeate divine texts.<sup>147</sup> For example, kindness and compassion are found in a variety of divine texts. The Qur'an teaches that kindness begets God's kindness.<sup>148</sup> The Dhammapada promises joy for kindness.<sup>149</sup> The Gospels testify that Jesus ate with sinners.<sup>150</sup> Hinduism confirms compassion as part of all divine texts by asking the following question: "What sort of religion can it be without compassion?"<sup>151</sup> The words in which universal themes are expressed are divine but one need not dissect the words. Linguistic dissection may be performed for intellectual curiosity. But preoccupation with the philology of divine texts, let alone analytical parsing of words and phrases, is unnecessary to celebrate the shared truth of divine texts.<sup>152</sup>

Even linguistic *intratextuality* may not yield much in the study of a single divine text.<sup>153</sup> A linguistic view of intratextuality would demand that the same or similar words found in different parts of the same divine text should be interpreted in the same or similar way.<sup>154</sup> The negative implication of linguistic intratextualism would command that different words should be construed differently and not in a way that ignores or minimizes the difference in their meaning. Looking for fine fingerprints of language is unnecessary, and might even be obstructive, in understanding the lucid messages of divine verses. When exegetes summon a regiment of linguistic

147. Kenneth L. Woodward, *In The Beginning There Were the Holy Books*, NEWSWEEK, Feb. 11, 2002, at 53 (noting that contrary to the popular perception, the Bible and the Qur'an have far fewer references to Jihad but many that emphasize mercy and compassion).

148. QUR'AN, *sura az-Zumar* 39:10.

149. DHAMMAPADA XXV:368, 376.

150. *Matthew* 9:10-12.

151. BASAVANNA, *Vacana* 247.

152. Ali Khan, *supra* note 98, at 1550 (showing inadequacies of finding linguistic parallels and derivatives between divine texts).

153. For an informative analysis of intratextuality in the case of the United States Constitution with emphasis on words, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

154. *Id.* at 761.

intratextuality to forcibly extract meaning from divine texts, they may unwittingly overlook obvious themes. In view of that, the Qur'an discourages guesswork and recommends a plain and honest reading of divine texts.<sup>155</sup>

### B. Thematic Intertextuality

Divine texts share thematic unity. Without any expert assistance, lay readers may find profound thematic connections among texts situated in different spiritual traditions and equipped with diverse techniques of communicating the revealed truth. On the surface, Indo-Persian spiritual tradition is polytheistic whereas the Middle Eastern spiritual tradition is monotheistic. Furthermore, the concepts of prophets, angels, heaven, and hell, which are dominant in the Middle East spiritual tradition, are not so obvious in the Vedas. The ideal of living forever in paradise seems opposite to the ideal of Nirvana under which one ceases to exist completely.<sup>156</sup> Despite apparent dissimilarities, the themes of loving kindness, charity, forgiveness, reconciliation, honesty, and good deeds permeate divine texts across spiritual traditions.<sup>157</sup>

The power of thematic intertextuality can be deciphered even in secular legal systems under which divine texts have been separated from secular laws. In 1959, the State of Ohio adopted an official motto, "With God all things are possible." These words were taken from the New Testament.<sup>158</sup> In 1996, on the State Governor's prompting, a decision was made to engrave the motto on the state house located in Capitol Square Plaza. The American Civil Liberties Union and a Presbyterian minister challenged the proposed engraving as a violation of the First Amendment that prohibits governmental establishment of religion. The plaintiffs argued that the motto endorses the Christian religion. A divided Sixth Circuit panel ruled that "the State of Ohio has adopted a motto which

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155. QUR'AN, *sura aal-Imran* 3:7.

156. However, the Zoroastrian divine text affirms the idea of a life hereafter where rewards and punishments would be given for acts committed in this life. AVESTA, THE RELIGIOUS BOOK OF THE PARSEES xviii (Friedrich Spiegel & Arthur Henry Bleek trans., 1864).

157. WORLD SCRIPTURES: A COMPARATIVE ANTHOLOGY OF SACRED TEXTS 683-728 (Andrew Wilson ed., 1995).

158. *Matthew* 19:26.

crosses the line from evenhandedness toward all religions, to a preference for Christianity, in the form of Christian text."<sup>159</sup>

On rehearing *en banc*, the Sixth Circuit rehabilitated the Ohio motto, declaring it to be a constitutionally permissible expression of civic piety.<sup>160</sup> In support of its holding, the court offered at least one argument that draws on the intertextuality of divine texts. To refute the contention that the Ohio motto is specifically tied to the New Testament, the court cites the Hebrew Bible, the Qur'an, the Upanishads, and *Akhenaten's Hymn to Aten* (an Egyptian wisdom text) to demonstrate that the idea of an all-powerful God is not confined to any one divine text.<sup>161</sup> This line of reasoning does not dwell on specific words taken from a particular divine text but rather recognizes the thematic intertextuality of divine texts. Most important, the court finds no constitutional objection to state practices where the state espouses a theme found in numerous divine texts. A secular constitution must oppose the state's alliance with any one divine text. But even a secular constitution is not "exclusively secular"<sup>162</sup> in that it may endorse the state's embracing of the shared wisdom of divine texts.

Secular laws, however, do not always adopt the thematic intertextuality of divine texts. For example, consider human speech. Restraint on speech is the norm of divine texts. The Dhammapada defines goodness in terms of multiple restraints.<sup>163</sup> The Bhikkhu, the virtuous man and the virtuous woman, is restrained in all things. The Bhikkhu is not a consumer of senses. The Bhikkhu knows that goodness comes from the restraints of eye, ear, smell, and taste.<sup>164</sup> The Bhikkhu is particularly temperate in tongue and exercises great restraint on speech. Since the virtuous person is moderate in speech and employs wisdom in interpretations—"sweet are his words."<sup>165</sup>

159. *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 210 F.3d 703, 726 (6th Cir. 2000), *overruled by* 243 F.3d 289 (6th Cir. 2001).

160. *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 300 (6th Cir. 2001).

161. *Id.* at 304.

162. *Id.* at 308.

163. WISDOM OF THE EAST, THE BUDDHA'S "WAY OF VIRTUE:" A TRANSLATION OF THE DHAMMAPADA, FROM THE PALI TEXT 76, verses 360-63 (W.D.C. Wagiswara & Kenneth James Saunders trans., 1912).

164. *Id.* at verse 361.

165. *Id.* at verse 363.

Calmness, the seat of virtue, cannot be maintained without careful restraints on thought and speech.

The Hebrew Bible reaffirms the truth of the Dhammapada. It also teaches speech restraint. The story of Job involves the test of faith under extreme suffering. A suffering person can lose control of speech, since sin tempts the mouth to engage in profanity. A complaining tongue can cross the boundaries of faith and propriety.<sup>166</sup> A suffering person can vent rage even against God with a downpour of curses. It is in this existential context that the Hebrew Bible warns the suffering person to exercise speech constraints. For example, in the Old Testament, Eliphaz the Temanite, a friend of Job, consoles and comforts Job, suggesting that Job should follow the example of a wise man, who would refuse to “argue with useless words, with speeches that have no value.”<sup>167</sup> In his response to Eliphaz, Job also condemns the long-winded speeches delivered to provide comfort.<sup>168</sup> Job concedes that speech to vent suffering does not relieve pain; but even holding back speech, says Job, has no healing effect.<sup>169</sup> Either way, speech is irrelevant to suffering. This exchange on the relationship between speech and suffering concludes that the persons of faith exercise speech restraints and refuse to soil their tongues with any form of hate speech.

