TRIBUTE

PETER STRAUSS: TEACHER, SCHOLAR, AND AMBASSADOR AT LARGE

RICHARD J. PIERCE, JR.*

Those of us who have been privileged to know Peter Strauss professionally think of him primarily in three roles—as a teacher, a scholar, and an ambassador at large. Professor Strauss has taught law for forty-eight years, including forty-four years at Columbia.[1] He has taught Legal Methods and Administrative Law to at least ten thousand students at Columbia.

That remarkable accomplishment understates Professor Strauss's role as a teacher in many ways, however. His casebooks have been used to teach tens of thousands of students at scores of law schools. His teachings have reached far beyond those communities. Practitioners and teachers of administrative law in the United States owe much of their understanding of the field to Professor Strauss's eighteen books, sixty scholarly articles, and hundreds of papers and speeches.

Professor Strauss's teachings have also had major effects beyond the borders of the United States. The papers and speeches he has presented overseas have influenced the thinking of government officials, lawyers, and scholars in scores of countries. Professor Strauss has presented speeches and papers in which he describes the U.S. public law system and compares it with the public law systems of other nations all over the world. He has presented papers at comparative law conferences in Addis Ababa, Ankara, Frankfurt, Ottawa, Tokyo, Kobe, Hanno, Caracas, Buenos Aires, Beijing, Utrecht, Sao Paulo, Florence, Montreal, Thessaloniki, Bologna, Brussels, Sydney, and Melbourne.

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1. Resume of Peter L. Strauss, http://www.law.columbia.edu/null?exclusive=filemgr.download&id=612658 (last visited Apr. 29, 2015).

Professor Strauss's impending retirement has provided me an excuse to celebrate his professional life by reading, or in most cases rereading, his extraordinary portfolio of scholarly articles. I have chosen seven of my favorites to illustrate some of the many ways in which Professor Strauss has contributed to our understanding of the U.S. public law system. Of course, my choices necessarily omit many important contributions he has made to the scholarly literature. Thus, for instance, my list of favorites does not even include the article by Professor Strauss that was recognized by the American Bar Association as the best article written in the field of administrative law in the year in which it was published.[2]

THE PLACE OF AGENCIES IN GOVERNMENT

My first choice is Professor Strauss's 1984 article: *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*.[3] In that tour de force, Professor Strauss provided a theory to describe and explain the structure and functions of the U.S. government. He explained how the structure of the government relates to the text of the Constitution, the goals of the Framers, the many functions of government, political accountability for policy decisions, and fairness to individuals. He then analyzed scores of legal issues that have arisen in our efforts to shape the structure of the government and the opinions in which the Supreme Court has grappled with many of those issues. In each case, he explained the relationship between the issue and the theory of government he described.

Professor Strauss devoted particular attention to the importance of distinguishing between the need for a strict separation of the powers of the President, the Congress, and the Judicial Branch, and the need to allow agencies to perform functions that combine powers that can be characterized as executive, legislative, and judicial, subject to the supervision of all three branches of government. I cannot improve on his summary of the structure and functions of our government:

> The basic conclusion was asserted at the outset: given the realities of contemporary government and the inescapable constraints of constitutional text and context, we can achieve the worthy ends of those who drafted our Constitution only if we give up the notion that it embodies a neat division of all government into three separate branches, each endowed with a unique

2. *Award for Scholarship in Administrative Law: Recipients*, AM. BAR ASS'N, http://www.americanbar.org/groups/administrative_law/initiatives_awards/scholarshipawards/past_scholarship_award_recipients.html (last visited Apr. 29, 2015). That article was Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

3. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

> portion of governmental power and employing no other. That apportionment was made, but it was made only as to those actors occupying the very apex of government—Congress, President, and Supreme Court. The remainder of government was left undefined, in the expectation that congressional judgments about appropriate structure would serve so long as they observed the two prescriptive judgments embodied in the Constitution: that the work of law-administration be under the supervision of a unitary, politically accountable chief executive; and that the structures chosen permit, even encourage, the continuation of rivalries and tensions among the three named heads of government, in order that no one body become irreversibly dominant and thus threaten to deprive the people themselves of their voice and control.
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> When the two judgments are taken together, it becomes clear that parity is only a minimum: the President has an independent claim to control the execution of government to balance Congress's independent claim to structure it. Communication, coordination, even direction are as much the characteristic modes by which an executive exercises oversight as are hearings and the other tools of statute and budget working for a legislature. Balance between President and Congress in the work of law-administration can only be maintained by assuring settings in which these characteristic relationships may be effective.[4]

