

Re-reading the Declaration of Independence as perlocutionary performative

Yarran Hominh

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Abstract This paper addresses the question of the constitution of ‘the people’. It argues that J.L. Austin’s concept of the ‘perlocutionary’ speech act gives us a framework for understanding the constitutive force of a specific constitutional document: the American Declaration of Independence. It does so through responding to Derrida’s analysis of the Declaration, which itself draws on Austin’s work. Derrida argues that the Declaration’s constitutive force lies in the fact that it cannot be simply understood as either ‘performative’ or ‘constative’, in Austin’s terminology. According to Derrida, ‘the people’ do not pre-exist the Declaration, but are constituted in the act of declaration itself. In response, I argue that while Derrida’s insight regarding the constitution of ‘the people’ is sound, his analysis misses two key aspects of the Declaration. These two lacunae point the way to an understanding of the constitutive force of the Declaration in terms of Austin’s ‘perlocutionary’ speech act.

Keywords J.L. Austin; the people; performativity; perlocutionary speech act; Declaration of Independence; constitutional theory

Introduction

The American Declaration of Independence provides one answer to what Jean-Jacques Rousseau, in the preceding decade, had described as ‘[t]he great problem of Politics, which I compare to that of squaring the circle in Geometry... To find a form of government that might put the law above man’ (Rousseau 2003, p.268). The answer provided by the Declaration is to ground the authority of the laws in ‘man’ – ‘the people’, on the constitutional theory embodied in the Declaration, provide the authority for the law’s rule over them. The problem with this answer, implicit in Rousseau’s original comment, is the circularity apparent in legitimating legal authority over the people by recourse to the people themselves: the law is

‘above man’, but if the people legitimate the law, then the law is also a product of ‘man’, and therefore ‘below man’. The way to address this problem, I argue in this paper, is to understand that the answer the Declaration provides is not simply a *theoretical* answer. It is an answer in the form of an *act* – as Hannah Arendt put it, the Declaration is ‘the perfect way for an action to appear in words’ (Arendt, 1963, p.130). What the Declaration performatively *does*, I will argue, is to constitute ‘the people’, as an act of the people. The Declaration can be understood, in that way, as a ‘constitutional’ document.¹

This paper aims to provide an account of how the Declaration constitutes ‘the people’ using J.L. Austin’s theory of performative utterance. In particular, I will claim that the best way to understand the constitutive force of the Declaration is through Austin’s much overlooked concept of the ‘perlocutionary’ speech act. This kind of speech act, I will argue, is central to the process of constituting ‘the people’ – a concept central to the modern polity – and is therefore of importance to political and legal theory more generally. While the concept of the ‘performative’ is undergoing somewhat of a resurgence (Butler 1997; Habermas 1984; White 1989; Saward 2010; Pryor 2007), the specific concept of the perlocutionary speech act – largely because Austin himself puts it to one side – has not received enough attention.² My suggestion, in Austin’s words, is that there is still ‘gold in them thar hills’ (Austin 1979, p.181).³

The significance of my approach, and its difference from other post-Austinian uses of speech act theory, is twofold. First, it differs in its primary focus on the perlocutionary; speech act theory generally,

¹ A constitutional document, one which forms (at least part of) the foundation for a particular political society, should be distinguished from a ‘constitution’ insofar as the former does not create legal rights or duties; although, as we shall see, the Declaration was in at least one important way a legal document and purported to have legal effect.

² The work of Aletta Norval and Marianne Constable are exceptions here. See Norval 2007; 2009, and Constable 2007; 2010; 2011.

³ The gold I attempt to mine in this paper bears connections to that provided by other post-Austinians who apply his speech-act theories, in particular, Quentin Skinner’s account of historical meaning, but is distinguishable from Skinner’s theory by its *conceptual* focus on the speaking *subject* as a constituted subject; that is, as a political or a legal subject. Unlike Skinner’s project, then, which provides a theory of *historical* utterance-meaning which proceeds methodologically by reconstructing the contextualised intentions-in-action of the speaker, what I am providing is a primarily *philosophical* account of political subjecthood, and only secondarily and derivatively concerned with the meaning of a text. That is, my account is inverse to Skinner’s, which focuses first on the historical meaning of a text and only derivatively on the acting subject of that text.

Another way to put this point may be to say that I am concerned not with historical meaning, but with ‘constitutional meaning’: *how* the subject (‘the people’) is constituted through a text. This constitutional meaning, of course, may only be a part of a text’s full historical meaning (which, as Skinner accepts, may only be a part of a text’s meaning, see Skinner 1989, p.269-273).

following Austin,⁴ has focused almost solely on the locutionary/illocutionary distinction.⁵ Secondly, my central claim relates to the political and legal implications of the perlocutionary. I claim that perlocutionary speech acts *constitute* the (politico-legal) acting subject; they *precede* the subject. Such speech acts are not acts of an already-formed subject to which we can unproblematically attribute ‘intentions’ or ‘purposes’ that lie behind the acts; rather, the subject is formed through the very utterance of perlocutionary speech acts themselves.⁶ This constitutive function of perlocutionary speech acts, as I will argue, is the reason why the concept of the perlocutionary should be of interest to political and legal theory; in particular, as I argue in this paper, to the question of the constitution of the demos.

The foil against which I will make this argument is Jacques Derrida’s (1986) analysis of the Declaration of Independence. In that piece, Derrida makes a powerful argument for the force of that document as constitutive of ‘the people’. Derrida’s analysis of the Declaration draws heavily on his prior response to and appropriation of J.L. Austin’s concept of the ‘performative utterance’ in ‘Signature, Event, Context’, where Derrida powerfully criticises Austin’s work at the same time as he finds in Austin’s ‘patient, open, aporetic’ analysis a kindred voice (Derrida 1988, p.14). In response to Derrida, I will claim that Derrida’s key insight regarding the (problematic) performative invocation of the people in the Declaration can be better analysed in terms of the perlocutionary speech act. The specific argument against Derrida will form

⁴ It 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 “doing an action”, is a performative, at least if that is to be distinct from a constative’ (Austin 1975, p.110).

