

## CONSTITUTIONAL MATURITY, OR READING WEBER IN THE AGE OF TRUMP

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We might be in trouble. That, at least, would seem to be the premise of this symposium: after all, symposia on the current state of constitutional law tend to proliferate when there is anxiety about the current state of constitutional law. And this symposium is hardly alone in expressing such anxiety—conferences, books, and articles fretting about the American constitutional order in “the age of Trump” abound.<sup>1</sup>

One common technique for getting a handle on anxiety is to try to take a step back, to think in broader terms about the

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1. See Josh Chafetz, *What Do Presidents Need to Know?*, N.Y. TIMES BOOK REV. (Sept. 14, 2018), <https://www.nytimes.com/2018/09/14/books/review/corey-brettschneider-oath-and-the-office.html> (“Popular books about the Constitution are something of a countercyclical phenomenon. When all is well in the polity, they are relatively scarce on the ground. Their recent profusion—and, in particular, the development of the this-book-is-about-timeless-constitutional-truths-not-about-Trump-wink-wink subgenre—is not a great sign, then, for the health of our body politic.”). On the use of the “age of Trump” trope in particular, see, e.g., FIGHT FOR LIBERTY: DEFENDING DEMOCRACY IN THE AGE OF TRUMP (Mark Lasswell ed., 2018); MICHIKO KAKUTANI, THE DEATH OF TRUTH: NOTES ON FALSEHOOD IN THE AGE OF TRUMP (2018); CARNES LORD, THE MODERN PRINCE: WHAT MACHIAVELLI CAN TEACH US IN THE AGE OF TRUMP (2018); DAVID NEIWERT, ALT-AMERICA: THE RISE OF THE RADICAL RIGHT IN THE AGE OF TRUMP (2017); Erin Delaney, *Immigration in the Age of Trump: Extremism vs. Exceptionalism*, 2017 U. ILL. L. REV. ONLINE: TRUMP 100 DAYS (April 29, 2017), <https://illinoislawreview.org/symposium/first-100-days/immigration-in-the-age-of-trump/>; Michael Millemann, *Checks and Balances in the Age of Trump*, 17 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1 (2017); “*Connecting the McCarthy Era to the Age of Trump*”—A Symposium at NYU’s Center for the United States and the Cold War, Sept. 15-16, NYU, <https://www.nyu.edu/about/news-publications/news/2017/september/symposium-on-the-cold-war-and-mccarthyism.html> (last visited Nov. 23, 2018); *Parties & Partisanship in the Age of Trump Symposium*, USC SOL PRICE SCH. OF PUB. POL’Y, <https://priceschool.usc.edu/events/event-details/?event-id=1184437> (last visited Nov. 23, 2018); *The Prospects for American Democracy in the Age of Trump: A Preliminary Assessment*, CORNELL, [http://events.cornell.edu/event/the\\_prospects\\_for\\_american\\_democracy\\_in\\_the\\_age\\_of\\_trump\\_a\\_preliminary\\_assessment](http://events.cornell.edu/event/the_prospects_for_american_democracy_in_the_age_of_trump_a_preliminary_assessment) (last visited Nov. 23, 2018).

situation. And turning or returning to some of the classic works of the past, works inspired by a similar set of questions but written in a different time or place, can often assist us in thinking through what might be new about the present—and, at least as importantly, what might be familiar about it.

In this Essay, I propose to look back about a century, and across the Atlantic, to the great German social theorist Max Weber. In Weber’s work, we find important insights into both the institutional structures of the modern state and the character traits that constitute a successful politician. For Weber, *maturity*, understood in terms of balance, or the productive negotiation of the tensions between conflicting principles, characterizes both the successful state and the successful politician. In this moment in American history in which concerns abound about both the resilience of our institutional arrangements and the character of our president, it is especially illuminating, I think, to turn to Weber’s reflections on both types of maturity.

### I. A MATURE POLITY?

“America cannot continue to be ruled by amateurs.”

- Max Weber, *Politics as a Vocation* (1919)<sup>2</sup>

When he delivered his *Politics as a Vocation* lecture a century ago, Weber insisted that the United States had just begun to enter its political maturity. The domination of American politics by the Jacksonian “spoils system” — the organization of party machinery around the dispensing of patronage—was characteristic of its political youth.<sup>3</sup> Indeed, the spoils system was only *possible* because of American immaturity: “For it is self-evident that the existence of three to four hundred thousand party supporters who had nothing to show by way of their qualifications for office but the fact that they had served their party well—such a state of affairs could not survive without major abuses: corruption and the squandering of resources on a vast scale such as could only be borne by a nation with as yet unlimited economic prospects.”<sup>4</sup>

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2. MAX WEBER, *Politics as a Vocation*, in *THE VOCATION LECTURES* 32, 71 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., Hackett 2004).

3. *Id.* at 67–68.

4. *Id.* at 69.

But then we grew up and got rationalized. “Civil Service Reform”<sup>5</sup>—a phrase he left in English—“is now creating lifelong pensionable posts in constantly growing numbers. In consequence, posts are now being filled by university-educated officials who are just as incorruptible and competent as in Germany.”<sup>6</sup>

The Prussian’s comparison to Germany was a double-edged sword. He was in fact deeply concerned about the modern German state. In Weber’s view, Otto von Bismarck’s creation of a powerful centralized bureaucracy and the first modern welfare state had come at the expense of political leadership. Once Bismarck himself had left the stage, there was no one with the combination of talent and training to take his place: “Since the resignation of Prince Bismarck Germany has been governed by ‘bureaucrats,’ a result of his elimination of all political talent. Germany continued to maintain a military and civilian bureaucracy superior to all others in the world in terms of integrity, education, conscientiousness and intelligence.... But what about the *direction* of German ... policy during recent decades?”<sup>7</sup> The ship of state, though powerfully rowed, was rudderless in Weber’s estimation, because Germans had gotten out of the habit of thinking about politics, instead abdicating the governance of public life to the bureaucracy alone. And without a vibrant public politics up and running, there was no way to develop a new generation of political talent, such that the rule of the bureaucracy risked becoming a self-perpetuating cycle.<sup>8</sup>

For Weber, politics and bureaucracy were distinct realms of collective activity,<sup>9</sup> *both* of which were necessary in a modern

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5. On the path of American civil service reform, see JOSH CHAFETZ, *CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 113–16 (2017); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 236–40 (2012).

6. WEBER, *supra* note 2, at 71–72.

7. Max Weber, *Parliament and Government in a Reconstructed Germany* (1918), reprinted in 2 MAX WEBER, *ECONOMY AND SOCIETY* 1381, 1404–05 (Guenther Roth & Claus Wittich eds., 1978) [hereinafter Weber, *Parliament and Government*].

8. See *id.* at 1413; see also Sven Eliaeson, *Constitutional Caesarism: Weber’s Politics in Their German Context*, in *THE CAMBRIDGE COMPANION TO WEBER* 131, 134–36 (Stephen Turner ed., 2000).

9. It should be noted that Weber’s terminology, and especially his distinction between politics and bureaucracy, is specific to his project. It is certainly possible—and in the service of other projects, quite sensible—to conceive of bureaucracy as a subset of politics. See, e.g., CHAFETZ, *supra* note 5, at 16 (defining “politics” far more capaciously as “the processes and institutions of collective self-government,” a definition that would

state. It is well known that he characterized politics as a “vocation” (*Beruf*); it is less remembered that he characterized bureaucracy with exactly the same term.<sup>10</sup> As he understood it, modern bureaucracy had six essential characteristics: (1) rule-delineated jurisdictions; (2) a hierarchy of offices; (3) written record-keeping and file-keeping; (4) specialization and a system of training specific to the areas of specialization; (5) full-time commitment by its practitioners; and (6) a system of stable, general, learnable rules.<sup>11</sup> These characteristics of modern bureaucracy implied some concomitant characteristics of modern bureaucrats. For Weber, the bureaucrat was appointed, not elected; served for life (by which he meant had legal protections against discretionary firing or transfer); received a regular salary; and occupied a rung of a defined career ladder.<sup>12</sup> (It should be noted that, for Weber, these characteristics imply that modern legal systems—even common law ones—are bureaucracies.<sup>13</sup>)

Above all, the ethic of bureaucracy is an ethic of rationalization, in at least two senses of the word. First, bureaucracy is fundamentally concerned with *reason-giving*—indeed, bureaucratic action is illegitimate without some statement of reasons.<sup>14</sup> (In modern American administrative law, this has taken the form of a component of the Administrative Procedures Act’s prohibition on agency action that is arbitrary or capricious.<sup>15</sup>) Second, and at least as importantly, the rationalism characteristic of bureaucracy prescribes the *form* those reasons

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include both the bureaucracy and the courts as political institutions). Because my goal in this Essay is to mine Weber for insights into our current constitutional situation, I adopt his terminology here.

