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## Promises to Keep and Miles to Go: A Look at Europe Poised Between Two Treaties

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# PROMISES TO KEEP AND MILES TO GO: A LOOK AT EUROPE POISED BETWEEN TWO TREATIES

SINGULAR EUROPE: ECONOMY AND POLITY OF THE EUROPEAN COMMUNITY AFTER 1992. (William J. Adams ed.) Ann Arbor: University of Michigan Press, 1992. viii + 388 pp.

EMIL J. KIRCHNER, DECISION-MAKING IN THE EUROPEAN COMMUNITY: THE COUNCIL PRESIDENCY AND EUROPEAN INTEGRATION. Manchester & New York: Manchester University Press, 1992. ix + 165 pp.

*Reviewed by Willajeanne F. McLean\**

L'Europe ne se fera pas d'un coup ni dans une construction d'ensemble: elle se fera par des réalisations concrètes créant d'abord une solidarité de fait . . . .<sup>1</sup>

With those words, Robert Schuman, Foreign Minister of France, helped to launch a bold new initiative: a "joint venture" of former allies and enemies. The goal of the partnership was to preclude any new conflicts between old enemies.<sup>2</sup> As Schuman guessed, Europe has not been "built all at once," but has evolved, through progressive stages from a common market to an internal market, and has now transformed itself into a European Union.<sup>3</sup> Not surprisingly, the progressive advancement of Europe has not occurred without periods of stagnation, internal struggles, or self-reflection.

The books *Singular Europe: Economy and Polity of the European Community After 1992* (*Singular Europe*), edited by William J. Adams, and *Decisionmaking in the European Community: The Council Presidency*

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1. "A United Europe will not be achieved all at once, nor in a single framework: It will be formed by concrete measures which first of all create a solidarity in fact . . . ." Schuman Declaration of May 9, 1950, in DOCUMENTS ON INTERNATIONAL AFFAIRS 1949-50 (Margaret Carlyle ed., 1953) (translated in 22 DEP'T ST. BULL. 936-37 (1950)).

2. "The uniting of the European nations requires that the age-old opposition between France and Germany be culminated . . . ." *Id.*

3. The Treaty on European Union was signed in Maastricht on February 7, 1992, and, entered into force on November 1, 1993. See TREATY ON EUROPEAN UNION [TEU].

and *European Integration (The Council Presidency)*, by Emil J. Kirchner, provide background and insight to a Europe poised between two treaties — one creating a common market<sup>4</sup> and one creating an economic union. Though the European Community (EC) has already taken another leap and moved from the concept of an internal market to that of a European Union, *Singular Europe* remains of interest, as it evaluates not only the challenges posed to Europe in its efforts to complete the internal market, but also predicts the problems a single Europe would face post-1992.

The book *Singular Europe* examines the problems inherent in establishing an “ever closer union.”<sup>5</sup> Cleverly timed to be published in 1992, and thus to coincide with the completion of the much-heralded internal market,<sup>6</sup> the book offers the reader, concerned with the impact of Project 1992, a wide range of subject matter from social policy, to economics, to corporate strategy.<sup>7</sup> In doing so, the book proffers the opinions and insights of those who have observed, and contributed to, the progressive integration of the Member States into a single internal market. The strength of *Singular Europe* is in its diverse offerings. Paradoxically, this is also its weakness — the multiplicity of authors have worked together to create a book whose content varies in style, substance, and application.<sup>8</sup>

4. The Treaty establishing the European Economic Community was signed in Rome on March 25, 1957 and entered into force on January 1, 1958. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY].

5. The phrase “ever closer union” first appears in the preamble to the EEC Treaty, which states that the signatories of the Treaty are “[determined] to lay the foundations of an ever closer union among the European peoples.” See EEC TREATY pmbl. It should be noted that since the ratification and entry into force of the TEU, the term “European Community” (EC) replaces the term “European Economic Community” throughout the EEC Treaty. See TEU art. G(A). For an interesting account of the difficulties in naming institutions post-TEU, see Editorial Note, *Names After Maastricht*, 1 C.M.L.R. 4 (1994).

6. Project 1992 generated much curiosity, consternation, and concern, not only in the United States, where businesses, seemingly overnight, were established to combat “Fortress Europe,” but also in Europe as well. See generally Michel Waelbroeck, *The Role of the Court of Justice in the Implementation of the Single European Act*, 11 MICH. J. INT’L L. 671, 671 (1990) (remarking that an unnamed Member State designated a Secretary of State to deal with the problems resulting from 1992); Claus-Dieter Ehlermann, *The “1992 Project”: Stages, Structures, Result and Prospect*, 11 MICH. J. INT’L L. 1097, 1112 (1990) (noting that concerns within and outside the Community focused on remaining competitive in the internal market).

7. For an idea of the richness of diversity offered by *Singular Europe*, see, e.g., Stephan Leibfried, *Europe’s Could-Be Social State: Social Policy in European Integration After 1992*, in SINGULAR EUROPE: ECONOMY AND POLITY OF THE EUROPEAN COMMUNITY AFTER 1992 97 (William J. Adams ed., 1992) [hereinafter SINGULAR EUROPE]; Tommaso Padoa-Schioppa, *Key Questions on Economic and Monetary Union*, in SINGULAR EUROPE, *supra*, at 55; Alexis Jacquemin, *Corporate Strategy and Competition Policy in the Post-1992 Market*, in SINGULAR EUROPE, *supra*, at 125.

8. It should be noted that the chapters which comprise the book were originally presentations made by the various authors at seminars on Europe after 1992. Furthermore, *Singular Europe* is primarily aimed at managers and government officials concerned with the implications of Project 1992, and to scholars of the European economy and market. Thus, it was not written with legal academics or scholars in mind.