In harmony with the Hebrew Bible and the Dhammapada, the Qur’an also prohibits irresponsible speech and instructs Muslims to engage in reverent, dignified, and gentle speech.<sup>170</sup> Says the Qur’an, “Be modest in your bearing and subdue your voice. Lo! the harshest of all voices is the voice [braying] of the donkey.”<sup>171</sup> Muslims must speak the truth and abstain from convoluted words to deceive or gain unlawful favors. “O ye who believe! Guard your duty to God, and speak words straight to the point.”<sup>172</sup> Furthermore, gratuitous infliction of emotional distress through hurtful words is strongly

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166. *Job* 15:4.

167. *Job* 15:3.

168. *Job* 16:3.

169. *Job* 16:6.

170. QUR’AN, *sura al-Baqara* 2:197 (forbidding quarreling during pilgrimage); *sura al-Isra* 17:23 (rejecting the chiding of one’s aged parents), 28 (encouraging gentle speech).

171. QUR’AN, *sura Luqman* 31:19.

172. QUR’AN, *sura al-Ahsab* 33:70.

disapproved.<sup>173</sup> Thus, divine texts teach speech restraints and prohibit the uttering of hateful words.

One may argue that free speech guaranteed under secular laws is contrary to the speech norms of divine texts. Divine texts teach to restrain speech whereas free speech encourages more speech, not less. This apparent incongruity may be called upon to discard the divine norms of speech restraint. Those who believe in the speech norms of divine texts, however, see no contradiction between the two values. Free speech is a right that the believers may exercise, for example, against governments and state officials to disapprove government policies. Abusive language, however, is unnecessary to furnish effective criticism of public policies. Speech restraint is a virtue that the believers develop to refrain from inflicting verbal injury on others. Without speech restraint, in both private and public matters, individuals may sink into vulgarity and meanness that stain individual virtue and putrefy civic grace. For the believers, therefore, no contradiction exists between free speech and gentle speech. For them, free speech does not diminish civility, or vice versa. Hate speech protected under some secular laws cannot be reconciled with the teachings of divine texts.

Consistent with the mandates of divine texts, hate speech that incites violence, hostility, and discrimination has been outlawed throughout the world.<sup>174</sup> The International Covenant on Civil and Political Rights (ICCPR) prescribes that signatory states prevent and punish hate speech against racial, national, and religious groups.<sup>175</sup> Contrary to universal trend, however, the United States First Amendment jurisprudence does not preclude all forms of hate speech<sup>176</sup>—even if it causes emotional harm to groups of people<sup>177</sup> or

173. I discuss this point at length in Ali Khan, *Advocacy Under Islam and Common Law*, 45 SAN DIEGO L. REV. (forthcoming 2008).

174. Amnon Reichman, *The Passionate Expression of Hate: Constitutional Protections, Emotional Harm and Comparative Law*, 31 FORDHAM INT'L L.J. 76 (2007) (comparing American and Israeli approaches to hate speech).

175. International Covenant on Civil and Political Rights, art. 20, Dec. 16, 1966, at 999 U.N.T.S. 171, 173 [hereinafter ICCPR].

176. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 377 (1992).

177. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2380 (1989) (providing a critique of free speech jurisprudence); Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1542 (2003).

degrades prophets and holy books.<sup>178</sup> It is unlikely that the First Amendment would ever be amended to outlaw hate speech. It is equally unlikely that a regime of prior restraints will be put in place to chill speech.<sup>179</sup> The government, however, may enact laws to punish some disfavored speech.<sup>180</sup> It is, therefore, more likely that the courts may re-interpret the First Amendment to bring the constitutional law in harmony with the rest of the world that finds little value in upholding speech that wounds sentiments. Increasingly, racial hate speech, though legally protected, is socially unacceptable in the United States. If persons in power-positions engage in racially insensitive speech, they end up paying huge social costs, including loss of employment. Several states provide for enhanced punishments for crimes accompanied with hate speech.<sup>181</sup> These fetters on hate speech demonstrate that the United States is increasingly uncomfortable in vigorously protecting hate speech—a turnaround that might eventually harmonize the First Amendment with the teachings of divine texts.

#### VI. DIVINE TEXTS' INTERACTION WITH STATE CONSTITUTIONS

Constitutional texts are similar to divine texts in that they are durable and self-preserving. Constitutional texts are different from divine texts in that they are not timeless and immutable. This section discusses both these similarities and differences and demonstrates the influence divine texts have had on constitutional text. Constitutions are made in the image of divine texts. They espouse the noble principles of law. They pursue immutability, and they are the supreme law of the land. Government officials take an oath to protect and enforce the constitution. Subverting the constitution is high treason, akin to heresy, sometimes punishable with death. Judges, just like exegetes, interpret the constitution to extend and explain its application to new and novel human predicaments. Even ordinary citizens, including ardent followers of divine texts, revere

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178. Ali Khan, *supra* note 99, at 632 (explaining the distinction between religion as idea and religion as intellectual property).

179. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

180. Laura Pfeiffer, Note, *To Enhance or Not to Enhance: Civil Penalty Enhancement for Parents of Juvenile Hate Crime Offenders*, 41 VAL. U. L. REV. 1685, 1699 n.61 (2007).

181. *Id.*

national constitutions. These attributes of divinity might have persuaded Joseph Smith, the founder of the Church of Jesus Christ of Latter-day Saints, to declare that the United States Constitution is no ordinary secular law, but God-inspired text.<sup>182</sup> The Constitution, says Joseph Smith, “belongs to all mankind”<sup>183</sup> and protects the rights of “all flesh”<sup>184</sup>—thus declaring the Constitution’s universality in the tradition of divine texts.

Professor Mauro Cappelletti explains the dialectical progression by which the norms of divine texts have been secularized and reposed in numerous national constitutions.<sup>185</sup> In the pre-constitutional stage, the notion of law was inseparable from divine texts. Thomas Aquinas’s doctrine that an unjust law is no law declared the supremacy of the divine texts.<sup>186</sup> The seventeenth-century positivist movement challenged the supremacy of divine texts and introduced a radical theory of secular law under which the state may enact valid laws contrary to the dictates of divine texts. In this second stage, law was separated from natural law and divine texts. Enlightenment, the will of the people, the age of reason, and other similar slogans challenged the supremacy of divine texts and their custodians, whether monarchs or the clergy. The power to manufacture laws was turned into a quasi-industrial complex housed in national parliaments. In the third stage, primarily led by the United States, nations promulgated constitutions to reinvent the concept of higher law.<sup>187</sup> They also launched the practice of judicial review to re-introduce the hierarchy of laws, thus guaranteeing that no ordinary laws are permitted to alter the higher law. The national constitution, a substitute divine text, would become the civic scripture for the secular state.

182. Ezra Taft Benson, *Our Divine Constitution*, ENSIGN, Nov. 1987, at 4. But following the view of separation of church and state, some scholars argue that the United States Constitution is Godless. ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE* 12 (2005) (1996).

183. THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 98:5.

184. THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 101:77.

185. MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971).

186. 2 BASIC WRITINGS OF ST. THOMAS AQUINAS 784 (Anton C. Pegis ed., 1945).

