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Ideal Types and Behavioral Hypotheses: Public Law, Max Weber and the New Public Administration

Paolo D'Anselmi

Abstract

The article challenges the assumptions that current public administration is a direct application of Max Weber's ideal type of rational-legal bureaucracy. The prevailing theory of public administration is the Rational Behavioral Hypothesis which this article argues is an instrumentalized version of Weber's ideal type and as such it presumes, invalidly, the attributes of legal-rationality. Of the majority of civil services across the world employing an estimated half a billion officials, Weberian criteria of efficiency, rationality, and impartiality to politicians and citizens alike is lacking. Yet despite these failings bureaucratic practice is assumed to be Weberian. The author argues that the Rational Behavioral Hypothesis has to be replaced by the 'Administrative Behavior hypothesis' which is taken from Herbert Simon. Bruce Ackerman's account of bureaucracy as the fourth pillar of modern constitutionalism is criticised for its reliance on the cultural formation of bureaucratic elites. The role of New Public Management and the Neo-Weberian State in public administration are assessed.

Keywords: Rational Behavioral Hypothesis, public law, Administrative Behavior hypothesis, bureaucracy, Neo-Weberian state.

'That is not what I meant at all'.

Introduction

Scholars of public law have been revising Montesquieu's model of the separation of powers nearly three centuries after its original formulation in 1748. Likewise public law appears to be based on a 'received view' of Weber's ideal typical formulation of rational legal authority, leading to a 'Rational Behavior Hypothesis' on the part of bureaucracy. Such a view has been deepened and revised over the course of the last century by both Max Weber scholars and management sciences. This article investigates the interaction between these two strands of scholarship and the impact of contemporary

Weberian scholarship on public law's Rational Behavior Hypothesis. The general point of the article is that public law follows a received view of Max Weber and thus has formulated for public administration a behavioral reading of Weberian social action according to the rational legal authority ideal type. Weber scholarship has shown that ideal types are not in themselves behavioral hypotheses, consequently there could be an inherent flaw in public law. We need to carefully unpack the legal-rational model. We also need to derive a more efficient behavioral hypothesis. The specific and alternative hypothesis of organizational behavior on the part of the public administration's bureaucracies that is proposed here is called the 'administrative behavior hypothesis'.

To argue its point this article draws on key debates about public law's theory of the separation of powers, its interaction with Max Weber scholarship, and theories of New Public Administration (NPA); this last includes New Public Management (NPM) and the Neo-Weberian State (NWS).

Accordingly, the plan of the article is as follows. Part 1 is focused on public law as expressed in Bruce Ackerman's work on the *new* separation of the three classical powers.¹ Part 2—Critical Discussion—makes observations about the assumption of supposedly Weberian public administration inherent in the Ackerman article and its interaction with the theories of New Public Management (NPM) and the Neo-Weberian State (NWS). Part 3 provides a reading of Max Weber according to Max Weber scholars and derives operational consequences for public law.

The aim of such an investigation is to encourage management sciences to make changes in the formulation and implementation of law with an impact on current approaches to public law, and consequently on economic development across the world. This becomes highly relevant when public administration is viewed from below, for it concerns the work of about half a billion employees in public administration globally.² Uncritical and widespread adoption of what this article terms 'received view' of Weber or 'Rational Behavior Hypothesis',

1. Bruce Ackerman, 'The New Separation of Powers', *Harvard Law Review* 113.3 (2000): 633-725.

2. This article takes a 'view from below' to public administration. See Ralph S. Brower and Mitchel Y. Abolafia, 'Bureaucratic Politics: The View from Below', *Journal of Public Administration Research and Theory* 2 (1997): 305-31. The half a billion employees of public administration globally is this author's estimate.

with its supposed Weberian imprimatur, has allowed the general underperformance of bureaucrats and administrative officials to pass unnoticed.

Part 1:

Ackerman's Separation of Powers

In his article 'The New Separation of Powers' Ackerman deals with the separation of powers in three respects: (1) the boundaries between parliament and the executive; (2) the germane point about the possible separation of politics from administration; and (3) new powers that need to be introduced.

1.1. The Executive and Parliament

In Section I—Democratic Legitimacy—of his article, Ackerman is concerned with the line of separation between legislative and the executive and the relationship between president and parliament, be the latter adversarial or friendly according to the majority represented there. Ackerman prefers the European parliamentary system to the American presidential system because the former curbs the influence of politics (i.e., of the Executive, or the President in the US case) on public administration. Ackerman wants to avoid the spoils system by means of tighter parliamentary controls over the executive branch, as is the case in the European systems, notwithstanding France's semi-presidential arrangement.³ Under the administration of President Trump, Ackerman's worse misgivings are being confirmed.

1.2. Separation between Politics and Administration within the Executive

The above deals with the legislative vs. executive. In his Section II—Functional Specialization—the same question of separation is dealt with one level below, examining the executive branch. Here, in Ackerman's view,⁴ is where the second element of separation of powers is located, namely 'the division between politics and administration'. Ackerman directs his attention to within the executive branch and asks the question: 'Should we carve out a space, insulated from direct political intervention, in which judges and bureaucrats may deploy

3. Ackerman's preferred European systems are Germany, the United Kingdom and France.

4. Ackerman, 'The New Separation of Powers'.

their professional judgment in the service of legislative objectives?⁵ Once again we may reflect on the relevance of such thoughts to the administration of President Trump. Ackerman then adds: 'This Part begins on a constructive note, proposing new forms of separation that may help to realize the promise of a professional judicial and civil service to fair and effective government'.⁶ Ackerman explores the consequences of American-style 'presidentialism' 'on *impartial* and *professional* public administration'. In this same section,⁷ Ackerman founds his separation of politics from administration (i.e., constrained presidentialism) no longer on democratic legitimacy (as he does in the powers of parliament vs. executive), but instead on the need for functional specialization between politics and administration within one branch of power: the Executive. However, he does acknowledge that politicians should decide on the 'elaboration of basic values' and on 'some concrete questions [that] are so important and so difficult to regulate in advance, that they should be reserved for direct decision by high-visibility politicians—a declaration of war can serve as the paradigm'.⁸ The rest should be dealt with by public administration (i.e., the bureaucracy).

