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How Relevant to the United Kingdom are the 'Religious' Cases of the US Supreme Court?

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High-profile cases in the Supreme Court of the United States ('SCOTUS') on religion tend to attract a certain amount of academic comment in the United Kingdom but US judgments are cited only infrequently by the superior courts in the UK. In return, SCOTUS rarely cites foreign judgments at all. The reason, it is suggested, is that the effect given by the First Amendment to the US Constitution is to render US case law of less relevance to the UK than, for example, judgments from jurisdictions such as Canada and Australia.

Keywords: US Supreme Court, precedent, religion

INTRODUCTION

In *Exmoor Boat Cruises*[2] the First-tier Tribunal (Tax) upheld the refusal by HMRC to allow a company's proprietor and sole shareholder to file its VAT returns on paper instead of electronically, on the grounds that he was not 'a practising member of a religious society or order whose beliefs are incompatible with the use of electronic communications'.[3] In a note on the case I contrasted it with the outcome in *Blackburn*,[4] in which a husband and wife won the right not to file online VAT returns for their bee-keeping business after claiming that to do so would be contrary to their religious beliefs as Seventh-day Adventists, even though the Seventh-day Adventist Church does not require its members to avoid using electronic communications – and, indeed, has its own website.[5] My conclusion was that such cases are highly sensitive to the

1 This article began life as a much more basic post on the *Law & Religion UK* blog. I should like to thank Paul de Mello, Jr for sparking off the original train of thought, Norman Doe for commenting on my draft and Neil Foster for drawing my attention to the relevance of *Big M* to the points under consideration. None bears any responsibility for the result.
2 *Exmoor Coast Boat Cruises Ltd v Revenue & Customs* [2014] UKFTT 1103 (TC).
3 The exemption in Regulation 25A, Value Added Tax Regulations 1995 as amended.
4 *Blackburn & Anor v Revenue & Customs* [2013] UKFTT 525 (TC).
5 F Cranmer, 'Can a commercial company have "beliefs"? *Exmoor Coast Boat Cruises Ltd v Revenue & Customs*', *Law & Religion UK*, 22 December 2014, <http://www.lawandreligionuk.com/2014/12/22/can-a-commercial-company-have-beliefs-exmoor-coast-boat-cruises-ltd-v-revenue-customs/>, accessed 23 March 2016.

facts and one cannot simply argue from one set of individual circumstances to another.

It was then pointed out that I had made no mention of the decision of the Supreme Court of the United States ('SCOTUS') in *Hobby Lobby*[6] – to which I replied that it was quite hard enough trying to keep up with developments in the United Kingdom, the European Court of Human Rights ('ECtHR') and the Court of Justice of the European Union ('CJEU') without worrying about foreign jurisdictions as well. But I freely admit that US law is not my starter for ten; and I began to have nagging doubts as to whether my reluctance to engage with US judgments was on the arguably legitimate grounds that their context was so different from our own as to make them *sui generis* or whether I was simply being too lazy to think the matter through. So perhaps what follows is some kind of *apologia pro inertia sua*.

THE FIRST AMENDMENT AND THE SUBSEQUENT LEGISLATION

From a UK perspective, law and religion issues in the US seem to be dominated by three pieces of legislation for which there are no obvious UK equivalents: the First Amendment to the Constitution, the Religious Freedom Restoration Act 1993 ('RFRA')[7] and the Religious Land Use and Institutionalized Persons Act 2000 ('RLUIPA').[8]

As every reader will know, the First Amendment declares, inter alia, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof': the 'Establishment Clause' and the 'Free Exercise Clause'. The First Amendment was passed in the very particular circumstances of a new federation whose founders had to accommodate a very wide range of religious views: from the Anglicans of Virginia and the Roman Catholics in Maryland to the Puritans in Massachusetts and the Pennsylvania Quakers. A notable precursor was the Statute for Religious Freedom introduced into the Virginia General Assembly in 1779 and enacted in 1786, which disestablished the Church of England in Virginia and declared that:

> no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief, but that all men shall be free to profess, and by argument to maintain, their opinions in matters of Religion ...

6 *Burwell v Hobby Lobby Stores Inc* 573 US __ (2014).
7 Codified in 42 US Code Ch 21B (Religious Freedom Restoration).
8 Codified as 42 US Code Ch 21C §§ 2000cc–2000cc–5.

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The Religious Freedom Restoration Act 1993 was an attempt to moderate the impact of laws that, though intended to be religiously neutral, in reality might have unintended consequences for religious organisations. It was not, however, intended to bypass the provisions of the Establishment Clause; section 7 declares that:

> Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion ... Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter ...