THE RELATIONSHIP BETWEEN LEGAL DOCTRINES AND GEOGRAPHIC UNIFORMITY OF NATIONAL LAWS

My second choice is Professor Strauss's insightful 1987 article, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*.[5] Professor Strauss began by recognizing two important principles: (1) agency actions should be subject to judicial review, and (2) federal law should be uniform across the country. He then identified a large and growing problem with any attempt to implement those two principles simultaneously. The federal circuit courts that review most agency policy decisions are organized by region, and the Supreme Court lacks the resources needed to resolve the inevitable conflicts among the circuit courts in their review of agency actions. As the size and complexity of the government has increased over time, this source of tension in the effort to further judicial review of agency action and uniformity in federal law has increased to the point at which the nation risks becoming balkanized, with significant regional variations in federal law.

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4. *Id.* at 667–68.

5. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

Professor Strauss then discussed a 1984 Supreme Court opinion that had the potential to reduce the extent of the inevitable conflict between creating and maintaining a system of federal law that is uniform across the country, and providing for effective judicial review of major agency actions. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[6] the Court announced a new two-part test for courts to apply when they review agency interpretations of agency-administered statutes:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[7]

The Court explicitly linked its new doctrine to the need to permit agencies to make policy decisions as long as they are within the agency's statutory authority, within the range of options Congress has left to the agency's discretion, and explained adequately by the agency:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."[8]

The opinion the Court issued in *Chevron* has become the most frequently cited administrative law opinion in history, and the *Chevron* doctrine has been the subject of hundreds of scholarly articles. By the time that Professor Strauss wrote his 1987 article, the *Chevron* opinion and the doctrine it announced had already been the subject of many articles—some favorable and some critical. No one had identified the important effect of the *Chevron* doctrine that Professor Strauss discussed in his article, however.

Professor Strauss recognized that the *Chevron* doctrine has the potential to

6. 467 U.S. 837 (1984).
7. *Id.* at 842–43.
8. *Id.* at 866.

reduce the problem that he described—the tension between the need to subject agency actions to judicial review and the desire to create and maintain a legal system in which the law is the same in every region. The *Chevron* doctrine allocates to agencies the choice of policies to implement as long as the policy chosen by the agency is reasonable and within the statutory boundaries created by Congress. Since there is only one agency and there are thirteen circuit courts, the *Chevron* doctrine has the potential to reduce the tendency for judicial review of agency actions by regional circuit courts to create a balkanized system of federal law in which the law varies in important ways among regions of the country.

The insight Professor Strauss provided in his 1987 article has become a major part of the debate about the merits of the *Chevron* doctrine and of other doctrines that have a similar potential to increase uniformity in interpreting and applying federal laws. Every participant in those important debates must acknowledge that, whatever might be its other good or bad effects, the *Chevron* doctrine has the laudable effect of increasing national uniformity in interpreting and applying national laws.[9] This is typical of Professor Strauss's many contributions to our understanding of the U.S. public law system—he provides unique insights that change the ways in which we think about legal doctrines and the factors we must consider in choosing among competing doctrines.

IMPROVING DECISIONMAKING THROUGH ACCURATE CHARACTERIZATION OF LEGAL DOCTRINES

My third choice of favorite articles by Professor Strauss also focused on *Chevron*, but in a quite different way. He provided a whole new way of thinking about the choice among review doctrines in his 2012 article: *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight."*[10] Professor Strauss's goal in this article was to change the terms courts and scholars have used in a longstanding debate in ways that provide a more accurate reflection of the doctrinal choices available to courts when they review agency actions.

Seventeen years after *Chevron*, the Court issued an opinion in *United States v. Mead Corp.*[11] that limited the scope of the *Chevron* doctrine by holding that courts should not apply *Chevron* to some agency interpretations of agency-

9. *See generally* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.4 (5th ed. 2010).

10. Peter Strauss, *"Deference" Is Too Confusing: Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143 (2012) [hereinafter Strauss, *"*Chevron *Space" and "*Skidmore *Weight"*].