10. 2 MAX WEBER, *ECONOMY AND SOCIETY* 958–59 (Guenther Roth & Claus Wittich eds., 1978); *see also* WEBER, *supra* note 2, at 44 (“[M]odern bureaucracy [has developed] into a specialized, highly qualified, intellectual workforce that has undergone a lengthy preparatory period of training. This workforce has a highly developed sense of professional *honor* with an emphasis on probity.”).

11. 2 WEBER, *supra* note 10, at 956–58.

12. *Id.* at 960–63.

13. *Id.* at 975–80. On what we might think of as the decisive moment for the bureaucratic turn in English-derived legal systems, see Thomas McSweeney, *English Judges and Roman Jurists: The Civilian Learning Behind England’s First Case Law*, 84 *TEMP. L. REV.* 827, 832–33 (2012).

14. 2 WEBER, *supra* note 10, at 979 (“[I]n principle a system of rationally debatable ‘reasons’ stands behind every act of bureaucratic administration, namely, either subsumption under norms, or a weighing of ends and means.”).

15. 5 U.S.C. § 706(2)(A); *see also* *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (understanding the “arbitrary or capricious” standard to require “that an agency provide reasoned explanation for its action”).

must take. In particular, the logic of bureaucracy requires that decisions be based upon “purely objective considerations,” by which Weber means considerations specified in advance and applied without regard for the specific persons who will be affected by them.<sup>16</sup> Indeed, “[w]hen fully developed, bureaucracy ... stands ... under the principle of *sine ira ac studio*. Bureaucracy develops the more perfectly, the more it is ‘dehumanized,’ the more completely it succeeds from eliminating from official business love, hatred, and all purely personal, irrational, and emotional elements which escape calculation.”<sup>17</sup>

Bureaucracy’s inexorable drive toward rationalization makes the governance of a modern state possible.<sup>18</sup> Its characteristic rationality enables the efficient large-scale mobilization of social resources. As increased demands are put upon the state—from police protection to social welfare policies to public administration of new technologies of communication and transportation<sup>19</sup>—the bureaucratic state’s “*technical* superiority over any other form of organization”<sup>20</sup> becomes more and more manifest. Governance of an increasingly complex and specialized world increasingly requires the work of subject-matter experts, and those experts are most naturally housed within bureaucratic structures.<sup>21</sup> The rationality of bureaucracy also serves a legitimating function: as Paul du Gay put it, without a rationalized bureaucracy, “many of the qualitative features of government that are regularly taken for granted—for instance, reliability and procedural fairness in the treatment of cases—would not exist.”<sup>22</sup>

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16. 2 WEBER, *supra* note 10, at 975.

17. *Id.*; *see also id.* at 998 (“Naturally, bureaucracy promotes a ‘rationalist’ way of life, but the concept of rationalism allows for widely differing contents. Quite generally, one can say only that the bureaucratization of all domination very strongly furthers the development of ‘rational matter-of-factness’ and the personality type of the professional expert.”); WEBER, *supra* note 2, at 53 (“[T]he genuine official ... should ‘administer,’ *impartially*.”).

18. *See* David Owen & Tracy B. Strong, *Introduction* to THE VOCATION LECTURES, *supra* note 2, at li (“[F]or Weber there can be no politics in the modern world that is not centrally involved with rational-legal *Herrschaft*, and this means with bureaucracy.”).

19. 2 WEBER, *supra* note 10, at 972–73.

20. *Id.* at 973.

21. *See id.* at 975.

22. Paul du Gay, *Max Weber and the Ethics of Office*, in OXFORD HANDBOOK OF SOCIOLOGY AND ORGANIZATION STUDIES: CLASSICAL FOUNDATIONS 146, 155 (Paul S. Adler ed., 2009).

22            *CONSTITUTIONAL COMMENTARY*    [Vol. 34:17]

As a result of both its technical superiority and its legitimating potential, for Weber “[t]he future belongs to bureaucratization.”<sup>23</sup>

But bureaucracy’s rationalization of governance, like the rationalization of the rest of modern life, has its dark side. Most famously, Weber described the rationalization of the modern, capitalistic economic order as “an iron cage” in which the pursuit of material goods has become an end in itself, stripped of any connection to “the highest spiritual and cultural values.”<sup>24</sup> Because a wholly rationalistic enterprise can never speak in terms of ultimate values, the result of the total triumph of rationalization is disenchantment, a transformation of “human interaction and behavior into a dreary quasi-mechanization, bereft of sensuality, spirit, and culture,” in the words of Stewart Clegg and Michael Lounsbury.<sup>25</sup> Unsurprisingly, the “dehumanized”<sup>26</sup> governance of bureaucracy has a similar tendency in our public life:

[T]he bureaucratic organization, with its specialization of trained skills, its division of jurisdiction, its rules and hierarchical relations of authority .... is busy fabricating the shell of bondage which men will perhaps be forced to inhabit some day, as powerless as the fellahs of ancient Egypt. This might happen *if* a technically superior administration *were to be the ultimate and sole value* in the ordering of their affairs, and that means: a rational bureaucratic administration with the corresponding welfare benefits, for this bureaucracy can accomplish much better than any other structure of domination.<sup>27</sup>

The bureaucratization of modern governance is thus both at least partially inevitable and normatively ambivalent. It has the potential—far more than any other technique of governance—to organize action in pursuit of collective ends. But it also disenchant, making those ends increasingly difficult to identify and justify, until, at its logical endpoint, we are left in an iron cage,

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23. Weber, *Parliament and Government*, *supra* note 7, at 1401.

24. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 181–82 (Talcott Parsons trans., 1976).

25. Stewart Clegg & Michael Lounsbury, *Weber: Sintering the Iron Cage: Translation, Domination, and Rationality*, in *OXFORD HANDBOOK OF SOCIOLOGY AND ORGANIZATION STUDIES*, *supra* note 22, at 118, 128.

26. 2 WEBER, *supra* note 10, at 975.

27. Weber, *Parliament and Government*, *supra* note 7, at 1402.

or a shell of bondage, in which we have nothing but aimless technique.<sup>28</sup>

Importantly, however, there is nothing inevitable about our entrapment in that cage or shell. This is because there is an opposing force that counteracts, and might perhaps balance, bureaucratic rationalization: politics. The politician “is *supposed* to be something different” from the bureaucrat.<sup>29</sup> The essential difference, for Weber, lies in the sort of responsibility inherent in each office.<sup>30</sup> A bureaucrat “who receives a directive which he considers wrong can and is supposed to object to it. If his superior insists on its execution, it is his duty and even his honor to carry it out as if it corresponded to his innermost conviction, and to demonstrate in this fashion that his sense of duty stands above his personal preference.... This is the ethos of *office*.”<sup>31</sup> The highest ethical duty of the bureaucrat is to recognize his position and role within a rationalistic machine of governance. By contrast, “the point of honor of the political leader, that is, the leading statesman, is that he acts exclusively on his *own* responsibility, a responsibility that he may not and cannot refuse or shuffle off onto someone else.”<sup>32</sup> Because politics entails personal responsibility, the politician cannot subordinate her own views to those of another (as the bureaucrat *must* do). As a consequence, “[p]olitics means conflict.”<sup>33</sup>

Because the politician cannot fall back on her role within a rationalistic machine (as, again, the bureaucrat must), the politician must justify her seeking after power in the name of some cause:

The *nature* of the cause in whose service the politician strives for power and makes use of power is a matter of belief. He may serve national or universally human goals, social and ethical

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28. See Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299, 1321–22 (1997) (“Weber’s assessment, in brief, is that bureaucracy, as a purposive-rational mechanism of governance, creates unprecedented possibilities for the mobilization of social resources and the exercise of political control. But purposive-rational behavior is fulfilling only to the extent that the individual or the society can identify its purposes; if that does not occur, then efficiency becomes a purpose of its own, and the bureaucratic apparatus turns into an enclosed, self-sustaining system that imprisons its society in an iron cage.”) (internal footnotes omitted).

