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# Authority and Responsibility: The Jurisprudence of Deference

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## AUTHORITY AND RESPONSIBILITY: THE JURISPRUDENCE OF DEFERENCE\*

*Joseph Vining*†

**T**he connection between authority and responsibility is such that the one cannot be thought of without the other. In legal method, close reading and rereading of a text marks it as an authoritative text; the presupposition of mind which is necessary to close reading is presupposition of a responsible mind. In the working of institutions that embody authority, the disposition to follow the decisions and statements of a person responsible for a matter inevitably rests upon a presupposition that the decisions and statements followed are those of the responsible person. As that presupposition fades with bureaucratization of decision and writing, authority fades; authority re-emerges with institutional change, with delegation of office and assumption by the delegee of responsibility.

That authority and responsibility are facets of one experience appears in a particularly explicit way in the jurisprudence of deference in the non-constitutional public law of the United States. Public or administrative law in the United States, it may be said, is that part of law which treats the actions and statements of persons who are explicitly recognized as making use of public power. To the extent persons are not recognized as making use of public power to effect substantive ends, their actions and statements are treated in the body of law known as private law. Private law will be beyond our focus. But generalization from public to private law should be possible: deference is associated with all authority.

Deference is of course associated with authoritarianism also. The very word *deference* calls up lowering the eyes, baring the covered head, laughing at jokes that are not funny. But there is a difference between true deference and deference that only bides its time. In American nonconstitutional public law, courts' deference is likely to be true deference. The deference treated

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in public law is the deference of courts to litigants before them, not the other way around. It is, moreover, deference on the question of what the law is.<sup>1</sup>

## I. THE NATURE OF DEFERENCE AND THE CONSTRAINTS UPON IT

The jurisprudence of deference is an amalgam of ordering notions of a technical kind, appearing in opinions, commentary, and the writing and argument of practicing lawyers. The pertinent doctrines are formulated and invoked in discussing the appropriate scope of judicial review of administrative determinations; in the course of defining questions as questions “of law” or questions “of fact”; in the categorization of rules announced by an administrative agency (when its statements of law are announced in the form of rules) as interpretative on the one hand or as substantive, prescriptive, or legislative on the other; in determining the extent of the record to be required of an administrative decision maker in support of and explanation of a decision; in determining the elaborateness of the procedure and internal structuring required of an administrative decision maker; in the application of the doctrine of primary jurisdiction—the initiation by a court of decisionmaking by an agency; in the application of the doctrines of ripeness, finality, and exhaustion, governing the timing of judicial review and its procedural mode; and even in the determination whether a particular decision maker is inside or outside an agency, i.e., in a hierarchy, or, instead, independent and a separate and different agency. Any of these doctrines might be picked out and used as a thread. Many would be met in exploring the complexities of any actual case. But it will be more useful, for demonstrative purposes, to set up a simple hypothetical.

Suppose a public prosecutor files a criminal information against an individual for “reckless driving.” There is no speeding, weaving, or accident in the case. But the driver had been driving without his seat belt fastened. The jurisdiction has no explicit requirement that seat belts be worn. The question arises what the phrase “reckless driving” means in the statutory prohibition against reckless driving.

At the trial the prosecutor says to the court: “Of course I had to think about this question before I decided to bring the prosecution. I think a great deal about what reckless driving might mean, because I bring a great many

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1. In general, a degree of deference by a court to some other on questions of law suggests to the public generally that they also defer and seek in good faith to understand and follow the speaker's statements over time. Not only is it less cumbersome that those toward whom such statements may be directed listen themselves to the person to whom the court is listening; if there is public deference to courts, there is the thought that others should listen to the degree the court does and that they are open to some measure of condemnation if they do not. This is part of what is implied in the phrase “the force of law,” to which we refer below. We will concentrate, however, on the primary phenomenon, deference by courts.

prosecutions in the field of vehicular safety. I have concluded, Your Honor, that reckless driving might mean driving without a seat belt and I am going to argue that to you.”

