The constitutive rhetoric of the Preamble to the Australian Constitution as a 'performative utterance'

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Introduction

Helen Irving, in her 2009 inaugural lecture as returning Harvard Chair of Australian Studies, invited Australians to 'be better prepared to understand our Constitution, better able to work with our written words.'[1] This paper is an attempt to respond to that invitation by looking at the Preamble to the constitution through two texts: first, through J.L. Austin's William James lectures of 1955 at Harvard, later published posthumously in 1962 as 'How to do Things with Words'; and second, through Jacques Derrida's reading of that Austinian text in his analysis of the American Declaration of Independence.

What would it be to 'understand our Constitution' by being 'better able to work with our written words'? I suggest in this paper that the beginnings of an answer to this question relies on unpacking what is contained in the idea of 'our Constitution' as 'our written words'. In what sense is the Constitution ours? Who are 'We'? The answer I put forward here is that the Constitution is 'ours' because it constitutes us rhetorically;[2] it constitutes us ('the people') as itself an act of the people.

This answer has two related components. The first is the claim that this constitutive relationship between the people and the Constitution can be understood through conceptualising a constitution as what J.L. Austin called a 'performative utterance', ie words that not only just *say* something, but also *do* something.[3] In particular, I will argue that what a constitution does should be conceptualised in terms of a particular Austinian 'speech act': what he calls the 'perlocutionary act'. Perlocutionary acts, according to Austin, are acts performed indirectly *through* an utterance, as opposed to 'illocutionary' utterances, which are directly performed *in* the utterance itself. This *particular* kind of speech act – hitherto almost totally ignored in the literature[4] – provides us with a new way of

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1 H Irving, 'A Nation Built On Words: The constitution and national identity in America and Australia' (2009) 33(2) *Journal of Australian Studies* 211.

2 I am using the concept of 'rhetoric' in a broad sense, not one limited to the historic *ars rhetorica* which aims at convincing or persuading through speech: see Aristotle, *On Rhetoric* (G.A. Kennedy trans, Oxford University Press, 2007); MT Cicero, *De Inventione* (H.M. Hubbell trans, Harvard University Press, 1968). I use the term 'rhetoric' to mean the aspects of a text which are not explicitly or literally expressed, but which convey meaning. See, for example, the work of James Boyd White: JB White, *When Words Lose Their Meaning* (University of Chicago Press, 1984; JB White, 'Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life' (1985) *The University of Chicago Law Review* 68; JB White, *Heracles' bow: Essays on the rhetoric and poetics of law* (University of Wisconsin Press, 1989).

3 JL Austin, *How to Do Things with Words* (Harvard University Press, 1975).

4 This Austinian concept of the perlocutionary act has remained undertheorised since Austin himself, in *How to Do Things with Words*, remarked that is certain that the perlocutionary sense of "doing an action" must somehow be ruled out as irrelevant to the sense in which an utterance, if the issuing of it is the "doing of an action", is a performative': ibid, 110.
Following Austin's lead, post-Austinian projects as different as John Searle's speech act theory, Jürgen Habermas's universal pragmatics, and Quentin Skinner's 'New History' have all either elided any proper discussion of the perlocutionary (a scan of Skinner's methodological works reveals only scattered and

understanding what constitutional texts do. The perlocutionary act, I will argue, shows us *how* a constitutional text constitutes its subject – not as a static, determined entity, but as a *relational* subject, defined through its acts. 'The people', as formed through the Constitution, exist only through their confrontation with the Constitution. On my argument, therefore, the Preamble to the Constitution, understood as a perlocutionary act, rhetorically and performatively constitutes 'the people' into the 'Federal Commonwealth', as an *act of that people*.

The second claim is that we can understand what is implied by the term 'our Constitution' by attending not only to the words of the Constitution themselves, but to what lies behind the words: the stories that the words tell. These stories, as embodied in the constitutional text, point us towards the rhetorical force of those words; the way in which things are done with and through the words. The rhetoric of the Preamble, I claim, is inseparable from its particular constitutive effects.

The paper will proceed as follows. In Part I, I will outline J.L. Austin's concept of performative utterance and the distinction he makes between 'performative' and 'constative' utterances (utterances that describe something). This distinction applies directly to the Preamble to the Australian Constitution, which can, on first blush, be understood either as the 'performative' utterance of the Imperial British Crown, or as a 'constative' utterance which merely *describes* the prior agreement of 'the people' – or indeed, as I shall argue, as simultaneously 'performative' and 'constative'. The acting *subject* of the Constitution, it seems, is both 'the people' and the Crown.

In Part II I shall set the groundwork for understanding what this strange duality of subject might entail, through examining Jacques Derrida's analysis of the American Declaration of Independence. Derrida, also drawing on Austin, argues that the Declaration, as a speech act, comes about through a tension – an 'undecidability', as Derrida calls it – between the constative and performative acts. Interestingly, Derrida also makes the claim that this 'undecidability' concerns not only the act performed, but also essentially concerns the *performative subject* of that act. The question posed by the first two parts of this paper is: how might this paradox or 'undecidability' be understood?

I will make the suggestion in Part III that one fruitful way of understanding this idea may lie in returning to Austin's theory of performativity, in particular, by returning to Austin's distinction between *illocutionary* and *perlocutionary* speech acts. I will argue that the perlocutionary speech act is a *constitutive* speech act; it does not proceed as an act of a fully-formed subject, but instead *constitutes* its subject in the act itself.

In Part IV, therefore, I will argue that a better understanding of the Australian Constitution is as a *perlocutionary* act. This kind of speech act, as I will detail, draws its force from the context and from the response to the speech act, rather than from the words themselves; that is, through rhetorical allusion, not through overt action. It is what lies behind the words, I will argue, that creates meaning, rather than simply the words themselves. I make this argument through examining a particular episode in Australian constitutional history: the confrontation in London between the British Colonial Secretary, Joseph Chamberlain, and the Australian delegates invited by Chamberlain to 'explain' the Constitution Bill to the Imperial Parliament.

Reading the Constitution as a perlocutionary speech act, I will argue, shows us that the relationship between 'the people' and their Constitution is one where the Constitution *constitutes* the people, as an act of the people. This is rhetorically embodied in the tension in the Preamble between the Imperial Parliament as performative subject and the people as constative subject. This tension itself, following Derrida, is itself productive: understood through the concept of the perlocutionary, the tension rhetorically transforms 'the people' into 'one indissoluble Federal Commonwealth'.

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inconsequential mentions of the term), or have relegated the perlocutionary – as Habermas does, following Searle – to the realm of the irrational (for Habermas, 'strategic action') as opposed to rational ('communicative action'). See J Habermas, *The Theory of Communicative Action* (T. McCarthy trans, Beacon Press, 1984) particularly 99-101, 286-310; J Searle, *Speech Acts* (Cambridge University Press, 1969); and Skinner's various methodological works, usefully collated as the first six chapters in Q Skinner and J Tully, *Meaning and Context: Quentin Skinner and his Critics* (Princeton University Press, 1989). Implicit in this paper, then, is an attempt to rehabilitate more broadly the concept of the perlocutionary.

Before I begin my argument, I should distinguish my question from two others. First, it must (at least for the purposes of this paper) be distinguished from the strictly legal question of the foundational authority of the Constitution and the effects of that foundation. It is profitable to make this distinction, despite the clear relation of my project to the question of authority, for the reason that I think my approach may, from a different direction and from a different theoretical perspective, shed light on these older debates – but only if it is free – at least at the start – from the commitments that may attach to a more direct approach to the question of constitutional authority.

