A pious Europe?
Why Europe should not define itself as Christian

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Abstract

Joseph Weiler’s *Un’Europa Cristiana* argues that there should be an explicit reference to the Christian roots of European identity in the Preamble of an eventual European Constitution. Such a claim requires discussing the groundings of European identity, its relation with personal and collective identities, and the relationship between the process of political and economic integration and the national constitutional traditions. This paper finds such a discussion proper and timely, but disagrees with Weiler’s conclusions. First, it is held that the positive constitutional law of the Union and its member states does not support an explicit reference to Christian values. It is argued that Weiler’s interpretation of “constitutional tolerance” does not correspond to the actual contents of European constitutional law, and that a different understanding of the ‘commonality’ of the common constitutional traditions is required by positive law. Second, Weiler’s argument is found wanting in politico-theoretical terms. A renewed secular or republican principle is found more respectful of the religious freedom of believers and non-believers, at the same time that an explicit reference to Christian values is found counterproductive in terms of ensuring the civic integration of all residents in the Union.
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“My own mind is my own church”
Thomas Paine, The Age of Reason

§1. There is hardly any seminar, conference or workshop on European studies where the name or the work of Joseph Weiler is not referred to. His famous piece The Transformation of Europe, republished in his best-seller The Constitution of Europe, is quite likely one of the most praised, influential, and surely one of the most quoted works in the field. From his professorship at the European University Institute in Florence in the 1980s and at Harvard and New York Law Schools in the 1990s, Weiler amplified the influence of the pioneering work of Mauro Cappelletti and Eric Stein on European legal integration, and put flesh into the bones of their approaches to Community law.

Thus, it is not surprising that any new Weiler’s is widely read and discussed. This will be the case with Un’Europa Cristiana, an elegantly written...
political pamphlet where Weiler claims that there should be an explicit reference to the Christian roots of European identity in the Preamble of an eventual European Constitution (*now in the process of being debated and ratified*). In doing so, Weiler renders more explicit his conception of European integration in legal, political and cultural terms. The style and beautiful prose of the pamphlet remind the reader of a previous book of his, namely *Israel and the creation of a Palestinian State: A European perspective*[^1], where he argued for a bi-national Israeli-Palestinian federation *a la Europeénne*. Indeed, a comparison between the two books might be pertinent even if the implications of Weiler’s line of argumentation in each text are somewhat different.

§2. In this review, I will try to summarise the main theses of *Un’Europa Cristiana* (Section I) and to scrutinise (and criticise) its basic premises (Section II). It seems to me that the book puts forward very proper and urgent questions about the process of European integration. Indeed, it is time that we discuss the groundings of European identity, its relation with personal and collective identities, and that we consider the relationship between the process of political and economic integration and the national constitutional traditions. In that sense, Weiler’s is the right salvo at the right moment.

Having said that, there are very good reasons to doubt that the book puts forwards the right answers, even if posing the right questions. One can remain sympathetic to the main insight of the book, namely, the need for an open discussion of the ends of European integration, or as it is usually (and somehow pedantically) labelled, its *finalité*, while deeply disagreeing with granting Christian values a prominent place among the founding values of the Union.

I. What Weiler claims

1. The Two Main Thesis

§3. *Un’Europa cristiana* makes two central claims.

First, Weiler argues that the European Union can only proceed further in the road of “an ever closer Union” if Europeans start discussing openly

about the goals of the Union. It is common to hear that the success of the process of integration in Europe was rendered possible by the use of economic means to achieve political goals. The argument goes that de facto integration, the forging of concrete solidarities, could be established because it was isolated from public critical exposure. Actual European integration concerned economic issues which did not awake much interest in citizens, as it is the case (at least since the Second World War) with customs duties and commercial regulations. However, the common regulation of such issues proved crucial in laying the ground of an economic, but also political, animal: the European Union. This argument might be somehow overstretched, given that there is nothing more political than the economy, one could say. But it has been proven basically correct. The success of the Union as a process of integration has been based on its economic means. The Union ensures compliance with the famous four economic freedoms (free movement of goods, services, labour and capital), protects free competition in the European markets, and has recently assumed exclusive monetary competences in twelve of the fifteen member states. Moreover, a good deal of European citizens keep on assuming that the European Union is basically a problem-solving organisation, and not a would-be political community (a matter of how to sell butter, as some Danes like to put it). This is especially the case in those countries, such as the United Kingdom, Denmark or Sweden, where the debate on accession to the Union was framed basically in economic terms,

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9 Before, customs duties were one of the most contentious political questions. See Alan Milward, ‘Tariffs as Constitutions’, in Susan Strange, Roger Tooze (eds.), The International Politics of Surplus Capacity, London: George Allen and Unwin, 1981, pp. 57-66.

10 This was clear in the old days in which economics was basically political economy. See, for example, Phyllis Deane, The State and The Economic System. An Introduction to the History of Political Economy, Oxford: Oxford University Press, 1989. When confronted for the first time with the question of the conditions under which candidate countries could become members of the Union, the Parliament argued in this very precise way. See ‘Rapport de la Commission politique de l’Assemblée Parlementaire Européenne sur les aspects politiques et institutionnels’, Document 122, January 1962.
namely, on whether joining the Union will increase or reduce the wealth of its citizens.\footnote{Pablo Jáuregui, ‘National Pride and the Meaning of “Europe”: a comparative study of Britain and Spain’, in Dennis Smith and Sue Wright (eds.), \textit{Whose Europe? The turn towards democracy}, Oxford: Blackwell, pp. 257-87.}

Weiler finds that this state of affairs is deeply disturbing, and in fact, is a central cause of most of the problems which affect the Union. Problems are bound to increase. Europeans were benignly neglectful of the process of integration as long as there were no explicit political decisions being adopted by the Union; they turned tepid if not cold when the political implications of European integration came to the fore.\footnote{As proved by the reaction of European publics to the Maastricht Treaty, especially the big Danish nei (in the first referendum) and the French petit oui. See, for example, Bino Olivi, \textit{L’Europa difficile}, Bologna: Il Mulino, 2001, pp. 407-12 and 414-17.} If the process of integration is to be sustainable, and eventually go further, it is absolutely necessary that Europeans tackle the “identity, self-understanding and telos” of the European Union \cite[see, for example, 31, 122 and 147]{Weiler}. Thus, Weiler seems to claim the explicit discussion of the ultimate goals of European integration, and the eventual traits of a European identity, are the main reason why Europeans should embark on a constitution-making process.\footnote{See, in a similar line of reasoning, Armin Von Bogdandy, ‘The European Constitution and European Identity, Potentials and Dangers of the Draft Treaty establishing a Constitution for Europe’, available at \url{http://www.jeannonnetprogram.org/conference_IMC_Princeton/NYU_Princeton_von_Bogdandy.rtf}.}

Second, Weiler further argues that Europe should consider its \textit{Christian heritage} as a central part of its identity, so much that a reference to it should be contained in the Preamble of an eventual European Constitution.\footnote{To be more precise, Weiler claims that such reference is needed only in case the eventual European Constitution contains a Preamble. He is rather agnostic on the question whether Constitutions should be preceded by a Preamble where the basic moral and ethical values which underpin the text would be explicated \cite{Weiler}. However, it is rather \textit{unlikely} that any European Constitution would be drafted without a Preamble. This is why I have confined this comment to a footnote.} No proper Preamble could be drafted, in Weiler’s mind, where reference to the main defining elements of European identity would not be made; being \textit{Christianity} a significant element of what is to be a European, a reference to it should be included in the Preamble. A \textit{generic reference} to the religion as part of the forging factors of European identity, as the one to be found in the Draft Treaty proposed by the Laeken Convention on July 18\textsuperscript{th}, 2003, will not be enough.\footnote{Cf. the Preamble: “Drawing inspiration from the cultural, religious and humanist inheritance of Europe, the values of which, still present in its heritage, have embedded within the life of society the central role of the human person and his or her inviolable and inalienable human rights, and respect for law”} He puts forward two arguments \textit{why this is so}: (1) a \textit{constitutional}
argument, according to which a proper reconstruction of the constitutional traditions common to the Member States supports the claim that Christianity should be explicitly referred to in the Preamble; (2) a historical argument, or what is the same, Christianity is said to have played a central role in the actual forging of a separate and distinct European identity.

