

BOOK REVIEWS

The First Amendment and State Bans on Teachers' Religious Garb: Analyzing the Historic Origins of Contemporary Legal Challenges in the United States. By Nathan C. Walker. New York: Routledge, 2020. Pp. 262. \$155.00 (cloth); \$52.16 (digital). ISBN: 9780367188306.

“If we were being indoctrinated now, at this very minute, would we know it?”¹ So asked Terence Copley, professor of religious education and theology at the University of Exeter in 2005.

Copley raised the question in the context of England’s approach to religion and ethics in the K-12 classroom. In the process of examining the strengths and weaknesses of the program of study, Copley noted that omissions are as instructive as commissions. When schools *avoid* teaching about the variety of religious and non-religious beliefs according to which human beings shape their lives, “Surely this [avoidance] too is indoctrination, as it has very effectively fixed habits and dispositions without engaging the child’s active powers. Even if by omission, and with no intention . . . the end result is the same—a closed mind, which sincerely believes in its own programming.”²

For this reason, Copley spent most of his professional life designing and field-testing K-12 courses about religion, which are mandated by statute in the United Kingdom and required in most European countries.³ Readers in the United States should note that K-12 coursework in religion and philosophy, the value of which forty-seven nations in the Council of Europe affirmed as recently as 2008,⁴ exists in *addition* to the pluralistic school structure in most democracies in which the state funds a variety of school types, including religious schools.⁵ Most modern democracies, in other words, acknowledge religion in both the structure and the content of public education. (The United States is thus an outlier in both respects.)

More diverse provision of education and a richer curriculum, however, have not resolved the issue of teachers’ religious garb in these countries. Indeed, this issue has exploded in recent years, with courts from Pakistan to the United Kingdom adjudicating between competing rights—and often coming to completely different conclusions.⁶

The matter of teachers’ religious garb is separate from educational structure and content, but it is certainly related to the larger question of what counts as indoctrination. Teachers’ religious garb is the focus of Nathan C. Walker’s *First Amendment and State Bans on Teachers’ Religious Garb*

1 Terence Copley, *Indoctrination, Education and God: The Struggle for the Mind* (London: Society for Promoting Christian Knowledge, 2005), xi.

2 Copley, 5.

3 See Myriam Hunter-Hénin, introduction to *Law, Religious Freedoms and Education in Europe*, ed. Myriam Hunter-Hénin (Farnham: Ashgate, 2011), 1–20, at 15.

4 See, for example, Robert Jackson, “Religion, Education, Dialogue and Conflict,” *British Journal of Religious Education* 33, no. 2 (2011): 105–9, at 105.

5 See, for example, Johns Hopkins Institute for Education Policy and European Association of Education Law and Policy, “Global Pluralism,” Johns Hopkins Institute for Education Policy, 2019, <https://edpolicy.education.jhu.edu/global-pluralism/>; Ashley Berner, *Pluralism and American Public Education: No One Way to School* (New York: Palgrave MacMillan, 2017).

6 Nathan Walker provides a summary of relevant cases at pages 16–19 of the book under review. See also, Hunter-Hénin, *Law, Religious Freedoms and Education in Europe*. Note that the issue of teachers’ and others’ “manifestation” of religious belief in the public square is quite pressing internationally. Both individual nations and the European Court of Human Rights frequently take up legal challenges.

(2020). Walker directly asks whether being taught by a public-school teacher who wears hijab—the covering required of Muslim women in some cultures—coerces young people into Islamic belief. Does a Catholic teacher's habit or a Mennonite teacher's bonnet indoctrinate? In legal terms, does religious garb offer a “symbolic link,” and thus an endorsement, of religion by the state and thus fall afoul of the Establishment Clause of the federal constitution?

Walker thinks not, but he takes the reader there by examining the confusing, often tortuous, decisions of courts in the United States about teachers' religious garb in public schools, and shows us that the matter is not yet settled law. The history he recounts plays out across 125 years of cultural conflict, state laws, and “eleven substantive cases about bans on public school-teachers' religious garb, nine of which were state Supreme Court decisions” (31). To my knowledge, his is the most extensive treatment of the subject to date. For readers who are not already engaged in the issue of religion and the public schools, Walker provides a helpful glossary of legal terms (xx–xxi), a table that sets out the relevant cases (34–38), details that locate teachers' religious garb firmly within First Amendment jurisprudence, and reflections on how federal courts might resolve the tensions between Establishment and Free Exercise claims when it comes to religious garb.

Walker's focal point is Pennsylvania, the state that passed the first-of-its-kind Anti-Religious Garb Law in 1895, directly after the state's Supreme Court ruled (1894) in favor of habited nuns who taught in public schools. Pennsylvania's Anti-Religious Garb Law was revised and reaffirmed in 1949 and, most recently, in 1982; it stands outside and in addition to the state's Education Code, which specifies separately that public schools may not enjoin activity that “instructs, proselytizes or indoctrinates students in a specific religious or political belief” (211). Walker highlights the fact that Pennsylvania's anti-religious-garb law may be in direct conflict with Pennsylvania's Religious Freedom Protection Act of 2002 (59) although—a critical point for Walker—no federal court has weighed in on the disjuncture or nuance.