*The Council Presidency*, on the other hand, has not only one author, but also has a single focus, that of the role of eight Council presidencies in the years between 1986 and 1989, a period which not only coincides with the signing of the Single European Act (SEA) and its implementation, but also with the accession of Spain and Portugal as new Member States.<sup>9</sup> Read in tandem with *Singular Europe*, it provides fascinating insight into the way in which the Council Presidency has helped to shape the decisions that are made in the Community.<sup>10</sup>

Despite the apparent differences in focus and tone, both books illustrate that the concerns regarding European institutional competency and legitimacy raised pre-1992 are no less important post-Treaty on European Union (TEU).

### I. DEFINING THE PROBLEMS OF LEGITIMACY IN A "SINGULAR EUROPE"

*Singular Europe*, like Gaul, is divided into three parts.<sup>11</sup> The first part entitled "A New European Community?" explores the problems engendered by a "singular Europe." It is the most interesting part of the book, and the most relevant at the present time, because its discussion centers around the issues that will help determine the level of success that the European Union will achieve. Broadly, the areas examined delve into the problems of political legitimacy of Europe's governance by centralized institutions, the economic and monetary implications created by the internal market, and the existence of impediments to competition. The first part also focuses on the impact that the internal market would have on social policy, and it raises questions regarding the concept of subsidiarity,<sup>12</sup> which was relatively unused in Community parlance prior to the SEA.<sup>13</sup>

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9. See EMIL J. KIRCHNER, *DECISION-MAKING IN THE EUROPEAN COMMUNITY: THE COUNCIL PRESIDENCY AND EUROPEAN INTEGRATION* 3 (1992).

10. Although *The Council Presidency* was written in 1991, it is not dated because its focus is more historical than that of *Singular Europe*.

11. "Omnia Gallia in tres partes divisa est." See JULIUS CAESAR, *COMMENTARII DE BELLO GALLICO*.

12. See George A. Bermann, *Subsidiarity and the European Community*, 17 HASTINGS INT'L COMP. L. REV. 97 (1993) ("subsidiarity stands for the principle that a legitimate government objective should be taken at the lowest level of government capable.").

13. The concept of subsidiarity was not new in 1989, but was a principle developed by the Roman Catholic Church in 1931. See *id.* See also Deborah Z. Cass, *The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers Within the European Community*, 29 COMMON MKT. L. REV. 1107, 1110-28 (1992) (developing the history of the principle of subsidiarity). It made its first appearance in the Draft Treaty Establishing the European Union. See Draft Treaty Establishing the European Union, EUR. PARL. DOC. (COM

An area of concern raised in *Singular Europe* involves the Community's institutional ability to act in the absence of popular agreement.<sup>14</sup> The problem with legitimacy is not new, but preexisted the ratification of the SEA.<sup>15</sup> Not surprisingly, some of the problems now faced by Europe seem to redound from this very fact — that Community institutions empowered themselves to fill in the lacunae of the Treaties, seemingly in a vacuum, and without the blessings of their constituents — “the little people.”<sup>16</sup>

The European peoples are represented by the European Parliament,<sup>17</sup> whose members are elected by national ballot.<sup>18</sup> However, the European Parliament has the weakest role of the Community institutions. Thus, the voice of the European peoples was not necessarily the voice of God.<sup>19</sup> With respect to legislative initiatives taken by the Commission,<sup>20</sup> and passed on to the Council for implementation,<sup>21</sup> the EEC Treaty gave the Parliament a limited consultative role, subject to the “conditions laid down by the

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1-1200/83/A) 7 (1983); Cass, *supra*, at 1116. The concept was then placed in the SINGLE EUROPEAN ACT [SEA] art. 130(r), and was given greater visibility in the TEU art. 3b.

14. The problem of legitimacy is explored in Joseph H. Weiler, *After Maastricht: Community Legitimacy in Post-1992 Europe*, in *SINGULAR EUROPE*, *supra* note 7, at 11.

15. *See id.* at 19.

16. This is a feature of the SEA and the TEU that was not lost on Baroness Thatcher. *See* Nikki Knewstub, *Thatcher Warns On Powers In Treaty*, *GUARDIAN*, June 8, 1993, at 6 (Baroness Thatcher notes that the TEU “is an overwhelming centralization of decision by bureaucracy at the expense of democracy and the accountability of the electorate.”) She also noted that the SEA had resulted in excessive regulation by the European Commission. *Id.* *See also* Brian Beedham, *Ask the People About the Big Decisions*, *INT’L HERALD TRIB.*, Sept. 22, 1992, at 8 (discussing legitimization by the peoples of Europe and concluding that the decisions should be “left to the little people.”).

17. The EEC Treaty provides for the representation of the peoples of the States. *See* EEC TREATY art. 137.

18. It is only since 1979 that elections to the Parliament were by national ballot. Prior to that time, the representatives consisted of delegates designated by the national parliaments of the Member States. *See* Act Concerning the Election of One Representative of the Assembly by Direct Universal Suffrage, 1976 O.J. (L 278) 5.

19. “Vox populi, vox dei (“The voice of the people is the voice of God.”).”

20. The Commission is the Community organ entrusted with ensuring the proper functioning and development of the Common Market. *See* EEC TREATY art. 155. It is the Commission which has the responsibility, *inter alia*, for proposing legislation to the Council. For a full discussion of the powers attributed to the Commission, see generally Juliet Lodge, *EC Policymaking: Institutional Dynamics*, in *THE EUROPEAN COMMUNITY AND THE CHALLENGE OF THE FUTURE* 1, 13 (Juliet Lodge ed., 2d ed. 1993).

21. The Council is the Community institution that is charged with “ensuring the achievement of the objectives set out in [the] Treaty.” *See* EEC TREATY art. 145. It achieves its tasks, ensuring the coordination of the general economic policies of the Member States, in cooperation with the Commission, which proposes the legislative action to be taken up by the Council, and, since the ratification of the SEA, the Parliament. *See infra* text accompanying notes 81–93 for a discussion of the Council and its Presidency.