In *City of Boerne*[9] SCOTUS held the RFRA unconstitutional *as it applied to the states*, ruling that the Act was not a proper exercise of Congress's power under section 5 of the Fourteenth Amendment 'to enforce, by appropriate legislation, the provisions of this article'. But the RFRA continues to apply to the activities of the Federal Government. In an attempt to blunt somewhat the impact of *City of Boerne* and to bolster the Free Exercise Clause, Congress passed the RLUIPA. Inter alia, it moderated the effect of zoning laws on religious institutions if they imposed a substantial burden on the religious exercise of a person or religious organisation unless the Government could demonstrate that the burden was in furtherance of a compelling governmental interest and was the least restrictive means of furthering it. It also defined 'religious exercise' very broadly indeed to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief'.[10]

HOBBY LOBBY AND *EXMOOR*

Hobby Lobby is a chain of retail arts and crafts stores constituted as a closely held company. Its proprietors objected on religious and moral grounds to having to comply with a regulation adopted by the US Department of Health and Human Services under the Patient Protection and Affordable Care Act 2010 that required employers to cover certain contraceptive provision for their female employees. Religious employers such as churches were exempt, as were religious non-profit organisations with religious objections; but before SCOTUS the US Government had argued that Hobby Lobby could not itself claim to have religious beliefs because it was a for-profit corporation. Though its owners, the Greens, held religious views, they and their corporation were

9 *City of Boerne v Flores* 521 US 507 (1997).
10 US Code Ch 21C § 2000cc–5 (Definitions).

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separate entities in law and the rights and obligations of a company were different from those of its owners: very much the argument of HMRC in *Exmoor*.

By a 5–4 majority, however, SCOTUS disagreed, holding that the regulation violated the RFRA. Congress had included corporations within the RFRA's definition of 'persons':

> But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company . . . And protecting the free-exercise rights of corporations like Hobby Lobby . . . protects the religious liberty of the humans who own and control those companies.[11]

This was very much the line taken by Tribunal Judge Mosedale in *Exmoor*, even though she upheld HMRC's decision on the facts:

> a company has human rights if and to the extent it is the *alter ego* of a person (or, potentially, a group of people). Therefore, it must be seen as being in the shoes of that person and must possess the same human rights because any other decision would deny that person his human rights.
>
> Therefore, while it is ludicrous to suggest a company has a religion, or private life or family, nevertheless a company which is the *alter ego* of a person can be a victim of a breach of A[rticle] 9 (the right to manifest its religion) if, were it not so protected, that person's human rights would be breached.[12]

But TJ Mosedale based her conclusion on the ECtHR's judgment in *Pine Valley Developments*,[13] which was about whether or not the Irish authorities' failure to validate outline planning permission retrospectively or to provide compensation in lieu violated Article 1 of Protocol No 1 ECHR (property). *Hobby Lobby* was nowhere mentioned.

11 *Hobby Lobby, per* Alito J, 18 (in the slip opinion).
12 *Exmoor* [71 & 72].
13 *Pine Valley Developments Ltd & Ors v Ireland* [1991] ECHR 55.

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EUROPE, THE US AND ESTABLISHMENT OF RELIGION

A bar on 'an establishment of religion' is obviously at odds with a system that accommodates an established Church of England, a national Church of Scotland with a special status and a Church in Wales that, in legal terms at least, still bears some of the marks of its previous establishment. So if there is any equivalent in UK law to the First Amendment, I would suggest that it is probably Article 9 of the European Convention on Human Rights, as applied by the Human Rights Act 1998, at least insofar as it guarantees

> the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

But there is nothing in Article 9 ECHR forbidding 'an establishment of religion' and, presumably, the original signatories to the Convention would never have contemplated any such notion, given that several of the member states of the Council of Europe have (or had) state churches. Moreover, in *Darby*[14] the European Commission on Human Rights (rather than the Court) ruled that

> A State Church system cannot in itself be considered to violate Article 9 . . . such a system exists in several Contracting States and existed there already when the Convention was drafted and when they became parties to it. However, a State Church system must . . . include specific safeguards for the individual's freedom of religion. In particular, no-one may be forced to enter, or be prohibited from leaving, a State Church.[15]

Similarly, an express exception for 'granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause' has no obvious resonance for a system which, for example, funds faith schools to the extent that, between them, the Church of England and the Roman Catholic Church educate some 1.8 million pupils in England and Wales. Even in secularist France, bastion of *laïcité* and the separation of Church and State,[16] the *Loi Debré* of 1959[17] (subsequently incorporated into the *Code de l'éducation*) provides for public financial support for the salaries of teachers of secular subjects and

14 *Darby v Sweden* [1989] ECommHR No 11581/85.
15 Ibid at para 45.
16 See *Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État.*
17 *Loi n° 59-1557 du 31 décembre 1959 sur les rapports entre l'État et les établissements d'enseignement privés.*

the general running costs of private, mostly Roman Catholic, schools that are prepared to enter into a *contrat d'association* with the French state.[18]

In short, in matters of law and religion the US and the UK operate in rather different socio-legal contexts.