29. Weber, *Parliament and Government*, *supra* note 7, at 1404.

30. *Id.*

31. *Id.*; see also WEBER, *supra* note 2, at 54 (similar).

32. WEBER, *supra* note 2, at 54.

33. Weber, *Parliament and Government*, *supra* note 7, at 1399.

goals, or goals that are cultural, worldly, or religious. He may be motivated by a powerful faith in “progress” (however this is defined), or he may coolly reject faith of this kind; he can claim to be acting in the service of an “idea,” or he may wish to reject such claims on principle and choose instead to promote external goods of ordinary life. But some belief or other must always be *present*.<sup>34</sup>

Unlike the bureaucrat, then, the politician seeks power in the service of articulated *ends*, and modern politicians, to be successful, must have the charisma to line up public support behind their articulated ends.<sup>35</sup> For Weber, the successful modern parliamentary party leader is a type of charismatic ruler—that is, a ruler to whom people submit not “because of any customs or statutes, but because they believe in them.”<sup>36</sup> Politics thus for Weber holds out the possibility of partially reenchanting public life by reinjecting into it some notion of ultimate ends.<sup>37</sup>

We are now in a position to understand why Weber was dissatisfied with the governance of Germany in his own day. It was not due to the growth of bureaucracy per se—that was both inevitable in a modern state and brought with it significant tangible and legitimizing benefits. Rather, Weber was dismayed by what he perceived to be the absence of any force counteracting the bureaucracy. He was upset by the lack of a political counterbalance. Bureaucracy *without political pushback* is what lands a polity in an iron cage of rationality, or a shell of bondage.

But politics without bureaucratic pushback is no better. The politician can articulate ends, but she cannot effectuate them on her own, which is why modern governance “demands” a bureaucratic element.<sup>38</sup> And this, in turn, brings us back to

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34. WEBER, *supra* note 2, at 78.

35. On the need for public articulation of those ends, see *id.* at 53 (“[P]olitics nowadays is conducted preeminently in public and through the medium of the spoken or written word.”).

36. *Id.* at 35; see also *id.* at 62 (describing the “charismatic element” of modern party leadership).

37. See Sung Ho Kim, *Max Weber*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 4.2 (Edward N. Zalta ed., 2017), <https://plato.stanford.edu/entries/weber/#ReeViaDis> (“Irretrievably gone ... is a unifying worldview, be it religious or scientific, and what ensues is its fragmentation into incompatible value spheres. . . . [Weber’s] vision of polytheistic reenchantment is rather that of an incommensurable value-fragmentation into a plurality of alternative metanarratives, each of which claims to answer the same metaphysical questions that religion and science strove to cope with in their own ways.”).

38. 2 WEBER, *supra* note 10, at 975.

America's political maturation. On Weber's telling, America's nineteenth-century underdeveloped bureaucracy was a luxury: "even the worst management by dilettanti could be tolerated in view of the limitless abundance of economic opportunities."<sup>39</sup> America, in effect, paid to remain enchanted for as long as possible, but even so it had to mature at some point. "America cannot continue to be ruled by amateurs."<sup>40</sup> Maturity, on this view, means striking a balance between politics and bureaucracy, constantly negotiating and renegotiating the tension between the charismatic pursuit of ultimate ends and the rationalistic demand for procedure and technique. Tip too far in the direction of politics and you get the immature waste of nineteenth-century America; tip too far in the direction of bureaucracy and you get the superannuated resignation of early-twentieth-century Germany.

And what of America in the early twenty-first century? It is worth noting at the outset that contemporary American bureaucracy is significantly more complex and internally heterogenous than the ideal bureaucratic type described by Weber. It of course includes a large number of bureaucrats who are close to Weber's ideal type: career civil servants with specialized areas of technical expertise, hired on a nonpartisan basis, with tenure protections. For them, bureaucracy can truly be said to be vocational. And in (or at least adjacent to) this category, we might also include judges' vocational commitments, the partisan nature of their appointment process notwithstanding. But the American federal bureaucracy also contains a relatively thick layer of officials with no tenure protections who are appointed on an explicitly partisan basis. Although we often refer to these officials as "political appointees," it would be a mistake to view them as politicians in the Weberian sense, for these officials, at least in their capacity as such,<sup>41</sup> do not act on their own responsibility. Rather, their function is to mediate between the ideal-typical politicians above them and the ideal-typical bureaucrats below. In performing this mediating function, these officials do not fully partake of the vocation of either the politician

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39. Weber, *Parliament and Government*, *supra* note 7, at 1398.

40. WEBER, *supra* note 2, at 71.

41. This qualification is necessary because many people appointed to such positions have previously been active politicians in the Weberian sense, and many of them hope to be such in the future. But in their current capacity as appointed leadership at bureaucratic agencies, they cannot be said to be Weberian politicians.

or the bureaucrat. Rather, they should be understood as partaking of the forms of action characteristic of each at different times (and sometimes simultaneously), in order to facilitate the simultaneous functioning of each.

As this American bureaucracy grew and developed in the decades after Weber passed away, it increasingly came into tension with elected politicians—just as one would expect in a mature polity. In the canonical expression of that tension, outgoing President Harry Truman contrasted his successor’s experience atop a military bureaucracy with what he anticipated would be his experience in politics: “He’ll sit here ... and he’ll say, ‘Do this! Do that!’ *And nothing will happen*. Poor Ike—it won’t be a bit like the Army. He’ll find it very frustrating.”<sup>42</sup> And indeed the difficulty of getting things to “*happen*” has been an almost constant complaint of presidents (and other political leaders) of both parties in the decades since. (Indeed, this sense has been behind repeated attempts to “marketize” the bureaucracy, attempts that Jon Michaels has convincingly demonstrated are actually aimed at giving politicians increased control over it.<sup>43</sup>) Bureaucracy, precisely because of its characteristic forms and procedures, will tend to implement politicians’ programs more slowly and with more moderations and qualifications than those politicians would like. What’s more, those forms and procedures can be deployed deliberately to frustrate politicians when they and the bureaucracy are at loggerheads.

Just as the internal structure of modern American bureaucratic agencies is more complex than that portrayed by Weber, so too are the forms of bureaucratic action. Weber suggested that it was the “duty and even [the] honor” of bureaucrats to carry out directives with which they disagree,<sup>44</sup> but bureaucratic activity does not operate in a carry out / defy binary. Indeed, the bureaucratic insistence on procedure, on record-keeping, on reason-giving, and on respecting prescribed forms gives rise to myriad opportunities for what Jennifer Nou has characterized as “bureaucratic resistance from below.”<sup>45</sup> For

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42. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 9 (1960).

43. *See generally* JON MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC* 119–41 (2017).

44. *See supra* text accompanying note 31.

45. Jennifer Nou, *Bureaucratic Resistance from Below*, 36 *YALE J. ON REG.: NOTICE & COMMENT* (Nov. 16, 2016), <http://yalejreg.com/nc/bureaucratic-resistance-from-below->

instance, given the timeline on which politicians usually want action to occur, a commitment by bureaucrats to build an especially thorough record before acting can be an intense irritant to their political superiors. That record, in turn, can be used by other bureaucratic actors (including the courts) in evaluating the action, and it can form the basis of public politics by the opponents of the politicians who demanded the action in the first place. In this case, the bureaucrats' actions—building a thorough and detailed public record—is deeply consistent with the ethical obligations of their office.<sup>46</sup> They have simply weaponized those ethics to push back against politicians who seek to direct action in a manner that the bureaucracy opposes.<sup>47</sup>

Consider, then, the various forms of bureaucratic pushback that have characterized the Trump Administration to date. At the most extreme, there have been moments of outright defiance: most notably a mere ten days into the administration's tenure, when Acting Attorney General Sally Yates refused to defend in court an executive order imposing a ban on nationals of a number of Muslim-majority countries from entering the United States. Yates was immediately fired for her insubordination.<sup>48</sup> Perhaps with a view to retaining her/his job, another "senior official in the Trump administration" in 2018 anonymously published an op-ed in the *New York Times* declaring that "many of the senior officials in [Trump's] own administration are working diligently from within to frustrate parts of his agenda and his worst inclinations. I would know. I am one of them."<sup>49</sup> On a Weberian view, both Yates and the anonymous official acted inconsistently with their ethical obligations, which would have counseled that (after expressing their reservations) they carry out the orders of their political superiors. Many other officials, sensing a similar

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by-jennifer-nou/. See also Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 163–65 (2018).