§4. These two theses come hand in hand with a reconstruction of the history of European integration from a Christian standpoint. Weiler argues that such an endeavour is highly needed in order to overcome the true and hidden deficit of the Union. While most citizens and scholars talk continuously about the democratic deficit of the Union, its Christian deficit is the really problematic one to Weiler’s eyes. To overcome it, it is urgent to reinterpret the grounds and steps of the process of European integration through the lens of Christian teachings, and, simultaneously, to construct central texts of the Christian canon in view of the problems posed by the process of European integration. This Weiler basically undertakes by means of offering a narrative of European integration through the encyclical letter Redemptoris Missio.16

2. From Religion to Christianity, and then to Catholicism

§5. Weiler assumes that a reference to Christianity should (would?) be endorsed and advocated not only by Christians, but by many others, and very especially, Muslims, Jews and, in general, all other believers. This is so because the reference to Christianity highlights the importance of religion in personal and collective identities, something which all believers could agree upon; thus, all believers, Christian or not, should support an initiative which emphasises the importance of religion. They should be even more enthusiastic if they take into account the specific circumstances of the European context. First, to the author of Un’Europa Cristiana, the constitutional reference to Christianity is the path of least resistance towards a public recognition of the importance of religion in the European Union. Not only Christianity is the religion which has marked more deeply the identity of Europe and of Europeans, but is also the faith actually shared by more

16 And, it must be added, also the reverse, namely, revisiting the said encyclical letter from the experience gained in analysing European integration.
Europeans. Second, the other believers should acknowledge that their identity as Europeans is deeply determined by Christianism nonetheless. The identity of a European Jew or Muslim, according to Weiler, is deeply marked by Christianity, so in a sense they are Christians, too.

§6. Controversial as such claims are bound to be, they are likely to prove less contentious than Weiler’s definition of the core elements of Christian ethics by reference to Catholicism, and more specifically, to the canonical thinking of the Roman Catholic Church [28], as expressed in the encyclical writings of the Popes (referred extensively at several turns of his argument [cf., for example, 84, 95, 123ff, 157ff]). This move seems to be grounded on the need of having a clear reference standpoint, which allegedly would be provided by the canonical set of Papal writings. The position of the pope as ‘Supreme leader of the Roman Church’ provides a degree of certainty which the lawyer in Weiler seems to appreciate.

3. The two arguments in favour of a Christian Europe, in detail.

A) The constitutional argument

§7. As already indicated, Weiler claims that the common constitutional traditions require that the Preamble of any future Constitution should refer to Christian values as one of the defining goals of the process of European integration. [54, 61]. This constitutional argument is considered by Weiler himself as the most weighty, if not the decisive, claim of the book, precisely because it is a legal, and allegedly, objective argument. It is worth quoting at length:

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17 Weiler defines Christians in a thin or existential sense as those who follow Christian rituals in key moments of their life (birth, marriage, death) without necessarily defining their everyday identities by a partial or complete reference to Christian values or rituals [40]. He claims that thin Christians are a vast majority of the residents in all European states.

18 Weiler makes this argument only when referring to Europeans who define themselves as European Jews, but I guess this is only a matter of style, and he will be more than happy to extend it to Europeans who define themselves as European Muslims [92].

19 On the historical background of the position of the Pope, see, for example, B Tierney, Origins of papal infallibility, 1150–1350: a study on the concepts of infallibility, sovereignty and tradition in the Middle Ages (Leiden, E. J. Brill, 1972). As it is rather well-known, the First Vatican Council (1869–70) transformed infallibility into dogma.
“This claim does not express my religious preferences, or my understanding of what is best for Europe; to the contrary, this claim is based on my constitutional analysis, on what European constitutionalism requires to be done” [54].

§8. In its turn, the constitutional claim is composed of two-sub claims.

First, Weiler argues that there is an essential core of the European constitution, composed of the constitutional traditions common to the Member States. It is important to notice that Weiler considers that such a core is not open to be amended, not even in the process of writing a European constitution [58: “there are no absolute sovereigns in Europe, as even national parliaments have to respect the common constitutional traditions in the constitution-making process”, my italics].

This implies that Weiler understands the process of European constitution-making as basically one of elucidation of the common constitutional traditions, and not a process of constitution-making as usually understood in most national constitutional traditions, that is, one in which European citizens decide their common constitutional norms, certainly inspired by their constitutional traditions, but without being bound by them. To put it differently, Weiler claims that the validity of European constitutional norms will not stem from the fact that they have been posited, but from the fact that they will fit into the constitutional traditions common to the Member States.

Second, the transcendental constitutional core is structured by the principle of “constitutional tolerance” or “pluralistic tolerance”[70]. Or what is the same, the different national constitutional traditions are related to each other, and thus, become common, on the basis of tolerance of each other. This idea has become an explicit central theme of the recent works of Joseph Weiler, 21

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20 Luis María Díez-Picazo has rightly pointed that in a strict sense, the only pouvoir constituent was the French Constituent Assembly of 1789. See his ‘La Unión Europea en busca de su poder constituyente: reflexiones sobre la Convención y la Constitución’, on file with the autor. All processes of constitution-making cannot but follow the steps of the revolutionnaires. But even if we use the term in a less rigorous sense, it is clear that any constitution-making process which poses itself as amending a previously existing constitution differs markedly from a revolutionary process, which aims at marking a new constitutional beginning. Constitution-making in the Union is further marked by the fact that the process of integration itself can be reconstructed as a fusion of the constitutional horizons of the Member States. See Jürgen Habermas, ‘Constitutional Democracy: A Paradoxical Union of Contradictory Principles?’, 29 (2001) Political Theory, pp. 766-81 But this does not mean that any part of the Constitution is to be considered as forming part of hard core not amenable to amendment.

although one could see it as a guiding principle in most of his writings on the European Communities. Given the assignment of such a central place to the principle in his theory, it is worth quoting his definition of pluralistic tolerance:

“[T]he Principle of Tolerance finds its expression in [this] very arrangement (...) : a federal constitutional discipline which, however, is not rooted in a statist-type constitution”

This is based on the very idea of tolerance as a way of recognising the human character of the other, without failing to notice that the other has an identity of her own:

“The alternative strategy of dealing with the alien is to acknowledge the validity of certain forms of non-ethnic bounded identity but simultaneously to reach across boundaries. We acknowledge and respect difference, and what is special and unique about ourselves as individuals and groups; and yet we reach across differences in recognition of our essential humanity. What is significant in this are the two elements I have mentioned. On the one hand, the identity of the alien, as such, is maintained. One is not invited to go out and, say, ‘save him’ by inviting him to be one of you. One is not invited to recast the boundary. On the other hand, despite the boundaries which are maintained, and constitute the I and the Alien, one is commanded to reach over the boundary and accept him, in his alienship, as oneself. The alien is accorded human dignity. The soul of the I is tended to not by eliminating the temptation to oppress but by learning humility and overcoming it”

Pluralistic tolerance as a framing principle of a legal order requires all legal norms to reflect the concern for finding the appropriate way in which the other, that is, those who are not full members, those who are not as we are, should be treated [148]. The ultimate telos of the process of European integration would thus be to ensure that all national legal systems uphold the principle of pluralistic tolerance. This entails two things. One, the aim of “an ever closer Union” never becomes the forging of a full-blown political community, in the sense of one single political community. If the central

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23 Weiler, supra, fn 20, page 11
24 Thus, one can guess that for Weiler the principle of non-discrimination on the basis of nationality is the central principle of European constitutional law.
principle of Union law is *how to treat the other*, this entails that Europeans will remain *others* to each other. This might explain why Weiler has remained sceptic towards the idea of a full-blown Constitution for the Union, and manifested himself in favour of the constitutional status quo.\(^{26}\) Second, that the commonality of the *common* constitutional traditions should be respectful of the idiosyncrasies of each national constitutional tradition. This corresponds very well with the idea of the *common constitutional traditions* as a transcendental core of the European constitution, not open to be amended.\(^{27}\) And, as just indicated, to the idea of the fundamental law of the Union being Treaties playing the role of material constitution, and not a full-blown Constitution *in a political, democratic sense*.

§9. Having established and defended such a definition of what is common in the common constitutional traditions, Weiler might assume that he is just one step from having proven the correctness of his claim that the common constitutional traditions call for a reference to Christianity in the Preamble of the Constitution. If the *common constitutional traditions have to respect the defining elements of the national constitutional traditions* (pp. 61ff), then it is only necessary to show (1) that *some national constitutional traditions* make explicit reference to Christianity as part and parcel of the ethical values of the nation, (2) that such traditions can only be properly respected by an explicit acknowledgement of Christian values in the Preamble of the Treaty.

§10. All national constitutional traditions uphold the right to religious freedom, but they offer different interpretations of what this entails in the relationship between *public institutions* and the *churches*. The *French (and Italian) secular republicanism*, based on the bracketing of religious questions in the political sphere, requires a clear-cut separation between state and church. This contrasts with the *confessional turn* of some constitutions, noticeably the Irish (with its reference in the Preamble to the *Holy Trinity*), the German (with its reference to God), and the Greek, the Danish and the Maltese


\(^{27}\) Although Weiler introduces some doubts by qualifying his claim by reference to “within the limits of what is reasonable” [33].
constitutions (which proclaim on specific religion as a state religion), which seem to define the constitutional ethics in confessional terms.\textsuperscript{28} The constitutional traditions of the latter seem to comfort Weiler’s argument. They could be constructed as grounding an explicit reference to Christianity in the Preamble of any eventual European Constitutional Treaty.

§11. To the empirical argument on the present state of some national constitutional traditions, Weiler adds the contention that such traditions could only be properly respected in the commonality of national constitutional traditions by an explicit acknowledgement of Christian values as part of the ethical values of the Union. This is so even if some national constitutional traditions are clearly supportive of a secular, republican conception which would rule out such a reference in their respective national constitutions \cite{70}.

Weiler defends that the way to reconcile both kinds of constitutional traditions is by means of making explicit reference to both in the definition of the ethical values which underpin a European Constitution. In this sense, he claims that the 1997 Polish Constitution offers an example of how to reconcile in a genuinely neutral way, the concerns of those for whom Christian values are part of the essential constitutional values, and those for which this is not the case. The key sentence in the Polish Preamble is the following:

“We, the Polish Nation – all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources, equal in rights and obligations towards the common good” \cite{70}.

A fair solution could not be provided by the affirmation of the secular principle at the European level, Weiler adds. This would be so because such a principle is not neutral. For Weiler, secularism is to be properly conceptualised as protecting not so much religious freedom, but freedom from religion \cite{69}, which is not a neutral, but a partisan position. On such a basis, a secular Preamble which would avoid reference to any specific religion would be inadequate, as a denial of the constitutional sensibility of those

\textsuperscript{28} Weiler claims that further support could be found in provisions such as those on religious freedom in the Spanish Constitution, together with the specific mention to the Catholic Church as one of the confessions with which the Spanish State will establish agreements. This is rather doubtful, because religious freedom is perfectly compatible (I would say, especially compatible) with a secular view of the relationships between religion and politics. He also makes open-ended references to the English Constitution.
constitutional traditions where religion is stressed as part of the common collective values [69].

**B) The Historical argument**

§12. The *constitutional argument* is further supported by a *historical argument*. Weiler claims that the identity of individual Europeans, and of Europe as a Union, keeps on being heavily influenced by Christian values. This is so because *individual and collective identities* are heavily marked by the past of the community where one is brought up, and European history can simply not be explained without reference to Christianity (32).

§13. It is rather uncontroversial to sustain that no proper account of European history can obviate the role played by Christian religion, as a religious, moral and political force. One could go as far as claiming that if Christianity would not have become the predominant religion in most European countries, the history of Europe would have been extremely different. Weiler put this rather vividly in the following passage, with which one cannot but agree:

“It is not possible to write the ancient or the contemporary history [of Europe] without reference to Christianity. This would be as difficult as ignoring all the crosses in Europe’s cemeteries” (46)

To move from such observation to the claim that Christianity is an essential component of the *European identity* (32), Weiler implicitly adds the further premise that identity is *predetermined by history*, or more precisely, that the weight of the past is the *determining factor* in the shaping of individual or collective identities. This suffices to claim that the historical fact that Christianity has been central to the definition of what is to be a European requires that *contemporary Europeans* make a explicit reference to Christianity when they explicit their most fundamental ethical values, and thus, when they elucidate who they are now and who they aspire to become.

Indeed, Weiler comes close to render explicit such a claim when he argues that (1) an ethical community *can only be based on historical memory* [74: “we have already seen that to build up an ethical community, historical memory is much needed”]; (2) that individuals might have multiple identities [93], but they *cannot* (and should not) compartmentalise them [119, 136]. Thus, one can have different identities, but all of them *should be* active at any
point in time. One might be a Spaniard, a Catalan and an Anabaptist, but one is all those things at the same time, all the time.

II. Critical Analysis of the Book

§14. It is time now to offer a critical reading of the book. I will first challenge the constitutional and historical arguments in favour of an explicit reference to Christianity in the Preamble of the Constitution (sections 1 and 2). In my view, Weiler’s case is problematic because he fails to conceive the possibility of a European Constitution which goes beyond the consolidation of the common constitutional traditions, and also because he interprets wrongly the commonality of the common constitutional traditions, and thus fails to see that they are part of a process of political integration. Moreover, Weiler wrongly assumes that history not only shapes, but also predetermines, individual and collective identities. Finally, Weiler fails to provide any theoretical justification of his conception of pluralistic tolerance and of his criticism of secularism as the proper principle to determine the relationships between state and churches (section 3).