Second, it must be distinguished from the historico-legal question of the legal necessity of the Imperial enactment as opposed to the legality of a 'revolutionary' declaration by the colonies.[5] I make this distinction on the grounds of historical method: my concern is not primarily historical, but theoretical.[6] My use of the historical materials is meant to drive my broader theoretical point, which is about the *rhetorical* relation between 'the people' and the Australian Constitution: what is it, I want to ask, that the Constitution *does*? Does it 'express the will of the people', does it (as an act of a third party) create the people, or can we understand it in a more complex way, as a rhetorical speech act that constitutes the people, as an act of the people?

I. How to Do Things with Words

Our starting point is the concept of 'performative utterance'. J.L. Austin, in *How to Do Things with Words*, defines a performative utterance simply as an utterance which *performs* an act. It is an utterance that does not merely *say* something, but *does* something.[7] In noticing that some utterances had this effect, Austin was criticising what he described as the 'age-old'[8] assumption of philosophy: that to say something meaningful was 'always and simply to state something.'[9] A 'statement' (or, in Austin's terminology, a 'constative utterance') was meaningful because it can be judged as true or false: it corresponds, or fails to correspond, to a state of affairs in the world. A meaningful statement, on this assumption, 'describes' a state of affairs. Austin calls this assumption the 'descriptive fallacy'.[10]

Adhering to this assumption had many consequences, not least that it meant that aesthetic, religious, and ethical utterances were not fully meaningful, because they could not be strictly true or false. These sorts of utterances did not have 'factual meaning'; rather, they had an *inferior* kind of

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5 See M Moshinsky, 'Re-Enacting the Constitution in an Australian Act' (1989) 18 *Federal Law Review* 13; G Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* ; JA Thomson, 'Altering the Constitution: Some Aspects of Section 128' (1982) 13 *Federal Law Review* 32; A Dillon, 'A Turtle by any other Name: The legal basis of the Australian Constitution' (2001) 29(2) *Federal Law Review* 241.

6 In this, my method is distinguishable from that of Quentin Skinner, who also uses Austin's work on performativity to examine political authority historically. Skinner's concern – and this is borne out in his acceptance of the unimportance of Austin's concept of the perlocutionary – is to examine what the 'historical intentions' of the author of a text were. While I stake no claim on whether or not this recovery of intentions is possible, my concern is theoretical rather than strictly historical. See, generally, Skinner's methodological essays collected in Tully, above n 4.

7 Austin was not the first to notice that language operated this way. Thomas Reid, in his *Essays on the Active Powers*, was perhaps the first philosopher to set out systematically the idea that language *acts*. He distinguished 'solitary acts' or 'solitary operations of the mind', like judging or willing, from 'social acts', like promising or contracting: T Reid, *Essays on the Active Powers of Man* (John Bell and G.G.J. & J. Robinson, 1788). See generally, B Smith, 'Towards a History of Speech Act Theory' in A. Burkhardt (ed), *Speech Acts, Meanings and Intentions: Critical approaches to the philosophy of John R. Searle* (de Gruyter, 1990) 2; A Esterhammer, 'Of Promises, Contracts and Constitutions: Thomas Reid and Jeremy Bentham on Language as Social Action' (2000) 6(1) *Romanticism* 55.

8 Austin, above n 3, 12. The assumption goes back to Aristotle, who, while claiming that '[e]very sentence has meaning', distinguished between 'propositions' and other forms of sentences, relegating non-propositional sentences to 'rhetoric or poetry': Aristotle, *De Interpretatione* (E.M. Edghill trans) Ch 1, Pt 4.

9 Austin, above n 3, 12.

10 Ibid 3.

meaning, perhaps to be called 'emotive' meaning. This point of view, in modern times, was most famously espoused in A.J. Ayer's classic *Language, Truth and Logic*, where Ayer argued that an ethical judgment such as 'stealing is wrong' is a 'sentence which has no factual meaning—that is, [it] expresses no proposition which can be true or false.'[11]

'Performative' utterances showed this assumption to be fallacious, according to Austin, because such utterances are clearly fully meaningful without being true or false. Austin illustrates this with a few 'humdrum' examples: 'I do (take this woman to be my lawfully wedded wife)'; 'I name this ship the Queen Elizabeth'; 'I give and bequeath my watch to my brother'.[12] These utterances are clearly meaningful, but equally as clearly are not true or false. Their meaning consists in the act they perform: marrying; naming; bequeathing.

Importantly, all these acts – at least in 'Western' societies – are also legal acts. Their success (what Austin calls their 'felicity') relies on certain legal conventions, even against the grain of broader social norms (in Australia, in 2014, only a woman can marry a man). This is relevant for two reasons. First, it points to a pertinent analogy between Austin's concept of performativity and law. Like performative utterances, legal utterances are meaningful, but not true or false (think of 'I accept your offer'). Law operates through performative utterances; what is a 'deed' but a legal instrument – the 'most solemn act that a person can perform'?[13] Law, like a performative utterance, is conventional, as positivists have argued time and again.[14]

Indeed, Austin recognises this connection. He describes the 'nearest approach' to his idea of the performative as the legal concept of the 'operative' provision (as opposed to the 'recitative'): 'the part of [the instrument] which actually performs the legal act which it is the purpose of the instrument to perform.'[15] That is, Austin draws his concept of the performative from the law.

Second, performative utterances, on Austin's account, are conventional. By this he means that a performative utterance only counts as an act within a particular context involving certain set rules and institutions.[16] I cannot – thankfully – walk up to any woman in the street, say 'I do', and expect to carry her off as my lawfully wedded wife.[17]

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11 AJ Ayer, *Language, Truth and Logic* (1936) 107. See also C Stevenson, *Ethics and Language* (Yale University Press, 1944).

12 Austin, above n 3, 5

13 *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 362, 367-8 (Young J).

14 Yet at the same time, as I will argue, law is equally *unconventional* (though perhaps not 'natural'), as non-positivists have argued time and again.

15 JL Austin, 'Performative utterances' in J.O. Urmson and G.J. Warnock (eds), *Philosophical Papers* (Oxford University Press, 3rd ed, 1979) 232, 236.

16 Exactly what Austin means by 'convention' has been the subject of much debate. See eg A Sesonske, 'Performatives' (1965) 62 *The Journal of Philosophy* 459 (conventional acts 'alter formal relations', which are 'defined by implicit or explicit conventions or rules accepted within a group, community, or culture'); Q Skinner, 'Conventions and the Understanding of Speech Acts' (1970) 20(79) *The Philosophical Quarterly* 118 (conventions are criteria by which meanings can be 'recognized and discriminated'); JO Urmson, 'Performative utterances' (1977) 2(1) *Midwest Studies in Philosophy* 120 (a conventional act is 'an act such that it can be performed only following some rule, principle, or convention that the performance of some arbitrary natural act [by which Urmson means an act that can be performed without a convention, ie walking, moving] is the performance of that conventional act.'); cf PF Strawson, 'Intention and Convention in Speech Acts' (1964) 73(4) *The Philosophical Review* 439 (arguing that the key concepts are intention and understanding, not convention – a performative utterance is an attempt at communication). See also P Mew, 'Conventions on Thin Ice' (1971) 21(85) *The Philosophical Quarterly* 352; BC O'Neill, 'Conventions and illocutionary force' (1972) 22(88) *The Philosophical Quarterly* 215. For an account of linguistic conventionalism more generally, see D Lewis, *Convention: A philosophical study* (Harvard University Press, 1969) and D Lewis, 'Languages and language' (1975) 7 *Minnesota studies in the philosophy of science* 3; for the standard response, see D Davidson, 'Communication and Convention' (1984) 59 *Synthese* 3. In order to sidestep this debate, which is orthogonal to my project, I understand 'convention' in the broad way noted above.