Ackerman's vision of a functional specialization between politics and public administration 'requires a candid assessment of a nation's cultural and human resources' and here there is a clear reference to Weber's theory of bureaucracy.

Before functional separation can make sense, there must be the makings of something I shall call a '*Weberian culture*'. *At least some talented people must find inspiration in the prospect of professional service to the state.* Otherwise, the functional separation of powers will serve merely as a fig leaf for corruption and clientelism. ... *Public-spirited specialists* are ... in short supply in many parts of the world—in which case there will be many more important things to worry about than the functional separation of powers⁹ (emphases added).

5. Ackerman, 'The New Separation of Powers', p. 685; notice Ackerman here speaks of judges also as bureaucrats, assimilating them in the administrative, non-political, non-elected areas of public service.

6. Ackerman, 'The New Separation of Powers', p. 686, II Functional Specialization, i.e., politics vs. administration).

7. Ackerman, 'The New Separation of Powers', p. 687.

8. Ackerman, 'The New Separation of Powers', p. 687. We may add the coronavirus epidemic as an example.

9. Ackerman, 'The New Separation of Powers', p. 687. It should be noted that Ackerman's article was published 20 years ago; however, it can be noted that Profes-

The Ackermanian notion of 'Weberian culture' materializes through the presence in the country of 'at least some public-spirited specialists'. Such presence becomes a necessary condition for 'functional separation' of powers to 'make sense'. Let us reflect on what is meant exactly by such notion of Weberian culture, how such notion is still supported by theories of NPA, and how and whether these theories reflect Max Weber's legacy.

The passage is crucial because Ackerman makes explicit here his Rational Behavior Hypothesis, which is widely echoed in documents of global public organizations and in the global media. In fact, Ackerman's hypothesis about the existence of a 'Weberian culture' and 'public-spirited specialists' speaks to the existence of a 'class of higher echelons' in public administration as implied by today's media.¹⁰ Such thinking also permeates much of public law and international and national organizations' policy.¹¹ These are examples of uncritical and widespread adoption of what this article terms 'received view' of Weber or 'Rational Behavior Hypothesis', allowing the general underperformance of bureaucrats and administrative officials

sor Ackerman's current work is also framed within the Weberian paradigm including the rational-legal source of authority (Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* [Harvard University Press, 2019], p. 1), 'bureaucratic rationality'.

10. 'Mandarin Lessons: Governments Need to Rethink How They Reward and Motivate Civil Servants', *The Economist* (August 9, 2014); 'Aiwa (Yes) Minister: The Region's Countries Desperately Need to Reform Their Public Sectors', *The Economist* (November 14, 2015); 'From Red Tape to Joined-up Government: Latin America's Efforts to Improve Public Policies Are Often Undermined by Politicised and Obsolete Civil Services', *The Economist* (January 2, 2016) and 'Bureaucratic Blight: The federal government's ability to operate effectively was already in question. Then Donald Trump became its master', *The Economist* (September 7, 2019). 'The total number of workers matters less to effective governance than what those workers do. Max Stier, [of] Partnership for Public Service [said]: "legacy government has not kept up with the world around it... [and] has not been updated to address the problems of tomorrow"...The Government Accountability Office has long warned of problems in recruiting and retaining *public-spirited* [emphasis added] workers'.

11. International Monetary Fund (IMF), Fiscal Affairs and Legal Departments, Corruption: Costs and Mitigating Strategies (May 2016), at iii, 'Perhaps most importantly, however, addressing corruption requires effective institutions. While building institutions is a complex and time consuming exercise that involves a number of intangible elements that may seem beyond the reach of government policy, the objective is clear: the development of a competent civil service that takes pride in being independent of both private influence and public interference'.

to pass unnoticed or at least preventing the identification of the root causes of the problem: the task that this article aims to perform.

Ackerman's hypothesis also raises a question about what exactly the public administration literature is dealing with: is it the hundreds of millions of people who are employed by governments worldwide or it is only their higher echelons? This question is not pursued in this article. Nonetheless, the intellectual and emotional nourishment of 'public-spirited specialists' is the basic tenet of—for instance—the Harvard Kennedy School, which Ackerman mentions explicitly,¹² and of many schools of public administration around the world. Schools of public administration work under the Rational Behavior Hypothesis whereby training and endowing as many public managers as possible around the world with the 'right' skills will result in better public administrations—and they, the schools, will have made a difference. Such an all-out effort and an expectation of public-spiritedness appears to be aimed not only at the higher echelons but to the whole body of employees on public payroll globally.¹³

Ackerman argues that the bureaucracy behaves as a fourth power, and he invites scholars to address the issue: 'Constitutionalists should, therefore, extend their thinking to embrace the distinctive structural problems involved in controlling the fourth branch of government: the bureaucracy'.¹⁴ Without going into an exposition here, Weber clearly constructed his ideas on bureaucracy both on the opposition of the political and the bureaucratic as well as the impartiality of the administrative apparatus.¹⁵

12. Ackerman, 'The New Separation of Powers', p. 711, 'Similarly, one may try to dissolve the tension between professionalism and American-style separation through a second form of reductionism deriding the "myth of expertise" that serves as a principal justification for bureaucratic regulation. According to the extreme reductionist version, the folks at the Kennedy School are engaged in criminal fraud when they charge outrageous tuition for a degree in public administration — there is simply no such subject that can be taught. And because it's all politics anyway, there isn't anything wrong with revolving-door politicians using their presidentially approved intuitions as they take their turn at the bureaucratic helm'.

