Scott Soames Response to Richard Fallon

How can ***speech act*** models be significantly applied to plural agents? They can because the contents of the acts (asserting, guaranteeing, and promising) are intersubjectively defined, rather than extracted from private cognitions. To *assert that p* is to commit oneself to p's being true; *to promise to Phi* is to commit oneself, often by *asserting* that one promises, to making it true that one *Phi's*. What an agent uses a sentence S to assert is *what an attentive rational hearer who knows the meaning of S, and who is aware of the intersubjectively available features of the context, would be most justified in taking A to intend to assert.*

Because assertion is a move in a social language game it carries content-bearing obligations. Some uses of language are private. We privately use sentences to prove propositions, imagine scenarios and plan actions. Some uses are social. To *promise* to do Phi is to promise *someone* we will do it, which gives that someone a claim on us. The same is true of *assertion.* To assert that p is, roughly, to give one's guarantee that p is true. ***These speech acts are governed by social rules because their function is to provide others with reasons for thinking, feeling, and acting. Because the resulting thoughts, feelings, and actions may be consequential, the contents hearers justifiably assign to one's remarks are those for which one is responsible.*** They are propositions asserted, guaranteed to be true, or promised to be made true.

The same is true of lawmakers collectively adopting a text. What they assert is *what a knowledgeable hearer who understands the text's linguistic meaning, publicly available facts, relevant lawmaking history, and the background of existing law into which the new law will fit, would be justified in taking the lawmakers to commit to.* It's not necessary that actual addressees know all this, but it must be possible for one to come to know it. It's also not necessary that lawmakers know all aspects of the contents of bills they have adopted. It's enough that the contents *be rationally derivable from the meaning of the text plus the full context and public record.*

An individual speaker using a sentence S typically has two assertive intentions. One is to assert the speaker's privately cognized proposition p, thereby vouching for its truth. The other is to assert *the proposition Q justifiably derivable from the speaker's use of S,* thereby vouching for it. To ensure communication, ***S is chosen so that p and Q coincide.*** Sometimes, however, the intentions come apart because the private proposition p isn't rationally derivable from the speaker's performance, but Q is. ***Then it is, Q, not p, that is asserted***.

This is common with plural speech. To say that a plural agent *asserts*, *stipulates, or promises* that *so-and-so* is ***to treat the plurality as a rational agent using language to communicate with others***. Imagine 10 lawmakers voting on a text, with which each privately associates an interpretive proposition p. When the text gets 6 votes, it is associated with 6 intentions to guarantee the truth of whatever proposition Q is justifiably derivable from public facts about the meaning of the text, legislative history, and the body of law into which the bill is expected to fit. Q thereby becomes law, even if it differs from some or all of the private propositions p associated with the text by the 6 supporters because some or all of them are ignorant of the difference between Q and their private p's or because they think the difference doesn't matter. ***This is what it means for collective legislative assertive intentions not to be aggregates of private assertive intentions.*** If you don't recognize this, but instead emphasize historical records of private intentions, as Richard seems to do, you are bound to underestimate the substantive ***original assertive content*** of complex, contentious law.

If you do recognize this methodological point, you will understand how and why original asserted contents often far exceed the minimal originalist contents Richard recognizes. Take the 14th Amendment. When I plug John Harrison's work into the plural speech act model, I treat Congress as a rational agent using the *privileges or immunities* clause to guarantee colorblind civil rights created by state law that enable citizens to live normal, self-sufficient lives. When I plug in Mike McConnell's work on efforts of congressional supporters to ***enforce*** the Amendment, and on efforts of Southern states ***to appear to comply with it*** in order to gain readmission, I find evidence that the original asserted content of the Amendment was understood ***not to permit segregation in important domains of public life.*** Because public education was then in its infancy, it's arguable that segregated education may not have been such a domain in 1868. But it's clear that within a few decades it became one, thereby triggering colorblind rights in public education with the same status as those listed in the 1866 Civil Rights Act, which the Amendment was intended to constitutionalize.