Council in its rules of procedure."<sup>22</sup> In addition, the EEC Treaty provided that the Parliament may censure the activities of the Commission, and upon a two-thirds vote, the entire Commission must resign and be replaced.<sup>23</sup> The Parliament also has limited supervisory powers over the Commission through its power to ask questions to which the Commission must respond, thereby enabling the Parliament to take part in the activities of the Commission.<sup>24</sup> Its most significant function, however, is to decide whether or not to approve the budget.<sup>25</sup> Despite its budgetary authority, the Parliament has not frequently refused to approve the budget, in part because it had no power to prevent budgetary allocations from being exceeded.<sup>26</sup>

After the amendment of the EEC Treaty by the SEA, the Parliament's role in decisionmaking was bettered, but was not much improved.<sup>27</sup> The SEA enhanced the Parliament's legislative role by providing for a parliamentary cooperation procedure,<sup>28</sup> in which it would have the ability to review the Council's position on proposed legislation from the Commission.<sup>29</sup> While conferring these limited legislative powers on Parliament

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22. See EEC TREATY art. 140.

23. See EEC TREATY art. 144. It should be noted that the Parliament has never successfully censured the Commission, and has only threatened it twice. See Lodge, *supra* note 20, at 26-27.

24. See EEC TREATY art. 140.

25. See EEC TREATY art. 203. *But see* Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2467 (1991) (noting that "the Parliament's budgetary powers . . . do not affect the crucial areas of budgetary policy . . .").

26. See Lodge, *supra* note 20, at 27 (noting that it was not until 1988 that the Parliament had the power to prevent excess allocations by the Commission); KIRCHNER, *supra* note 9, at 7 (noting that the dominant role exercised by either the European Council or the Council of Ministers in the budgetary process has kept Parliament powers to a minimum).

27. See EEC TREATY art. 149, *as amended* by SEA art. 7 (which introduced a cooperation procedure). For a discussion of the cooperative procedure, see also *infra* note 28.

28. The cooperation procedure prevents the Council from making a final decision on a Commission proposal of legislation without first consulting the Parliament and requires the Council first to reach a "common position" by qualified majority. Once the common position has been reached, the position is referred to the Parliament which has three months to take one of four steps: (1) approve the Council position; (2) leave the matter undecided; (3) amend the position by absolute majority; or (4) reject the position, also by absolute majority. If the Parliament either approves the position or leaves it undecided, the Council may proceed to act on the common position. If the Parliament amends the proposal, the Commission is given one month to review the Parliament's amendment. After the Commission's review, the Council has three months in which it may: (1) adopt the Commission's revised proposal by qualified majority; (2) adopt Parliamentary amendments not adopted by the Commission by unanimity; (3) amend the Commission's proposal by unanimity; or (4) fail to act. See EEC TREATY art. 149, *as amended* by SEA art. 7.

29. The cooperation procedure was limited, *inter alia*, to the following areas: free movement of workers, EEC TREATY art. 49, *as amended* by SEA art. 6(1); mutual recognition of degrees, EEC TREATY art. 57(1), *as amended* by SEA art. 6(1); and harmonization measures for the completion of the internal market, EEC TREATY arts. 100a, 100b, *as amended* by SEA art. 6(1).

helps to increase democratic legitimacy, there is still a need for social legitimacy; that is, the democratic government process must allow all to be heard, thereby ensuring the notion of fairness.<sup>30</sup> However, in *Singular Europe*, it is contended that the problem of democratic legitimacy was only partially ameliorated by the SEA, because the procedures inaugurated in the Act still did not give enough decision-making power to the constituents and beneficiaries of Community legislation.<sup>31</sup>

The need to harmonize national legislation by the deadline of December 31, 1992, which was occasioned by the SEA,<sup>32</sup> shifted the emphasis and impetus for legislative initiative from the national governments to the Community within the areas covered by the SEA. This, in turn, ensured that the national governments (and their residents) were less empowered. Thus, even with new powers conferred upon the Parliament by the SEA, the problems of legitimacy of the Community vis-à-vis the national government remained: a "single Europe" was still in the position to override individual national interests.

Since the publication of *Singular Europe*, the TEU has given more power to the Parliament.<sup>33</sup> In article 189b, the TEU provides for extensive legislative cooperation between the Parliament and the Council.<sup>34</sup> In

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30. Weiler, *supra* note 14, at 19–20.

31. *See id.* at 12–14.

32. Article 8A of the SEA proclaims that "[t]he Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992 . . . ." SEA art. 8A.

33. The TEU has inaugurated a new codecision procedure whereby proposals for legislation are submitted to both the Council and Parliament. TEU art. 189b. The codecision procedure applies, *inter alia*, to legislation in the areas of free movement of workers, EEC TREATY art. 49, *as amended* by TEU; the right of establishment, EEC TREATY art. 57, *as amended* by TEU; and also to new areas of competence created by the TEU, such as health, TEU art. 129(4), and consumer protection, TEU art. 129a(2).

34. *See* TEU art. 189b. The codecision procedure has been described as "even more complicated than parliamentary cooperation." *See* Roger J. Goebel, *The European Community and Eastern Europe: "Deepening" and "Widening" the Community Brand of Federalism*, 1 NEW EUR. L. REV. 163, 209 (1993). Broadly, the codecision procedure calls for the Commission to submit a proposal to the Parliament and the Council. The Council, after obtaining an opinion from the Parliament, acting by qualified majority, adopts a common position. The Parliament may approve the position, reject the position, or propose amendments.

If the Parliament and the Council do not reach agreement on amendments suggested by the Parliament, the President of the Council, in agreement with the President of the Parliament, is to convene a meeting of the Conciliation Committee, composed of members of the Council or their representatives and an equal number of representatives of the European Parliament, who have the task of reaching agreement on a joint text by qualified majority.

