Response to Rosen
Scott Soames

In what follows, I make some remarks on Gideon Rosen's paper, "Deferentialism and Adjudication," which raises issues useful for precisifying Deferentialism.

1. The role of rationale.

I begin by noting a misreading of my position on Roberts' decision upholding the Affordable Care Act. Rosen reconstructs my argument as proceeding as follows:

(i) Roberts didn't modify the content of the act as passed; he *interpreted* what it called a *penalty* for not purchasing required insurance as a *tax*.
(ii) Achieving the other goals of the act without raising taxes on individuals was part of the act's rationale.
(iii) Thus the content of the law as passed violated part of the law's rationale.
(iv) For that reason a properly deferentialist judge should have voided it.

This isn't my argument. On my view, only (ii) is correct; (i), (iii), and (iv) are not.

Claim (i) is incorrect because the law as passed involved, not a tax, but a *penalty* – which was the word used in the act – imposed on those failing to comply with the *requirement* to buy approved insurance. Since Roberts ruled that Congress lacked authority to impose such a *requirement,* he modified the stated content to render it consistent with (his reading of) the Constitution. Claim (ii) is supported by proponents' insistence that the fee imposed was *not a tax* but a *penalty* for not complying with a *requirement*. Since this was done to secure passage in the face of objections, it was part of the law's rationale. Because (i) is false, (iii) can't soundly be derived.

On my reading, Roberts changed the law's content by replacing a *penalty* with a *tax*. This would be deferentially acceptable if it were "a minimum change in existing law that maximizes the fulfillment of the original rationale for the law." I criticized the decision

for not meeting this requirement. In the footnote on which Rosen relies, I reasoned as follows.

> "Since it was politically important in passing the act that the mandate *not* be labeled by its supporters as a tax, we may conclude that *if* the mandate was not severable from the act, and *if* it was not justified by the *Commerce,* or the *Necessary and Proper* clauses, *then* the act's survival depended, *not* on bringing it's legal content into conformity with the rationale used to secure its passage, but on *increasing* the disparity between the two. Thus, Robert's reasoning was not deferentially justifiable."

This brief statement can be extended by considering a possible deferentialist *defense* of Roberts. The defense maintains that maximal fidelity to original content and rationale is better achieved by modifying a minor part of each than by voiding the law. This defense might have merit *if avoidance of a tax was a sincerely held part of the rationale for the law that was inessential to its passage*. But it wasn't. Due to strong opposition, the act passed by the narrowest of margins. Because the no-tax rationale was politically effective, a reasonable case can be made that, had it been abandoned, the act wouldn't have passed. This is important. When changing the content of a law to remove a conflict with other authoritative law (in this case the Constitution as Roberts interpreted it), it is generally acceptable to sacrifice a minor feature of the law's content and rationale to preserve the rest, but it is not acceptable to jettison a feature essential to its passage. Deferentialism requires deference to the exercise of legislative authority by which a bill became law – preserving, when modifications are needed, as much of the content and rationale inherent in that exercise as possible, without abandoning aspects of the law that were essential to achieve passage.

This, of course, was not spelled out in the brief discussion of Roberts' decision in my footnote. Nor was the connection made explicit between my argument there and the paragraph it was meant to elaborate. The point of the paragraph was that lawmakers'

deceptive manipulation of stated rationale for the purpose of assuring passage should not be excused in later adjudication, when sacrificing the deception becomes necessary to save the law in the process of judicial rectification. The alacrity of supporters in urging reclassification of the penalty as a tax when the constitutional issue was raised after passage suggests such deception. My criticism of the decision was meant to underline this point; if a change in the content of the law requires one to sacrifice an element deceptively introduced into to secure passage, such a change is not deferentially justified.

On my reading, the original content of the Affordable Care Act was consistent with its stated rationale. Roberts' attempt to remove what he took to be a conflict between that content and the Constitution introduced an inconsistency between an aspect of the law's original rationale and its revised content. This change might have been a defensible alternative to voiding the law, had the original content and the rationale it served not been introduced as a political expedient needed to secure passage.