DO THE UK COURTS ROUTINELY CITE US CASES?

Academic commentators and the courts tend to have rather different perspectives on the utility of judgments from the US. In *Religious Freedom in the Liberal State*, for example, Rex Adhar and Ian Leigh cite numerous US cases, largely in relation to such general issues as defining 'religion', constitutional protections (which, in any case, are different in the US) and school curricula (in particular, creationism).[19] In *Religion and Law: an introduction*, Peter Edge discusses the US cases on the First Amendment, on religious drug use, on misconduct of religious professionals and on 'sacred places'.[20] In *Law and Religion* Russell Sandberg discusses *Kuch*,[21] in which the plaintiff claimed – unsuccessfully – a constitutional right to take drugs on the grounds that it was part of his religion.[22] However, an analysis of some of the major judgments touching on 'religion', broadly defined, over the past few years in the Civil Division of the Court of Appeal, the Inner House of the Court of Session, the House of Lords and the Supreme Court suggests that citation of non-UK/ECtHR/CJEU precedents appears to be less frequent than one might have expected, as the following list indicates.

i. In *Mandla*,[23] about the right of Sikh schoolboys to wear turbans, Lord Fraser of Tullybelton cited a New Zealand case, *King-Ansell*,[24] on the construction of the term 'ethnic origins';
ii. In *A (Children)*,[25] the decision on separating the conjoined twins 'Jodie' and 'Mary', the Court referred to three US cases – Scalia J in *Cruzan*,[26] on the unknowability of the point at which life becomes 'worthless', Cardozo J in *Schloendorff*,[27] on the principle of self-determination, and (in a passing reference) *Holmes*,[28] about necessity being a possible

18 See *Titre IV: les établissements d'enseignement privés. Chapitre II section 3: contrat d'association à l'enseignement public passé avec l'Etat par des établissements d'enseignement privés.*
19 R Adhar and I Leigh, *Religious Freedom in the Liberal* State, second edition (Oxford, 2013).
20 P Edge, *Religion and Law: an introduction* (Aldershot, 2006), pp 68–72, 81, 118–122, 129–131.
21 *United States v Kuch* 288 F Supp 439 (DDC 1968).
22 R Sandberg, *Law and Religion* (Cambridge, 2011), pp 46–47.
23 *Mandla (Sewa Singh) v Dowell Lee* [1982] UKHL 7.
24 *King-Ansell v Police* [1979] 2 NZLR 531.
25 *A (Children), Re* [2000] EWCA Civ 254.
26 *Cruzan v Director, Missouri Department of Health* 497 US 261 (1990).
27 *Schloendorff v Society of New York Hospital* (1914) 105 NE 92.
28 *United States v Holmes* 26 Fed Cas 360 (1842).

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justification for homicide – to a New Zealand case, *Auckland Area Health Board*,[29] and to four Canadian cases, principally *Perka*,[30] on the conflict between legal as opposed to moral duties, and *Walker*,[31] *Morgentaler*[32] and *Nancy B*;[33]

iii. In the House of Lords judgment in *Pretty*[34] (which was about assisted suicide; it was appealed to the ECtHR), references in arguments about proportionality and the right to self-determination were made to the Supreme Court of Canada in *Rodriguez*,[35] to the US Supreme Court in *Vacco*[36] and *Glucksberg*[37] and to a case from Zimbabwe, *Nyambirai*;[38]

iv. In *ProLife Alliance*,[39] in which a registered political party challenged the broadcasters' refusal to permit a party election broadcast in Wales which included 'prolonged and graphic images of the product of suction abortion', the House of Lords referred to the US Supreme Court in *Pacifica Foundation*,[40] on the use of obscene language on sound radio, and to the US Court of Appeals for the District of Columbia in *Becker*, on the political uses of television for shock effect;[41]

v. In *Williamson*,[42] about corporal punishment in independent schools (discussed further below), Lord Walker cited Sachs J in *Christian Education South Africa*,[43] in which the facts were very similar;

vi. In *Copsey*,[44] on religious objection to Sunday working, the Court referred to two judgments of the Supreme Court of Canada, *Simpson-Sears*,[45] on observance of the Seventh-day Adventist Sabbath, and *Central Alberta Dairy Pool*;[46]

vii. In *Begum*,[47] about a school's refusal to allow a pupil to wear the long *jilbab* coat, the House of Lords referred to *Christian Education South*