The court must then decide what reckless driving means and whether the defendant may be convicted of the crime if he has omitted to wear his seat belt. A conscious taking of a risk to life and limb while driving, and as a result of driving, is there. To be sure, the risk is primarily (though not entirely) a risk of the driver's own death and it is not immediately evident that the risk is raised by the way the defendant has driven, if driving is manipulating the wheel and the pedals. But the proposition that this behavior constitutes reckless driving is not out of the question. The court must make a decision. And so it makes various inquiries and takes various considerations into account.

Are those considerations, which the court is to take into account in concluding whether reckless driving does mean driving without a seat belt, to include the fact before the court that the prosecutor has taken the position that such driving might mean this? One would not think so. The prosecutor is an adversary before the court. Having taken a position that reckless driving *might* mean driving without a seat belt, the prosecutor may be expected to see how far he can go in making arguments to support it. His lawyer's ingenuity will be devoted to a means-end question. He leaves responsibility for decision about what the phrase does mean up to the court. The fact that the prosecutor has decided that it would be reasonable to read reckless driving in this way, if that is the fact, may be a factor taken into account as such by the court if the defendant argues that it is not even plausible to suppose driving without a seat belt is reckless driving (and that, therefore, the prosecutor must be suing the defendant on other unstated and illegitimate grounds, some family feud, for instance, or political grudge). But in the main the prosecutorial position with respect to the meaning of the statute is just an argument like the argument of any other litigant in an adversarial stance, an argument on the merits to be considered by the court while thinking about the merits.

Now suppose the prosecutor says instead, “Your Honor, I have thought about this area of law and I think this is not only what reckless driving might mean: I think this is what reckless driving does mean. In my view this is the law.” And suppose that in deciding to give weight to one of the considerations proffered by the prosecutor in the form of reasons or legal arguments, or in making its final decision, the court takes into account (as one of its reasons for giving weight or a particular weight to that consideration, or for making its decision) the fact that the prosecutor has decided a factor is relevant (or should have a particular weight, or should be put together with other factors in a certain way), that fact in itself, just that the prosecutor has decided and said so.

Would there not be an odor of unfairness in the case if the court's legal

judgment were grounded even in part on that fact? The two parties before the court are not being treated as equals. The statements of one side are being given more weight than the statements of the other side, not because of their persuasiveness, but rather because of who is making the statement. Justice is not "impersonal" and is not "blind." Moreover, the defendant may have had no notice this was the law. How could there have been notice if no court had said publicly this was the law or made public statements from which this could have been construed? There seems injected the most basic form of arbitrariness. The prosecutor is only a litigant, an adversary. His positions should be treated as arguments only.<sup>2</sup>

But if the substantive or organic statute, under which court, prosecutor, and driver all operate, reads "It shall be a crime to drive recklessly in contravention of such rules as the enforcement agency promulgates to achieve the purposes of this prohibition,"<sup>3</sup> the situation is different. It is different at the very least in that it is contemplated that an enforcement agency will issue statements of position in the form of "rules." Suppose the agency does issue a "rule" to the effect that driving without a seat belt is driving recklessly. The driver then drives without a seat belt, and he is prosecuted. Can the driver still argue that driving without a seat belt is driving without recklessness? Most certainly he can. The rule issued by the enforcement agency may be illegal, unauthorized. The particular position in question, it may be argued, is not one contemplated by the statute; reckless driving may mean only risking harm to others, never harm to oneself.

Again, the court must decide, engaging in what is known as judicial review of the agency's rule or rulemaking. The agency makes arguments in support of its rule. The question arises again, should the court in *its* decision take into account and give weight to the fact that the agency has taken the position that reckless driving includes harm to oneself and covers driving without a seat belt, so that the court's decision is made not purely on the substance of the issue but in part on the ground that it is the agency that has said this is what reckless driving means? The answer in the United States appears to be yes, and has been yes for much of the century.<sup>4</sup> The judicial oath to administer justice without respect to persons<sup>5</sup> does not stand in the way of it. The court applies what is known as a "limited scope of review" of the agency's position on this "question of law" (though courts sometimes characterize the issue as a "question of fact" or a "mixed question of law and

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2. This indeed is the classic conception of litigation under the Rule of Law—no distinction made between the public and the private entity, both treated as if their purposes in coming to court were hidden or irrelevant.

