Ever closer markets:

Public procurement & services in the EU and the USA

Leif Hoffmann
Ph.D. Candidate & Instructor
University of Oregon
Department of Political Science
Email: lhoffma2@uoregon.edu
Phone: +1-541-935-6452

Scholars tend to assume that in terms of institutional shape the US is generally more hierarchical and centralised than the EU, and in terms of market integration the former is more of a single free market than the latter in the sense of fewer trade restraints. However, in some policy fields the European Union appears to have gone further than the United States in centralising authority and eliminating interstate barriers to integrate the common market. This raises a number of long-term questions about how homogenised and centralised the US market and polity are relative to Europe, why the attribution of policy sectors to different levels of governance vary across multi-level governance entities, and why multi-level governance entities pursue different trajectories with regard to the adjudication of authority to the sub-level versus the central or federal level of authority. This paper here, in focusing on public procurement and services, seeks in a first step to establish the descriptive claim that the EU has, indeed, in contrast to the United States and contrary to expectations, centralised policy sectors with the goal to integrate the common market. The project will enrich our knowledge of the applicability of existing theories in comparing the literatures of American state-building and European integration and in leading to novel insights about processes of market integration and state-building in the European Union as well as the United States of America.

This paper will show that in terms of regulations for public procurement and services, which represent a huge part of the two economies, the European Union, however, has gone further than the United States in centralising authority and eliminating interstate barriers. The EU regulatory regime appears to be more integrated and centralised in a free market way while the US, conversely, looks as if it is largely settled in certain decentralised, fairly protectionist rules. The main explanations of market integration and centralisation in the immense literatures on either polity do not seem to cope well with my basic descriptive claim. When the respective logics of the major explanations are actually employed to the two polities, they appear to be insufficient at best, leaving us to wonder why the EU went beyond the US in integrating and centralising public procurement.

This paper is part of a larger project to increase our understanding of policy adjudication in the US and the EU and limits itself here to setting out the puzzle. It proceeds with an overview of the public procurement and services policy fields of the respective internal markets to illustrate that the respective organisational structures present evidence that the EU's member states have given up more of their sovereignty so far to a federal level than the US states. The main theoretical arguments of the existing literature on American and European market integration and institutional centralisation will be reviewed immediately afterwards. The focus here will be especially on drawing out from each theory its expectations about market-related sectors in general and to

demonstrate how this empirically counterintuitive pattern challenges some of the main explanations of centralisation that are offered in the respective EU and US contexts.

Public procurement and services rules in the US and the EU

Notwithstanding efforts and aspirations to the contrary, interstate trade barriers have been common throughout American and European history. To overcome the previous lack of authority to remove barriers, the drafters of the US Constitution specifically incorporated five provisions designed to promote free trade. These provisions included the authority for Congress to regulate commerce with foreign nations, the Indian tribes, among sister states (Art. I §8), the interdiction to levy export duties and to give preference to the ports of one state over the ports of any other state (Art. 1 §9), the interdiction for states to levy an import or export duty without the consent of Congress which may revise or abolish the duty (Art. I §10) and the proscription for any state to deny any of its privileges and immunities to citizens of sister States (Art. 4 §2).

Moreover, the Constitution granted, as part of a list of delegated powers, Congress the authority '[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof' (Art. 1 §8). The general assumption, however, was that all other powers not specifically forbidden would be reserved to the

states, which was made explicit with the Tenth Amendment. In short, the states were left with broad regulatory authority.

Thus, non-tariff barriers have continued to exist for a long time.[1] McCurdy notes that US 'state legislatures also spun an effective web of barriers to internal commerce' and that '[s]tate and local officials prescribed marketing practices, enacted discriminatory schemes of mercantile licensing and taxation, proscribed the entry of unfavoured articles of commerce, and devised inspection laws to improve the competitive position of their citizens relative to producers in other states' (McCurdy 1978: 634-5). These non-tariff barriers are generally the results of the states utilising their otherwise legitimate license, police, proprietary and tax powers (cf. Zimmerman 2003). But, as noted below, impediments as a result from regulatory authority and the powers of the states in general can be overcome in theory and practice.

Regarding services and public procurement, a state's licensing and proprietary powers are especially relevant. The privileges and immunities clause together with the full faith and credit clause, obligating states to recognise each other's 'public acts, records, and judicial proceedings" (Art. 4 § 1), are generally conceived to 'promote interstate citizenship by forbidding a state legislature to favour its citizens over visiting US citizens from other states in terms of

[11] Only in 2005 for instance, did the US Supreme Court struck down states laws which allowed instate wineries to ship directly to consumers but not wineries from out of the state. (cf. Tims 2004 and 2005; Wiseman and Ellig 2007).

privileges and immunities' (Zimmerman 2002: 26). Yet, as has been opined by Chief Justice Fred M. Vinson of the US Supreme in 1948:

> The privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other states where there is no substantial reason for discrimination beyond the mere fact that they are citizens of other states. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it (Toomer v. Witsell, 344 U.S. 385 at 396 (1948)).

In addition the US Supreme Court has also held that the privileges and immunities clause does not apply to associations or corporations (Hemphill v. Orloff, 277 U.S. 537 (1928); Bank of Augusta v. Earle, 38 U.S. 519 (1839)). Thus, "states are free to discriminate in terms of privileges and immunities against a foreign corporation (chartered by a sister state)" and might completely forbid the corporation "to conduct business in the state" (Zimmerman 2002: 27). Therefore, the US Supreme Court has repeatedly validated the right of states to discriminate when acting in their roles of proprietor of their respective public domains or as employer (Zimmerman 2003: 5). Thus, residency requirements for public employees are commonplace and do not violate the due process clause or the equal protection clause or violate the constitutionally protected right of interstate travel (McCarthy v. Philadelphia Civil Service Commission, 424 US 645 (1976). In addition, it then hardly comes as a surprise that by 1940 forty-seven of the forty-eight states had at least one statute on the books giving preferential treatment to in-state products or companies (Melder 1940: 58). This practice is largely continued today, where the vast majority of sister states has tie-bid preferences. Many states also possess more specific preferences, such as up to 15 per cent limited preferences over the lowest out-of-state bidders

and general exclusionary preferences for mulch and compost made in the state (Georgia), coal for heating state buildings (Pennsylvania), and all print jobs (Oregon) (Oregon State Procurement Office 2006; North Carolina Department of Administration 2006; Zimmerman 2003: 6).