17 Austin sets out the following criteria for the 'felicity' of a performative utterance: (A. 1) There must exist an accepted conventional procedure having a certain conventional effect, that

Austin insisted, however, that the conventionality of performative utterance was not the whole story. He also wanted to emphasise the centrality of the first-person *subject* to performative utterance. The importance of the first-person can be seen by examining the grammatical form of the examples Austin provides. All the examples are in the first-person present indicative active tense: 'I do'; 'I name'; 'I bequeath'.

Performative utterances are also distinct from constative utterances, for Austin, in terms of what we may call their 'direction of fit'.[18] A performative utterance has the opposite 'direction of fit' to a constative utterance: whereas a constative utterance, if felicitous, 'fits' the world – a constative utterance has a 'word-to-world' direction of fit, a performative utterance, if felicitous, changes the world. It has a 'world-to-word' direction of fit. While a constative utterance *corresponds* to the world (truly or falsely), a performative utterance performs some act in the world which does not simply correspond to, or describe, the world.

What a performative utterance *does*, then, is not to reveal the world to the subject, but to reveal the subject to the world. A performative utterance brings the *utterer* into view. In Austin's words, '[t]he 'I" who is doing the action does thus come essentially into the picture'.[19] The performative *subject*, for Austin, is central to performative utterance. Austinian performative utterance, then, connects the conventionality of the law and the legal subject. Understood in terms of this connection, the concept of performative utterance becomes a useful *initial* framework to examine how a constitution, as a legal document, relates to the creative subject of that constitution. Through Parts II and III, however, we shall see how this initial framework needs to be modified

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procedure to include the uttering of certain words by certain persons in certain circumstances, and further,

(A. 2) the particular persons and circumstances in a given case must be appropriate for the invocation of the particular procedure invoked.

(B. 1) The procedure must be executed by all participants both correctly and

(B. 2) completely.

(Γ. 1) Where, as often, the procedure is designed for use by persons having certain thoughts or feelings, or for the inauguration of certain consequential conduct on the part of any participant, then a person participating in and so invoking the procedure must in fact have those thoughts or feelings, and the participants must intend so to conduct themselves, and further

(Γ. 2) must actually so conduct themselves subsequently. (14-15)

While I do not have the space to address these criteria here in detail, they should be understood as Austin's initial attempt to flesh out the conventional aspects of any performative utterance.

18 GEM Anscombe, *Intention* (Blackwell, 1957) 56. See also Searle, Classification of Illocutionary Acts, JR Searle, 'A Classification of Illocutionary Acts' (1976) 5(1) *Language in Society* 1, 3; see further JR Searle, *Intentionality* (Cambridge University Press, 1983). Searle uses the terms 'mind-to-world' and 'world-to-mind'. A note: I use the language of 'direction of fit' here cautiously. The argument could be raised that a simple 'word-to-world' direction of fit is impossible; that any use of our language already defines or categorises the world in particular ways. This argument takes many forms, from a simple conventionalism to constructivism; from poststructuralism to various forms of post-Wittgensteinian 'language-games' theory. While I am sympathetic to these arguments, which would claim that 'constative' utterances are equally as conventional and context-dependent as 'performative' utterances, for the purposes of this initial stage of my argument, the language of 'direction of fit' aptly illustrates the point I wish to make. I am indebted to an anonymous reviewer for drawing this point to my attention.

We shall see below, in Parts II and III, how the distinction between the constative and the performative breaks down, even within the space of Austin's own work. (Lynd Forguson aptly puts the situation in this way: 'J.L. Austin was perhaps unique in that he not only rejected a philosophical view of which he himself was the author, he patiently developed the view and then showed it to be ultimately unsatisfactory within the compass of the same work. And he did this not once, but three times, in material intended for publication': L.W. Forguson, 'In Pursuit of Performatives' (1966) 41(58) *Philosophy* 341, 341.)

19 Austin, above n 3, 61.

A. THE AUSTRALIAN CONSTITUTION: PERFORMATIVE OR CONSTATIVE?

Using Austin's framework, we can interrogate the relationship between the Constitution and the people by asking what the Constitution *does*. Is the Constitution, as a whole, performative or constative,[20] and perhaps more importantly, what might this analysis reveal about the relationship we have with our Constitution?

I propose to begin this form of understanding the Constitution by looking at the Preamble. The Preamble is, after all, 'a good means to find out the intention of the [constitution], and, as it were, a key to the understanding of it.'[21]

The Preamble to the United States Constitution, for example, is clearly (at least prima facie) *performative*: 'We the people of the United States… do ordain and establish this Constitution for the United States of America'.[22] The active subject: 'We the people', perform the acts, through words, of ordainment and establishment. The linguistic structure of the United States Preamble reveals much about the way in which the people of the United States understand their relationship to their constitution; as Irving puts it, 'the core American constitutional idea is textual, or scriptural. The words of the American Constitution are words of command. They constitute a nation… The words of the constitution were not merely words imputed to the people. They *constituted* the people.'[23]

The Preamble to the Australian Constitution, in comparison, appears much more prosaic (and much less active), beginning:

> Whereas the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of Almighty God, *have agreed* to unite in one indissoluble Federal Commonwealth (emphasis added).

This opening to the Preamble textually embodies a picture of the Australian Constitution as (constatively) expressing or describing the *already-existing will* of the people of the colonies – 'Whereas the people… *have agreed* to unite'.[24] Quick and Garran comment here that ''[t]he opening words of the preamble proclaim that the Constitution of the Commonwealth of Australia is founded on the will of the people whom it is designed to unite and govern.'[25] On this reading, 'the people' pre-exist the Constitution, and it is their will that is *constatively* described and expressed in the Constitution.

However, immediately following that sentence, Quick and Garran write that '[a]lthough it [the Constitution] proceeds from the people, it is clothed in the form of law by an Act of the Imperial

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20 Of course, the Constitution consists of many sentences that can themselves be individuated and analysed separately as 'performative' or 'constative'. This is not my question here; though it may be an interesting and fruitful one. My question is with what the Constitution does *as* a Constitution: to understand it as a single entity. This is one reason why I focus on the Preamble.

21 J Quick and R Garran, *Annotated Constitution of the Commonwealth of Australia* (Legal Books, Sydney, 1901) 284.

22 See eg AR Amar, 'The Document and the Doctrine The Supreme Court - 1999 Term: Foreword' (2000) 114 *Harvard Law Review* 26, 35, describing the ratification of the United States as a 'performative act of ordainment'.