Having contested the core of his argument, I will dwell with some additional relevant claims: his choice to consider that the Catholic Church is a good representative of Christian thought (section 4), his insufficient consideration of the concrete legal consequences of a reference to Christianity in the preamble (section 5) his peculiar claims about the christophobic attitudes of all those who oppose his main claims (section 6) and, finally, his conception of a Christian history of Europe (section 7).

I. The Constitutional Argument criticised

§15. Weiler’s case for a reference to Christianity in the Preamble of the European Constitution relies heavily in his constitutional argument (§§7-11). There are two main reasons why the argument is much weaker than what Weiler claims it is.

29 In a different format, it would be necessary to explore in further detail the relationship that Weiler assumes between collective and individual identities. This will reveal his hard-core communitarianism. This explains his respect for the pre-political aspects of collective identities. See his ‘To be a European citizen: Eros and Civilisation’, 4 (1997) Journal of European Public Policy, pp. 495-519.
§16. First, there is a clear tension between the modern idea of Constitution and his understanding of the constitution as the elucidation of the common constitutional traditions. The modern understanding of the constitution is closely associated to the idea of the constitution as the law which the people give to themselves. Democratic authority is, thus, the ultimate source of validity of modern constitutions. However, we have already seen that Weiler defends a rather different conception of European constitution-making as a process through which the pre-existing basic legal norms are elucidated (cf. §8). Thus, he does claim not only that European Union law has actually been based on the common constitutional traditions of the Member States, but that such core of the European Constitution can only (if at all) be changed by the slow and autonomous amendment of each national constitution. True, Weiler's conception comes close to that proper of some national constitutional traditions, such as the British and, with some caveats, the pre-Weimar German one, which shared an understanding of the constitution as evolutionary, as the set of fundamental norms the wisdom of which has been tested by the passage of time. But such an understanding is not only minoritarian, but seems to be clearly on the retreat. Weiler can, of course, claim that he is not against intentional constitutional change, but only against conducting such change at the European level. Thus, as already hinted, a substantive change of the European constitution cannot be conducted through a pan-European constitution-making process, but through the amendment of, as of May 1st 2004, the twenty five constitutions of the Member States. But if this is so, Weiler has still to confront the fact that such

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31 This must be shared by any positivist or post-positivistic conception of law. See, for example, Robert Alexy, An Argument from Injustice, Oxford: Oxford University Press, 2002 and Jürgen Habermas, Between Facts and Norms, Cambridge: The MIT Press, 1996; and supra, fn 21.


A conception does not correspond to the *historical* practice of Treaty Amendment in the Union, and very specifically, to the *constitutional conception* which underlies the Laeken Declaration and the debates of the Convention. Not only Treaty amendment has increasingly been undertaken through procedures of a *constitutional* nature, but Treaties such as the Maastricht Treaty have led to changes in the core elements of the constitutional traditions of the Member States. Consider just the following two instances. By establishing the right to European citizenship, and by means of granting all European citizens the right to vote in the local elections of their place of residence, wherever that is in the Union, the Maastricht Treaty led to a major change in some *national constitutional traditions*. It suffices to consider the constitutional status of such a right in Germany before the Maastricht Treaty to notice the *transcendence* of such a change. The German Constitutional Court had expressly declared unconstitutional regional laws which granted the right to vote to citizens of other Member States of the Union resident in Germany. Less obviously, the Treaty resulted in a redefinition of the *free movement of capital* as an autonomous economic freedom applicable to all capital movements, including those to third countries, in stark contrast with what was the case *before*. This led to a major change in the *common constitutional traditions*, which had, by the way, massive implications for the balance between politics and markets, as it led to a virtual de-taxation of

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35 Cf. Article TEC 19 (ex Article 8b), inserted by the Treaty of Maastricht.

36 In the late 1980s, the land of Schleswig Holstein had established the right to vote in the land elections of the citizens of other Member States of the Communities. The German Constitutional Court invalidated such a statute in the name of the equation between democratic legitimacy, popular sovereignty and German citizenship. See BVerfGE 83, 60 II (20.2.1989) and BVerfGE 83, 37 II (31.10.1990). On this, see Rut Rubio, *Immigration as a democratic challenge*, Cambridge: Cambridge University Press, 2000, pp. 203ff.

37 See Article TEC 56, section 1 as amended by the Maastricht Treaty. The founding Treaties defined free movements of capitals as an economic freedom instrumental to the other three. This was changed first in ‘Directive 88/361 for the implementation of the free movement of capital’, OJ L 178, of 8.7.1988, pp. 5-18. The Community legislature was very conscious of the implications that such a redefinition had for the effectiveness of national taxation on capital income. Article 6.3 expressly stated that before the Directive entered into force, “The Commission shall submit to the Council (...) proposals aimed at eliminating or reducing risks of distortion, tax evasion and tax avoidance linked to the diversity of national systems for the taxation of savings and for controlling the application of these systems”. Nothing was done, not even after the Maastricht Treaty entered into force. This resulted in a dramatic decrease of the withholding taxes applied to the savings income of non-residents. More than a race to the bottom it is proper to speak of a race to zero. See also Sideek Mohamed, *European Community law on the free movement of capital and EMU*, Dordrecht and Stockholm: Kluwer, 2000. For an analysis of the negotiations leading to Monetary Union, see Kenneth Disson and Kevin Featherstone, *The Road to Maastricht*, Oxford: Oxford University Press, 1999.
certain types of capital income.\textsuperscript{38} This was especially problematic for the constitutional traditions which explicitly upheld constitutional principles of taxation.\textsuperscript{39}

Moreover, both the Laeken Declaration and the Convention on the Future of Europe have upheld a conception of the European Constitution in line with I have labelled the modern conception of the Constitution.\textsuperscript{40} It is obvious that the proposed text, no matter how it is assessed in substantive terms, goes clearly beyond the mere elucidation of the common constitutional traditions. It suffices to consider that the explicit affirmation of the principle of supremacy of Union law has been considered as rendering necessary the amendment of national constitutions before the ratification of the Draft Treaty.\textsuperscript{41} Finally, Weiler himself seems to endorse such a different conception of the Constitution when he describes, especially at the very end of the book, the legitimacy shortcomings of the Union. If one claims that the Union is no longer part of the solution to the legitimacy deficit of Member States, but part of the causes of such a deficit [186], and still one thinks that there is a need for such a thing as the European Union, it is difficult to avoid favouring an open-ended and conscious process of constitution-making,\textsuperscript{42} where the whole constitutional edifice of the European Union and the member states could be changed in such a way as to re-establish their democratic legitimacy.