13. Thomas Hobbes seemingly answers this question in the second part of *Leviathan*, Chapter xxiii, 'On the Public Ministers of the Sovereign Power', where he enumerates rather extensively who is to be regarded as a public minister.

14. Ackerman, 'The New Separation of Powers', p. 689.

15. Wolfgang J. Mommsen, *The Age of Bureaucracy: Perspectives on the Political Sociology of Max Weber* (New York: Harper, 1974).

1.3. *More Powers*

In his section III—Fundamental Rights—Ackerman¹⁶ stresses the need for new branches of power to be independent of one other and of the classical three powers. New branches of power are organizational structures that wield some specific power that is outside the jurisdiction of the classical Montesquieuian three branches of power. Such branches are needed because ‘politicians might legitimately pass any laws they liked’ and this might give rise to ‘their predictable tendency to pursue their ends by undermining impartial and informed administration’. So, there is need for ‘constitutional protection against these predictable efforts to erode the rule of law’. Therefore, such branches are needed ‘to impose ultimate limits on the legislative authority of democratically elected politicians’ especially to insure the protection of fundamental rights. Historically, the first separate power was central banking, motivated by the avoidance of a ‘politicized’ management of such a function. Ackerman’s system of authorities is needed to allow a kind of non-parliamentary executive action, which presidential systems obtain through the president himself. The Federal Reserve system, where the President appoints the Chair and vice-chair, is an example of this.¹⁷ Thus independent authorities appear to wield an executive power that is independent of parliament. Still, the Ackermanian view of independent and separate authorities appears to share with presidentialism an aspiration for effective executive action, taking it out of parliamentary control because parliaments are often fragmented between political parties and factions within parties.

Part 2:

Critical discussion:

Public Law, Weber and the New Public Administration

This Part makes observations about the assumption of Weberian public administration inherent in Ackerman’s presentation. As pointed out above, the Ackermanian notion of ‘the makings of a

16. Ackerman, ‘The New Separation of Powers’, p. 712.

17. 12 U.S.C. United States Code §241. Independent authorities leave us with the problem of oversight. An example of proposal of oversight by parliamentary committees is provided for the case of independent central banks, by Paul Tucker, *Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State* (Princeton, NJ: Princeton University Press, 2018).

Weberian culture' is revealed by the presence in the country of 'at least some public-spirited specialists'. Such presence becomes a necessary condition for 'functional separation' of powers to 'make sense'. 'Otherwise, the functional separation of powers will serve merely as a fig leaf for corruption and clientelism'. What Ackerman is referring to is Max Weber's first ideal type of legitimate domination: legal domination.¹⁸ Let us trace the lineage of Ackerman's thinking about public administration adhering to presumed Weberian thinking. The Weberian ideal type of legitimate domination is the basis for scholars of the Neo-Weberian State.

2.1. *The Neo-Weberian State*

Ackerman's public spirited specialists are very much in tune with thinkers of the Neo-Weberian State (NWS). Pollitt and Bouckaert qualify Weber's alleged 'ancient regime', summarize his view, and defend it. Talking about public administration organization, they define Weber's ancient regime as characterized by:

- fixed spheres of competence;
- a defined hierarchy of offices;
- a clear distinction between the public and the private roles (and property) of the officials;
- specialization and expertise as the basis for action;
- full-time, career appointments for officials;
- management by the application of a developing set of rules, knowledge of which was the special technical competence of the officials concerned.¹⁹

Following a previous edition of Pollitt and Bouckaert, Lawrence Lynn clearly defines the elements of the Neo-Weberian State²⁰:

18. Mommsen, *The Age of Bureaucracy*, p. 81; on ideal types also Sam Whimster, *Understanding Weber* (London: Routledge, 2007), p. 111 and on Herrschaft, p. 233.

19. Christopher Pollitt and Geert Bouckaert, *Public Management Reform: A Comparative Analysis – New Public Management, Governance, and the Neo-Weberian State* (Oxford: Oxford University Press, 3rd edn, 2011), pp. 71-72.

20. Lawrence E. Lynn, Jr., 'What Is a Neo-Weberian State? Reflections on a Concept and its Implications', *NISPAcee Journal of Public Administration and Policy* 17 (2008): 17-30 (27).

- Reaffirmation of the state as the main facilitator of solutions to the new problems of globalization, technological change, shifting demographics and environmental threat;
- Reaffirmation of the role of representative democracy (central, regional, and local) as the legitimating elements within the state apparatus;
- Reaffirmation of the role of administrative law—suitably modernized—in preserving the basic principles pertaining to the citizen-state relationship, including equality before the law, legal security, and the availability of specialized legal scrutiny of state actions;
- Preservation of the idea of a public service with a distinctive status, culture, and terms and conditions.