Barriers to the free exercise of services also remain common in the US, showing that Europe's much lamented difficulty to establish cross-border accreditations of professional credentials and the free movement of service providers is not unique. Mancur Olsen previously observed that

> The separate states of the United States, for example, not only control admission into most professions, but often also into such diverse occupations as cosmetology, barbering, acupuncture, and lightning-rod salesmen. These controls are frequently used to keep out practitioners from other states (Olsen 1982: 143).

In brief, the states' licensing authority has led to '[d]iscriminatory licensing requirements [protecting] individuals engaged in a specific profession in a state against competition by their counterparts in other states' (Zimmerman 2003: 6). To overcome some of the discriminatory practices many states have entered into reciprocity agreements. However, these agreements vary from state to state, from profession to profession and are not universally applied across the United States, giving the impression of a large patchwork quilt. For instance as regard the provision of contractor services, the state of Arizona does not recognise contractor's licenses issued by other states and has only entered into a reciprocity agreement with the California State Contractor's Board, the Nevada State License Board, and the Utah State License Board. The Arizona

Registrar of Contractors may waiver trade examination requirements for contractors who want to be licensed in both states, but still requires at a minimum to pass the Arizona Business Management examination (Arizona Registrar of Contractors 2006). As regard the practice of law, the US Supreme Court reversed its position in 1985 and allowed a Vermont resident, living 400 yards from the New Hampshire border to be admitted to the bar. She was previously refused admission until the establishment of a residential address in New Hampshire (Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985). However, contrary to the directives in the EU and the decisions by the ECJ, there has been no action taken so far by the US Congress through the invocation of the commerce clause nor by the US Supreme through the interpretation of the privileges and immunities clause granting 'nonresident lawyers the right to provide temporary interstate transactional services in states where they are not admitted to the bar' (Turina 2005: 227). Likewise, it remains common in the United States to discriminate against museum visitors from other states. In February of 2006, the Kansas Museum of History for instance announced that it 'will raise admission fees for out of state residents' by charging $5 for out-of-state residents and $4 dollars for in-state residents (Kansas State Historical Society 2006).

In total, there are four possibilities to remove interstate trade barriers in the US: reciprocity, congressional preemption, judicial decisions and interstate compacts (Zimmerman 2003). Reciprocity agreements are purely interstate

arrangements. They have been quite common, but have not led to the disappearance of barriers in the discussed policy arenas. Interstate compacts, according to the US Constitution generally need the consent of Congress. To this day, interstate compacts 'have not been utilized' to remove interstate trade barriers, focusing instead on the settling of boundary disputes (Zimmerman 2002: 54 – 5). Besides, short of involving every single state, interstate compacts would rather lead to an America à la carte or a multi-speed America, to use phraseology from the European context.

A 'preemption revolution', however, has taken place in the last several decades (Zimmerman 2005: xi). Congressional preemption refers to the right of Congress, based on the necessary and proper clause, the supremacy of the laws clause and the interstate commerce clause, 'to enact statues invalidating regulatory statutes and regulations of subnational governments' and 'to employ its constitutional powers to remove completely or partially concurrent and reserved regulatory powers of the states' (Zimmerman 2005: 1). While only 29 nine preemption statues were enacted by 1900, by 2004 a total of 522 preemption statues had been passed (Zimmerman 2005: 1 and 5). Yet, none of these statutes dealt with the services or public procurement sectors, leaving these sectors to this day in the hands of the states, although as the *Airline Deregulation Act of 1978* and the *Gramm-Leach-Bliley Financial Modernization Act* of 1999, reversing the *McCarran-Ferguson Act* of 1945, which reversed a previous Supreme Court decision, have shown that on occasion Congress does

preempt in regards to the functioning of the internal market. Zimmerman (2005: 127). contends that '[t]he greatly increased mobility of citizens and business firms, and inventions and technological developments spurred enactment of congressional statues that remove regulatory powers from states'.

The above examples contrast starkly with the EU's conception of a free internal market and its (intended) practice. While the Member States, not unlike the US sister states, retain similar powers, such as license, police and tax powers, the European Union is adamant in its treaties and directives that there shall be no discrimination against other Member States, including citizens and corporations. The free movement of goods, persons, services, and capital is a cornerstone of the EU, if not always in practice, at least in theory since the 1957 EC Treaty. However, it appears now the European Union through preemption resulting from power invested in the federal level to create an internal market is now also in practice creating a less restricted market. In short, policy decisions are taken at the federal level to ensure the eradication of barriers.

Total public procurement in the EU – i.e. the purchases of goods, services and public works by governments and public utilities - is estimated at about 16 per cent of the Union's GDP or €1500 billion in 2002 (European Commission 2006a). Directive 2004/18/EC regulates the coordination of procedures for the award of public work contracts, public supply contracts and public service

contracts. The EU Member States, above a minimum threshold,[2] do not retain the authority to discriminate against bidders from other Member States, with the exception of military equipment for the defense sector. Article 3 of the Directive states that

> Where a contracting authority grants special or exclusive rights to carry out a public service activity to an entity other than such a contracting authority, the act by which that right is granted shall provide that, in respect of the supply contracts which it awards to third parties as part of its activities, the entity concerned must comply with the principle of non-discrimination on the basis of nationality.