If the Conciliation Committee approves a joint text, then it is given to the Parliament and the Council, which are given a period of six weeks to adopt the act in question. If one of the two institutions does not adopt the act, it is not successful.

If the Conciliation Committee does not approve a joint text, the proposed act fails unless the Council, acting by qualified majority, confirms the common position to which it agreed before the conciliation procedure was begun (possibly including the amendments made by the

addition, the Parliament has the right to approve the Commission prior to its appointment,<sup>35</sup> and to give assent to international agreements or legislative initiatives that influence the budget.<sup>36</sup> It also has the right to request that the Commission submit proposals on matters in which the Parliament considers that a Community act is required.<sup>37</sup>

Yet in order to have a "social legitimacy," it is suggested that there must also be a broad societal acceptance of the system.<sup>38</sup> However, in a system such as that presently found in Europe, whether post-SEA or even post-TEU, social legitimacy and democracy may be at odds with each other.<sup>39</sup> That is, it may be more difficult to create a democracy in which the constituency (or in this case, the Council) has a unanimous voice, particularly when the system of government is still evolving, because the condition of unanimity could, and did, impede any controversial draft legislation, and acted as a veto on key issues.<sup>40</sup>

Thus, in order to achieve the stated, and central, objective of creating an internal market, the EEC Treaty needed to be amended in order to remove some of the obstacles to integration. The Member States recognized that with a requirement of unanimity, it would be more difficult to achieve the objectives of Project 1992; therefore, they agreed to majority voting.<sup>41</sup> In doing so, however, the goal of social legitimacy was, in the short term, relinquished.

Professor Weiler, in his contribution to *Singular Europe*, predicted that sacrificing social legitimacy for further integration would result in an increase in the number of conflicts of authority between the national governments and the European institutions.<sup>42</sup> It appears that this prediction

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Parliament). In this case, the legislation in question is adopted unless the Parliament, within six weeks of confirmation by the Council, rejects the text by an absolute majority of its component members, in which case the act is not adopted. TEU art. 189b. For a chart detailing the codecision procedure, see Lodge, *supra* note 20, at 30.

35. See TEU art. 158.

36. See *id.* art. 228.

37. See *id.* art. 138b.

38. See Weiler, *supra* note 14, at 19.

39. *Id.* at 20.

40. The Luxembourg Compromise, reached by the six Member States in 1966 to diffuse a constitutional crisis, allowed Member States to designate decisions which would normally require a qualified majority vote, as "very important issues." This designation meant that no vote would be taken on these issues until the Member States could reach unanimous agreement. See generally Anthony L. Teasdale, *The Life and Death of the Luxembourg Compromise*, 31 J. COMMON MKT. STUD. 567 (1993).

41. See Weiler, *supra* note 25, at 2458 (discussing the impetus of realizing the objectives of the White Paper as grounds for the switch to majority voting); Teasdale, *supra* note 40, at 573 (discussing the drive within the Council to move to majority voting to allow the completion of the single market).

42. See Weiler, *supra* note 14, at 26.



has rung true. For example, during the summer and fall of 1993, the U.S.-EC negotiations on agriculture for the General Agreement on Tariffs and Trade (GATT) were imperiled by the demands of the French, who felt that the Community representatives were selling short the interests of the French farmers.<sup>43</sup> Not only did the French Prime Minister protest,<sup>44</sup> but also the farmers took to the streets.<sup>45</sup>

Another issue tackled in *Singular Europe* concerns the limits of Community competence.<sup>46</sup> Initially, the Community, speaking through the European Court of Justice, defined its powers as residing in limited areas.<sup>47</sup> However, over the course of time, the Community's sphere of competence was enlarged, both legislatively and by judicial fiat.<sup>48</sup> The first legislative expansion of competence occurred with the ratification of the SEA. Under the Act, the Community's powers were extended into domains once thought to be within the exclusive jurisdiction of the national governments.<sup>49</sup> As one might expect, these encroachments by the

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43. See generally *French Farmers in Trade Protest*, Press Association Limited, July 7, 1993, available in LEXIS, Press Association Newsfile (where the representative of a farmers' union noted that the farmers were under the impression that the French government would concede on agricultural issues).

44. See Teasdale, *supra* note 40, at 576-77 (discussing the protests of various French Prime Ministers regarding the U.S.-EC negotiations on agriculture).

45. See *Angry Farmers Invade Euro-Disney*, Press Association Limited, Sept. 17, 1993, available in LEXIS, Press Association Newsfile (farmers campaigning against a US-EC agricultural accord); Kathryn Hone, *Farmers Protest in Rain at GATT Deal*, IRISH TIMES, Sept. 16, 1993, at 6 (blockade of farmers in protest against the EC-US agreement designed to settle agricultural differences as part of the GATT trade talks).

46. See Ernst J. Mestmäcker, *The New Germany in the New Europe*, in SINGULAR EUROPE, *supra* note 7, at 43, 52 (discussing the conflicts between the German Constitutional Court and the EC and the questions these conflicts pose regarding the proper exercise of power).

47. See generally Case 26/62, *Van Gend & Loos v. Administration Fiscale Neerlandaise*, 1963 E.C.R. 1, 6 C.M.L.R. 105 (1963) (stating that the "Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields.").

48. See generally Case 22/70, *Commission v. Council (ERTA)*, 1971 E.C.R. 263, 50 C.M.L.R. 335 (1971) (agreeing with the Commission that where the Community has legislated on a particular subject matter, negotiations could no longer be left to the Member States). See also Bermann, *supra* note 12, at 101 (discussing the various means employed by the Court of Justice in enlarging the Community's sphere of competence over the Member States); Reinhard Ellger, *Telecommunications in Europe: Law and Policy of the European Community in a Key Industrial Section*, in SINGULAR EUROPE, *supra* note 7, at 203, 242 (discussing a telecommunications case brought before the Court, and noting that the Court's judgment cleared the way for the Commission to liberalize all markets in Member States that are presently characterized as legally protected monopolies).