46. See *supra* text accompanying notes 10–16.

47. In this regard, it can be understood as a form of what Jessica Bulman-Pozen and David Pozen have termed "uncivil obedience"—that is, "subversive law-following." Jessica Bulman-Pozen & David Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 811 (2015). Here, the bureaucrats would be engaged in subversive adherence to the ethics of their office.

48. Michael D. Shear et al., *Trump Fires Justice Chief Who Defied Him*, N.Y. TIMES, Jan. 31, 2017, at A1.

49. Anonymous, *I am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html>.

disconnect between the ethical demands of their position and their personal views, have simply quit.<sup>50</sup> (Although voluntary departures from the bureaucracy may at first glance seem congenial to an administration that has declared war on the administrative state,<sup>51</sup> it is worth remembering that deregulation, like regulation, requires competent bureaucratic work.)

Many other forms of bureaucratic pushback have stopped well short of insubordination or resignation. Indeed, some have come through well-established mechanisms, such as the State Department's "dissent cable,"<sup>52</sup> via which career foreign service officers can register their disagreement with official policy. Others have come in the form of bureaucrats conscientiously doing their jobs:<sup>53</sup> staff at the National Oceanic and Atmospheric Administration, the Department of Energy, and elsewhere have produced reports arguing that anthropogenic climate change is real and that significantly increasing use of renewable energy is a viable response to it.<sup>54</sup> In another case, "Pentagon staffers effectively stalled a Trump reversal of an Obama policy on climate change and national security by initiating a review [that was] apparently still underway nine months later."<sup>55</sup> Canny bureaucrats can also rebrand old programs so as to make them appear sympathetic to new political priorities, as when State Department staff relabeled a foreign aid program as "a way to create markets for U.S. exports,"<sup>56</sup> or when the General Services Administration continued its program to purchase electric

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50. See Lisa Rein & Andrew Ba Tran, *How the Trump Era Is Changing the Federal Bureaucracy*, WASH. POST (Dec. 30, 2017), [https://www.washingtonpost.com/politics/how-the-trump-era-is-changing-the-federal-bureaucracy/2017/12/30/8d5149c6-daa7-11e7-b859-fb0995360725\\_story.html](https://www.washingtonpost.com/politics/how-the-trump-era-is-changing-the-federal-bureaucracy/2017/12/30/8d5149c6-daa7-11e7-b859-fb0995360725_story.html) (noting that "[t]here are signs that Trump's polarizing presidency has helped drive more civil servants to the exits this year" and that "[i]n some agencies, the number of people leaving has been crippling").

51. See generally Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

52. See Jeffrey Gettleman, *Dissent on Travel Ban Spreads from One Embassy to Another*, N.Y. TIMES, Feb. 1, 2017, at A1.

53. Cf. Ingber, *supra* note 45, at 165 ("The piece of resistance that is simply 'work,' but that nevertheless keeps the machinery of the bureaucracy from changing direction on a dime or from taking action as quickly as it otherwise might, is the bread and butter of bureaucratic life.").

54. See Christopher Flavelle & Benjamin Bain, *Washington Bureaucrats Are Quietly Working to Undermine Trump's Agenda*, BLOOMBERG (Dec. 18, 2017, 3:00 AM), <https://www.bloomberg.com/news/features/2017-12-18/washington-bureaucrats-are-chipping-away-at-trump-s-agenda>.

55. *Id.*

56. *Id.*

vehicles but began justifying it in terms of job-creation and cost-cutting, rather than environmental benefits.<sup>57</sup> Because their political superiors cannot possibly monitor every action taken by bureaucrats, many of these small-scale actions by the bureaucracy will persist, even if contrary to politicians' wishes. What's more, some bureaucratic entities—so-called “independent agencies”<sup>58</sup>—have structural features that lessen even their formal responsiveness to politicians, resulting in policies that may be at odds with those of the administration. The Federal Reserve, for instance, has set monetary policy in a manner at odds with Trump's expressed wishes.<sup>59</sup>

Much bureaucratic pushback has been carried out, or at least facilitated, by leaks to the press. Longtime political reporters routinely characterize the Trump White House as the leakiest in history.<sup>60</sup> Of course, senior White House staff have long leaked to position-take, score-settle, or otherwise move policy in their preferred direction.<sup>61</sup> But White House leaking has also been matched by leaking (or other forms of public communication at odds with the White House's official line) from the agencies

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57. *Id.*

58. On the porosity of this term, see generally Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013).

59. See Christopher Condon & Steve Matthews, *Trump Slams Fed Hours After Powell Lifts Interest Rates*, BLOOMBERG (Sept. 26, 2018, 4:34 PM), <https://www.bloomberg.com/news/articles/2018-09-26/trump-slams-fed-hours-after-his-pick-powell-lifts-interest-rates>; Heather Long, *Can the 'Strong' U.S. Economy Survive Until 2020?*, WASH. POST (Aug. 27, 2018), <https://www.washingtonpost.com/business/2018/08/27/can-strong-us-economy-survive-until/>; Matt O'Brien, *Trump Thinks the Fed Has Gone 'Loco.' Wait Until He Sees What It Does Next.*, WASH. POST (Oct. 19, 2018), <https://www.washingtonpost.com/business/2018/10/19/trump-thinks-fed-has-gone-loco-wait-until-he-sees-what-it-does-next/>.

60. See, e.g., Chris Cillizza, *There's 1 Very Simple Reason Why This Is the Leakiest White House Ever*, CNN (May 15, 2018, 9:45 AM), <https://www.cnn.com/2018/05/15/politics/trump-leaks/index.html>; Jonah Goldberg, *Why the Trump White House Is So Leaky*, NAT'L REV. (May 12, 2017, 4:00 AM), <https://www.nationalreview.com/2017/05/trump-white-house-leaks-show-president-dramatic-personality/>; Dara Lind, *The Real Reason the Trump Administration Has Such a Leak Problem*, VOX (July 27, 2017, 9:33 AM), <https://www.vox.com/policy-and-politics/2017/5/19/15662842/trump-leaks-stop>; Jonathan Swan, *White House Leakers Leak About Leaking*, AXIOS (May 13, 2018), <https://www.axios.com/trump-white-house-leakers-leak-about-leaking-dae05b8e-e792-41a7-bb74-c2756b542cd0.html>; Paul Waldman, *The Leakiest White House in History*, THE WEEK (May 16, 2018), <http://theweek.com/articles/773355/leakiest-white-house-history>.

61. See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 532–33 (2013).

themselves—from Twitter accounts going “rogue”<sup>62</sup> to cabinet secretaries claiming that the president does not speak for the United States.<sup>63</sup> Moreover, leaks can reinforce other forms of bureaucratic pushback<sup>64</sup>: when Department of Energy staffers drafted a report finding that growth in renewable energy did not threaten power-grid reliability, they leaked the report to the media to prevent their superiors from making substantive changes to the final draft.<sup>65</sup>

One should also understand the special counsel’s investigation that began early in Trump’s presidency as a form of bureaucratic pushback. In recusing himself from overseeing the investigation into Russian meddling in the 2016 election, Attorney General Jeff Sessions was adhering to a bureaucratic ethics of impartiality, and he was signaling that there would be some distance between the White House and the investigation.<sup>66</sup> A little over two months later—and a little over a week after Trump fired FBI Director James Comey, who had testified before Congress that his agency was investigating ties between Russia and the Trump campaign—Deputy Attorney General Rod Rosenstein appointed another former FBI Director, Robert Mueller, as special counsel.<sup>67</sup> Mueller’s ongoing investigation, carried out in an apparently methodical and professional manner, has resulted in short order in a striking number of indictments,

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62. See Madison Malone Kircher, *The National Park Service’s Twitter Goes Rogue, Gets Banned from Tweeting*, N.Y. MAG. (Jan. 21, 2017), <http://nymag.com/selectall/2017/01/national-park-service-tweets-about-trump-inauguration-crowd.html>.