And even when it comes to minimum thresholds, the EU Commission appears to be diligent in holding Member States accountable. In 2005 the Commission for instance decided to bring Germany before the Court of Justice in a case concerning the transport of works of art for temporary exhibitions, which Germany claims concern contracts below the Directive's threshold and therefore didn't need to be advertised. The Commission, though, expressed the view that these kind of public contracts can be quite important for small and medium enterprises (SMEs) and that the ECJ has previously established that public authorities awarding such contracts have to ensure a sufficient degree of advertising, offering a fair chance to all potential bidders (European

---

[2] The Commission verifies the thresholds every two years. At present they are EUR 137 000 for public supply and service contracts awarded by central government authorities (ministries, national public establishments); EUR 211 000 for public supply and service contracts: awarded by contracting authorities, which are not central government authorities; covering certain products in the field of defense awarded by the central government authorities; concerning certain services in the fields of research and development (RTD), telecommunications, hotels and catering, transport by rail and waterway, provision of personnel, vocational training, investigation and security, certain legal, social and sanitary, recreational, cultural and sporting

Commission 2005a). Furthermore, European legislation requires that threshold-exceeding tenders for public contracts be published in the Official Journal S series and made accessible free of charge in an online database.

These federal level regulations contrast with the US where the states retain the right to freely discriminate against out-of-state bidders and where no federal preemption has taken place so far to overcome these barriers to achieve a genuine internal market. The EU has considered the "lack of open and effective competition [in the procurement sector as] one of the most obvious and anachronistic obstacles to the completion of the single market" (European Commission 2006b).

A similar pattern emerges as regard to the regulation of services. The EU is currently in the process of passing a comprehensive Services Directive, also known as the Bolkestein Directive after the former internal market commissioner. This Directive is, among others, the direct result of the ambitious Lisbon agenda to create 'the most competitive and dynamic knowledge-based economy in the world by 2010' and the subsequent report on the remaining barriers to the internal market for services (European Commission 2002). According to the amended Commission proposal the aim of the new Directive is to '[a]chieve a genuine Internal Market in services by removing legal and administrative barriers to the development of service activities' (EU Commission

---

services; EUR 5 278 000 in the case of works contracts (cf.

2006c: 2). Services account for almost 70 per cent of the European Union's GDP (European Commission 2002: 10). Considering the large share of GDP services represents, the EU contends it is 'vital that the Union enhances the quality and competitiveness of its service industries' (European Commission 2001). The Service Directive covers a wide range of different services, including, among many others, management consultancy; facilities management; advertising; the services of commercial agents, legal or fiscal advisors, and tour guides; real estate and leisure services; and construction, including the services of architects; distributive trades, etc.

The Commission notes that this Directive would not only strengthen the rights of providers of services but also of consumers 'by enshrining the right of non-discrimination, which would, for example, prevent EU citizens being charged different entry fees to museums on the basis of their nationality' (European Commission 2006d). Moreover, the Directive on the recognition of professional qualifications (Directive 2005/36/EC) already allows that any national of a Member State 'legally established in a given Member State may provide services on a temporary and occasional basis in another Member State under their original professional title without having to apply for recognition of their qualifications' (European Commission 2005b). The right to freely offer interstate transactional services, specifically in regard to legal services, has also been previously established with a decision by the ECJ in the landmark 1974 Van

---

http://europa.eu/scadplus/leg/en/lvb/l22009.htm) .

Binsbergen v. Bestuur case. This decision had a major impact on the present Directive as well as its predecessors (cf. Turina 2005: 233).

Overall, what we see here, in contrast to the United States, is a liberalisation of the public procurement and services arenas through power transferred to and action taken by the higher plane of government and on occasion by the intervention of the ECJ. A similar debate in the United States regarding the removal of all barriers to the provision of services and public procurement appears to be absent, despite the fact that services for instance represent 78.3 per cent of the American GDP and that mobility rates in the US are higher than in the EU (CIA Factbook 2005). This leads, however, to the expectation that there should be more interest in harmonising the services sector in the US. Indeed, as Turina (2005: 225) contends, the approach, adopted by the EU, i.e. preemption of state regulations, appears to be more in consonance with 'modern commercial realities' where on both sides of the Atlantic '[t]he globalization of the financial markets and technological innovation have contributed to a broad geographical expansion of corporations' areas of interest' and where for instance 'providers of legal services seek to break through established local barriers to practice law in order to better cater to their clients' needs'. Given these similar pressures in the EU and the US Congress' increasing use of pre-emption statues in the 20th century, one wonders why market integration and centralisation, contrary to the EU, has so far not happened in the services and public procurement sectors in the United States.

Thus, we will now turn our attention to how the major market integration and state-building explanations measure up to this initial evidence.

Centralisation and market integration

Notwithstanding myths propagated in the British press about the EU passing directives to regulate the curvature of bananas or to ban alcohol sales during the week, it is certainly not unreasonable in a first cut but arguably the obvious expectation of anyone, including experts on the polities, to imagine the United States to be a much more homogenised and centralised entity than the European Union (European Commission Representation in the UK 2008). The latter encompasses a wide variety of democratic political and market systems and historical trajectories, a greater per capita income spread between states as well as lower mobility rates across states, and a much lamented lack of a common *demos*. The entire subtext of the EU literature is that while the EU has become more centralised than any other international organisation, it still falls short of being considered a state. This point is recapped by Magnette, Lequesne, Jabko and Costa (2003: 834) who contend that "the EU is not a state, and not likely to become one in the foreseeable future". Sbragia concurs noting that "even in the economic area, precisely the area in which the Union is the strongest" the EU lacks power in many important areas (Sbragia 2006: 23). She argues that "[i]n spite of having created an extremely important single market, it does not yet have an economic identity: no product carries a 'Made in

the EU' mark; an EU patent does not yet exist, and the Union is not even considering an EU postage stamp" (Sbragia 2006: 23).