3. Compare *United States v. International Min. & Chem. Corp.*, 402 U.S. 558 (1971).

4. There is an underlying analytic problem, which we will note below (section IV), with regard to whether it is the agency that has spoken when a statement is presented to which its name has been signed. The fact that this is a problem reflects a difference and maintains the separation between courts and agencies. Courts' response to it can swallow all prior analysis.

5. 28 U.S.C. § 453.

fact"). The court defers to the agency, and others affected by the agency position are invited to look to the agency.

The reason why deference is given here by the court is that the agency's position is more than a litigant's argument in court: the agency is conceived, both at its creation and thereafter, to make decisions and take responsibility for them. The agency is to make decisions on the merits, seeking in good faith to follow the law as it genuinely believes the law to be. It is not to be merely an adversary seeking as much as it can get, making arguments in which it does not necessarily believe and without even asking itself whether it believes them, shifting to the court total responsibility for legal determinations. In the view of the agency, which precedes the view of the court, the position it takes is to be more than an argument. The agency's view of its own position is then confirmed by the court's view of it; and, in public law, there are beyond deference itself a variety of judicially developed doctrines designed in part to maintain this sense of independent responsibility to the law.<sup>6</sup>

## II. DEFERENCE AND THE FORCE OF LAW

This is the simple case in which deference enters. Many, perhaps most, organic statutes are not so explicit in their directions to agencies to make responsible decisions (except insofar as they assume or state that an agency is a public agency). But no such statutory delegation of "rule-making power" is necessary to making decisions and taking positions on legal questions. The prosecutor above first revealed his position on the question of driving without seat belts when he brought a particular prosecution, and agencies often first reveal a position in this way. It is also possible for an enforcement agency to use a vehicle other than a prosecution for the announcement of a position. The agency may issue a rule without a particular statutory directive to do so, stating in advance of any enforcement action that reckless driving does mean driving without a seat belt. One cannot easily prevent an agency or anyone else from saying what it thinks or wants others to think it thinks (at least the first time a position is expressed), and, in any event, in the United States the federal Administrative Procedure Act contemplates such rules, referring to them as "interpretative rules" or "general state-

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6. Examples are the doctrines of finality, to provide agencies time to take a responsible position, *see* *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), *National Automatic Laundry and Cleaning Council v. Schulz*, 443 F.2d 689, 698-703 (D.C. Cir. 1971), or primary jurisdiction, to shift initial determinations of questions of law from courts to agencies, *see* *United States v. Western Pac. R.R.*, 352 U.S. 59 (1956). It may be noted that, in deferring, appellate courts in the United States appear to treat statements of law by officials rather differently from statements of law by courts of first instance. Lower and higher courts are in a hierarchy within the judicial body, as courts and officials are not. The analogy in the administrative sphere to lower and upper courts is a lower echelon of an agency in its relation to the head or Commission or an upper echelon of that agency.

ments of policy.”<sup>7</sup> If such a “rule” or “statement” is issued and the agency then undertakes enforcement action (as before, against a driver who has driven without a seat belt), the question will arise whether the court should give weight to the fact that the agency has issued a rule, i.e., that the agency has taken this position.

The defendant will say that the situation is exactly as the situation would have been without the rule. The rule only states a litigant’s position. But the odor of unfairness is not present to the same degree, and in this situation courts will often say that they do give deference, even though they have before them no apparent mandate from Congress to do so.