11. 533 U.S. 218 (2001).

administered statutes. The majority opinion in *Mead* concluded that *Chevron* applies when a court decides that Congress has authorized an agency to use one or more procedures to issue a legally binding interpretation of a statute and the agency has used one of the procedures that Congress authorized it to use for that purpose.[12] The *Mead* majority held that when an agency announces an interpretation of an agency-administered statute in a context in which Congress has not authorized the agency to issue a legally-binding interpretation or through use of a procedure that Congress has not authorized for that purpose, a reviewing court should apply the review doctrine that the Court originally announced in its 1944 opinion in *Skidmore v. Swift & Co.*:

> The weight [accorded to an administrative judgment in a particular case] will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[13]

The majority opinion in *Mead* appeared to distinguish among agency interpretations based on a judicial decision that Congress did or did not confer binding interpretative power on the agency to use a particular procedure to interpret a particular statute, thereby implying that a reviewing court should make a doctrinal choice in each case based on its interpretation of congressional intent.[14] The majority opinion in *Mead* also referred repeatedly, however, to a "spectrum" of degrees of deference a reviewing court should confer on agency interpretations, with *Chevron* and *Skidmore* as points on that sliding scale. Thus, the majority characterized both *Chevron* and *Skidmore* as deference doctrines, and said that:

> The fair measure of deference to an agency administering its own statute has been understood to vary with the circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position. The approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other.[15]

The *Mead* opinion was controversial when it was issued. Justice Scalia wrote a harshly worded dissenting opinion in which he criticized the majority for announcing a "wonderfully imprecise" test that will produce "protracted confusion."[16] Justice Scalia's prediction has proven to be

12. *Id.* at 229–31, 234–35.
13. 323 U.S. 134, 140 (1944).
14. 533 U.S. at 229–31.
15. *Id.* at 228 (internal citations omitted).
16. *Id.* at 245.

accurate. The many studies of judicial review of agency statutory interpretations since *Mead* have found that *Mead* has indeed produced a confused pattern of decisions.[17] In most cases, the reviewing court began by framing the question in terms of the degree of deference it owes the agency on a long spectrum of potential degrees of deference. Similarly, the scholarly debate about the merits or flaws of *Mead* was usually framed in terms of the degree of deference a court should accord an agency in various circumstances.

Professor Strauss argued that the *Mead*/*Chevron*/*Skidmore* debate has become confused in large part because courts and scholars have emphasized the *Mead* majority's reference to degrees of deference rather than the actual basis for the holding in *Mead*. In his view:

> "[D]eference" is a highly variable, if not empty, concept. It is sometimes used in the sense of "obey" or "accept," and sometimes as "respectfully consider." Instead of "*Chevron* deference," this Essay will urge the use of "*Chevron* space"; instead of "*Skidmore* deference," "*Skidmore* weight."
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> "*Chevron* space" denotes the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its delegated or allocated authority. The whole idea of "agency" is that the agent has a certain authority, a zone of responsibility legislatively conferred upon it.
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> . . .
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> "*Skidmore* weight" addresses the possibility that an agency's view on a given statutory question may in itself warrant respect by judges who themselves have ultimate interpretive authority.[18]

Professor Strauss then supported his preferred terms of debate and discussion with reference to the history of judicial review of agency actions, the ways in which Congress allocates authority to agencies and to courts, the facts and reasoning of *Skidmore*, *Chevron*, and *Mead*, and the language of the Administrative Procedure Act. He concluded by explaining the many ways in which his preferred terms of discussion would yield a coherent and consistent set of review doctrines; explaining the Supreme Court's major decisions with respect to the scope, meaning, and application of review doctrines; and assisting courts in deciding both when to apply *Chevron* and when to apply *Skidmore*, and what meaning to give each of those review doctrines. This contribution to the literature by Professor Strauss will help judges make better decisions, help scholars debate and discuss review

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17. *E.g.*, Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007). *See generally* PIERCE, *supra* note 9, § 3.5, at 171–214.

18. Strauss, "Chevron *Space" and "*Skidmore *Weight"*, *supra* note 10, at 1145.

doctrines more effectively, and help students obtain a better understanding of this challenging area of law. There is evidence that it is already having these effects.[19]

THE RULEMAKING CONTINUUM

My fourth favorite of Professor Strauss's articles is his 1992 comment on the widely varying views that scholars have expressed about several types of agency rulemakings: *The Rulemaking Continuum*.[20] Some scholars have criticized courts and presidents for imposing what they view as excessively burdensome and time-consuming procedures on agencies when they use the notice-and-comment process to issue legislative rules, while other scholars have criticized courts for allowing agencies to characterize rules that are "practically binding" as interpretative rules and policy statements, thereby exempting them from the notice-and-comment process.