⁵ For example, John Searle, in his magisterial work *Speech Acts*, mentions the perlocutionary only in passing and generally with pejorative implications. In critiquing Grice’s theory of ‘non-natural meaning’ as a full account of the meaning of utterances (Searle 1969, pp.44-46), Searle takes the perlocutionary to function causally or ‘naturalistically’. It is thus akin to Davidson’s (1963) concept of ‘motive’ and therefore inadequate to explain ‘meaning’. Searle claims the perlocutionary therefore cannot account for the ‘institutional’ character of language-as-communication; that is, of ‘meaning’ as a realm of human action (Searle 1969, p.71). See further Austin (1975, p.115); Gu (1993). Similarly to Searle’s causal construal of the perlocutionary, Habermas’ account of ‘communicative action’ relegates perlocutionary speech acts to the realm of irrational and non-universalisable ‘strategic action’ (Habermas 1984, pp.99-101; pp.286-310). Quentin Skinner’s speech-act based ‘New History’ largely ignores the perlocutionary, again focusing solely on the illocutionary speech act; his methodological works bear only scant mention of the term, and then only to sideline it, eg: ‘I shall concede that a writer’s perlocutionary intentions (what he may have intended to do *by* writing in a certain way) do not need to be further considered. They do not seem to need any separate study, since the question of whether a given work was intended by its author, say, to induce sadness does seem to be capable of being settled (if at all) only by considering the work itself and such clues about its intended effects as may be contained within it’ (Skinner 1972, p.403). This reduction of ‘perlocutionary intentions’ to ‘illocutionary intentions’ is evident in Skinner’s understanding of ‘to ridicule’ as an illocutionary act, rather than a perlocutionary act. ‘I ridicule you’, unless uttered in strange circumstances, is not to ridicule you; and ‘I ridicule that X’ is nonsensical (Skinner 1989, pp.270-271; Austin 1975, pp.103-104).

⁶ See further Kukla and Lance (2009)’s account of speech acts as containing a ‘transcendental vocative’: ‘vocative discourse plays a crucial role in constituting individuals as particular, normatively positioned persons’ (Kukla and Lance 2009, p.181).

the basis for my larger claim about the broader significance of the perlocutionary for political and legal theory.

My argument will proceed as follows. I will first set out Austin's (1975) distinction between 'performative' and 'constative' utterances. Central to this will be the role 'convention' and 'intention' play in his theory. I will then examine the details of Derrida's (1986) claim regarding the constitutive force of the Declaration of Independence. I will argue that Derrida's claim that the Declaration is *both* performative and constative is, while not wholly inaccurate, in an important way incomplete. Derrida's analysis, I will argue, misses two important things about the Declaration.

These two lacunae, I will then suggest, point the way to an understanding of how the Declaration constitutes 'the people' through Austin's concept of the 'perlocutionary' speech act. I will argue that the characteristics of the perlocutionary speech act – what I will call, roughly following Stanley Cavell (2006), 'responsiveness' and 'confrontation' – provide a useful way of understanding what it is that constitutional documents like the Declaration do. I will conclude with some general observations on the importance of the perlocutionary for legal and political theory.

I should also point out what I am *not* doing in this paper. First, I am not engaging in either Austin or Derrida exegesis for its own sake. Neither am I attempting to defend either Austin or Derrida's interpretation of Austin (hence, I will proceed without taking account of the Searle-Derrida 'debate'). I will not, therefore, be entering into the specific questions Derrida raises about the violent foundations of law (Derrida 1990), as these questions are separable from my concerns, which relate to how legal and political claims are *articulated* in and through language. Finally, although there is some history involved in my argument relating to the Declaration of Independence, I am not undertaking historical analysis. The historical material I cite is used only in support of the broader theoretical point I am trying to make, and I do not purport to enter into the historiographical debates surrounding the drafting of the Declaration (Becker 1942; Wills 1978; Detweiler 1962; White 1978). My attention is always on the significance of the perlocutionary speech act for understanding what it is the Declaration does, and, consequently, the broader theoretical ramifications of the concept of the perlocutionary for the idea of the politico-legal subject.

How to Do Things with Words

Austin defines a 'performative utterance' as an utterance which *performs* an act: it is an utterance that does something. Austin distinguishes this kind of utterance from what he calls 'constative' utterance, which describes (or fails to describe) a state of affairs in the world.

Austin intends this idea of performative utterance to be a critique of the 'age-old assumption in philosophy ... that to say something, *at least in all cases worth considering*, ie all cases considered is always and simply to state something' (Austin 1975, p.12). A 'statement', or in Austin's terminology, a 'constative utterance' (Austin 1975 p.3), is meaningful because it can be judged as true or false: it corresponds, or does not correspond, to a state of affairs in the world. A meaningful statement, on this assumption, 'describes' a state of affairs. Austin dubs this assumption the 'descriptive fallacy' (Austin 1975, p.3). The 'descriptive fallacy' unduly restricted the philosophically legitimate uses of language insofar as it understood 'meaning' solely in terms of propositional truth or falsity.

'Performative' utterances showed this assumption to be fallacious, according to Austin, because such utterances are clearly meaningful without being true or false. He 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' (Austin 1975, p.5). These utterances have clear meaning, but equally as clearly are not true or false. Their meaning consists in the *act* they perform: marrying; naming; bequeathing.

Conventionality and the first-person

There is an important *legal* dimension to these utterances. The acts they perform are all legal acts, in the sense that they rely upon legal conventions. Austin claims that there is thus a *conventional* aspect to performative utterance generally; a conventionality that is common also to legal utterances. For Austin, a performative utterance, to be successful (or 'felicitous', in Austin's terms), must be situated in a particular context, and uttered according to certain rules. I cannot for example walk up to a woman in the street, say

'I do', and expect to carry her off into the sunset as my wife.⁷ It is only given the satisfaction of these conventional criteria that an utterance constitutes a particular act.⁸

In addition to this social, conventional aspect of performative utterance, Austin also emphasises the *first-personal* aspect of such utterance. There is, Austin believes, something important about the first-person subject in the present tense. This can be easily seen by considering the difference between 'I promise' and 'he promises', or between 'I promise' and 'I have promised': the first in each pair is performative; the second is not. The second in each case does not *perform* any act, but is a description of a promise. In performative utterance, '[t]he 'I' who is doing the action does thus come essentially into the picture' (Austin 1975, p.61). For Derrida, this introduction of the first-personal subject will prove essential.

One way to explain the importance of the first-person would be through the concept of intention. One could argue that what is essential to the success of a performative utterance is that it must be *meant*, that it must be uttered 'seriously' (Austin 1975, p.9). What determines the meaning of a performative utterance, on the model of descriptive utterance, is the speaker's intention. The speaker 'expresses' or 'communicates' her intention or other inward mental state *through* the utterance. On this picture, the felicity of any performative utterance depends on the intention (or other mental state) of the speaker.

Austin argues that this move is mistaken. It would mean that performative utterances are really constative. The 'outward' act (the utterance) on this picture, Austin argues, would be merely a description of the 'inward performance' (the act of intending). Intention therefore cannot be definitive of performative utterance.⁹ Even a 'false' promise (one uttered without intending to promise) is still a valid promise – although perhaps 'given in bad faith... perhaps misleading, probably deceitful and doubtless wrong' (Austin 1975, p.11). As Austin says, 'our word is our bond' (Austin 1975, p.10).