29 *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235.
30 *Perka v The Queen* 13 DLR (4th) 1.
31 *R v Walker* (1973) 48 CCC (2d) 126.
32 *Morgentaler v The Queen* [1976] 1 SCR 616.
33 *Nancy B v Hôtel-Dieu de Québec* (1992) 86 DLR (4th) 385.
34 *Pretty v DPP and Secretary of State for the Home Department* [2001] UKHL 61.
35 *Rodriguez v Attorney-General of Canada* [1993] 3 SCR 519.
36 *Vacco v Quill* (1997) 521 US 793.
37 *Washington v Glucksberg* (1997) 521 US 702.
38 *Nyambirai v National Social Security Authority* [1996] 1 LRC 64.
39 *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23.
40 *Federal Communications Commission v Pacifica Foundation* (1978) 438 US 726.
41 *Becker v Federal Communications Commission* (1996) 95 F 3d75.
42 *R (Williamson) v Secretary of State for Education and Employment & Ors* [2005] UKHL 15.
43 *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11.
44 *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932.
45 *Re Ontario Human Rights Commission v Simpson-Sears Limited* (1985) 23 DLR (4th) 321.
46 *Alberta Human Rights Commission v Central Alberta Dairy Pool; Canadian Human Rights Commission et al, Interveners* (1990) 72 DLR 417.
47 *R (Begum) v Denbigh High School* [2006] UKHL 15.

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Africa and to the decision of the Supreme Court of Canada in *Multani*,[48] on wearing a *kirpan* at school;

viii. In *Helow*,[49] on whether or not a judge of the Court of Session who was a member of the International Association of Jewish Lawyers and Jurists should have recused herself from hearing an asylum appeal from a Palestinian, the House of Lords referred to the High Court of Australia in *Johnson*[50] and to the Canadian Supreme Court in *S (RD)*,[51] both on reasonable apprehension of bias;

ix. In *P & Ors*,[52] in which the House of Lords held that a blanket ban on joint adoption by unmarried couples violated their Article 8 ECHR rights, the Court referred to the South African Constitutional Court's judgment in *Du Toit and Vos*,[53] which granted same-sex couples the ability to adopt jointly;

x. In *Baiai*,[54] about the control of the right to marry by the Secretary of State by virtue of section 19 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and whether or not it was a disproportionate interference with Article 12 ECHR, the House of Lords referred to SCOTUS in (the serendipitously titled) *Loving*,[55] which invalidated laws prohibiting interracial marriage, and to the Constitutional Court of South Africa in *Fourie*,[56] which upheld the constitutional right of same-sex couples to marry;

xi. In *Ladele*,[57] in which a local authority registrar claimed that being obliged to conduct civil partnership ceremonies, contrary to her Christian beliefs about same-sex relationships, violated Article 9 ECHR, Neuberger MR cited Sachs J in *Christian Education South Africa*;

xii. In *Purdy*,[58] where a claimant with a fatal degenerative disease sought clarification of the circumstances in which her husband might help her to go abroad for assisted suicide, Lord Phillips PSC cited the Supreme Court of Canada on assisted suicide in *Rodriguez*;[59]

xiii. In *JFS*,[60] on whether or not the child of a mother whose conversion to Judaism was not recognised by the Office of the Chief Rabbi should be

48 *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] SCC 6.
49 *Helow v Secretary of State for the Home Department & Anor (Scotland)* [2008] UKHL 62.
50 *Johnson v Johnson* (2000) 201 CLR 488.
51 *R v S (RD)* [1997] 3 SCR 484.
52 *P & Ors, Re* (Northern Ireland) [2008] UKHL 38.
53 *Du Toit and Vos v Minister for Welfare and Population Development* [2002] ZACC 20.
54 *R (Baiai & Ors) v Secretary of State for the Home Department* [2008] UKHL 53.
55 *Loving et ux. v Virginia* 388 US 1 (1967).
56 *Minister of Home Affairs v Fourie & Anor* [2005] ZACC 19.
57 *Ladele v London Borough of Islington* [2009] EWCA Civ 1357.
58 *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45.
59 *Rodriguez v British Columbia (AG)* [1993] 3 SCR 519.
60 *R (E) v Governing Body of JFS & Anor* [2009] UKSC 15.

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regarded as 'Jewish' for the purposes of admission to the school, Lord Clarke JSC made passing reference to the US Supreme Court in *Bob Jones University*,[61] upholding the removal of the university's tax-exempt status, while Lord Hope JSC cited the Supreme Court of Israel in *No'ar K'halacha*[62] and *Bob Jones University*;

xiv. In *Eweida*,[63] about wearing a visible cross with the claimant's company uniform, Sedley LJ made passing reference to the US Supreme Court's judgment in *Griggs*,[64] on discrimination against black employees;

xv. In *Maga*,[65] about the Roman Catholic Church's vicarious liability for historic sexual abuse by a cleric, two Canadian cases on vicarious liability – *Bazley*[66] and *Jacobi*[67] – were cited, along with the judgment of the Irish Supreme Court in *O'Keefe*;[68]

xvi. In *Catholic Child Welfare Society*,[69] also about vicarious liability for sexual abuse of minors, the Court cited four Canadian cases – *Bazley, Jacobi, Doe*[70] and *Blackwater*[71] – together with an Australian one, *Lepore*;[72]

