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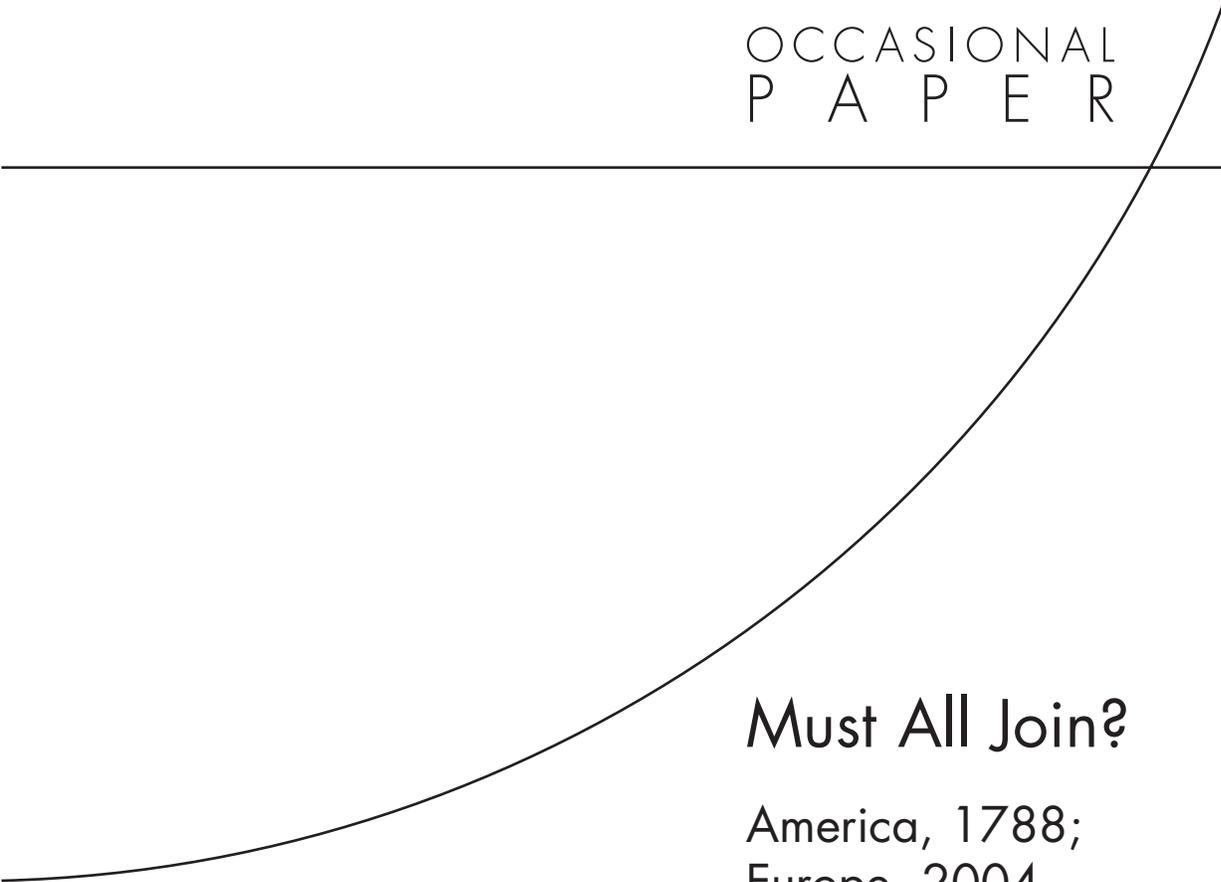
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P A P E R



Must All Join?

America, 1788;
Europe, 2004

James Thomson

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Preface

Processes of arranging federations among otherwise independent states inevitably have many similarities. As the European Union stands on the threshold of a ratification process for a new constitution, Americans can't help looking at their own experience with ratification over 200 years ago to see if there are any useful lessons. This paper deals with one of those potential lessons—the difficulty of achieving ratification if all states must agree before the new constitution can come into force, as is required for the EU's new constitution.

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Must All Join? America, 1788; Europe, 2004

The impasse that developed over the draft European Constitution before its approval by the European Council in June raises the question of whether the project will be able to move forward so long as serious matters, such as the ratification of the document, require the agreement of all states in the European Union (EU). Complete agreement is hard enough with the 15 member states of the pre-May 1 EU, let alone with the 25 that it now comprises. Already, as a consequence of disagreements over many aspects of the document, its future is at risk. Options such as a two-speed (or multi-speed) Europe or a watered-down constitution are frequent subjects of discussion, although advocates of a stronger Europe generally view these options with worry.

