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The Power to Contract and the Offer-and-Acceptance Analysis of Contract Formation

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Abstract

The offer-and-acceptance analysis has long been questioned as not (easily) applicable to certain methods of contracting. This paper looks at this analysis through the prism of *normative powers* and identifies much deeper problems with the analytic explanation of how such *unilateral* normative powers as *offer* and *acceptance* can generate such a normative result as concluding a contract. It argues that even if the powers to offer and accept are exercised, as they are in certain methods of contracting, these are not the normative powers that create contractual obligations; such obligations are always created by the *jointly* exercised *power to contract.* The paper substantiates an account of the power to contract as a *sui generis* normative power and explains the role the unilateral powers to offer and to accept play when they are exercised, while also explaining why there is no need to 'invent' offering and accepting where there are none.

Keywords: *power to contract; offer; acceptance; contract formation; normative powers*

1. Introduction

Despite the fact that it takes (at least) two to make a contract, and that it is hardly in dispute that contractual obligations are uniquely *bilateral*,[1] theorists explaining the normative power[2] that persons exercise to create such obligations almost invariably do so by 'reducing' it to essentially *unilateral* powers. The reduction can take one of two forms: (1) by supposing that each contracting party exercises a unilateral power such as a power to promise, consent, or transfer a right; or (2) by portraying contract formation as *essentially* comprising a two-step process in which contracting parties exercise *different* unilateral powers—the power to offer and the power to accept an offer.

1. A contract can, of course, have multiple parties; the term 'bilateral' (as pertaining to the nature of contractual obligations) is used here as covering such contracts. However, this term is also used in the paper in a narrower sense when bilateral and multilateral contracts are contrasted.
2. The term 'normative powers' is used in the paper as covering both *legal* and *moral* powers, which is, by and large, how this term is usually understood in moral and legal philosophy. However, given that the paper deals with the legal institution of contract, the expression 'the normative power to contract' mostly translates into the expression 'the legal power to contract'.

The two methods of reduction, however, are not mutually exclusive, as those who see contracting parties as promising, consenting, or transferring often also 'project' the respective powers onto the powers to offer and to accept. This 'projection' has also not been without difficulties, and an acknowledged challenge has been to explain how offering and accepting in contractual obligations differs from offering and accepting in gratuitous obligations (in particular, gratuitous promises).[3] In the latter case (and if any acceptance is required at all), the role of the obligee (in particular, promisee) in creating the relationship is 'passive'; acceptance is a 'response' ensuring that the obligation, and any benefit associated with it, is not unwanted. In the former case, however, the roles of *both* parties appear to be 'active'; the parties *together* create a relationship contemplating their *reciprocal* obligations, which makes it more difficult to describe what the parties are doing as (merely) 'offering' and 'accepting'. Moreover, regardless of whether any *other* unilateral powers are 'projected' on offering and accepting, the offer-and-acceptance analysis itself has been questioned as not being (easily) applicable to certain methods of contracting (such as signing, simultaneously, a written contract, previously negotiated by the parties),[4] which appears to undermine the universality of this analysis as an explanation of contract formation.

Given how 'standard' the offer-and-acceptance analysis is in contract theory, its acknowledged limitations undoubtedly represent a valid concern, and they will be, in one way or the other, touched upon in the paper. However, what appears to be almost completely overlooked in the literature is what this paper identifies as much deeper problems with the offer-and-acceptance analysis (a classic—and largely unchallenged—statement of which being that of Wesley Hohfeld) as an *analytic* explanation of how such *normative powers* as offer and acceptance can generate the *normative result* of entering into a contract. The central contention of this paper is that even if no other unilateral powers are 'projected' on offering and accepting, and even if the unilateral powers to offer and accept *are* exercised, as they are in certain methods of contracting, these are simply *not* the normative powers that *create* contractual obligations. By examining in detail the offer-and-acceptance analysis through the prism of *normative powers*, or so this paper contends, the paper provides an account of the power that genuinely does give rise to a contractual relationship.[5]

The paper proceeds as follows. Section 2 considers how an offer-and-acceptance analysis can be applied to a (hypothetical) agreement model of gifts and demonstrates how different the notions of offer and acceptance are in gifts and contracts; in particular, referring to certain ways of agreeing to a contractual relationship as 'offering' and 'accepting' is merely notional, as the parties must *jointly* exercise *one and the same* power to enter into a contract. Section 3 follows

3. See the text accompanying note 28.
4. See *infra* notes 20 and 26 and the text accompanying notes 27, 49, and 50.
5. It might be clarified that while providing an analytical account of the power to contract, the paper does not directly engage with normative theories of contract; nor is it aimed at examining various accounts that rely on the first form of reduction identified above (by supposing that each contracting party exercises a unilateral power such as a power to promise, consent, or transfer a right).

with an exploration of the concept of exercising a normative power jointly, applying a model of collective decision-making. Section 4 first focuses on multilateral contracts, which have been on the periphery of contract theory, and shows why, despite certain differences with collective-decision making, this model of contracting defies the offer-and-acceptance analysis; it then examines typical bilateral contracts, explaining the role the unilateral powers to offer and to accept play when they are exercised, while also explaining why there is no need to 'invent' offering and accepting where there are none. Section 5 concludes. All this makes it possible to substantiate a (new) account of the power to contract as a *sui generis* normative power exercised *jointly* and not reducible to the (unilateral) powers to offer and to accept.

Importantly, far from denying that the contracting parties may, and in certain methods of contracting, do, exercise the unilateral powers to offer and to accept, the paper explains their *instrumental* role in contract formation; while exercising these unilateral powers does not bring about a contractual relationship, it can, and normally does, create the *conditions* necessary for a joint exercise of the power to contract, while not representing the only way in which such conditions can be created. The account of the power to contract as a *jointly* exercised power provides a better conceptual framework both for analysing the formation of contracts negotiated by offering and accepting and for explaining those methods of contracting with respect to which the offer-and-acceptance analysis has long been questioned. Apart from its paramount significance for contract theory, the account of the power to contract put forward in the paper gives us a (more) suitable tool for rationalising those contract law cases which do not fit into the traditional offer-and-acceptance mould. It also sheds light on some perennial debates in legal and moral philosophy about the dividing line between contractual and gratuitous voluntary obligations by illuminating important, and typically overlooked, differences in undertaking such obligations—differences that obtain even in those instances in which persons do resort to offering and accepting to undertake such obligations—and demonstrating how accounting for such differences is key to a richer theoretical explanation of the existing contract law doctrine of contract formation.