49. The SEA provided for the Community to have additional competence in the areas of environment research and technological development, and called for cooperation in economic and monetary policy. See Mestmäcker, *supra* note 46, at 51 (discussing the conflicts raised by the Commission's implementation of the SEA).

Community into national spheres of competence resulted in conflict.<sup>50</sup> For example, the Council directive providing for television without frontiers<sup>51</sup> resulted in a constitutional challenge brought by the German Länder because the regulation of television was regarded to be within the exclusive jurisdiction of the Länder.<sup>52</sup>

The SEA did not adequately provide for resolution of these questions of legitimacy. Although it called for the Community to exercise its competence only if the objectives could not be attained at the national level,<sup>53</sup> there were no bright lines delineating competencies. Although the principle of subsidiarity was inserted into the bedrock of the TEU,<sup>54</sup> it has not yet been tested and may be of limited value.<sup>55</sup> Despite the language in the TEU, fears regarding loss of national competence did not abate. For example, a challenge was brought before the German Supreme Court regarding the constitutionality of German membership in the European Union.<sup>56</sup> The main complaint was that a European Union would expropriate powers from the German Parliament. The underlying concern was that the Commission was not adequately controlled by the European Parliament.<sup>57</sup> Nevertheless, the German Court did rule in favor of the Treaty, thereby allowing its ratification by Germany, and its subsequent entry into

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50. See *id.* at 51 (finding that the "stream of directiveness, regulations, decisions, and blueprints for Community action" raises constitutional issues about the foundations for the Community's acts).

51. Council Directive of 3 October 1989 on the Coordination of Certain Provision Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23.

52. See Mestmäcker, *supra* note 46, at 52 (noting that although the German court decided to defer to the European courts, issues such as this raise difficult questions under the EEC Treaty, as well as under GATT).

53. See SEA art. 130r(4) (calling for Community involvement in the sphere of the environment only when Community action would have better results than would action at the Member State level).

54. See TEU art. 3b (where the Treaty adjures the Community to take action only if "the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore . . . be better achieved by the Community.").

55. See Bermann, *supra* note 12, at 108 (noting that "[the principle of subsidiarity] has significant limitations as a principle of legislation . . ."). Weiler also notes that while the concept of subsidiarity might be the beginning of a strategy for the containment of Community competences, its usage by a national government before the European Court of Justice to contest Community action, for example, might engender conflicts among the Community institutions, e.g. the substitution of the European Court's wisdom for that of the Parliament. Weiler, *supra* note 14, at 30-31. See also Cass, *supra* note 13, at 1131-33 (raising questions regarding the interpretation of TEU art. 3b).

56. Brunner v. European Union Treaty, 1 C.M.L.R. 57 (German Federal Constitutional Court 1994). See also Tom Heneghan, *German Court Due to Say "Yes, But" to Maastricht*, Reuters, Oct. 5, 1993, available in LEXIS, Reuter Library Report.

57. Brunner, 1 C.M.L.R. at 75 (1994).

force.<sup>58</sup> Despite its findings of constitutionality, the German Court did express its ongoing concern that the Community take into consideration democratic legitimization by the peoples of Europe.<sup>59</sup>

Project 1992 was a catalyst for change, not only in the institutional framework of the Community, or within the Member States, but also beyond. For example, in the domain of competition policy, Member States moved to harmonize their laws on competition so that they would mirror those of the Community.<sup>60</sup> In fact, the seven European countries which were part of the European Free Trade Association (EFTA) signed the Agreement on the European Economic Area (AEEA),<sup>61</sup> which provided for their national governments' adoption of competition rules corresponding to those contained in the EEC Treaty.<sup>62</sup> This move by non-EC countries, desiring a closer union with the Community, illustrates the impact of the internal market, in general.<sup>63</sup>

The issues of legitimacy and Community competence also arise, although less transparently, in the second part of *Singular Europe*, "A New European Economy?" While this section is principally devoted to an analysis of the impact of the single market on businesses,<sup>64</sup> the questions

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58. The German Court allowed ratification of the TEU on October 12, 1993. The Treaty entered into force on November 1, 1993. See *Brunner*, 1 C.M.L.R. at 63 (1994).

59. See *Brunner*, 1 C.M.L.R. at 108 (1994). See also *Excerpts from German Court Ruling on Maastricht Treaty*, Reuters, Oct. 12, 1993, available in LEXIS, Reuters Library Report (ruling that "democratic legitimization is conveyed by the European Parliament elected by the citizens of member states" and that "[i]t is of decisive importance that the democratic basis of [European] Union should keep pace with integration.").

60. See Frédéric Jenny, *Competition and Competition Policy*, in *SINGULAR EUROPE*, *supra* note 7, at 69, 81 (discussing the inevitability of the harmonization of national competition laws and EC law). See generally Claus-Dieter Ehlermann, *The Contribution of EC Competition Policy to the Single Market*, 29 COMMON MKT. L. REV. 257, 257-58 (1992) (noting that Member States attached greater importance to competition policy following the entry into force of the SEA).

61. AGREEMENT ON THE EUROPEAN ECONOMIC AREA [AEEA]. The seven countries that signed the Agreement are Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, and Switzerland. AEEA pmbl. However, Switzerland opted out of the Agreement in December 1992. This opt-out by Switzerland prompted Liechtenstein to postpone the entry into force of the AEEA until it resolves its customs arrangements with Switzerland. See Protocol Adjusting the Agreement on the European Economic Area, 1994 O.J. (L1) 572.

