

# Constituent power-with

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## Abstract:

Constituent power is an idea with a long tradition in modern political thought but has been largely abandoned since the middle of the twentieth century. Here I offer a new account of constituent power that avoids problems of the classical account, including the paradox of constitutionalism, and clarifies how individuals contribute to creating their shared political order. I argue that constituent power should be understood as an individual power-with: the agential power to constitute a legal order with others. Our individual, banal acts of law-abidingness each partially effect the collective outcome. We generally exercise constituent power unconsciously and automatically, guiding our actions to succeed as defined by law and relying on the legal system to take up our contributions and effectively combine them with others.

## Keywords:

Constituent power, political legitimacy, power, law, intentionality

## Main text:

“My system is quite simple,” wrote Napoleon Bonaparte three days before being proclaimed Emperor. “I am the constituent power.”<sup>1</sup> Napoleon was deploying language popularized fifteen years earlier by Emmanuel Sieyès, who distinguished constituent power (*pouvoir constituant*) from constituted power (*pouvoir constitué*).<sup>2</sup> Constituted power is the sort of political power we are familiar with in our daily lives: legislators passing laws, judges issuing opinions, police stopping

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<sup>1</sup> Napoleon Bonaparte, “May 15, 1804,” in *The Corsican: A Diary of Napoleon’s Life in His Own Words*, ed. R. M. Johnston (Boston: Houghton Mifflin, 1910), 182.

<sup>2</sup> Emmanuel Joseph Sieyès, “What is the Third Estate?”, in *Emmanuel Joseph Sieyès: The Essential Political Writings*, ed. Oliver W. Lembcke and Florian Weber (Leiden: Brill, 2014). On the terms’ origins, see Michael Sonenscher, *Sans-culottes* (Princeton: Princeton University Press, 2009), 308ff.

drivers. Such power can only be exercised in an institutional framework, which creates official positions, defines powers, and otherwise enables politics. The institutional framework itself must be created, and that is the work of constituent power.

Since Sieyès' 1789 pamphlet, constituent power has consistently been at the center of constitutional debates. In the early days of the first French republic, Sieyès used it to resist Robespierre's appeals to popular sovereignty.<sup>3</sup> Napoleon claimed it to explain how he could transform that republic into an empire. Constituent power was an important topic in continental Europe and South America throughout the nineteenth and twentieth centuries.<sup>4</sup> It continues to appear in political practice. Two examples: in 1992, considering the European Union, the French Constitutional Council wrote, "the constituent power is sovereign;" in 2017, calling a Constituent Assembly, Venezuelan President Nicolás Maduro declared, "I convene the original constituent power."<sup>5</sup>

However, the idea of constituent power has been largely abandoned in political theory and philosophy since the middle of the twentieth century.<sup>6</sup> The reasons for this are complex. Sociologically, part of the explanation is postwar disdain for Carl Schmitt, with whom constituent power was associated.<sup>7</sup> Politically, the language of sovereignty became dominant in the twentieth century, so Sieyès' alternative of constituent power lost out.<sup>8</sup> Philosophically, Sieyèsian theories of constituent power rest on anachronistic ideas of pre-politically formed nations that legitimate political orders on a contract model. When modern thinkers rejected these ideas, they ran into the paradox of constitutionalism, which Hannah Arendt characterized as the "vicious circle of *pouvoir constituant* and *pouvoir constitué*."<sup>9</sup>

The core insight of theories of constituent power is that the political ordering of society is something that people *do*, so something that people can do differently, can be responsible for, and so on.<sup>10</sup> This attractive idea is plausibly central to modern political thought. Jürgen Habermas describes it as the French Revolution's legacy of revolutionary consciousness: "the conviction that emancipated individuals are jointly called to be authors of their destiny. In their hands lies the

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<sup>3</sup> Lucia Rubinelli, *Constituent power: A history* (Cambridge: Cambridge University Press, 2020), ch. 1.

<sup>4</sup> Rubinelli, *A history*, chs. 2-5; Joel Colón-Ríos, *Constituent power and the law* (Oxford: Oxford University Press, 2020), chs. 5-7.

<sup>5</sup> See Colón-Ríos, *Law*, 14, 257, 269, and elsewhere for more examples.

<sup>6</sup> The main exception is constitutional theory; see, e.g., Andrew Arato, *The adventures of the constituent power* (Cambridge: Cambridge University Press, 2017); Markus Patberg, *Constituent power in the European Union* (Oxford: Oxford University Press, 2020); Alessandro Ferraro, *Sovereignty across generations* (Oxford: Oxford University Press, 2023).

<sup>7</sup> Carl Schmitt, *Constitutional Theory*, ed. Jeffrey Seitzer (Durham: Duke University Press, 2008): 125ff.

<sup>8</sup> Rubinelli, *A history*, 33ff.

<sup>9</sup> Hannah Arendt, *On Revolution* (London: Penguin Books, 1990 [1965]): 166.

<sup>10</sup> I do not pursue responsibility here, but see Iris Marion Young, *Responsibility for justice* (Oxford: Oxford University Press, 2011).

power to decide about the rules and manner of their living together.”<sup>11</sup> The problem is that this power has been difficult to clearly and adequately explain. Today, however, we have new theoretical tools from a wide variety of disciplines that illuminate the relationships between individuals and social structures.

In this paper, I articulate a new account of constituent power. I characterize three main aspects of constituent power: what kind of power it is, how it is exercised, and what outcomes it exercises effect.<sup>12</sup> The Sieyèsian view says that constituent power is a collective power-to, exercised on a contractual model, that effects a constitution. In contrast, my account says that constituent power is an individual power-with, exercised on a fluent agency model, that partially effects a legal order.<sup>13</sup>

In some ways, then, my account changes the subject. Instead of focusing on grand founding moments, I focus on banal moments of people complying with law and thereby contributing to a way of living together. People’s power to make politics is not exercised at the outset and set aside; it is something that every individual legal subject has and that most subjects must regularly exercise to make a political order. When someone crossing the street is guided by law (in the sense I explain below), they exercise constituent power. When an oncoming driver is guided by law to stop, they exercise constituent power. When exercised across sufficiently many domains by a sufficiently high proportion of community members, the result of such commonplaces is a new form of community life, a legal order. Explaining legal orders and explaining constitutions are different projects, but my approach remains true to the ambition to explain how people make their own political order.

Here’s the plan. I begin in section I by describing the classical account of constituent power and its main obstacle, the paradox of constitutionalism. I then address each of the three core aspects of my account. In section II, I explain what outcome exercises of constituent power produce: legal order. In section III, I explain what kind of power constituent power is: power-with.<sup>14</sup> In section IV, I explain how constituent power is primarily exercised: fluent agency in the context of a legal system, through what I call incorporation and scaffolding. Drawing all these elements together, section V articulates my account of constituent power as the individual power to constitute a legal order with others.

A final introductory note. My goal is a descriptive account. An accurate explanation of constituent power, how it is exercised, and its effects is enough to occupy us here. I certainly do

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<sup>11</sup> Jürgen Habermas, *Between facts and norms*, trans. William Rehg (Cambridge: The MIT Press, 1998), 468.

<sup>12</sup> I use “effect” to leave open non-causally produced outcomes; see fn. 79 below.

<sup>13</sup> Peter Railton, “Practical competence and fluent agency,” in *Reasons for Action*, ed. David Sobel and Steven Wall (Cambridge: Cambridge University Press, 2009), 81-115.

<sup>14</sup> Arash Abizadeh, “The Power of Numbers: On Agential Power-With-Others Without Power-Over-Others,” *Philosophy & Public Affairs* 49/3 (2021): 290-318; “The Grammar of Social Power: Power-to, Power-with, Power-despite and Power-over,” *Political Studies* 71/1 (2023): 3-19.

not aim to give a full normative theory of constituent power, let alone political legitimacy.<sup>15</sup> But legitimacy will arise throughout our discussion, since constituent power's ultimate interest is its purported ability to explain how political rule can be justified to those being ruled over. For our purposes, a minimal sense of this justification will be most useful, so in various places I connect constituent power to Bernard Williams' realist approach to legitimacy. For Williams, legitimate rule must make sense as "an intelligible order of authority" to those being ruled.<sup>16</sup> Almost nobody, including Williams, holds that such intelligibility is sufficient for legitimacy.<sup>17</sup> But something like collective intelligibility is widely held to be necessary for legitimacy, particularly under the guises of sociological legitimacy and de facto authority. By the end of the paper, we will see that constituent power-with explains why: rule must make sense to individuals because individuals are the ones who live the rules and thereby partially effect a rule-governed order.

### **I. Classical constituent power**

Sieyès represents what I will call the classical account of constituent power, which is committed to a contractual model of legitimacy.<sup>18</sup> In this section I explain the classical account and its main theoretical challenge, the paradox of constitutionalism. In my view, the paradox is decisive, but its source is the classical account's model of legitimacy, not the very idea of constituent power. As others have argued both within and outside the debate over constituent power, a contractual model of political legitimacy should be rejected.<sup>19</sup> Revisionist accounts of constituent power, including my own, appeal to a different model of legitimacy.

As noted above, constituent power is contrasted to constituted power. Constituted power is institutionalized power, the sort at work in everyday politics; constituent power, sometimes also termed constituting power, is what brings constituted power into existence. Of course, most constituted power is straightforwardly created by other constituted powers: modern administrative agencies such as the Environmental Protection Agency are the creation of the executive and legislative branches. The branches are, in turn, defined and created by the constitution. But constitutions are not the creation of other legal powers, so their creation needs a different explanation.

Constitutions originate in an action such as a ratification or referendum. How can an action create a binding normative order? Under what conditions does such an attempted act fail? Constituent power was posited to answer these questions, to the extent that some authors simply

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<sup>15</sup> On legitimacy in general, see N. P. Adams, "The Concept of Legitimacy," *Canadian Journal of Philosophy* 52/4 (2022): 381-95; for a more specific application, see N. P. Adams, "Institutional Legitimacy," *The Journal of Political Philosophy* 26/1 (2018): 84-102.

<sup>16</sup> Bernard Williams, *In the beginning was the deed* (Princeton: Princeton University Press, 2005), 10.

<sup>17</sup> Williams, 6.