For this reason, I reject Rosen's critique. However, I credit his discussion with calling attention to an overly general formulation of clause (c) in the following summary statement of my principles of judicial rectification. "*In applying the law to the facts of a case, the legal duty of a judge is to reach the verdict determined by the stipulated content, unless (a)… or (b)… or (c) the contents and facts are inconsistent with the rationale of the law, which is the chief publically stated purpose that proponents of the law advanced to justify it.*" Clause (c) was intended to cover cases in which the literal application of a law's stated content to *unanticipated facts* of a particular case lead to *obviously unwanted results* that subvert or fail to advance the rationale of the law itself, or of surrounding laws, in ways

that can be corrected by *fine-tuning the law's content*.[1] This is a proper part of Deferentialism. But it's not a blank check.

To see why, imagine a hypothetical case in which the legislature foolishly triples the minimum wage to serve the stated rationale of increasing the income of certain workers without causing unacceptable job losses. Suppose further that the economic effects of the law after passage are pernicious. No matter how great the failure to achieve the law's rationale, deferentialist judges cannot rewrite it – both because the relevant economic considerations were available to the legislature at the time of passage and because avoiding the resulting economic failure would require, not a minor adjustment in the content of the law, but wholesale change or invalidation, which would exceed the authority of judges. In this case, the literature on job losses and other economic ill-effects of large mandated wage increases would rightly be seen as undercutting any claim that the chances of economic ill effects could not reasonably have been taken into account. That the possibility of such effects was implicitly recognized is reflected in fact that the law's rationale already incorporates a clearly political judgment that only the legislature can make – weighing the social good of increasing the economic prospects of some at the expense of others. Since setting the wage rate at any other level would merely substitute a figure already implicitly considered and rejected by the legislators for one they accepted, no such judicial rectification is deferentially allowed.

The recent decision in *King v Burwell*[2] provides a similar case in point. Proponents of the Affordable Care Act included precise language stipulating that purchasers of

[1]See pp. Soames, Scott. 2011. "Toward a Theory of Legal Interpretation," *New York University Journal of Law and Liberty,* 6:231-259, at pp. 244-53, or at pp. 308-15 of the reprinting in Soames 2014.

[2] 576 U.S. 2015.

mandated health insurance would be eligible for federal subsidies *only if* their policies were obtained through an exchange established by one of the states. Backers of the legislation included this language deliberately, to create political pressure they hoped would lead states to participate in, and eventually share the cost of, a program they might otherwise shun. When, after passage, 30 states declined to set up exchanges, this purpose was thwarted, threatening the long-term financial viability of the program, unless modified by further congressional action. Rather than open up the act to further legislative bargaining, the executive branch, operating through the I.R.S., rewrote the law to allow federal subsidies for those *not* purchasing their plans through one of the states.

This executive change of legislative content was authorized by Justice Roberts' decision in *King v Burwell*, primarily on the ground that the change in content was required to fulfill the law's rationale – since otherwise the program might fail financially. But his decision can no more be deferentially justified than could a decision ratifying unilateral action of a President altering the dollar amount of minimum-wage legislation. In both cases, the possibility that circumstances threatening the law's rationale – weak economic performance in one case and refusal of many states to participate in an unpopular program in the other – were considered by legislators. Being factors that were, or could reasonably have been, taken into account, their actual occurrence is no excuse for either judicial or executive usurpation of congressional authority. Any deferentialist principle of rationale-based rectification of content must reflect this.

Further precisification of clause (c) of the deferentialist rectification principle is needed to incorporate the factors illustrated here. Since this isn't the place for such a reformulation, I will simply illustrate why rationale-based rectification is sometimes needed. My example is the free-exercise clause of the First Amendment, which states

that *Congress shall make no law* respecting the establishment of religion *or prohibiting the free exercise thereof*. Though a useful general directive, this stated content is only a starting point. In one respect, it is not general enough, because what Congress is here prohibited from doing the President would also be prohibited from doing by executive order, except perhaps in an emergency. To the extent that this is already a settled legal matter, it is the result of previous rectifications of the content of the clause in order to fulfill its rationale. To the extent that further rectification may be needed, a decision extending the constitutional guarantee in an unanticipated case of this kind would amount to judicial fine-tuning of pre-existing content of the sort I envision. In a different sort of case, the rectification may narrow the originally stated content of the clause. Since there are few limits on the range of possible activities that might be required or prohibited by the practice of some religion or other, it is easy to imagine cases in which a literal application of the stated content of the free-exercise clause would compromise the overarching rationale of our constitutional structure of democratic self-government. As before, to the extent that this is already a settled matter of our law, it is the result of previous rectification of the original stated content of the clause. To the extent that further rectification may be needed, a decision narrowing the constitutional guarantee in a novel case of the sort imagined would be an instance of judicial fine-tuning of pre-existing content in the service of better fulfilling the rationale of both the free-exercise clause and the surrounding constitutional structure to which it contributes.