⁷ On convention in Austin, see Searles (1965); Skinner (1970); Urmson (1977); Strawson (1964). More generally, see Lewis (1969) and Lewis (1975); the classic response is Davidson (1984).

⁸ See Austin (1975, pp.14-15) for his set of felicity criteria. I do not have space to analyse these criteria in this paper.

⁹ In principle, a similar argument could be levelled at any reduction of performative ('external') meaning to something like 'propositional content'. Austin's argument, taken at its most abstract, is that one cannot think of the meaning of any utterance (that is, any act of *speaking*, by someone, to someone else) as reducible to the external, outward 'expression' of content 'in the mind' of the speaker. Alice Crary (2002; 2006) has argued convincingly – though I do not address her argument here – that Austin's target is the idea of 'literal meaning', or meaning that attaches to a set of words independently of any context of utterance.

It is clear that Austin intends his concept of performative utterance to displace intention from its determinative role with respect to meaning. Words *do* things whether we intend them to or not. At the same time, Austin wants to insist on the claim that words only *do* things when *used* by a particular speaker, in a particular context.¹⁰

Derrida's reading of Austin

This tension between the social and personal aspects of the performative is Derrida's starting point for reading Austin. Derrida finds Austin congenial for two reasons: first, because they both share an openness to an understanding of language that goes beyond description, language that is not oriented purely towards truth;¹¹ second, because in Austin's concept of the performative, Derrida finds the value of 'truth' replaced by the concept of 'force' – a power to *act* which language *itself* has, outside any particular 'subject' of language.

Austin's idea of the 'performative', Derrida believes, shows us that language is not merely a 'communication' of 'semantic content' between two (or more) already-constituted subjects, where the meaning of what is said is fully determined by those subjects. A concern with performative utterance, for both Austin and Derrida, becomes a concern with the *subject* of language (the 'I' or the 'We').

Austin thus wishes to emphasise the importance of the first-person subject, while downplaying the centrality of 'intention' to our conception of the subject. Derrida criticises Austin precisely on this point: despite Austin's best intentions, Derrida claims, he still retains the concept of meaning that accompanies the concept of intention – the idea that the meaning of an utterance (whether performative or constative) can be exhaustively defined. This idea of 'absolute' meaning is what Derrida calls the 'totalisation' of the speech situation (Derrida 1988, p.15). Although Austin does not see the meaning of an utterance as

¹⁰ Perhaps Austin's message is simply that we must pay more attention to what the words we use actually do; that is, to make those words more *ours*. This injunction, like all deceptively simple philosophical injunctions, is harder to obey than it might at first seem. One is always in danger, as Humpty Dumpty was, of falling off the wall on either side. In this respect, it is instructive that the debate about the 'essence' of linguistic meaning, post-Austin, has been largely between some form of Lewisian 'conventionalism' and some form of 'mentalism' or 'intentionalism'.

¹¹ At least 'truth' understood as a correspondence between a proposition and the world: 'the *adequation-congruence* between a judicative utterance and the thing itself' (Derrida 1988, p.14). the legal metaphor is interesting. Derrida is connecting the *normative* sense of 'to judge' with what we may want to call a descriptive sense: 'to judge' the correspondence of one thing to another. His point is, presumably, that *both* sorts of judging (to the extent that they can be separated) rely on already-existing networks of meaning: the truth-relation does not stand outside and above (as the 'thing-in-itself') our (conventional) world of humanly existing things: a very Austinian thought.

determined by the intention of the speaking subject, he still (on Derrida's reading) retains the idea that an utterance *has* (theoretically, at least) a fully determinate, exhaustible meaning.

What replaces the concept of 'intention', on Derrida's reading, is that of 'convention'. 'Convention' is that which determines the meaning of an utterance, and the 'total' conventional context, although in any particular case perhaps incompletely known, has as its theoretical possibility and as its endpoint¹² an exhaustive determination of meaning: the possibility of 'absolutely meaningful speech' (Derrida 1988, p.14).¹³ Both of these concepts, for Derrida, rely on the idea of 'presence': an already-determined self present to itself; an already-determined meaning present to itself. The idea of 'presence' grounds meaning.¹⁴

What Derrida instead wants to argue is that the possibility of meaning does not require the 'grounding' of that meaning, whether in intention or in convention. There is not a 'pure' or 'literal' meaning which then finds expression in a particular context; rather, meaning is a function of the fact that the structure of language is iterable or citable; it is repeatable. Language, on the Derridean picture, does not require an

¹² For Derrida, Austin's conception of meaning still has an implicit teleology: the *goal* of an utterance is to perform (felicitously) a specific speech-act. While he thinks this is a step beyond a conception of meaning which merely focuses on *communication* (of 'content', compare with, for example, Dummett (1973, p.298): 'the utterance of a [declarative] sentence does not need a particular context to give it a point ... The utterance of a sentence serves to assert something'), Derrida's point is that Austin still thinks that the *value* of an utterance is to be judged by reference to its (intended) goal.

¹³ One may recall here Austin's insistence that there are not 'infinite uses of language' and his love of categorisation. For example, this pithy comment: '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, 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 1979, p.234).

¹⁴ There is a shift here in Derrida's reading of Austin, from the notion of a self present-to-itself to the notion of a fully specifiable meaning. Both can be seen as conceptions of the broader concept, important to Derrida, of 'presence'. The two notions are equivalent, for Derrida's purposes here, insofar as the self present-to-itself is only one way of getting to the more basic notion of fully specifiable meaning. This latter notion is the more appropriate one for the problem at hand here.

Whether or not Austin is committed to the notion of a self present-to-itself in addition to a notion of (contextualised) fully specifiable meaning is not a question I have room to address here; however, the best reading of Austin on this point, I think, must take into account his work on excuses, where Austin's focus on where, despite our best 'intentions', words go wrong seems to indicate, to me at least, that Austin is sensitive to the problems entailed by a notion of the self present-to-itself. It is worth noting in this regard that Searle, and following him, Habermas, both, I think, hold to both notions. Searle, for instance, takes intentions to precede and cause actions; in a successful act, the content of the intention is the same as (and determines) the content of the action. The issue is complicated further by the specifics of the constitutional case. The self-constitution of the constitutional subject seems to have the consequence that a full explication of constitutional meaning is equivalent to a self wholly present-to-itself. I am thankful to an anonymous reviewer for pointing this problem out.

outside determinant; its meaning comes about self-referentially. Meaning, for Derrida, is created and sustained through imitation and invocation; there is no ‘core’ meaning.

This idea of the *constitution* of meaning applies in particular to the concept of the subject. The subject, Derrida claims, is created *through* language and does not function to ‘ground’ language. This is well-trodden ground (Derrida 1973; Cadava 1991; Butler 1993; De Ville 2008) and I will not go into it here. Rather, I will see how Derrida draws this conclusion in political or constitutional discourse with respect to the American Declaration of Independence. Through this analysis, I will suggest that Austin’s work on performativity – in particular, the concept of the perlocutionary speech act – goes deeper than Derrida thinks.