If practically all scholars take as given that the US is more integrated and centralised than the EU, the literatures on integration and centralisation in these two polities display a contradictory emphasis. The EU integration literature—which tends to compare the EU, explicitly or implicitly, to other international organisations—is largely set up to explain how the EU became so centralised. Prominent books on the US state and market, conversely, are usually set up to stress that the US is a relatively decentralised and fragmented state in comparison to more unitary states, especially European ones, and to explain why. Skworonek's book (1982) on *Building a New American State* was written to deal with exactly this question. It was the common wisdom presumption that the US should be more centralised that made his book so forceful. Other books on the American state and market have overlapping backgrounds. Thus, Bensel (2000: xxi) argues against the 'conventional explanations' that 'an unregulated national market existed in the United States, almost as a birthright of national existence'. And Berk in *Alternative Tracks* documents multiple competing early-American industrial orders, against the widespread impression that there has long been a strong entity called the 'US economy' (Berk 1994). While both literatures thus emphasise that the two federations may be unusually comparable (with the EU as the most centralised international institution, and the US as one of the most decentralised states), no one who looks at them side

by side has ever suggested anything other than that the US is substantially more centralised. This is most obviously reflected in the fact that the United States is always explicitly (Dobbin 1994) or implicitly (Skowronek 1982: 5) compared to other unitary states, such as France and the United Kingdom, while the European Union's usual comparators are other international organisations. More importantly, while scholars will not quite call the EU a 'state', no one is arguing that the US label as a 'state' should be questioned.

In theory, we have a few different coherent explanations of centralisation/institutional outcomes and market integration deriving from what can be called structuralist-materialist / rationalist-functionalist, institutionalist and ideational / cultural approaches. In practice, however, these arguments have almost always been made about only one set of institutions, and especially when placed in comparative perspective they appear to end up being reasoned backward from the outcome. Structural, materialist, rationalist, or functionalist arguments are placed here in the same category, given that they share the same idea: a certain kind of institutions with a certain degree of centralisation are the outcome of the aggregation of rational individuals' straightforward responses to an objectively real obstacle course of material challenges.

Structuralist-materialist & rationalist-functionalist explanations

Functionalist, efficiency-based approaches have been very common in the multi-level governance and federalist literature. The main focus is generally on

the correction of market failure and the reduction of transaction costs. In general the idea is that Coase's notion of the nature of the firm gets extended to the establishment of a government (Coase 1937). Thus, a central government or state is supposed to emerge in those cases where a very short term contract would be unsatisfactory and where free-riding incentives threaten to prevent efficient bargains. Hence, a central government might be given independent authority to promote the efficient allocation of national resources. However, a single authority may also use its power for purposes that are inimical to allocative efficiency. Hence, 'thriving markets require not only an appropriately designed economic system, but a secure political foundation that limits the ability of the state to confiscate wealth' (Weingast 1995: 1). Competition among various jurisdictional units is thus considered beneficial (cf. Tiebout 1956). Consequently, in a multi-level governance entity we should see the adjudication of authority to 'the smallest area necessary to optimize the information available to the government decisionmaker […], while ensuring that it internalizes all the consequences of its activities' (Triantis 1997: 1276). Oates calls this the basic principle of fiscal federalism and it has been the standard view of functionalist, efficiency-based arguments for a while (Oates 1997: 1323). In short, based on this model multi-level governance entities should ensure that competition in diverse policy fields across jurisdictional units is alive and kicking. Zimmerman seems to support this view by arguing for a facilitative role for Congress in interstate commerce and in noting 'the ability of [US] states to function as

laboratories of democracies developing new solutions for problems' (Zimmerman 2003: 36).

Yet, in more recent years, newer efficiency-based arguments have come to argue the contrary, blurring the line and making prediction or explanation based on an efficiency model even harder. Alice Rivlin (1992) for instance argues that tax competition among the states leads to inefficiently low levels of public services. As Oates (1997: 1322) therefore notes, her 'basic contention is thus that competition among jurisdictions (be they nation states within the European Community or political subdivision within a nation) leads to distorted outcomes in the public sector both in terms of fiscal and regulatory policies'. Competition at the state level is seen as destructive, i.e. as a system that needs to be carefully circumscribed to enhance efficiency by avoiding races to the bottom. This then leads to the expectation of more harmonisation of various policies, including tax policies. And, indeed, this seems to be partly the argument of the European Union that drives liberalisation of the services and public procurement sectors through governmental fiat.

Functionalist logics of various sorts tend to argue that whatever turned out in the US or EU was most functional in that case. As Thelen (2004: 24) points out, in this literature the existence of specific occurrences is explicated with reference to the effects of those occurrences. Pierson (2000: 475 – 6), moreover, notes that scholars so far have generally focused more of their

attention on institutional effects than institutional origins and change, leading the lacunae being filled with functional reasoning. Thus, the existence and form of institutions is attributed to the functions they perform, either for the collective system as a whole or for the powerful actors that benefit from a particular institutional arrangement. Alfred Chandler for instance not only takes the existence of a national market in the United States for granted, but also argues that 'the rise of the modern business enterprise in American industry' was an inevitability in that 'it was little affected by public policy, capital markets, or entrepreneurial talents because it was part of a more fundamental economic development […], the organizational response to fundamental changes in processes of production' (Chandler 1977: 376; cf. Bensel 2000: 6 – 7). In short, 'managerial capitalism' and the modern large corporation came about in the United States as a result of the size and homogeneity of the country's market, which 'hastened the adoption of new technologies', 'stimulated the rapid spread of fundamental innovations – the railroad, the telegraph, and the new coal technologies', and 'encouraged Americans to pioneer in the machinery and organization of mass production' (Chandler, 1977: 498 – 9).

Arguments related to functionalist logic, but supplemented with bargaining dynamics, have also been made for the EU and the US (Garrett 1992; Moravcsik 1991; 1998). These structuralist-materialist explanations claim that the adjudication of authority can be predicted and is the result of different bargaining situations, where pressure groups in the EU and the United States

vary. Typical for structural-materialist arguments is therefore the notion that market integration and centralisation across sectors is a function of variation in the economic interdependence of private actors where rising interdependence leads to domestic politics and national preference formation which then via intergovernmental bargaining leads to the delegation of authority (Moravcsik 1991; 1998; McCurdy 1978).