2. Unilateral Normative Powers and the Two-Step Analysis of 'Agreeing'

In legal theory, a classic statement of the offer-and-acceptance analysis is that of Wesley Hohfeld.[6] On his analysis, entering into a contract *is necessarily* a

6. See Wesley N Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23:1 Yale LJ 16 at 49-50. In contract theory, the Hohfeldian analysis of contract formation was initially applied and developed by Arthur Corbin and has recently been explicitly endorsed by Peter Benson, at least as far as understanding the power to accept is concerned. See Arthur L Corbin, "Offer and Acceptance, and Some of the Resulting Legal Relations" (1917) 26:3 Yale LJ 169; Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Harvard University Press, 2019) at 101-110. Benson also attempts to overcome the challenges of

two-step process.[7] First, A, by exercising the (unilateral) power to offer, vests a new power—the power to accept—in B, which power correlates with A's liability. Secondly, B, by exercising the acquired (unilateral) power to accept, brings about a contractual relationship between A and B. Contract formation, therefore, involves two consecutive normative changes: one is 'interim' (B is empowered to accept that which is offered by A and, in so doing, to alter A's, and B's own, normative position), and the other one is 'final' (a contract between A and B is concluded).[8]

On the face of it, the two-step analysis of contract formation seems compelling, as it is not implausible to imagine contracts the formation of which does involve two steps at which two persons exercise the powers to offer and to accept; additionally, this analysis purports to break up contract formation into two instances of exercising *unilateral* powers, which powers may appear as more 'familiar', or less 'mysterious', than joint powers.[9] Yet, the two-step analysis is deeply problematic as an explanation of how the parties, by exercising two different unilateral powers, can *together* create a contractual relation by *agreeing* to it.

On the two-step analysis, there does not seem to be such a thing as the normative power *to contract*, which intuitively ought to be in existence. At best, the power to contract could be seen as shorthand for the power to accept or, perhaps, as some metaphorical amalgam of the power to offer and to accept; it is only metaphorical, as it is difficult to see how two normative powers can be transformed, or rather transmogrified, into some other normative power. More specifically, it appears that no one has any power to enter into a contract *per se;* the only power that persons have is a power to empower some other person to create a contractual relationship (the power to offer). A contractual relationship can then be created as the result of the offeree's exercising the power to accept, but no one has this power *ab initio;* it is merely a power that persons may acquire if and when someone, who does not have any power to create a contractual relationship, exercises the power to offer.[10] To be sure, there is a *causal* relation between

'projecting' other unilateral powers on offering and accepting; this intriguing attempt will be looked at more closely in Subsection 4.2.

7. A two-step analysis can also be referred to, more generally, as a "'last-act' analysis." James Penner, *The Idea of Property in Law* (Oxford University Press, 1997) at 158. Penner uses the term 'last-act analysis' to refer to the standard analysis of contract formation in terms of offer and acceptance; in the present paper, this term will also be used in other contexts, such as the context of discussing whether such analysis could be applicable to collective decision-making, in which case it might be preferable to speak of a 'last-act analysis', rather than of a 'two-step analysis', as more than two persons are likely to be involved (see Section 3), which is to say that it might be preferable to speak of such an analysis *while discussing whether* it could be applicable to collective decision-making; not that it could, in fact, be applicable.

8. See Hohfeld, *supra* note 6 at 49-50.

9. See the text accompanying note 13.

10. It could be said that if one is regarded as having the power to accept, it is a power that is only contingent—contingent in the sense that it is only 'activated' when another makes one an offer, but it might be better to describe such 'ability' to accept without referring to the term 'power'. For example, the term 'competence' could be used instead to refer to some (general) 'ability' to accept offers made to one (e.g., in virtue of being an agent, having capacity to contract, etc.). On this view, the ability, competence, or capacity to accept an offer is certainly different from having the (specific) *power* to accept the specific offer and in so doing to bring about the normative result at which exercising this power is directed.

exercising the power to offer and such a normative result as a contractual relationship, but it is only the power to accept that brings about this relationship *normatively,* and not only causally; the normative result that the power to offer brings about, normatively, and not only causally, is the situation in which somebody is empowered to create a contractual relationship.[11] It appears that the power that creates a contract is derivative, while the power from which the power to create a contract is derived is in only a causal, and not a normative, relation with creating a contract. A two-step analysis of this sort can surely explain certain private law normative changes, but it is at odds with the idea that the parties to a contractual relationship must together *agree* to enter into this relationship; it is also, of course, at odds with the intuition that the power (to agree) to enter into a contractual relationship that the parties must exercise should be one and the same normative power. This paper defends that intuition, indeed explains why entering into a contract depends on the exercise by the parties *jointly* of a *sui generis* normative power that everyone has *ab initio*. Before attending to that, the paper will contrast 'agreeing' about a gift and contracting about a sale to illustrate some of the limitations of the two-step analysis as an explanation of contractual agreements.

Gifts and contracts are routinely compared for all sorts of reasons and purposes; however, as far as normative powers relevant to *agreements* are concerned, reflecting upon the nature of common law gifts might appear to be unmotivated: a common law gift is perfected by delivery of the given property (or, alternatively, by delivery of a valid deed of gift), and does not require any acceptance or even knowledge on the part of the donee. This suggests that it is by exercising a *unilateral* power—the power to give or the power to transfer as a gift—that the donor can make an effective gift, i.e., they can bring about the desired normative change without anyone else's participation. However, certain

11. Admittedly, there are different approaches to understanding (private) legal powers (and normative powers more generally), but at least two truths pertaining to the exercise of such powers can be stated: the exercise of a (private) legal power effects a change in a legal situation, and it brings about this change normatively, not (merely) causally. See Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 1999) at 103; Neil MacCormick & Joseph Raz, "Voluntary Obligations and Normative Powers" (1972) 46 Proceedings of the Aristotelian Society, Supplementary Volumes 59 at 80. There are, of course, different ways in which the second proposition may be expressed: it has been said that the exercise of a legal power grounds the legal change, that the exercise of a legal power explains the legal change noncausally, and that the legal change happens in virtue of the exercise of a legal power. For a helpful overview and discussion, see Christopher Essert, "Legal Powers in Private Law" (2015) 21:3-4 Leg Theory 136 at 139-45. The distinction between bringing about a change in a legal situation in virtue of the exercise of a legal power and in some other way is also often explained with reference to the distinction between *results* of an act and *consequences* of an act. For a recent discussion, see JE Penner, *Property Rights: A Re-Examination* (Oxford University Press, 2020) at 71-75. Jeremy Waldron, following Carl Wellman, also expresses this distinction by using the terms 'legal consequences' of one's action and its 'other consequences' or 'further consequences'. See Jeremy Waldron, "Votes as Powers" in Marilyn Friedman et al, eds, *Rights and Reason: Essays in Honor of Carl Wellman* (Kluwer Academic, 2000) 45 at 54-55. See also Carl Wellman, *Real Rights* (Oxford University Press, 1995) at 23. Following Raz, this paper mainly uses the words 'normative' and (merely/only) 'causal' to refer to this distinction, while acknowledging that it is possible for something to be both normative and causal. For a discussion of this distinction in a different context, see Irina Sakharova, "(Mis)Understanding Correlativity in Contractual Relations" (2024) Ratio Juris [forthcoming].