63. Anne Gearan, *Tillerson Says Trump ‘Speaks for Himself’ on Values*, WASH. POST (Aug. 27, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/08/27/tillerson-says-trump-speaks-for-himself-on-values/>.

64. See generally Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011 (2008).

65. Flavelle & Bain, *supra* note 54.

66. See Mark Landler & Eric Lichtblau, *Jeff Sessions Recuses Himself from Russia Inquiry*, N.Y. TIMES (Mar. 2, 2017), <https://www.nytimes.com/2017/03/02/us/politics/jeff-sessions-russia-trump-investigation-democrats.html>.

67. On Comey’s testimony, see Matt Apuzzo, Matthew Rosenberg & Emmarie Huettelman, *F.B.I. Is Investigating Trump’s Russia Ties, Comey Confirms*, N.Y. TIMES (Mar. 20, 2017), <https://www.nytimes.com/2017/03/20/us/politics/fbi-investigation-trump-russia-comey.html>. On Mueller’s appointment, see Devlin Barrett, Sari Horowitz & Matt Zapotosky, *Deputy Attorney General Appoints Special Counsel to Oversee Probe of Russian Interference in Election*, WASH. POST (May 18, 2017), [https://www.washingtonpost.com/world/national-security/deputy-attorney-general-appoints-special-counsel-to-oversee-probe-of-russian-interference-in-election/2017/05/17/302c1774-3b49-11e7-8854-21f359183e8c\\_story.html](https://www.washingtonpost.com/world/national-security/deputy-attorney-general-appoints-special-counsel-to-oversee-probe-of-russian-interference-in-election/2017/05/17/302c1774-3b49-11e7-8854-21f359183e8c_story.html).

guilty pleas, and (to date) one conviction.<sup>68</sup> These have included the conviction of Trump's campaign manager Paul Manafort on eight charges of fraud and his guilty plea on two other charges,<sup>69</sup> the guilty pleas of his National Security Advisor (Michael Flynn) and his deputy campaign manager and deputy inaugural committee chair (Rick Gates),<sup>70</sup> and, in a case that was handed off from the special counsel's office to the U.S. Attorney's office for the Southern District of New York, the guilty plea of Trump's personal lawyer in a manner that implicated Trump himself in campaign finance violations.<sup>71</sup> This is a strikingly aggressive form of bureaucratic resistance to a political leader.

Finally, recall that, on a Weberian model of the bureaucracy, judges are a type of bureaucrat.<sup>72</sup> And judges too have been systematically pushing back against Trump on issues ranging from immigration<sup>73</sup> to environmental regulation<sup>74</sup> to his attempt to ban transgendered persons from military service<sup>75</sup> to his attempts to undermine the Affordable Care Act.<sup>76</sup> Indeed, in one case a

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68. For a running tally, see Marshall Cohen, Tal Yellin & Liz Stark, *Tracking the Russia Investigations*, CNN, <https://www.cnn.com/interactive/2017/politics/russia-investigations/#/investigations/specialCounsel/charges> (last updated Dec. 12, 2018).

69. Spencer S. Hsu, Devlin Barrett & Justin Jouvenal, *Manafort Will Cooperate with Mueller as Part of Guilty Plea, Prosecutor Says*, WASH. POST (Sept. 14, 2018), [https://www.washingtonpost.com/world/national-security/manafort-plans-to-plead-guilty-to-second-set-of-charges/2018/09/14/a1541068-b5c9-11e8-a7b5-adaaa5b2a57f\\_story.html](https://www.washingtonpost.com/world/national-security/manafort-plans-to-plead-guilty-to-second-set-of-charges/2018/09/14/a1541068-b5c9-11e8-a7b5-adaaa5b2a57f_story.html); Sharon LaFraniere, *Paul Manafort, Trump's Former Campaign Manager, Guilty of 8 Counts*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/politics/paul-manafort-trial-verdict.html>.

70. See Cohen, Yellin & Stark, *supra* note 68.

71. William K. Rashbaum et al., *Michael Cohen Says He Arranged Payments to Women at Trump's Direction*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/nyregion/michael-cohen-plea-deal-trump.html>.

72. See *supra* text accompanying note 13.

73. See Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1453 & nn.87–90 (2018).

74. See Ruairí Arrieta-Kenna, *Trump's Environmental Agenda Is Crashing Into the Courts*, VOX (Aug. 11, 2017, 1:40 PM), <https://www.vox.com/energy-and-environment/2017/8/11/16113348/trump-environmental-agenda-crashing-into-courts>; Michael Grunwald, *The Myth of Scott Pruitt's EPA Rollback*, POLITICO (Apr. 7, 2018), <https://www.politico.com/magazine/story/2018/04/07/scott-pruitt-epa-accomplishments-rollback-217834>; Oliver Milman, *Blow for EPA as Court Blocks Bid to Slacken Safety Rules for Chemical Plants*, GUARDIAN (Aug. 17, 2018, 12:35 PM), <https://www.theguardian.com/environment/2018/aug/17/epa-setback-court-chemical-safety-environment> (noting that an EPA loss before the D.C. Circuit “is the third such setback for the agency in a week”).

75. See, e.g., *Doe v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017) (granting a preliminary injunction); *Stockman v. Trump*, 2017 WL 9732572 (C.D. Cal. 2017) (same); *Karnoski v. Trump*, 2017 WL 6311305 (W.D. Wash. 2017) (same).

76. See *Stewart v. Azar*, 313 F. Supp. 3d 237 (D.D.C. 2018) (vacating an

federal judge angrily ordered a plane turned around mid-flight when he learned that the government was in the process of deporting the plaintiffs in a lawsuit challenging the administration's restrictions on asylum claims.<sup>77</sup> A federal judge has denied Trump's motion to dismiss a suit filed by the District of Columbia and the state of Maryland alleging that his ownership of the Trump International Hotel in Washington constitutes a violation of the Foreign and Domestic Emoluments Clauses,<sup>78</sup> and another federal judge has held that Democratic members of Congress have standing to sue Trump for violating the Foreign Emoluments Clause.<sup>79</sup> These rulings in toto have led some observers to claim that there is a more-or-less organized "legal resistance" against Trump.<sup>80</sup>

It is worth noting that these examples of bureaucratic resistance have cut across some of what we might normally think of as the most salient distinctions in American institutional politics. They have involved pushback by politically appointed officials who serve at will, as well as by career civil servants. They have involved pushback in agencies typically characterized as executive, independent, and judicial. They have involved pushback on grounds ranging from policy disagreements to norm violations to illegality. Of course, those distinctions are relevant to the frequency of the resistance, the form it takes, and the likelihood of its success—but, crucially, the logic of Weberian bureaucratic situatedness seems sufficiently powerful to, at least sometimes, cut across these distinctions.<sup>81</sup>

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administration waiver that allowed states to impose work requirements as a condition for Medicaid eligibility).

77. Although the judge said, "Turn that plane around and bring those people back to the United States," it turned out to be impossible to turn the plane around midflight, so the plaintiffs were returned to the United States after they landed in El Salvador. See Mike James, *Judge Orders Plane Carrying Deported Mother and Daughter to Turn Around*, USA TODAY (Aug. 10, 2018, 1:04 PM), <https://www.usatoday.com/story/news/2018/08/09/pretty-outrageous-federal-judge-blasts-u-s-orders-plane-carrying-deported-mother-and-daughter-turn/952310002/>.

78. *Dist. of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018).

79. *Blumenthal v. Trump*, 1:17-cv-01154 (D.D.C. 2017).

80. See Chafetz & Pozen, *supra* note 73, at 1453 & n.90.

81. See Ingber, *supra* note 45, at 157 ("[I]n reality there are few true crisp dichotomies, whether between the President and the bureaucracy; the politically appointed and civil service; the partisan and the impartial; or the high-level officials and the low.... [B]ureaucratic actors at each point along each of these many spectra intersect and tussle with others above, below, and horizontal to them across the bureaucracy.").