There is no longer quite the problem of notice or surprise, the wholly retroactive application of a legal determination.<sup>8</sup> Nor is there so much a sense that an argument made for the sake of argument—or to see whether some ulterior end can be gained thereby—might become substantive law through judicial indolence or some other lapse in judicial responsibility. Before deferring, courts certainly look for expertise—which may itself be in considerable part an evidently genuine and independent concern with the subject matter—or a mission legislatively given to the agency to achieve the values promoted by the rule in question.<sup>9</sup> But whatever courts find after looking for these, they regularly demand, and condition their deference upon, evidence that the agency has in fact responsibly considered the question fully and on the merits. Such evidence might consist in the agency’s permitting the participation of affected parties in deliberations leading to the rule, the agency’s provision of procedural opportunities for the testing and exploration of the factors of decision, an understandable explanation of the agency’s decision making, or a spreading upon the record of the agency’s grounds for decision. Even with these present, some further showing may be required that a decision was in fact made and was not simply the outcome of the jostling of interested parties within the agency halls. Courts’ demands for such evidence and division of such evidence into its various usually encountered kinds make up the doctrines and subdoctrines of the jurisprudence of deference, which are then linked into doctrines designed to allow time and opportunity for responsible decisions that can be so evidenced.

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7. 5 U.S.C. § 553(b). *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199 (1974); *Frozen Food Express v. United States*, 351 U.S. 40, 44, 45-48 (1956).

8. An affected party’s doubt about whether the agency’s statement represented the law is often handled as a matter for the law of remedies if the doubt was in good faith. For example, if in the particular case the driver’s not following the rule is viewed as merely a step taken to invoke judicial review, no sanction may be appropriate. *Cf.* *United States v. Nixon*, 418 U.S. 683 (1974).

9. In some fields Congress and at least the Supreme Court may conceive the agency a more trustworthy expositor of legislated values than the courts themselves, and weight deliberately given to agency positions as such may be for the purpose of counteracting an excessive leaning by the judiciary in the opposite direction. The prime example is the early National Labor Relations Board.

Without these evidences of a responsible mind at work, a court is markedly less interested in the formality that the agency's name is attached to what is said to affected parties and the court. A court will likely pay some attention to what is said because of the structure of litigation, which limits what can be heard. Sitting on a park bench one might similarly pay some attention to what is written on a stray piece of paper that flutters to one's feet. What is written there comes to one's attention, and other things do not, as a result of sitting where one is sitting. But the court will not attend as before to the fact, or factor, of who is saying it.<sup>10</sup> If the position, that driving without a seat belt is driving recklessly, does enter the law, it does so through the court's statement of it, not the agency's. It is then the court's speaking that gives the statement its character as material that is to be treated seriously rather than played with in a game of words. In seeking to follow the law in good faith, drivers defer then to the court, not to the agency. As for the agency's position, when it first appears drivers may say, "That's what you think. We'll wait and see what a court says," and they may go on quite legitimately to resist and thwart and fight the agency in or out of court. Drivers need not defer. The court does not defer. The agency is like any other adversary in the world: to the extent it is not responsible, its statements do not have what is called "the force of law."<sup>11</sup>

### III. DEFERENCE IN THE ABSENCE OF A PRIOR STATEMENT OF POSITION

It is in the two situations just described, where positions are taken in the form of "rules," that judicial deference to responsible agencies on questions of law appears most clearly. Whether there is or is not explicit delegation of rule-making "power" to an agency, a court may give deference to an agency making legal determinations cast in the form of rules. And if the court does give deference, it may classify the rule a "substantive" or "legislative" or "prescriptive" rule rather than an "interpretative" rule.

Without the prospect of deference an agency's position lacks the force of law unless and until a court independently concludes the same, and the agency's position is generally enforced only through the initiation of a proceeding in court, to which the agency comes as any other litigant. Agency positions may have force, of course, because those to whom they are directed are too fearful, tired, or poor to resist litigation brought against them individually, or wish to use apparent acquiescence in the agency position as a bargaining counter in the political process in which they and the agency

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10. In the end one may wonder whether it is not the entirely adversarial stance of litigants who are challenging agency positions in courts, the naked irresponsibility of other arguments being made—as merely arguments in which belief plays no part—that turns courts back to listen more carefully to what agencies seem to be saying.

11. For an explanation of the phrase, *see, e.g.*, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 150-52 (1967).



also participate. But such force is not the force of law. The agency's positions are not different from the positions taken by any entity in society seeking to get its way.