xvii. In *JGE*,[73] yet another case about historic sexual abuse and vicarious liability, four Canadian cases and one Australian case were cited: *Montreal Locomotive Works*,[74] *Bazley, Jacobi, Doe* and *Lepore*;

xviii. In *Bull*,[75] in which a husband and wife claimed that to be obliged to let a double room in their hotel to a same-sex couple violated their Article 9 ECHR rights, there were references to two decisions of the British Columbia Human Rights Tribunal and to a South African judgment, *National Coalition for Gay and Lesbian Equality*,[76] which declared unconstitutional the common law offence of sodomy;

xix. In *Hodkin*,[77] which concerned the definition of 'religion' for the purposes of registering a place of worship to solemnise marriages, Lord Toulson JSC referred to the judgment of Adams CJ in *Malnak*,[78] concurring in a *per curiam* opinion of the US Court of Appeals 3rd Circuit,

61 *Bob Jones University v United States* 461 US 574 (1983).
62 *No'ar K'halacha v Ministry of Education* HCJ 1067/08 (unreported) 6 August 2009.
63 *Eweida v British Airways Plc* [2010] EWCA Civ 80.
64 *Griggs v Duke Power Co* 401 US 424 (1971).
65 *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256.
66 *Bazley v Currie* (1999) 174 DLR (4th) 45.
67 *Jacobi v Griffiths* (1999) 174 DLR (4th) 71.
68 *O'Keefe v Hickey* [2008] IESC 72.
69 *Catholic Child Welfare Society & Ors v Various Claimants* [2012] UKSC 56.
70 *Doe v Bennett* [2004] 1 SCR 436.
71 *Blackwater v Plint* (2005) SCC 58.
72 *New South Wales v Lepore* [2003] HCA 4.
73 *JGE v The Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938.
74 *Montreal v Montreal Locomotive Works Ltd* [1947] 1 DLR 161.
75 *Bull & Anor v Hall & Anor* [2013] UKSC 73.
76 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6.
77 *R (Hodkin & Anor) v Registrar-General of Births, Deaths and Marriages* [2013] UKSC 77.
78 *Malnak v Yogi* 592 F 2d 197 (1979).

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which had held unconstitutional the teaching of transcendental meditation in a course that included a ceremony (the *puja*) in which the students made offerings to a deity, but he appeared to give more weight to the judgment of the High Court of Australia in *Church of the New Faith*;[79]

xx. In *Mba*,[80] a claim for constructive unfair dismissal by an Evangelical Christian who did not wish to work on Sundays, the only 'foreign' citation was a passing reference to *Syndicat Northcrest*,[81] in which Iacobucci J attempted to define freedom of religion under the Quebec Charter of Human Rights and Freedoms and the Canadian Charter of Rights and Freedoms;

xxi. In *Shergill*,[82] which was ultimately about the degree to which the secular courts were prepared to involve themselves in adjudication in matters of religious doctrine where a claimant sought the enforcement of private rights and obligations that depended on religious issues, Lords Neuberger PSC and Sumption and Hodge JJSC referred to a fairly early ruling of the US Supreme Court on the doctrine of act of state in *Underhill*[83] and to two Canadian cases, *Bruker*[84] and *Syndicat Northcrest*;

xxii. In *Nicklinson*,[85] about whether or not someone with 'locked-in syndrome' had the right to be helped to die, Lord Neuberger PSC cited *Carter v Canada (AG)*,[86] which declared unconstitutional the blanket ban on physician-assisted death in the Canadian Criminal Code – but only to dismiss it. Lord Mance JSC found some relevance in the majority reasoning of the US Supreme Court in *Washington* and *Vacco*. Lord Mance cited with approval Lord Reed's discussion in *Bank Mellat*[87] of Dickson CJ's judgment in the Supreme Court of Canada in *R v Oakes*,[88] and Lord Sumption JSC noted the relevance of *Rodriguez* to *Pretty*; and

xxiii. In *Ross*,[89] an unsuccessful challenge under Article 8 ECHR to the Lord Advocate's refusal to publish specific guidance on the circumstances in which individuals would be prosecuted for assisted suicide, Lord Justice Clerk Carloway referred to the Supreme Court of Canada in *Carter*[90] and to a South African case, *Stransham-Ford*.[91]

79 *Church of the New Faith v Comr of Pay-Roll Tax (Victoria)* (1983) 154 CLR 136.
80 *Mba v London Borough of Merton* [2013] EWCA Civ 1562.
81 *Syndicat Northcrest v Amselem* [2004] 2 SCR 551.
82 *Shergill & Ors v Khaira & Ors* [2014] UKSC 33.
83 *Underhill v Hernandez* (1897) 168 US 250.
84 *Bruker v Marcovitz* [2007] 3 SCR 607.
85 *R (Nicklinson & Anor) v Ministry of Justice; R (AM) v DPP* [2014] UKSC 38.
86 *Carter v Canada (AG)* [2012] BCSC 886.
87 *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39.
88 *R v Oakes* [1986] 1 SCR 103.
89 *Ross v Lord Advocate* [2016] ScotCS CSIH 12.
90 *Carter v Canada* (AG) 2015 SCC 5.
91 *Stransham-Ford v Minister of Justice* [2015] ZAGPPHC 230.