Thus, McCurdy contends that it is the rise of big business, which enabled integration of the national market in the US (McCurdy 1978: 633). The Supreme Court needed 'litigants with sufficient resources to finance scores of lawsuits in order […] to combat the tendency of state government to mobilize counterthrusts against the Supreme Court's nationalist doctrines' (McCurdy 1978: 648). It was in short these new big business groups which led due to a vigorous expression of their interests and strong pressure on domestic politics to further market integration and centralisation.

Similarly on the EU side, Garrett argues that while steps towards internal market integration can be considered as a functional response to the changing patterns of market interdependence, conventional theories based on a functional orientation are only 'helpful in delineating both the general environment in which cooperative solutions may emerge and the general institutional forms that such solutions may take' (Garrett 1992: 560). Therefore,

he emphasises that such an approach "downplays the fundamentally political nature of most bargaining over cooperative agreements" and that '[b]oth the economic and the political institutions governing the internal market reflect the preferences of the most powerful countries in the EC: France and Germany' (Garret 1992: 560 – 561).

If outcomes are indeed in the last resort based on reactions to the size and the homogeneity of a polity's market as functionalist theories argue, the similar size and greater homogeneity of the US to the EU market would lead to the expectation that it is the United States which would have taken more steps in integrating the public procurement and the services sectors. The vice versa, i.e. the potential notion that due to greater complexity and more veto points the EU might have to centralise more to be able to function efficiently, simply does not hold up, given that on the one hand many policy areas in the EU still appear to be far less centralised than in the US and that on the other hand this would imply that the most centralised and integrated polities must be those with the greatest number of obstacles.

Given the similar sizes today of the European and American markets and similar technological stimuli and pressures on both sides of the Atlantic leading to, as Turina (2005: 225) has pointed out, 'a broad geographical expansion of corporations' areas of interest' and to the desire of service providers to 'break

through established local barriers', the argument by Chandler as well as in extension by McCurdy lead toward the assumption that the US would have taken by now at the very least steps not unlike the EU to eradicate still existing stumbling blocks to the provision of services and to the free competition in the public procurement sector either out of commercial necessity or because of powerful business interests. Yet, this is not the case. Moreover, Garrett's approach rooted in power politics would assume that what we see happening in the public procurement and services arenas in the EU are in the end the outcome of Europe's most powerful states. However, applied to the United States, this would suggest that the most powerful states, such as California, which the Governor Schwarzenegger calls a 'nation-state […] acting as a new country', would have an interest to maintain these barriers (Breslau, 2007: 60). However, why this would be so, given that California has some of the most competitive industrial, agricultural and service industries is unclear.

Institutionalist explanations

Path-dependence advocates assert that whatever turned out was at least partly locked in by earlier institutional developments (Sandholtz 1996). Concerning state-building in the United States, Skowronek for instance contends that 'states change (or fail to change through political struggles rooted in and mediated by preestablished institutional arrangements' (Skowronek 1982: ix). Thus, the functionalist formulation is not only inadequate in 'approaching state building as the natural and adaptive reaction of governments to changing conditions', but

also ‘distorts the history of reform’ by ignoring ‘the limitations of modern American state building’ (Skowronek 1982: viii). In brief, Skowronek argues that centralisation or rather the lack of it in America compared to other unitary states can be explained by the low level of federal resources and the vested interests in the state level, dating back at least as far as the American Constitution. Hence, he observes that America is ‘distinguished by incoherence and fragmentation in governmental operations and by the absence of clear lines of authoritative control’, by ‘a meager concentration of governmental controls at the national level’, and by the fact that ’the American Constitution has always been awkward and incomplete as an organisation of state power’ given that it was ‘[f]orged in the wake of a liberal revolt against the state’ (Skowronek 1982: viii, 8 and 287). Yet, it is in the EU where we see a removal of barriers to public procurement and trade in services taking place by the central authorities, despite of having even fewer federal resources and more vested interests in the state level than the US.

Similarly Stone Sweet and Sandholtz attempt to explain centralisation in the EU not only as a function of variation in the economic interdependence of private actors, and thus of the presence of active interest group demands for easier transnational exchange, but additionally emphasise the importance of policy feedbacks, path-dependence and institutionalisation (Stone Sweet and Sandholtz 1998: 22 – 5; cf. Pierson 1998). To answer therefore the question

'why does integration proceed faster or further in some policy areas than in others?', the authors contend that:

> We would look to variation in the levels of cross-border interaction and in the consequent need for supranational coordination and rules. In sectors where the intensity and value of cross-national transactions are relatively low, the demand for EC-level coordination of rules and dispute resolution will be correspondingly low. Conversely, in domains where the number and value of cross-border transactions are rising, there will be increasing demand on the part of the transactors for EC-level rules and dispute-resolution mechanisms (Stone Sweet and Sandholtz 1998: 14).

In short, both, Skowronek and Sweet Stone and Sandholtz, argue that change is driven by demand for integration from non-state actors. Thus, while the latter stress the variation in the level of cross-border interactions, the former notes that 'the expansion of national administrative capacities in America […] was a response to industrialism', the disappearance of 'the bucolic environment', '[t]he close of the frontiers, the rise of the city' and 'the end of isolation', all changes leading to 'raised demands for governmental capacities' (Skowronek 1982: 4, 8-9). The institutional outcomes of this change are, however, heavily channelled by the shape of previous delegations of power to the central state (or the lack thereof).