62. See generally Juliet Lodge, *From Civilian Power to Speaking with a Common Voice: the Transition to a CFSP, in THE EUROPEAN COMMUNITY AND THE CHALLENGE OF THE FUTURE*, *supra* note 20, at 227, 241 (mentioning that one of the goals of the European Economic Area is to establish fair terms of competition); Goebel, *supra* note 34, at 227 (noting that the AEEA calls for the adoption of a system of competition rules that mirror those of the Community).

63. See Weiler, *supra* note 14, at 35.

64. For example, there is an excellent analysis of the problems in the financial industry, which do not necessarily have a "uniquely European dimension." See Gunter Dufey, *Banking in the EC After 1992*, in *SINGULAR EUROPE*, *supra* note 7, at 171, 173 (explaining that market integration of banks is not unique to Europe post-1992 but is a result of the globalization of financial markets in general).

regarding the competence of the Community to act, particularly in areas such as telecommunications or the airlines industry, are never far removed.<sup>65</sup> For example, Member States challenged rights given to national (State owned) telecommunications administrations (PTTS).<sup>66</sup> In upholding parts of the directive, the European Court of Justice confirmed the institutional powers of the Community to act in domains once considered the preserve of Member States.<sup>67</sup>

The third section of the book, "Fortress Europe?" takes a different tack, and scrutinizes the evolving role of a unified Europe in a global marketplace.<sup>68</sup> Instead of dealing with the internal affairs of the Community, the section examines the face the Community presents to the world.

Despite the change of focus, the themes of institutional competence and legitimacy are still important. The issues here turn on the Community's ability to negotiate and conclude trading agreements with third countries (non-EC) as well as Community policy regarding those countries.

Under article 113 of the EC Treaty, for example, the Community has competence to make decisions in matters of external commercial policy.<sup>69</sup> The ability of the Community to conclude agreements in its name,<sup>70</sup> thereby

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65. See Reinhard Ellger, *Telecommunications in Europe: Law and Policy of the European Community in a Key Individual Section*, in SINGULAR EUROPE, *supra* note 7, at 203. For an analysis of the problems in deregulation of European airlines, see Severin Borenstein, *Prospects for Competitive Air Travel in Europe*, in SINGULAR EUROPE, *supra* note 7, at 251, 252 (discussing the intransigence of Member States with respect to the relinquishment of sovereignty to make a "commitment to the principles of Project 1992.").

66. See generally Case 202/88, French Republic v. Commission, 1991 E.C.R. 1223, 5 C.M.L.R. 552 (1992) (where France and four other Member States challenged a directive on telecommunications terminal equipment).

67. For a full discussion of the issues confronting the telecommunications industry, see Ellger, *supra* note 65, at 203.

68. See, e.g., William Wallace, *The Changing International Context*, in SINGULAR EUROPE, *supra* note 7, at 275 (discussing the EC as an emerging global power); Gary R. Saxonhouse, *Europe's Economic Relations with Japan*, in SINGULAR EUROPE, *supra* note 7, at 347 (discussing Europe's trading history with Japan).

69. Article 113 of the EEC Treaty states in pertinent part: "[w]here agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations." EEC TREATY art. 113.

70. For example, the Community has been attributed exclusive competency in matters relating to commercial policy. See ERTA, 1971 E.C.R. at 263 (where the Court found that the Commission has the power to conclude agreements, and that this authority excludes the possibility of concurrent authority on the part of Member States). Yet the Community has concurrent competency with the Member States in absence of common rules. See Cases 3, 4, and 6/76, *In re Kramer*, 1976 E.C.R. 1279, 1319, 2 C.M.L.R. 440, 454 (1976) (where the Court held that in the absence of Community legislation, Member States retain the right to ensure the application of commitments within the area of their jurisdiction).

binding Member States, has been questioned, and judicially settled.<sup>71</sup> Member States, however, have not entirely lost their ability to ratify and conclude treaties.<sup>72</sup> When the subject matter of the agreements fall within the competence of the Community and the Member States, e.g., association agreements with third countries,<sup>73</sup> both the EC and the Member States sign the agreement. These agreements, called mixed agreements, require each Member State to ratify the agreement according to its constitutionally mandated procedures.<sup>74</sup> Although these types of agreements permit Member States to retain a semblance of sovereignty in foreign affairs,<sup>75</sup> they can be problematic, for example when the legal status of the EC as a party-contractant vis-à-vis the legal status of the Member State, also a party-contractant, is unclear.<sup>76</sup> Thus, the ability of the Community to speak with one voice has been muted by the desire to accord sovereign prerogative to the Member States.

Unfortunately, the third section does not discuss in much detail the political problems or issues of political or social legitimacy that are engendered by the practice of concurrent negotiation by the EC and the Member States, but instead focuses on the phenomenon known as "Fortress Europe."<sup>77</sup> While it is true that a great deal of energy was then directed towards determining ways to combat the Fortress,<sup>78</sup> the

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71. See ERTA, 1971 E.C.R. at 263, 274 (where the Court found that when the Community adopts provisions that set forth common rules, "the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.").

72. The European court has said that where the Community has not exercised its powers, Member States continue to have powers to contract international agreements. See generally *In re Kramer*, 1976 E.C.R. at 1319.

73. For example, agreements made between the EC and third countries for development assistance, or association as a preliminary to membership in the EC are subject to the mixed accords. See generally EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE 964-70 (Eric Stein et al. eds., 1963).

74. Once the agreement has been ratified by the Member States, the Community accedes to the agreement. See generally Henry G. Schermers, *The Community's Relations Under Public International Law*, in THIRTY YEARS OF COMMUNITY LAW 231-33 (Gaston Thorn ed., 1983); John H. Jackson, *The European Community and World Trade: The Commercial Policy Dimension*, in SINGULAR EUROPE, *supra* note 7, at 321, 325 (discussing the mixed agreements).

75. See generally Note, *A Community within the Community: Prospects for Foreign Policy Integration in the European Community*, 103 HARV. L. REV. 1066, 1070 (1990) (discussing the effect of mixed agreements on foreign policy).