23 Irving, above n 1, 212; 218.

24 This reading does not ignore the fact that this wording was more or less standard in British legislative preambles of the time: the *British North America Act 1867* (Imp) has a similar preamble, as did the unsuccessful 1891 Australian Constitution Bill.
The comparison with the original Canadian Constitution is instructive. Its Preamble begins: 'Whereas the Provinces of *Canada, Nova Scotia,* and *New Brunswick* have expressed their Desire to be federally united into One Dominion'. The notable differences are, first, the reference to the 'Provinces' rather than to 'the people [of the federating colonies]', and second, that those Provinces 'have expressed their Desire to be federally united'. This, in itself, is not an act, but an intention to act. The Australian Preamble is interesting partly because it grammatically describes a past act.

25 Quick and Garran, above n 21, 286.

Parliament of Great Britain and Ireland, the Supreme Sovereign Legislature of the British Empire.'[26] As an Imperial Act, the enacting subject of the Australian Constitution (at least the *Constitution Act 1900* (Imp)) was the Imperial Crown. This Imperial act constitutes the people from 'outside', as it were; it is not an act of the people. This is recognised in the Preamble, which closes with the performative phrase:

> Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows...

Thus, on the other hand, the Preamble also embodies the opposing idea that the Australian Constitution is a *performative* act – albeit of the sovereign Imperial Parliament – which brings 'the people' into existence.[27] The Preamble, it seems, is *both* performative and constative. Furthermore, it seems as if it has *two* subjects: the performative (active) Imperial subject, and the constative (passive/descriptive) subject of the people of the colonies.

II. Derrida and the undecidability of the Declaration of Independence

To understand what this strange idea might amount to, that an utterance could be *both* performative and constative, we turn now to Jacques Derrida's analysis of the Declaration of Independence as containing a certain 'undecidability' between the performative or constative. Derrida's argument with respect to the Declaration, in particular the way in which he construes the relationship between the performative and the constative, will form the starting point for my argument with respect to the Australian Constitution.

I will take it for granted, as many scholars have argued, that the Declaration, while not strictly a *constitution* – it did not, for example, lay down the rules or structures of governance – is nonetheless constitution*al*. It is constitutional insofar as it attempts to constitute a new independent polity through writing, through an invocation of 'the people'. It inaugurated a new political imaginary: the idea of America. John Quincy Adams, sixth President of the United States, described the Declaration in his 1831 Independence Day oration as 'the first example of a self-constituted nation proclaiming to the rest of mankind the principles upon which it was addressed'.[28] The Founding Generation also held the same belief: James Madison described the document as 'the fundamental Act of Union of these States'; and John Hancock called it 'the Ground and Foundation of a Future Government.'[29]

Modern theorists have agreed with Adams. Dennis Mahoney argues that 'it is the Declaration that constitutes the American nation';[30] similarly, Jack Balkin writes that '[t]he Declaration is our [the American people's] constitution. It is our constitution because it constitutes us, constitutes us as a people "conceived in liberty, and dedicated to a proposition."'[31] Following the lead of these theorists, I will take the Declaration of Independence as a constitutional document.

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26 Ibid.

27 This particular tension has surfaced particularly in post-*Australia Acts* High Court jurisprudence, notably the freedom of political communication decisions beginning with *ACTV v Commonwealth* (1992) 177 CLR 106 and *Nationwide News v Wills* (1992) 177 CLR 1. Note, in particular, the dissenting line of argument beginning with Dawson J in these cases and continuing in recent judgments of Heydon J; see eg *Monis v The Queen* [2013] HCA 4.

28 JQ Adams, *An oration addressed to the citizens of the town of Quincy: on the fourth of July, 1831, the fifty-fifth anniversary of the independence of the United States of America* (Richardson, Lord & Holbrook, 1831) 19.

29 Quoted in DJ Mahoney, 'Declaration of Independence' (1986) 24(1) *Society* 46, 46.

30 ibid.

31 JM Balkin, 'The Declaration and the Promise of a Democratic Culture' (1999) 4 *Widener Law Symposium* 167, 168, citing Abraham Lincoln's Gettysburg Address.

Derrida poses the question of performativity in the following way: 'who signs, and with what so-called proper name, the declarative act which founds an institution?'[32] That is, Derrida asks, how does the founding of an institution, the constituting of a government and of a people, come about through a particular text? As is evident from the beginning of Derrida's question, for him (as, in a different way, for Austin), this question of constitution (for Austin, of action) is inextricably linked to the subject of the constitution.[33]

Derrida claims that the Declaration of Independence is a 'founding document' which embodies a particular performative act: a 'declaration'. This declaration is embodied in the final sentence of the Declaration, whereby 'the Representatives of the united States of America …do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States'; namely, the performative act of declaring independence.

Derrida contends in relation to this final declaration that '[o]ne cannot decide – and that's the interesting thing… – whether independence is stated or produced by this utterance.'[34] This question is essentially connected to the question of the 'actual signer' of the document: the body with the authority to guarantee the truth of the document. He traces out the line of authority with respect to the Declaration: Jefferson's authority comes from Congress, who were in turn elected by the 'good People of these Colonies'. However, 'the people' themselves are not the end of the line. The people's authority is justified by the famous second sentence of the Declaration: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness'.

Derrida argues that this sentence – normally read as the central part of the Declaration – contains what he describes as an 'undecidability'. The sentence is also (like the Australian Preamble) *both* performative and constative. 'We hold these truths' is performative, while the appeal to 'self-evidence' is constative; descriptive of a higher (and previously existing) state of affairs. For Derrida, this 'obscurity, this undecidability between ... a performative structure and a constative structure, is required'.[35] The Declaration, for Derrida, must be *both* and *neither* performative and/or constative in order to achieve its desired effect: to declare independence.

There is thus, for Derrida, a contradiction present in the very heart of the Declaration as a constitutional document. The 'self-evident' truths of these unalienable rights to life, liberty, and the pursuit of happiness, are at the same time secured by an appeal to 'nature's God', and *held* to be true by the 'We': the newly-created (and not-yet-created) American people. Importantly, for Derrida, this contradiction is *productive*. It allows the Declaration to *do* something (ie to constitute a people) in a way that a simple performative claim does not; indeed, Derrida argues further, *any* performative utterance is similarly afflicted.[36]

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32 J Derrida, 'Declarations of independence' (1986) 7(1) *New Political Science* 7, 8. My use of this text of Derrida's here glosses over a number of deeper issues to do with his analysis of the Declaration. These issues are tangential to the focus of my present discussion, which is to draw out the analogy between Derrida's analysis of the Declaration and my analysis of the Australian Preamble in order to problematise the performative/constative distinction I drew above. I address the deeper issues in other work; see Y Hominh, "Re-reading the Declaration of Independence as perlocutionary performative" (forthcoming) *Res Publica*.

33 See J de Ville, 'Sovereignty without sovereignty: Derrida's *Declarations of Independence*' (2008) 19 *Law and Critique* 87.

34 Derrida, above n 32, 8.

35 ibid 9.