\textsuperscript{39} The German Parliament introduced a withholding tax on savings income in 1987, at the rate of 10\% from January 1\,st, 1989. With the 1988 Directive in the books, the German tax was bound to be short-lived. Its application led to massive capital flight (Mohamed, supra, fn 37, at p. 133 estimates that 300 billion Deutschemarks ‘crossed’ the border) However, the repeal of the tax was constitutionally problematic, as it left untaxed a source of income. The German Constitutional Court found in 1991 that a tax, such as the income tax, would have to be considered unfair and consequently unconstitutional if compliance with the tax reached only a fraction of the tax base (which was the case after the repeal of the tax. Cf. 2 BvR 1493/89 BStB1 II 1991 at 654. This forced the reintroduction of some new form of withholding tax from January 1, 1993. However, this time the legislature introduce a generous annual exemption and, what is even more telling, exempted non-residents from the tax. This did not prevent a new capital flight. In fact, the very same day that the new tax was implemented, the Bank of Scotland placed advertisements in leading German newspapers offering investors interest on their capital without deduction of tax. Whether this has not led to a de facto change of German constitutional tax principles is, indeed, a good question.

\textsuperscript{40} Kokott and Rüth, supra, fn 32.


\textsuperscript{42} Indeed, Weiler could only escape that by seeking refuge in some kind of eschatological theory.
If these three claims are correct, then Weiler must come to terms with the fact that an eventual European Constitution needs not necessarily be framed by national constitutional traditions, but can innovate upon them. Even more to the point, Weiler is implicitly making a claim for a democratic, full-blown constitution. Whether this is coherent with Weiler’s own position is, indeed, a different question. At any rate, one cannot simultaneously claim that the Union has become part of the democratic problem and that Europeans should not give themselves a full-blown constitution. This observation has rather concrete consequences for Weiler’s main claim in Un’Europa Cristiana. Even if we were to accept that Christian ethics is part of the values which are upheld by the said common constitutional traditions, it will be within the full power of Europeans not to make a reference to Christian values in the Preamble to an eventual European Constitution.

§17. Second, it is not obvious that we should determine the content of the common constitutional traditions by reference to the principle of “constitutional tolerance” as defined by Weiler.

Any proper reconstruction of European Union law must highlight the central role played by the common constitutional traditions in the Union legal order. In fact, it can be argued that the founding Treaties were indeed a (partial) explicitation of the common constitutional traditions in the specific context of the process of integration. The Court of Justice was mandated to put flesh into the bones of the provisions of the Treaties by means of having resort to the common constitutional traditions. This is perhaps the best interpretation of Article TEC 164 (now Article TEC 220), which required the Court to “ensure that in the interpretation and application of this Treaty the law is ensured”. This points to the common constitutional traditions as the “deep constitution” of the Union in legal and normative terms. Indeed, this view allows us to understand the basic claims of the Court in its judgments in the paradigmatic cases Van Gend en Loos, Costa and Internationale, as the determination of what the common constitutional traditions required the

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43 What Weiler could still claim is that the Laeken process of constitution-making might fail to meet the standards of procedural and substantive legitimacy required by democratic theory. But this would be a rather different argument.

substantive and structural principles of the European material constitution to be.

But this does not mean that the commonality of the constitutional traditions of the Member States should be based on the full respect of the idiosyncrasies of national constitutional traditions. The goal of political and legal integration could simply not have been realised to the extent if this had been the case. Indeed, the Court of Justice has been outworking the common constitutional traditions in a critical comparative fashion, something which does not exclude considering that some national provisions, even of if of constitutional status according to national law, should be found in breach of Community law. Clear cut examples might be found in the cases Johnston and Tax on Export earnings.

In Johnston, the Court dealt with a conflict between the right to effective judicial protection as enshrined in the common constitutional traditions of the Member States and the British exclusion from the review of the Courts of the decision to deny women access to police jobs which required the carrying of fire-arms. Such exclusion was formally based on grounds of protection of national security, public safety and order, and substantially, on a certificate extended by the Secretary of State. The Court found that this resulted in an unlawful discrimination of women, even if it could be argued that such a division of work between the government and the judiciary was part and parcel of the British Constitution.

In Tax of Export Earnings, the Court had to decide on the legality of Greek tax exemptions granted to all exporting companies. It was crystal clear that a tax expenditure calculated by reference to the value of all exports, including those to other Member States of the Communities, was bound to be considered as a covered state aid. However, the Greek Constitution included a bold principle of non-retroactivity of taxation (cf. Article 78.2 of the Greek Constitution) which precluded the Greek legislature from requesting payment of the amounts of taxes unduly not collected. The principle of non-retroactivity of taxation seems to have been affirmed in such a principled way in order to avoid the repetition of previous bad experiences with politically motivated retroactive taxation. Despite such a constitutional obstacle, the Court ruled that the Greek tax expenditure was indeed state aid, and as such should be paid back.

46 See especially paragraph 20 of the judgment.
If this is so, Weiler’s constitutional argument would be on shaky grounds.

§18. Thirdly, even if we were to accept Weiler’s characterisation of the common constitutional traditions, it is not obvious that they will uphold making a reference to Christian values in the Constitution.

As was already indicated, Weiler must be interpreted as claiming that at the very least, the contents and shape of five of the constitutional traditions of the Member States support a non-secular definition of the European identity. This is so because the Irish and the German Constitution make express references to, respectively, the Holy Trinity and God in their preambles, while the Danish, Greek and Maltese constitutions affirm a state religion. A first problem with this argument is the heterogeneity of these provisions. On the one hand, the Irish constitution clearly comforts Weiler’s position. But the same cannot be said about the German constitutional invocation of God. The mere reference to ‘God’ clearly does not imply a reference to Christianity, as most religions indeed share a belief in some supreme being. Moreover, references to God can be found even in the parlance of agnostic or atheist, as a shorthand of an impartial critical standpoint. Finally, the very specific historical and social context in which the German Fundamental Law was written seems to advice great caution when drawing any conclusion from the reference to God in the Preamble of the German Constitution. It does not take much imagination to figure out that after the Holocaust, the reference to God could be understood as proper even by non-believers, as some kind of yardstick of individual and collective responsibility, which would render more difficult that the Holocaust will be repeated.

On the other hand, the establishment of a particular church is indeed good evidence of the affirmation of a non-secular conception of the relationships between politics and religion. Having said that, two things are far from obvious. First, whether the constitutional choice to establish a given Church in the three referred cases can be said to based on a common model

48 Some anecdotic evidence: Altiero Spinelli, far from being a believer in God, opened one of his most famous speeches before the European Parliament with the following terms: “Gott helf mir!” (God may help me!). See OJ, C, 19.11.1981, n° 277, p. 240-241. What could be argued is that the absence of a reference to God certainly implies a secular conception of the relationships between religion and politics. In this regard, see Isaac Kramnick and R. Laurence Moore, The Godless Constitution: the case against religion correctness, New York: Norton.
of the relationship between religion and politics. In that regard, it is obvious
that the Danish constitution implies a certain degree of control of religious
matters by the state, as the head of state is at the same time the ultimate
authority within the Danish Lutheran Church. The Greek Constitution
contains a lengthy provision which reflects the complex historical background
of the Greek Orthodox Church. By means of upholding the religious
authority of the Greek Holy Synod, the Constitution upholds a national state
religion, emancipated from Constantinople. Several cases before the
European Court of Human Rights, even if not concerning the Orthodox
Church, reveal that the Greek state sees itself as having authority on religious
matters. These two different solutions contrast with the Maltese model, if
only because the ultimate religious authority in Malta is the Pope, as head of
the Roman Catholic Church. This implies establishing a Church which is
neither national nor within the reach of the Maltese authorities. Second, and
more importantly, Weiler neglects the tension between the establishment of a
church and religious freedom. Indeed, the case law of the European Court of
Human Rights is good evidence of the far from easy relationship between an
official church and religious freedom. It is not far from implausible to claim
that the establishment of a given church is, in itself, against the best
interpretation of the common constitutional traditions, specifically, against
the conception of religious freedom upheld by them. This is why in each of the
three Member States with an established church, there is a debate on whether
this should cease to be the case, debate which is fostered by the rulings of the
European Court of Human Rights.