187. Keith Rosenn, *Judicial Review: Old and New*, 81 YALE L.J. 1411 (1972).



Although numerous aspects of the divine text were appropriated and lodged in the text of the constitution, the constitution was not a complete affirmation of the divine text. Despite this borrowing, the making of the national constitution as a higher law was to some extent a subversive experiment in weakening the hold of divine texts. The triumph of positive law was indeed the victory of an agnostic class that doubted the legitimacy of divine texts and resented the influence of the clergy. In dethroning divine texts, the power to control the community, its shared resources, and even ordinary legal relationships was taken away from the administrators of divine texts and lodged in the creators, enforcers, and defenders of secular law. The administrators of divine texts are sometimes corrupt or devious. But so are the administrators of secular law. The human factor in corrupting the laws, be they divine or secular, has more or less remained the same. However, the institution of national constitutions and the concomitant secularization have confused the role of divine texts in ordering the lives of individuals and communities.

Following the attributes of divine texts, constitutions carry the sentiments of immutability. Some constitutions formally prohibit the amendment of certain fundamental values. The German constitution, for example, grants numerous civil and political rights.<sup>188</sup> To make these rights permanent, the constitution formally prohibits any amendment to these rights.<sup>189</sup> Even if no such commitment to permanence is formally made in the constitution itself, certain parts of the constitution might nonetheless be considered immutable. For example, it is highly unlikely that the First Amendment of the United States Constitution would ever be amended, though it is theoretically possible. The constitutional law developed under the First Amendment may suffer changes and reversals, as it has in the past. But the text of the First Amendment appears to be permanent.

Constitutions are durable texts. Some texts, however, are more socially entrenched than others.<sup>190</sup> The degree of effort required to change a text defines its durability. Unlike divine texts, constitutions

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188. GRUNDGESETZ [GG] [Constitution] arts. 1–20 (F.R.G.).

189. *Id.* art. 79(3).

190. A socially entrenched constitution is more difficult to alter even if the procedures to amend are relatively simple.

are mutable texts. The contents of a constitution can be amended or deleted, and new contents can be added to it. The United States Constitution is a good example of durable text. The procedures to amend the Constitution allow no easy textual changes. A change requires the consent of a supermajority of elected officials. Despite this rigidity, the Constitution is still considered a mutable text. Over the decades, numerous amendments have been made to the original text of the Constitution. These amendments become as much a part of the Constitution as the original text. If an amendment modifies and is therefore incompatible with original contents, the amendment supersedes the original text.

Constitutional texts strike a complex relationship with temporality. They both resist time and submit to time. For constitutional texts, however, time per se has no transformative value. No constitutional text is automatically clocked to change with the passage of prescribed periods, though some constitutional provisions may occasionally be clocked to expire. A constitutional text is rarely timeless and makes no claims to that effect. It submits to time if its provisions are no longer acceptable to the people.

By cautiously negotiating social change, constitutions imitate the logic of divine texts. If a simple majority of the people wishes to change the constitutional text, the amendment procedures resist such change. A constitutional text is thus self-preserving. It protects its own textual integrity. A constitutional text is skeptical of the change that a simple majority wishes to make, allowing it to survive and supersede the shifting majoritarian values. In fact, a deeply entrenched constitutional text not only resists changing values of the majority but forces the majority to adhere to the past. In protecting traditions of the past, a constitutional text acts as a conservative force. It denies instant legitimacy to majoritarian sentiments. To this extent, therefore, constitutional texts follow the logic of divine texts.

When a supermajority demands amendments, however, the constitutional text succumbs to change. It abandons the logic of divine texts under which no one, not even with unanimous approval, can alter a single divine value. Likewise, no changes in social, political, cultural, or economic conditions may legitimize changing the values of divine texts. Divine texts invite believers to reconsider changing their own sentiments. By contrast, facing a supermajority, constitutional texts discard the past and embrace the present for a

new future. Serving adequately as a conservative force in ordinary times, constitutional texts cannot withstand the pressures of extraordinary times. In the ordinary times, constitutional texts look toward the past. In the extraordinary times, however, constitutional texts submit to the present. Constitutional texts no longer imitate the logic of divine texts, which are immune from the wishes of a supermajority.

The following discussion examines various constitutional challenges that divine texts face in preserving their functional authority.<sup>191</sup> In examining these challenges, three distinct constitutional prototypes are identified: the exclusion prototype, the liberal prototype, and the fusion prototype. A prototype constitution is adopted by numerous states that need not be identical to each other. Each state may adopt a distinct constitution and yet share core attributes of the prototype.

#### *A. Exclusion Prototype*

Under the influence of the Soviet Union, a global movement was launched in the twentieth century to universalize the communist prototype constitution.<sup>192</sup> The communist prototype was an ideological constitution that established the supremacy of state-sponsored materialism. It established an ideologically atheistic state that had little respect for religion or divine texts. Religion was scorned as a reactionary force incompatible with the theory and practice of communism. Divine texts were degraded as meddling impediments that confused economic relations and perpetuated class injustices. Preceding the Soviet Revolution in 1917, numerous leaders of the communist movement insisted that "religious ideas and beliefs must be uprooted from the human mind before there

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191. A divine text continues to be a functional text when it inspires compliance with its message. It is not required that each believer comply with every aspect of the divine text for it to be functional. No such unanimity is required.

192. Many newly independent states emerging from Western colonialism, Eastern European states, China, Cuba, and others adopted the communist prototype constitution. For several decades, it seemed as if the communist prototype constitution would itself become an immutable text.

could be an intelligent acceptance of the Socialist ideal and programme.”<sup>193</sup>

The communist prototype, however, was powerless to expel the immutable influence of divine texts. Even for the nineteenth century believers, who were watching the rising tide of Western industrial-capitalism, socialism was “applied Christianity.”<sup>194</sup> They were unwilling to exchange divine texts for the economic distributive justice that socialism promised. Despite its disdain for all religion, the Soviet Union itself could not expel divine texts from the peoples’ consciousness and the communist prototype constitution had little choice but to grant the freedom of religion. Realizing the staying power of divine texts, the Chinese communist party disapproved of what Lenin had called “superficial” attempts to overthrow religion by atheistic propaganda.<sup>195</sup> For its own security, Chinese communism now accommodates Buddhism, which informs the deepest layers of the Chinese culture.<sup>196</sup> In 1979, when Iran waged a theocratic revolution to purge itself of Western capitalism, it merged the notion of socialist justice with teachings of the Qur’an.<sup>197</sup>

The collapse of the Soviet Union dealt a severe blow to the communist prototype constitution. The Central Asian States, which were once the heartland of Islam, have re-embraced the Qur’an and the Prophet’s Sunna. After liberating itself from the Soviet yoke, Poland has returned to Roman Catholicism. The Russian Orthodox Church has been rehabilitated and formerly confiscated church properties have been returned. The people can now watch live recitals of divine texts on television. It is unclear whether a new surge in history would ever resuscitate the communist prototype

193. JOHN SPARGO, *THE SPIRITUAL SIGNIFICANCE OF MODERN SOCIALISM* 85 (1911) (showing that despite the rhetoric of incompatibility the believers saw no contradiction between religion and socialism).

194. FRANKLIN MONROE SPRAGUE, *SOCIALISM FROM GENESIS TO REVELATION* 49 (1892).

195. MICKEY SPIEGEL, *CHINA: STATE CONTROL OF RELIGION* 119 (1997).

196. David C. Yu, *Buddhism in Communist China: Demise or Co-Existence*, 39 J. AM. ACAD. RELIGION 48, 49 (1971) (describing the government’s sometimes begrudging acceptance of the role of Buddhism in Chinese society).