36 For an insightful comparison to Arendt's conception of the performative subject, see B Honig, 'Declarations of Independence: Arendt and Derrida on the Problem of Founding of a Republic' (1991) 85(1) *The American Political Science Review* 97; see also B Lee, 'Performing the People' (1995) 5(2) *Pragmatics* 263. A full analysis of this claim with respect to the performative form of law requires examination of at least two further texts of Derrida's: 'Signature, Event, Context', in *Limited Inc.* (Northwestern University Press, 1988); and 'The Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo Law Review* 920. I do not attempt this analysis here; though see de Ville, above n 33

Similarly, in the Australian Preamble, there is a tension – an 'undecidability' – between the explicit performative subject (the Imperial Parliament) and the constative description of a prior act of a different subject ('the people'). I will explore in the next section how this tension may be understood in a different way by returning to Austin, while maintaining the *productive* force that it has in Derrida; in particular, returning to Austin's concept of the 'perlocutionary' speech act. An examination of this concept will allow us to see in the Australian case how this tension may be productive or creative of a certain conception of the people as a constitutional subject; that is, how the tension itself has a certain rhetorical and constitutive force. It points our attention away from the question of *who* or *what* is the subject of the constitution, and turns our attention to *how* and *why* this subject is constituted.

III. Illocutionary and perlocutionary

In the second half of *How to Do Things with Words*, Austin distinguishes three different ways 'in which to say something is to do something': different 'speech acts'.[37] We can distinguish, Austin claims, the 'locutionary' speech act (the act *of* saying something), from the 'illocutionary' speech act (that which is done *in* saying something) and the 'perlocutionary' speech act (that which is done *by* saying something). The pertinent distinction for our purposes is between the illocutionary and perlocutionary speech acts.

The illocutionary, Austin argues, is that which is done directly in the (locutionary) saying of the utterance itself, while the perlocutionary act is done only indirectly by or through the utterance. The illocutionary 'takes effect', while the perlocutionary 'produces consequences'.[38] My argument will be here that the *perlocutionary* speech act is the better speech act through which to understand what a constitution does. It can play this role, I will argue, because of three features of the perlocutionary speech act: what I will label constitutiveness; responsiveness; and confrontation. These features show how the perlocutionary speech act can constitute a 'we', and how it does so through a rhetorical dimension of speech, and hence how the Australian Constitution, understood as a perlocutionary speech act, can rhetorically constitute the people. We shall examine how these concepts apply to the Australian Constitution in Part IV.

A quick example to illustrate these distinctions between Austin's different speech acts: suppose I say to you 'I promise to take you to the movies tomorrow'. According to Austin, with this utterance I have done (at least) three things. First, I have uttered a particular locution: 'I promise...'. Second, in uttering that locution I have performed the illocutionary act of promising. The utterance *is* itself a promise. Third, by or through that utterance, I may have performed the additional or consequential perlocutionary act of making you inordinately happy, or convincing you that I am 'the one for you', or perhaps, if I have made the promise hiding behind the bushes outside your house, of alarming you.

The distinction between the illocutionary and perlocutionary, for Austin, turns on the concept (brought up in Part I) of convention. While an illocutionary utterance is conventional, in the sense that it is rule-governed, a perlocutionary utterance, for Austin, is unconventional; as Austin says, 'any, or almost any, perlocutionary act is liable to be brought off, in sufficiently special circumstances, by the issuing, with or without calculation, of any utterance whatsoever'.[39] If the words 'I promise …' can alarm, Austin thinks, then there will be no way to categorise such perlocutionary acts, therefore, no way to come up with a theory explaining how they operate.[40]

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for a beginning, and my forthcoming paper, above n 32. Another useful Derridean approach to the performativity of constitutional documents is J Pryor, *Constitutions: Writing Nations, Reading Difference* (Birkbeck Law Press, 2007). See also J Derrida, 'Admiration of Nelson Mandela, or The Laws of Reflection' (2014) 26(1) *Law and Literature* 9.

37 Austin, above n 3, 94-103.

38 Ibid 113.

39 Ibid 110.

40 Austin had a love of categorisation and order. We may recall here his insistence that there were not 'infinite' uses of language: 'Certainly there are a great many uses of language. It's rather a pity that people are apt to invoke a new use of language whenever they feel so inclined, to help them out of this,

While Austin is right, I think, to describe the perlocutionary speech act as 'unconventional', I would not go so far as to say (as Austin implies) that convention plays no role in perlocutionary speech acts whatsoever. Any perlocutionary speech act, however creative and unconventional, is set against the backdrop of prior context and convention. While a perlocutionary speech act is not determined by convention; rather, it transcends conventions and is in that sense 'unconventional'. A perlocutionary act, nonetheless, still draws on those conventions.[41] It is not *entirely* unconventional.

Austin, however, reads the perlocutionary act as entirely unconventional and therefore as wholly unsusceptible to categorisation. It is this transcending of conventions which means that perlocutionary acts must 'somehow be ruled out as irrelevant to the sense in which an utterance, if the issuing of it is the "doing of an action", is a performative'.[42] Austin thus limits the term 'performative' to those (illocutionary) speech acts which can be achieved *directly in* an utterance. He prioritises the illocutionary over the perlocutionary. My claim here therefore is to resuscitate the perlocutionary in part by showing the theoretical role it can play.

To illustrate the distinction between illocutionary and perlocutionary speech acts, let us compare the two speech acts of promising (illocutionary) and alarming (perlocutionary). 'To promise' is an illocutionary speech act; to utter 'I promise that X' or 'I promise you' just is to make a promise. A promise is carried off in the making of the utterance itself. Compare this to the speech act 'to alarm'. 'I alarm you' is certainly not to alarm you; 'I alarm that X' is nonsensical. I may, however, say something like 'I alarm you, it seems', as an *acknowledgment* of my having alarmed you. The performance of a perlocutionary act, as opposed to an illocutionary act, depends on another. The first-person in the perlocutionary case therefore, in Stanley Cavell's words, 'requires displacing or disclaiming'.[43]

A. THE THREE FEATURES OF PERLOCUTIONARY UTTERANCE

This displacement of the first person reveals three important things about perlocutionary utterance. These will provide the basis for understanding the Australian Constitution as an act of the people, constituting the people. First, it shows that a perlocutionary utterance depends on *you*, on the other, for acknowledgment. Whereas an illocutionary speech act rests only on the words (uttered in the right conventional circumstances) themselves, a perlocutionary speech act relies on another person. As Cavell puts it, in the perlocutionary case, 'the "you" comes essentially into the picture.'[44]

That is, because the (perlocutionary) effect of what I say depends on how *you* take my words, the perlocutionary speech act *constitutes* me as the subject of that act at the same time as it constitutes you as the object of that act. This is what I will call the 'constitutive' element of perlocutionary utterance. Its constitutivity lies both with respect to the parties to the act, and to the nature of the act itself. Any claim that a particular perlocutionary act has occurred, for example, that I have alarmed you, must come from you. It requires your *acknowledgment* of my words *as* constituting the act of alarming. (Not every utterance made from behind the bushes will alarm; for example, if we are

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that, or the other well-known philosophical tangle; we need more of a framework in which to discuss these uses of language; and also I think we should not despair too easily and talk, as people are apt to do, about the *infinite* uses of language. Philosophers will do this when they have listed as many, let us say, as seventeen; but even if there were something like ten thousand uses of language, surely we could list them all in time': Austin, above n 15, 234.

41 The Australian Preamble's meaning, as we shall see below, is an example of drawing on convention while transcending it. The conventions on which the Preamble draws are the standard preambular forms of legal language which existed at the time for Imperial statutes. I thank an anonymous reviewer for this point.

42 Austin, above n 3, 110. Stanley Cavell has another explanation for Austin's dogged insistence on the irrelevance of the perlocutionary speech act – he claims that Austin, in line with much British philosophy of the time, was 'skittish about emotion': see S Cavell, 'Performative and passionate utterance' in *Philosophy the Day After Tomorrow* (Belknap Press, 2006) 155, 156.