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DO THE US COURTS ROUTINELY CITE UK OR EUROPEAN CASES?

Any definitive quantitative assessment of the extent to which UK or European judgments are cited by the US courts is well beyond the reach of a journal article (there must be a couple of putative doctoral theses in it at the very least). Generally speaking, however, the superior courts in the US have taken a fairly conservative view of the relevance and/or helpfulness of foreign precedents.

In *Lawrence*,[92] SCOTUS, in a 6–3 ruling, struck down the law in Texas (and, by extension, in thirteen other states) criminalising sodomy. Delivering the majority opinion, Kennedy J cited *Dudgeon*,[93] in which the ECtHR had declared the criminal sanctions on homosexual acts in Northern Ireland incompatible with Article 8 ECHR (private and family life). In doing so, he gave rise to speculation that the opinion might herald a new departure in the jurisprudence of the Court. However, the propriety of citing foreign judgments as persuasive authority was, and remains, a matter of some controversy.

Richard Posner, who is both a judge of the US Court of Appeals for the Seventh Circuit and a Senior Lecturer at Chicago Law School, expressed trenchant opposition to the practice, which he described as 'judicial fig-leafing, of which we have enough already':

> In politically fraught cases, such as the sodomy decision (*Lawrence v Texas*) that touched off this debate, judges take their cues from their personal experiences, values, intuitions, temperament, reading of public opinion, and ideology. None of these influences on adjudication at the highest level has been shaped by the study of foreign judicial decisions. Some foreign nations criminalize sodomy, others don't; is it to be supposed that the justices in *Lawrence* weighed the arguments made in other nations about the criminalization of sodomy?[94]

Austen Parrish, on the other hand, described such arguments as both inconsistent with a long history of practice and slightly xenophobic. In his view:

> The use of foreign law as persuasive authority is deeply embedded in our legal traditions, particularly in state court constitutionalism. Moreover, the

92 *Lawrence v Texas* 539 US 558 (2003).
93 *Dudgeon v United Kingdom* [1981] ECHR 5.
94 R Posner, 'No thanks, we already have our own laws: the court should never view a foreign legal decision as a precedent in any way', (July/August 2004) *Legal Affairs*, <http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp>, accessed 7 June 2016. He developed the argument further in 'Foreword: a political court', (2005) 119 *Harvard Law Review* 28–102 at 84–90.

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> mere citation to foreign laws neither undermines our national sovereignty nor provides judges the means to render unprincipled, nakedly political decisions.[95]

Likewise, David Seipp dismissed the matter in a single crisp sentence: 'The objection to citation of foreign law in US Supreme Court decisions is bad history and bad law.'[96]

That said, however, analysis of five of the highest-profile SCOTUS cases about religious and moral issues in recent years – *Hobby Lobby, Windsor,*[97] *Town of Greece,*[98] *Hosanna-Tabor*[99] and *Obergefell*[100] – reveals that not a single non-US case was cited in any of them, whether by the majority or the minority. This suggests that, if *Lawrence* was indeed a new departure, in matters of religion and morality at any rate, the train has barely left the station.

Looking at the issue some fifteen years on from *Lawrence*, the late Justice Scalia (who dissented in *Lawrence*) and Justice Breyer (who joined in the majority opinion) agreed to disagree. Scalia, the arch-originalist, summed up his position like this:

> foreign law is irrelevant with one exception: old English law – because phrases like 'due process', and the 'right of confrontation' were taken from English law, and were understood to mean what they meant there. So the reality is I use foreign law more than anybody on the Court. But it's all old English law.[101]

Breyer took the view that, while a foreign judgment could never be more than persuasive, that was no reason for rejecting it outright:

95 A Parrish, 'Storm in a teacup: the US Supreme Court's use of foreign law', (2007) 2 *University of Illinois Law Review* 637–680 at 680.

96 He then went on at length to explain why: D Seipp, 'Our law, their law, history, and the citation of foreign law', (2006) 86 *Boston University Law Review* 1417–1446 at 1417.

97 *United States v Windsor* 570 US __ (2013), in which the Court held by 5–4 that the restriction to heterosexual unions of the federal interpretation of 'marriage' and 'spouse' imposed by section 3 of the Defense of Marriage Act 1996 was a deprivation of the equal liberty of persons guaranteed by the Fifth Amendment.

98 *Town of Greece v Galloway* 572 __ US (2014), in which the Court held by 5–4 that the practice of opening meetings of the town board with prayer by volunteer chaplains did not violate the Establishment Clause.