None of this, of course, is to suggest that the Trump Administration has not changed national policy, in many cases significantly. Nor is it to suggest that bureaucratic resistance can last indefinitely.<sup>82</sup> At some point, options for delay or undermining will run out; at some point, new personnel, more congenial to the political leadership, will be in place. But the extent of bureaucratic pushback against the Trump presidency has been remarkable—so much so that Trump’s supporters have imported the foreign, and ominous, concept of a “deep state” to describe it.<sup>83</sup> But from a Weberian perspective, we might understand it as something else, as a clash between the rationalistic ethos of the bureaucratic corps and the charismatic politics of Donald Trump. Trump’s attempts to sweep aside bureaucratic procedures, practices, and priorities that conflict with his policy positions have met with some success, but they have also met with no small measure of the frustration that Truman prophesied for Eisenhower. That is, there appears to be something of the balance between the bureaucratic and the political that Weber understood as characterizing a mature state.

Naturally this is intolerable to the president and his supporters, who have argued that the “deep state” is engaged in a nefarious subversion of the legitimate state.<sup>84</sup> The administration has repeatedly attacked bureaucratic pushback in manners ranging from questioning the legitimacy of judicial actors<sup>85</sup> to attacking the safeguards of bureaucratic tenure<sup>86</sup> to firing high-

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82. See Ingber, *supra* note 45, at 189–201 (noting the functional constraints on bureaucratic pushback).

83. See Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1653 (2018) (“Whether cast as insidious or cast aside as fictitious, the American ‘deep state’ is an increasingly compelling concept in the Age of Trump. In a year’s time, a label that had practically no domestic resonance has been elevated to the status of public enemy number one.”).

84. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (May 23, 2018, 6:54 AM), <https://twitter.com/realDonaldTrump/status/999242039723163648> (“Look how things have turned around on the Criminal Deep State. They go after Phony Collusion with Russia, a made up Scam, and end up getting caught in a major SPY scandal the likes of which this country may never have seen before! What goes around, comes around! [sic all]”).

85. See Amy B. Wang, *Trump Lashes Out at ‘So-Called Judge’ Who Temporarily Blocked Travel Ban*, WASH. POST (Feb. 4, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/>.

86. See Lisa Rein, *Trump Takes Aim at Federal Bureaucracy with New Executive Orders Rolling Back Civil-Service Protections*, WASH. POST (May 25, 2018), <https://www.washingtonpost.com/politics/trump-takes-aim-at-federal-bureaucracy-with->

ranking bureaucrats who have proven uncooperative<sup>87</sup> to stripping the security clearance from a former CIA director turned Trump critic.<sup>88</sup> And of course Trump has repeatedly referred to the special counsel's investigation as a "witch hunt"<sup>89</sup> and repeatedly mused about firing Mueller or the Justice Department leadership to which he answers.<sup>90</sup> In seeking to undermine the bureaucracy in these ways, Trump is seeking, in Weberian terms, to de-mature the American state, to return it to the condition in which it "could not survive without major abuses: corruption and the squandering of resources on a vast scale such as could only be borne by a nation with as yet unlimited economic prospects."<sup>91</sup> It seems fitting, then, that Trump's favorite predecessor in office is the man whose name is most closely associated with the spoils system: Andrew Jackson.<sup>92</sup>

The Weberian perspective also suggests a perhaps counterintuitive way of evaluating the Trump presidency. Although it is his flamboyant defiance of governing norms and his wild lurches in policy that tend to make the most news, they are perhaps less concerning in the short term in part because of the

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new-executive-orders-altering-civil-service-protections/2018/05/25/3ed8bf84-6055-11e8-9ee3-49d6d4814c4\_story.html. In yet another example of pushback from the courts, a federal court has permanently enjoined enforcement of much of these attempted changes. *Am. Fed. of Gov. Employees v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018).

87. See, e.g., Steve Benen, *Why the FBI Firing Peter Strzok, A Frequent Trump Critic, Matters*, MSNBC (Aug. 13, 2018, 3:18 PM), <http://www.msnbc.com/rachel-maddow-show/why-the-fbi-firing-peter-strzok-frequent-trump-target-matters>.

88. David Nakamura & Felicia Sonmez, *Trump Revokes Security Clearance of Former CIA Director John Brennan—a Leading Critic of the President*, WASH. POST (Aug. 15, 2018), [https://www.washingtonpost.com/politics/trump-revokes-security-clearance-of-former-cia-director-john-brennan/2018/08/15/043b6fc4-a0bb-11e8-8e87-c869fe70a721\\_story.html](https://www.washingtonpost.com/politics/trump-revokes-security-clearance-of-former-cia-director-john-brennan/2018/08/15/043b6fc4-a0bb-11e8-8e87-c869fe70a721_story.html).

89. See, e.g., Sahil Chinoy, Jessica Ma & Stuart A. Thompson, *Trump's Growing Obsession with the 'Witch Hunt'*, N.Y. TIMES (Aug. 23, 2018), <https://www.nytimes.com/interactive/2018/08/22/opinion/trump-cohen-mueller-investigation.html>.

90. See Margaret Hartmann, *Will Trump Actually Fire Mueller, Rosenstein, or Sessions?*, N.Y. MAG. (Apr. 11, 2018), <http://nymag.com/daily/intelligencer/2018/04/will-trump-actually-fire-mueller-rosenstein-or-sessions.html>. In November 2018, Attorney General Jeff Sessions was forced out of his job, although that has had no discernible effect on the special counsel's investigation as this Essay goes to press. See Peter Baker, Katie Benner & Michael D. Shear, *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html>.

91. WEBER, *supra* note 2, at 69.

92. See Jenna Johnson & Karen Tumulty, *Trump Cites Andrew Jackson as His Hero—And a Reflection of Himself*, WASH. POST (Mar. 15, 2017), [https://www.washingtonpost.com/politics/trump-cites-andrew-jackson-as-his-hero—and-a-reflection-of-himself/2017/03/15/4da8dc8c-0995-11e7-a15f-a58d4a988474\\_story.html](https://www.washingtonpost.com/politics/trump-cites-andrew-jackson-as-his-hero—and-a-reflection-of-himself/2017/03/15/4da8dc8c-0995-11e7-a15f-a58d4a988474_story.html).

bureaucratic capacity and willingness to push back.<sup>93</sup> But Trump's willingness to take steps to weaken or undermine bureaucratic resistance — and, to be clear, similar steps that political actors have been taking for decades now<sup>94</sup> — tends to receive far less attention. And yet, in the medium term, it is precisely the attempts to demature the state by attacking bureaucratic independence or competence that could have the most serious consequences by removing the rationalistic bureaucratic impediment to unchecked charismatic political rule. The threat, in other words, is the mirror-image of the one perceived by Weber in Germany a century ago: he feared that the growing power of the bureaucracy had created an imbalance by causing political abilities to atrophy. Today, we might more plausibly fear an imbalance caused by the atrophying of bureaucratic capacity.

## II. A MATURE PRESIDENT?

“[T]here is no more destructive distortion of political energy than when the parvenu swaggers around, boasting of his power, conceitedly reveling in its reflected glory ....”

- Max Weber, *Politics as a Vocation* (1919)<sup>95</sup>

There is, in some sense, a fractal quality to Weber's analysis of the mature polity: the balance that characterizes the mature state relies, not only on the balance of power between the bureaucracy and the politicians, but also on the balanced character of the politicians themselves. The bureaucrat is defined by her place within an established hierarchy and is expected to take on the goals and methods of the machine of which she is a part. But the politician can claim no such rationalistic situatedness; she instead must rely on her individual character. Weber thus has a good deal to say about the characterological aspects of a mature politician.

Specifically, Weber argues that “three qualities, above all, are of decisive importance for a politician: passion, a sense of responsibility, and a sense of proportion.”<sup>96</sup> Passion requires a

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93. This can be understood as analogous to the argument that David Pozen and I have made that attempts at norm “decomposition” should be understood as more worrisome than spectacular attempts at norm “destruction.” Chafetz & Pozen, *supra* note 73, at 1445–58.

94. See generally MICHAELS, *supra* note 43, at 79–141.

95. WEBER, *supra* note 2, at 78.

96. *Id.* at 76.