43 Cavell, above n 42, 170.

44 Ibid 180.

playing hide-and-seek.) Through this claim (that I have alarmed you), we enter into a particular relationship.

Second, because of this requirement of acknowledgment, a perlocutionary speech act is an invitation to an exchange between you and me as to the meaning of that act ('no, I didn't intend to alarm you in speaking from behind the bushes, I was merely hiding from your mother'). The act requires *responsiveness* to the other: a perlocutionary act demands a response. Importantly, this responsiveness can only draw on the already existing history between us; the context in which the utterance is spoken. A perlocutionary utterance is a necessarily historical utterance, at the same time that it becomes the vehicle for the creation of something new.

Third, in this process of question and response between us, a perlocutionary utterance involves the contestation of meaning; it always involves the possibility of a confrontation with the other. To modify a term from the literature, perlocutionary speech acts are 'essentially contestable'.[45] This is because perlocutionary speech acts are not defined by convention; rather, their meaning comes from the way in which they are *taken* by another.[46]

These three features of perlocutionary speech acts, I want to argue, mean that such speech acts constitute a 'we' – a *plural* subject. A plural subject, I emphasise, is a subject which is not necessarily unified on the basis of certain shared or common characteristics. Rather, a plural subject is one which is relational. It exists *only* in the relations and confrontations between individuals.[47] This further constitutive function of perlocutionary speech acts – in particular, political or legal perlocutionary speech acts[48] – arises because 'I' and 'you' are constituted, through the perlocutionary, as engaged in a particular relationship; one based not on necessarily shared characteristics, but simply on the fact of response and the possibility of confrontation. The concept of the perlocutionary provides a way of understanding how an acting subject can be constituted *through* its own speech and through its own

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45 See WB Gallie, 'Essentially Contested Concepts' (Paper presented at the Proceedings of the Aristotelian Society, 1956). I reiterate that perlocutionary utterance is not *always* contested, or will necessarily have to be contested in order to qualify as such an act I merely mean that there is the *potential* for contestation; and any such development *may* be contested, may be questioned; hence 'contestable'.

46 Of course, illocutionary speech acts can be questioned; as Austin points out, it can be challenged whether a particular utterance meets any of his given performative criteria. However, this contestability is contingent, whereas, in the case of perlocutionary speech acts, contestability is internal to what such a speech act is.

47 A useful analogy here, though I do not claim it is entirely accurate to 'the people', is to Iris Marion Young's concept of a 'social group'. Young contrasts 'social groups' to 'associations' (groups formed on consent) and 'aggregations' (groups formed on the basis of shared properties). 'Social groups', in contrast to these other forms of groups, are neither wholly consent-based or property-based; rather, they involve an affinity with the other members of the group ('affinity' here is not so strong as to involve a necessarily shared characteristic) which is partly constitutive or definitive of one's identity. One does not 'join' a social group; one finds oneself already as part of a social group. As Young puts it, a 'social group should not be understood as an essence or nature… Instead, group identity should be understood in relational terms… Although social processes of affinity and separation define groups, they do not give groups a substantive identity. There is no common nature that groups have'; Iris Marion Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99(2) *Ethics* 250, 260. See also Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, 2000).

48 There is a broader question here of distinguishing political or legal subject formation from the ordinary forms of subject formation found in every day perlocutionary speech acts. I am tempted by the view that the distinction here is not one of kind, but of context: any subject has the potential to become a political group; though, of course, not all will. There are also different kinds of political or legal subjects. Some will require representation; others will be small enough not to require representation. These larger issues are best left for another paper; though for a useful approach to representation and subject formation, see Michael Saward, *The Representative Claim* (Oxford University Press, 2009).

The question of the effect of particular forms of constitutional language on the formation of the constitutional subject is a particularly interesting one, but outside the scope of this paper. A general answer will have to address questions of textual interpretation and representation that are too broad to encompass here. The work of James Boyd White is interesting in this particular regard; see references above, n 2. I am indebted to an anonymous referee for raising these issues.

acts; that is, it provides a way of understanding the constitutive force of speech. This, I claim, is one way we can understand what it is that a constitution does: through words, it constitutes a people, as an act of that people.

'The people' – the constitutional subject – is a plural subject. The people are not to be understood as a predetermined entity with set characteristics which exists behind its acts. Rather, the people, as I will show below, are always in the process of constitution. The way the people are claimed to be constituted in any particular case is always contestable and always fragile. Because the constitutional subject is plural, there will be conflicts internal to the subject as to its own nature. These internal differences, as I will show below with respect to the Australian preamble, are the means by which the people constitute themselves.

IV. The stories behind the words

This concept of the perlocutionary speech act, I have argued, allows for a proper conception of the relationship between the people and their constitution, where the constitution constitutes the people, as an act of the people. I will now argue that this constitutive force of constitutional speech can be understood in terms of rhetoric; in terms of understanding what lies behind the words themselves; as Irving concludes in her 2009 oration, '[t]he power of the Australian text is not the words themselves, but in the story they tell.'[49] The rhetorical force of perlocutionary speech acts allows us to conceptualise the performative subject of the Australian Constitution in a way that illustrates the role of both the people and the Imperial Parliament in creating the subject of the Constitution. As I will argue, neither the people nor the Imperial Parliament can be the sole subject of the Constitution; rather, the Constitution itself is the means by which the people constitute themselves.

To recap what we found in Section I: the Constitution is both constative and performative. On the one hand, it is a 'report' of the prior 'agreement' of the people, as indicated at the beginning of the Preamble. On the other hand, the Constitution is an act of the Imperial Parliament, as suggested by the fact that the *Constitution Act 1900* (Imp) is entitled 'An Act to constitute the Commonwealth of Australia', implying the Act is doing the constituting, and it is 'therefore enacted … by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled'. We see here, in these two statements which bookend the Preamble, Derrida's 'undecidability' between the constative and the performative. As I will show, neither of these claims to sole authority is justified by the history. What is essential here, I will claim, is not the pre-existing authority of any one particular body, but the interplay between multiple perlocutionary claims to represent the people; that is, the rhetorical confrontations in which the people are constituted.

To support this claim, let us see, as Irving suggests, what stories lie behind these words, and how they shed light on the way in which the Constitution constitutes 'the people'. What follows is intended as a small illustration of how we may gain a greater understanding of our Constitution through examining the perlocutionary force of its words. I propose to examine, briefly, the behind-the-scenes constitutional confrontation in 1900, between the Australian federationist delegates[50] who were sent to London to 'explain' the newly-minted Constitution Bill to the Imperial Parliament, and the Colonial Secretary, Sir Joseph Chamberlain – as Alfred Deakin describes him, 'the most formidable man the Australians could have met'.[51] I do not intend my telling of this well-known (at least in some circles) story to shed any new historical light on the events; rather, I want to look at this story as showing something important about the rhetorical relationship between 'the people' and their Constitution. What it reveals is that the way 'the people' were invoked in this confrontation is itself

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49 Irving, above n 1, 224.

50 Each colony sent delegates to London, including New Zealand and Western Australia, who attempted to sabotage the Bill. The delegates were: Edmund Barton from NSW; Alfred Deakin from Victoria; Charles Kingston from South Australia; Sir Phillip Fysh from Tasmania; James Dickson from Queensland; and later, Stephen Parker from Western Australia. They were joined in London by the New Zealand Agent-General, William Pember Reeves.