There is a third situation in which courts commonly defer to an agency on questions of law. That is the situation in which the agency is made judge in the first instance in the application of an organic statute. Here too the trigger of judicial deference to the agency, in evaluating propositions about the meaning of the law which the agency applies, is the agency's undertaking responsibility for decisions on the merits. If an appeal is brought to a court from an agency decision in a proceeding before the agency, the respondent agency may seem again to be only one litigant among several, equal before the bar of justice to its antagonists. But if the agency is seen to be one that does not just make arguments about the law but makes decisions about the law, decisions in which it believes, deference begins to enter the case in the judicial decision on appeal.

This is indeed the classic form of judicial deference. It is the least explicit. Deference is still to an agency making statements, or "rules." But the rules are not in a form of words that resembles legislative utterances. They are rather in the form in which a court states rules in the course of writing an opinion in a case—it being notoriously difficult to distinguish, difficult to the point of raising a question whether any distinction can be made, either the application of an old rule from the enunciation of a new rule, or the meaning of a new rule from the application of it. As in the "rule-making" situation, there is judicial action and judicial doctrine designed to maintain the possibility of presupposing a responsible decision maker, such action and doctrine ranging from prohibition of *ex parte* contacts by advocates of particular positions and insistence on revelation of positions put to the agency decision makers by even presumptively nonpartisan staff, to requirements that there be openness to participation by proponents of affected values, consistency in the fabric of positions (which ordinary litigants are never formally required to maintain), and the writing of adequate—or understandable—explanations.<sup>12</sup>

To return to the reckless driving hypothetical, an enforcement agency might be empowered to proceed civilly against drivers for reckless driving on a case-by-case basis in agency hearings, rather than being limited to initiating cases solely by suit or prosecution in court. If the agency finds that someone has driven recklessly in that he did not wear a seat belt, and the statute says only that reckless driving is prohibited, then on judicial review

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12. Although this is the classic form of deference, ultimately a court may be moved to require an agency to engage in rulemaking, outside the context of a particular case, by problems of notice, by the importance of participation of affected parties beyond those to whom the agency adjudication is directed, or by concern that in the case an agency may be making general statements not on its responsible view of the merits but as a means to achieve some particular end at hand (which may be indicated by an agency's inconsistency with its own prior decisions or pronouncements).

of the agency's action (which might be either an agency determination of a violation, or, if the agency is to make remedial determinations as well, an agency imposition of a sanction such as suspension of a license), the reviewing court faces the question whether to give deference to the agency in reviewing the position that reckless driving means driving without a seat belt. If the court does give deference, it may cast its decision in the language of fact and of review of determinations of fact, saying that the court does not decide for itself questions of fact but engages in only limited review to determine whether the facts in the record (e.g., the fact that the driver did not wear a seat belt) support, as a matter of evidence, the agency's conclusion (that the driver drove recklessly). Or the court may cast its decision to defer more directly in the language of law: the court may say that a rule was issued in the agency adjudication, and that it as a court, on various grounds such as adequate explanation by the agency, the agency's consistency, openness, independence—evidence pointing to a responsible decision-making mind—will limit its inquiries into the statute and will not undertake to make a *de novo* interpretation of the statute to lay beside the agency's interpretation and use as the standard for judging it.<sup>13</sup>

#### IV. THE POSSIBILITY OF TRUE DEFERENCE

Whether framed in the first, second, or third situation we have noted, the jurisprudence of deference is a window on the presuppositions of authority. Like any jurisprudence it tends to be formal and general. It is meant to apply generally; it can be seen applied to particular agencies in particular cases. But only the scholastic would suppose that it is applied wherever the formal indices of its applicability appear, or even that it is applied in substance in every case in which it is said to apply and seems to be applied.

There remains always the large difference between a court of general jurisdiction, responsible to all the law, and an agency of limited jurisdiction. This is the difference that puts courts in the position of judging when a decision, even of law, is a decision *of the agency* recognizable as such; it constantly works against and limits the possibility of deference.