*cause*—as noted above, it can only be politics, not bureaucracy, that gives the state its ends.<sup>97</sup> But passion alone is insufficient; the politician must not only pursue a cause, she must pursue it with a sense of responsibility for its achievement.<sup>98</sup> For Weber, to be a politician is to take responsibility for the achievement of the goals you have put forward. And taking responsibility for the achievement of one’s chosen ends requires “*a sense of proportion* ... [that is,] the ability to allow realities to impinge on you while maintaining an inner calm and composure.”<sup>99</sup> In other words, the politician must both *have* a passion and have sufficient *distance* from that passion so as to be able to pursue it efficaciously.

The likeliest failing in a politician, then, is “*vanity*, the deadly enemy of all dedication to a cause and of all distance, in this case, the distance from oneself.”<sup>100</sup> There are two distinct ways in which vanity can be the downfall of a politician. In one, it takes the form of the desire for power becoming an end in itself, rather than a means of bringing about some desired end for the state. In this form, vanity means that the politician’s passion has taken as its focal point himself, rather than some external good. Weber describes the politician who has fallen prey to this form of vanity as a “parvenu, swagger[ing] around, boasting of his power, conceitedly reveling in its reflected glory.”<sup>101</sup>

The other way in which vanity might destroy a politician is by undermining his sense of responsibility. One version of this phenomenon consists in privileging what Weber calls the “ethics of conviction” over the “ethics of responsibility.”<sup>102</sup> In other words, it is an abdication of political responsibility to act as a moral purist, when politics demands compromise, even on matters of principle.<sup>103</sup> Someone who stands on principle even in the face of bad political consequences “is in fact a mere child in political matters.”<sup>104</sup> But there’s another, even more straightforward way

97. See *supra* text accompanying notes 34–37.

98. WEBER, *supra* note 2, at 77.

99. *Id.*

100. *Id.*

101. *Id.* at 78. See also *id.* at 77 (“[T]he sin against the Holy Spirit of [politicians’] profession begins where this striving for power is *separated from the matter in hand* and becomes an object purely of self-intoxication instead of something that enters exclusively into the service of their ‘cause.’”).

102. *Id.* at 83.

103. See *id.* at 85 (“The man who embraces an ethics of conviction is unable to tolerate the ethical irrationality of the world. He is a cosmic, ethical ‘rationalist.’”).

104. *Id.* at 86.

in which a politician may fail to be responsible, and that is simply by refusing to *take responsibility* for the consequences of her actions. The politician ought to be “uncomplaining,” which Weber also describes using the gendered language of “manly” and “chivalr[ous].”<sup>105</sup> The politician ought to be forward-looking, but the complainer is always looking backwards, trying to readjudicate past failures or revel in past victories.<sup>106</sup>

Resisting the urge to complain is never easy, and may be especially difficult in politics, because politics under conditions of modernity (which is to say, disenchantment) is always at least potentially tragic. It requires, in the words of David Owen and Tracy Strong,

the recognition that any action taken is taken under circumstances where the consequences of that action are not only not apparent but over the long term do not add up to make sense (as Hegel had thought they would). The acceptance of this, and the avoidance of the plea of good intentions, no matter what the outcome, is what distinguishes an adult from a child. Mistakes are to be attributed to insufficient skill and commitment.<sup>107</sup>

Politics requires good intentions—that is the requirement that the politician be passionate in support of a cause—but good intentions are insufficient. They must be pursued skillfully, with a sense of proportion and a willingness to compromise, and even then there is no guarantee of success. But in the face of failure, the mature politician does not plead good intentions: there’s no whining in politics.<sup>108</sup>

So, what might Weber’s analysis of the character of the mature politician suggest about our current moment? It hardly seems a stretch to suggest that “maturity” is not one of the words most commonly used to characterize Donald Trump.<sup>109</sup> Indeed,

105. *Id.* at 79–80.

106. *See id.* at 80 (“Instead of focusing on those issues that concern the politician, namely, the future and our responsibility for the future, such an ethic becomes immersed in questions of past guilt, which are politically sterile . . .”).

107. Owen & Strong, *supra* note 18, at xlv.

108. *Cf.* A LEAGUE OF THEIR OWN (Parkway Productions 1992) (“There’s no crying in baseball!”).

109. In fact, thanks to polling, we know what words are most commonly used to characterize Trump. An ABC News/*Washington Post* poll found that the ten words respondents most associated with him were: “incompetent,” “arrogant,” “strong,” “idiot,” “egotistical,” “ignorant,” “great,” “racist,” “asshole” and “narcissistic.” John Verhovek, *10 Most Common Words Americans Use to Describe Trump*, ABC NEWS (Sept. 30, 2017),

political scientist Daniel Drezner has maintained a “toddler-in-chief” Twitter thread, a running count of all of the times that Trump’s *aides and allies* have described him in terms applicable to a small child.<sup>110</sup> By the end of 2018, the thread had topped 600 entries.<sup>111</sup>

More granularly, we might think in terms of Weber’s two types of political vanity. First, there is the vanity of pursuing power as an end in itself, rather than as a means to some other-regarding passion. So, what of Trump’s commitment to ends beyond himself? There is a sense in which Trump appears to be almost wholly innocent of policy goals—indeed, to be unsure why he ran for president in the first place.<sup>112</sup> He seems far more interested in playing golf<sup>113</sup> and watching coverage of himself on television<sup>114</sup> than in doing any of the work of governing. If that reading of Trump is correct—if, that is, his interest is in power and its trappings for their own sake—then he is best characterized as

<https://abcnews.go.com/Politics/incompetent-strong-egotistical-words-people-describe-trump/story?id=50178088>. A Quinnipiac University Poll found similar results. *December 12, 2017—American Voters Have Few Kind Words for Trump, Quinnipiac University National Poll Finds; Expel Moore If He Wins, Voters Say Almost 2-1*, QUINNIPIAC UNIV. POLL (Dec. 12, 2017), <https://poll.qu.edu/national/release-detail?ReleaseID=2507>.

110. The thread itself can be found at Daniel W. Drezner (@dandrezner), TWITTER (Apr. 25, 2017, 10:23 AM), <https://twitter.com/dandrezner/status/856876322001432581>. Drezner described his criteria for inclusion and collected the first 320 examples at Daniel W. Drezner, *White House Aides Can’t Stop Talking About President Trump Like He’s a Toddler*, WASH. POST (Aug. 21, 2017), <https://www.washingtonpost.com/news/posteverything/wp/2017/08/21/the-trump-as-toddler-thread-explained-and-curated/>.

111. See Daniel W. Drezner (@dandrezner), TWITTER (Dec. 30, 2018, 9:57 PM), <https://twitter.com/dandrezner/status/1079572243674550272> (presenting the 604th entry in the thread).

112. See Jack Shafer, *Trump Doesn’t Want to Be President*, POLITICO (June 22, 2017), <https://www.politico.com/magazine/story/2017/06/22/trump-doesnt-want-to-be-president-215292>; David Von Drehle, *Trump Doesn’t Seem to Like Being President. So Why Not Quit?*, WASH. POST (Aug. 18, 2017), [https://www.washingtonpost.com/opinions/trump-doesnt-seem-to-like-being-president-so-why-not-quit/2017/08/18/83c2e38e-842a-11e7-902a-2a9f2d808496\\_story.html](https://www.washingtonpost.com/opinions/trump-doesnt-seem-to-like-being-president-so-why-not-quit/2017/08/18/83c2e38e-842a-11e7-902a-2a9f2d808496_story.html).

113. See John Parkinson, *500 Days of Trump: His Presidency, By the Numbers*, ABC NEWS (June 4, 2018), <https://abcnews.go.com/Politics/500-days-trump-presidency-numbers/story?id=55635385> (revealing that “Trump’s trips to a golf course have topped 102 excursions through his first 500 days in office . . .”).