<sup>18</sup> On the variety of classical accounts, see Rubinelli, *A history* and Colón-Ríos, *Law*.

<sup>19</sup> Cf. Carole Pateman, *The problem of political obligation* (Berkeley: University of California Press, 1985).

rechristened it constitution-making power.<sup>20</sup> On the standard telling, only “the people” possess constituent power and so only the people can successfully inaugurate constitutions. Once the constitution is in place, the people’s constituent power is generally quiescent (though not alienated, so reclaimable during crises).

Sieyès’ three-stage genealogy highlights the classical account’s problems.<sup>21</sup> First, there are disconnected individuals, who form a nation in virtue of their affective ties. Second, those individuals discuss notions of the common good and form a collective will. At this stage the collective gains agential powers: “The community needs a common will; without singleness of will it could not succeed in being a willing and acting body.”<sup>22</sup> As the community becomes larger, they encounter the need for specialized political functions and so a government. Stage three begins when the nation exercises constituent power to make the constitution, bringing the government into existence. The crucial point is that at stage two there are no constituted powers, but the nation exists as a collective agent that can exercise constituent power. The nation “owes its existence to natural law alone,” so can exercise constituent power without the constituted powers of positive law.<sup>23</sup>

One problem for Sieyès is that nations are not pre-political collective agents. Collectives of the sort that can exercise agential power can only be the result of politics. Once we admit this, however, we encounter the paradox of constitutionalism: constituent power must be legitimately exercised to bring legitimate constituted powers into existence, but legitimate constituted powers must exist for constituent powers to be legitimately exercised.<sup>24</sup> Legitimate constitutional founding appears impossible since neither can precede the other, resulting in Arendt’s vicious circle. For example, consider a constitutional referendum. This is a paradigmatic exercise of constituent power, so should be able to be done without constituted powers. But a referendum is a massive, institutionalized process that rests on political choices: who gets a vote, and when, and how? What threshold is required for ratification? What happens if the referendum is rejected: what is this a choice between? These choices require legitimation, so they either are illegitimate or originate in a previous exercise of constituent power, initiating a regress.

While the paradox is particularly stark for Sieyès, the problem is ultimately not in his appeal to collectives. Individualist strains run directly into the paradox as well.<sup>25</sup> Consider again the referendum, understood as binding because each individual exercises constituent power by voting. It would still be an open question why taking this vote, under these conditions, resulting from the political choices sketched above, was an exercise of constituent power that created a binding

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<sup>20</sup> Schmitt, *Constitutional Theory*, ch. 5; Colón-Ríos, *Law*, 28.

<sup>21</sup> Sieyès, “Third Estate,” 87ff.

<sup>22</sup> Sieyès, 88.

<sup>23</sup> Sieyès, 90.

<sup>24</sup> For discussion, see *The Paradox of Constitutionalism*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2008)

<sup>25</sup> Colón-Ríos, *Law*, 77.

constitution. If the individual did not vote on the political choices that make the referendum, how could voting in the referendum be a legitimate exercise of power? But that prior vote would also be a political process requiring legitimation through individual exercises of power, so we are caught in the paradox's regress. At this point, some theorists simply admit defeat. Thomas Nagel argues that illegitimate constituted power necessarily precedes legitimate rule: "Unjust and illegitimate regimes are the necessary precursors of the progress toward legitimacy and democracy, because they create the centralized power that can then be contested."<sup>26</sup>

Classical accounts of constituent power rest on a flawed model of political legitimacy. The problem is not who has constituent power but how exercises of that power are supposed to legitimate. In a social contract model of legitimacy, an exercise of consent must precede whatever is being legitimated. A contract model is therefore at best strained when applied to political power because individuals never have the chance to exercise normative powers prior to their participation in society and political influence. We are running into what John Rawls called the outer limit of freedom.<sup>27</sup> Humans only develop the capacities necessary to exercise normative powers when and because they are in societies. By the time someone can consent, they have been deeply shaped by their political order. So, humans cannot be free in the sense that they choose, and so contractually legitimate, their starting positions or the conditions of their development. The outer limit of human freedom is a retrospective, hypothetical freedom: I would have chosen that, had I been given the chance. If political legitimacy is modeled as a contract, that is the best we can secure.

But there are other models of legitimacy. Williams' political realism is one such model.<sup>28</sup> As Williams puts it, legitimation is "required *all the time*," under changing historical conditions; "it is not a matter of arriving at a solution... at the level of state-of-nature theory and then going on to the rest of the agenda."<sup>29</sup> The paradox of constitutionalism arises when we ignore "the irreducibly political condition of the community," as emphasized by Bonnie Honig.<sup>30</sup> There are no pre-political collectives and there are no pre-social individuals, so theories that try to solve political problems by appeal to such entities' powers are making a fundamental error. For Williams and Honig, our theories of politics must start "in *medias res*."<sup>31</sup> Social contract models try to find a starting point that confers legitimacy indefinitely to the future. The realist alternative sees legitimation as a necessarily ongoing process: it must involve "a politics, in which plural and

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<sup>26</sup> Thomas Nagel, "The problem of global justice," *Philosophy & Public Affairs* 33/2 (2005), 113-147, at 146.

<sup>27</sup> John Rawls, *Political Liberalism*, exp. ed. (New York: Columbia University Press, 2005), 222. Cf. Benjamin L. McKean, *Disorienting neoliberalism* (Oxford: Oxford University Press, 2020), ch. 3.

<sup>28</sup> On Nagel, see Williams, *In the beginning*, 65-7.

<sup>29</sup> Williams, 3, original emphasis.

<sup>30</sup> Bonnie Honig, "Between decision and deliberation: Political paradox in democratic theory," *American Political Science Review* 101/1 (2007): 1-17, 6.

<sup>31</sup> Honig, 2.

contending parties make claims in the name of public goods, seek support from various constituencies, and the legitimacy of outcomes is always contestable.”<sup>32</sup>

Contemporary revisionist accounts of constituent power reject the contractual model of legitimation, implicitly capturing the realist insight. They put this in terms of rejecting the stark contrast between constituent and constituted power.<sup>33</sup> Instead of viewing constituent power as exercised only at a founding, revisionists argue that constituent power is present with and exercised alongside constituted power. As Filippo Del Lucchese puts it, constituent power is “linked to the conflictual life of the society, precedes, coexists with and goes beyond every constituted power.”<sup>34</sup> The central revisionist idea is that we need more than an account of how some founding generation made a political order, we need an account of how people are always making and remaking it. But revisionists tend to assert people’s ongoing relevance with the language of constituent power rather than providing an account of the power as a distinctive phenomenon. An illustrative, if extreme, example is Antonio Negri, who equates constituent power with “the concept of crisis,” arguing that it undergirds the permanent possibility of revolution.<sup>35</sup> It is “a force that bursts apart, breaks, interrupts, unhinges any preexisting equilibrium.”<sup>36</sup> Revisionists say that individuals possess a world-making force in constituent power. But what exactly is it? My goal in the remainder of this paper is to articulate a new revisionist account that answers this demand.

## II. Outcome: legal order

Recall our three basic questions about constituent power. What kind of power is it? How is it exercised? What outcomes do exercises of it effect? It will help to start with this third question. Classical accounts say exercises of constituent power effect a constitution, while I say exercises of constituent power effect a legal order.

A legal order is a type of normative order.<sup>37</sup> When a group of people follow an interrelated set of norms, their behavior will be meaningfully patterned into the kind of social practice we call a normative order.<sup>38</sup> “Normative order” refers not to a set of normative propositions but to the way people live together with norms, to how people’s lives are structured by compliance with shared behavioral standards. Families, businesses, gender, and clubs are all normative orders. A club is a group of people following some shared club norms to pattern behavior, such as arriving at the

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<sup>32</sup> Honig, 14.

<sup>33</sup> Antonio Negri, *Insurgencies* (Minneapolis; University of Minnesota Press, 1999); Martin Loughlin. “The concept of constituent power,” *European Journal of Political Thought* 13/2 (2014): 218-37; Filippo Del Lucchese, “Machiavelli and constituent power: The revolutionary foundation of modern political thought,” *European Journal of Political Thought* 16/1 (2017): 3-23. See Rubinelli, *A history*, ch. 4, for early contributors to this shift.

<sup>34</sup> Del Lucchese, “Machiavelli,” 10.

<sup>35</sup> Negri, *Insurgencies*, 2.

<sup>36</sup> Negri, 10.

<sup>37</sup> Max Weber, *The theory of social and economic organization*, trans. A. M. Henderson and Talcott Parsons, (Oxford: Oxford University Press, 1947): 124ff.

<sup>38</sup> See, e.g., Sally Haslanger, “What is a social practice?,” *Royal Institute of Philosophy Supplement* 82 (2018), 231-47.

same place and time every week for a meeting. Complying with the shared norms is how club members can enact this particular way of living together, so the norms are important, but only as part of an ongoing, lived practice. When people comply with norms, they are not mechanically interpreting propositions, they are fitting into a social practice by living a certain way.<sup>39</sup>

Our social life is suffused with normative orders, which intersect, embed, conflict, and otherwise interact in many ways. These interactions are managed at various levels, from individual personalities, through social roles, and to overarching social management. At this overarching level, normative orders must be integrated with each other into a collectively livable social order or society. When the social order successfully performs its integrating function, it avoids destabilizing collective behavior, correspondingly securing social reproduction and the possibility of some kinds of coherent individual lives.<sup>40</sup> In modern societies, the integrating function is carried out by law.<sup>41</sup>

Legal orders are social orders where law performs the integrating function. I follow H. L. A. Hart in thinking of law as necessarily systemic: some particular law is a law in virtue of its relation to other laws in a shared legal system.<sup>42</sup> So, legal orders are societies where legal systems perform the integrating function. The legal system is what we often colloquially refer to as the law: constitutions and particular laws qua promulgated public rules, but also legal officials and the resources they employ. Legal orders and legal systems are both normative orders, but “legal order” describes a society while “legal system” describes one specific institution among many others in the society, such as corporations, churches, clubs, and families. Perhaps the most strategically significant aspect of my approach to constituent power is shifting focus to legal orders from legal systems.