Beyond this is a more serious difficulty. There is the fact of practice, the commonplace indeed, that courts often find it hard to defer at all, in even a limited way, or to demand of others that they respond affirmatively to the claim of obligation laid upon them by an agency's position. Equally commonplace, and whatever the conclusion of a court with regard to deference may be, those to whom an agency's statements of law are directed in their activities in the world often resist and evade what an agency says on a matter,

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13. Courts comment also upon the desirability of a center in a particular field of law, to be occupied by the statements of a single agency rather than the various statements of the various courts that may be brought into the field by the agency or affected parties from time to time. This may be made an independent ground for deferring to an agency in its field.

to a degree unseen when it is a court that speaks; they remain in a stance on the matter (toward the agency or toward others in the field) which is characterized by feint and manipulation. This is not entirely the legacy of separation of powers doctrine, into which adjudicating and rule-making executive agencies do not fit.<sup>14</sup> Nor is this otherwise explained by the *laissez-faire* vision, hostile to administrative intervention in a quasi-natural private sphere, to which the organized bar and schools of law in the United States have been particularly devoted. Cutting across ideological lines, and more potent than constitutional doctrine antagonistic to deference, is the perception, on the part of court, lawyer, and regulated party alike, that the presupposition of mind cannot easily be maintained where agencies are involved, particularly the great agencies that have produced so many of the cases and so much of the commentary in which the jurisprudence of deference has been developed. Here we return to the observations with which we began.

Responsibility is a cast of mind, reflected in the manner of making a decision and coming to the statement of a position. But there must be mind to have a cast of mind. There must be the possibility of that which the various particulars searched for are taken to reflect. As authority and responsibility are connected, so are responsibility and mind. Courts are rarely explicit;<sup>15</sup> the problem is one they face in their own processes and structure. The perception that the presupposition of mind cannot easily or always be maintained is rather to be found in the form of quiet warnings, preserved, quoted, and interspersed even in the teaching of the doctrinal pulls toward deference: "Only a very few, highly controversial issues can hope to receive detailed personal attention from the administrator of a busy agency, be he or she ever so competent. In all other cases, no single authority passes judgment on the rule. Different parts of the agency work on different parts of the rule, or on the same part from different angles—and the rule emerges. It follows from the lack of any meaningful central 'authority' that the phrase 'considered by the authority' also loses meaning. . . ."<sup>16</sup> "The formation of government policy is not an event but a process. It takes place over a period of time and involves legions of participants, who may never see or know each other. From a distance, government action may appear to be the work of . . . the head of a federal agency. On closer look that image fractures into a thousand pieces."<sup>17</sup> "The failure to use rulemaking is far less a product of conscious departmental choice than a result of impediments to the making of rules created by the Department's internal procedures. . . . And like

14. See J. FREEDMAN, *CRISIS AND LEGITIMACY* (1978).

15. See, e.g., the allusions to administrative due process in *KFC Nat'l Mfg. v. National Labor Bd.*, 497 F.2d 298 (2d Cir. 1974); *Home Box Office, Inc. v. Federal Communications Comm'n*, 567 F.2d 9, 53-56 (D.C. Cir. 1977).

16. Pedersen, *Formal Records and Informal Rulemaking*, 85 *YALE L.J.* 38, 65 (1975). Case books transmit these and similar comments. For an example, see the standard W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF, R. SCHOTLAND, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 293, 447, 935, 950 (8th ed. 1987).

17. J. QUARLES, *CLEANING UP AMERICA* 166 (1976).

an adult game of 'Telephone,' Department personnel complain, what is suggested at the outset for possible rulemaking is often unrecognizable when and if a formal proposal ultimately emerges."<sup>18</sup> "It is wholly unrealistic to regard most federal agencies as though all of their parts were moved by a single brain, instead of as an aggregation whose moves are responsive to many minds, often without awareness of movements dictated by yet other minds."<sup>19</sup> The formal indices of responsibility and therefore of deference can fail to produce the substance of deference. The agency hearings, explanations, and procedures can be viewed as empty and are called empty, and when analysts go on to ask themselves "Empty of what?" they touch the problem of mind in administrative law. The presupposition of mind is difficult to maintain, not in the case of every agency, not for every conclusion of a great agency nor at all points in the development of a great agency, but too often to ignore; and insofar as the jurisprudence of deference is general, this general difficulty must operate against it.