attempts to accommodate, in an account of giving, the donee's ability to reject or disclaim the gift might create a temptation to see common law gifts as agreements. Although the point is not argued in this paper, such a temptation should be rejected; a power to disclaim is not a power to accept, and the power to give is a truly unilateral normative power in common law. Yet, it is helpful to imagine an agreement model of common law gifts, which in this paper will be considered as a hypothetical model. The point will be to demonstrate that even if gifts were seen as agreements, the donor and the donee would not have any 'meta-power' to agree: their 'power to agree' would merely be shorthand for *different* normative powers to which it is reducible and which must be exercised at two consecutive steps, with one normative power being primary or constitutive and the other secondary or derivative; moreover, even if the donor's power to give were labelled the 'power to offer a gift', the latter would merely be shorthand for the former, as no giving is possible without exercising the power to give, which only a donor can do. After demonstrating this, this section will show that, in contrast, even when contract formation involves two steps, an exercise of the power to offer followed by an exercise of the power to accept, these powers are at best shorthand for the *power to contract*, which is one and the same power that each contracting party has, necessary and sufficient for contracting, not reducible to or explicable as 'offering and accepting'.

Three aspects of exercising normative powers relevant to a hypothetical agreement model of common law gifts can be highlighted. First, if A is the donor and B is the donee, it is only A who has the power to (offer to) give and can trigger a stepwise process of giving by exercising this power. B's role is essentially passive and is confined to the final stage of the process; B cannot, *in legal terms*, initiate the process of giving. Secondly, A and B cannot switch their roles as offeror and offeree in this process. Once A's power to (offer to) give is exercised, the only option that B, who wants to receive this gift, has is to accept it, and B's acceptance must be a complete 'response' to A's offer. B is not able to counter-offer and reverse A and B's roles; or rather, this would simply amount to B's proposing an entirely separate transaction, i.e., to make a gift to A. In other words, B cannot exercise the power to (offer to) give something to A in response to A's exercise of the power to (offer to) give something to B; nor can B change the parameters of the prospective agreement between A and B, set by A's offer to give, and be regarded, on this basis, as counter-offering; to reiterate, B can only accept A's offer and A's gift. It is indeed true that B does not have *ab initio* a power to accept A's, or somebody else's, gift which power would exist independently of A's, or somebody else's, power to (offer to) give; rather, B only acquires the power to accept A's, or somebody else's, gift once A, or somebody else, has offered the gift to B. It is only the power to (offer to) give that everyone has *ab initio* as opposed to acquiring it only in the result of somebody else's exercise of a different power. Lastly, even if A is seen as 'offering' to give, as B's acceptance of the gift is necessary on the agreement model of gifts, A must have the power to give and actually exercise this power for any giving to take place. By merely 'offering' to give (and even if the 'offer' to give is 'accepted'), no gift can

be effected; in other words, A's 'offer' to give is only effected by A's actually exercising the power to give, and it is this power that is fundamental for understanding the legal mechanism of giving, even if an agreement model is applied to common law gifts.

It is clear that even if an agreement model is applied to common law gifts, speaking about the parties' 'power to agree' is rather *notional*; each party exercises a *different* power—the donor can and does exercise the *power to give*, that is, the power to transfer the property to be given, which (and not merely the power to 'offer' to give) must be exercised even though acceptance of the gift is also necessary to effect the gift, while the donee can and does exercise the *power to accept* the gift. How different is the situation in contracting? In contracting, as this section will show, the '*notionality*' is reversed: the stepwise process of offering and accepting is notional, while the real normative change—entering into a contract—is determined by the intending parties' joint exercise of a genuine power to agree (to contract).

Consider the example of a contract for sale. Once again, three aspects of exercising relevant normative powers will be focused on to contrast 'agreeing' about a gift and contracting about a sale. First, if A is the seller and B is the buyer, either party can, by exercising the power to offer to enter into a contract for sale, empower the other party to accept the offer to enter into this contract for sale. In practice, if exercising the powers to offer and to accept is indeed part of contract formation, it is either A who offers to sell an item to B for a particular price or B who offers to buy an item from A for a particular price, but either party *ab initio* has the power to trigger the process of concluding a contract for sale. Secondly, A and B can easily switch their roles as offeror and offeree multiple times up to the moment of concluding the contract; if A offers B to enter into a contract for sale (and empowers B to accept the offer), accepting the offer is not the only option that B, who wants to enter into a contract for sale with A, has: B can, of course, counter-offer by changing the terms of the prospective contract set by A's offer, which will, of course, put B into the position of the offeror (empowering A to accept B's offer), regardless of how insignificant the proposed change to the terms of the prospective contract is; needless to say, A can also counter-offer and so can B again. Moreover, not only is it merely circumstantial who 'offers' and who 'accepts', but once the contract is concluded, it is also largely not important who *was* the offeror and who *was* the offeree: A and B are simply the parties to the contract. It might be emphasised that A and B can be switching their roles as offeror and offeree even if it is assumed that their roles as seller and buyer remain constant (for the sake of this exercise of comparing sales and gifts), although nothing, of course, turns on who is selling and who is buying as far as exercising the power to enter into a contract for sale is concerned. Lastly, A, who is the seller in the example, does not need to have any *power to sell* in order to enter into a contract for sale with B, and even if A has this power, its exercise is not necessary for concluding this contract. It might not be appropriate to describe B's ability to buy as a power, but a more general point can be made: in stark contrast with gifts, contracting parties can create a contractual relationship between them simply by exercising the power to enter into a contract, even if

the parties do not have the collateral legal powers necessary to discharge the contractual obligations they have created—for example, A doesn't own what they contract to sell—or are unable to discharge those obligations for any other reason.

Thus, the example of contract for sale reveals a remarkable contrast between contracting and giving. Even if contracting parties exercise the powers to offer and to accept during contract negotiation, the notions of 'offering' and 'accepting' are not helpful, and even misleading, if the aim is, as it is, to understand the normative power that *creates* a contractual relationship. It is not the case that one party merely 'offers' something that the other party can 'accept' in the way that this happens in the case of a gift. In order to enter into a contract, the parties must *agree* to a contractual relationship between them on particular terms; this can, of course, only be achieved if *each* party agrees, which either party can do in multiple ways, as we shall see. The most obvious example of another way is the signing by both parties of a written contract whose terms have already been negotiated. It is true that some ways of *agreeing* to a contractual relationship may involve exercising the powers to offer and to accept, but referring even to such ways of *agreeing* to a contractual relationship as 'offering' and 'accepting' is, it will be argued, notional. The conclusion will be that the parties have to exercise one and the same *joint* power to enter into a contract—the *power to contract*. In Section 4, the nature of this joint power, as well as the precise role that the *unilateral* powers to offer and to accept play in those methods of contracting which involve offering and accepting, will be explained. First, however, a different, related, case of exercising a normative power jointly is considered in the next section in order to make some important preliminary observations about the nature of joint powers.