A legal system is necessary but not sufficient for a legal order. Legal systems can fail to create legal orders; if a group of people makes some rules and promulgates them but the society successfully resists the group’s rule, then that social order is mainly structured not by laws but by other norms, perhaps local customs.<sup>43</sup> Weber’s notion of sociological legitimacy highlights the gap: social orders are in the first instance a product of people accepting the rules, not a product of the rules being coercively imposed.<sup>44</sup> Law is primarily self-administered: people apply the law to their

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<sup>39</sup> Ludwig Wittgenstein, *Philosophical investigations*, 3<sup>rd</sup> ed, trans. G.E.M. Anscombe (London: Blackwell, 2001 [1953]), § 2, 6, 85, and many others. See Saul Kripke, *Wittgenstein on rules and private language* (Cambridge: Harvard University Press, 1982).

<sup>40</sup> I assume no particular explanation of integration, especially not the harmony of Talcott Parsons, *The social system* (New York: Routledge, 1991 [1951]).

<sup>41</sup> On integration in modern societies, see, e.g., Habermas, *Between*, 8.

<sup>42</sup> H. L. A. Hart, *The concept of law*, 3<sup>rd</sup> ed. (Oxford: The Clarendon Press, 2012); cf. Joseph Raz, *The concept of a legal system*, 2<sup>nd</sup> ed. (Oxford: The Clarendon Press, 1980).

<sup>43</sup> Thomas Adams, “The efficacy condition,” *Legal Theory* 25 (2019): 225-243.

<sup>44</sup> Weber, *Organization*, 325; cf. Hart, *Concept*, 193; Williams, *In the beginning*, 5.



own lives, guiding their behavior.<sup>45</sup> The gap between laws and a legal order can only be filled by people. A legal order simply is how people successfully live their lives together with shared norms of a certain sort. So, a legal system leads to integrated social life only when and because people live the laws.

The need for individuals to self-administer laws follows from the nature of a legal system as an interrelated set of publicly codified rules. Rules are necessarily underdetermined, a feature Hart calls open texture. Rules state general behavioral standards that apply over some set of contexts and with respect to some set of agents.<sup>46</sup> For agents to actually follow these rules, they must be stated succinctly and clearly, but this means the rules must be limited. Further, rules cannot determine the strictness of their own application, or what Frederick Schauer calls their ruleness.<sup>47</sup> For example, the same jaywalking law will be applied, followed, and enforced at very different levels of strictness in the United States and Germany, not due to anything in the law but due to cultural context. How a law contributes to structuring a legal order cannot be read off its formal features.<sup>48</sup> People must live the laws. A legal order is not a static object but a pattern of repeated choices.

Crucially, however, a legal order is more than agglomerated compliance. A normative order structures social life at the level of reciprocal expectations. It is not simply the fact that people do comply but that we can trust them to comply that brings about a distinctive form of community. This feature of a legal order is crucial for its integrating role. As emphasized in the social contract tradition, social norms face an assurance problem. Complying with norms is costly, especially the integrating norms that sometimes direct us to sacrifice other commitments. There are also especially many chances for defection from self-administered norms. Knowing this, it seems rational to not comply whenever one can. If this is how everyone treated social norms, however, our normative order would be very fragile, if it existed at all. Political orders are only stable insofar as they solve the assurance problem.

Habermas shows that modern legal systems solve the assurance problem by distinctively implementing their norms. Laws are public, formalized, administered by a specialized official agency, and enforced by the organization with most control over the means of coercion in society. Laws are therefore “between facts and norms:” they have both normative character and what Habermas calls facticity or empirical character.<sup>49</sup> Law’s facticity arises from its institutionalization, especially but not only its enforcement, such that people face law as a “de facto constraint.”<sup>50</sup> Thus,

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<sup>45</sup> On “self-application,” see Jeremy Waldron, “How law protects dignity,” *Cambridge Law Journal* 71/1 (2012): 200-22, at 206.

<sup>46</sup> Frederick Schauer, *Playing by the rules*, (Oxford: The Clarendon Press, 1991).

<sup>47</sup> Frederick Schauer, “Ruleness,” in *Legal rules in practice*, ed. Baudouin Dupret, Julie Colemans, and Max Travers (New York: Routledge, 2021): 13-25.

<sup>48</sup> Cf. Roscoe Pound, “Law in books and law in action,” *American Law Review* 44/1 (1910): 12-36.

<sup>49</sup> Habermas, *Between*, ch. 1 (on facticity); 69 (on empirical motives).

<sup>50</sup> Habermas, 27.

law makes it possible to comply both from the normative perspective, out of respect for law's valid reasons, and from the empirical perspective, out of strategic self-interest.<sup>51</sup> Since law is public, we know that others can relate to laws in both dimensions as well. We know that others occupy the institutionally administered, impersonal role of subject and we observe widespread intentional compliance with law. Given this common knowledge, we can trust others to mostly comply and they can trust us to mostly comply without any special knowledge about private motives, solving the assurance problem.

Law's distinctive implementation secures what Habermas calls "average norm compliance."<sup>52</sup> A legal order requires average compliance, not perfect compliance. Indeed, the administration of law is premised in many ways on expected non-compliance. Thus, it makes sense that our reciprocal expectations are centered around reasonable compliance with law, rather than perfect compliance. As I argue below, we expect others to be law-abiding subjects: people who exercise discretion about when and how to comply with law but who generally reasonably comply. A legal order is the result of members of a community trusting others to be law-abiding subjects, not merely predicting the compliance of legal automatons. I am not surprised when people break speed limits or jaywalking laws, for example. I expect general law-abidingness, relative to the practical context, the kind of law at stake, and so on. Average compliance comes from people living their lives with law.

So, now we have a sense of what exercises of constituent power actually do on my account. Contributing to a legal order is a more plausible role for every individual legal subject to play than writing or even ratifying a constitution. But, so far, this simply makes my task harder. The legal order is specifically designed to persist through violations. Even worse, it is designed to persist across generations: whether I live or die has no bearing on the existence of the legal order. As I will describe it, a legal order is massively distributed—across time, space, individual lives, and variations in compliance.<sup>53</sup> But this is a problem for taking constituent power to constitute a legal order. If individual acts of legal compliance are neither necessary nor sufficient to bring about a legal order, how could they could count as exercises of a power to constitute one?

### III. Kind: power-with

Addressing this problem requires us to move on to our second question: what kind of power is constituent power? In debates over social power, two models were historically prominent: power-to and power-over. As we will see, in their standard form, neither is a good fit for constituent power. But Arash Abizadeh has recently argued for a modified model of power-to, called power-with. In this section, I argue that constituent power is a kind of power-with.

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<sup>51</sup> Habermas, 25-32.

<sup>52</sup> Habermas, 31.

<sup>53</sup> Cf. Scott Shapiro, "Massively shared agency," in ed. Manuel Vargas and Gideon Yaffe, *Rational and social agency: The philosophy of Michael Bratman* (Oxford: Oxford University Press, 2014), 257-293.

Appeals to constituent power present the social order as the product of agential choice. In the language of powers, constituent power must be an agential power as opposed to a mere causal power. An agent has the agential power to  $\phi$  when they can efficaciously bring about, or effect, the outcome  $\phi$  by their intentional action. As discussed in more detail below, intentions are mental states that effect outcomes due to their self-reflexive content. I intentionally raise my leg when I present myself, to myself, as raising my leg, and thereby raise my leg. Agential power describes the special relation between agents and outcomes wherein agents can effect outcomes by exercising their intentional agency. As Abizadeh puts it, “[t]he exercise of agential power presupposes an appropriate link between effected outcomes and the agent’s subjective intentional states.”<sup>54</sup> The question my account faces, then, is whether individual intentional states are connected to the legal order in the right way for agential power.

For me to have power, I must be able to make a difference. This is clearest in cases where I can make a difference because of my intentional control over my body. I have the power to drink a cup of coffee or open a door because I can physically manipulate coffee cups and doors. It is less clear how I make a difference to more complex outcomes, especially collective outcomes. Consider extinguishing a house fire. I do not have the power to extinguish this fire on my own; it is growing too quickly and I do not have the equipment. But if I combine my efforts with sufficiently many others in appropriate ways, we clearly intentionally make a difference: it’s no mere accident or byproduct that the fire is extinguished, it’s the very thing we set out to do. While it’s clear that we intentionally extinguished the fire, though, it’s unclear where we locate the power to extinguish.

Standard pictures of agential power offer two routes for combining individual powers. Both routes explain some phenomena well but neither can explain constituent power in my sense. First, individuals can enhance their own powers by having power over others, forcibly combining others’ efforts for their own ends. On this route, the chief of the local firefighters has the individual power to extinguish fires because of the hierarchical organizational structure of the firefighting ladder company. The political parallel is a chief executive who stands at the top of a coercive legal system and so can direct individual agential actions to constitute a legal order. Second, standard pictures recognize individuals can combine to make an independent group, which has its own powers. Since we reject pre-political agential collectives, group agency must be explained by an institutional decision-making structure.<sup>55</sup> On this route, the ladder company has the power to extinguish fires. The political parallel is the people as a group, perhaps in their guise as the state, directly constituting the legal order. Clearly neither of these routes works if individuals generally possess constituent power.

Firefighting provides an alternative model of collective action: a bucket brigade. Neighbors and passers-by can voluntarily join in a collective effort to extinguish the fire without any formal organization. Standard pictures say that there is no agential power to extinguish exercised in such

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<sup>54</sup> Abizadeh, “Grammar,” 3.

<sup>55</sup> Philip Pettit and Christian List, *Group agency* (Oxford: Oxford University Press, 2011).

cases because, following Weber, the standard picture conceptualizes power as the ability to overcome resistance.<sup>56</sup> If no resistance is overcome, then there is no exercise of power. The residents of the house are fortunate that others joined them in the bucket brigade but if they could not have forced the others to join, they did not have the power to extinguish the fire.<sup>57</sup> The standard picture says that each person exercised their powers to do specific tasks, like pass a bucket. These exercises of power combined to result in extinguishing the fire. But nobody exercised an agential power to extinguish. The result was collective and social but because there was no social resistance, there was no social power. Yet, if I am in a bucket brigade, the natural thought is that we extinguished the fire. The result is not happenstance; we intentionally guided and combined our efforts to secure our desired result.