2. The Historical Argument criticised

§19. If Weiler’s constitutional argument is proved false, it is still possible that
the historical argument suffices to save the theses of the book. It seems to me
that this is, however, not the case.

49 See Judgment in the Case of Agga v. Greece, Application no. 37439/97, of 25.1.2000, available at
http://hudoc.echr.coe.int/Hudoc1doc2/HEJUD/200107/agga%20-%2037439jv.chb2%2025012000e.doc;
http://hudoc.echr.coe.int/Hudoc1doc2/HEJUD/200302/agga%20-%2050776jv.chb1%2017102002e.doc.

50 The Court has considered in different cases the different ways in which this could be so. In Darby
(17/1989/177/233), the Court considered tax discrimination. In more general terms, it must be added that,
in the Danish case, the religious freedom of the sovereign is clearly infringed. After all, she cannot make public
her religious choice without risking loss of her office. Indeed, this is an extreme case. I am indebted to professor
Ferlito for comments on this regard.
It was already said (§§12-13) that Weiler’s historical argument is crucially dependent on some premises that he does not formulate explicitly, which are: (1) that identities are \textit{predetermined by history}; (2) that \textit{an ethical community} (which is what the Union aspires to be) can only be based on \textit{memory}; (3) and that individuals can have multiple but \textit{not compartmentalised} identities.

I will leave aside here the, in my view, too liberal use of the word identity by Weiler, who does not draw a clear line between individual and collective identity. It seems to me that this is very much needed, and that many of the flaws in the argument are related to this. However, a proper discussion of the issue will exceed the purpose of this paper, and might not be necessary, as there are other, less demanding grounds on which the argument can be proved to be flawed.

No doubt, neither individual nor collective identities can be fully divorced from the individual and collective past. But it is open to discussion whether personal and collective identities could not be defined in ways which combine past and future, the historical background and the normative aspirations concerning who I/we want to become. Unless one is ready to defend a hard-core communitarian conception of identity, one must allow some \textit{forward-looking} element into the definition of individual and collective identities. This has clear consequences for Weiler’s claim. After all, most would accept that Christianity has been central to the individual and collective identity of Europeans, while simultaneously claiming that we should no longer define our identity in this way. The plausible grounds for this conscious bracketing are manifold. Boldly, it could be claimed that the equation of European-ness with Christianity is causally linked to recurrent wars among European peoples on apparently religious grounds, and also to European brutal colonial domination of other peoples. Colonialism was frequently justified in the name of \textit{Christian values}, and resulted in precisely the opposite of what Weiler aims at, namely a \textit{proper treatment of the other}.\textsuperscript{51} It might also be linked to the \textit{instrumentalisation} of genuine religious believes by political authorities.\textsuperscript{52} At any rate, it might be sufficient to argue that the flagging of a European Christian identity might be counterproductive in


\textsuperscript{52} An intelligent analysis is to be found in Isaac Kramnick, ‘Is God a Republican? Why Politics is Dangerous for Religion?’, \textit{The American Prospect}, September 1996.
terms of social inclusion within the member states of the Union. It might be the case that we run the risk of missing something when bracketing Christianity from our collective and individual identities, by turning religion from a public to a private affair, but it could also be the case that by affirming this element of our identity, we expose ourselves to even clearer and more present dangers, so to say. By means of defining the constitutional ethics in exclusive Christian terms, we are likely to obstruct the integration of those who are not only believers in other religion (or agnostic, or atheists), but also who experience legal, social and economic barriers to become full members of our society. In most European countries, citizens of Morocco, Algeria or Tunisia form a considerable part both of the foreign population, and tend to be occupied in lowly paid, work-intense jobs. It is clearly a wrong policy to add to the many different forks in the road to integration an exclusivist definition of the ethical values underlying the European Constitution.

§20. More specifically, it is an essential part of a viable political project to downplay the deadweight of the past, while emphasising what can actually constitute a common heritage. By claiming that ethical communities are based on memory, Weiler obfuscates a central question, namely, which specific kind of memory of the past is needed to forge a political community. This is clearly proved by the process of European integration, which is based on memory, but also on reinterpreting such memories in ways in which they can unleash a feeling of togetherness. If European integration rendered possible the reconciliation of France and Germany after centuries of war-making, this was so because both Germans and French could slowly but steadily detach a part of the past from their own collective identities. In this way, they were able to

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53 This is indeed a delicate question. Weiler seems to focus on the integrative effects that Christian identity might have among Europeans, but fails to consider the segregative effects that it might have upon those which are slowly becoming Europeans themselves. This is the case of immigrants, especially those who are not Christians in a thin sense (see supra, fn 9). The establishment of European citizenship might be normatively desirable, but it has been shown that, by means of excluding third country nationals from access to such a status, it engendered segregation at a local level. See Patrick Weil, 'The transformation of Immigration Policies: Immigration Control and Nationality Laws in Europe A Comparative Approach", European Forum Working Paper 5/98, Florence: European University Institute, 1998.

54 In this sense, a good deal of the suggestions of the Stasi Commission, not precisely those implemented by President Chirac, could be seen as offering a new interpretation of the secular, republican principle in line with the cultural pluralism of contemporary European societies. The report is available at http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf.

make those parts of their past history, and no longer part of their present identity.

3. The philosophical basis of pluralistic tolerance

§21. If both the constitutional and the historical argument fail, then Weiler is forced to present a philosophical argument in defence of his conception of “pluralistic tolerance”, that is, a normative case of why his pluralistic tolerance and not secularism à la française is not the best guiding principle of the relationships between state and church. Un’Europa Cristiana does not provide such an argument, dwelling as it exclusively does with the law and the historical record. It would be unfair to criticise Weiler for what the book is not about, and does not do. But it might be fair to say that it is hard to imagine how he could defend such a position, especially if he wants to take into account the moral learning which might be said to be embedded in Modern European history, and reflected in European constitutional traditions. Because toleration, be it constitutional or religious, seems to require an end to the idea and the symbols of a dominant religion, and to be based on a basic value agreement which, until proof to the contrary, is in my mind best operationalised by secularism.56

4. Why say Christianism if one means Catholicism?

§22. An intriguing turn of Weiler’s argument is his use of official Catholic teachings when in need of substantiating specific Christian values. Weiler seems to claim that this is done for purely practical reasons, as only in such a way it is possible to keep the argument within manageable boundaries. After all, a more precise and embracing characterisation of Christianity would require a previous theological (and sociological?) work of such a magnitude that a prompt answer to the relative urgent politico-philosophical questions addressed by Weiler would be rendered impossible.