3. Collective Decision-Making and Joint Normative Powers

The previous section has highlighted some limitations of the offer-and-acceptance analysis as an explanation of the power that creates contractual obligations. At this point, it might be asked why contract theorists purport to explain, persistently, the power that creates contractual obligations by resorting to the *unilateral* (and *different*) powers to offer and to accept, paying little, if any, attention to the possibility that the intending parties might be exercising a joint power, a power to agree or, as a matter of law, a power to contract. Two answers may be suggested.

First, contract negotiations *can* take two steps at which the parties do exercise the power to offer and the power to accept; moreover, a typical model of contracting analysed in contract theory involves what might be referred to as a quid pro quo contract, in which each party performs in exchange for the other party's performance, and although there is an immediate (and recognised) problem of describing one party's 'contribution' to the formation of the contractual agreement as a mere ('passive') acceptance,[12] it is still tempting to see 'offering and accepting' as mirroring the two sides of the 'contractual equation'.

12. See the text accompanying note 28.

Secondly, and perhaps more importantly, it seems that legal theorists have generally been somewhat more 'comfortable' with dealing with *unilateral* powers, whereas the normative powers that are *shared* with others and have to be exercised *jointly* often appear as puzzling or mysterious;[13] this is liable to prompt an inclination, even if only a subconscious one, to try to explain normative changes by resorting to unilateral powers, however artificial the resulting analysis appears to be. So, in the case of contract formation, the unilateral powers to offer and to accept—which may indeed in some cases be exercised in two steps temporally—are resorted to in order to explain the cases in which they are exercised and all the cases of contract formation.

In order to dislodge the attractiveness of the 'unilateral power' approach to understanding contract formation, a relatively uncontroversial case of exercising a normative power jointly is examined in this section. That is the case of collective decision-making by a company's board of directors. Here we do not resort to the notions of offering and accepting; nor do we tend to apply a two-step or a last-act analysis in explaining the process of decision-making;[14] the process rather involves voting by the individual members of the board. They vote for or, indeed, against, particular resolutions, which eventuates in a collective decision. This section suggests why it might be easier to 'see' in this case that the power that is exercised to reach a decision—the power to vote—is indeed one and the same power that is exercised jointly by the individual members of the collective body despite the fact that the members may, and often do, exercise it in a particular sequence and despite the fact that exercising the power to vote by an individual member may, and normally does, (also) produce a (separate) normative change different from reaching a collective decision; this latter change is only brought about by exercising the power to vote jointly.[15] The discussion in this section prepares the ground for accounting, in the next section, for the power to contract as a jointly exercised power *and* explaining the role that the unilateral powers to offer and to accept play in those methods of contracting which involve offering and accepting.

Consider two voting scenarios: (1) unanimous voting, and (2) majority voting.

Unanimous Voting. A board consists of A, B, and C. In the process of open voting, A is the first to vote, and A votes 'yes'. Once A's power to vote is exercised, the normative landscape changes: A no longer has the right to vote on the matter, and there is a vote to count. However, when A votes, they certainly do not vote *in order to* lose the right to vote; nor do they vote merely in order to *vote*, i.e., in order to participate in voting (so that there will be one more vote to count). Rather, A *votes for* or *agrees with* a particular resolution; yet, no decision is met just in virtue of A's voting: B and C are yet to vote. B is the next to vote, and B also votes 'yes'. The normative landscape changes in exactly the same

13. *Cf* Waldron, *supra* note 11 at 50.
14. For a terminological clarification, see *supra* note 7.
15. Any further questions of attribution, as far as the board itself is concerned, are not addressed in the paper.

way: B no longer has the right to vote on the matter, and there is one more vote to count. Still, there is some sense in which the situation is different now: if C now votes 'yes', not only will they lose the right to vote on the matter and not only will there be one more vote to count, but the decision of the board will also be reached. Might it be said that it is C who effects the 'final' normative change—the decision of the board is reached—by exercising the power to vote 'in response' to the 'interim' normative change brought about by A's and B's exercising their powers to vote? In other words, might the last-act analysis be used in this case? It would be quite odd to do so. In some factual sense, it is easy to label C's vote as decisive (and one might even imagine A and B looking at some point at C with eager anticipation, wondering whether the decision of the board is now going to be reached), but normatively speaking, C's vote *for* the decision does not mean anything without A's and B's votes *for* it; the decision is reached *after* C has voted 'yes', but not *as the result of* it. It has been reached as the result of A, B, and C's voting *together;* it is merely circumstantial who votes first and who votes last, and more importantly, when each of them does vote, they exercise one and the same power creating identical normative changes; if taken individually, each instance of exercising this power, from first to last, changes the normative landscape in exactly the same way (the member loses the right to vote on the matter, and there is a vote to count), but only jointly do they bring about the intended, and separate, normative change, i.e., the decision of the board.[16]

Majority Voting. A board now consists of A, B, C, D, and E. In the process of open voting, A, B, and C have all voted 'yes'. D and E are yet to vote, but it might seem that in this situation, there is no need for them to vote: the decision of the board now appears to have been reached regardless of how they may vote. Yet, D and E do not lose their right to vote and most certainly may exercise their powers to vote on the matter, *and* their votes *will* be counted.[17] Suppose it transpires thereafter that C's voting was vitiated (e.g., by C's having a conflict of interest) and has to be invalidated. Does this 'destroy' the decision of the board? Obviously, this would depend on how D and E (whose voting appeared to be so irrelevant at the moment of decision-making) voted. If at least one of them voted 'yes', the decision would stand, as the majority of the members would still have voted for this decision of the board. It does not matter, once again, who votes first and who votes last; the normative landscape does change in a particular (and exactly the same) way in the result of each and every exercise of the power to vote by each and every individual member, but the collective decision of the board is only reached in the result of their joint exercising one and the same power, and the *rules* on voting determine how exactly the members can achieve this result *together*.

Returning to the question that this section seeks to address, why might it be easier to 'see' in these two voting scenarios that the individual members jointly exercise one and the same power to vote to reach a decision of the collective

16. *Cf* Waldron, *supra* note 11 at 54 (discussing voting in elections).
17. It is assumed that any member of the board may abstain from voting, but nothing turns on this.

body? Three suggestions can be put forward as an explanation of why we are not tempted to apply the last-act analysis here.