197. Ali Khan, *Constitutional Kinship Between Iran and the Soviet Union*, 9 N.Y.L. SCH. J. INT’L. & COMP. L. 293, 293 (1988) (“The Iranian Constitution incorporates the principles of socialist justice and roots them into the framework of Islamic values, as if these principles had always been inherent to Islamic orthodoxy.”).

constitution for universal adoption. Currently, it appears that the exclusion prototype, which aspired to erase divine texts from the people's memory, was a transient phenomenon.

### *B. Liberal Prototype*

Much more durable than the exclusion prototype constitution has been what may be called the liberal prototype constitution. A pro-market, secular, liberal constitution is a prototype found in numerous states: the prime example of this is the United States Constitution.<sup>198</sup> This liberal prototype constitution, instituted by the will of the people, establishes a democratic order under which the legislature and executive branches are periodically elected. The constitution protects individual rights through an independent judiciary.<sup>199</sup> Prominent among these rights are civil and political rights, including the right to vote, to freely express oneself, and to own property. Although citizens are granted the right to freely practice religion in accordance with their divine texts, the state itself adopts no official religion.

The liberal prototype constitution reflects complex and conflicted experiences of the Western Christian world that had for centuries accepted the Bible as the guiding divine text but also engaged in a protracted struggle to fight the supremacy of the Roman Catholic Church. Theological and political revolutions against the Church in the seventeenth century resulted in murderous religious persecution. Responding to these atrocities, the liberal prototype adopted the separation doctrine under which the state is separated from the church. In a great normative reversal, the liberal prototype constitution, and not any divine text, is anointed as the supreme law of the land. To preserve secular supremacy, the prototype may empower the judiciary to treat the constitution as a

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198. Eleanor Rosch, *Natural Categories*, in 4 COGNITIVE PSYCHOLOGY 328 (1973) (defining a prototype as the most central member of a category).

199. The liberal prototype constitution is amendable, often described within the text of the constitution. The amendment process is rigid—requiring a near consensus of variant political forces represented in national and provincial/state legislatures. The supermajority requirement to amend the constitution is derived from the immutability sentiments. By establishing hard-to-amend constitutions, liberal societies demonstrate a commitment to democratic political structures and fundamental values of personal liberty, property, and religious freedom including the freedom to have no religion.

super-text. Accordingly, the judiciary may strike down laws that conflict with the constitution. Under the combined effects of separation and supremacy doctrines, the liberal prototype establishes what is known as the secular state. Consequently, man-made laws can trump the laws of divine texts.

Unlike the exclusion prototype, the liberal prototype does not view religion as a decadent force that must be suppressed through state propaganda or scientific enlightenment. The liberal prototype prohibits the state from establishing or disestablishing the laws of any one divine text to the exclusion of others. The separation doctrine poses no threat to the integrity of divine texts if the people are free to practice the commandments of their divine texts. In a pluralistic society with diverse religious practices, the liberal prototype offers equal respect for all religions and denominations. Open hostility to religion is not an element of the liberal prototype.<sup>200</sup>

In the United States, for example, great confusion surrounds the separation of church and state—most evident in judicial decisions of the United States Supreme Court. Strict separationists on the Court argue that the federal and state governments must not align with any denomination, any religion, or religion in general. Soft separationists allow the government to embrace some thematic intertextuality of monotheistic divine texts. In this ongoing debate, soft separationists have won a few key battles by authenticating the government's alliance with God. The invocation of God in the United States National Motto, on coinage, and in the Pledge of Allegiance is constitutionally permissible because of soft separationists. God enters the government in other ways too. The presidential oath traditionally, though not by statute, concludes with the words "so help me God." The sessions of the United States Supreme Court open with the prayer "God save the United States and this Honorable Court."<sup>201</sup> National and state legislatures also open their

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200. *Accommodation of Religion in Public Institutions*, 100 HARV. L. REV. 1639, 1641-42 (1987).

201. *Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952). By citing these examples, the Court argues that the First Amendment does not comprehensively separate church and state. *Id.*

sessions with prayers to God.<sup>202</sup> These concessions demonstrate the presence and power of monotheistic divine texts.

While God is firmly established in the American constitutional law, the question remains whether the liberal prototype may also endorse thematic intertextuality of divine texts. No clear position has yet congealed in American constitutional jurisprudence. Two Ten Commandments cases decided the same day in 2005—one supporting a state's display of the Ten Commandments, the other striking down a state's desire to do so—underscore the lingering difference of opinion.<sup>203</sup> These cases, reaching opposite results, demonstrate a profound struggle between strict and soft separationists to define the scope of secularism. No side disputes the fact that the Ten Commandments proclaim "the existence of a monotheistic god (no other gods)."<sup>204</sup> Specifically mentioning Judaism, Christianity, and Islam, soft separationists highlight the fact that close to ninety-eight percent of the United States population is monotheistic, and that, in addition to Jews and Christians, Muslims also believe that God spoke to Moses.<sup>205</sup> If a divine text, such as the Ten Commandments, is "recognized across such a broad and diverse range of the population," soft separationists argue, its display cannot be understood as endorsement of a particular religion.<sup>206</sup>

For strict separationists, the state-sponsored display of the Ten Commandments is unacceptable for such a display prefers religion over irreligion. Strict separationists do not seem to accept any thematic intertextuality of divine texts, much less the common elements of monotheism.<sup>207</sup> They fear that such an espousal would

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202. For commentary on the issue, see Ashley M. Bell, Comment, "God Save This Honorable Court": How Current Establishment Clause Jurisprudence Can Be Reconciled with the Secularization of Historical Religious Expressions, 50 AM. U. L. REV. 1273 (2001).

203. *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005); *McCreary County v. ACLU*, 545 U.S. 844, 868 (2005).

204. *McCreary County*, 545 U.S. at 868.

205. *Id.* For commentary on this issue, see generally Antony Barone Kolenc, "Mr. Scalia's Neighborhood": A Home for Minority Religions, 81 ST. JOHN'S L. REV. 819 (2007) (detailing a hypothetical world where Scalia's Establishment Clause jurisprudence prevails and predicting its possibly adverse effect on adherents to minority religions).

206. *McCreary County*, 545 U.S. at 894 (Scalia, J., dissenting).

207. *Id.* at 877 (majority opinion). This discrimination against select faiths, however, is not confined to the fusion prototype. Even the liberal prototype draws distinctions among belief systems and refuses to accord equal respect to all religions.

send a message to polytheists and non-believers that the government has allied itself with monotheism and religious beliefs. This argument, however, is anything but neutral. If the state shuns all religion, it is seen to have made an alliance with non-believers. If it embraces thematic intertextuality, it is seen to have made an alliance with believers. In between this binary contest, the liberal prototype may not find any credible neutral space to please everyone.

In theory, the secular state is not bound to obey the laws of any divine text. However, the secular state is not obligated to oppose the laws of divine texts. If the secular state violates the accepted laws of divine texts, it will infringe upon the freedom of religion. Separation of church and state does not necessarily mean opposition between church and state. An ideological state, such as the communist state, may oppose religion and may actively proselytize believers away from divine texts. The secular state engages in no such anti-religious propaganda.

Even in the secular state, state officials (lawmakers, the executive, and judges) continue to practice religion, some more devoutly than others. The liberal prototype constitution does not demand that state officials give up their faith in divine texts. State officials, just like any other citizens, enjoy the equal right to freely practice their faith. The liberal prototype requires, though, that state officials do not use state resources to promote one religion over another, much less to coerce anyone to believe in any particular divine text. This neutrality is not as crisp as it sounds in theory. When an overwhelming majority of state officials belong to the same religion, the neutrality of the state in religious matters, though still possible, is more an abstraction than a cultural reality. Underneath the thin veneer of the secular state, divine texts continue to assert influence over society and culture.