99 *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* 565 US __ (2012), on the 'ministerial exception': the right of religious organisations to discriminate in employment.

100 *Obergefell v Hodges* 576 US __ (2015), in which the Court held by 5–4 that the restriction of marriage to opposite-sex couples violated both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Though 'religion' was certainly not the presenting issue, same-sex marriage has huge theological and ecclesiological implications for religious bodies.

101 A Scalia and S Breyer, 'A conversation between U.S. Supreme Court justices', (2005) 3:4 *International Journal of Constitutional Law* 519–541 at 525. See also Scalia J's dissent in *Roper v Simmons* 543 US 2005 at paras 16–23.

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> I understand that a judge cannot read everything. But if the lawyers find an interesting and useful foreign case, and if they refer to that case, the judges will likely read it, using it as food for thought, not as binding precedent. I think that is fine.[102]

So far as cases on religious manifestation and on moral issues with a religious dimension are concerned, the short answer to the question is probably twofold. First, the US has so many domestic jurisdictions of its own and such a large number of cases on religion every year that overseas precedents are generally regarded as superfluous. Second, because so many US religion cases relate back to the Establishment Clause, the Free Exercise Clause, the RFRA or the RLUIPA, overseas decisions are unlikely to be of much relevance in any event.[103]

A TENTATIVE CONCLUSION?

Even though all the US jurisdictions, with the partial exception of Louisiana,[104] are based on common law, it would appear that, on matters of religion at any rate, their divergence from the UK and Europe is so great that a US case is usually only of interest for the UK when it sheds some light on a juridical or socio-legal principle of fairly general application – and *vice versa*. And when it comes to legal nuts and bolts, the foregoing analysis of recent high-profile law and religion cases would seem to suggest that, on balance (and making due allowance for the fact that a different list from mine might have produced somewhat different results), the UK courts are rather more likely to look to Commonwealth jurisdictions for parallels than to US ones – as the following examples suggest.

When the issue of the legality of prayers at town council meetings was tested in *Bideford*,[105] Ouseley J cited the ECtHR in *Buscarini*[106] – a challenge to the requirement for San Marino's MPs to take an oath referring to the Gospels – and the Grand Chamber judgment on the legality of crucifixes in state school classrooms in *Lautsi*.[107] But he made no mention of the (admittedly somewhat equivocal) judgment of Calabresi J two years previously in the US Court of Appeals Second Circuit in *Town of Greece*,[108] in which the plaintiffs had

102 Scalia and Breyer, 'Conversation', p 524.
103 Conversely, though the UK domestic courts and the ECtHR occasionally rule on accommodating prisoners' religious beliefs, it is difficult to imagine that we could ever have the seemingly endless procession of prisoner free-exercise cases that are such a feature of First Amendment jurisprudence.
104 Criminal law in Louisiana largely rests on Anglo-American common law but its private law is still based on the French and Spanish civilian codes in operation prior to the Louisiana Purchase in 1803.
105 *R (National Secular Society & Anor) v Bideford Town Council* [2012] EWHC (Admin) 175.
106 *Buscarini v San Marino* [1999] ECHR 7.
107 *Lautsi v Italy* [2011] ECHR 2412.
108 *Galloway v Town of Greece* 732 F Supp 2d 195 (2010).

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challenged the legality of opening town board meetings with prayer *as a violation of the Establishment Clause* – and which, as we have seen, went all the way to the Supreme Court. Possibly the reason for ignoring *Town of Greece* was that the challenge in *Bideford* was primarily about whether or not prayers at council meetings were *ultra vires* section 111 of Local Government Act 1972, not about constitutionality *per se*. Nor was the right to manifest under Article 9 ECHR a significant element except insofar as the second claimant, a former councillor, argued that the practice interfered with his Article 9 right *not* to hold religious beliefs.

In *Preston*[109] the core issue was whether a presbyter in the Methodist Church was a worker with employment rights or an office-holder: it was argued that, on being ordained into Full Connexion, ministers entered a non-contractual 'covenant relationship' with the Church rather than a contract of employment. Central to the dispute was Methodist ecclesiology and the self-understanding of the Church *as a church*. *Hosanna-Tabor* was not cited: presumably it was thought to be too remote from the situation in *Preston* to be relevant, even though it dealt with the rights of religious organisations in hiring personnel.

Why should this be? In *Big M Drug Mart*[110] – in which the Supreme Court of Canada held that the provisions of the Lord's Day Act 1906 violated the freedom of conscience and religion guaranteed by section 2(a) of the Canadian Charter of Rights and Freedoms in the Constitution Act 1982 – Dickson J was distinctly unenthusiastic about the usefulness and relevance to Canada of US case law in matters of religion:

> In my view this recourse to categories from the American jurisprudence is not particularly helpful in defining the meaning of freedom of conscience and religion under the *Charter*. The adoption in the United States of the categories 'establishment' and 'free exercise' is perhaps an inevitable consequence of the wording of the First Amendment. The cases illustrate, however, that these are not two totally separate and distinct categories, but rather, as the Supreme Court of the United States has frequently recognized, in specific instances 'the two clauses may overlap' . . . Perhaps even more important is the fact that neither 'free exercise' nor 'anti-establishment' is a homogeneous category; each contains a broad spectrum of heterogeneous principles. This heterogeneity is reflected in the not infrequent conflict that arises between the two clauses.[111]

109 *Methodist Conference v Preston* [2013] UKSC 29.