And there is considerable nuance. Walker reminds us, for instance, that courts pay particular attention to students' *impressionability* when determining the appropriate age at which public-school students could participate voluntarily in religious clubs or the appropriate role of teachers in sponsoring such activities (149). Walker honors the subtlety well, with a dialogical back-and-forth between competing “takes” on teachers' religious attire within both Establishment and Free Exercise claims (especially 126–82). He also calls for research that could empirically ground the courts' assumptions about the real-world impact of teachers' religious garb on students; our current disagreements about “how best to balance the rights and interests of children and religious-garb-wearing teachers” are determined by the subjective views of the observer rather than upon evidence (241–43). I am sure he is right.

While Walker's book addresses a specific matter—religious garb in public schools—it raises a more profound, and perennial one: How do we adequately prepare the next generation to navigate pluralism and liberal democracy?⁷ As Walker himself notes, “the complex questions embedded in this subject do not simply fall in the domain of teachers' rights or students' rights, but they also put into question the very purpose of public education in the twenty-first century” (2). Walker's book is thus particularly urgent and timely, and is a welcome guide for legal scholars and education policy-makers alike.

7 See a brief summary of national statistics and data from classrooms in Ashley Berner, “In a Polarized America, What Can We Do about Civil Disagreement?,” *Brown Center Chalkboard* (blog), April 10, 2020, <https://www.brookings.edu/blog/brown-center-chalkboard/2020/04/10/in-a-polarized-america-what-can-we-do-about-civil-disagreement/>.

My primary criticism of the book is that at times it becomes quite tedious in its rehearsal of Walker's own process of study and review, reading more like a doctoral thesis than a legal analysis. The reader does not particularly need to know that Walker searched through LexisNexis, nor do we need to hear a blow-by-blow and often repeated account of what will be addressed in future sections or chapters, as if we were evaluating the success of a high school Lincoln-Douglas debate. We assume Walker did due intellectual diligence to produce this (peer-reviewed) volume.

Indeed, Walker's final three chapters are so exciting that one wishes even more for a tighter, more high-level analysis of the legal history that could lead us more directly to the questions of why this issue matters so very much—for teachers, for students, for policy makers, and indeed for the viability of American democracy itself. For democratic education exists, in no small part, to prepare the next generation of young people to sustain a democracy that is both liberal and plural. Walker's argument is that laws against religious manifestations in schools diminish rather than enhance this preparation. Far from being indoctrinatory, he suggests, religious attire in the public schools represents an important reference point for students about what it means to live in a demographically and ideologically diverse community. His argument thus points beyond the narrow scope of the book's inquiry and toward the central dilemma of how democratic life ought to be organized and nurtured.

Therefore, one of the most satisfying parts of the book, for me, comes when Walker outlines the fears of a "religious takeover" that animate Pennsylvania's anti-religious-garb law; for instance, the concern that a "critical mass" of teachers in religious garb in a majority-Jewish neighborhood in Pittsburgh, or in a majority-Muslim neighborhood in Philadelphia, might create a "symbolic link" between the state and religious belief. To this, Walker remarks, "The obvious question is, *so what?* Should not public schools reflect the public it serves? Employing teachers who reflect the demographics of their community is not a violation of the Establishment Clause—denying members of the community employment because of their religious identity is a violation of both the Establishment and Free Exercise clauses of the First Amendment" (192).

Put positively, exposure not only does not equal "coercion," but it may well constitute a net positive that can support civil tolerance. Put negatively, *not* allowing religious garb "intentionally suppresses teachers' religious identity by 'sanitizing' them for the classroom—a message that students can reasonably interpret to mean that the state is hostile to the religion of their teacher, an identity some students in the classroom may share" (136). Walker and Copley are on the same page.

Walker concludes on a sober note, namely, the cold, hard facts of "trends in social hostilities and violence against religious minorities [that] correlate with the laws used to regulate them" (193, also see 13). He recites the anti-Catholic vitriol that inspired Pennsylvania's 1895 law; he brings prejudice up to date with statistics on the negative biases levied against Muslims in the workplace (168–69). Walker follows up the general finding that religious restrictions penalize minorities disproportionately, with the (to me) shocking and unpleasant news that "to date, no Native American, Jew, or Sikh has won a Free Exercise claim before the U.S. Supreme Court. Muslims won their first cases in 2015" (171).

Unfortunately, many aspects of the United States' school systems reinforce prejudice against religious minorities, including the limitations we place on religious schools⁸ and the absence of a

8 There are too many excellent sources to name in a footnote. But for a start, see Charles Leslie Glenn, *The Myth of the Common School* (Amherst: University of Massachusetts Press, 1988); Philip Hamburger, *Separation of Church and State* (Cambridge, MA: Harvard University Press, 2002).

systematic K-12 approach to religion and ethics.⁹ Would a clear Supreme Court ruling supporting teachers' religious garb in schools make a difference? It might. At the very least, it would offer an opportunity for legal scholars, education policymakers, parents, and activists, to engage in democratic deliberation about the relationship between exposure and indoctrination.¹⁰ Walker's book can prepare us for that conversation.

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9 See, for example, Stephen Prothero, *Religious Literacy: What Every American Needs to Know—And Doesn't* (New York: HarperCollins, 2007).

10 "Democratic deliberation" is one of the goods valued by educational theorist Amy Gutmann, currently president of the University of Pennsylvania. See Amy Gutmann, *Democratic Education* (Princeton: Princeton University Press, 1987); Amy Gutmann, *Democratic Education: With a New Preface and Epilogue* (Princeton: Princeton University Press, 1999); Amy Gutmann, *Democratic Education*, rev. ed. (Princeton: Princeton University Press, 2001).