Declarations of Independence

Derrida uses the Declaration as an example of the way in which a subject – ‘the people’ – is self-constituted through a linguistic invocation of itself. The Declaration, on Derrida’s reading, is important because it *does* something; it constitutes a people, as an act of the people. The Declaration founded a polity; it inaugurated the political imaginary of ‘America’. It is this that I mean when I describe the Declaration as a ‘constitutional’ document¹⁵ – although it is not a ‘constitution’ in the strict legal sense – and it is this function of the Declaration that I will limit myself to here.¹⁶

This question Derrida raises with respect to the Declaration is how – by what authority – does it perform this act, given that ‘the people’ do not exist prior to their constitution, and hence cannot authorise that

¹⁵ The Declaration’s constitutionality was recognised by the Founding Generation. James Madison strikingly 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’ (Mahoney 1986, p.46). John Quincy Adams, sixth President of the United States of America, 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’ (Adams et al 1831). Hannah Arendt (1963, p.125), over a century later, wrote that the Declaration initiated the ‘process which prepared and culminated in the Constitution of the Union, the foundation of the United States’.

Modern commentators make similar claims: Mahoney (1986, p.46) claims that ‘it is the Declaration that constitutes the American nation’; Lutz (1989) argues the Declaration, as a ‘covenant’ between the American people, created that national people; similarly, according to Balkin (1999, p.168), ‘[t]he Declaration is our constitution... because it constitutes us, constitutes us as a people “conceived in liberty, and dedicated to a proposition”.’ Other writers stress the close connection between the political principles contained in the Declaration and those of the US Constitution (Tushnet 1996; Himmelfarb 1990).

¹⁶ This is not to say, of course, that the Declaration cannot be understood as performing other acts; it may have other functions. One of these other functions may have been, as David Armitage (2002) argues, to act as a signal to France that the American colonies were again ‘open for business’, in order to prosecute successfully the war against Britain.

act?¹⁷ In Derrida's words, '[t]he "we" of the declaration speaks "in the name of the people". But this people does not yet exist. They do *not* exist as an entity, it does *not* exist, *before* this declaration, not *as such*' (Derrida 1986, p.10).

Derrida argues that the people are constituted through the Declaration, through what he calls an 'undecidability' between the performative and the constative. This undecidability is expressed in the Declaration's famous second sentence announcing the goals of the new American polity: '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'. The Declaration, Derrida argues, is ambiguous between the *performative* force of 'We hold these truths' and the *constative* force of 'to be self-evident' (Derrida, 1986, p.7).¹⁸

The same ambiguity or undecidability, Derrida claims, can be seen in the final declaration that nearly concludes the Declaration: 'We... the representatives of the United States of America... do in the name and by the 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' (emphasis added). Again, the conjunction of 'are' and 'ought to be', for Derrida, raises an ambiguity between the 'constation and the prescription, the fact and the right' (Derrida, 1986, p.11). It is thus, according to Derrida, 'undecidable' whether the force of the Declaration is constative or performative.

Derrida claims that this 'obscurity, this undecidability between ... a performative structure and a constative structure, is *required*... It is essential to the very positing or position of a right as such' (Derrida 1986, pp.9-10). For Derrida, therefore, the very force of the Declaration *comes from* this undecidability:

One cannot decide – and that's the interesting thing... – whether independence is stated or produced by this utterance... Is it that the good people have already freed themselves in fact and

¹⁷ I do not consider the question of representation in this paper, although it is an essential part of Derrida's reading of the Declaration – and, I think, central to the way in which speech act theory must be understood in connection to political or legal theory. Hannah Arendt (1963, p.236) is on to something when she writes that 'the whole question of representation, one of the crucial and most troublesome issues of modern politics ever since the revolutions, actually implies no less than a decision on the very dignity of the political realm itself'. See further Derrida's (1974) comments on Rousseau.

¹⁸ It is interesting that Austin (1975, p.68) recognises a similar problematic with respect to the verb 'to hold'. He lists it, along with 'to class', as verbs which are 'in a way [constative], in a way [performative]'. The ambiguity Derrida identifies is already present in Austin's own work, even without the claim to self-evidence which reinforces it in the Declaration.

are only stating the fact of this emancipation in the Declaration? Or is it rather that they free themselves at the instant of and by the signature of this Declaration? (Derrida 1986, p.9)

This undecidability means that the people – the ‘We’ – cannot be construed as existing prior to, hence as ‘authorising’ or ‘guaranteeing’ the Declaration. This is, I think, Derrida’s way of putting Austin’s point that any performative utterance should not be construed as an external description of an internal mental state. Rather, the people is created itself as an entity, as *such-and-such* an entity at the moment of the signing of the Declaration: ‘The signature invents the signer’ (Derrida 1986, p.10). The contradiction is that the ‘self-evident’ truths posited by the Declaration: equality, unalienable rights, the sovereignty of the people and the right to revolution, from which flows the freedom and independence of the colonies, are justified by and are posited on the basis of a prior existing natural law, and simultaneously, these truths are posited on the basis of, and justified by an appeal to, ‘the Authority of the good People’ of the United States of America: ‘We the People’.¹⁹

On the one hand, the appeal to natural law in the form of ‘nature’s god’ is constative: the truths upon which the new American polity will be based are merely *descriptive* of a higher true state of affairs; they are true by correspondence to the higher natural law. On the other, the equality of men and the unalienable rights of life, liberty and the pursuit of happiness are *performative* insofar as they are ‘held’ to be true by the ‘We’.²⁰

Derrida’s argument, then, is that the ‘performative moment’ is saddled with an aporia: if it is to be felicitous, it must claim authority from elsewhere. However, if it claims an external authority, it is no longer purely performative. This is true of any claim to authority: all such claims are afflicted with this unaccountable ‘remainder’. It is through this ‘remainder’, Derrida argues, that the subject is constituted.

Derrida’s remainder

While Derrida accurately identifies an ambiguity within the Declaration between the performative and the constative, and while he is right to argue that this ambiguity bears an essential relation to the performative

¹⁹ See further Honig (1991), who usefully compares Derrida’s conception of the Declaration to Arendt’s.

²⁰ Patrick Riley (1974; 1976) shows how this tension between ‘natural law’ and ‘consent’ plays out in Locke’s own political writings that most scholars accept form the philosophical basis of the Declaration.

subject of the Declaration, I argue that a better way to understand this subject is through a different Austinian distinction: that between the locutionary, illocutionary and perlocutionary acts. I will argue that the perlocutionary act is the relevant Austinian speech act for understanding how it is that constitutions (and constitutional documents) *constitute* a people, and that Derrida has understood performativity (as Austin himself does²¹) only in terms of the illocutionary.