Exercising such influence, divine texts serve as anchors of stability. The separation of church and state does not imply that divine texts are irrelevant to the maintenance of cultural decency and security. On specific social issues, such as abortion, there might be friction between divine texts and secular laws. Such frictions may produce some resentment, even violence. Obedience to laws, however, is a fundamental tenet of divine texts. Furthermore, divine texts inculcate sentiments for compassion, honesty, responsibility, and sharing, and sentiments against arrogance, waste, and selfishness.



These spiritual sentiments create positive psychology of obligations toward the community. The believers in divine texts develop sympathetic consciousness, anchored both in love and fear of God, which not only deters them from committing wrongs but also motivates them to do good. Needless to say, skeptics view religion as a divisive force. They doubt that divine texts offer social stability and rely more on earthly rewards and punishments to demand compliance with secular laws.

### *C. Fusion Prototype*

In contrast to the liberal prototype, the fusion prototype constitution fuses state and religion. The fusion prototype establishes a particular religion as the state religion. It does not necessarily forbid the practice of religions other than the state religion,<sup>208</sup> nor does it necessarily promote religious intolerance; different religions can continue to coexist with the state religion, though the fusion state is unlikely to accord equal respect to *all* faiths.<sup>209</sup> A fusion state, though founded on respect for diverse religions, may refuse to recognize select faiths and may actively suppress them.<sup>210</sup> Or, it may grant equal respect only to certain specified religions. These preferences are often concretized in recognizing personal law. Personal law allows religious populations to conduct certain legal relations, including family and inheritance matters, according to their own divine texts.<sup>211</sup> The most conspicuous examples of the fusion of state and religion are found in the Muslim world.

#### *1. Islamic prototype constitution*

So far, Muslim nations have been unsuccessful in designing an Islamic prototype constitution. A variety of constitutions has

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208. MALAY. CONST. art. III ("Islam is the religion of the Federation; but other religions may be practised [sic] in peace and harmony in any part of the Federation.")

209. Of course, even secular states boasting robust freedom of religion, like the United States, ultimately do not accord equal respect to all religious practices. *See, e.g.*, *Emp. Div. v. Smith*, 494 U.S. 872 (1990) (establishing that the state may prohibit the religious use of peyote without violating the Free Exercise Clause).

210. Pakistan does not recognize the followers of Ahmed Qadiani as Muslims. PAK. CONST. 260(3).

211. Even some secular states, such as India and South Africa, embrace the institution of personal law.

flourished among Muslim nations. Muslim Turkey has a secular constitution.<sup>212</sup> In fact, the secular provisions of the Turkish constitution are immutable and cannot be amended.<sup>213</sup> Saudi Arabia's constitution declares that the kingdom's system of government is a monarchy but "God's Book (the Qur'an) and the Sunnah of His Prophet (Muhammad) . . . are its constitution."<sup>214</sup> Pakistan has a quasi-liberal but not secular constitution. Iran is a theocracy.

Although democracy is compatible with Islamic divine texts, most Muslim nations do not wish to adopt the liberal prototype constitution. Even their commitment to democracy is weak. Pakistan suffers from periodic military interventions. These interventions have served both to strengthen the Islamic rule as well as to secularize the nation.<sup>215</sup> Iran's constitution mandates periodic elections but the Council of Guardians, the highest theocratic institution, screens political candidates for their commitment to Islam.<sup>216</sup> Liberal candidates are often denied the right to contest elections. In Egypt, periodic elections to elect the government are held but the political competition is rarely free or robust. Islamic parties, which are frequently denied access to the ballot box, have expanded into syndicates: doctors, engineers, and lawyers.<sup>217</sup>

The absence of a Muslim prototype constitution is not surprising. Over the centuries, various political systems have been found to be compatible with the Qur'an and the Prophet's Sunna. No single form of government has emerged to be more Islamic than others. This lack of consensus demonstrates that Islamic divine texts offer no political theory. Even though monarchy and democracy both may be defended under the principles of divine texts, Islamic

212. The Turkish Constitution of 1924 declared Islam to be the religion of the state. However, the law was abrogated in 1928. See William Thomson, *The Renaissance of Islam*, 30 HARV. THEOLOGICAL REV. 51, 56 (1937).

213. TURK. CONST. arts. II, IV.

214. SAUDI ARABIA CONST. art. V (monarchy); art. I (constitution).

215. STEPHEN PHILIP COHEN, THE IDEA OF PAKISTAN 58 (2004).

216. Ali Khan, *Saving Islamic Democracy in Iran: The Governing Council Should be Juristic, Not Political*, JURIST (Jan. 20, 2004) available at <http://jurist.law.pitt.edu/forum/forumnew136.php>.

217. NINETTE S. FAHMY, THE POLITICS OF EGYPT: STATE-SOCIETY RELATIONSHIP 67-69 (2002) (detailing some of the Egyptian legal constraints on minority political parties, including those associated with Islam).

texts make no exclusive alliance with any one particular form of government. In the dynamism of human evolution, forms of government are transient. Divine commitment to any prototype might turn out to be overly restrictive. Islam is a universal religion, completely free of temporality. It makes no permanent alliances with any one political theory or constitutional prototype.

## 2. *Fusion and supremacy provisions*

Although no Islamic prototype constitution governs Muslim nations, the fusion and supremacy provisions have become integral parts of Islamic constitutionalism. The fusion provision fuses religion with state. Fusion is incompatible with secularism.<sup>218</sup> Under the fusion provision, the state adopts an official religion. The Egypt Constitution declares that “Islam is the Religion of the State.”<sup>219</sup> The Afghanistan Constitution—drafted after the United States invasion and expulsion of the Taliban—states that the sacred religion of Islam is the state religion.<sup>220</sup> Such fusion provisions are common among Muslim states.<sup>221</sup>

The supremacy provision declares the supremacy of the Qur’an and the Prophet’s Sunna over state-made laws. Regardless of the form of government—whether it is monarchy, theocracy, or democracy—fusion states almost always adopt a supremacy provision similar to the one found in the Pakistan constitution: “All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur’an and Sunnah, . . . and no law shall be enacted which is repugnant to such Injunctions.”<sup>222</sup> The supremacy provision demonstrates a commitment to subject existing and future laws to Islamic divine texts. Even the Iraqi constitution drafted under the American occupation declares in unambiguous terms that

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218. See generally L. ALI KHAN, A THEORY OF UNIVERSAL DEMOCRACY: BEYOND THE END OF HISTORY (2003). In this book, the author more fully develops the idea of the fusion state.

219. EGYPT CONST. art. II.

220. AFG. CONST. art. II.

221. Cf. GREECE CONST. art. 3 (declaring that the prevailing religion in Greece is that of the Eastern Orthodox Church of Christ). This declaration, however, does not state that the prevailing religion is the state religion. See *id.*

222. PAK. CONST. art. 227.

Islam is the official religion of the state<sup>223</sup> and that no law that contradicts the established provisions of Islam may be established.<sup>224</sup>

As noted before, the Turkish constitution establishes an irrevocable secular state. It is unclear whether the Turkish constitution will authorize the enactment of laws contrary to the Qur'an and the Sunna. Turkey is a religiously homogenous society, more so than many other Muslim nations. Turks are devoted Muslims, but the state, including the armed forces and bureaucracy, is predominantly secular.<sup>225</sup> The non-amendable secular provisions of the Turkish constitution arose from a questionable theory of modernity, composed at dissolution of the Ottoman Empire, which blamed Islam for Turkey's backwardness. By adopting permanent secular provisions, Turkey has chosen a norm incompatible with its history and culture. Conservative Muslims will find ways to reassert the fusion of Islam and government. Recent changes in the Turkish political and social landscape indicate a shift towards fusion.<sup>226</sup> If this shift gathers momentum, the secular provisions may have to be ignored and perhaps ultimately discarded under the concept of desuetude. If Turkey is permitted to join the European Union, the fusion matters may become more intractable and confusing.