The inability to explain the power exercised in these sorts of cases is a significant failure of the standard picture. Power as the ability to overcome resistance makes sense in many cases, including cases of social resistance. But if overcoming resistance is all there is to power, then when resistance is overcome, further contributions cannot be exercises of power. It is clear, however, that such overdetermining causes exist and can be exercises of power. In the physical domain, consider Jonathan Schaffer's case of two rocks being thrown and simultaneously breaking a windowpane.<sup>58</sup> Neither was necessary and either was sufficient but both individually broke the windowpane as a result of the causal powers of their physical properties.

In the social domain, consider a case where Alex's car is stuck in the mud.<sup>59</sup> Alex's powers are relative to Alex's personal capacities, like strength, and the action context, like how deep the mud is and how heavy the car is. In this context, Alex is not strong enough to free the car from the mud, so Alex lacks the power to free the car. When Billy comes along, Alex and Billy are strong enough. Intuitively, Billy's arrival empowers Alex so that together they have the agential power to free the car. The standard picture affirms this: each has the individual power to free the car because each is necessary due to their ability to unilaterally scuttle the joint effort by refusing to push. When Cade comes along, they now have more than enough power and it is even easier for them to free the car. Intuitively, Cade's arrival further empowers Alex and Billy because exercising their agential power to secure their desired outcome requires less contribution of their physical powers. But the standard picture disagrees: Cade's arrival disempowers both Alex and Billy because now either could refuse to help and still the other two could free the car from the mud. Since each individual's contribution overdetermines the outcome, none have the power to free the car.

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<sup>56</sup> Standardly, A has social power if A is able to make B act in some way that B would not otherwise act: A is able to overcome B's resistance. See Robert A. Dahl, "The concept of power," *Behavioral Science* 2/3 (1957): 201-15. Cf. Weber, *Organization*, 152 and Steven Lukes, *Power*, 2<sup>nd</sup> ed. (Palgrave Macmillan, 2004).

<sup>57</sup> Brian Barry, "Is it better to be powerful or lucky?: Part 1," *Political Studies* 28/2 (1980): 183-94.

<sup>58</sup> Jonathan Schaffer, "Overdetermining causes," *Philosophical Studies* 114 (2003): 23-45.

<sup>59</sup> Cf. Alvin I. Goldman, "Toward a theory of social power," *Philosophical Studies* 23 (1972): 221-68.

The standard picture of power must be mistaken because it massively flattens our picture of the world and the powers within it. As Schaffer notes, “overdetermination is *everywhere*.”<sup>60</sup> Reducing causation to overcoming resistance mistakenly models many social outcomes. Social outcomes often lack the features that would make precise determination of resistance possible. Consider playing a symphony. What are the minimal causal contributions to say that a group of people played a symphony? How many missed notes, how many missing instruments? We have no minimal criteria because playing a symphony is a different kind of outcome than freeing a car. The orchestra cares about more than simply playing, they want to play well, or inspiringly, or beautifully. It’s clear that playing a symphony beautifully is a social outcome effected by the exercise of members’ various agential powers, but not in any simple, additive way. We cannot make the outcome more beautiful by exhorting any individual musician to play harder, or even better. The outcome is more than the sum of its parts.

By focusing on acting against resistance, the standard picture of power misses acting with assistance: power-with.<sup>61</sup> The basic idea of power-with is that we often have the power to effect some outcome only when and because we act with other people. When we join forces, we get more powerful. Alex, Billy, and Cade each have the *individual* power to free the car from the mud *with* the others. Each could effectively exercise their power with only one of the others, but they can also, more easily, exercise it all together. What powers we have is a function of our environment; others’ willingness to join can be an empowering part of the social environment. Power-with allows us to plausibly assess this case. When all three push, they all intentionally contribute to the outcome by exercising their agential power to free the car with the others. Since all three contributed, each was “*partially* rather than fully efficacious.”<sup>62</sup> The power of others may be a welcome addition, not an obstacle. To understand agential powers, we must include power-with, especially when investigating mass phenomena.<sup>63</sup>

It is obviously true that nothing I do is necessary or sufficient to create or maintain a legal order. As I emphasized above, the legal system specifically maintains the legal order over and against individual variations. If agential power requires a necessary or sufficient connection between the agent’s intentional states and the outcome, then normal people cannot have the power to effect a legal order. The point of this section was to show that this concern rests on a mistaken, though standard, picture of power. We can exercise agential power with others to partially effect overdetermined outcomes. This opens the possibility that constituent power is a form of individual power-with. But this possibility still faces a serious hurdle: exercises of agential power must be intentional.

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<sup>60</sup> Schaffer, “Overdetermining causes,” 26, original emphasis.

<sup>61</sup> Abizadeh, “Grammar,” 7, building on a longer history, including Arendt.

<sup>62</sup> Abizadeh, “Numbers,” 310.

<sup>63</sup> Cf. Abizadeh’s discussions of voting.

#### IV. Exercise: incorporation and scaffolding

So far, I have argued that constituent power is a kind of power-with and that its exercises partially effect a legal order. Our third question is: how is constituent power exercised? The crucial issue in any exercise of power-with is combination. To exercise an agential power with others, our contributions must do more than agglomerate, they must intentionally combine. The cases of power-with we have seen so far have been cases of joint action, where people are face-to-face and so combination is achieved by interpersonal mechanisms.<sup>64</sup> When Alex takes up the left side of the bumper, Billy adjusts to take up the right, they count down to simultaneously push, and so on. Clearly massively distributed outcomes cannot result from such interpersonal mechanisms of combination.<sup>65</sup>

The fact that agential powers must be intentionally exercised gives rise to two specific challenges for constituent power-with. First, I claim that constituent power is commonly exercised but widespread intentions to constitute a legal order seem simply absent. When I am crossing the street or driving to work, the legal order is the farthest thing from my mind. If I am intentionally exercising constituent power in such cases, I am doing so unconsciously. Call this the *unconscious exercise problem*. Second, the legal order is massively distributed: my individual contributions are combined with the contributions of distant others to successfully effect a legal order. Again, however, I am generally unaware of such combination and certainly do not control it, so how could it be intentional? Call this the *ballistic combination problem*.

This section is lengthy, complex, and will be the most unfamiliar for many readers, so I have broken it into four parts. Parts A and B address the unconscious exercise problem. I argue that people can unconsciously but intentionally be guided by norms, on a model I call incorporation. Parts C and D address the ballistic combination problem. I argue that when people are guided by social norms, they are offering pre-shaped contributions for normative orders to combine, on a model I call scaffolding.

##### A. Intentionality

As noted above, intentions are mental states that effect outcomes due to their self-reflexive content. I intentionally raise my leg when I represent myself as raising my leg and thereby raise my leg. When the doctor taps my patellar tendon, my leg raises without my mental states affecting the outcome. If I form the intention to raise my leg, tell the doctor my intention, then get distracted for so long that the doctor raises my leg for me, the causal chain of the outcome includes my intention but not in the right way to count as an intentional outcome. In this case, my leg is raised but I do not exercise agential power to raise my leg: exercises of agential power must be

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<sup>64</sup> On joint action, see, e.g., Margaret Gilbert, *Joint commitment* (Oxford: Oxford University Press, 2013); Michael Bratman, *Shared agency* (Oxford: Oxford University Press, 2013); Raimo Tuomela, *The philosophy of sociality* (Oxford: Oxford University Press, 2007); Christopher Kutz, *Complicity* (Cambridge: Cambridge University Press, 2000).

<sup>65</sup> Shapiro, "Massively shared agency."

intentional.<sup>66</sup>

To understand the claim that intentional outcomes need not be consciously intended, two distinctions will help.<sup>67</sup> First, prior intentions are distinct from intentions-in-action. As the name indicates, prior intentions are intentions we form before acting, paradigmatically as plans. But we do not need a plan to act intentionally. Extemporaneous action is often intentional in the sense that I guide my behavior towards some outcome by representing myself as effecting it, rather than being mere reflex or bodily motion. When I am driving and slam on the brakes to avoid a collision, I do so extemporaneously but fully intentionally. Second, conscious intentions are distinct from unconscious intentions. A mental state is conscious when the subject is occurrently aware of it; if I am considering which route to take to work tomorrow, I have a conscious intention to go to work tomorrow because it is explicitly the focus of my awareness as I weigh alternative versions of it. I can act intentionally without being occurrently aware of my intentions or, as discussed below, even my actions.<sup>68</sup> While intentionally writing, I type on a keyboard without being aware of and consciously guiding each finger movement.<sup>69</sup> I can make myself conscious of each key press, but I do not need to and normally I do not.

Conscious intentions are at the center of our mental phenomenology, so folk theories of action tend to focus on them. However, following empirical work in psychology, some contemporary work on action has shifted towards the explanatory primacy of unconscious, intention-in-action.<sup>70</sup> Rather than taking deliberation as the paradigm of intentional agency, the alternative model focuses on automaticity and habit. Following Peter Railton, I will call this fluent agency.<sup>71</sup> Fluent agency is premised on complex interactions between deliberative and automatized behavior. What is deliberative and what is automatized is not fixed; ‘automatized’ emphasizes that processes can be made automatic. Railton describes learning how to drive: at the beginning, even the basic physical motions of turning the wheel and applying appropriate force to the pedals are pained matters of struggle and focus. With practice these become automatized, allowing attention to shift to passengers or the radio.

Automatized behaviors are not necessarily mechanized, proceeding along a set path. Every automatic turn of the steering wheel differs according to degree of turn, road conditions, and so

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<sup>66</sup> I depart from Abizadeh’s (“Numbers,” 293) “welcome test.”

<sup>67</sup> John R. Searle, *Intentionality* (Cambridge: Cambridge University Press, 1983); *Making the social world* (Oxford: Oxford University Press, 2010), 34. On unconscious exercises of power, see D. M. White, “Power and intention,” *The American Political Science Review* 65/3 (1971): 749-59.

<sup>68</sup> Cf. Michael Bratman, “Two faces of intention,” *The Philosophical Review* 93/3 (1984): 375-405, denying that intentionally  $\phi$ -ing requires intending to  $\phi$ .

<sup>69</sup> Cf. Wayne Wu, “Mental Action and the Threat of Automaticity,” in ed. Andy Clark, Julian Kiverstein & Tillman Vierkant, *Decomposing the will* (Oxford: Oxford University Press, 2013), 244-61.