2. Content, Assertion, Stipulation

In identifying the original content of a piece of legislation with what the lawmakers asserted or stipulated in enacting it, I invoke a kind of illocutionary content. The concept employed, *what is said or stipulated*, is not a technical one reserved for legal language;

the use I make of it in contexts of lawmaking and adjudication are applications of the concepts employed in non-legal contexts. In all these contexts asserted or stipulated content arises from a confluence of factors. Speakers, hearers, writers, and readers communicating in ordinary conversations, pubic speeches, academic seminars, planning sessions, group meetings or through letters, text messages, newspapers, or scholarly books use language against a background of presumed shared information that shapes asserted or stipulated content. Language users in these contexts make assumptions about each other's awareness of the general purposes of the communication, the questions currently at stake, the ground already covered, the linguistic meanings of the expressions employed, and relevant background facts that participants can be expected to know without being told.

Typically these assumptions of speaker/writers and hearer/readers converge on optimal candidates for asserted/stipulated contents (among which it is not necessary to make further discriminations). Sometimes, however, participants fail to correctly identify that content because they fail to recognize what their position in the exchange would justify assuming or inferring. In such cases they miss some of what is literally asserted or stipulated because they don't live up to the normative demands of their position in the linguistic exchange. Since this content-determining idealization is a feature of ordinary assertions and stipulations, the idealization needed when using these concepts to determine *legal content* isn't a departure from the speech-act model -- even though the legal idealization has some special features due to the gap between the lawmaking body and the multiple audiences to which its use of language is addressed.

It must also be noted that asserted/stipulated content can be indeterminate. It may be *determinate* that an agent asserted or stipulated at least one of several related

propositions, while being *indeterminate* which ones were asserted or stipulated. Often this indeterminacy doesn't matter, but sometimes it does. When this indeterminacy occurs in a lawmaking context, and resolving or narrowing it is needed in adjudication, the indeterminacy can be treated as a kind of vagueness to be resolved in judicial rectification.

3. Brown, Deferentialism, and Hypothetical Intentionalism

Rosen's discussion of *Brown*[3] illustrates the importance of adhering to the speech-act model. I do regard the asserted/stipulated content of the Privileges or Immunities Clause – which speaks of "the privileges and immunities of citizens of the United States" – as an important justifier of *Brown*. I also take its content to include "prohibiting states from abridging the privileges or immunities of US citizens, wherever they may happen to be." I see this not simply as an *intention* of the authors and ratifiers of the amendment; it is part of what they used the text to *assert/stipulate*--which, I contend, would have been grasped by a reasonable and knowledgeable audience. It was, I think, unclear what, if any, provision for public education all citizens of the United States were entitled to in 1868. But it was crystal clear that whatever those entitlements might turn out to be, they can't be denied on the basis of race. It should also have been clear that the entitlements might change over time. It follows that if access to public education was, by 1954, such an entitlement, then the stipulated content of the Privileges and Immunities Clause plus the facts in 1954 were sufficient to justify *Brown*.

Rosen sees a problem for Deferentialism in the fact that many drafters/ratifiers did not view the 14th Amendment as prohibiting racial segregation in public schools and

[3] *Brown vs. Board of Education,* 347 U. S. 483

would not have endorsed it had they thought otherwise. But this cuts no ice. In1868 there may have been an arguable case that the amendment didn't prohibit school segregation because public education was not one of the rights inherent in national citizenship. Those who favored segregation might thus have been comforted by the expectation that ratification wouldn't change things. But an expectation is all it was. Rosen protests that Deferentialism risks giving weight to this expectation, which he calls *the intention to permit segregation in public schools*, when in fact it should have none. Not to worry. The amendment can't be read, nor can its ratification be understood, as involving a *stipulation* that, henceforth, segregation in public education would be constitutionally protected. Securing constitutionally protected segregation was also not part of the *rationale* for the 14th Amendment. It was, merely an expectation that forced desegregation wasn't in the immediate offing, coupled with a belief (by some) that it should never be. Here, I fear that Rosen's elision of my speech-act conception of legal content into a version of hypothetical intentionalism, obscures needed distinctions.