First, a plurality of participants would obviously complicate the offer-and-acceptance story; relatedly, there is no quid pro quo element involved, at least not directly. Would eliminating the plurality of persons exercising the power to vote make any difference? Consider a modification of the *Unanimous Voting* example. A board consists of A and B. In the process of open voting, A is the first to vote, and A votes 'yes'. By voting, as has already been emphasised, A *votes for* or *agrees with* a particular resolution. Could then A, who has voted 'yes', be regarded as 'offering' B to vote for or agree with this decision, and could B, who votes 'yes', be regarded as 'accepting' A's offer?[18] Metaphorically, the situation can be presented in this way, but clearly, A is not offering something *to* B—something that B can now accept; nor is B accepting anything *from* A. There are no two sides of an 'equation', contractual or not, that 'offering and accepting' could mirror, as there is no 'equation' itself: A and B are not participating in an exchange; they are pursuing some *common goal* by trying to reach a decision that may be beneficial (or detrimental, as the case may be) to *both* of them. Needless to repeat, it is circumstantial who votes first and who votes last. Moreover, it might be that A proposes that the board votes on the matter, and in the process of voting, A is the first to vote, but it might be that it is B who proposes that the board votes on this matter, but it is A who is then the first to vote. In any case, when they do vote, they jointly exercise one and the same power to *make the decision* which they jointly exercise *by each of them voting*. Their individual votes are not intended to, nor do they, create some 'interim' normative change, with prior voters empowering later ones to take advantage of this normative change by exercising some newly acquired normative power to effect some 'final' normative change. The offer-and-acceptance story collapses, as does the last-act analysis.

Secondly, despite the fact that the members of the board vote in a particular sequence, we might tend to 'disregard', in our analysis of all the voting scenarios above, any temporal gap between different instances of exercising the power to vote and in doing so we might be assuming, whether consciously or subconsciously, that all the members of the board vote simultaneously; we might also tend to 'approximate' a sequential voting scenario to a ballot box scenario. Consider a modification of the *Majority Voting* example. Instead of voting openly in a particular sequence, A, B, C, D, and E cast their votes by marking paper ballots, which are put into a ballot box, votes which are counted after everyone has voted. If there is the requisite number of votes for the decision, the decision is reached. In this case, we might focus on the count as the moment of time at which the decision is reached, and we might assume that each member of the board exercises the power to vote at this moment. Yet, in *actual* fact, the members almost certainly fill in their ballots at *different* moments of time, but this fact is clearly irrelevant in terms of the normative changes that occur; each individual

18. 'A' might also be the one, it might be assumed, who initially proposed that the board vote on the matter.

vote changes the normative situation in exactly the same way (the member loses the right to vote on the matter, and there is a vote to count), and only together do they bring about a different normative change (the decision of the board is reached). What is distinctive about a ballot box scenario is only that any order of voting becomes invisible, and so does any attribution of any particular vote to any particular member. Might we then treat the whole process of voting as one 'prolonged' moment of time, and assume that the power to vote is exercised at this moment? We might, and such a subterfuge might also work for the sequential voting scenario, but is it important whether there is any temporal gap between different instances of exercising the power to vote and whether we 'disregard' such a gap where it actually exists? It seems that to the extent that we strive to 'invent' simultaneity of all the instances of exercising a normative power jointly, we might treat simultaneity, whether consciously or subconsciously, as a proxy for 'togetherness'. Yet, as has been aptly observed:

> Acting together is not the same thing as acting simultaneously. A relay team's action of running a mile is constituted by the actions of its four members, each of whom runs one quarter of a mile. Their teamwork and fleetness of foot might enable them to win the race, but temporally speaking they run one after another.… Conversely, all the members of a collection might act at the same time but not together, as when each and every member of a crowd independently flees at the sight of the approaching police.[19]

Simultaneity is artificial in voting scenarios, but even if it were real, it would be of no help in determining whether the power to vote, or any other power, is exercised *together*, that is, jointly.

Lastly, in all the voting scenarios that have been considered, there is a (pre-existing) *framework* allowing both an independent observer and the members of the board themselves to 'see' or to understand what exactly the members are doing when each of them individually votes for or against a collective decision of the board; this framework includes, *inter alia, rules* on voting in the board, determining who does what, when they do it, and how they do it. However, while there must be *some* framework for exercising a normative power jointly, it is certainly not necessary to be a member of a body of an incorporated entity in order to exercise a normative power together with others. Further modifications of sequential voting scenarios could be considered—modifications that would turn *collective decision-making* in a body of an incorporated entity into *contracting,* be it a multilateral contract or a bilateral contract—but considering any modifications of this sort is better left for the next section, which looks at the power to contract more specifically.

The next section draws on the observations about exercising a normative power (to vote) jointly made in this section, as well as on the conclusions on the offer-and-acceptance analysis reached in the earlier section (on gifts and sales), to substantiate an account of the power to contract as a jointly exercised normative power. In doing so, the next section explains the role the unilateral powers to offer and to accept (which are not the powers creating contractual

19. Wellman, *supra* note 11 at 166.

obligations) play in those methods of contracting which involve offering and accepting, while also explaining why there is no need to 'invent' offering and accepting in those methods of contracting in which there are none.

4. Contracting and Joint and Unilateral Normative Powers

This section first looks at what will be referred to as *multilateral* contracts, which are normally on the periphery of contract theory, if they are ever seriously analysed at all; it then considers in more detail *bilateral* or *quid pro quo* contracts, which are a typical focus of contract theory. An important difference between multilateral and bilateral contracts, as understood in the paper, lies not in the number of persons involved, but in the connection between parties' rights and duties and between their interests in contracting. In a bilateral contract, each party performs in exchange for the other party's performance, and each party's duty to perform correlates with the other party's right to performance; an example of this model is a contract for sale. In a multilateral contract, the parties do not perform *in order to* receive the other parties' performances. Instead, they are pooling resources for a common purpose and their rights are rights to what the performance of each and every individual duty collectively secures, including the duty of the performing party itself; an example of this model is a contract underlying an unincorporated association. Concluding a multilateral contract could be most fruitfully compared, although not analogised, to collective decision-making by a board of directors, with the presence of a *pre-existing* framework including, *inter alia,* rules on voting (determining who does what, when they do it, and how they do it) being a feature of the latter, but not the former. Despite this difference, it is still relatively easy to 'see' that when persons conclude a multilateral contract, they jointly exercise the power to enter into such a contract, and it is still extremely difficult to 'fit' the formation of such contracts into the mould of the offer-and-acceptance or the last-act analysis, and this section suggests why.[20]

20. Indeed, multilateral contracts, of which a contract underlying an unincorporated association is an example, are usually mentioned in contract law literature as an *exception* to concluding a contract by offering and accepting. See e.g. *Re Recher's Will Trusts,* [1972] Ch 526 at 538-39. Another example that is typically given is a contract between competitors in a yacht race. See *The Satanita,* [1895] P 248 (CA), [1897] AC 59 (HL(Eng)). Per Lord Herschell: "I cannot entertain any doubt that there was a contractual relation between the parties to this litigation. The effect of their entering for the race, and undertaking to be bound by these rules to the knowledge of each other, is sufficient, I think, where those rules indicate a liability on the part of the one to the other, to create a contractual obligation to discharge that liability" (*ibid* at 63). *Cf Bony v Kacou,* [2017] EWHC 2146 (Ch). See also *Mercato Sports (UK) Ltd v Everton Football Club Co Ltd,* [2018] EWHC 1567 (Ch). See e.g. Andrew Burrows, *A Restatement of the English Law of Contract,* 2d ed (Oxford University Press, 2020) at 54; Edwin Peel, ed, *Treitel on the Law of Contract,* 15th ed (Sweet & Maxwell, 2020) at para 2-077; HG Beale, ed, *Chitty on Contracts,* 34th ed (Sweet & Maxwell, 2021) at paras 4-143, 4-144. As John Cartwright observes, "[i]n the case of such multiparty contracts, the courts appear simply to have recognised the existence of the contract from the parties' intention to be mutually bound, without seeking to find the offer and the acceptance." John Cartwright, *Formation and Variation of Contracts,* 3d ed (Sweet & Maxwell, 2021) at para 3-23 [footnote omitted] (also referencing the cases mentioned above).