#### VII. DIVINE TEXTS' INTERACTION WITH UNIVERSAL TEXTS

In addition to constitutions, divine texts must interact with a new breed of texts that have surfaced on the landscape of immutability: universal texts. This section examines the interaction between divine texts and universal texts. Universal texts like the Universal Declaration of Human Rights are adopted by several sovereign nations and declare to apply to all people. The norms of universal texts are mostly in harmony with those of divine texts, but not completely. States, therefore, make reservations to discount incompatible provisions of universal texts, provisions that cannot be reconciled with divine texts. Muslim states are at the forefront of

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223. IRAQ CONST. art. II.

224. *Id.* art. II(A).

225. See BASSAM TIBI, *THE CHALLENGE OF FUNDAMENTALISM: POLITICAL ISLAM AND THE NEW WORLD DISORDER* 147 (2002); YUSUF AL-QARADAWI, *ISLAMIC AWAKENING BETWEEN REJECTION AND EXTREMISM* 82 (2006).

226. ALI ÇARKOĞLU & BARRY M. RUBIN, *RELIGION AND POLITICS IN TURKEY* 6-7 (2006).

making such reservations. They make reservations to assert the supremacy of Islamic divine texts, that is, the Qur'an and the Prophet's Sunna.<sup>227</sup> Very few states, if any, have made similar reservations to safeguard the integrity of Christian, Hindu, or Buddhist divine texts. Part of this asymmetry arises from the fact that secular states rarely make reservations to assure the supremacy of divine texts.<sup>228</sup> The United States, however, makes reservations and declarations not to accept provisions in universal texts contrary to the United States Constitution.<sup>229</sup> Since most non-Muslim states subscribe to secularism, and most Muslim states do not, religious-based reservations to universal texts have become the predominant practice of Muslim nations. Western scholarly proposals to reform Islamic divine texts to meet the norms of universal texts are unlikely to succeed.<sup>230</sup>

Most universal texts offer secularized concepts<sup>231</sup> of human rights without which a life of dignity is unattainable. Made through complex processes of consensus building among nation-states, universal texts began to appear in the second half of the twentieth

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227. See Alison Dundes Renteln, *Cultural Bias in International Law*, 92 AM. SOC'Y. INT'L. L. PROC. 232, 239-40 (1998). These reservations shape international law both at the formative and interpretive levels. See *id.*

228. Secular states, however, do make cultural-based reservations to universal texts.

229. The United States makes several reservations, understandings, and declarations (RUDs) while subscribing to international treaties, including human rights texts. Eric Neumayer, *Qualified Ratification: Explaining Reservations to Human Rights Treaties*, 36 J. LEGAL STUD. 397, 403 (2007).

230. ABDULLAHI AHMED AN-NA'IM, *TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW* 7 (Syracuse University Press 1990). Professor An-Na'im is a reformist with some following in the Western world but it remains to be seen whether the Muslim world would take his suggestions seriously. Western scholars, Muslims and non-Muslims, who wish to reform Islam are rarely taken seriously in the Muslim world.

231. Secular texts are human texts. They are composed without any claims of divine inspiration. Novels, plays, academic texts, statutes, and treaties are some of the examples of secular texts. Some texts are protected under copyrights laws and no unauthorized changes may be made to alter their contents or style. Some texts are updated periodically. These texts are temporal. If not updated, these texts lose use-value. Most law books containing cases and commentaries are transient texts that are periodically edited to accommodate changes in law. Even statutes and treaties are periodically amended. Some are completely repealed, thus losing systemic validity. A temporal text that has lost its usefulness or systemic validity may still be preserved. Any such preservation, however, confers no immutability on the text.

century—after the atrocities of two horrific wars.<sup>232</sup> The Universal Declaration of Human Rights (UDHR),<sup>233</sup> the International Covenant on Economic, Social, and Cultural Rights (ICESCR),<sup>234</sup> and the International Covenant on Civil and Political Rights (ICCPR)<sup>235</sup> are universal texts, which obligate states to protect rights, freedoms, and liberties, considered indispensable for safeguarding human dignity and for the full development of individual talents. In spite of resource constraints, governments are obligated to take affirmative steps for the progressive realization of social and economic rights, such as the right to food, shelter, education, healthcare, and social security. Civil and political rights, including the right to freedom of religion, are available without any waiting period.<sup>236</sup> In addition, several other universal texts have been framed to eradicate discrimination against women, racial, and religious groups. Even though rights found in universal texts have not yet been realized and even though governments across the world commit gross violations of individual and group rights, violations of rights must never be confused with non-recognition of rights. Governments that violate rights often deny violations, thus affirming that rights must not be violated.

Similar to divine texts, many view universal texts as inspired or holy. On the fiftieth anniversary of the UDHR,<sup>237</sup> Professor Mary

232. See generally George J. Annas, *Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror*, 87 B.U. L. REV. 427 (2007) (showing the significance of the human rights movement in a post-9/11 world that seems to forget the lessons of World War II).

233. Universal Declaration of Human Rights, G.A. Res. 217(III)(A), U.N. GAOR, 3d Sess., at 71–77, U.N. Doc. A/810 (1948).

234. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

235. ICCPR, *supra* note 175.

236. See Katie Lee, *China and the International Covenant on Civil and Political Rights: Prospects and Challenges*, 6 CHINESE J. INT'L L. 445, 450–51 (2007) (remarking that China is more comfortable with economic, social, and cultural rights with respect to which there is latitude of progressive realization than with civil and political rights with respect to which there is no such latitude available).

237. On December 8, 1948, the Declaration was proclaimed in two official languages, English and French. Since then, the Declaration has been translated into 300 languages of the world. Although the official languages of the Declaration are more authentic for interpretation purposes, all languages in which the Declaration has been translated capture the core teachings of the Declaration. For access to the various translations, see Universal Declaration of Human Rights, Alphabetical Listing of All Translations, <http://www.unhchr.ch/udhr/navigate/alpha.htm> (last visited Aug. 2, 2008).

Ann Glendon paid a memorable tribute to its sacred wisdom, calling it “a holy writ within the human rights movement.”<sup>238</sup> Professor Glendon explains how the primary authors of the UDHR, writing for the future generations, conceived the UDHR as a wisdom text. Lebanon’s Charles Malik, a professor of philosophy, said that the UDHR was “a composite synthesis of all these outlooks and movements and of much Oriental and Latin American wisdom. Such a synthesis has never occurred before in history.”<sup>239</sup> France’s Rene Cassin, an eminent jurist, compared the UDHR with the portico of a temple: The UDHR’s principles of human dignity, liberty, equality, and fraternity, constitute the portico’s foundation blocks; personal liberties, civil, political, economic, and social rights enshrined in the UDHR stand as the portico’s pillars.<sup>240</sup> Eleanor Roosevelt, the President of the United Nations Commission of Human Rights, under whose auspices the UDHR was drafted, paved the way for various delegates to speak their minds and freely discuss the representative ideas of diverse cultures. She frequently invited the Christian and Chinese delegates to her apartment to debate Thomism and Confucianism over tea.<sup>241</sup> Among many contributions, Roosevelt introduced specific reference to “freedom of religion” into the text of the UDHR.<sup>242</sup>

Universal texts are gradually acquiring elements of immutability. It is hard to imagine that universal texts will ever be repealed or their themes radically altered. Not every treaty that has been universally accepted, however, is likely to turn into an immutable text. The United Nations Charter, for example, is a global treaty that has universal approval of all nations of the world. Yet it is conceivable that the Charter will be radically modified or completely replaced. The Charter may have to be rewritten to democratize the United Nations organs, such as the Security Council.<sup>243</sup> Just as the United

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238. Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1153 (1998).