<sup>70</sup> For a recent discussion, see Zachary Irving, “Drifting and directed minds: The significance of mind-wandering for mental agency,” *The Journal of Philosophy* 118 (2021): 614-644. Also see Railton, “Practical competence” and Michael Brownstein, *The implicit mind* (Oxford: Oxford University Press, 2018).

<sup>71</sup> Railton, “Practical competence.”

on. We make the appropriate adjustments to our environment without having to consciously attend to adjusting. Wayne Wu notes that learning to play an arpeggio automatically enables the player to play in different styles, to improvise, and otherwise build on the basic performance.<sup>72</sup> This is how automatizing undergirds Railton's notion of fluency: as with language, agential fluency is more than mechanical perfection, it is mastery that enables greater nuanced control, self-expression, and much else—including masterful deviation.

Fluent agency expands the scope of our intentional actions beyond what we consciously intend. But we still need to distinguish intentional outcomes from mere causal products. All actions have unintentional consequences. What determines which outcomes are intentional, if not what the agent consciously intends? In one sense, the solution is straightforward. As mental states, intentions have representational content: the state of affairs they represent as being effected. When I raise my leg, my intention-in-action represents the state of affairs where my leg is raised because I raised it. So, an outcome is intentional when it was effected by being represented in an intention as the goal or object of that action. This is true but it simply pushes back the issue since our intentions are not transparent.

Modifying an idea of Searle's, we can use an action's "success conditions" to identify what state of affairs it represents as its goal.<sup>73</sup> Success conditions answer the question, "What counts as succeeding or failing?"<sup>74</sup> Success conditions are revealed by adjustments, both actual and counterfactual: I adjust my behavior to my circumstances to ensure that my action successfully effects its object. Consider the striking case of driving home without being aware of the actual driving. I may come to awareness when I stop in my driveway, unable to remember the precise path I took. But it must be the case that I intentionally, agentially drove home. Without being aware of it, I represented the environment and guided my behavior accordingly: stopping at lights, avoiding collisions, turning on the correct path, and so on.<sup>75</sup> We know my action counts as successful when I arrive home because I stop putting in the characteristic effort needed to succeed. So, I arrived home intentionally because I adjusted my driving to arrive home: arriving home was the state of affairs I unconsciously represented myself as successfully effecting by driving.<sup>76</sup>

Intentionally driving home requires that I represent myself in a more complex way than intentionally raising my leg. In cases of basic action, we represent ourselves as doing something and simply do it. I can raise my leg simply by representing myself as raising my leg. When I drive home, I represent myself as doing some physical actions such as those involved with steering, but

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<sup>72</sup> Wu, "Mental Action," 249-50. Cf. Irving, "Drifting," 629.

<sup>73</sup> Searle (*Making the social world*, 29) calls these satisfaction conditions; also see Brandon Johns, "Not intentional, not unintentional," *Philosophia* 48 (2020): 1881-99.

<sup>74</sup> Searle, *Intentionality*, 99.

<sup>75</sup> Of course, if my car breaks down, I will adjust by calling a taxi or walking. I still intentionally drive home because success is contextual: I aim to succeed under some description and under certain contingent assumptions.

<sup>76</sup> Automatized behavior is unintentional when failures are not felt as requiring correction; see the cabinet case in Railton, "Normative guidance," 9-10.



I also represent myself as performing social and norm-governed action, such as stopping at red lights, merging into traffic, and so on. Human agency is marked by our ability to extend intentionality; I can intend to drive home but also to cook dinner, get a promotion, or become a better person.<sup>77</sup> Our greater representational capacities enable us to represent ourselves in more complex relations to more complex states of affairs.

Agential powers extend alongside effective intentions. I have the agential power to drive home in virtue of my ability to represent arriving home as an outcome I can effect and I exercise that power by guiding the many skills and powers that constitute driving to a successful outcome.<sup>78</sup> Note that most of us would be totally unable to consciously articulate how a car works or the precise movements of muscle, perception, and social dexterity that constitute driving, yet exercising the agential power to drive home is banal. Intentionality thus extends past our understanding and awareness; even if I know nothing about anatomy, I intentionally flex my biceps when I turn the steering wheel. We do not need to understand exactly how our powers work to represent ourselves as efficaciously exercising them at a relatively coarse-grained, functional level in our causal environment, or as I will say, effectual order.<sup>79</sup> Since intentional action only requires coarse-grained representations, we can possess and exercise powers that we do not understand.

## **B. Incorporation**

On my account, constituent power is exercised by intentionally following the law. So, it is a normative rather than a physical agential power, exercised by intentionally complying with norms. But this may appear to be a problem for fluent agency; even if physical skills like driving can be automatized, it may remain unclear how norms can be followed unconsciously and automatically.<sup>80</sup> Norm following seems to require judgment in a way that mere bodily motion does not. Of course, much norm following is conscious, as when I tell myself to watch my speed. But if the fluent agency model is correct, then we should expect this kind of conscious norm-following to be the exception, not the rule. Indeed, we should expect conscious norm-following to be premised upon much unconscious norm-following.<sup>81</sup>

The problem can be traced with the distinction between behavior that merely accords with the norm and behavior that accords with the norm because it was guided by the norm. I will call

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<sup>77</sup> Searle, *Making the social world*, 37.

<sup>78</sup> Cf. Railton, "Practical competence," on practical competence.

<sup>79</sup> Cf. Mikayla Kelley, "How to perform a non-basic action," *Noûs* (2022): 1-20, at 14; available at <http://doi.org/10.1111/nous.12440>. I use "effectual order" instead of causal order because we often intentionally effect outcomes by directly constituting them, not causing them. Borrowing Searle's example: Gavrilo Princip's assassination of Archduke Franz Ferdinand did not cause revenge, it was revenge.

<sup>80</sup> Peter Railton, "Normative Guidance," in *Oxford Studies in Metaethics* vol. 1, ed. Russ Shafer-Landau (Oxford: Oxford University Press, 2006), 3-33; Nancy E. Snow, *Virtue as social intelligence* (New York: Routledge, 2010), ch. 2; Michael Brownstein and Alex Madva, "Normativity and Automaticity," *Mind and Language* 27 (2012), 410-434.

<sup>81</sup> Railton, "Practical competence," 102-3.

the latter compliance.<sup>82</sup> When behavior merely accords with a norm it would be odd to say that the person followed the norm since accordance may be accidental or coincidental. In contrast, someone complies when their behavior accords with the norm because they followed the norm: the norm somehow explains their behavior.<sup>83</sup> Normative orders, especially legal orders, are premised on widespread compliance.<sup>84</sup> Compliance implies that norms are actually changing behavior, rather than merely describing it.

Railton argues at length that automatized norm guidance is not only possible, it is widespread and often desirable.<sup>85</sup> The driving case already makes this clear. In addition to physical acts, skilled drivers automatize behaviors like following the flow of traffic and using signals when changing lanes. These behaviors are partly aimed at complying with relevant driving norms, but experienced drivers are not usually consciously considering those norms. Instead, norm compliance is built into the activity of driving under normal conditions.

Automatized compliance is not mechanized but simply pursued by default, steered by both unconscious agential and subagential processes. Our conscious agency can usually intervene on automatized processes and their operations are often relatively transparent to us. If there is an emergency, we can drive in unexpected ways; if someone asks us why we use our turn signals, we can say because it is the law. Instead of exercising direct, ongoing control over these automatized processes, we exercise standby control.<sup>86</sup> Automatizing norm compliance is often desirable for the same reasons automatizing physical driving skills is desirable, freeing up resources and enabling more complex activity. Fluent norm compliance can make behavior expressive, improvisational, and better attuned to context.

To see how norm compliance can be automatized but still agential, consider the example of Dahlia.<sup>87</sup> Dahlia is driving home in a rush because she is running late for dinner with her family. She is concerned with the well-being of herself and others, and is generally a cautious person, so she has adopted a personal norm to drive safely. She prides herself on being a safe driver, avoids driving in dangerous conditions, and so on. As Dahlia is rushing home on this occasion, she comes to a narrow part of the road and sees an oncoming car driven by an elderly man. Dahlia can tell that she has enough space to continue by him at speed but instead she slows down; the man waves as he passes and Dahlia accelerates again.

Dahlia's adoption of the safety norm explains why she slowed down. But we do not need to imagine that Dahlia went through some conscious deliberations about road safety and her lateness. She slowed down automatically. How so? How did she represent and process this situation

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<sup>82</sup> Cf. Joseph Raz, *Practical Reason and Norms*, rev. ed. (Oxford: Oxford University Press: 1999), 178-79.

<sup>83</sup> Railton, "Normative guidance." Cf. the notion of guidance in Irving, "Drifting."

<sup>84</sup> Cf. Habermas, *Between*, 318, arguing that a constitutional system operates "at a reflexive level."

<sup>85</sup> Railton, "Practical competence" and "Normative guidance." Moral theories often recognize the desirability of automatized norm compliance; consider how neo-Aristotelian virtues operate or Williams' one thought too many.

<sup>86</sup> Philip Pettit, *A theory of freedom* (Cambridge: Polity Press, 2001), 38-9, 91-2.

<sup>87</sup> Modified from Railton, "Practical competence," 104ff.

as unsafe and automatically make a contextually appropriate response? By building safety into her perceptions and affects.<sup>88</sup> Norms automatically guide behavior when failures to comply are experienced as errors calling for correction or as tensions calling for alleviation.<sup>89</sup> As Dahlia neared the oncoming driver, she perceived unsafe conditions: safety shaped the phenomenological frame of her environment, which details she experiences as relevant and how she experiences them.<sup>90</sup> Her perception of insecurity makes her uncomfortable and she automatically slows down to relieve that discomfort. Her affect is not a mere urge, it is part of her personality that she built up over time in her experiences with driving, with elderly people, and so on. And her response is not a mere reflex, it is part of a “coordinated response pattern” that is guided to be effective in the circumstances given her capacities and her environment’s affordances.<sup>91</sup> When insecurity is realized differently, for example when merging onto a highway, relieving her discomfort may require accelerating. Although her response was automatic and affective, it was an “intelligent and plastic” act of fluent agency.<sup>92</sup>

It follows that Dahlia made complying with the safety norm a success condition of her driving. What counts as successfully arriving home includes safety: her goal is to arrive-safely, not merely to arrive at a coordinate in space with a secondary concern about her mode of arrival.<sup>93</sup> The norm becomes part of her intention-in-action, an internal standard on whether she succeeded by her own lights. We can call this phenomenon of internalizing a norm into fluent agency *incorporation*. When a norm is incorporated, compliance with it becomes automatized. Since Dahlia had incorporated the safety norm, she could automatically exercise her agential power to arrive safely by complying with the norm.