4. Substantive Due Process

Regarding the *Slaughterhouse cases*[4], *Cruikshank*[5], and related cases severely limiting the Privileges and Immunities Clause (from 1873 through the turn of the 20th century), I largely agree with Jack Balkin's conclusion (though not always with his reasons) that they were wrongly decided.[6] I haven't studied, and so won't comment on, the incorporation cases *Chicago B & Q R. Co.*[7], *Gitlow*[8], or *McDonald*[9]. But I agree that

[4] 83 U.S. 36 (1873)

[5] *U.S. v Cruikshank* 92 U.S. 542 (1876)

[6] See chapter 10 of Balkin 2011.

[7] *Chicago B & Q R. Co. vs. Chicago*, 166 U. S. 226 (1897)

[8] *Gitlow v New York* 268 U.S. 652 (1925)

the questions Rosen raises are significant. If, following McConnell's and Chapman's historical analysis, I am right that many substantive due process over last century plus weren't deferentially justified, then it is worth asking whether some are deferentially justifiable on other grounds. This provides further reason to clarify the original legal content and rationale of the Privileges and Immunities Clause, which might do some of the justificatory work. I won't here prejudge the outcome of such a clarification.

5. Deferentialism and Judicial Error

I agree with much in this section of Rosen's paper. Of course, Deferentialism tells us that many cases have been wrongly decided and that those mistakes have changed the content of the law. The actions of authoritative actors, including judges and justices, change law, whether or not the changes are justified. Moreover, not all judicial changes, justified or not, are created equal. Sometimes originally unjustified changes become so entrenched and widely embedded in our system that it becomes virtually impossible, and undesirable, to wholly reverse them. This is one way that the legal contents of constitutional provisions change over time. Still, changes due to judicial error retain a degree of vulnerability. They can be challenged by showing both (i) that an earlier decision failed to respect constitutional content and rationale, while a different resolution that is now possible does a better job, and (ii) that the new resolution does not seriously disrupt the existing body of law, constitutional or otherwise.

Here is how I put the issue in my original article on Deferentialism.

"Because of the many anti- or non-deferentialist decisions in past decades, any effective renewal of deferentialism must include a strategy for dealing with the body of existing law created by those decisions. Since neither wholesale revocation nor wholesale preservation of previous non-deferentialist decisions in their current form is compatible with a lasting deferentialist judiciary, finding a workable middle way is the most

[9] *McDonald vs. Chicago* 561 U. S. 742 (2010)

> daunting task of rectification that confronts deferentialism. The way to think of this task is, I suggest, to treat it as a sub case of *harmonization of conflicts in law*, where (at least) one of the laws in conflict is judge-made. When the Supreme Court finds that the facts of a new case create a conflict between some valid legal provision and the law produced by a previous decision that the Court now finds unjustified, the task of the Court is to remove the conflict by making the minimal changes needed to the conflicting laws while furthering, to the extent possible, the rationales for both. How this would, or should, work in particular cases is, of course, a large, open-ended question. But the principle of respecting both laws, despite their provenance, and aiming for limited adjustments –- which may, over time, become cumulative – is, I think, the best general procedure."[10]

I may help to make this more specific. When the Court finds that the facts of a new case create a conflict between some *valid* legal provision L and a constitutional provision L* produced by an earlier *mistaken* decision, the task is to make the least change in L* that both narrows the previous error (by bringing the interpretation of the provision closer to what is now seen to be correct) and removes the conflict with L. This should be done to the extent that the consequences of the rectification of L* for settled law are foreseeable and reasonably localized. When this isn't so--when the mistaken L* is inextricably entrenched in a complex body of surrounding law--the goal may have to be reduced to creating a carve-out for L that doesn't expand the mistaken content L*. Reapplication of this rule over time may gradually narrow the impact of past erroneous judicial decisions, while avoiding unpredictably destabilizing effects on the body of existing law. In this way, rectification of previous error my proceed, and become cumulative, without inviting disastrous or quixotic quests.

[10] Page 617 of Soames 2013 (p. 341 of the reprinting in Soames 2014).