I will set up this argument through looking at two aspects of the Declaration that Derrida does not address. These will initially further problematise the ‘performativity’ of the Declaration by providing more weight to the ‘constative’ or ‘descriptive’ side of the Declaration. They will thus necessitate, I will argue, a more nuanced understanding of the ‘performativity’ of the Declaration: how it does what it does. This discussion of these two lacunae will lead to my final claim that the Declaration is perlocutionary.

The beginning of the Declaration

The first thing Derrida has missed is that the fact that the Declaration does not *begin* with the performative contradiction between the ‘We hold’ and ‘these truths to be self-evident’. Rather, it begins with a *description* of a certain history that acts as a *justification* for the claims that follow. The first and often-overlooked sentence of the Declaration reads as follows:

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

Note that this sentence invokes the ‘Course of human events’: the British acts that compelled, or led, necessarily (according to its authors), to this Declaration of Independence. These facts are listed later in the Declaration, ‘submitted to a candid world’. That is, the declarative act itself – the ‘We hold’ – does not stand on its own terms; it is contextualised by and based in this history.

²¹ ‘It 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, at least if that is to be distinct from a constative. For clearly 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, and in particular by a straightforward constative utterance (if there is such an animal)’(Austin 1975, p.110).

Indeed, Thomas Jefferson in drafting the text of the Declaration did not see himself as creating a new justification for revolution, but merely as ‘express[ing] the ideas of the Whigs, who all thought alike on the subject’ (Becker 1942, p.25). These facts, this context, then, were ‘conventional’ insofar as they were ‘common sense’, or ‘commonly taken for granted’ (Becker 1942, p.26).²² In this sense, the Declaration is merely descriptive or constative of the prior common understanding of the Americans.²³ What is important here is the way in which the Declaration is a *response* to this prior common understanding. The Declaration was only an act (of the American people) insofar as it was a response to this history.

Importantly, this history was a *legal* history, and in that sense a *conventional* history. As Garry Wills (1978) notes, the acts of the British government in question were not just any acts reprehensible to the American colonies²⁴ – they were *grievances*, in the sense of legal concerns; more specifically, they were *constitutional* concerns. A grievance, writes Wills (1978, p.59), ‘had a particular technical meaning... It meant the denial of a constitutional right’. Listing the grievances was necessary because the Declaration was the final step in a legal process of petition to the King for redress. As the Declaration itself says: ‘In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.’ The extra-legal step of declaring independence, then, was a continuation – indeed, it was the ‘logical culmination’ – of the Congressional legal petitions of 1774 and 1775 (Wills 1978, p.64).²⁵

The invocation of ‘We’ here is also relevant to this idea of convention. Who could the ‘We’ be who was able to petition the King for redress? The Declaration must be understood as invoking (at least implicitly) the Americans’ status as British subjects, subjects of the King who on this basis have the power to petition. The ‘We’ here invokes the British constitution against which the Declaration is set. The rights

²² Garry Wills (1978) argues that Jefferson’s concept of ‘common sense’ is central to understanding the Declaration, and has its roots in the Scottish Enlightenment use of the term.

²³ Becker argues that although they may have been ‘common sense’ to the Whigs in Congress, they were certainly not common sense to the average American. On Becker’s reading, the Declaration was much a plea to the American people (inviting a response) as it was a justification to the British. Note, however, that modern American republican historians, including Bernard Bailyn (1967) and Gordon Wood (1969), do argue that these Lockean ideas were more or less common among the populace, spread by pamphlets and newspapers.

²⁴ Wills argues this explains the excision by Congress of Jefferson’s original inclusion, in the list of concerns, of the King’s perpetuation of the slave trade. Since the King’s perpetuation of slavery was not a *constitutional* concern going to the rights of the Americans as Englishmen, it was not relevant to their petition (Wills 1978, p.59; pp.67-69).

²⁵ The petition of 1774 enjoined Britain to ensure the colonists their rights as Englishmen, and the petition of 1775 outlined the Reasons for Taking Up Arms in defence of those rights.

claimed in the Declaration are not *new* rights, but the existing rights of Englishmen.²⁶ The Americans were not in a state of nature, but were Englishmen claiming the already-existing rights of their English heritage. The force of the Declaration, then, depends on this prior legal – indeed, constitutional – context which both textually precedes and follows the constative/performative ‘undecidability’ contained in the second sentence. Derrida’s claim of undecidability is more complicated than he makes it out to be; the ostensibly performative claim to independence implicitly relies upon a whole history of conventional, already defined legal and historical content.

The prior Resolution of Independence

The second point Derrida does not address is that the Declaration, adopted as it was on 4 July 1776, was not actually the instrument that legally ‘declared’ independence. That had been achieved two days prior, on 2 July 1776, by the first of three resolutions submitted to the Continental Congress by the Virginian Richard Henry Lee.²⁷ That resolution (the ‘Resolution of Independence’) declared that ‘these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.’ This statement, as history shows, would find its way into the final paragraph of the Declaration of Independence. The significance of this is shown by the fact that John Adams himself thought Independence Day should be July 2, not July 4. He wrote to his wife Abigail Adams on July 3, saying:

The second day of July, 1776, will be the most memorable epoch in the history of America. I am apt to believe that it will be celebrated by succeeding generations as the great anniversary festival. It ought to be commemorated as the day of deliverance, by solemn acts of devotion to God Almighty. It ought to be solemnized with pomp and parade, with shows, games, sports, guns, bells, bonfires, and illuminations, from one end of this continent to the other, from this time forward forever more (Adams et al 1975, p.140).

²⁶ See further Von Gentz (1977). Admittedly, there were reasons why the Americans did not claim their rights explicitly as British citizens. As Becker (1942, pp.80-134) outlines, the American arguments against British taxation had evolved, by the 1770s, to the stage where they could not coherently distinguish between legitimate and illegitimate taxation. Their move was thus to reject British Parliamentary sovereignty altogether, while still arguing that they owed allegiance to the King. This is why none of the grievances listed in the Declaration are grievances against Parliament.

²⁷ ‘It is often forgotten that the document which we know as the Declaration of Independence is not the official act by which the Continental Congress voted in favour of separation from Great Britain’ (Becker 1942, p.3).

Therefore, not only is the famous ‘We hold...’ sentence undecidable between the constative and the performative, as Derrida suggests, but the very nature of the Declaration *as a Declaration* (as a legal, illocutionary act – ‘We declare ourselves independent’) can itself be seen to be in question.