It then explains how the parties to a bilateral (and any) contract jointly exercise one and the same power in order to enter into the contract—the power to contract—despite the fact that they may *also* exercise the unilateral powers to offer and to accept, and regardless of whether or not they exercise these unilateral powers.

4.1 Multilateral Contracts

Why would it be counter-intuitive to use the offer-and-acceptance analysis to account for the conclusion of a multilateral contract? The answer mirrors the earlier explanation as to why we do not tend to apply the last-act analysis to analysing collective-decision making by a board of directors.

As with voting, there is typically a plurality of parties, and even when, circumstantially, there is not, there is still no quid pro quo. Consider an example. A comes up with an idea to pursue some common cause with B and C. A approaches B, and B agrees with the terms of the prospective contract. A and B then approach C, and C also agrees with these terms. Does anyone offer or accept anything in this scenario? Does A make an offer to B, which B accepts, in which case B would obviously agree *to,* and not merely *with,* the terms of the prospective contract? If so, are A and B already in some 'interim' contract between them before any involvement of C? Do they now offer C to enter into the contract with them and form the 'final' contract, as initially contemplated by A, and does C do so by accepting their offer? It is very difficult to give an affirmative answer to any of these questions. It is hard to specify what any possible contract between A and B might amount to given that the terms of the contract which A seeks to conclude with B *and* with C also contemplate C's participation. Also, C does not enter into the contract with A and B acting as one party in the way in which someone might enter into a contract for sale with, for example, a couple acting as one party—the seller or the buyer; rather, C enters into the contract with A and with B, who are *different* parties to the contract. The example can also be modified (read: complicated) by supposing that B does not *fully* agree with the terms of the prospective contract when A approaches B, but suggests their modification, to which A might agree or suggest further modification, which B might agree with, and so (almost) *ad infinitum*. Moreover, when A and B (finally) approach C, C might, instead of *fully* agreeing with the terms, suggest their revision, which is now to be considered by A *and* by B; suppose B approves the revision, but A comes up with a new revision of the terms as revised by C, which revision B and C are now to consider. A plurality of parties defies representing contract negotiation between A, B, and C as offering and accepting, but such representation is also at odds with the nature of multilateral contracts: the parties do not exchange anything on a quid pro quo basis; rather, they agree with, and ultimately to, particular *terms* of the contract between them, or to express it metaphorically, they 'vote' for these terms. As with actual voting, in order to do so, A, B, and C exercise one and the same normative power (the *power to contract* in this case), but when do they do it, and how precisely is this power exercised?

As with voting, an element of simultaneity, real or merely assumed, might cloud the analysis, but even if A, B, and C exercise the power to enter into a contract between them simultaneously, simultaneity does not help to make sense of the power (to contract) they exercise *together* for the same reason it did not in the case of the power to vote: one exercises a normative power together with others when they exercise it jointly, not simultaneously. In some, or even many, cases, it might be that A, B, and C do not exercise the power to contract when they all agree *with* the terms of the contract proposed by either of them, as they may agree subject to a written contract between them. In such a case, they will exercise the power to contract when they sign the contract, and they, in fact, may, although do not have to, do so simultaneously. Yet, any simultaneity is, of course, merely circumstantial, while signing a written contract is just one method of contracting. Furthermore, it does not appear to be impossible for A, B, and C to enter into a multilateral contract without signing anything; in such a case, they must be exercising the power to contract when each of them agrees *to* the terms of the contract proposed by either of them, and this includes agreeing to the terms by proposing them. As with voting, we might treat the whole process of negotiation as one 'prolonged' moment of time and assume that the power to contract is exercised at this moment, but as with voting, this would not advance our understanding of how A, B, and C exercise the power to contract together. How then can any of them be regarded as exercising *this* power if the result at which exercising this power is directed can only be brought about if all of them exercise this power? The normative powers that are *shared* with others may appear as mysterious,[21] but as Jeremy Waldron observes, "[j]oint powers are in fact quite familiar in private law: such powers often involve actions taken severally by pairs or sets of individuals."[22] An example that he uses to illustrate his point is a joint checking account owned by X and Y and requiring the signature of both of them on a check of $1,000 or more. Waldron suggests several ways in which the exercise of the power by X and Y can be analysed, but prefers an analysis in which "X has the power to produce a certain legal consequence—namely an authorization for the bank to pay $1,000 from the account to a specified person—but that the power depends on Y's exercise of it as well."[23] Waldron goes on to emphasise, however, that on any analysis,

> we should acknowledge that the bank's being authorized to pay $1,000 from the joint account to the specified person, is not just *a further consequence* of X's action. . . . [I]t is the *point* of X's action—the legal point—that the bank should be authorized. . . . X is doing what it takes, legally—for his part—to bring it about that the bank has the authorization.[24]

Waldron sees this as the reason why it is pertinent "to describe X's power by reference to the ultimate change in the bank's legal position, even though the

21. See Waldron, *supra* note 11 at 50.
22. *Ibid* at 55.
23. *Ibid*.
24. *Ibid* [emphasis in original].

bank's position does not change unless Y's signature is there as well."[25] In any case, X does not exercise some unilateral power (merely) *empowering* Y to exercise a unilateral power as well. Returning to the contract between A, B, and C, the *legal point* of agreeing to particular terms of the contract between them by *each* of them (including agreeing by proposing these terms) is entering into this very contract, and not (merely) empowering the others to exercise some power; regardless of whether A, B, and C agree to enter into the contract simultaneously or in a particular sequence, *each* of them *does what it takes* to enter into the contract. Once either party agrees to enter the contract, there is nothing else that this party can or should do to enter into the contract; that entering into the contract depends on exercising the power to contract by all the parties is a just way to say that this power is a jointly exercised normative power.