76. See Jackson, *supra* note 74, at 327 (discussing the implication of representation at GATT meetings by both a representative from the EC and representatives of the 12 Member States); Schermers, *supra* note 74, at 233 (discussing the problems of voting rights when both the EC and Member States have acceded to a convention).

77. According to Peter Norman, "[a] certain mystery . . . surround[s] the origins of 'fortress Europe' idea." Peter Norman, *Green Thoughts at the OECD*, FIN. TIMES (London), June 5, 1989, at 23.

78. See Steven Greenhouse, *The Growing Fear of Fortress Europe*, N.Y. TIMES, Oct. 23, 1988, at 1 (discussing the anxieties of U.S. and Japanese officials and executives); Art

fear has abated,<sup>79</sup> and now, post-1992 (or even post-TEU), seems exaggerated.<sup>80</sup> The section, however, is still of interest because it enables one to understand the prevailing attitudes, particularly those expressed by outsiders to the European integration process, towards Europe pre-1992.

## II. THE ROLE OF THE COUNCIL PRESIDENCY IN A "SINGULAR EUROPE"

The questions raised in *Singular Europe* regarding legitimacy, i.e., the scope, competency, and accountability of Community institutions, come to the fore in Emil J. Kirchner's book, *The Council Presidency*. *The Council Presidency* also explores the various theoretical underpinnings which explain how the EC cooperation procedure became important, and analyzes the incentives that were the impetus for instituting the SEA. The introductory chapters of the book are important to an understanding of the climate which permitted the Council Presidency to derive its puissance.

Despite Kirchner's inability to determine which political theory accounts for the successful consolidation of national and Community powers,<sup>81</sup> it appears that the pace of integration, and the coordination of such efforts lies directly at the door of the Council. Here, again, is the problem of Community legitimacy. The Council, by virtue of its powers to overrule the Commission and to adopt legislative acts by qualified majority, can override national interests.

Yet, unlike the other institutions of the Community, the Council considers the nationalistic interests of the Member States when fulfilling its legislative role.<sup>82</sup> This means that Member State governments, to a

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Pine, *Europe's Goal of Unified Market Spurs Hope, Fear*, L.A. TIMES, Sept. 20, 1988, at 10 (discussing fears of non-EC government officials and business executives).

79. See generally Peter Riddell, *US More at Ease With Europe's Unity*, FIN. TIMES (London), Nov. 17, 1989, at 8 (characterizing the change in U.S. attitudes toward Project 1992 from "hostility" to "partnership"); Willajeanne F. McLean, *A Fence, Not a Fortress*, LEGAL TIMES, June 29, 1992, at 20 (discussing the treaties and agreements in preparation for 1992, and noting that they "erected something more akin to a scalable fence than an impenetrable fortress.").

80. See William J. Adams, *Introduction to Part 3*, in SINGULAR EUROPE, *supra* note 7, at 273 (stating that "it is easy to exaggerate the scale of fortress Europe.").

81. See KIRCHNER, *supra* note 9, at 34 (concluding that there is no particular theory that satisfactorily explains the level of cooperation between national and community institutions or the amalgamation of competencies). Kirchner is not alone in his views. See generally Andrew Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, 31 J. COMMON MKT. STUD. 473, 517 (1993) (noting that "EC institutions cannot be explained entirely on the basis of existing regime theory.").

82. Although members of the Commission are appointed by the governments of the Member States, the Commissioners are not permitted to allow nationalistic interests to

great extent, determine the focus of the Council, and the reach of Community legislation. The makeup of the Council illustrates the extent to which national interests are represented: the Council is comprised of representatives of the governments of the Member States whose voting strength is weighted according to that State's relative population.<sup>83</sup> In addition, the Presidency of the Council is held for a term of six months, rotating among the Member States.<sup>84</sup> The rotating Presidency assures that a Member State's agenda can be advanced during its term of office.<sup>85</sup> While the administrative tasks of the Presidency are important — it is the Council Presidency that is responsible for calling meetings, setting the agenda, and coordinating the various committees responsible to the Council — the Presidency is also the body responsible for building and forming consensus among the Member States.<sup>86</sup> The completion of the internal market required adopting legislation, which in turn required greater cooperation between the Council and the Parliament, for example.<sup>87</sup> The Council President's role of building consensus

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influence their actions. See EEC TREATY art. 157. Judges of the Court of Justice are also required to act independently of nationalistic influences. See EEC TREATY art. 167. In contrast, the members of Parliament vote in accordance with their political affiliations. See EEC TREATY arts. 137, 138.

83. See EEC TREATY art. 148, which provides for the weighing of the votes of members when a qualified majority vote is required to adopt legislation. For example, the large states — France, Italy, Germany, and the United Kingdom — have 10 votes each, while smaller states, such as Belgium, have 5 votes. Luxembourg, the smallest, only has 2 votes. For adoption of a decision by qualified majority there must be 54 votes out of the total of 76.

84. See EEC TREATY art. 146, which provides in pertinent part:

The office of President shall be held for a term of six months by each member of the Council in turn, in the following order of Member States:

—for a first cycle of six years: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Portugal, United Kingdom,

—for the following cycle of six years: Denmark, Belgium, Greece, Germany, France, Spain, Italy, Ireland, Netherlands, Luxembourg, United Kingdom, Portugal.

85. For example, the current Council Presidency, headed by Greece, has outlined its priorities for its six month term. They are the issues of parental leave, reversal of the burden of proof in cases of discrimination, the rights of part-time and seasonal workers, and Works Councils. See *Social Affairs: The Greek Presidency Nails its Colours to the Mast*, European Reporter, Jan. 19, 1994, available in LEXIS, Nexis Library, European Information Services File.