The perlocutionary language of the Declaration

I suggest that this repetition of the very phrase contained in the Resolution of Independence that *declares* independence functions to place that prior declaration in the wider justificatory context afforded by the Declaration as a whole. The need for this justificatory context, hence the Declaration as a whole, I argue, is best understood in terms of Austin’s perlocutionary act. The Declaration was directed *to* Britain, and *to* the American people that it was to create. This other-directedness is central to the perlocutionary act. Not only does Derrida’s analysis occlude the importance of the opening sentence of the Declaration, but, I argue, it occludes the bulk of what follows the second sentence. Upon reading the entire Declaration – not just its ‘key’ passages – the perlocutionary nature of the Declaration emerges.

Austin’s trichotomy – locution/illocution/perlocution

I now return to Austin’s *How to Do Things with Words* in order to understand this concept of the perlocutionary speech act. I am concerned here with perlocutionary *acts*, not simply perlocutionary *effects*. An act, I take it, is an event normatively attributable to an agent, for which an agent can be held responsible. The relationship between an agent and her acts is not simply causal. It is also normative. Mere effects, by contrast, are simply caused. Austin uses the term ‘perlocutionary’ to cover both acts and effects; indeed, he conflates them both at times to the latter category. I will take it for granted here that the distinction I make between acts and effects, and hence the subset of the perlocutionary that I characterise as perlocutionary speech acts, is made clear enough with the examples I outline below.²⁸

In the second half of *How to Do Things with Words*, Austin, for a number of reasons not immediately relevant here, realises he cannot maintain the distinction between the performative and the constative. Instead, Austin (1975, pp.94-101) proposes a trichotomy of ‘speech acts’: the locutionary act (the act *of* saying something); the illocutionary act (the act that is done *in* saying something); and the perlocutionary act (the act that is done *by* saying something). The illocutionary is that which is done *directly* in the saying

²⁸ I thank an anonymous reviewer for pushing me on this clarification.

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’ (Austin 1975, p.117).

Suppose I say to you, ‘I promise to take you to the movies tomorrow’. According to Austin’s analysis, 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* 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, or alarming you (if I have bad cinematic taste).

What is immediately evident here is that the perlocutionary act follows from the locutionary act in a very different way to the illocutionary act. Unlike the relationship between the illocutionary and the locutionary, it is not predetermined which perlocutionary act will result from any locutionary act. Some other interesting facts become apparent by comparing the illocutionary and perlocutionary acts. Illocutionary acts can be put into what Austin calls the ‘explicit performative form’ – the first person present indicative active: to say ‘I promise X’ *is* to promise. Perlocutionary acts, however, cannot be so put: to say ‘I frighten you’ is not to frighten you; to say ‘I frighten that ...’ is to say, so far, nothing at all.

Austin says that his interest is to ‘fasten on the second, illocutionary act and contrast it with the other two’ (1975, p.103). He equates the illocutionary act to the ‘performative’, and excludes the perlocutionary act from consideration: ‘It is certain that the perlocutionary sense of ‘doing an action’ must somehow be ruled out as irrelevant’ (Austin 1975, p.110). This is because the perlocutionary is not rule-bound in the same way as the illocutionary act: it 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’ (Austin 1975, p.110). Austin’s perlocutionary act *is* a performative speech act for which, in Derrida’s (1988, p.15) words, ‘a possible risk... is *always* possible, and is in some sense a necessary possibility’. A perlocutionary act can fail to come off for reasons which are *not* evident from the speaker’s intention, or from the direct context. A perlocutionary act is *always problematic*. For Austin, this necessary risk means the perlocutionary is of secondary consideration to the illocutionary: analysis of the perlocutionary effects of an utterance must follow a consideration of its illocutionary force.

It is important to note that Derrida follows Austin in limiting the word ‘performative’ to illocutionary acts, and hence in occluding the perlocutionary. It is only the illocutionary act that is conventional and can hence be defined ‘completely’. Derrida’s critique of Austin, I argue therefore, only applies to the illocutionary.

Characteristics of the perlocutionary – responsiveness and confrontation

This is an oversight that requires rectification. How might we characterise the perlocutionary, given Austin’s neglect of the concept? I suggest, broadly following Cavell (2006), that the perlocutionary should be understood in terms of *responsiveness* and *confrontation*.²⁹ It is these two characteristics, I claim, that give the perlocutionary *constitutive* force. The perlocutionary is that which constitutes (and re-constitutes) the subject of any utterance.

Let us return to the promising example. Whereas the illocutionary act of promising is determined, as Austin says, by the ‘I’ (said in a certain context, etc), the perlocutionary act (of alarming, horrifying, convincing) relies on *you*.³⁰ While I cannot say ‘I alarm you’ to alarm you, I can say something like ‘I alarm you, it seems’. This locution shows that the first person in the perlocutionary case ‘requires displacing or disclaiming’ (Cavell 2006, p.170). What is significant here is a twofold acknowledgment: first, by you of whatever I have said *as* alarming; second, by me of the effect I have (perhaps unwittingly or accidentally) had on you. What is important is this acknowledgment – you have to take my words in a particular way, *as* a particular action for them to have that effect.

This means that the success of any perlocutionary speech act requires a *response* from the person addressed. It is not simply a determinate function of the speaker’s intention, nor of the context. This response is of a particular kind. It is not like the response given to an illocutionary act, say an offer to contract. Unlike accepting a contract, or agreeing to a proposal, the response here is not fully active, in the Cartesian sense of self-originating. In a sense, it is not entirely up to me how to take your action. That

²⁹ Cavell does not use these terms; however, I do think they are an accurate encapsulation of (at least some of) the themes that he grapples with in that engaging paper. See, in particular, his seventh ‘perlocutionary condition’ (intended to contest Austin’s own felicity criteria): ‘You may contest my invitation to exchange, at any or all of the points marked by the list of conditions for the successful perlocutionary act, for example, deny that I have standing with you, or question my consciousness of my passion, or dismiss the demand for the kind of response I seek, or ask to postpone it, or worse. I may or may not have further means of response’ (Cavell 2006, p.182).

³⁰ ‘The ‘I’ who is doing the action does thus come essentially into the picture’ (Austin 1975, p.61), compare: ‘[i]n perlocutionary acts, the “you” comes essentially into the picture’ (Cavell 2006, p.170).

I find you promising, from behind the bushes, to take me to the movies alarming is not my *choice*; indeed, I may wish it otherwise. Neither is it, however, *merely* an effect your words have on me in a purely causal sense. (Compare the causal perlocutionary *effect* a child's screaming has on me: it simply *hurts* me, and causes me to drop my expensive Ming vase, which I happen to be cleaning at the time. Do we hold the child responsible for the breaking of the vase? Am *I* responsible for the breaking of the vase? I did not *break* it simpliciter, and neither did the child, although it is now *broken*.)³¹ The response to a perlocutionary act, which in turn characterises that act, is not fully active, nor is it simply passive. It is a curious mix of the two.³²

That curious mix between activity and passivity shows itself in the fact that this response can be *contested* – the felicity of any perlocutionary act is a matter of confrontation between the parties to the utterance. I *may* have horrified you through my promise; but this claim must come from *you*, and once it is issued, I can claim various excuses: I can claim not to have meant to, or even not to have done it. What is at stake in this confrontation is *our* relationship – a 'We' has formed in the course of the confrontation. Importantly, this responsiveness turns on the history between us, on the existing 'conventions'. A perlocutionary act, through inviting response, re-interprets or redraws this history. It is both contextual and creative of a new possibility.