Having defined the Weberian elements, Lynn lists the ‘Neo’ elements of the ‘Neo-Weberian State’:

- Shift from an internal orientation towards bureaucratic rules towards an external orientation towards meeting citizens’ needs and wishes. The primary route to achieving this is not the employment of market mechanisms (although they may occasionally come in handy) but the creation of a professional culture of quality and service;
- Supplementation (not replacement) of the role of representative democracy by a range of devices for consultation with, and the direct representation of, citizens’ views (this aspect being more visible in the northern European states and Germany at the local level than in Belgium, France or Italy);
- In the management of resources within government, a modernization of the relevant laws to encourage a greater orientation on the achievement of results rather than merely the correct following of procedure. This is expressed partly in a shift to the balance from *ex ante* to *ex post* controls, but not a complete abandonment of the former;
- A professionalization of the public service, so that the ‘bureaucrat’ becomes not simply an expert in the law relevant to his or her sphere of activity, but also a professional manager, oriented to meeting the needs of his or her citizens/users.²¹

21. Lynn, ‘Neo-Weberian State’, p. 27.

Rare among scholars, Lynn recognizes the prevalence of public law: 'constitutions and constitutional institutions, legislatures, and courts regulate the evolution of managerialism'.²² Raadschelders as well recognizes the role of law, regulation and the so-called 'soft law': 'Law is an element in the "closing of the iron cage". It expands in scope and range and becomes increasingly refined and then not so much as primary law, which is debated in and enacted by a legislature, but in secondary law which is written and issued by administrative agencies. Driven to its extreme, modern law becomes a technically rational machine with the judge operating as an automaton who is expected to apply the law as a technical and intellectual procedure. Just as economic and bureaucratic systems, the legal system operates upon formal rationality; it is merely procedural when taking only unambiguous general characteristics of the facts of a case into regard'.²³

Invoking the role of law in the expansion of public administration leads us to the reflection: is this true to the rational-legal ideal type or is it an extension? This article argues that it is this true to the 'received view' of the rational-legal ideal type; it is a manifestation of the instrumentalized nature of the received view of Max Weber. The received view, per se, implies that public administration does everything the bureaucratic way. The received view is per se omniscient, omnipresent, it does not discuss itself; it takes itself for granted. This is 'instrumentalized' Weber, i.e., claiming Weber's imprimatur of formal legality. Soft law—made at all levels of the bureaucracy—shows that the Rational Behavior Hypothesis—or received view of Weber—is being applied by all and to all the millions that compose public services worldwide.

Lynn does, however, have a vision and a plan for Ackerman's public-spirited specialists. This kind of formulation has resulted in a flurry of activity aimed at better specifying and implementing Weber's presumed prescriptions. In fact, scholars—and politicians as well as public opinion (implicitly)—adhering to their own view of Weber's analysis of public administration do acknowledge public administration's poor performance and air their concerns about how it might be improved, thus generating a strand of public

22. Laurence E. Lynn, Jr., *Public Management: Old and New* (London: Routledge, 2006), p. i.

23. Jos C.N. Raadschelders, 'The Iron Cage in the Information Age', in Edith Hanke, Lawrence Scaff and Sam Whimster (eds), *The Oxford Handbook of Max Weber* (Oxford: Oxford University Press, 2020), pp. 557-74 (561).

administration reforms. Such reforms nonetheless remain focused on how to better implement the presumed Weberian prescriptions: tighter selection of personnel, more controls, more division of labour (or less division of labour, if the previous reform had more), or higher expectations of ethical behavior from individuals. Such approaches can be seen to some extent as trying to fix 'instrumentalized' Weber with misinterpreted Weber.

This kind of approach is observable in Ackerman²⁴ as well when he proposes an 'integrity branch' charged with the task of 'monitoring corruption phenomena'. Transparency and integrity are certainly desirable goals. However, we question that such goals should be pursued through the creation of more public organizations. In general, it does not follow that the pursuit of a goal implies the creation of an organization for the sole purpose of pursuing that goal. To argue for this is to subscribe to the implicit hypothesis that current organizations cannot be reformed and their current organizational arrangements are already perfect.

2.2. *New Public Management*

The Neo-Weberian State (NWS) came after New Public Management (NPM) and was developed through criticisms of NPM. Pollitt and Bouckaert (NWS) criticize Osborne and Gaebler (NPM) as 'reducing the past to a single system', 'it is a long—an unjustified—leap' to think 'that governments of the industrialized world previously operated their public sectors as Weberian-style traditional bureaucracies, and are now able to move, without significant loss, to a new, modern type of organization which avoids all the problems of the past... Each country is different ... individual public sectors have distinctive organizational cultures of their own'.²⁵

Osborne and Gaebler are a classical reference of NPM, albeit they do not use such a phrase in their book. Osborne and Gaebler are never worried about the Executive per se and about the separation of politics from administration. They are concerned with government agencies providing services to other government agencies.²⁶ In this

24. Ackerman, 'The New Separation of Powers'.

25. David Osborne and Ted Gaebler, *Reinventing Government: How the entrepreneurial Spirit is Transforming the Public Sector* (Reading, MA: Addison Wesley, 1992), pp. 12-14, 72.

26. Osborne and Gaebler, *Reinventing Government*, p. 90.

respect, however, scholars of NPM are concerned about central government giving up its own decision-making capacity.²⁷

Supposedly Osborne and Gaebler's preference for market mechanisms comes from the Public Choice school of thought. However, they are not concerned with politics nor with ideology. They do not cite Buchanan and Tullock²⁸ nor Downs²⁹. They are pragmatists. They could hardly be included in MacLean's argument about the far reaching roots of the political situation of the USA during the Trump administration.³⁰

Osborne and Gaebler are rather neo-Weberian themselves and are sympathetic to Weber's methodology: registering and modeling what is available around the world of organization. Weber himself said that bureaucracies are intrinsic to both the private and the public sector.³¹ So Osborne and Gaebler look at how the private sector deals with bureaucracy and try to do the same in the public sector. 'The bureaucratic model developed in conditions very different from those we experience today. It developed in an age of hierarchy'. They basically claim they are doing the same operation that was done one hundred years before by the Progressives: Theodore Roosevelt, Woodrow Wilson and Louis Brandeis, following Weber.³² For Weber the commonality of private and public sectors were their organisational requirements.