Professor Strauss began with a helpful taxonomy of rules of various types and a matrix that he then used to characterize the effects of rules of each type in binding either the government alone or both the government and regulated entities.[21] He then responded to the scholars who criticized courts and presidents for imposing arguably excessive procedural requirements. He expressed the view that those requirements were defensible on several grounds: (1) there was inadequate evidence to support the claim that they had "ossified" the rulemaking process; (2) they were applied selectively only to the relatively few rules that were expected to have major effects; and (3) they reflect a widespread consensus that courts and the president should "impose additional rationalizing analysis and/or (you may take your pick) political controls over these highly significant decisions."[22] Professor Strauss noted that the extra-statutory procedural requirements were imposed "with the concurrence of all three branches of the federal government."[23] He opined that: "It is hard to understand the changes, in the context in which they have occurred, as other than responses to a fairly 'strong and persistent public opinion' about the utility of procedural checks on decisions of such high dimension."[24]

Professor Strauss then responded to the scholars who urge the courts to

19. Thus, for instance, Professor Walker uses Professor Strauss's terminology in his empirical study of the ways in which agencies understand and apply review doctrines. Christopher J. Walker, Chevron *Inside the Administrative State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 706–07 (2014).

20. Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463 (1992).

21. *See id.* at 1464–66.

22. *Id.* at 1470–72.

23. *Id.* at 1470.

24. *Id.* at 1471.

require agencies to use the notice-and-comment procedure to issue interpretative rules and policy statements that are not legally binding on courts or members of the public but that bind agencies and are "practically binding" on members of the public.[25] Professor Strauss labeled rules of this type "publication rules" because no member of the public can be adversely affected by such a rule without adequate and timely notice of the rule.[26]

Professor Strauss began his evaluation of the argument to require agencies to use the notice-and-comment procedure to issue publication rules by recognizing that agencies would reduce significantly the number of publication rules they issue if they were required to use the time-consuming and resource-intensive notice-and-comment procedure to issue such rules.[27] He then described the advantages of publication rules: "By informing the public how the agency intends to carry out an otherwise discretionary task, publication rulemaking permits important efficiencies to those who must deal with government."[28] He used the Nuclear Regulatory Commission (NRC), of which he was once General Counsel, to illustrate his point:

> From the perspective of an applicant whose chief interest is to build a plant that will meet NRC standards, receiving such guidance from the agency where possible is strongly preferable to being left to speculate about the details of agency policies and to pay for case-by-case demonstration that it has met those policies' demands.[29]

Professor Strauss then described two other ways in which publication rules that bind agencies provide benefits to both agencies and regulated firms:

> Permitting the discretion left open by its legislative rulemakings to be structured by publication rulemakings is valuable to the NRC (or to the FERC or to the FAA) and to the general public, as well as to the private parties most directly concerned. . . . If the policies were not there, and these [agency employees] were required to act on their own knowledge and judgment, agency staffing would be a much more complex matter; even if it could be successful, substantial variation would be expected.
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> Putting the matter this way also suggests the high stakes for the public, including the regulated public, in encouraging the adoption of publication rules. . . . [T]he choice the public faces is between having the [agency employee] apply his own interpretation of the agency's legislative rules, or having his decisions and actions further controlled by the agency's publication rules. . . . [T]he affected public (especially the repeat players

25. *Id.* at 1479.
26. *Id.* at 1468.
27. *See id.* at 1484–85.
28. *Id.* at 1481.
29. *Id.*

> among them) will almost certainly prefer a state of affairs in which such instructions are publicly given and may be relied upon—that is, the lower-level bureaucrats are to follow them, and higher levels are to depart from them only with an explanation.[30]

Professor Strauss also recognized why courts often mistakenly believe that most regulated firms want to make it difficult for agencies to issue publication rules: "A difficulty, of course, is that these satisfied consumers of publication rules tend not to appear in court, and the valuable functions publication rules perform, especially in constraining the behavior of agency operatives, consequently appear in court opinions only as asides."[31]

Professor Strauss repeatedly acknowledged the need for some limit on the discretion of agencies to issue publication rules and suggested such a limit: "[J]udicial inquiry into the sufficiency of agency legislative rule guidance for publication rule activity would answer directly the recently expressed concerns about agency evasion of the obligation to make *some* legislative rules, without threatening to deny the continued utility of publication rules."[32]

The Supreme Court recognized the concern Professor Strauss identified and responded to that concern in the manner he suggested fourteen years later in its opinion in *Gonzales v. Oregon*.[33] The Court held that a reviewing court is not required to defer to an agency interpretation of an agency's legislative rule if the rule merely "parrots" the language of the statute it implements.[34]