110 *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 1985 CanLII 69 (SCC).

111 Ibid at para 105. But that is not so for Canadian judgments generally: 'when all cases are considered, statistics show that the Supreme Court of Canada has cited American case law almost forty times as often as the Supreme Court of the United States has cited Canadian case law': Law Library of Congress, *The Impact of Foreign Law on Domestic Judgments* (Washington, DC, 2010), p 23, available at <https://www.loc.gov/law/help/domestic-judgment/impact-of-foreign-law.pdf>, accessed 22 February 2016.

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My suspicion is that what appears to be the case for Canada also holds true for the UK: that the overlap has something of a distorting effect on US case law and diminishes its usefulness to other common law jurisdictions.

If, for example, the Canadian Supreme Court rules that there has been a contravention of the Charter in a matter of religion or belief, a commentator from the United Kingdom is on fairly familiar ground. The fundamental 'freedom of conscience and religion' provision in section 2(a) is qualified by 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society' under section 1 – from which it is not at all difficult to read across to Article 9 ECHR and its accompanying limitations on the right to manifest in Article 9(2).

Similarly in South Africa, under the Constitution, rights – including 'freedom of conscience, religion, thought, belief and opinion'[112] – may be limited

> in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
>
> a. the nature of the right;
> b. the importance of the purpose of the limitation;
> c. the nature and extent of the limitation;
> d. the relation between the limitation and its purpose; and
> e. less restrictive means to achieve the purpose.[113]

So a case in point from an appropriate Commonwealth jurisdiction might well be cited as persuasive in the UK courts. Lord Walker of Gestingthorpe's speech in *Williamson* is an example. *Williamson* was about whether or not parents with a religious conviction about the efficacy of corporal punishment might delegate authority to beat their children to teachers in independent schools. Lord Walker cited Sachs J in the Constitutional Court of South Africa in a case with very strong factual similarities: *Christian Education South Africa* was about whether or not the statutory ban on corporal punishment in schools contravened the constitutional provisions on privacy, education and freedom of religion, belief and opinion.

In conclusion: a US religion case can sometimes be very interesting as a piece of legal reasoning, but I suspect that only very rarely indeed is it likely to be of assistance even as a persuasive precedent in a United Kingdom context.[114] There

112 Constitution of the Republic of South Africa 1996, s 15.
113 Constitution of the Republic of South Africa 1996, s 36.
114 A view supported by a recent analysis of citations in the judgments of the UKSC on human rights issues: for the period from its foundation to 2014 there were 14 US citations in total: Hélène

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does not seem to be any obvious UK or European parallel with either the First Amendment, the RFRA or the RLUIPA that would *routinely* lead UK courts to cite US cases based on them, even where there might appear to be a superficial relevance.

There is also an issue about the perceived objectivity or otherwise of SCOTUS on religious and moral issues. The arguments about its place in the US Constitution and the extent to which it makes new law rather than merely interpreting it are beyond the scope of this article – though Geoffrey Hazard's thoughts on the matter almost forty years ago still make for salutary reading.[115] But be that as it may, of the five cases discussed above, only in *Hosanna-Tabor* was the Court unanimous; in the others, it divided 5–4, with Scalia, Thomas and Alito JJ consistently on one side of the argument and Ginsburg, Breyer, Sotomayor and Kagan JJ on the other. Looking back over the judgments of the Roberts Court on law and religion generally, DeGirolami concludes that

> overwhelmingly the cases are either unanimous or split five to four, with comparatively few separate dissents expressing distinctive approaches, and with the split correlating with (if not due to) partisan political or ideological divisions.[116]

So might the justices' conclusions on religious or moral issues be thought to proceed as much from a priori socio-political assumptions as from legal analysis and therefore not worth citing at all? Perish the thought …

Tyrrell, 'The use of foreign jurisprudence in human rights cases before the UK Supreme Court', unpublished PhD thesis, Queen Mary, University of London, 2014.

115 G Hazard, 'The Supreme Court as a legislature', (1978) 64 *Cornell Law Review* 1–27.

116 M DeGirolami, 'Constitutional contraction: religion and the Roberts Court', (2015) 26 *Stanford Law & Policy Review* 385–409 at 387. Presumably his article was written before *Obergefell*, in which Roberts CJ, Scalia, Thomas and Alito JJ all wrote individual dissenting opinions.

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