51 A Deakin, *The Federal Story* (Robertson & Mullens, 1944) 120.

part of the 'constitution' of the Federal Commonwealth; that this conflict between the British and the Australians was part of the rhetorical constitution of 'the people' themselves.

A. 'THE PEOPLE' IN LONDON

We take up the story after ratification of the draft Constitution proposed at the 1898 Constitutional Convention by the people of the colonies (excepting Western Australia). The draft Constitution, known as the Commonwealth of Australia Constitution Bill, was submitted to the Imperial Parliament for approval. An Australian delegation, comprising leading federationists, was invited by Chamberlain to London, ostensibly to 'assist and explain when Parliament is considering the Federation Bill.'[52]

However, Chamberlain's real motive, according to Quick and Garran, was to amend the Commonwealth Bill – the Imperial Government were 'anxious to amend certain provisions which seemed to them to affect Imperial interests.'[53] Chief among these were the final appellate jurisdiction of the Judicial Committee of the Privy Council, and various amendments to the covering clauses.[54]

The response of the Australians (hastily forewarned of Chamberlain's intentions, we know, on the voyage over to London by Edmund Barton, who had George Reid's notes from Chamberlain which Reid had used at the 1897 Convention) was to argue that no amendments to the Bill could be countenanced, as the people of the federating colonies had agreed to unite in a federal Commonwealth 'under the Constitution hereby established'. Any alterations, they maintained, would mean the agreement of the people had not been achieved.[55] Further, any amendment to the covering clauses 'which altered the meaning of the Constitution would be in effect an alteration of the Constitution, and would therefore be equally objectionable.'[56]

Deakin writes that, facing pressure not only from Chamberlain but from Western Australia and New Zealand (indeed, subtly also from Queensland and Tasmania back home), '[t]he whole strength of the delegates lay in their claim that the Bill was Australian and that they spoke for Australia'.[57]

After a process of negotiation between the delegates and the Imperial Government, including the canvassing of Parliamentary support by the delegates through the press, and through public speeches given at 'clubs, guilds and public bodies',[58] the position remained more or less unchanged. While Chamberlain withdrew some of his proposed amendments upon the insistence of the Australian delegates, the appellate jurisdiction of the Privy Council over Australian courts remained a sticking

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52 Telegram from Chamberlain to Beauchamp, 22 Dec 1899, in *British Parliamentary Papers* 55 (1900) 26, quoted in BK de Garis, 'The Colonial Office and the Commonwealth Constitution Bill' in A.W. Martin (ed), *Essays in Australian Federation* (Melbourne University Press, 1969) 94, 117.

53 Quick & Garran, above n 21, 229. See also JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 2nd ed, 1972) 170-6, 248-69, quoting John Anderson, senior official in the Australasian Department of the Colonial Office on the 1897 Constitution Bill: '"It is impossible to view the Bill as entirely satisfactory, especially in regard to the unity of the Empire"': at 172. La Nauze notes that Anderson, by the time the Australian delegates stepped ashore in London in 1900, had a change of heart. There was by this time, according to La Nauze, a difference of opinion between the Attorney-General's Law Officers (who were pushing for changes in respect of Imperial interests) and the Colonial Office. He writes that the Colonial Office officials, including Anderson, 'were unanimous in regarding these [the Law Officers'] recommendations [on the Commonwealth Constitution Bill] as decidedly inconvenient, and some of them as unnecessary': at 252. '[T]he Colonial Office was, if not enthusiastically, at least definitely on their [the Australians'] side': at 253.

54 These were, in short, to limit Australian jurisdiction in areas where it may conflict with British jurisdiction; for example, by providing that Commonwealth laws would be 'colonial laws' for the purposes of the *Colonial Laws Validity Act 1865*, to remove covering clause 2, which provided that 'this Act shall bind the Crown'; and to provide for appeals to the Privy Council from Australian courts.

55 Quick & Garran, above n 21, 230.

56 Ibid.

57 Deakin, above n 51, 140.

58 Ibid 147.

point.[59] In support of the delegates' claim that they had no authority, at this late stage, to amend the Constitution Bill, the Premiers of the colonies telegrammed the following to the British:

> the framing of the Federal Constitution was expressly entrusted to the Convention of Representatives, specially elected by the people for the purpose, in all the Colonies, except Queensland and Western Australia, and that the final acceptance or rejection of the Constitution when framed was also remitted to the people... [that] the Commonwealth Bill belongs therefore in a very special sense to the people of Australia, whose only mandate to Governments and Parliaments is to seek its enactment by the Imperial Parliament in the form in which it was adopted by the people... [Hence] [t]he Premiers do not consider themselves as having authority to accept any amendments.[60]

The delegates in London went so far as to suggest that 'if the amendments were to be insisted upon there was nothing left for the delegates but to pack up and go home.[61] If neither the federationist delegates nor the colonial Premiers accepted the authority to accept amendments, went the argument, the Bill must go through 'in the form in which it was adopted by the people'. Despite this show of strength, however, and despite the colonial Premiers' support, the Constitution Bill was presented to Parliament with various modifications[62] – Sir Henry Campbell-Bannerman, the leader of the Liberal opposition, expressing his regret that that the Government had 'flouted Australia' by 'going behind the opinions of the accredited representatives of Australia.'[63]

Behind closed doors, however, the delegates had found it possible to compromise over the sticky question of Privy Council jurisdiction.[64] The British negotiators proposed a modified clause which would limit appeals in constitutional cases to the Privy Council.[65]

While this modification was accepted by the delegates in London, it caused an outcry in the Australian colonies. Queensland 'announced that a Bill so seriously altered must be submitted to its Parliament before it could be accepted',[66] despite its earlier willingness to accept Chamberlain's original modifications. South Australia also withdrew its support for the Bill, as, according to Deakin, 'the whole of the voices of Australia shrieked censure'.[67] These voices included not only the official colonial governments and representatives, but unofficial representatives like newspapers and various federalist groups.

A further compromise, proposed by Sir Samuel Griffith (at that stage no longer an elected political figure, but the Chief Justice of the Supreme Court of Queensland, and thus yet another unofficial representative of the people) that any right of appeal to the Privy Council in inter se matters would lie only with the approval of the High Court, proved to be 'the golden bridge over which the delegates passed to union.'[68] A final compromise was reached, and Australia had its Constitution.

This story is not itself (obviously) written into the Preamble, nor into the Constitution itself. With the benefit of hindsight, however, and reading the words of the text in light of the narratives that frame the text, we can understand this history as embodied implicitly in the two claims to authority (as we can now read them) that bookend the Preamble: 'Whereas the people… have agreed' and '[b]e it therefore enacted … by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same'. This re-reading of the preambular words in light of this story allows us to reconsider the way in which the people, as the subject of the constitution, are themselves constituted

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59 See de Garis, above n 52, La Nauze, above n 53, 254-69.

60 Quick & Garran, above n 21, 236-7.

61 Deakin, above n 51, 152.

62 Quick & Garran, above n 21, 242-5.

63 Ibid 244.

64 La Nauze writes that the modified clause 74 is likely to have been Chamberlain's suggestion, 'offered from a position of strength': La Nauze, above n 53, 265.