What is significant about the perlocutionary, therefore, is that it displaces or disclaims the 'I' in reliance upon the 'you'. This reliance upon the other invites confrontation as to what perlocutionary act has actually been performed, if any. You may accuse me of alarming you by inviting you to the movies; I may provide an excuse: that was not my intention; you may respond by claiming that 'I should have known better', and so on. Perlocutionary speech acts are 'essentially contestable' (Gallie 1956).³³

³¹ Austin's work on excuses is relevant here. I am thankful to an anonymous referee both for the example and for pushing me on this point.

³² This mix of active and passive has consequences for the kind of normativity that attends perlocutionary acts, as well as the kind of responsibility one takes for them, and for one's response to them. I cannot be *blamed* for finding your promise alarming, though in a sense I am partially responsible for it being alarming, insofar as, given the right circumstances and the right relations between us, I could find it otherwise than alarming. The question of the kind of normativity attached to a perlocutionary act is a topic for another discussion.

³³ I reiterate that perlocutionary acts are 'essentially contestable'; they need not necessarily be contested. There is merely the necessary potential for contestation.

Hence, in their reliance upon the 'you' and with this possibility of confrontation, perlocutionary acts must contain the possibility of failure. The confrontation may not come off successfully for either party, and what 'success' means, again, is a matter for contestation. Importantly, how it may fail cannot be 'read off' conventionally from the context, nor can it be gleaned from the participants' intentions, as their intentions may be misread or misunderstood.

In this act of confrontation, then, a perlocutionary speech act constitutes a *new* subject, a 'We'. This new plural subject, although created by and through a perlocutionary speech act, determines the conditions for that act's success; that is, the terms upon which it is to be understood and judged. This 'We' that is created is not exhaustively determined by the context, nor by the 'I's that comprise it. It is not defined by convention or by intention. Instead, the plural subject is *relational* insofar as it only exists in the relations and confrontations between (and perhaps within) individuals. It is essentially open to contest and to reconstitution.

This openness means that the acting subject that is constituted by a perlocutionary speech act is fragile. It is always possible that the subject (and the individual components of that subject) comes apart; that it reverts back to conventionality or the private intentions of the individuals that comprise it. In this case, nothing new is created. Indeed, nothing new is achieved; of course, this may be precisely what is needed or desired. My contention is, however, that the *constitution* of a people as an acting subject requires a perlocutionary speech act, and that it requires, furthermore, that what results from this act does not simply revert back to conventionality or to private intentionality.

It is worth at this stage addressing briefly a possible objection to my account. It could be argued that the very concept of performance presupposes a performer; hence, perlocutionary speech acts cannot logically themselves be constitutive of subjects. My response here has two parts. The first is simply to stress the fact that the constitutional subject is *plural*; that what is formed and reformed through perlocutionary action is a collective subject. It is the speech acts of individuals constituting themselves and each other in particular ways that forms the plural subject; and, as I emphasised earlier, the plural subject exists only in those constitutive relations between individuals.

The second part of the response, which I cannot develop fully here, is a stronger claim: that individuals themselves ('you' and 'I') are constituted through perlocutionary speech acts, because *who* each person *is* changes and develops through those relations that constitute the plural subject. We find ourselves in relation to others. To develop this line of argument would be to stress the constitutive nature of intersubjective relations generally; that is, to give full force to the adjective 'constitutional' in its original, embodied sense.³⁴

The Declaration as perlocutionary speech act

My claim in response to Derrida, therefore, is that the Declaration constitutes the people as a perlocutionary speech act. Where Derrida sees an undecidability between the performative and the constative, I want to argue that it is the perlocutionary aspects of the Declaration that bring together the performative and constative elements. There are (at least) three aspects of the Declaration that make this reading plausible.

First, as outlined above, the Declaration was a *response* to the conventional, legal history recited at the beginning of the Declaration. It was the 'logical culmination' of the constitutional petitions of 1774 and 1775, which invoked an understanding of the Americans as British subjects: 'In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.' A petition essentially invites a response. Its 'felicity' is in question at all times – hence the need for restatement of the 'Resolution of Independence' in the later 'Declaration of Independence'. The accuracy of the Declaration itself was contested after its publication in 1776 on both sides of the Atlantic – by the ex-Massachusetts Governor and English loyalist, Thomas Hutchinson (1776), and by the contemporary English pamphleteer, John Lind (1776).³⁵

³⁴ One such line of argument would focus on the processes of social recognition that occur in and through speech acts, and which are part of the process of constitution of the political subject. Another line of argument (the 'republican' line of argument) would focus on the development of individual character through perlocutionary speech acts in the public sphere. I think, in fact, that these two lines of argument are closely related (as Pettit (1997, Ch.4) suggests; see also Skinner (1978) and, in a different key, Taylor (1991), who also addresses the idea of a 'reversion' to the private from the public) and need to be brought together; but I do not have space to support this further suggestion here. Arguably, Rousseau makes a version of this argument in *The Social Contract* in his contrast between the public body and the private body; see Strong (2002).

³⁵ Both Hutchinson and Lind contested not only the accuracy of the facts contained in the Declaration, but also – as good lawyers – the claim that independence was a necessary result of those facts, even if they did obtain. However, the bulk of their responses was directed to the factual accuracy of the Declaration (Wills 1978, pp.65-66).

Lind, in his 1776 pamphlet *An Answer to the Declaration of the American Congress*, argued that the American revolutionaries were merely *traitors* and rebels. Their list of grievances was inaccurate, Lind argued, and even if the grievances were true, they would not justify independence, which could only come as a result of a grant from the Crown. He argued the Declaration was akin to Captain Kidd declaring himself independent: ‘Instead of the guilty pirate, he would have become the *independent* prince; and taken among the “*maritime*” powers—“*that separate and equal station, to which*”—he too might have discovered—“*the laws of nature and of nature’s God entitled him*”’ (Lind 1776, p.95).

Using the concept of the perlocutionary, we can say (anachronistically) that those, like Lind, who read the Declaration as an appeal only to nature, missed the *perlocutionary* aspect of the Declaration. To understand the truths contained in the Declaration *only* as ‘self-evident’ or natural – hence as constative – and not *also* as the result of the ‘We hold’, is to miss the very ‘undecidability’ Derrida later points to between the constative and the performative. It is to read the Declaration merely as fact, and to ignore the explicit perlocutionary aspects of the document, particularly the language used in the second half.