86. See Goebel, *supra* note 34, at 192-93 (where Goebel notes that although there is no mention in the EEC Treaty as to the role of the Council President, the "President does more than chair Council meetings."). See also Lodge, *supra* note 20, at 17 (noting that the most important role of the Presidency is to mediate among the Member States).

87. See EEC TREATY art. 100a, which requires use of the cooperation procedure for harmonization of legislation necessary for the completion of the internal market. For a description of the cooperation procedure, see *supra* note 28 and accompanying text.

between the institutions and the Member States helped the Presidency to assume greater importance, particularly during the push for European integration.<sup>88</sup>

The emergent importance of the Council presidency post-SEA, and the resultant impetus for European integration is examined by Kirchner in great detail.<sup>89</sup> Establishing "who does what, when and how" within the confines of a cooperative federalism,<sup>90</sup> is never precise in a legislative process, and when it involves twelve independent sovereign nations, becomes even more complex.

Unfortunately, the integration of twelve different countries and interests leads to inefficiency. A prime example is the rotation of the Presidency itself. While the Presidency works as a "Troika," consisting of the past and future presidents together with the incumbent to ensure continuity of the work, the changing of the guard every six months ensures that some initiatives cannot be met.<sup>91</sup> However, an evaluation of the efficiency of a particular Presidency cannot be made solely based upon the number of initiatives it managed to pass through the legislative process; it should also include the level of commitment the Member State has to various Community objectives, the length and continuity of the ministerial experience of the President, and the size of the Member State.<sup>92</sup> Although Kirchner proposes a list of criteria to be applied when

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88. According to its original grant of powers in the EC Treaties, the Council President was the representative of the Council to the Member States. See generally TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC] art. 28 which states, in pertinent part, "[t]he Council shall deal with the Member States through its President . . ." But see EEC TREATY art. 146, which does not specify the role of the Council President.

89. The Presidency has not always been invested with these powers. See KIRCHNER, *supra* note 9, at 72 (noting that the Council President's powers were derived from the 1958 Council standing orders). Kirchner reviews the history of the Council Presidency and its ascendancy to its role as power broker in the fourth chapter entitled "The Evolving Role of the Council Presidency." This chapter is an interesting exploration of the structure and functions of the Council Presidency. For those who are not conversant with the workings of either the Council or its Presidency, this chapter alone would be worth the price of the book. It is an exhaustive (but not exhausting) compendium of the nature of the Council Presidency's roles at all levels, and includes tables which illustrate, *inter alia*, the frequency of Council meetings, the type of forum, and the level of representation. For example, if the meeting concerned major policy issues of European integration, then the national representatives to the Council would be the foreign ministers; a meeting of the Council concerning agriculture would be attended by the agriculture ministers. See *id.* at 71-89.

90. Kirchner defines the role of the Council, its Presidency, and Community decisionmaking within the context of a cooperative federalism. As defined by Kirchner, "[c]o-operative federalism signifies the existence of joint tasks between national governments and Community institutions, the widespread practice of majority voting, and an orientation towards problem solving rather than the splitting of differences . . ." *Id.* at 14.

91. See *id.* at 82 (citations omitted) (noting that the length of the Presidency is "barely longer than a learning curve.").

92. The evaluation should include an assessment of, *inter alia*, managerial skill, selection of policy providers, presidential style, and the extent and way in which the issues were approached and coalitions were built. See *id.* at 86 (discussing the various factors which determine a Presidency's effectiveness).



assessing the effectiveness of a Council Presidency, he unfortunately does not offer any prescriptions for more effective leadership, but instead acknowledges that the Council Presidency is limited in what it can achieve.<sup>93</sup>

### CONCLUSION

The TEU has augmented the Council's ability to adopt legislative initiatives by increasing the fields in which a vote of qualified majority may be taken. These areas include education, public health, consumer protection, and the environment.<sup>94</sup> This amendment and augmentation of the Council's powers seems to presage a larger mediating role for the Council Presidency, particularly since these new areas are in domains which typically were once exclusive national concerns.<sup>95</sup> Still, the questions regarding the competence of a Community institution, such as the Council, to act, and its legitimacy, remain largely unanswered. These issues are those that have been left unresolved by the Treaties (or their amendments). Perhaps they have not been remedied because of the European belief that the EEC Treaty does not provide a definitive solution to such problems, but merely is a "framework" upon which Europe will build.<sup>96</sup>

While neither *Singular Europe* nor *The Council Presidency* offer any suggestions or solutions as to how to remedy the "democratic deficit" that exists, these books have frozen Europe in a particular moment in time, and offer insights into that moment. The European Community has evolved, and has accomplished much; yet the questions posed in *Singular Europe* still remains unanswered. Thus, the question for Europe post-1992 remains — at what point is the Community restrained from action?

The answer to this question (and others posed by these books) will presumably be forthcoming as the TEU is only a "new stage in the process of European integration."<sup>97</sup> Thus, Europe has "promises to keep and miles to go" before it can consider itself truly "singular."<sup>98</sup>

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93. See *id.* at 115 (discussing the drawbacks of the Council Presidency, listing the short duration, the prevailing economic and political conditions domestically and in the other Member States, and the overlap in functions between the Presidency and the Commission as limitations of the Presidency).

94. TEU arts. 126, 129, 129a, and 1305.

95. See Lodge, *supra* note 20, at 20 (discussing the greater role of the Council Presidency under the TEU, particularly in the areas of foreign and security policy measures).

96. See generally Giancarlo Olmi, *Introduction*, in THIRTY YEARS OF COMMUNITY LAW, *supra* note 74, at 2 (describing the EEC Treaty as "an outline treaty (traité-cadre) covering a very wide area and laying down little more than a set of broad principles . . .").

97. TEU, pmb1.

98. See Robert Frost, *Stopping By Woods on A Snowy Evening*, in COMPLETE POEMS OF ROBERT FROST 275 (1949).