It might be noticed, however, that an important difference between authorising the bank by X and Y on the one hand, and concluding a contract between A, B, and C on the other hand, is that there is a *pre-existing* framework for exercising a power jointly in the first case, but not in the second one; indeed, there are particular rules pertaining to joint checking accounts, and there is a particular account held, jointly, by X and Y. A similar difference, as was already registered, exists between collective decision-making by a board of directors and contracting. As the example of A, B, and C's multilateral contract shows, the exercise of a joint power needs no prior conventional rules (established by the parties), much less the sort of institutionalised voting rules governing the voting of a board of directors. Moreover, there does not even have to be any *prior* relationship between A, B, and C, prior that is to their entering into the contract between them. Rather, A, B, and C can be, and not infrequently are, (complete) strangers; yet, they can exercise the power to contract jointly. In order for them to do so, some *context* or *conditions* appear to be necessary. This context or these conditions, it is submitted, are created by their *contract negotiation*. If contract negotiation leads to signing a contract between A, B, and C, signing the contract itself, along with the prior negotiation leading to signing the contract, it is submitted, provides sufficient conditions for the joint exercise of the power to contract. Even if A, B, and C agree to enter into the contract in sequence, without (necessarily) signing anything, contract negotiation still provides them with a requisite context for exercising the power to contract together, because now they can all 'vote' to accept or reject the proposed terms. Nothing further would seem to be required to conclude that A, B, and C, once they all accept (or 'vote' for) these terms, have successfully voluntarily undertaken the duties, and conferred upon themselves the rights, that the agreement specifies.

We must turn our attention to bilateral or quid pro quo contracts; this will also lead to a more satisfactory explanation of the roles that the unilateral powers to offer and to accept play when they are exercised and why they do not have to be exercised for the power to contract to be exercised jointly.

25. *Ibid*.

4.2 Bilateral Contracts

As already indicated, it is undoubtedly very tempting, even if equally problematic, to resort to the last-act analysis (and, in particular, to the offer-and-acceptance analysis) to try to rationalise the formation of a typical bilateral or quid pro quo contract. It is therefore not surprising that in the case of such contracts, the *unilateral* powers to offer and to accept have served as a relatively 'convenient excuse' for ignoring the *joint* power to contract in the philosophy of (contract) law. Yet, as already alluded to, even if the power to contract has been almost invariably reduced to the powers to offer and to accept in the existing theoretical accounts of contract formation, some limitations of the offer-and-acceptance analysis have also been acknowledged in contract law and contract theory. On the one hand, this analysis has been questioned as not being (easily) applicable to certain methods of contracting.[26] Indeed, even if the case of multilateral contracts is put to one side, applying the offer-and-acceptance analysis can be rather strained even in two party cases when, for example, the two parties settle the terms of a written contract and then sign it simultaneously or conclude an oral contract by shaking hands; do we even need to try to 'discern' *the* offer and *the* acceptance in such cases?[27] On the other hand, even if 'offering' and 'accepting' have been seen as mirroring the two sides of the quid pro quo 'contractual equation', it has also been recognised that 'offering' and 'accepting' in contracting must be different, in some important ways, from offering and accepting in gratuitous obligations (and we have already seen some limitations of the offer-and-acceptance analysis in Section 2). In particular, while the *negative non-imposition rationale* could account for acceptance in the latter case, it obviously cannot in the former case; it is not easy to describe one party's 'contribution' to the formation of a *contractual* agreement as a mere 'passive' acceptance of something offered.[28] Can some of these acknowledged limitations of the offer-and-acceptance analysis be overcome within a reductionist approach to the power to contract? An interesting attempt to do so has recently been made by Peter Benson.[29] Benson endorses the Hohfeldian two-step analysis of contract formation in terms of normative powers, but seeks to distinguish offering and accepting in contracting from offering and accepting in gratuitous obligations by, essentially, attributing some special characteristics to *contractual* offers and acceptances; while Benson does not specifically consider an application of his version of the two-step model to various methods of contracting, he observes that "[d]espite the complications and varieties of technologically sophisticated modern contracting, this

26. John Cartwright helpfully summarises instances in which the offer-and-acceptance analysis is problematic, stating that it is very often artificial, may be too simplistic, and is sometimes impossible. See Cartwright, *supra* note 20 at paras 3-20ff (also giving a brief overview of the discussions in the relevant cases).
27. See e.g. *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd, The Eurymedon,* [1975] AC 154 (PC) at 167 [*The Eurymedon*]; Burrows, *supra* note 20 at 53.
28. See e.g. Benson, *supra* note 6 at 102.
29. See *ibid* at 101-110.

basic bilateral model must guide the analysis of the non-formal generation of all contractual relations."[30] This subsection looks at this insightful attempt to rescue the reduction of the power to contract to the powers to offer and to accept before explaining why no such reduction can be made; even when contract negotiation takes two steps at which the parties exercise the powers to offer and to accept, these are not the normative powers that generate contract formation. This subsection explains the role these *unilateral* normative powers play in those methods of contracting which involve offering and accepting, while also explaining how the parties can jointly exercise the power to contract, which *is* the power generating contract formation, without exercising the unilateral powers to offer and to accept; this shows why there is no need to 'invent' offering and accepting in those methods of contracting in which there are none.

A version of the two-step model of contract formation, elaborated by Peter Benson, can be very briefly summarised as follows.[31] He sees a contractual relationship as "fully and intrinsically" or "robustly" bilateral, and maintains that an explanation of contract formation must be different from explaining how gratuitous obligations, or "gratuitous promises," as Benson refers to them, come into existence.[32] In the latter case, there are two parties to the relationship, but given that only one party comes under an obligation, the creation of such a relationship, and in particular, any participation of the other party in it, could plausibly be explained with reference to the negative non-imposition rationale; on this rationale, acceptance is merely *passive* and ensures that the obligation, as well as any benefit that its performance brings, is not unwanted. The negative non-imposition rationale, however, does not explain how a *contractual* relationship, what Benson calls the "promise-for-consideration relation," arises.[33] In such a relationship, the parties' obligations are reciprocal, as required by the doctrine of consideration (which Benson understands as the static dimension of the contractual relationship); the doctrine of offer and acceptance should therefore explain how *both* parties *actively* contribute to the creation of such a relationship in the sense that it is created with *coequal* participation of each party, and not just by one party's undertaking for or to the other (which Benson understands as the dynamic dimension of the contractual relationship). How then do offer and acceptance generate such a relationship? It is crucial that the offer, viewed as "one side of a bilateral relation constituted by the two expressions of assent," can be "both fixed and incomplete."[34] It is *fixed* in the sense that it communicates to the offeree the offeror's unreserved present commitment to perform in the future on the condition that the offeree accepts, and its immediate legal effect is to grant to the offeree the *power* of acceptance, the "articulation of [which] is perhaps the most important

30. *Ibid* at 107 [footnote omitted].
31. For the original account (many nuances of which are not reflected in this paper's summary), see *ibid* at 101-110.
32. *Ibid* at 102. This is explained more fully in Peter Benson's account of consideration, which is complemented by his account of offer and acceptance (see *ibid* at ch 1).
33. *Ibid* at 102.
34. *Ibid* at 106.