Lind’s constative reading of the Declaration’s recourse to natural law theory reveals something of the importance of the perlocutionary to political and legal theory. Lind, in construing the Declaration in constative terms, claims that the only authority a text can have is *authorial*; that is, authority that stems from an already-existing and already-constituted (divine) source. For Lind, the right to declare independence; that is, the right to make *performative* utterances of one’s own, is reserved to the Crown in exercise of its divinely granted prerogative. Any assumption of performative right is therefore immediately revolutionary. The dichotomy between constative and performative, here, becomes a dichotomy between legitimate authority and extra-legal power. What the concept of the perlocutionary allows us to say, against this dichotomy, is that authority is *relational*. It gives us a conception of authority that is not determined either by the existing context (the reservation of prerogative powers to the Crown) or by some sort of pure ‘intention’ (of the authors of the Declaration). It allows us to make sense of the claims to authority that inhere in the history, and thus allows us properly to conceptualise the development of the meaning of a constitutional text in its relation to the subject it creates and which is

then posited as its creator. Meaning, on a perlocutionary reading, is not a function of either text or context, or of the simple interplay between them, but of the *claims* to authority that that text generates.

The second relevant aspect of the Declaration is that these claims to authority are evident in the text of the Declaration, in the form of appeals to the British demanding response. The second half of the Declaration reveals that not only had the Americans '*warned* them [the British] from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us' (an illocutionary act), they had also '*appealed* to their native justice and magnanimity' and '*conjured* them by the ties of our common kindred' (acts all inviting response and confrontation, drawing on their shared history). These appeals and conjurations, the Declaration claims, have all been rejected by the British, leaving only the exercise of force. The British, we may say, refused to participate in the contestation of the 'We' that was claimed to exist between them and the Americans, leaving the Americans to constitute a new 'We' on the basis of that rejection.

Third, in concluding, the signers of the Declaration 'mutually pledge[d] to each other [their] Lives, [their] Fortunes and [their] sacred Honor.' This vow, normally made between 'traitors' and conspirators, evinces, as Robert Cover (1985, p.1606) argues, 'an awareness of the risk of pain and death that attends so momentous an interpretive occasion.' Cover notes that '[l]ife, fortune, and sacred honour were, of course, precisely the price that would have been exacted from the conspirators were their act unsuccessful'.³⁶

This mutual pledge, while having the form of an illocutionary verb (in that the locutions 'I pledge that...', or 'I pledge to you' *are* pledges, on the face of it), is reliant upon the response of others; indeed, is an act which is both addressed to others and speaks for others. A pledge is not felicitous unless it is mutual. This is the act whereby those pledging individuals form the 'we' – not on the basis of any shared or common interest, but on the basis of a shared willingness to *commit* to this 'we' – here, even on pain of death. This willingness does not rely on social convention nor on personal intention, but on the responsiveness to the other and the confrontation with the other that characterise the perlocutionary

³⁶ Cover further refers to Blackstone's account of punishment for treason in his *Commentaries*, namely to be hanged, drawn, and quartered. The extreme violence of this punishment reflects the seriousness of the 'crime' (of treason) committed by the Americans: it was not only a breach of a law, but an attack on the very human relations that underlie law. It is the recognition of this fact (Wills 1978) in the Declaration that gives it such perlocutionary force.

speech act. However, this act of committing to the other is also always open to failure. The other can reject our act, or unintentionally let us down. There are endless possibilities for failed ‘uptake’. In this sense, the ‘We’ created by the Declaration was fragile. Its authors recognised this fragility, put to the test of arms; hence the attempts at constitutionalisation of the Declaration’s basic ideas that followed in the Articles of Confederation and the final Constitution.

The Declaration was thus an act which put at risk its own felicity – so much so that its authors swore to secure its felicity at the cost of not only their lives, but their fortunes and honour as well. This risk was accepted by its authors; they knew its felicity did not just rest on them, but on the response of others: the response of the British, and the response of their fellow Americans; and on the confrontation with those others. It was this responsiveness and confrontation – the perlocutionary aspects of the Declaration – that constituted the people and the new idea of ‘America’. The felicity of the Declaration is not secured by an appeal to any external authority. It is, rather, left intentionally open. The success of the Declaration as a constitutional act consists in nothing but the constitution of ‘America’; the constitution of ‘the people’. Its authorisation lies in nothing but the same. In this openness to failure, in recognising the possibility of failure, the Declaration constitutes ‘the people’ as a ‘We’, as a perlocutionary act of the people.

Conclusion

What is essential to understanding the Declaration, I have argued, is not just the undecidability between the (illocutionary) performative and the constative, but the way in which the perlocutionary brings both sides of the dichotomy together. Understanding the Declaration as a perlocutionary act allows us to understand how, as an act of the people, it is constitutive of the people.

The oft-overlooked perlocutionary speech act, I have argued, is the ‘gold in them thar hills’ that political and legal theory generally can glean from a return to Austin’s own work on speech acts – at least, from returning to Austin in Austin’s own spirit; not as gospel, but as a starting point for inquiry. The gold lies in the area of the perlocutionary for two related reasons. First, the perlocutionary speech act does not rely on an already-existing subject; rather, the perlocutionary *constitutes* a plural subject – a ‘We’ – through the

speech act itself. This is because perlocutionary speech acts require response, and invite confrontation. In contrast with illocutionary acts, for which ‘the I ... come[s] essentially into the picture’, perlocutionary acts create a relationship with a ‘you’.

Second, because the subject is created *in* the perlocutionary act itself, the meaning of such an act is not exhausted by the intention of the speaker (which may be wholly irrelevant to what perlocutionary speech act is in fact performed) nor by the context. Instead, the meaning of perlocutionary speech acts is open and always (at least partially) un- or under-determined. Perlocutionary meaning is relational. It is a matter of how claims to authority are generated and received. A perlocutionary act therefore always contains the possibility of infelicity, because what counts as felicity is exactly what is at stake.

Reading constitutional texts as perlocutionary acts, therefore, recognises this contestability. It recognises that constitutional authority is always granted on the basis of how a particular claim is received, and that constitutional authority is therefore not divine, but human and open to human frailties. If we are to maintain our constitution and our society, therefore, it is up to us and our use of our words.

If there is one thing that Austin and Derrida hope to teach us, each in their different way, it is that what we mean by our words and what our words mean always have the potential to come apart. It is in the recognition of this possibility of failure, I want to suggest, that ‘we’, through our words, can come together. It is this possibility, in the constant shadow of the possibility of infelicity, that constitutes the importance of the perlocutionary speech act.

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