So the observer might end, looking at deference in public law as instance or evidence of authority. But courts and all those in government who reflect upon government are not observers only. They know courts are too few, too far, and too slow to be the only sources of authority and objects of deference, and they know that political theory, of any kind, promises more than it gives. The small example used here, of seat belt use, barely suggests what is at stake in the large. Concrete outcomes, particular decisions, make individuals weep and bleed. To them, or to their mobilization of protest against or evasion of a decision, the liberal response that the decision's legitimacy lies in their own consent to it cannot convince beyond the simplest and most intimate situations. The substance of individual consent to a process of decisionmaking, that may initially attach to and legitimate outcomes, thins as the process expands in scope and lengthens in time; it disappears when among the outcomes of the process is change in the decision-making process itself. And both liberal and postliberal proposals of legitimation through participation or opportunity for participation founder upon the brevity of life.

There is no self-governance in the easy sense of it. If the measure of what is short and what is long is the span of the individual human life, the time required to change a complex system or to counter change in it is more long than short, whether the system be industrial, natural, political, or intellectual. The effects of what is decided or achieved are not felt so much by the participants, aging rapidly, disappearing, as by those yet to come who are not there to consent or participate. The benefits of a decision are conferred on others, the losses from it imposed on others. What is argued and fought

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18. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1245-46 (1974).

19. GELLHORN & BYSE, *supra* note 16, at 950.

over and traded by those arguing and fighting and trading is less power over themselves than power over others who cannot be given an opportunity to be present even by lottery, and what is created in decision making cannot be celebrated as self-governance—our own however contingent or arbitrary it may be, legitimate whatever it is—for it is not our lot but another's that we fashion. The children in school when desegregation was argued in *Brown* must be long grown up and gone before desegregation is realized; workers exposed to eradicable carcinogens in the workplace will have retired before eradication of carcinogens can be expected. Knowledge of this is part of knowledge of law and is continuously reconfirmed by practice in the actual operation of complex systems. All are trustees, participants and decision makers alike. All is discussion of value, all is drawn forward by value, all identification through time with those who are affected in the future and those who made decisions in the past is through value.

But value not connected by mind to responsible belief is mirage, nothing, vanishing when questioned or sought. And it is this connection, of value and responsible mind, that is law's distinctive contribution, made prior to political theory and after theory is finished speaking—atheoretical in its concern with the legitimacy of the detail, which cannot be secured by any tracing of power or jurisdiction to a formal source, kingly, legislative, popular, or judicial. Against the fading of the conditions for true deference is what comes from law that pushes toward the personal and toward a context of decisionmaking in which the personal can be recognized. The judge's promise to administer justice without respect to persons has a silent clause that can be assumed all know from their experience of the world—without respect to persons, it is, who are not persons, not embodiments of responsible mind. Law's promise is respect to persons. There is constant molding of structures for decisionmaking, for challenge to decisionmaking, and for review of decisionmaking, that will permit a presumption of responsible mind to be entertained and the giving and the receiving of true deference to go forward, together with all in the operation of complex systems that depends upon such mutual respect.

Legislators, line agencies, and coordinating executive agencies, as well as courts, are engaged in this work. The work might be characterized as implementation of the rule of law, but no longer is it best described in that way. The connotations of both "rule" and "law" in the phrase "rule of law," of objective legal substance, objective legal persons, and hierarchical obedience, are descended from societies less aware of their dynamism and complexity than ours. Speaking of this rather as attention to the force of law, and to what is necessary if a society is to have the force of law within it, will be truer to the language and more natural to the wider consciousness of those who are thus engaged in the creation of authority in the daily fabric of public life.