THE IMPORTANT BUT LIMITED ROLE OF THE PRESIDENT IN AGENCY DECISIONMAKING

My fifth favorite of Professor Strauss's articles is the essay he wrote as the introduction to the 2007 administrative law issue of the George Washington Law Review, *Overseer or "The Decider"? The President in Administrative Law*.[35] He recounted the longstanding debate between those who believe that the President has the power to overrule the decisions of the officers that Congress has empowered to make decisions and to make the decisions himself versus those who believe that the President has only the power to influence the decisions of the officers whom Congress has

30. *Id.* at 1482–83.
31. *Id.* at 1483.
32. *Id.* at 1480.
33. 546 U.S. 243 (2006).
34. *See id.* at 257–58.
35. Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) [hereinafter Strauss, *Overseer or "The Decider"*].

authorized to make decisions through use of the many tools the Constitution makes available to the President.[36] He then made powerful and well-supported arguments in support of the latter view.

Professor Strauss began by describing several recent events that had caused him concern that presidents were beginning to act based on the erroneous belief that they can make decisions Congress has assigned to other officers and that the Supreme Court might be prepared to approve of that pattern of behavior.[37] Those events included five-to-four decisions in two recent Supreme Court cases that suggested that a majority of Justices might be prepared to approve of the presidential role as "decider"[38] and recent law review articles in which three highly respected scholars seemed to be urging adoption of a model of government in which the President is the decider of all major questions, including those Congress has assigned to other officers.[39] Notably, two of those scholars have held positions of great responsibility in the White House, and one has become a Supreme Court Justice. Professor Strauss found one recent event particularly troubling. President Bush had just issued an Executive Order in which he seemed to take the power to initiate a rulemaking away from agency heads whose nominations as officers of the United States had been confirmed by the Senate, and gave that power instead to lower ranking agency officials—"inferior officers"—who had been appointed by the President without Senate confirmation.[40]

In his typical careful and comprehensive manner, Professor Strauss relied on a combination of constitutional text, historical practices, Supreme Court opinions, opinions of Attorneys General, articles in both the legal and political science literature, and analysis of the policy implications of alternative presidential roles to explain why the President must be the "overseer" of the Executive Branch rather than the "decider" of all questions that Congress has assigned to officials in the Executive Branch. After describing many incidents in which presidents differed with the officers to whom Congress had given decisionmaking power—with widely varying results—Professor Strauss described and explained the many critical differences between an Executive Branch in which the President is the decider and an Executive Branch in which the President is the overseer:

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36. *See id.* at 698–705.

37. *See id.* at 699–702.

38. *See* Gonzales v. Oregon, 546 U.S. 243 (2006); Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

39. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

40. *See* Exec. Order No. 13,422 § 4(b), 3 C.F.R. 191, 192 (2007).

> To raise these questions is to doubt neither that procedural requirements will sometimes permit private presidential consultations that they do not permit in on-the-record proceedings, nor that when those consultations occur, "undisclosed presidential prodding may direct an outcome that *is* factually based on the record, but different from the outcome that would have obtained in the absence of presidential involvement." Rather, the question is where legal responsibility for the decision lies. In what frame of mind is this presidential prodding received? Does the recipient of such communications receive them as political wishes expressed by the leadership of her administration respecting how she will exercise a responsibility that by law is hers? Does she think, "In this particular case, Congress confers a discretionary power, and requires reasons if I exercise it. Surely this contemplates responsibility on my part"? Or does she take it as a command that she has a legal as well as a political obligation to honor, and for whose justifications she thus has no particular responsibility?
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> This is precisely the difference between the oversight and the decisional presidency. . . .
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> Distinguishing the legal from the political not only reinforces the psychology of office for the administrator, with its arguable contributions to the reasoned decisionmaking and application of expert judgment that remain major rationales of the administrative state. For presidential administration, it also arms the checks and balances instinct in the necessities of publicly firing a recalcitrant officer, enduring the resulting political reaction, and persuading the Senate to confirm her more compliant replacement. So dramatic a step is not likely to follow from a single disagreement between President and administrator (or, the much likelier situation, presidential staff and agency administration); ordinarily, that will require repeated mismanagement or departures from policies of central importance. These checks are missing if both sides of the conversation inside the executive branch understand and accept that, by law, the President is "the decider" of particular matters.[41]

A WINDOW TO PROFESSOR STRAUSS'S PEDAGOGIC APPROACH

My sixth favorite article by Professor Strauss is *Administrative Law: The Hidden Comparative Law Course*,[42] published in the *Journal of Legal Education* in 1996. I have chosen this article because it provides a window on Professor Strauss's role as a teacher. He has an unmatched understanding of complicated relationships within administrative law, between administrative law and other areas of law, and between administrative law

41. Strauss, *Overseer or "The Decider"*, *supra* note 35, at 712, 714.

42. Peter L. Strauss, *Administrative Law: The Hidden Comparative Law Course*, 46 J. LEGAL EDUC. 478 (1996).

and other social science disciplines. His tens of thousands of students—both direct and indirect—have benefited greatly from his ability to identify, understand, and explain those relationships. His focus on relationships has advanced our understanding not only of administrative law but of many other fields of law and areas of intersection between law and social sciences.