So, incorporation solves the unconscious exercise problem. Agential powers must be exercised intentionally and most behavior guided by laws is not done with conscious awareness of those laws. But this is only a problem if intentionally complying with a norm must be conscious. Since we can incorporate norms into our fluent agency, we can unconsciously but intentionally comply with law and so, potentially, unconsciously but intentionally exercise constituent power-with.

### C. Ordered social norms

Turning to the ballistic combination problem: exercises of power-with require that individual

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<sup>88</sup> Consider the debate over whether to stop at a desert stop sign; many people simply feel uncomfortable at the prospect of breaking the law.

<sup>89</sup> Irving, “Drifting,” 622; Brownstein and Madva, “Normativity,” 420ff; Brownstein, *Implicit Mind*, ch. 2; Railton, “Normative Guidance,” 10.

<sup>90</sup> Irving, “Drifting,” 629ff.

<sup>91</sup> Brownstein and Madva, “Normativity,” 422.

<sup>92</sup> Railton, “Practical competence,” 96.

<sup>93</sup> As mentioned in fn.76, success is contextual. If a disaster occurs and there is no way to arrive safely and Dahlia drives anyway, we do not need to claim that she was never committed to safety in the first place.

contributions are not only intentionally performed but intentionally (and effectively) combined. In cases of joint action, where everyone is aware of their contributions, interpersonal mechanisms can handle effective intentional combination. But for a massively distributed outcome like a legal order, interpersonal mechanisms are insufficient. Even if complying with law causally contributes to the legal order, it does not seem to do so intentionally.

The solution to the ballistic combination problem rests in the nature of social norms and normative orders, particularly in modes of regulation. Norms as behavioral standards produce patterns of behavior in virtue of their associated regulatory practices. Dahlia's safety norm produces a pattern of safe driving because of how she trained her personality and habits to regulate her driving behavior. We can distinguish different kinds of norms based on modes of regulation. Dahlia's safety norm is a personal norm because it is only personally regulated. She is subject to a standard of safe driving just because she made a commitment to herself, expressing her personal values. She decides what exactly it means to comply with this norm and what the consequences of norm violation will be.

In contrast, social norms involve community regulation.<sup>94</sup> The community determines whether an individual is subject to them, what counts as compliance with them, and how to induce compliance. Community regulation can include a range of social practices, such as shared concepts, reactive attitudes, and direct institutional sanction. Most social norms are ordered: the community regulation that creates them also systematically relates them to a variety of other norms, embedding them in a normative order, introducing further modes of regulation.

Complying with norms effects different outcomes depending on their modes of regulation. Even if a personal norm and a social norm have the same content and enjoin otherwise identical behavior in some practical context, complying with them effects different outcomes. A parallel case: if Dahlia drives a gasoline-powered car or an electricity-powered car, she can effect the same outcome of arriving home and even take the same route, but she will still effect different further outcomes (e.g. carbon emissions) because of the cars' causal differences. Analogously, personal norms and social norms are different entities in the effectual order, so being guided by them effects different further outcomes even when compliance behavior is otherwise identical.<sup>95</sup> Differences between enacted behavioral standards are a matter of their associated regulatory practices.

Let's consider an example. Ethel is part of a jogging club that meets every Wednesday morning at 6am, at the northwest corner of 1<sup>st</sup> and Main Street. The club is a normative order: club members follow club norms and thereby pattern their behavior into club activities. The club norm requiring attendance at a specific time and place is simple but crucial because it coordinates members meeting. So, imagine Ethel arrives at the specified time and place to join the weekly jog.

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<sup>94</sup> Here I take inspiration (and depart) from Cristina Bicchieri, *The grammar of society* (Cambridge: Cambridge University Press, 2005) and Geoffrey Brennan, Lina Eriksson, Robert E. Goodin, and Nicholas Southwood, *Explaining norms* (Oxford: Oxford University Press, 2013).

<sup>95</sup> Cf. Tamar Schapiro, "Three Conceptions of Action in Moral Theory," *Noûs* 35 (2001): 93-117.

As it turns out, Farhad also arrives at the northwest corner of 1<sup>st</sup> and Main Street every Wednesday at 6am in order to start his jog. He usually sees Ethel and her club, but then he jogs off on his own. Ethel arrives because of a social norm of attendance; Farhad arrives because of a personal norm. Ethel and Farhad intentionally effect different outcomes in virtue of differences between these norms.

Let's start with the outcomes Ethel and Farhad both intentionally effect, focusing on adjustments for success. Physical arrival at the time and place is clearly intentional, just like Dahlia's commute: Ethel and Farhad put forth the effort to travel, adjust their route along the way, and then cease when they arrive because arrival constitutes successful action. Compliance with their respective norms is intentional, just like Dahlia's compliance with the safety norm: success requires arriving at the time and place specified in the norm. Familiar adjustments to succeed may include setting their alarm and planning their breakfast so they could arrive on time, feeling antsy about delays, and so on. If the norm doesn't apply on a holiday, then they do not arrive: their arrival is controlled by the norm. So, Ethel and Farhad both intentionally arrive and intentionally comply with their respective norms, but Ethel also does more.

Social norms are social in virtue of their associated community regulation. What counts as compliance with the attendance norm is determined by the club: if everyone is delayed, the club can push back arrival by half an hour. If the club is delayed but Ethel shows up at the original time anyway, she is doing so for her own reasons and not because the norm guided her. When Ethel shows up at the time and place specified by the club's attendance norm, she accepts the club's role in regulating her compliance and thus presents herself as a good club member.<sup>96</sup> As I will put it, complying with a social norm effects good social standing. Failing to comply also effects changes in standing: it makes Ethel open to corrective social regulation. If she is late, the other members may express frustration; if she is habitually late, they may simply stop waiting for her. Effecting good standing is intentional because it is an independent source of adjustments for success. Perhaps Ethel has arrived late for the last several weeks, so she is worried about her standing as a member. She wants to demonstrate that she is committed to the club, so she structures her travel to arrive not merely on time but early, hoping to reinforce her standing. This tie between standing and social regulation is non-accidental: social norms produce behavioral patterns in virtue of practices of accountability that tie norm-compliance with standing. As Geoffrey Brennan and co-authors put it, in adopting regulative attitudes, "we necessarily regard ourselves as accountable to others."<sup>97</sup>

By complying, Ethel also intentionally partially effects the club meet-up. Her arrival is only successful insofar as she arrives at a meet-up, which is an independent source of adjustment. When meet-ups change, so do arrival times; when a meet-up is cancelled, arrival at the normal time and

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<sup>96</sup> Cf. Schapiro, "Three conceptions."

<sup>97</sup> Brennan et. al, *Explaining*, 37. Cf. Joseph Rouse, "Social practices and normativity," *Philosophy of the Social Sciences* 37/1 (2007), 46-56.

place is no longer required. Each member complying with the arrival norm just is part of the way that the group meets up. Arrival partially effects club meet-ups precisely because the arrival norm is ordered: it is systematically related to the other elements of the club to produce certain outcomes. Arrival is required of all members in common, jogging commences at the time and place of arrival, and so on. If the arrival norm is poorly structured or poorly related to other norms, the club members will not be able to jog together.

So far, we have been focused on the consequences of complying with a single norm. The notion of an ordered norm brings in the rest of the order, changing how we should think of social standing and adjustments. Normative orders, especially more complex ones like legal orders, do not simply list norms. They define roles, which serve to collect and organize norms.<sup>98</sup> In turn, people primarily participate not as bearers of bare norms but as role-occupants. Ethel relates to the club primarily as a member, so she relates to norms and regulation in more complex, holistic ways. For example, not only can Ethel adjust her behavior to comply, she can adjust violations to lessen their impact. If she is running late, she may call ahead and ask the others to delay the jog. Since arriving only matters as a way of meeting up, they can adjust the meet-up in the face of the norm violation, securing the point of arriving on time even when Ethel arrives late.

#### **D. Scaffolding**

The previous subsection showed that intentionally complying with a social norm introduces socially regulated success conditions into the agent's own action. Ethel represents herself as being guided by the norm at a coarse-grained functional level but thereby intentionally effects outcomes she may not be consciously aware of, outcomes like social standing and club activities. Ethel's arrival effects one more outcome, which matters most for our concerns here. By complying with the arrival norm, Ethel also partially effects the club as a normative order.<sup>99</sup>

In one sense, this is no surprise. If we accept that when Ethel attends a club meet-up, she partially effects that meet-up, then it is a short step to partially effecting the club since clubs are plausibly mainly constituted by meet-ups. But this is too quick, as emphasized by the problem of ballistic combination. The challenge is that exercises of power-with must intentionally effect the legal order. And while Ethel's contribution to the club meet-up may be intentional, her contribution to the club as a whole seems more a matter of social metaphysics than intentionality. Imagine Gabriel intentionally empties a water jug out a window next to the bucket brigade and the falling water accidentally fills one of the buckets, which is then emptied onto the fire. Gabriel causally contributes to extinguishing the fire, and the action that causally contributed was itself intentional, but he surely does not count as intentionally extinguishing the fire with others. Merely

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<sup>98</sup> See, e.g., Katherine Ritchie, "Social Structures and the Ontology of Social Groups," *Philosophy and Phenomenological Research* 100/2 (2020), 402-24.

<sup>99</sup> On automaticity in social ontology, see, e.g., Roberto Frega, "Social Ontology between Habits and Social Interactions," in *Habits*, ed. Fausto Caruana and Italo Testa (Cambridge: Cambridge University Press, 2020), pp. 417-437.

complying with a club's norms appears to have the same ballistic character with respect to constituting the order as a whole: intentional and causally contributory but not intentionally contributory, so not an exercise of agential power to effect the outcome.