Some limitation of the scope of the argument could indeed be considered as absolutely necessary in order to have a discussion on the matter. What is indeed problematic is to do so by means of picking up one variant of Christianism, and more specifically, Catholicism. In that regard, Weiler’s move

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is only justified by reference to numbers: European Catholics are the biggest contingent of European Christians, [29].

Even if this is accepted as a correct factual statement, the move is far from justified.

First, Weiler could have given concrete substance to the Christian in Christian Europe by reference to some common ecumenical denominator of Christianism, instead of picking up Catholicism. This is especially so once we take into account that he explicitly aims at a thin definition of Christianism. True, such an option will deprive Weiler of the ready references to encyclical letters; however, he could still rely on the works published in the matter, sufficiently adequate for, I insist, a thin characterisation of Christianism. One could even claim that such a solution would render Weiler’s argument more coherent, as it would be but one application of his conception of pluralistic tolerance, this time within Christianism itself. Ecumenism would be, indeed, the most adequate pluralistic reading of Christianism.

§23. At any rate, the choice of Catholicism is rather infelicitous. This is so for the simple reason that, not being grounded on good reasons, it could give the impression that the author has tried to render his case easier. After all, it is the Vatican that has been the main lobbyist in favour of an explicit reference to Christian values in the Preamble of the Charter, and later, of the Constitution. In pure anecdotic terms, it might be added that this might explain why Un’Europa Cristiana has been received with such wide applause by some of the most conservative movements within the Catholic Church. It was in the annual meeting of Communione e Liberazione, a deeply conservative movement active mainly in Italy, that Weiler first presented his book. And the publisher of the Spanish translation (Ediciones Encuentro) is associated to Opus Dei, also a Catholic movement siding in the far-right side of the political spectrum.

5. Real and present dangers: the case of abortion

This is tricky, given that he had previously argued for Christianity against other confessions on the basis of numbers. Weiler might be right that Christians in a thin sense are more numerous than believers of other religions in a thin sense, but can it be said that Catholics in a thin sense are more numerous than the believers of other religions in a thin sense?

I am referring to the Ecumenism of the sixties, but also to the New Ecumenism of the nineties. See, for example, Christos Yannaras, Towards a New Ecumenism, available at http://www.incommunion.org/Yannaris.htm. See also, in this regard, the on-line journal of Ecumenical Christianism, http://www.orthovox.org/.
§24. In stark contrast with his lengthy exposition on pluralistic tolerance, Weiler does not devote much time to a crucial question, namely, the concrete legal consequences of including a reference to Christian values in the Preamble of the Treaty.

It is not obvious that a reference to Christianity in the Preamble would be deprived of very concrete legal consequences. Not only this is precisely what some of the advocates of such a reference actually hope, but it is rather clear that the inclusion of any text in the Preamble could affect the interpretation of the provisions of the eventual European Constitution and, consequently, of the whole of European law. Moreover, such a reference would have clear political consequences besides its legal ones.

To start with constitutional interpretation, one can imagine that when the time comes to weight and balance fundamental rights protected by European and national constitutions, the reference to Christianity in the Preamble could be invoked as an argument in favour of rendering certain rights weightier than others. In that regard, we could wonder whether the reference to Christian values might not tilt the balance in favour of the official Church positions on, say, the right of women to interrupt their pregnancies, i.e., the right to abort. As it is well-known, the Court of Justice has already been confronted with the tension between the national prohibition of the right to abortion (concretely, in Ireland; but also Portuguese, and after enlargement, Polish and Maltese legislation deny women the right to decide whether to continue or interrupt their pregnancy) and the freedom of clinics providing abortion services to advertise their services across the Union. The Court decided the case in such a way as to avoid the direct balancing of these rights. However, it is not only conceivable, but also highly probable, that the question will arise again in the coming future. Moreover, it seems to me that the

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59 This is obviously so if the European Constitution is regarded as the foundational text of the European Union legal order. National constitutional traditions clearly uphold the idea that ordinary statutes and all other legal norms have to be interpreted in line with the Constitution.

60 Something which has not escaped astute observers, seeing through the debate. See Terrence Murray, ‘Europe debates God's place in new constitution: A divine reference is among the most contentious issues as delegates reconvene this month’, The Christian Science Monitor, 10 April 2003.

representatives of the Irish, Polish, Portuguese or Maltese states consider that an eventual reference to Christian values in the Preamble would indeed reinforce their constitutional solution, which deprives women of the right to decide whether or not to give birth. But should it? Can we simply hide behind the claim that abortion is an ethical question which should be decided by national constitutions, and not by the European one? The Grogan case shows that the degree of interdependence, social and economic, brought about by European integration renders simply hypocritical to rely on such a claim when we are confronted with the problem.

6. Christophobia or Papaphobia?

§25. *Un’Europa Cristiana* indulges in some side remarks at different points of the book on why the idea of a Christian Europe is so fiercely opposed. Indeed, Weiler claims to know the real cause that lies behind the formal arguments against a reference to Christian values in the Preamble of the European Constitution. In this dietrological spirit, he affirms that such cause is wide-spread cristophobia.

What the author means by that is not explicitly spelled out in the book, but the phenomenon is associated with five main social trends: (1) the tendency to consider the Vatican as partially responsible of the Holocaust; (2) the anti-religious philosophy of European leaders and intellectuals (the lot of Fischer and Straw), based on the diffused feeling that the Catholic Church tends to side with right-wing movements; this is supposed to be proved by the practice, still prevailing in some European Universities of obliging professors and researchers to declare their themselves as “free-thinkers” in a solemn document (i.e., thus, as thinkers emancipated from the authority of the Pope); (3) some kind of “envious resentment” against the central role played by the Catholic Church, very specially Pope John Paul II, in the liberation of Eastern Europe from Soviet oppression, which amplifies the resentment against the anti-Communist stand of Christian-Democratic Parties during the Cold War; (4) further animosity against the Pope on account of his popularity among the youth, unaffected by his preaching of a “strict” sexual morality; (5) the confusion between religious neutrality and the secular,

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62 In a jocular mood, one is tempted to conclude that this will also apply to this review.

63 I take the licence to use this Italianised term, which literally means what is behind. “Dietrologia” is indeed a term which refers to the spurious science of working out what is behind appearances.
republican conception of the state; or what is the same, the equation of religious freedom with freedom from religion.

Obviously enough, these are rather different things, and a proper analysis will require considering them. But this would render too long this review, and such an analysis is probably besides the interests of its eventual (few) readers.

What can be said in not too many words is that Weiler fails to observe that what to him look as prejudices, could seem to others (including Christians themselves) very good reasons to oppose his thesis. And that what he labels rather extravagantly as cristophobia might be more properly labelled as papa-phobia (i.e., opposition to the positions defended by the Pope).