In this article, Professor Strauss identified and explained many of the ways in which administrative law students can learn from their knowledge of other fields of law and the ways in which students of other fields of law can learn by applying lessons learned from their study of administrative law to the most serious problems that arise in other fields of law. He accomplished this by describing and analyzing some of the many issues that arise in administrative law and their analogues or potential applications in Civil Procedure, Constitutional Law, Criminal Procedure, Evidence, Federal Courts, Legislation, and Corporations.[43]

Professor Strauss began and ended this article with a well-supported plea to expand the law school curriculum to include the social science tools that are essential to any effort to understand the closely related fields of administrative law and government regulation: "[C]ontemporary law studies should include explicit instruction in the skills of public policy analysis—in particular, how to evaluate the need for and probable effectiveness of regulation."[44]

PROFESSOR STRAUSS AS AMBASSADOR AT LARGE

My final choice of favorite articles is *Rulemaking in the Ages of Globalization and Information: What America Can Learn from Europe, and Vice Versa*.[45] This article illustrates Professor Strauss's valuable role as a comparative law scholar and an ambassador at large. He has written many books and articles that are intended to introduce foreign legal scholars, law students, lawyers, and government officials to the U.S. administrative law system.[46] I am familiar with some of these works, and they seem to perform their function well. I am not in a good position to evaluate them, however, because I am not a member of the audience that is the target of those books.

Rather than attempt the difficult task of empathizing with the foreign

43. *See id.* at 478–89.

44. *Id.* at 478, 489.

45. Peter L. Strauss, *Rulemaking in the Ages of Globalization and Information: What America Can Learn from Europe, and Vice Versa*, 12 COLUM. J. EUR. L. 645 (2006) [hereinafter Strauss, *Globalization and Information*].

46. *See, e.g.*, PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES (2d ed. 2002).

readers for whom Professor Strauss has written his books and articles on the U.S. administrative law system, I decided to read one of the comparative law articles that he has written primarily to introduce U.S. scholars and lawyers to the administrative law system of another jurisdiction. The few hours I spent reading Professor Strauss's forty-six page description and analysis of the European Union's (EU's) system of administrative law provided me with a much better understanding of EU administrative law than I had previously obtained by participating in several comparative law symposia and by discussing the EU system with scores of European professors.

A few of the many insights Professor Strauss provided illustrate the rich body of knowledge he made available in this article. Thus, for instance, the EU has an Executive Branch, the European Commission, and a Legislative Branch, the European Parliament. The Commission uses a decisionmaking procedure roughly analogous to our notice-and-comment process to create proposed legislation: "[A]ll proposals considered by the Council and the Parliament for actions that will have the force of law on Member States and/or their citizens—*must* originate with the Commission."[47]

The Commission's procedure for creating a legislative proposal begins with publication of a "work plan" that is roughly analogous to a U.S. agency's Notice of Proposed Rulemaking.[48] The Commission then engages in "consultation." Consultation is roughly analogous to solicitation of comments in the United States.[49] It differs significantly, however, in both its rigor and its results: "Commission consultations tend to be quite structured in character, requiring responses to a series of questions about identity and interest and then asking particular questions about the matter under study."[50] The comments elicited through this highly structured process differ from those received by a U.S. agency in a major rulemaking. Professor Strauss's description of the results of one Commission consultation with respect to a major legislative proposal illustrates the differences:

47. Strauss, *Globalization and Information*, *supra* note 45, at 655.
48. *Id.* at 656–60.
49. *Id.* at 664–70.
50. *Id.* at 668.