Gabriel does not intentionally contribute but not because of lack of control. We often intentionally effect outcomes by starting processes that we cannot control. The classic example is shooting a gun: we can aim and fire, but from there forward the path of the bullet is determined ballistically and the exact outcome is out of our ongoing control. Despite the lack of ongoing control, people count as intentionally effecting outcomes like hitting bullseyes.<sup>100</sup> As usual, we see this in adjustments. Hitting the bullseye is intentional when the shooter adjusts his aim to ensure that he hits his target. Complications of responsibility certainly arise, but initiating ballistic processes is clearly a way of intentionally effecting outcomes.<sup>101</sup>

So, the issue with ballistic contributions is not ongoing control but adjusting aim. Gabriel does not intentionally contribute because he succeeds by his own lights whether he fills the bucket or not: if he missed the bucket, he would not adjust his behavior. Ethel, on the other hand, would adjust to effect the normative order. She may not be aware that she would adjust, let alone under that description. But, as emphasized in the previous subsection, she would adjust to succeed in whatever way social regulation defines success. The social regulation of ordered social norms is itself part of the normative order, so Ethel is adjusting to succeed as defined by the normative order. By doing so, she is partially effecting the normative order.

There are two aspects to Ethel's effect. First, complying with an ordered norm partially effects an order simply in virtue of enacting the order's normativity. When Ethel arrives, she contributes to the pattern of norm-guided arrival that the norm aims to secure. Second, assuming the order is minimally functional, complying also effects the order by being an effective combinatory contribution. The club defines the arrival norm so that when Ethel does her part and others do their part, the club can meet. In the end, then, it is possible for individuals to intentionally and effectively contribute to the existence of normative orders in virtue of those orders' own careful regulation of their norms. I will call this ordered regulatory process *scaffolding*. Scaffolding enables individuals to both enact and contribute to the normative order.

The first part of scaffolding is enactment. Enactment is more than a technical quibble; it is an analysis of what it means to live together with norms. People incorporate ordered social norms not as isolated behavioral directives but as part of a shared practice in which they are participants. Their actions are only successful when and because they contribute to the normative order as a shared form of life.<sup>102</sup> As Tamar Schapiro puts it, "By regulating herself according to the rules of the practice, an agent can be regarded as 'upholding' those rules. To uphold rules is to sustain the

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<sup>100</sup> Cf. Kelley, "Non-basic actions."

<sup>101</sup> Larry Alexander, Kimberly Kessler Ferzan, and Stephen Morse, *Crime and culpability* (Cambridge: Cambridge University Press, 2009).

<sup>102</sup> Thus, participants are often guided by rules as paradigms rather than algorithms; see Lorraine Daston, *Rules* (Princeton: Princeton University Press, 2022).

normative structure they impose on the world.”<sup>103</sup> By following the norms of a normative order, “she does what is in her power to determine the normative character of the social order.”<sup>104</sup> Normative orders are meaningful patterns of behavior produced by following shared behavioral standards. Following the norms just is how people create the patterns.

The second part of scaffolding is contribution. Consider a university as a normative order and Hana, a university employee. Hana’s contributions at work partially constitute the university in virtue of the university’s scaffolding. Obviously, though, that is no accident. The reason the university has employees is a matter of scaffolding. The university requires the stable, effective provision of certain contributions to continue functioning well as a university. To ensure those contributions, it creates a special role that is specifically required to contribute in the ways the university needs by defining the role’s success conditions and, among other regulatory mechanisms, paying its occupant. From Hana’s perspective, the rest of the university is also scaffolding for her input, just as she is scaffolding for theirs. The reason her contributions effectively partially constitute the university is because other people are doing their parts, and those parts are constantly effectively combined into an ongoing social practice.

The role of scaffolding emphasizes that individuals’ ability to effect, and indeed to intend, certain outcomes depends on others. This is exactly what we should expect from an account of power-with. Others’ abilities and willingness to work together are part of the social environment that determines what agential powers we have. In the case of Alex freeing their car from the mud, Billy’s and Cade’s willingness is circumstantial. In contrast, Ethel and Hana can rely on their normative orders to recruit and stabilize other members’ contributions; the orders create the empowering environment.

So, scaffolding solves the problem of ballistic combination. Exercises of agential power-with must be intentionally and effectively combined to produce an outcome. Complying with law is often done without being aware of the legal order, let alone others’ contributions, and definitely without control over the outcome. But complying with ordered social norms is a matter of intentionally shaping one’s behavior to fit the order’s scaffolding, ballistically releasing contributions but adjusting such that they enact the order and effectively contribute by being apt for combination.

## **V. Revised constituent power**

To recap, in the preceding sections I have answered three questions about constituent power. First, what outcome does its exercise produce? Instead of a constitution, I answered a legal order: a social order resulting from average compliance with law. Second, what kind of power is it? Instead of (standard) power-to or power-over, I answered power-with: an individual agential power to partially effect outcomes with others. Third, how is it primarily exercised? Instead of conscious

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<sup>103</sup> Schapiro, “Three conceptions,” 104-5.

<sup>104</sup> Schapiro, 105.



deliberation, I answered incorporation and scaffolding: unconsciously being guided by ordered social norms in fluent agency, combined through the normal operations of normative orders. These answers give us the resources we need for a new account of constituent power.

Here's the core of the account. Constituent power is the individual agential power to constitute a legal order with others. An individual paradigmatically exercises constituent power by intentionally complying with law. They make compliance with law a success condition of their action and so adjust their behavior to succeed as determined by law. When an individual exercises their constituent power, they intentionally partially effect the legal order. But since a modern legal order is a pervasive and massively distributed entity, there is a large gap between individuals' mental states and the legal order. This gap is bridged by incorporation and scaffolding. Most of the time, individuals comply with law unconsciously and automatically by making compliance with law part of their fluent agency. The legal system's mechanisms of social regulation pre-shape individuals' contributions by defining successful compliance and ensure sufficiently regular contributions from sufficiently many individuals. Exercising constituent power is a way of living individually that contributes to a way of living together.

At the very outset of the paper, I claimed that crossing the street in a crosswalk was an exercise of constituent power. This seemed incredible because when I cross the street, I am generally not thinking about the crosswalk laws at all, let alone the legal order as a whole. I am thinking about my destination or current podcast episode. But if I have made compliance with law a success condition, then as I walk, I automatically adjust my behavior to the law. I stop when the signal turns red and proceed when it turns green, I remain within the designated pedestrian areas, and so on. This act of compliance intentionally partially constitutes the legal order. Call an agent's action "lawful" when it intentionally complies with law, whether consciously or unconsciously. When I cross the street lawfully, I exercise constituent power.

If complying with law partially constitutes the legal order, does breaking the law partially destroy it? When I jaywalk, am I harming the legal order? To address this, we need to go beyond the core of the account, which focuses on individual acts of compliance, to the nature of the legal order. Recall, we are following Habermas' idea that the legal order is not an agglomeration of compliance, it is a mode of living together based on reciprocal civic trust.<sup>105</sup> As I emphasized, we do not expect perfect compliance with law as if we lived with legal automatons, we expect reasonable compliance as people live their lives with law, exercising judgment in the self-administration of law. This is built into our web of civic trust, which is therefore not so fragile as to be even partially destroyed by every individual act of law-breaking.<sup>106</sup> In modern administrative states, I take it that living one's life with law means a great deal of law-compliance but also quite a bit of unremarkable law-breaking and even some remarkable law-breaking that the legal system

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<sup>105</sup> Cf. Ryan Preston-Roedder, "Civic trust," *Philosophers' Imprint* 17/4 (2017), 1-23.

<sup>106</sup> Where the state has no rivals, there is a crucial scaffolding difference between compliance and non-compliance.

doesn't regulate. And, in some situations, civic trust requires public, blatant law-breaking.<sup>107</sup> Although "law presents itself as a seamless web," it cannot be lived as one.<sup>108</sup>

Going beyond individual acts of compliance also helps us understand the role of incorporation. Although lawful action can be either conscious or unconscious, the sheer size and pervasiveness of law in modern states means most exercises of constituent power will need to be automatized for people to live their lives with law. Call people who incorporate law, "law-abiding."<sup>109</sup> Law-abiding people are fluent with law as a social practice.<sup>110</sup> They agentially adjust their behavior to law and to the purposes of the legal order. Legal orders are largely the product of law-abiding people automatically, unconsciously exercising constituent power. But just as fluency with language, fluency with law does more than ensure perfect compliance with the rules, it enables apt deviation.

This gestures towards the complex relationship between constituent power and law on my account. Although compliance with law is paradigmatic, it is not the only way constituent power is exercised. Like many others, I jaywalk regularly but not haphazardly. I know what the traffic laws are for, so I jaywalk when there is no traffic and no possibility of disrupting traffic flow or risking an accident. Although I don't adjust my behavior on this particular occasion to secure compliance with traffic laws, I adjust my jaywalking policies to fit jaywalking social norms. Drivers and police officers also adjust their policies to recognize socially permissible jaywalking. The social norms are part of the legal order: the jaywalking law only creates a pattern of behavior when a community enacts it by interpreting and applying it with related social practices, including those determining its ruleness. So, adjusting to jaywalk in a socially permissible way is, I claim, both unlawful and an exercise of constituent power. It adjusts to success conditions determined by social regulation and partially effects a way of living together under and with law. Our main concern is the legal order, not law.

Here I offer no account of law or a legal system, and therefore no full account of a legal order. Plausibly, the explicit creation and administration of norms requires more than incorporation, it requires conscious planning.<sup>111</sup> A spontaneous order of overarching, integrating norms of the sort required for a modern state is both unlikely and undesirable.<sup>112</sup> Incorporation and scaffolding explain one kind of contribution to normative orders but many normative orders, including the legal order, require other contributions. Relatedly, incorporation and scaffolding are not offered as the basis of an independent social ontology. At most, widespread incorporation and

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<sup>107</sup> Cf. Jürgen Habermas, "Civil disobedience: Litmus test for the democratic constitutional state," *Berkeley Journal of Sociology* 30 (1985), 95-116.