65 Quick & Garran, above n 21, 245; Deakin, above n 51, 154-5.

66 Deakin, above n 51, 156.

67 Ibid.

68 Ibid. See also La Nauze, above n 53, 267-8.

through the constitutional text. The linguistic tension as to the identity of the constitutional subject, whether the people or the Imperial Parliament, reflects the claims to authority that led to the creation of the Constitution.

B. THE PERLOCUTIONARY AND THE PEOPLE

My suggestion is that this episode shows two specific things in relevance to the relationship between the Australian people and their Constitution. Following from these two specific claims, I will make two broader claims regarding the question of understanding the people as rhetorically constituted through the perlocutionary.

First, this episode shows that what was in the end decided upon and embodied in the final Constitution, then, was neither what was 'agreed to' at referendum by the Australian people (including because the Western Australians had not yet held such a referendum), nor what was suggested by the Imperial Government, but something in between. In the end, the Constitution was neither simply a 'description' of the prior agreement of the people, nor was it a simple overt performative act of the Imperial Parliament; that is, it was neither an expression of the 'will' of the people nor of the 'will' of the Imperial Parliament. It was a claim made by the Australian people, acting through referenda and their representatives – not only the federationist delegates in London, who did not have absolute authority to speak for the people, but the Premiers of the states, the media and unofficial representative groups, none of which had singular authority to represent the people.[69]

Second, in claiming to speak for the people, these disparate groups responded to and perpetuated a process of confrontation involving various rhetorical invocations of 'the people'. This process, importantly, included not only the delegates in London and different parties back home, but also the Colonial Office. In support of its position against the Constitution Bill passing in its original form, the Colonial Office argued that 'it could not fairly be contended that the referendum on the Bill was to be taken as an unqualified and considered ratification of every detail of the Constitution'. Even the British authorities, then, constructed rhetorically a version of 'the people' in order to justify a particular legal standpoint.

This story therefore displays the sort of responsiveness and confrontation characteristic of perlocutionary utterance. Deakin's 'golden bridge… to union' resulted from the conflict and compromise between the different rhetorical claims made about the constitutional role of 'the people'; the different ways in which 'the people' were invoked to justify certain arguments. My first broad claim follows directly from this analysis. Taking seriously this process of conflict and compromise – of responsiveness and confrontation – means that it does not make sense to ask which group *really* or *truly* represented or spoke for the people. In Derrida's words, the question is 'undecidable'. There is no 'people' that pre-exists, in a determinate form, the perlocutionary utterance that constitutes it. It does not make sense, that is, to talk about the 'actual' interests of the people, as if these could somehow be isolated and identified independently of the way in which the people are rhetorically constituted.

Rather, the people, as constituted rhetorically, function to contextualise certain sorts of legal claims. These claims then gain meaning and force from the way in which they relate to that context: the way we understand what a legal text means (in this case, the Constitution) is to analyse the ways in which it relates to its context; the way in which its meaning can be construed by those whom it addresses and whom it constitutes. The importance of this rhetorical reading to legal (constitutional) meaning can be understood, I suggest, by the way in which the Preamble contains the paradox we identified originally between the people and the Imperial Parliament as the acting subject of the Constitution. This paradox, as Derrida argued with respect to the Declaration of Independence, is *productive*. It draws our attention to the rhetorical and hence constitutive elements of the Preamble (and, by induction, though I do not pursue the point here, the rest of the Constitution). That is, the

[69] See, for example, Irving's analysis of the understated importance of women's groups, such as the various Women's Federal Leagues, from the early 1890s in the push for Federation: H Irving, *To Constitute a Nation: A cultural history of Australia's Constitution* (Cambridge University Press, 1999) Ch 10.

paradox focuses our attention not simply on *who* or *what* the acting subject of the Constitution *is*, but on *how* and *why* this subject is constructed.

Related to this shift in emphasis, the final point I wish to make is a more general point about the nature of the people constituted by perlocutionary utterance. What my account stresses is the *fragility* of the people; the way in which the relationship of responsiveness that rhetorically constitutes the people is in need of constant attention and renewal. Unlike conceptions of the people that take their existence, as a determinate entity, for granted, and thus *tie down* or *delimit* the characteristics – whether textual or cultural – that make the people who they are, understanding the people as constituted by perlocutionary utterance *opens up* the way in which we can understand the people. It makes their constitution open to challenge and hence open to failure. It does so through the disclaiming of the first-person 'I' in favour of the 'you'. Since 'I' can no longer claim fully to determine the meaning of my utterances (unlike in the illocutionary case), 'you' have an essential role to play, in responding, in confronting, in contesting. 'You' have a measure of control over meaning – and this is essential to the constitution of meaning itself.

In the same way that the federationist delegates in London had to cede certain authority to other bodies (the Premiers, the Colonial Office) at the same time as they were able to draw on the authority of other bodies, any perlocutionary utterance, in constituting a 'we', both cedes authority to others and provides the resources by which one can claim authority to speak for others. If you accuse me of alarming you by promising from behind the bushes, I can provide excuses and justifications; I can claim not to have meant it, or even to deny that my act constituted (should be read as) an act of alarming. In any case, what the act *is*; that is, what it means for *us*, as an act that concerns us in particular, is something we must work out.

V. Conclusion

I have argued in this paper for two related claims. The first and broader claim is that one way we can usefully understand the Australian Constitution is by attending to its rhetorical aspects: what lies behind the words; the stories told by the words. That is, we can attend to what the words *do*, rather than simply what they *say*. We can understand the Constitution as a performative utterance; more accurately, as what Austin called a perlocutionary speech act.

The second and more specific claim I have made in this paper is that by understanding the Australian Constitution – particularly, but not limited to the Preamble – as a perlocutionary speech act of the people, we can see that it *constitutes* the people into an 'indissoluble Federal Commonwealth'. It does so not simply on the surface of the words, but rather through rhetorically embodying a particular acting relationship between the people and their constitution in those words. This rhetorical move can be seen in the Preamble through a particular paradox as to the acting subject of the Constitution: the Preamble seemingly says that *both* the people and the Imperial Parliament are the subject of the Constitution. Derrida, in relation to the American Declaration of Independence, claimed that a similar paradox – an 'undecidability', as he called it – existed with respect to the force of the Declaration. For Derrida, this undecidability between the performative and the constative force of the Declaration's second sentence was *necessary* for the production of its desired effect; that is, independence. In the Australian case, analogously, I have argued that the paradox is similarly productive in that it points to what lies beyond the words themselves, in the stories those words tell.

I have tried to illustrate this by looking briefly at one of those stories: the conflict between the Australian federationist delegates and the Colonial Secretary Sir Joseph Chamberlain in London. This story, I have suggested, illustrates the way in which 'the people' formed a conceptual resource for differing claims about constitutional authority; the conflicts between those claims themselves constituting a particular conception of the people.

This way of understanding the relationship between the people and the Constitution underscores, I have claimed, the fragile nature of that relationship. We cannot understand the people as a determinate entity that pre-exists the Constitution; rather, the people only exist as constituted *through* the Constitution, through the ways in which we understand ourselves as constituted. Our self-

conception is therefore always open to challenge and to revision; it cannot be properly understood as fixed as a certain set of characteristics. This openness is its power and also its possibility of failure. To understand our relationship to our Constitution in this way is to begin understanding what it means to 'better work with our written words.'