Stone Sweet and Sandholtz's approach is a fine example of where the arguments that are made about one polity seem at best underdetermined when also considering another one. Based on their argument, the clear expectation would be that the United States, with their higher rates of mobility across states

and the fact that services represent 8 per cent more of the American than the European GDP, would have moved along towards further integration in the services sector. This, obviously, is not the case and therefore begs the question why there is no or no successful pressuring for the removal of barriers in the public procurement and services sectors in the United States. More generally interest group-based arguments frequently fail 'to explain why a weak interest group in one country often wins a better policy outcome than its stronger counterpart in another country' and 'why parallel interest groups in different countries believe very different policies to be in their interest' (Dobbin 1994: 6). What is more, Stone Sweet and Sandholtz's argument leads us to expect more US centralisation since the earlier delegation of power to the central government in the US (while not large compared to other countries) was larger than the early delegations of power to the EU in a variety of ways. This delegation of power should have created federal entrepreneurs with an interest in more central power who should have generated more path-dependent dynamics of centralisation. Yet as regards public procurement and services this hasn't been the case in the United States.

Ideational and cultural explanations

Explanations derived from ideational-cultural approaches usually tend to consider state centralisation and market integration to be the result of different political cultures or having been constructed top-down by powerful political actors. Frank Dobbin argues that rationality, or rather what is perceived as

such, is cultural (Dobbin 1994). Different political traditions lead to different perceptions of and responses to similar problems, which then in turn explicate different industrial policies (Dobbin 1994: 22). Consequently in Britain, where 'the political autonomy of individuals was constitutive of political order [, the] domination by government or other actors was [considered] destructive', while in France 'excessive privatism was [deemed] destructive' due to the fact that 'central state concertation of society was constitutive of political order' (Dobbin 1994: 24 – 25). In the United States, in contrast, Washington became 'the referee of a free market' focusing on 'a policy of enforcing price competition as a way of guarding Americans' economic liberties against the demon of concentrated economic power' (Dobbin 1994: 2 and 24). Yet, if the American cultural focus is really on enforced price competition and that the 'United States' market-enforcing industrial policies contribute to the conviction that free competition will induce efficiency in virtually every economic sector' how do we explain that public procurement and services appear to be shielded from this enforced price competition while the EU exactly employs this kind of enforcement in these sectors (Dobbin 1994: 3)? It also leaves one to wonder whether the EU is for instance simply following French or British traditions, an amalgam of the two or already has created is own political and economic tradition.

Bensel (2000) and Berk (1994) share with Dobbin the view that market integration is not simply the outcome of technological determinism and that

markets are constructed. Yet, the former part company with the latter when it comes to the idea that the US had only one viable political and economic tradition. Indeed, Bensel and Berk challenge the notion that 'the national market was [either] a natural [or] an inevitable feature of the American political economy' and that 'politics in the age of enterprise [are] epiphenomenal and adaptive' (Bensel 2000: 290; Berk 1994: ix). For Bensel market integration was the result of 'elite-sponsored policies' where the Republican Party as 'developmental agent' played the key role in insuring that the Supreme Court was packed with Republican judges, who insulated by life tenure appointments were able to suppress 'state and local attempts to regulate interstate commerce' (Bensel 2000: xix – xx). In short, Bensel contends the US national market 'was politically constructed by the Supreme Court' to avoid it from being 'balkanized into much smaller units' and ruling thus 'out all but the most trivial state and local regulations of interstate trade' (Bensel 2000: xix and 7). Yet, public procurement and services are definitely not more trivial in the United States than in the European Union. Thus, why does then the 'unregulated national market' in the US continue to regulate public procurement and services at the state level while in the EU every effort is made to open up these policy sectors for free competition?

Jabko (1999) and Berk (1994) when looking at market integration in the EU and the US respectively emphasise contingency, noting not only that markets are constructed but also that alternative outcomes were very well feasible. Thus,

Berk observes that 'industrialization and statebuilding in the United States were much more contested and open-ended than twentieth-century learning suggests' (Berk 1994: 51). Jabko agrees in regards to the EU in commenting that 'there is little evidence that EMU was intrinsically in the economic interest of particular social groups' and that the 'euro's recent birth […] are neither the result of grandiose geopolitical design, nor the product of abstract economic necessity' (Jabko 1999: 486 and 488). This relative open-endedness due to political contestation also challenges the notion that we can predict which policy sector in the end will become more centralised in the EU and which one in US. These explanations thus lead to the hypotheses that market integration and centralisation is the result of elite constructions. Elites in favour of centralisation will lead to policy sectors being moved to the federal level. Moreover, the adjudication of policy sectors is the result of many contingencies which makes prediction of outcomes impossible. They do, however, generate predictions about processes, i.e. about the kind of story we should see when we do observe centralisation. Thus, we should find evidence that those actors in favour of centralisation have been for instance in the key policy positions to make it happen or vice versa.

Another important explanation, which bridges the divide of structural-materialist, institutional and cultural-based approaches ', can be derived from Louis Hartz's seminal work 'The Liberal Tradition in America" (Hartz 1955). This explanation of centralisation and market integration is based on the idea of American

exceptionalism. Similar to Dobbin, Hartz emphasises cultural differences, noticing the relative uniqueness of the American experience in contrast to Europe's history. Bruce Ackerman succinctly summarises Hartz's view in observing that

> Americans had never experienced anything like European feudalism. Since the first term in the [Marxian] three-stage sequence was lacking, America lacked the social ingredients necessary to spark the later movement from the second capitalist stage to the third socialist state. America was a case of arrested development, permanently frozen at stage two. […] Since Americans never were obligated to use state power to liberate themselves from feudalism, they were "born equal" and could afford to look upon the state as an unmitigated threat to natural liberty. The government that governs best governs least. Let the Europeans say otherwise (Ackerman 1991: 25 – 6).