At any rate, the claims are rather over-stretched. To consider the first claim, Weiler states that it is wrong to allocate a part of the blame of the Holocaust on the Vatican given that many of those who managed to escape from such a horrible fate expressed their gratitude to the Vatican. Perhaps Weiler has a more extensive case to make, but expressed in these terms, this is simply a non-starter (the Vatican could have helped some victims, while actively or passively acted in ways which rendered more likely that others were slaughtered). Indeed, the attitude and the responsibility of the Vatican on the matter are far from being open to a simplistic analysis. But it is increasingly undisputable that the attitude of the Pope Pius XII and a part of the clergy was, decorously speaking, passive: we cannot but conclude that the Pope and his close advisers failed to make use of his power (at least try to make use of it) in order to comply with what we can assume was his moral duty, namely, to help the victims and oppose the prosecution of Jews, Gypsies, homosexuals and others who ended up being killed in the concentration camps. Truly, many priests and rank and file Catholics showed a gigantic moral stature and risked their lives to save those prosecuted. But one thing is the Vatican, and another is the faithful. Having said that, what truly escapes my understanding is what is the relation between acknowledging these facts and being christophobic. After all, some of the historians who have been active in getting the historical record straight are Catholics. Are they also christophobic? At most, they could be said to be Papa-phobic.

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§26. To this, it must be added that Weiler gets the record rather wrong in the main example of institutionalized christophobia to which he refers, namely, the Charter Convention which consolidated the acquis communitaire on the protection of fundamental rights.\footnote{OJ C 364, of 18.12.2000, pp. 1-22. A critical analysis in Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez, The Chartering of Europe, Baden-Baden: Nomos, 2003.} Weiler claims in page 96 that “at the very end, a compromise solution was put forward, on the basis of which the European religious heritage” will be mentioned explicitly in the Preamble of the Charter. The rejection of even such moderated proposal constitutes, in Weiler’s mind, a clear instance of cristophobia at work. But if we consider the argument in some more depth, we might wonder whether this is the case. The author fails to identify those who rejected the formula, but we know that opposition was led by the representative of the French Government, Mr Guy Brabant. So he is the main suspect of cristophobia, one could assume. Given that the secular conception which Weiler abhors finds in the French constitutional tradition a paradigmatic defence, this is not very surprising. What Weiler fails to mention is that the christophiles (perhaps an apt term to refer to those who favoured the mention to religion in the Preamble of the Charter) ended up accepting a compromise in which the reference to the religious heritage was dropped in exchanged for a stronger and weightier definition of the right to private property in Article 17 of the Charter.\footnote{See Justus Schoenlau, ‘New values for Europe? Deliberation, compromise, and coercion in drafting the preamble to the EU Charter of Fundamental Rights’, in Eriksen, Fossum, Menéndez, supra, fn 62, pp. 112-32, at pp 125ff.} If Mr Brabant was the christophobic, what would be the appropriate characterisation for the christophiles who accepted this marchandage? I do not know and prefer suspending judgment. My point is a more simple one, namely, that this dietrological approach can be proven to be rather incoherent, and as such, inadequate in a serious political pamphlet.

7. A Christian Narrative of European History

§27. Weiler also devotes a considerable number of pages of the book to what he characterises as a Christian history of Europe (with specific reference to the basic legal norms of Union law, 118 and ff, and the welfare state, 160).

It seems to me that Weiler is in reality doing something else, namely, a constitutional reconstruction of the process of European integration from a
Christian standpoint. Which is something valuable in itself, as it renders explicit to Christians the reasons why they should find the process of European integration worth of praise (and criticism)? In this regard, one can see much of the lawyer in Weiler when he argues that “the meaning of the process [of European integration] is to a very good extent what we want it to be, by means of selecting what we want it to be”. Indeed, Weiler is claiming that his Christian reading is based in one of the usual methodologies which jurists apply constantly, namely, the retrospective reconstruction of the legal order from a specific normative standpoint.\textsuperscript{68} Indeed, one could claim that some kind of overlapping consensus on European integration would require many efforts of that kind.\textsuperscript{69} However, and rather quite obviously, the methodological imperatives of a legal reconstruction and of a historical reconstruction are not the same, if only because truth means different things in each context.

If such a distinction is found appropriate and convenient, it can be said that Weiler provides a reconstruction of Union law which associates it to Christian values. This is rather different from putting forward a full-blown historical narrative of European integration, which could not avoid considering complex causal links, and in which (at most) Christian actors and values could only be part of the explanation. The obvious problem is that without aiming at a full-blown historical reconstruction, Weiler cannot draw much support for the theses of the book. A reconstruction from a Christian standpoint is far from being sufficient to claim that Christian values played a major causal role in the forging of the European Communities.

**Conclusion**

Weiler’s principle of constitutional tolerance can be said to be but a specific conception of the federal principle. As it is well-known, a federal view of the Union does not entail claiming that the European Union is a federation, because one thing is the federal principle and another one the institutional form of the federation. But a federal view of the Union requires striking the right balance between commonality and difference in the Union.

A political community needs some kind of we-feeling, that is, some kind of collective identity which influences the individual identity of all its members. *Un’Europa Cristiana* is an engaging political pamphlet that deals with this vexing question. As such, it masterfully sets some of the most pertinent questions for the future of Europe. Weiler is very right in claiming that the sustainability and resilience of European integration is crucially dependent on the explicit recognition of the political character of the European Union, on the forging of a European (political) identity. This requires a serious discussion about the purposes of integration, what is pompously and ceremoniously labelled as the *finalité* debate. Europeans should become conscious of *why they are together*, the rationales of what has been achieved and of what *must* be achieved in the future. It also seems to me that Weiler is also right in claiming that the relationship between personal and collective religious and political identities is one of the key issues which Europeans should consider, not only as nationals of a Member State, but also as European citizens.

But it seems to me that even if Weiler poses some of the right questions, most of his concrete answers are simply wrong. Weiler is wrong in sustaining that the common constitutional traditions of the Member States make it necessary that the Constitution of the Union anchors its value-basis to Christian ethics. Not only a proper Constitution of the Union would not be bound by the present shape of European constitutional traditions, but the common constitutional traditions, as they stand now, do not require an explicit reference to Christianity. His claim that the individual and collective identities of Europeans are unavoidably shaped by Christian values is only tenable if we uphold a rather simplistic relation between history, memory and

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Footnote 70: Having said that, Weiler is too much focused on this aspect, and rather neglects two further central questions, namely (1) the co-relationship between the increased frustration of European citizens with the national and with the European levels of government and the embryonic stage of actual political decision-making at the European level; without a bold decision to establish a political structure of decision-making open to political participation of European citizens, the very possibility of *political action*, both at the national and at the European level would be lost. Many decisions which affect the lives of European citizens are no longer taken by member states, but cannot be taken by the Union either. Indeed, there has been a transfer of decision-making from the *political to the economic sphere* in many domains, including a good deal of taxation and spending policies. The forging of a political identity is both a pre-condition and a consequence of the progressive affirmation of European politics; (2) the close relationship between the forging of a European identity and the establishment of a full-blown European community of economic risks; the process of European integration has resulted in the Europeanisation of the legal and economic framework of economic activities, but it is still to result in the forging of sufficiently strong solidaristic elements at the European level which would render possible the cushioning of the true European acquis for most European citizens, namely, the welfare state.
identity. There are very good substantive reasons why our collective identity should not contain reference to Christian values. Among such reasons are the devastating consequences of holding fast to such association in the past (imperialism, war-mongering in the name of religion, manipulation of religious feelings by authorities in their own self-interest). But perhaps even more importantly, we should avoid identifying being a European with being a Christian if we really want to make integration possible for all Europeans, whatever their religious beliefs are.