> [There were] 968 participants in an Interactive Policymaking tool that was, in part, a structured questionnaire, and a total of 6400 comments of varying length and detail. . . . [I]n contradistinction to American rulemaking processes of equivalent controversiality, virtually all these comments appear to have spoken to the proposals in knowledgeable detail.[51]

As Professor Strauss noted, the contrast with the U.S. notice-and-comment process is stark. The vast majority of the comments filed in a typical major U.S. rulemaking are worthless to decisionmakers because they consist of brief assertions with no supporting data or analysis.[52]

The process of creating a legislative proposal in the EU also includes an assessment of the expected impact of the proposal. This step is roughly equivalent to the cost-benefit analysis (CBA) that the Office of Information and Regulatory Affairs (OIRA) implements with respect to major rules proposed by U.S. agencies, though it differs in some important respects from its U.S. analogue. Thus, for instance, it is broader in scope than a CBA; it includes assessment of the likely environmental impact of the proposal. It is also accomplished through use of a far more publicly visible procedure than the largely opaque OIRA review process.[53]

Perhaps the biggest differences between the United States and EU decisionmaking procedures are apparent in the explanations of the rules that emerge from the process. The typical explanation of an EU rule is about eight pages long compared with the 200 to 2,000 page statement of basis and purpose that usually accompanies a major rule issued by a U.S. agency.[54] That difference undoubtedly is attributable to the differing roles that the judiciary plays in the United States and the EU. U.S. courts invariably review all major rules through use of an approach that requires an agency to write an extremely lengthy and detailed statement of the basis and purpose of the rule to have any chance of persuading a U.S. court to uphold a major rule. Courts play no role in the decisionmaking process in the EU. The architects of the EU decisionmaking process acted on the belief that: "Such an over-legalistic approach would be incompatible with the need for timely delivery of policy, and with the expectations of the citizens that the European Institutions should deliver on substance rather than concentrating on procedures."[55]

My brief summary of Professor Strauss's description of one of the

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51. *Id.* at 669–70.

52. *E.g.*, Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 71–78 (2013) (explaining this claim through the lens of the Financial Stability Oversight Council's implementation of the Volcker Rule).

53. Strauss, *Globalization and Information*, *supra* note 45, at 660–64.

54. *Id.* at 675.

55. *Id.* at 665.

important methods of decisionmaking the EU uses cannot do justice to this detailed and rich account of EU regulatory decisionmaking. He also describes other important decisionmaking processes, e.g., the comitology process the EU uses to make "soft law"—the EU equivalent of U.S. interpretative rules and policy statements.[56] He explains each of these decisionmaking procedures with reference to the unique institutional and cultural context in which they operate. That context includes treaty-based multi-national institutions in which the member states have different languages and cultures. Those institutions issue detailed regulatory rules that they do not implement. The rules are implemented by each of the member states in ways that reflect the constraints of "subsidiarity" and "proportionality."[57]

This masterful article illustrates well all of the ways in which Professor Strauss contributes to our understanding of administrative law and regulatory decisionmaking. It is superb as an educational tool. It is outstanding scholarship. It also illustrates well Professor Strauss's role as an ambassador at large. He helps scholars, lawyers, judges, and government officials understand the ways in which their counterparts in other countries make regulatory decisions. I end this essay where I began. Professor Strauss has made unparalleled contributions to our understanding of the public law systems of many nations in his roles as a teacher, a scholar, and an ambassador at large.

56. *Id.* at 678–85.
57. *Id.* at 675–77.

AFTERWORD: PETER STRAUSS AND THE ADMINISTRATIVE LAW SECTION

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I appreciate the *Administrative Law Review*'s invitation to write a short piece to accompany Dick Pierce's survey of some of Peter Strauss's best articles on administrative law.[1] By my lights, Peter's productivity, breadth of knowledge, eloquence, and vision have earned him a place at the very top of the administrative law field. Tributes occasioned by his impending retirement would seem to be very much in order.

I do not propose, however, to cover the same terrain that Dick has already ably canvassed. His choices of "favorite" articles, while not identical to the ones I would choose,[2] are certainly a reasonable selection that showcases a healthy portion of Peter's contributions to the academic literature. There is no good reason for me to seek to amplify on that warm appraisal.

On the other hand, there is an aspect of Peter's career that Dick doesn't discuss and that particularly deserves attention in the pages of this journal. After all, the *Administrative Law Review* is in many respects the house organ of the American Bar Association (ABA) Section of Administrative Law and Regulatory Practice (which publishes it in partnership with the American University Washington College of Law). I intend, therefore, to use this Afterword to write about Peter's exemplary record of leadership and service to the Section. With decades of contributions to choose from, I will

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1. Richard J. Pierce, Jr., *Peter Strauss: Teacher, Scholar, and Ambassador at Large*, 67 ADMIN. L. REV. 369 (2015).

2. For the record, my personal list of favorites would largely overlap Dick's, but it would also include, for example, Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1990), and Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429. The fact that the latter of these is primarily about statutory interpretation, and only secondarily about administrative law, is a small piece of evidence regarding the great breadth of Peter's scholarly interests.

mention only a few highlights and hopefully not commit too many sins of omission.