Therefore the United States should, in contrast to Dobbin's cultural-based argument, not be expected to centralise many policy sectors given the structural, historical factors and the resulting American mindset. The reticence in Europe, however, to market integration via federal government fiat should be much less and thus leads to policy sectors being centralised in Europe, which aren't in the US despite similar economic pressures. A view which seems to be supported by Aberbach et al., who note that '[o]n the administrative side, the American bureaucracy lacks the pre-democratic legitimacy that attaches to the monarchical, ex-monarchical, or Napoleonic bureaucracies of Europe' (Aberbach et al. 1981: 23). Yet, the latter authors also observe that 'American administrators have long had responsibility for promoting their policies and mobilizing their constituencies with an overtness and an intensity that is foreign to the European tradition', which implies the possibility that on occasion the US

bureaucracy might have succeeded in overcoming general reticence towards centralisation, providing a different piece of the American exceptionalism mosaic.

Conclusion

Preliminary evidence cited in this paper seems to indicate that the European Union has in some ways more regulatory authority in the fields of public procurement and services at the higher plane of government than the United States. The EU has used or is in the process of using this power to deregulate these sectors, while in the United States no remedial actions, besides reciprocity agreements between states, have been taken to achieve a genuine internal market. In reducing or abolishing restrictions in these sectors the European Union is also adopting a more liberal market oriented position than its transatlantic partner.

Therefore, regarding these policy areas, the EU appears to be more integrated and centralised in a free market way while the US, conversely, looks as if it is largely settled in its ways. The immense amount of scholarship does not seem to cope well with this observation. Even if the US literature commonly compares the United States to unitary states and the EU literature the European Union to international organisations, the literature in general refers to the US as being more centralised and integrated than its transatlantic neighbour.

In short, these observations, contrary to common expectations, raise interesting challenges and questions regarding the adjudication of authority, be it to a subsidiary or to a higher level and a search for theoretical explanations which can better explicate this variance. Some important work in this direction is already done by Michelle Egan and Sergio Fabbrini (Egan 2001, Fabbrini 2005 and 2007). Nevertheless future research will require even more in-depth and broadly systematic comparison across the history of the US and EU, in a way that can speak to all these potential explanations and combinations of them. We would want to choose some historical cases and some contemporary cases, and across sectors as well as making sure that the cases contrast across the two federal entities regarding to the adjudication of policy authority to avoid only looking at only one end of the spectrum. Thus, we need to look at all possible configurations, i.e. where sectoral policies in the US and the EU are both decided at either the state or the federal level, where they are decided at the higher plane of government in the US but not the EU and vice versa and where regulatory authority is shared among the levels of governance.

Bibliography

Aberbach, Joel D., Putnam, Robert D., Rockman, Bert A. 1981. Bureaucrats and politicians in western democracies. Cambridge, Mass.: Harvard University Press.

Ackerman, Bruce A. 1991. We the people. Cambridge, Mass.: The Belknap Press of Harvard University Press.

Arizona Registrar of Contractors. 2006. “Licensing Reciprocity”, http://www.azroc.gov/l_rep.html, Accessed April 25, 2006

Bensel, Richard Franklin. 2000. The Political Economy of American Industrialization, 1977-1900. Cambridge: Cambridge University Press.

Berk, Gerald. 1994. Alternative Tracks: The Constitution of American Industrial Order, 1865-1917. Baltimore and London: The John Hopkins University Press.

Breslau, Karen. 2007. “'We Are a Nation-State'; Interview: 'The Governator' walks where Washington fears to tread when it comes to global warming,” Newsweek (April 16):60.

Chandler, Alfred D. Jr. 1977. The Visible Hand: The Managerial Revolution in American Business. Cambridge, Massachusetts: Belknap Press of Harvard University Press.

CIA. 2006. “CIA World Factbook: USA,” http://www.cia.gov/cia/publications/factbook/geos/us.html, Accessed April 24, 2006

Coase, Ronald.1937. "The Nature of the Firm," Economica 4 (16): 386-405.

Dobbin, Frank. 1994. Forging Industrial Policy: The United States, Britain, and France in the Railway Age. Cambridge: Cambridge University Press.

Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the Recognition of Professional Qualifications.

Economist. 2006. Charlemagne: The nationalist resurgence. The Economist (March 4th, 2006): 50.

Egan, Michelle. 2001. Constructing a European Market. New York: Oxford University Press.

European Commission, Eurostat. 2003. "Population by Main Group of Citizenship (Eu/Non-Eu), by Each Eu Member State."

European Commission. 2001. “The Internal Market Strategy for Services Frequently Asked Questions,” http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/01/5&format=HTML&aged=0&language=EN&guiLanguage=en, April 24, 2006.

European Commission. 2002. "Com(2002) 441 Final: Report from the Commission to the Council and the European Parliament on the State of the Internal Market for Services Presented under the First Stage of the Internal Market Strategy for Services."

European Commission. 2005a. “Public Procurement: Infringement Procedures against Germany, Spain, Greece, Italy, Portugal and France,” http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/949&for

mat=HTML&aged=0&language=EN&guiLanguage=en, Accessed May 20, 2006

European Commission. 2005b. “Reform of the System for the Recognition of Professional Qualifications,” http://europa.eu.int/scadplus/leg/en/cha/c11065.htm, Accessed April 24, 2006

European Commission. 2006a. “Internal Market - Public Procurement – Introduction” http://ec.europa.eu/internal_market/publicprocurement/introduction_en.htm, Accessed May 24, 2006.

European Commission. 2006b. “Public Procurement: Introduction,” http://europa.eu/scadplus/leg/en/lvb/l22001.htm, Accessed May 26, 2006

European Commission. 2006c. "Com(2006) 160 Final: Amended Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market."

European Commission. 2006d. “Frequently Asked Questions (Faqs) on the Commission's Amended Proposal for a Services Directive,” http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/06/154&format=HTML&aged=0&language=EN&guiLanguage=en, Accessed April 24, 2006

European Commission Representation in the UK. 2008. “Euromyths,” http://ec.europa.eu/unitedkingdom/press/euromyths/index_en.htm, Accessed March 10 2008

Fabbrini, Sergio, ed. 2005. Democracy and Federalism in the European Union and the United States: Exploring post-national governance. New York: Routledge.