NPM—and the NWS criticism of NPM—appears to have been concerned more with the practical arrangements of public administration and the consequences of its practice, than with the tracing back to the possible theoretical underpinnings of its innovation. In doing so, they appear to possibly be missing the opportunity that the identification

27. Anne C.L. Davies, 'Beyond New Public Management: Problems of Accountability in the Modern Administrative State', in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford: Oxford University Press, 2013), pp. 333-53.

28. James M. Buchanan and Gordon Tullock, *The Calculus of Consent* (Liberty Fund, 1962). Ackerman, 'The New Separation of Powers', pp. 711, 719.

29. Anthony Downs, *An Economic Theory of Democracy* (New York: Harper and Row; 1957).

30. Nancy McClean, *Democracy in Chains: the deep history of the radical right's stealth plan for America* (New York: Penguin Random House, 2017).

31. Osborne and Gaebler, *Reinventing Government*, pp. 12-14.

32. Osborne and Gaebler, *Reinventing Government*, p. 15.

of a basic cause of malfunctioning of public administration might allow of going beyond the 'shopping basket'³³ nature of NPM.

2.3. Public Choice

Ackerman does consider the possible ancestors of NPM: Buchanan and Tullock. 'Analyzing the extent to which bicameralism serves to protect the status quo against modification by simple majority rule' Ackerman notes that 'characteristically, laissez-faire constitutional theorists emphasize the virtues of impasse, failing to notice the other side of the equation'.³⁴ However, such consideration is made within the discussion about new possible branches for the protection of fundamental rights. This paper eschews the political left / right debate. This paper wants to use mainstream organizational behavior arguments. It wants to be neither conservative nor liberal; it wants to be robust vis-à-vis politics and ideology, sticking to Max Weber's sociology of organizations as indispensable mechanisms in advanced societies. However, within the strand of thought generated by Buchanan and Tullock, a debt is dutifully acknowledged here to William Niskanen's theory of non-market decision-making.³⁵ Niskanen is a sideways product of Tullock, whom he acknowledges for an intuition about the relationship between the bureaucrats and the politicians in the so called 'broken triangle of governance'.³⁶ Niskanen analyzes the bureaucracy through microeconomic method and derives an appreciation for market mechanisms as proxies for proper evaluation of bureaucratic output. Such conclusions are in tune with New Public Management and less in tune with Ackerman and the Neo-Weberian State.

Ackerman, as noted, is trying to achieve constitutional neutrality among the three classical branches of power and within the Executive branch, between the President and the bureaucracy. We need to move one step below here and move from top constitutional structures to neutral organizational arguments about the bureaucracy. Impartiality of the bureaucracy was a central tenet in Weber's account

33. Tom Christensen, 'Post-NPM and changing public governance', *Meiji Journal of Political Science and Economics* 1 (2012): 1.

34. Ackerman, 'The New Separation of Powers', p. 719 n. 213. 'See, e.g., James M. Buchanan and Gordon Tullock, *The Calculus of Consent*, pp. 233-48'.

35. W.A. Niskanen, 'Non-market Decision Making—The Peculiar Economics of Bureaucracy', *American Economic Review* 58.2 (May 1968): 293-305.

36. A. Lapicicella, 'On Bureaucratic Behavior', in M. Di Bitetto, A. Chymis and P. D'Anselmi (eds), *Public Management as Corporate Social Responsibility: The Economic Bottom Line of Government* (Heidelberg: Springer, 2015), pp. 103-118.

of bureaucrat—'sine ira et studio'.³⁷ We need to dissect the notion of impartiality. The term impartiality of the bureaucracy is generally about the bureaucracy (supposedly) being impartial vis-à-vis the citizens, i.e., treating the same way one citizen and the next citizen. 'Administration "without regard for persons" implies the principles of equal treatment and non-discrimination that underlie today's egalitarian democracy'.³⁸ The same kind of impartiality is practiced vis-à-vis politicians: 'The civil service saw itself as neutral and impartial: a servant to any master'.³⁹ And: 'The political neutrality of the civil service is fundamental'.⁴⁰ We could qualify this kind of impartiality as 'horizontal' impartiality, in order to differentiate it from a 'vertical' impartiality—rather the absence of it—which is about the precedence the bureaucracy and the bureaucrat give to themselves vis-à-vis the rest of society. This is a way to represent an asymmetry that is present in the cited 'broken triangle of governance': the citizens and the politicians have limited power vis-à-vis the bureaucrats. Such notion of the absence of vertical impartiality will be also discussed in Part 3.

Concluding this discussion about the lineage of Ackerman's 'Weberian culture', we need to notice that the examined authors do not delve deeper into Max Weber's message which was that ideal types are heuristic models; they are not hypotheses about actual behavior. On the contrary, the cited authors have read Weber's ideal types as a normative/legal assumption—and this has been misleading on the functionality of the (Prussian-inspired) model. A model for thinking has been transformed into a positive fact. The received view of Max Weber has gone from the ideal type of bureaucracy to the concept of 'ideal bureaucracy'.⁴¹ One may very well exclaim the T.S. Eliot verse here: '*That is not what I meant at all*'.⁴²

37. Max Weber, *Economy and Society. An Outline of Interpretive Sociology* (ed. G. Roth and C. Wittich; Berkeley: University of California Press, 1978), p. 975.

38. Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 2009), p. 52.

39. Harlow and Rawlings, *Law and Administration*, p. 53.

40. A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law* (Harlow, England: Pearson, 2011).

41. Lynn, *Public Management* (48,54). 'Weber himself notes the ambiguity of the term 'ideal' in ideal types'. Whimster, *Understanding Weber*, p. 111; and, p. 112, 'Weber is aware that problems remain to be elucidated on the relation of ideal types to other seemingly similar concepts such as ideals in life'.