<sup>108</sup> John Finnis, "The Authority of Law in the Predicament of Contemporary Social Theory," *Notre Dame Journal of Law, Ethics & Public Policy* 1/1 (1984), 115-138, at 120.

<sup>109</sup> Cf. Noam Gur, *Legal directives and practical reasons* (Oxford: Oxford University Press, 2018).

<sup>110</sup> At least, the local parts of law they commonly encounter.

<sup>111</sup> Cf. Scott Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011).

<sup>112</sup> Hart, *Concept*, 92ff.

effective scaffolding are necessary but not sufficient conditions on the existence of some kinds of large-scale normative orders. This account is therefore not at odds with alternative ontologies of social practices, such as the popular contemporary theories of joint action, insofar as they offer similarly partial conditions or they address different kinds of practices.

However, when theories of joint action are offered as full social ontologies, my account highlights their main weakness: the contributions of what Scott Shapiro calls “alienated” participants.<sup>113</sup> Theories of joint action rely on some kind of commitment to explain why participants do their part. Shapiro points out that people can combine actions without any such commitment, for example someone who does their part simply because they were paid.<sup>114</sup> They participate and their contributions partially effect the joint outcome, but they may not be even slightly interested in whether the joint effort succeeds, as long as they get paid. And “in any large-scale activity, there are bound to be participants that intentionally contribute to the group effort but are not committed to the success of the group venture.”<sup>115</sup>

My account proposes mechanisms for the shaping and combination of actions that do not rely on individuals’ commitments. The normative order’s regulation mechanisms do most of the work by pre-shaping inputs, incentivizing cooperation, and so on. When alienated participants unconsciously represent themselves at a coarse-grained level, they intentionally guide their actions to effect outcomes determined by the effective structure of the normative order. Compare this to Michael Bratman’s recent response to Shapiro.<sup>116</sup> To explain alienated contributors, Bratman argues that only a “kernel” of participants need have his characteristic collective intentions. Participants in the “penumbra,” by contrast, “intend to do what is in fact their part” but do not collectively intend the shared goal.<sup>117</sup> They “know of their intended action that it conforms... they do not just intend some way of acting that, unbeknownst to them, conforms.”<sup>118</sup> This is similar to Christopher Kutz’s weakened condition: participants need only have individual participatory intentions that “involve a reflective or deliberative self-awareness of the instrumental relation of one’s part to the group act.”<sup>119</sup> However, precisely because of their reliance on explicit awareness of one’s contributions, both of these are too strong for constituent power and contributing to a legal order.<sup>120</sup> Modern law structures societies in deep ways that many people do not realize, let alone know their part in. Deliberative planning agency is plausibly necessary for legal systems but

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<sup>113</sup> Shapiro, “Massively shared agency,” at 270ff.

<sup>114</sup> Cf. Shapiro, 276-7, charging Bratman, Gilbert, and Kutz with requiring “hypercommitment.”

<sup>115</sup> Shapiro, 272.

<sup>116</sup> Michael Bratman, *Shared and institutional agency* (Oxford: Oxford University Press, 2022), 68ff.

<sup>117</sup> Bratman, 69.

<sup>118</sup> Bratman, 69.

<sup>119</sup> Kutz, *Complicity*, 84.

<sup>120</sup> Accounts of citizen contributions that appeal to Bratman’s or Kutz’s models thus run into the same issue; see, respectively, Anna Stilz, *Liberal loyalty* (Princeton: Princeton University Press, 2009), ch. 7 and Avia Pasternak, *Responsible citizens, irresponsible states* (Oxford: Oxford University Press, 2021), ch. 2. Stronger conditions may be necessary to capture responsibility but, as discussed below, intentionality and responsibility can come apart.

incorporation and scaffolding more plausibly explain normal contributions to legal orders.

Just because any extant legal order rests on widespread exercises of constituent power does not mean that all legal orders are *ipso facto* legitimate.<sup>121</sup> The exercise of a power and its legitimating effects are different. When I hand over my wallet to a mugger, I do so fully intentionally but because I do so under duress, it does not have the normal normative consequences of transferring use or ownership rights to the recipient. To accurately describe this event, we must recognize both the exercise of agential powers and the normatively vitiating effects of the threat. I intentionally effected the outcome of the mugger possessing my wallet by exercising various agential capacities. If the mugger knocks me unconscious and takes my wallet from my pocket, the outcome is the same but it came about very differently. Using agential powers is not necessarily better; I may be humiliated that I had to contribute to my own injury. Similarly, then, exercises of constituent power are not legitimating when they are performed under normatively vitiating conditions, for example of the sort Williams identifies in his critical theory principle.<sup>122</sup>

This finally returns us to Williams' realist model of legitimacy. For Williams, the political condition is defined by some people ruling over others. They rule by making claims of right in an "order of authority," which secures "order, protection, safety, trust, and the conditions of cooperation."<sup>123</sup> Without these, people's "vital interests" are insecure, so they live in Hobbesian fear and cannot live flourishing lives.<sup>124</sup> The most basic demand that people make on politics, then, is that they can make sense of political rule such that they can live their lives: they can exercise "their human capacity to live under an intelligible order of authority."<sup>125</sup> We do not need to be political realists to recognize that something like this is a necessary condition on political legitimacy. A regime where people's vital interests are insecure cannot be legitimate, even if legitimate regimes also need to be, e.g., democratic.

Although Williams refers to making sense and intelligibility, a better characterization is livability. The former terms over-intellectualize what is ultimately a practical hermeneutical category for Williams, not an abstract property.<sup>126</sup> Politics is something we do in the world with specific other people, under specific historical conditions and constraints. It must make sense as a way of living together. That is why legitimacy cannot be established and then set aside. Conditions could change such that our social order no longer makes sense to us, it is no longer livable. This could be because material conditions change, as in an ecological crisis or war, but it could also be because our own self-understanding changes, as in a shift in political values or in what counts as a vital interest.<sup>127</sup>

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<sup>121</sup> Thanks to reviewers for pushing me to clarify this.

<sup>122</sup> This is the point of the critical theory principle; Williams, *In the beginning*, 6.

<sup>123</sup> Williams, 3.

<sup>124</sup> Williams, 7.

<sup>125</sup> Williams, 10.

<sup>126</sup> Williams, 11. For example, Williams notes that political concepts that make sense are simply used.

<sup>127</sup> Williams, 7.

Once we recognize that livability can only be worked out in specific historical contexts, Williams argues we should recognize that our own theories of legitimacy are deeply connected to the specific historical context of modernity. Interestingly, here Williams recruits Habermas' analyses of law and modernity.<sup>128</sup> Williams goes so far as to say that he and Habermas are engaged in overlapping projects, though they disagree about "how a space is to be found between facts and norms."<sup>129</sup> For Habermas, laws are between facts and norms because of their dual empirical and normative character. But Williams is concerned with the experience of life under law.

So, I end with a proposal: exercises of constituent power create a shared space between facts and norms by living law under specific historical circumstances. Norms make demands on behavior but only individuals can enact the norms in the "facticity of modern societies."<sup>130</sup> When we exercise constituent power, we offer an interpretation of how abstract norms actually apply under the constraints of our lives. When exercised to the extent of average compliance, we create a legal order, a way of living together in the world structured by mutual standards of behavior: a social space between facts and norms.

To see the connection between constituent power and livability, consider incorporating law under a modern legal regime that fundamentally threatens your vital interests. You are faced with a devastating inconsistency: your agency is automatically directed both towards your own ends and towards contributing to the ends of the state, but these ends are at odds. You are compelled to pursue the former by your own self-preservation and the latter by modern law's inescapable modes of social regulation. This social order is not livable for you because coherent agency, fluency in the pursuit of your own ends while also respecting social norms, is impossible. Psychological mechanisms for managing the inconsistency of unlivable social conditions are familiar, for example adaptive preferences and double consciousness.<sup>131</sup> For Williams, an unlivable regime is an illegitimate reign of terror.

Focusing on conditions of livability also helps us understand the relation between constituent power and constituted power, and the problem of their origins. On my account, law makes constituent power possible because we exercise constituent power by complying with law. Equally, though, constituted power requires ongoing exercises of constituent power for law to actually create the patterns of behavior it aims to produce. Constituent power and constituted power are co-constituting, relative to a given normative order. For that order, constituent and constituted power are coeval. This would be worrying if we were stuck in a contractual model of legitimacy since exercises of constituent power could not precede constituted power.

However, coeval powers make sense on the realist model. A political order is legitimate only if it is livable, but livability is relative to historical conditions. When new constituted powers

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<sup>128</sup> Williams, 9ff.

<sup>129</sup> Williams, 10.

<sup>130</sup> Williams, 15.

<sup>131</sup> John Elster, *Sour Grapes* (Cambridge: Cambridge University Press, 1983); W. E. B. DuBois, "The Souls of Black Folk," in *Writings* (New York: Library of America, 1986).

are created, as under conditions of revolution or founding, whether and how those powers can be lived is an open practical question. Attempts to constitute a new livable social order may well fail; consider the 1777 Articles of Confederation, eventually replaced by the 1787 Constitution of the United States. Exercises of new agential powers are attempts to partially effect the new social order, with no guarantee of success.<sup>132</sup> Founding moments are best understood precisely as offering tentative solutions to the problems of the prior social order. They do not crystallize perfect answers, they propose an aspirational framework. If it were not for the fact that we can take up those aspirations and live them out in new ways, no polities with a flawed founding could approach legitimacy.<sup>133</sup> New political institutions empower individuals with new agential powers. Whether those powers can be effectively exercised and combined into a livable social order is an open question that can only be answered by people actually living with their new powers, and must be constantly answered anew under changing historical conditions.

Positing constituent power in contrast to constituted power emphasizes people's necessary role in making their own political order. Under modern legal regimes, this role is not to ratify a constitution and then leave politics aside. Instead, individuals must live the law by intentionally complying with legal norms and thereby contributing to a shared way of life. This is the revolutionary "power to decide about the rules and manner of... living together."<sup>134</sup> Constituent power is the individual agential power to partially effect a legal order with others.

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<sup>132</sup> Cf. the judge in Schapiro, "Three conceptions," 105.

<sup>133</sup> Kermit Roosevelt III, *The nation that never was* (Chicago: University of Chicago Press, 2022).

<sup>134</sup> Habermas, *Between*, 468.