239. *Id.* at 1161–62.

240. *Id.* at 1163.

241. *Id.* at 1159.

242. *Id.* at 1166. The Commission was poised to adopt a more abstract freedom of conscience and belief, without mentioning religion. *Id.*

243. See generally Hans Köchler, *The United Nations Organization and Global Power Politics: The Antagonism Between Power and Law and the Future of World Order*, 5 CHINESE J. INT’L L. 323 (2006) (exposing the imbalance of the Security Council and its impact on

Nations replaced the League of Nations, a more stable and just institutional structure might replace the United Nations, a change that would require a new Charter. By contrast, it is highly unlikely that the world would abandon the Genocide Convention and relapse into legalizing genocide.<sup>244</sup>

### *A. Super Rights*

The acknowledgement of religious freedom as a universal right demonstrates the influence that divine texts have had on the development of rights in secular societies. Universal human rights may be distinguished from territorial human rights, and super rights may be distinguished from universal rights. The UDHR is a universal text. What makes the UDHR a universal text is the framing of the UDHR for universal adoption and actual universal adherence to it. The rights recognized in the UDHR are universal rights. The same rights, however, may also be found in provincial statutes, national constitutions, and regional human rights treaties. Once a right such as the right to freedom of religion becomes part of a universal text, the right acquires universal dimension. In the absence of the right's explicit placement in universal texts, the right remains territorial. Territorial rights, that is, the rights available in provinces, states, and regions, may suffer vulnerability, doubt, and challenge. Hence, the placement of a right in universal texts is a momentous transformation of the right. The placement assures the right's universal legitimacy, longevity, and inter-generational affirmation.

Next, super rights may be distinguished from universal rights because not every universal right is a super right. Universal texts prohibit derogation from certain rights, thus introducing the concept of super rights. In time of public emergency that threatens the life of the nation, such as natural catastrophes, armed aggression, or civil war, the state may derogate from some rights to the extent

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international law). For a response to Köchler's critique, see generally C.L. Lim, *The Great Power Balance, the United Nations and What the Framers Intended: In Partial Response to Hans Köchler*, 6 CHINESE J. INT'L L. 307 (2007) (arguing that the veto power is not contrary to the idea of sovereign equality of states).

244. Paola Gaeta, *On What Conditions Can a State Be Held Responsible for Genocide*, 18 EUR. J. INT'L L. 631, 632 (2007) ("Nowadays nobody would dare to deny that customary international law contains a rule prohibiting states from committing genocide. It is generally contended that such a rule not only exists, but also belongs to *jus cogens*.").



strictly required by the exigencies of the situation.<sup>245</sup> For example, the general elections may be temporarily postponed to take care of floods and earthquakes. This postponement will negatively affect the citizens' right to vote. However, a temporary suspension of the general elections will free the government to devote its attention and resources to solve emergency problems. As soon as the normal life is restored, the suspended right must be reactivated. Any bad faith use or extension of emergency constitutes a violation of the obligation under the laws.<sup>246</sup>

Even in time of emergency that threatens the life of the nation, certain rights have been declared to be immutable. Such rights that are available under all circumstances are super rights. Long before the emergence of universal texts, the United States Chief Justice Hughes observed: "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved."<sup>247</sup> Hughes' observation has been modified to the extent that a nation facing a grave threat may exercise emergency powers to suspend some rights, but not all. Universal texts do not allow states to invoke any excuse whatever to derogate from identified super rights.<sup>248</sup> For example, no state may torture an individual under any circumstances.<sup>249</sup> Likewise, under no circumstances may a state arbitrarily deprive anyone the inherent right to life. No natural disaster or human catastrophe would justify slavery or slave-trade. No economic crisis or social upheaval will empower the state to imprison individuals for breaches of contractual obligations. No utilitarian calculus, theory of justice, or creative thinking will allow a state to rely on a national

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245. ICCPR, *supra* note 175, art. IV(2).

246. Ediel Hughes, *Entrenched Emergencies and the "War on Terror": Time to Reform the Derogation Procedure in International Law*, 20 N.Y. INT'L L. REV. 1, 1-2 (2007) (showing how states are using the war on terrorism as a basis to subvert the law of derogation and to perpetuate the violation of rights).

247. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934).

248. The ICCPR identifies super rights that cannot be suspended under a declared emergency. ICCPR, *supra* note 175, art. IV.

249. John Alan Cohan, *Torture and the Necessity Doctrine*, 41 VAL. U. L. REV. 1587, 1593 (2007). See also Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 89-96 (2007) (arguing that torture has been a consistent practice in the United States since the times of slavery both at home and abroad but that not taking international human rights seriously had weakened the institutional barriers to torture after September 11).

catastrophe to enact retroactive laws that hold individuals criminally accountable for acts or omissions that did not constitute a criminal offense at the time when it was committed. The right to freedom of religion is also a super right that cannot be suspended under any emergency pretext.<sup>250</sup> By recognizing the freedom of religion as a super right, universal texts acknowledge the unrelenting bearing of divine texts in human affairs.

### *B. Fusion States' Reservations*

As noted earlier, universal texts made under auspices of the United Nations are in harmony with divine texts. Despite this extensive harmony, points of difference do exist between fusion states and universal texts. The main contention arises from the strong belief in the supremacy of divine texts over any universal or state text. When Muslim states express their consent to be bound by universal texts, they make reservations to safeguard the supremacy of the Qur'an and the Prophet's Sunna. These reservations are made to eliminate possible conflict and confusion that may arise in domestic contexts when a provision of the universal text is found to be incompatible with the commandments of Islamic divine texts. For a variety of reasons, non-Muslim states also make reservations to select provisions of universal texts. Secular states may invoke national constitutions to make reservations. Their secular ideology, however, disables them from making reservations on the basis of divine texts. Muslim nations rarely hide the reasons in making reservations to universal texts. They openly refer to Islamic divine texts, the Qur'an and the Sunna, as the basis for the reservation.

Take, for example, the Convention on the Elimination of Discrimination against Women (CEDAW).<sup>251</sup> Most Muslim states, including Afghanistan and Saudi Arabia, are parties to the Convention.<sup>252</sup> The Convention is a universal text that an overwhelming majority of states have signed, though with

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250. Article 18 of the ICCPR identifies freedom of religion as a super right from which no derogation is permitted. ICCPR, *supra* note 175, art. XVIII.

251. Convention on the Elimination of Discrimination against Women (CEDAW), U.N. Doc. A/34/46 (Sept. 3, 1981) [hereinafter *CEDAW*].