42. T.S. Eliot, 'The Love Song of J. Alfred Prufrock'.

Part 3:
The Administrative Behavior Hypothesis

3.1. Ideal types and behavioral hypotheses

Let us now turn to contemporary Weber scholarship. 'Legal domination' by means of bureaucratic administrative techniques⁴³ is actually the 'Weberian culture' Ackerman and the NWS are referring to. Notice that Mommsen does not use the phrase 'legal-rational authority', rather he refers to 'legal domination', a completely different tune.⁴⁴ This is discussed by Max Weber in 'The theory of the "three pure types of legitimate domination"', or more precisely, the ideal-typical systematization of types of legitimate rule, [which] is perhaps the most mature and elaborate part of Max Weber's universal interpretative sociology'. Let us recall Mommsen's discussion about the ideal type: 'It claims to serve as a yardstick for the evaluation of any sort of domination, whether in the remote past or in present day societies'.⁴⁵ Let us point out—once again—that bureaucracy is an ideal type not a hypothesis. Hypotheses can be generated from the ideal type, which is a heuristic.

Weber took pains to make clear that these types of rule do not necessarily follow one another. The theory of the 'three pure types of legitimate domination' was not intended to be a scheme which stood for a sort of linear perspective of world history leading from charismatic forms of government at the beginning, to bureaucratic forms of government at the very end. ... Weber also went to some lengths to make it clear that *none of these 'pure types' was ever actually to be found in historical or social reality* (emphasis added).⁴⁶

Mommsen also writes:

It is the most significant feature of all 'instrumentally-rational' social systems [author: such as 'Legal domination' by means of bureaucratic administrative techniques] that they operate exclusively according to the principle of pure formal legality, rather than according to the principles as are derived from, and dependent on, a particular set of ultimate values... Weber strongly emphasized the purely formal quality of legality, as the dominant feature of the type of legal domination.⁴⁷

43. Mommsen, *The Age of Bureaucracy*, p. 73.

44. A philological account of the origins of the 'rational-legal-phrase' will be the subject of further research.

45. Mommsen, *The Age of Bureaucracy*, pp. 73-74.

46. Mommsen, *The Age of Bureaucracy*, pp. 73-74.

47. Mommsen, *The Age of Bureaucracy*, p. 81.

Weber gloomily depicted the kind of society which would come closest to a full implementation of all the elements listed under the type of pure legal rule. It would be administered by an almighty bureaucracy in accordance with a closely knit network of laws and regulations of a purely formalistic nature, which would leave little or no space for individually oriented creative action. In such a system all moral values would be of little avail, for the organizational structure would only take into account technical considerations, without any regard to the value attitudes of the particular groups or individuals concerned.⁴⁸

Mommsen's words tell us how hazardous it was to transform the ideal type into a behavioral hypothesis. We see that Weber scholarship tells us a different story from the received view and the 'Rational Behavior Hypothesis'. We can conclude from these passages that through a heuristic⁴⁹ process, the ideal type has been transformed and instrumentalized into a behavioral hypothesis⁵⁰, even more than that: it has been taken as a positive fact of nature. Public law scholars seem to have formulated their own question and thought that Weber's ideal type of 'legal domination' by means of bureaucratic administrative techniques⁵¹ was the answer to that question: 'How do we set up an organization that behaves and performs like a machine and delivers in reality what the law says in writing?' The seventeen to twenty *ex post* characteristics of bureaucracy in Weber's bureaucratic ideal type method of research were taken as an *ex ante* recipe to set up a performing organizational structure.⁵²

48. Mommsen, *The Age of Bureaucracy*, pp. 81-82.

49. Daniel Kahneman, *Thinking, Fast and Slow* (London: Penguin, 2011), pp. 97-98: 'I call the operation of answering one question in place of another *substitution*. I also adopt the following terms: [1] The target question is the assessment you intend to produce; [2] The heuristic question is the simpler question that you answer instead. The technical definition of *heuristic* is a simple procedure that helps find adequate, though often imperfect, answers to difficult questions. The word comes from the same root as *eureka*'. On heuristics see also Whimster, *Understanding Weber*, p. 111.

50. Weber, cited in Whimster, *Understanding Weber*, p. 111: 'The concept of the ideal type can direct judgement in matters of imputation; it is not a "hypothesis", but seeks to guide the formation of hypotheses'; Whimster comments, 'Weber has his gaze firmly set on causal explanation as the standard of objectivity and of science. But to do this, he has to interpose hypothesis construction between ideal types and causal explanation'.

51. Mommsen, *The Age of Bureaucracy*, p. 73.

52. Raadschelders, 'The Iron Cage', pp. 557, 569.

Our discussion so far has shown that the Rational Behavior Hypothesis, deriving from an instrumentalized received view of Weber, is non-performing and it does not adhere to Weber and Weberian scholarship. It leads us to 'pure formal legality', which does not necessarily result in rational or efficient outcomes.