American history may offer another option to today's Europeans. Americans once faced a very similar challenge. That story—long forgotten by most Americans—may help Europeans devise new options as they confront the issue of ratification. The bottom line is that the U.S. Constitution almost certainly would not have been ratified if agreement of all states had been required.

In 1781, at the end of the Revolutionary War, the newly independent states formalized in the Articles of Confederation the union that they had made informally during the war. The Articles created the “United States of America” and a Continental Congress, in which each of the thirteen states had one vote. The union's powers were weak.¹ Importantly, however, the union was “perpetual,” without a provision for secession. Amendments required the consent of all states.

In the first few years of the Articles, there were several attempts to strengthen them, especially concerning the union's role in regulating and taxing foreign commerce. These attempts failed to achieve unanimity among the states, and at least one important amendment failed because of the objection of one state.

Dissatisfaction with the Articles grew among a group that subsequently became known as the Federalists, led by James Madison, who would later become the fourth president of the United States. The Federalists were successful in persuading the Congress to call a convention to consider amendments to improve the Articles. Once the convention met in Philadelphia in the summer of 1787, it became clear that the Federalists had more in mind than amendments. The convention threw the Articles onto the trash heap and drafted a new constitution, which arrogated to the union considerably more power than was provided by the Articles of Confederation.

¹ This is not the place to analyze the powers afforded the union by the Articles. The powers were chiefly restricted to foreign and defense policy; the union had little authority over domestic affairs.

Most important, in Article VII of the Philadelphia Constitution, the delegates took a step that altered the ratification requirements of the Articles:

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

The Articles of Confederation required unanimous consent to amendments. The Philadelphia convention proposed that the new constitution would come into force if nine out of thirteen states ratified it. This amounted to secession by nine from the old order to create a new order.²

The ratification of the new constitution was opposed by a broad coalition known as the Antifederalists. Many prominent Americans were Antifederalists, including figures who had been important actors during the Revolutionary War, such as Patrick Henry, George Mason, Samuel Adams, and the future U.S. president James Monroe. They had many reasons to oppose the new constitution, of which the principal ones were fear of the powers of a strong central government, the lack of a bill of rights (which was corrected in the ratification process), a general revulsion against taxation, and the inevitable loss of power by the vested interests in state governments, especially in the small states that had powers equal to the large ones under the Articles of Confederation.

A key argument advanced in many forms by the Antifederalists was that the entire process—in particular Article VII of the new constitution and the “Rule of Nine”—was “illegal” because it contravened the unanimity requirement for amending the Articles of Confederation. At the Virginia ratification convention, Patrick Henry attacked the rule as

a proposal that goes to the utter annihilation of the most solemn engagements of the states—a proposal of establishing nine states into a confederacy, to the eventual exclusion of four states.

On the whole, the Federalists did not contest such claims of illegality. For good reason: They were in fact acting outside the established order so that a new one could emerge. In their minds, the existing order could not be changed under its rules: It was too easy to block change. They did not strongly contest the charge of illegality. Instead they appealed to logic and to higher authority.

Madison, for example, conceded the possibility of illegality while dismissing as illogical the legalistic complaints against the Rule of Nine:

It is worthy of remark that this objection, though the most plausible, has been the least urged in the publications which have swarmed against the convention. The forbearance can only have proceeded from an irresistible conviction of the absurdity of subjecting the fate of twelve States to the perverseness or corruption of a thirteenth.

² Some scholars have called this alteration of procedures “revolutionary” in that it proposed to cast aside one political order (the Articles) and replace it with another (the new constitution), without following the processes established by the existing political order. In this light, both Rule of Nine and the requirement that the ratification be accomplished by “conventions,” rather than by the state legislatures, were revolutionary. The latter is not the subject of this essay.