Peter has served as Section Chair (1992–1993), Council member (1980–1982), and chair or member of multiple Section committees. But such job titles tell only a fraction of the story, so I will quickly turn to some of his contributions to the intellectual work products of the Section.

A good example of the latter was the Section's 1997 report to the ABA House of Delegates on the Congressional Review Act.[3] The report, of which Peter was the principal author, masterfully combined a polite, constructive tone with careful legal analysis and searching criticism. It accepted the need for congressional review of executive rulemaking, but it made a strong case that the Act tries to do too much and would work better if its scope were narrowed and its procedures modified. The ABA endorsed the report's recommendations,[4] but Congress has never acted on them. One would be hard pressed to argue, however, that subsequent experience has shown that no modifications were needed.[5]

A few years ago, the Section enlisted me to draft a set of comments on a congressional bill that would extensively rewrite the rulemaking provisions of the Administrative Procedure Act.[6] This task entailed researching numerous existing Section and ABA positions on regulatory reform. The research repeatedly reminded me about how many of those policies were ones that Peter had initiated or promoted within the Section. For example, Peter played a major role in the drafting of a 1981 resolution in which the ABA proposed a legislative framework to reconcile the public's interest in careful decisionmaking with a rulemaking agency's need for efficiency.[7] That resolution is still in effect and provided the basis for many passages in the Section's comment letter.[8] A key issue regarding the bill was its proposal of multiple analysis requirements that would have the potential to bog down the rulemaking process. Peter has done a great deal to shape the Section's policies in this area as well, including a recommendation that

3. 5 U.S.C. §§ 801–808 (2012); *see* 122-2 A.B.A. ANN. REP. 465–80 (1997).

4. 122-2 A.B.A. ANN. REP. 43 (1997).

5. *See* CURTIS W. COPELAND, CONGRESSIONAL REVIEW ACT: MANY RECENT FINAL RULES WERE NOT SUBMITTED TO GAO AND CONGRESS 9–11, 51 (2014), *available at* https://www.acus.gov/report/Copeland-report-congressional-review-act (documenting broad agency noncompliance with the Act, and mentioning the American Bar Association approach as one possible legislative response).

6. American Bar Association Section of Administrative Law and Regulatory Practice, *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 619 (2012) (hereinafter ABA, *H.R. 3010 Comments*).

7. 106 A.B.A. ANN. REP. 783–92 (1981).

8. *See, e.g.*, ABA, *H.R. 3010 Comments*, *supra* note 6, at 628–29, 644–45, 647–48, 651–52, 663.

Congress and the President should work to harmonize overlapping and inconsistent regulatory analysis mandates.[9] In addition, the Section's comment letter supported review by the Office of Information and Regulatory Affairs of rulemaking by independent agencies.[10] That position is traceable to a report by Peter and Cass Sunstein, which the ABA endorsed in 1986.[11]

Apart from these and many other writing projects of which he has been an author or coauthor, Peter has been influential in countless debates within the Section, whether by circulating written comments or by participating in debate at Council meetings. His influence has flowed not only from his colleagues' respect for his insights and judgment, but also from his talent for proposing the right language to bridge differences between competing positions. I recall one occasion on which Council debate on a resolution had temporarily reached an impasse. After Peter suggested felicitous language for an amendment that broke the logjam, an appreciative Council member hailed him as "Peter James Madison Strauss."[12]

Like the magisterial articles that Dick summarizes, written projects such as the ones that I have described will remain as part of Peter's vast legacy to administrative law. For those of us who have had the opportunity to work with him directly, this legacy will be linked to our recollections of Peter himself. His ideas, sense of commitment, and friendship have greatly enriched the Section, along with the wider world of administrative law, and memories of those qualities will stay with us for years. We trust, though, that his "official" retirement will not mark the end of his involvement with Section affairs, nor of his influence on all of us in the field.[13]

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9. *See id.* at 636.

10. *Id.* at 648.

11. Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986).

12. These same talents have been on display during Peter's longtime service as a public member (now senior fellow) of the Administrative Conference of the United States (ACUS). In addition to serving as an ACUS consultant and committee chair, he has participated freely and often to great effect in many of the debates that constitute the regular work of the Conference.

13. Most recently, Peter has been a vigorous advocate on behalf of initiatives, inside and outside the Section, to address the problems that can result when industry codes are "incorporated by reference" into agency rules. *See generally* Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497 (2013).

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