3.2. *The Administrative Behavior hypothesis*

The foregoing discussion then leaves us orphans of a viable organizational behavior hypothesis about public administration, and indeed we do need one because a hypothesis is always implicit in the laws and provisions on public administration.⁵³ We need a conservative hypothesis, conservative in the sense of prudent or that would not make heroic assumptions about organizational behavior and human nature. For sake of robustness in implementation, we need to be, as it were, Madisonian, and rely as little as possible on the virtues of the individual. A hypothesis should be put forward in which assumptions about bureaucrats' ethics — e.g., expectations of public spiritedness, professionalism, and impartiality — are no more demanding than in hypotheses held regarding employees in the private and non-profit sectors of the economy. Public law—in its own turn—should therefore make provisions to orient organizational behavior *vis-à-vis* public administration in the same way that they already do regarding all other organized and individual actors in society and the economy. An assumption that is good at predicting real life behavior in the implementation of law should take into account that all three Weberian ideal types are found at work within the same organization. For instance, it is to be expected that traditional or customary behavior will be in evidence, just as much as charismatic personalities may play a role.⁵⁴ The needed hypothesis should also take into account Max Weber's 'gloom' and his prediction of purely formal legal behavior. We propose an 'Administrative Behavior hypothesis', borrowing Herbert Simon's expression⁵⁵ in order to convey the idea

53. G. Allison and P. Zelikow, *Essence of Decision: Explaining the Cuban Missile Crisis* (New York: Longman, 1999). The argument here implies a generalization of Allison and Zelikow. Taking action and decision making occur not only in the executive branch but also law making is decision making. Indeed law making is formalized and proceduralized decision making at its apex.

54. For example, remember the charismatic Richard Holbrooke in the U.S. State Department.

55. Herbert A. Simon, *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organization* (New York: Free Press, 1997).

of bounded rationality that is inherent in it on the part of the bureaucracy. Under the Administrative Behavior hypothesis bureaucratic rationality is bounded at least in its consequences, not necessarily in its intentions. One could also use the terms rationality of inputs and rationality of outputs and outcomes.

The 'Administrative Behavior hypothesis' appears to be in tune with Max Weber, who wrote in this respect:

[T]here is another tendency . . . in contradiction to the above . . . the tendency of officials to treat their official function . . . in the interest of the welfare of those under their authority. This tendency to substantive [instrumental] rationality is supported by all those subjected to authority... [and who are] interested in the protection of advantages already secured. The problems which open up at this point belong in the theory of 'democracy'.⁵⁶

This passage illustrates a key feature of the Administrative Behavior hypothesis: the absence of 'vertical' impartiality on the part of public administration. The notion of 'vertical' impartiality has been introduced above.

The means by which proper organizational arrangements will be sought in pursuit of proper implementation of laws is to adhere to a view that is more likely to predict organizational behavior and future response by public administrations: the Administrative Behavior hypothesis. Conversely, adopting organizational behavior hypotheses that are less performing in predicting organizational behavior is more likely to lead to unintended consequences within law-making and law implementation. Behavioral hypotheses in fact represent an intermediate step in the formulation of law and the proper implementation of it.

3.3. *Hyperpluralism*

Ackerman does consider the possible consequences of his Rational Behavior Hypothesis remaining unfulfilled and states that, unless we have a class of Weberian bureaucrats,⁵⁷ constitutional arrangements in the long run prove unsustainable. Thus his constitutionalism appears to be good only for a few countries in the world—twenty

56. Max Weber, *Economy and Society*, p. 226.

57. Upon closer reflection, Weberian bureaucrats appear to be an evolution of Plato's ruling class of guardians, who know how to rule and understand ruling as a craft. However, differently than Plato's guardians, bureaucrats ideally don't 'rule', and, if they do so, they 'usurp' power from the legislative representatives of the people (as in liberal theory), or from the peoplethemselves (as in populist imagery).

at most, e.g., some (not all) of the main OECD countries, covering no more than seventeen per cent of humanity.⁵⁸ Moreover, it is to be noted here that most of these advanced countries are not satisfied with their own bureaucracies. A case in point is *The Economist's* complaint that the United Kingdom is in the hands of a 'caste of "unsackable" functionaries'.⁵⁹ Indeed, most of the relevant literature that is critical of the Rational Behavior Hypothesis comes from such countries, which are today regarded as endowed with relatively Weberian bureaucracies.⁶⁰

Moving forward somewhat, it would be helpful to develop a constitutional theory that works for more people, especially in developing countries. Such an effort would follow in the footsteps of Ferrara's *Democratic Horizon*,⁶¹ which tries to found politics on weaker grounds—or less strict hypotheses—than current theory would have it. It is an ambition of this article to contribute to a more robust theory for institutional design.

3.4. Culture

Let us return to Ackerman's key passage and appreciate the cultural turn of his argument,⁶² Ackerman's cultural argument appears to

58. Ackerman, 'The New Separation of Powers', p. 688. Ackerman has in mind the United States, Germany, the United Kingdom, and France. Adding the rest of the European Union, the United States, Canada, Australia, New Zealand, Japan, and India, his is a constitutional theory for one-third of humanity at most.

59. *The Economist*, 'Mandarin Lessons'. This has now become controversial, see Dominic Cummings' reflections: <https://dominiccummings.com/2014/10/30/the-hollow-men-ii-some-reflections-on-westminster-and-whitehall-dysfunction/>. On the other hand, one could also think that there are fluctuations in the relevance and power of the higher echelons of the bureaucracy. Nonetheless, the view from the bottom that we have proposed here, taking stock and looking at the half a billion public employees worldwide, warrants a statistical status of public employees that is overall stable from a cross-section global perspective and rather stable over time as well. Public law, scholars and the public at large are still expecting special ethics from public employees. Unless we do something fundamental in the meantime.

60. They are termed here 'neo-Weberian' rather than 'non-Weberian' because they operate within the horizon of rationality of intentions, but do not imply a rationality of outcomes, as Ackerman expects Weberian bureaucrats to deliver. Outside the English speaking community, let us recall: in France, M. Crozier, *The Bureaucratic Phenomenon* (London: Routledge, 2009 [1964]), and in Austria, Ludwig von Mises, *Bureaucracy* (Glasgow: W. Hodge & Company, Limited, 1945).

61. Alessandro Ferrara, *The Democratic Horizon. Hyperpluralism and the Renewal of Political Liberalism* (New York: Cambridge University Press, 2014).