Fabbrini, Sergio. 2007. Compound democracies: why the United States and Europe are becoming similar. Oxford: Oxford University Press.

Garrett, Geoffrey. 1992. "International Cooperation and Institutional Choice: The European Community's Internal Market," International Organization 46 (2): 533-60.

Hartz, Louis. 1955. The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution. New York: Harcourt Brace Jovanovich.

Jabko, Nicolas. 1999. "In the Name of the Market: How the European Commission Paved the Way for Monetary Union," Journal of European Public Policy 6, (3): 475-95.

Kansas State Historical Society. 2006. "Museum Announces Change in Admission Fees." News - Kansas State Historical Society.

Magnette, Paul and Christian Lequesne, Nicolas Jabko and Olivier Costa. 2003. "Conclusion: Diffuse Democracy in the European Union: The Pathologies of Delegation," Journal of European Public Policy 10 (5): 834 - 40.

McCurdy, Charles W. 1978. "American Law and the Marketing of the Large Corporation, 1875 – 1890," The Journal of Economic History 38 (3): 631-49.

McKay, David. 2001. Designing Europe: Comparative Lessons from the Federal Experience. Oxford: Oxford University Press.

Melder, Frederick Eugene. 1940. "Trade Barriers between States," The Annals of the American Academy of Political and Social Science 207: 58.

Moravcsik, Andrew. 1991. "Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community," International Organization 45 (1): 19-56.

Moravcsik, Andrew. 1998. The Choice for Europe : Social Purpose and State Power from Messina to Maastricht. Ithaca, New York: Cornell University Press.

Nicolaidis, Kalypso and Robert Howse, eds. 2001. The Federal Vision: Legitimacy and Levels of Governance in the United States. Oxford: Oxford University Press.

Oates, Wallace E. 1997. "On Environmental Federalism," Virginia Law Review 83 (7): 1321-46.

Olsen, M. 1982. The Rise and Decline of Nations: Economic Growth, Stagflation and Social Rigidities. New Haven and London: Yale University Press.

Pierson, Paul. 1998. "The Path to European Integration: A Historical-Institutionalist Analysis," in Sandholtz, Wayne and Alec Stone Sweet, eds., European Integration and Supranational Governance, pp. 27-58. Oxford: Oxford University Press.

Pierson, Paul. 2000. "The Limits of Design: Explaining Institutional Origins and Change," Governance 13 (4): 475-99.

Rivlin, Alice M. 1992. Reviving the American Dream: The economy, the states & the federal government. Washington, D.C.: Brookings Institution.

Sandholtz, Wayne. 1996. "Membership Matters: Limits of the Functional Approach to European Institutions." Journal of Common Market Studies 34 (3): 403-29.

Sandholtz, Wayne, and Alec Stone-Sweet, eds. 1998. European Integration and Supranational Governance. New York: Oxford University Press.

Sbragia, Alberta M. 2002. The European Union, Federations, and sovereignty: The EU as a 'Mirror Image' of traditional federations. Unpublished Manuscript.

Skowronek, S. 1982. Building a New American State: The Expansion of National Administrative Capacities, 1877 - 1920. Cambridge: Cambridge University Press.

State of North Carolina - Department of Administration. 2005. “Summary of in-State Preference Practices,” http://www.doa.state.nc.us/PandC/rplaw.htm, Accessed May 22, 2006

State of Oregon - State Procurement Office. 2006. “State by State Reciprocal Preference Data,” http://www.oregon.gov/DAS/SSD/SPO/reciprocal_detail.shtml, Accessed May 22, 2006

Stone Sweet, Alec and Wayne Sandholtz. 1998. "Integration, Supranational Governance, and the Institutionalization of the European Polity," in Stone

Sweet, Alec and Wayne Sandholtz, eds., European Integration and Supranational Governance, pp. 1-26. Oxford: Oxford University Press.

Thelen, Kathleen. 2004. How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan. Cambridge: Cambridge University Press.

The Constitution of the United States of America. National Archives Trust Fund Board.

The Federalist papers : a collection of essays written in support of the Constitution of the United States, from the original text of Alexander Hamilton, James Madison, John Jay. 1966. 2nd edition. Garden City, N.Y: Anchor Books.

Tiebout, Charles M. "A Pure Theory of Local Expenditures," The Journal of Political Economy 64, no. 5 (1956): 416-24.

Triantis, George G. 1997. "Foreword: The Allocation of Government Authority." Virginia Law Review 83 (7): 1275 - 82.

Turina, Alessandro. 2005. "Temporary Interstate Transactional Practice in the United States and Europe-Keeping up with Modern Commercial Realities," Boston College International & Comparative Law Review 28 (1): 225-36.

U.S. Census Bureau. 2004. "Table a-1. Annual Geographical Mobility Rates, by Type of Movement: 1947 - 2003."

Weingast, Barry R. 1995. "The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development," Journal of Law, Economics & Organization 11 (1): 1-31.

Weingast, Barry R. 2002. "Rational-Choice Institutionalism," in Ira Katznelson and Helen V. Milner, eds., Political Science: The State of the Discipline, pp. 660-92. New York: W.W. Norton & Company

Williamson, Oliver E. 2000. "The New Institutional Economics: Taking Stock, Looking Ahead," Journal of Economic Literature 38 (3): 595-613.

Wiseman, Alan E. and Jerry Ellig. 2007. “The Politics of Wine: Trade Barriers, Interest Groups, and the Commerce Clause,” The Journal of Politics 69 (3): 859–75.

Zimmerman, Joseph Francis. 2002. Interstate Cooperation: Compacts and Administrative Agreements. Westport, Connecticut: Praeger Publishers

Zimmerman, Joseph Francis. 2003. "How Perfect Is the Economic Union? Interstate Trade Barriers." Paper presented at the Annual Meeting of the American Political Science Association, Philadelphia, August 28, 2003

Zimmerman, Joseph Francis. 2005. Congressional Preemption: Regulatory Federalism. Albany: State University of New York Press.