Similarly, in answering Henry at the Virginia convention, Governor Randolph argued not only that thirteen was illogical but that twelve made no sense either: It would require eleven to suffer from the actions of the twelfth since the action of the thirteenth—Rhode Island—was (as we will see) already predictable. Rejecting a simple majority, Randolph settled on nine as a logical number between seven and eleven.³

In its opening words, the constitution itself claimed to be based on the authority of “the people”: “We the People of the United States in Order to form a more perfect Union . . .” In essence the Federalists were arguing that the “people,” not the states, had fought and won the war against the British, and with victory the new order should be based on the will of the people rather than of the states, which represented authority delegated by the people. Alexander Hamilton put it this way:

. . . the foundations of our national government [should lie] deeper than in the mere sanction of delegated authority. The fabric of the American empire ought to rest on the consent of the people . . . [the] original fountain of all legitimate authority.

This enraged Antifederalists such as Patrick Henry:

My political curiosity leads me to ask . . . who authorized them to speak in the language of “We the People,” instead of “We the States”?

Of course, the Federalists had authorized themselves. They created what legal scholars Bruce Ackerman and Neal Katyal have called “a bandwagon effect”—a process in which each step leads to the next in such a way that the process becomes inexorable. It finally became impossible for the Antifederalists to stop the bandwagon. They either had to get on it or be left behind.

Much as an Intergovernmental Conference had to approve the new EU constitution, the Continental Congress had to approve the Philadelphia constitution before ratification by the states could commence. Congress had, of course, commissioned the Philadelphia convention. Because they feared that a vote of approval would fail, the Federalists maneuvered the Congress to simply pass the document on to the states for ratification, without “a word of favorable comment.”

The ratification process was a close-run thing and demonstrated the cohesive (and coercive) power of the Rule of Nine. Five states ratified quickly, although violence and gerrymandering contributed to the Federalist victories in two states. The drama of the Rule of Nine began to unfold when the Federalists ran into serious organized opposition in Massachusetts. Although they were outnumbered in that state’s convention, the Federalists were successful because they brought several Antifederalists to their side by agreeing that the first act of the new Congress would be to propose attaching a bill of rights to the constitution—a concession that would help in subsequent state debates. By a vote of 187 to 168, Massachusetts became the sixth state to ratify. Maryland and South Carolina followed Massachusetts in quick succession.

³ Nine is two-thirds of thirteen, rounded up; two-thirds is frequently used to define a supermajority. For example, the Articles themselves required a supermajority of nine states to authorize several important matters, such as declaration of war, borrowing and appropriating money, and admission of a new state. The Philadelphia constitution requires a two-thirds vote of the Senate to make treaties and various appointments.

The scene shifted to the five remaining states, where the Antifederalists forces had numerical advantages in the conventions. Rhode Island had already voted down the constitution.

The conventions in Virginia and New Hampshire were meeting at the same time. In the former, the argument turned on the question of whether there would be a union with Virginia in it, not on the specifics of the constitution. This is Governor Randolph speaking:

...I had, and I still have, objections to the Constitution ... [but] the accession of eight states [has] reduced our deliberations to the single question of Union or no Union.

Before Virginia could ratify (by a vote of 89 to 79), New Hampshire did. There, Federalist forces, facing a clear majority against ratification, managed to adjourn the convention to await the outcome in Massachusetts. It would have been politically, geographically, and economically untenable for the state to stay out of the union if its strong southern neighbor joined. And, indeed, once Massachusetts had ratified, the reconvened New Hampshire convention capitulated to reality and on June 22, 1788 voted 57 to 47 to ratify.

With New Hampshire making the ninth state to ratify, a few days later Congress established a committee to put “said constitution into operation,” aiming to begin the operation of the new government under the new constitution in February of the following year.

In New York, as in New Hampshire, the Federalists were in a deep hole and consequently stalled until the outcome was clear in Virginia or New Hampshire.

As soon as the news of New Hampshire’s ratification reached the convention, they played the same union card that had been used in Virginia. According to Chancellor Livingston, the New York convention now faced a changed circumstance: “The Confederation is now dissolved.” Thus New York either had to join the new union or be left outside alone. This was not much of a choice. Reluctantly, they voted 30 to 27, with eight abstentions, to ratify and to send a letter of protest to the governors of the other states asking for a new federal convention to revise the newly ratified constitution.