62. Ackerman, 'The New Separation of Powers', p. 687.

run as follows: to be able to do effective constitutionalism, there is a need for an appropriate exogenous (so called 'Weberian') culture. Culture, in the wider sense of the word, is by definition exogenous: the culture of one country is built over centuries; you can steward it, but you can't manage it, even in the long term (in economics, the long run is ten years). Culture then would warrant a resort to the traditional ideal type. Such argument could also be formulated, like: while all virtuous administrations seemingly look alike, the malfunctioning of public administration is often thought to be specific to the culture and 'civicness'⁶³ (or lack thereof) of the country being observed and not connected to the intrinsic inefficiencies of that country's organizational arrangements—the arrangements of public administrations around the world of course being the very subject of public law and their presumed Weberian debt being a key feature of them.

It is interesting that organizational cultures are also studied in private business;⁶⁴ however, this has never hindered a comparison of businesses across countries in the way that it has hampered comparative public law and public administration. It is clear that, if a country is democratic to begin with, there is not much need to perfect constitutional law, or it can manage to function with constitutional arrangements that are less than robust: 'civicness', after all, is the capability to complement law through culture, custom, and shared values. On the other hand, unless one wants to argue that constitutional law applies only to people who are already democratic, guidance must be formulated for those belonging to developing or democratizing societies. While a country's political regime must clearly be in line with its people's virtues, *à la* Montesquieu, there is nonetheless a need to avoid a constitutional determinism whereby no innovation is possible. The approach proposed here aspires to be in line with such an understanding.

3.5. *Monopoly and the Administrative Behavior hypothesis*

The Administrative behavior hypothesis takes into account one specific organizational arrangement that public administration organizations worldwide tend to share: monopoly. The Administrative

63. R.D. Putnam, R. Leonardi and R.Y. Nanetti, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, NJ: Princeton University Press, 1993).

64. Edgar H. Schein, *Organizational Culture and Leadership* (Hoboken, NJ: Wiley, 2017).

Behavior hypothesis acknowledges that both in the private and the public sector bureaucrats are human beings just like managers and employees in private enterprise: the hypothesis makes no distinction. Therefore public bureaucracies comprise people with their own agendas and objectives: they tend to be self-serving. The hypothesis also takes into account the only difference between public and private bureaucracies, but a critical one: public administration bureaucracies are established under monopolistic organizational arrangements, and, importantly, as a result there is hardly evaluation, or internal, micro-level, checks and balances.⁶⁵ Interestingly, Weber's ideal types neither imply nor regard the possible monopolistic nature of organizations notwithstanding his clear understanding of the power of monopoly. Monopolistic organizational arrangements of public administration would seem to preclude any constitutional procedural language regarding the internal functioning of organizations. Whereas constitutions are concerned with checks and balances as regards relationships among the branches of political power, they tend to be silent about conduct within public administration, implicitly trusting the Rational Behavior Hypothesis that public administration will behave rationally, in the sense of producing the intended outcomes. The lack of checks and balances is due to lack of multiplicity and virtual competition among public administration organizations. Such circumstances make public organizations behave in a way that is better predicted under the Administrative Behavior hypothesis than under the Rational Behavior Hypothesis. Novelist Ian McEwan succinctly articulates what Max Weber indeed foresaw⁶⁶; in his novel *Sweet Tooth*, on the subject of the expansion of the British intelligence service, he says: 'Any institution, any organization eventually becomes a dominion, self-contained, competitive, driven by its own logic and bent on survival and on extending its territory. It was inexorable and blind as a chemical process'.⁶⁷

65. Paolo D'Anselmi, 'The Privileged Working Conditions of Public Employees Sanctioned by Public Law: Adding one dimension to inequality', *Journal of Inequality Inquiry* (January 2020): 32-50.

66. Max Weber, *Economy and Society*, p. 226; also Weber's words at the end of Protestant Ethic are inspirational in this regard: 'Specialists without spirit, sensualists without heart; this nullity imagines that it has attained a level of civilization never before achieved', *The Protestant Ethic and the Spirit of Capitalism* (New York: Scribner, 1976), p. 182.

67. Ian McEwan, *Sweet Tooth* (New York: Nan A. Talese/Doubleday, 2012).

Conclusion

The point of this paper is public law follows a received view of Max Weber based on a heuristic understanding of Max Weber's ideal type of bureaucracy as an ideal bureaucracy. The characteristics of the ideal type were interpreted as a recipe to build an ideal bureaucracy. Specifically the paper argues that scholars of public law and of the Neo-Weberian State have misinterpreted Weber and through *their* heuristic have transformed what Weber saw as only one of the three ideal types into an (inefficient) behavioral hypothesis. To formulate an efficient hypothesis, we need to make use of all three of Weber's ideal types and of further concerns of Weber about the self-serving character of organizations. Therefore the paper went on to say that contemporary Weber scholarship warrants an Administrative Behavior hypothesis.

Summarizing the characteristics of the Administrative Behavior hypothesis:

- it makes no special assumptions about the work motivation of public employees vis-à-vis private employees;
- it takes into account that public administration bureaucracies tend to operate under monopolistic organizational arrangements;
- it acknowledges the absence of vertical impartiality between the bureaucracy and the citizens;
- it acknowledges the tendency on the part of public bureaucracies to have an autonomous behavior and to act as a fourth power within the constitutional framework;
- it acknowledges the tendency to operate under pure formal legality;
- it acknowledges the bureaucracy will produce outputs and outcomes of bounded rationality.

The hypothesis is relatively robust vis-à-vis the specific stage of civil and economic development of the public law environment adopting it. The hypothesis generates less inequality in the working conditions of the population. Adoption of the Administrative Behavior hypothesis would have a significant impact on public law.

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