252. As of December 2007, Iran and Sudan have not signed the Convention.

reservations.<sup>253</sup> Article 2 of the CEDAW lays out the general principles in that it prohibits discrimination against women in all its forms, and promotes the principle of the equality of men and women. Most important, it mandates that states “modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”<sup>254</sup>

Numerous Muslim states have made reservations to various CEDAW provisions, including Article 2, drawing criticisms from human rights advocates.<sup>255</sup> Here are a few representative reservations. Bangladesh announces: “The Government of the People’s Republic of Bangladesh does not consider as binding upon itself the provisions of article 2, [. . .] as they conflict with *Sharia* law based on Holy Qur’an and Sunna.”<sup>256</sup> Bahrain makes a reservation to assure that its enforcement of Article 2 is “within the bounds of the provisions of the Islamic *Shariah*.”<sup>257</sup> Egypt is “willing to comply with the . . . [A]rticle provided that such compliance does not run counter to the Islamic Sharia.”<sup>258</sup> Libya shall implement Article 2 “with due regard for the peremptory norms of the Islamic *Shariah* . . .”<sup>259</sup> Even Israel, which has substantial Muslim population within its territory, has made reservations to some provisions of the CEDAW, which are incompatible with “the laws of any of the religious communities in Israel.”<sup>260</sup>

The wording of the Libyan reservation captures the essence of Islamic normative priorities. For Muslim communities, the norms of Islamic divine texts constitute the peremptory norms. These peremptory norms are the supreme law of Muslim communities. No

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253. As of December 2007, 185 countries are party to the Convention.

254. *CEDAW*, *supra* note 251, art. II.

255. Ann Elizabeth Mayer, *Internationalizing the Conversation on Women’s Rights*, in *ISLAMIC LAW AND THE CHALLENGES OF MODERNITY* 133, 136 (Yvonne Yazbeck Haddad and Barbara Freyer Stowasser eds., 2004). Proposing accommodation of Islamic law, a Muslim commentator presents a Rawlsian proposal to reconcile Islamic law with universal texts. See Mohammad H. Fadel, *Public Reason as Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law*, 8 *CHI. J. INT’L L.* 1, 1–2 (2007).

256. Convention on the Elimination of All Forms of Discrimination Against Women, Reservations and Declarations, available at <http://www2.ohchr.org/english/bodies/ratification/8.htm>.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

universal text, even if it is derived from the consensus of all non-Muslim states, may revoke or even modify the peremptory norms of the Qur'an and the Prophet's Sunna. The Muslim commitment to safeguard the integrity of Islamic divine texts generates ideological tensions between Islam and secularism—tensions that must be converted into mutually beneficial dialogue for generations to come.

Meanwhile, Muslim reservations to the CEDAW should not be construed as endorsement of discrimination against women. Islamic divine texts, contrary to the mistaken belief in the non-Muslim world, have been great protectors of women's rights. No one can deny that some cultures within the Muslim world oppress women and have established male-dominated institutions and practices.<sup>261</sup> This blatant discrimination against women, however, does not arise from divine texts. Since the dawn of Islam some fourteen centuries ago, Muslim women have enjoyed, among many other rights, the right to property, the right to marriage based on contract, the right to divorce and maintenance, the right to work and equal pay, the right to privacy, the right to inheritance, the right to worship, and the right to read and interpret divine texts.<sup>262</sup> The propagation of Islam among Mongols, in China, Chad, and many other places has been the work of both men and women.<sup>263</sup>

Even with rights and powers that Muslim women have enjoyed for centuries, mechanical equality is not a principle of Islamic divine texts. The Qur'an constantly reminds believers that difference and not sameness is the founding principle of God's universe.<sup>264</sup> Men and women are not the same and therefore any concept of mechanical equality that ignores the difference between them is contrived and

261. See, e.g., UN Official, *Saudi Women Complain of Discrimination, Abuse*, Agence France Presse, Feb. 13, 2008, available at <http://afp.google.com/article/ALeqM5jdEYmnmjTWKIW-3LIL8OimKIT6RQ>.

262. Even non-Muslim scholars recognize that the rights of women under Islam have been considerable as compared to those in other cultures and religious communities. LUCY M. GARNETT, *TURKEY OF THE OTTOMANS 206-07* (1915).

263. See T. W. ARNOLD, *THE PREACHING OF ISLAM* 410-11 (2d ed. 1896).

264. Passive believers are not equal to believers who strive hard with their possessions and lives. QUR'AN, *sura an-Nisa* 4:95. See also *id.* at *sura al-Anam* 6:50 ("Can the blind and the seeing be deemed equal?"); *id.* at *sura ar-Rad* 13:16 ("Can the depths of darkness and light be deemed equal?"); *id.* at *sura an-Nabl* 16:75 (the enslaved and the free are not equal); *id.* at *sura ash-Shura* 26:98 (false deities are not equal to True God); *id.* at *sura Fatir* 35:22 (neither are equal the living and the dead); *id.* at *sura nal-Imran* 3:42 (Mary, the mother of Jesus, is above all the women of the world).

set against God's design. Difference, however, does not mean prejudicial discrimination or exclusion.<sup>265</sup> Nor can difference be a source of superiority of one gender over the other.<sup>266</sup> Muslim men and Muslim women celebrate natural difference that God has created between them. They do not envy each other; nor do they imitate each other.<sup>267</sup> Muslim women and Muslim men, each have its own unique package of rights and obligations. The two packages of rights and obligations are not the same. But, according to Islamic faith, each package is as worthy as the other. From an external viewpoint, the varying gender packages indicate discrimination against women. Gender segregation, though entrenched in varying degrees in Muslim cultures, musters little appeal in non-Muslim communities that have experienced and rejected the equal but separate doctrine.<sup>268</sup>

Religious-based reservations to CEDAW demonstrate that the believers would not agree that divine texts be altered or ignored to comply with every norm of universal texts. The human intelligence, incorporated in universal texts, is a reliable tool to study scriptures and understand divine laws. Ordinarily, there exists little tension between divinity and human intelligence. In cases where divine texts seem contrary to human intelligence, more intelligent work and reflection are needed to find solutions that would harmonize the sources of human knowledge. To subject divine texts to the dictates of universal texts is not, for most believers, an intelligent option. The believers cherish and submit to the immutable norms of divine texts.

### VIII. CONCLUSION

Divine texts are universal and timeless. They continue to guide communities and generations across the globe, as they have for centuries. Revealed in diverse cultures, languages, and legal traditions, divine texts share common themes to preserve human

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265. God has promised gardens of bliss to both men and women. QUR'AN, *sura at-Tauba* 9:72.

266. GUNAWAN ADNAN, *WOMEN AND THE GLORIOUS QUR'AN* 48-49 (2004).

267. QUR'AN, *sura an-Nisa* 4:32 (do not covet bounties of others).

268. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (launching the concept of the separate but equal doctrine). Some African-Americans, however, question whether racial integration is beneficial under all circumstances. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 515-16 (1976).

spirituality. No concept of prosperity, social advancement, or human rights will weaken the eternal influence of divine texts. Normative deviations from divine texts are transient. Spiritual needs that divine texts fulfill are permanent. The immutability of divine texts does not reside in interpretative gloss or exegetical methodologies. It does not dwell even in the sacred languages in which divine texts are revealed. Nor do divine texts establish exclusive relationship with any one nation, ethnic community, or generation of believers, even if the believers may assert such a relationship. Transcending interpretations and languages, and repudiating claims of sole proprietorship, divine texts tender themselves as the common heritage of all the peoples of the world.<sup>269</sup>

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269. The last chapter of the Qur'an ends with a universal message: "Say, I seek refuge with the Sustainer of all humanity." QUR'AN, *sura an-Nas* 114:1.