114. See Elaine Godfrey, *Trump’s TV Obsession Is a First*, ATLANTIC (Apr. 4, 2017), <https://www.theatlantic.com/politics/archive/2017/04/donald-trump-americas-first-tv-president/521640/>.

the politician who lacks a cause,<sup>115</sup> that is, as Weber's vain parvenu.<sup>116</sup>

But there is another reading of Trump—a darker one—in which it is possible to identify a cause of sorts that he pursues: a nostalgic identity politics expressed as longing for a period in which explicit public manifestations of white supremacy, patriarchy, and Christian identity were more culturally acceptable. This core commitment could explain not only his electoral support,<sup>117</sup> but also everything from the unspecified nostalgia of his campaign slogan (“Make America Great Again”) to his praise for white supremacists<sup>118</sup> to his attempts to keep nonwhite foreigners from entering the United States<sup>119</sup> to his repeated sexist comments, including bragging about committing sexual assault.<sup>120</sup> To the extent that Donald Trump can be said to be animated by a passion for a cause greater than himself, it is this: that America should return to a time when the wages of whiteness, maleness, and Christianity were higher than they are today.<sup>121</sup>

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115. See WEBER, *supra* note 2, at 77 (“[T]he sin against the Holy Spirit of [politicians’] profession begins where this striving for power is *separated from the matter in hand* and becomes an object purely of self-intoxication instead of something that enters exclusively into the service of their ‘cause.’”).

116. See *id.* at 78.

117. See Diana C. Mutz, *Status Threat, Not Economic Hardship, Explains the 2016 Presidential Vote*, 115 PROC. NAT. ACAD. SCI. E4330 (2018), available at <https://doi.org/10.1073/PNAS.1718155115>; Brian F. Schaffner, Matthew MacWilliams & Tatishe Nteta, *Understanding White Polarization in the 2016 Vote for President: The Sobering Role of Racism and Sexism*, 133 POL. SCI. Q. 9 (2018); John Sides, Michael Tesler & Lynn Vavreck, *The 2016 U.S. Election: How Trump Lost and Won*, 28 J. DEMOCRACY 34, 39–43 (2017); Thomas B. Edsall, *Donald Trump’s Identity Politics*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/2017/08/24/opinion/donald-trump-identity-politics.html>.

118. See Glenn Thrush & Maggie Haberman, *Trump Gives White Supremacists an Unequivocal Boost*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-charlottesville-white-nationalists.html>.

119. See Rick Gladstone & Satoshi Sugiyama, *Trump’s Travel Ban: How It Works and Who Is Affected*, N.Y. TIMES (July 1, 2018), <https://www.nytimes.com/2018/07/01/world/americas/travel-ban-trump-how-it-works.html>; Brian Naylor, *Trump Unveils Legislation Limiting Legal Immigration*, NPR (Aug. 2, 2017, 10:03 AM), <https://www.npr.org/2017/08/02/541104795/trump-to-unveil-legislation-limiting-legal-immigration>; *The Wall*, USA TODAY, <https://www.usatoday.com/border-wall/>.

120. See Claire Cohen, *Donald Trump and Sexism: How I Tracked Every Lewd Comment*, TELEGRAPH (Feb. 2, 2018, 8:43 PM), <https://www.telegraph.co.uk/women/politics/donald-trump-sexism-my-year-tracking-every-lewd-comment/>; Jill Filipovic, *Our President Has Always Degraded Women—And We’ve Always Let Him*, TIME (Dec. 5, 2017), <http://time.com/5047771/donald-trump-comments-billy-bush/>.

121. On the idea of privilege by birth functioning as “a sort of public and psychological

But even if we can understand Trump as pursuing some other-regarding cause, it hardly seems that he has done so with a sense of Weberian political responsibility. Few observers would use words like “uncomplaining” or “chivalrous” to characterize him. Indeed, Trump seems fixated on relitigating the past, constantly bringing up (and misrepresenting) everything from the size of his electoral college victory<sup>122</sup> to Hillary Clinton’s email server.<sup>123</sup> When this tendency was noted during his presidential campaign, Trump responded as follows: “I do whine because I want to win and I’m not happy about not winning and I am a whiner and I keep whining and whining until I win.”<sup>124</sup> This trend has continued into his presidency:<sup>125</sup> upon meeting resistance, Trump’s first instinct appears to be to deflect responsibility, blaming everything from the “deep state”<sup>126</sup> to the “fake news” media<sup>127</sup> to a “witch hunt”<sup>128</sup> to the legislative process.<sup>129</sup>

Thus, whether we understand Trump as having almost no goals beyond the retention of power and prestige or as pursuing a set of goals but constantly pleading that his good intentions have been stymied by nefarious forces beyond his control, it is apparent that he can be understood as exhibiting at least one of the two

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wage,” see W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA, 1860–1880*, at 700–01 (Free Press 1998) (1935).

122. See Peter Baker & Maggie Haberman, *The Election Is Over, But Trump Can’t Seem to Get Past It*, N.Y. TIMES (May 13, 2017), <https://www.nytimes.com/2017/05/13/us/politics/election-is-over-but-trump-still-cant-seem-to-get-past-it.html>.

123. See John Wagner, ‘Come on Jeff’: Trump Continues Public Feud with Sessions, *Urging Investigations of the ‘Other Side’*, WASH. POST (Aug. 24, 2018), [https://www.washingtonpost.com/politics/come-on-jeff-trump-continues-public-feud-with-session-urging-investigations-of-the-other-side/2018/08/24/ac5d329e-a784-11e8-97ce-cc9042272f07\\_story.html](https://www.washingtonpost.com/politics/come-on-jeff-trump-continues-public-feud-with-session-urging-investigations-of-the-other-side/2018/08/24/ac5d329e-a784-11e8-97ce-cc9042272f07_story.html).

124. Jeremy Diamond, *Donald Trump: ‘I Keep Whining and Whining Until I Win’*, CNN (Aug. 11, 2015, 3:35 PM), <https://www.cnn.com/2015/08/11/politics/donald-trump-refutes-third-party-run-report/index.html>.

125. See Charles M. Blow, *America’s Whiniest ‘Victim’*, N.Y. TIMES (Aug. 7, 2017), <https://www.nytimes.com/2017/08/07/opinion/donald-trump-unfair.html>.

126. See *supra* note 84 and accompanying text.

127. See Assoc. Press, *Trump Defends Tweets as ‘Modern Day Presidential’ in Renewed Attack on Media*, L.A. TIMES (July 1, 2017, 6:49 PM), <http://www.latimes.com/politics/la-pol-updates-everything-president-fake-1498958671-htmstory.html>; Steve Coll, *Donald Trump’s ‘Fake News’ Tactics*, NEW YORKER (Dec. 11, 2017), <https://www.newyorker.com/magazine/2017/12/11/donald-trumps-fake-news-tactics>.

128. See Olivia Paschal, *Trump’s Tweets and the Creation of ‘Illusory Truth’*, ATLANTIC (Aug. 3, 2018), <https://www.theatlantic.com/politics/archive/2018/08/how-trumps-witch-hunt-tweets-create-an-illusory-truth/566693/>.

129. See Molly E. Reynolds, *Trump’s Problem Isn’t the Filibuster. It’s the Republicans.*, N.Y. TIMES (Apr. 5, 2018), <https://www.nytimes.com/2018/04/05/opinion/trump-senate-filibuster-republicans.html>.

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sorts of political vanity against which Weber cautions. Or, put differently, he fails to demonstrate the maturity that successful politics demands.

### CONCLUSION

So, in Weberian terms, we have an immature politician sitting atop the apparatus of a mature—but perhaps precariously so—state. What are the implications of this combination? First, if one shares what seems to be the bureaucracy’s general disdain for Trump’s governing passions, such as they are, then one should probably be grateful that he pursues them immaturely. His doing so has facilitated much of the bureaucratic pushback. A less vain president, one who identified passions greater than himself and pursued them responsibly, would give bureaucrats in the agencies, the special counsel’s office, the courts, and elsewhere less to work with in opposing him. Second, although Trump’s vanity and its consequences tend to grab the headlines, the very fact that they facilitate bureaucratic pushback limits their dangerousness, at least in the short term. Third, and relatedly, we should focus more of our attention on attempts to weaken the bureaucracy, to demature it. These are not simply bad for governance—although they are that—they are also attempts to unbalance the state in favor of the charismatic politician. A time at which the dominant charismatic politician also happens to be vain is perhaps an ideal time to remember that a mature state requires a balance between the bureaucratic and the political.