A few days later, the North Carolina convention took up New York’s cry for a second federal convention. Rabidly Antifederalist, the convention refused to vote on ratification and adjourned. Meanwhile, the process of organizing the new federal government moved ahead. The first Congress under the new constitution met without the two holdouts. Taking advantage of this changed situation, the North Carolina Federalists succeeded in getting an election called for a new state ratification convention. By the time of this vote, the establishment of the new federal government had caused a shift in the popular mood. The newly elected convention ratified overwhelmingly and North Carolina joined the union in November 1789, well after February when the new federal government began to function.

When Madison spoke of the “perverseness or corruption of a thirteenth” state, he was talking about Rhode Island. This state had bedeviled the Confederation. It was often a holdout in Congress; it precipitated a monetary crisis through rampant printing of currency; and it refused to participate in the Philadelphia convention. The new federal constitution had been decisively defeated in a referendum (it initially refused to call a convention as stipulated by Article VII) early in the ratification process.

In 1790, Congress began to get tough. The U.S. Senate passed the Rhode Island Trade Bill, which amounted to an economic embargo and a demand for immediate hard currency payments of Rhode Island’s debts. As the bill moved toward a vote in the U.S. House,

a newly convened, but still Antifederalist-dominated, convention met in Rhode Island to consider ratification. The specter of an embargo brought commercial interests into the political game. Under such duress, several Antifederalists abstained or absented themselves, and Rhode Island ratified the U.S. Constitution on May 29, 1790 by a vote of 34 to 32, almost two years after New Hampshire's ratification launched the new United States.

In sum, the Rule of Nine created a bandwagon that began to pull reluctant states on board even before the required nine had ratified. Once nine states had ratified and the process of establishing the new political order was under way, the holdouts had little choice. But if the ratification process had been set up in accordance with the unanimity requirements of the Articles of Confederation, the constitution would have been dead on arrival. Almost certainly, ratification would not have been achieved. Perhaps the process would not have even started. The Federalists' extralegal step of the Rule of Nine made a positive outcome possible.

Commentators comparing the processes of U.S. and European unity usually point out the American advantages in commonality of language and of national origin. But the story of the Rule of Nine perhaps demonstrates another key difference—what might be called the popular mood or temperament.

In 1787 America had only recently emerged from the Revolutionary war to win independence from Great Britain. The Federalists themselves had participated in the struggle. For that reason, they were not impressed by arguments that they needed to adhere to an existing political order. They had just toppled one, so why adhere closely to the rules of another, especially one so newly established? Moreover, they gained legitimacy not through the rule of law, but by selecting the revolutionary leader George Washington as the president of the Philadelphia convention and placing him in the vanguard of the ratification effort.

By contrast, Europe today is not in a revolutionary mood. The fact that the process of unification is referred to as “ever-closer” underscores the European desire to avoid sharp breaks with the past. Post-WWII Europeans place great value on peace and on the institutions they have created or helped create to keep it secure. Perhaps for this reason, the framers of the draft European constitution did not deviate from the current EU practice of requiring unanimity for ratification.

This makes ratification a risky bet because there are several states that could become holdouts. There is certainly no Rhode Island, but there are several states where political support for the new constitution is weak. In the case of Spain and Poland, fear of political repercussions was great enough for these states to try to derail the constitution in the Intergovernmental Conference before the ratification process was even started. As in America in 1788, unease about building an ever-closer union is broader, however. For example, several states are uncomfortable with specific parts of the document. Thus, refusal of a few states to ratify could easily block the ratification process. In many states already, referendums dealing with the “ever-closer” advance of the EU have gone down to defeat—e.g., in Ireland, Denmark, and Sweden. In several other larger states, it is fair to guess that referendums would be risky and that even ratification by parliament might be problematic—e.g., in the UK, Poland, Spain, and possibly even Germany and France. A “Rule of Twenty” (four-fifths) or of “Seventeen” (two-thirds) would certainly change the picture by posing the question of “Union or no Union” to the holdouts.

In fact, there is a “Rule of Twenty” in the proposed EU constitution, but it comes into play after a failed ratification process—or during a drawn-out one—not before. A declaration at the close of the constitution says:

If, two years after the signature of the Treaty establishing the constitution, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council.

If four-fifths ratify within two years and a few holdouts seem immovable, it is conceivable that the EU could adopt a different approach to ratification. For example, a new constitution could be drafted, with minor or major modifications as needed but also with different terms for ratification, such a Rule of Twenty. In effect, a supermajority could secede from the EU in order to create a new EU, just as the new United States was created out of an older United States by what amounted to secession.

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