contribution of the doctrine of offer and acceptance,"[35] and the correlative of which is "the offeror's liability that [the parties'] legal relation may be changed without the offeror's further act or assent";[36] "[b]y exercising this power, the offeree can bring a relation of contractual rights and duties into existence."[37] The offer is *incomplete*, however, in the sense that it stipulates both sides of the proposed contractual relationship, and the offeror's commitment to perform in the future is "presented to the offeree as made for what the latter must promise or do in return."[38] By accepting, therefore, "the [offeree] does not merely signal to the [offeror] to go ahead," as it might be in the case of a gratuitous obligation, "but contributes her own act that joins with that of the [offeror]."[39] A *temporal gap* between the parties' expressions of assent is essential for concluding a contract, while a possibility of non-sequenced process of contract formation is excluded:

> One party must come to a decision in a way that places the possibility of a second related decision in the hands of the other party. And this second party must in turn be able to know that she is responding to the decision of the first that so links them. In this way, each party can reasonably view his or her decision as inherently joined with and completed by the other's, thereby establishing a genuinely bilateral relation that arises from their joint participation.[40]

Yet, "this sequenced interaction culminates in the copresent two-sidedness" of the contractual relation.[41] As the leading nineteenth-century offer and acceptance decisions established,

> once an offer is made, it *continues in time* (unless it has been effectively retracted or expires) up to and including the moment an acceptance is made. . . . in the words of Lord Eldon, "the acceptance *must be taken as simultaneous with* the offer, and *both together* as constituting such an agreement as this Court will execute."[42]

It appears that an immediate problem with Peter Benson's version of the two-step model of contract formation (as with other versions of such a model) is that it is not, *pace* Benson, (easily) applicable to all possible methods of (informal) contracting. Still, if the analysis is confined to those methods which do involve two steps at which the parties exercise the powers to offer and to accept, many points about the parties' *joint* participation in contract formation that Benson insightfully highlights are easy to agree with (and many are compatible with an account of contract formation offered in this paper); however, what appears to be difficult is to rationalise contract formation *in terms of normative powers* if

35. *Ibid* at 105. *Cf* Cartwright, *supra* note 20 at para 3-24: "If we analyse the formation of the contract by the acceptance of an offer, the acceptance is the critical communication."
36. Benson, *supra* note 6 at 105.
37. *Ibid* at 103.
38. *Ibid*.
39. *Ibid* at 102.
40. *Ibid* at 107.
41. *Ibid* at 109.
42. *Ibid* [emphasis added, footnote omitted]. Peter Benson was citing *Kennedy v Lee,* (1817) 36 ER 170 (Ch) at 173 [emphasis added].

the power to enter into a contract *is reduced*, as it seems to be on Benson's account of contract formation, to the powers to offer and to accept.

Starting from the power to offer, it is not clear how, *as a normative power*, it can be 'both fixed and incomplete'. A normative power is typically understood with reference to the normative result at which the exercise of such a power is directed. If A has a unilateral power, Power X, exercising which is directed at changing the normative situation in such a way that B is granted with a unilateral power, Power Y (whether or not any (future) exercise of Power Y by B affects A's normative position), the normative change at which A's exercise of Power X is directed is brought about once Power X is exercised; for bringing about *this* change, any subsequent exercise of Power Y by B is irrelevant. For example, the (future) principal's exercise of the power to grant the authority to the (future) agent gives certain powers to the agent (who may or may not choose to exercise these powers, and if they do, exercising such (acquired) powers by the agent will normally affect the principal's normative position); yet, the normative situation in which the agent is authorised (and thus has acquired certain powers) is the result of the principal's exercise of the power to grant the authority; any exercising (or not exercising) by the agent of their own (acquired) powers does not alter the fact that *this* normative change, i.e., the agent's authorisation by the principal, *has (already) occurred*. Similarly, if the (unilateral) *power to offer* is understood with reference to the (desired) normative situation in which the offeree is empowered to accept that which is offered, there is simply no conceptual space for supposing that the offer, as a unilateral normative power bringing about the (desired) normative result described above, 'continues in time' up to and including the moment of acceptance; to put it rather simply, while someone will not succeed in *giving* something to somebody without the latter's acceptance if such acceptance is required, someone surely succeeds in *offering* something (and in empowering somebody to accept) *as soon as* something *has been offered* (and someone has been so empowered); any acceptance itself is obviously irrelevant. The state of affairs in which something is offered may, of course, and normally does, continue,[43] but the offer as a *normative power* is exercised once it is exercised.[44]

If, however, *empowering* B to accept that which is offered by A is the normative result at which exercising the power to offer by A is directed (and which is brought about by exercising this power), could such a normative result as

43. Once the state of affairs in which something is offered obtains, it can normally be affected in multiple ways. Importantly, while exercising the power to offer empowers the offeree to accept and in so doing to change this state of affairs, the offeree is normally not the only one who has a normative power capable of bringing a change to this state of affairs, as the offeror normally has the power to revoke the offer; needless to say, the changes that can be brought about by exercising the power to accept the offer and by exercising the power to revoke the offer are very different; in the latter case, what was offered by the offeror is no longer offered, and the offeree no longer has the power to accept it.

44. A similar point is made by Hohfeld in his offer-and-acceptance analysis of contract formation, from which analysis Benson, who generally endorses it (or at least endorses it as far as understanding the power to accept is concerned), must be departing. See Hohfeld, *supra* note 6 at 50-51.

entering into a contract between A and B be still linked to any normative power exercised *by A* (and not by B)? Surely we want to say that A *agrees* to enter into the contract with B, and as far as A (and not B) is concerned, entering into the contract with B must be the result of A's *agreeing* to enter into this contract. But when does A agree? Quite obviously, A agrees when A proposes to B the terms of a prospective relationship contemplating A's and B's reciprocal performances, indicating A's assent to enter into this relationship with B and inviting B to assent as well; in other words, A agrees to enter into the contract with B *when* A exercises the normative power to offer. But is entering into the contract with B, the actual formation of the contract, the *result* of A's exercise of the normative power to offer? An immediate answer might be that it is not because *B's* agreeing to enter into the contract with A is necessary for any contractual relationship between them to ensue, but more fundamentally, even if B's agreeing to enter into the contract with A is put to one side, entering into the contract with B is simply not the result with reference to which A's *unilateral* power to offer can be understood. A unilateral power achieves the result at which exercising such a power is directed without anyone else's participation; in the case of the power to offer, this result is empowering some other person to accept the offer. If the unilateral power to offer is the only normative power that A exercises, what A could be taken to *agree* to when A exercises this power is the state of affairs in which B is empowered to bring about a contractual relationship between A and B, but such a relationship would be the *result* of exercising B's unilateral power (to accept) alone;[45] obviously, there would be a *causal* relation between exercising the power to offer and entering into the contract, but entering into the contract would not be *normatively* brought about by exercising the power to offer.

In view of these considerations, it seems that in order to link, normatively (and not merely causally), such a normative result as entering into the contract between A and B to a normative power exercised by A, we need to construe this power as something *different* from the unilateral power to offer. It is submitted that A enters into the contract by exercising the power to contract. By exercising this power or, in other words, by agreeing to *enter* into the contract with B on particular terms or, to put it metaphorically, by 'voting' for these terms, A does what it takes to enter into this contract, and what A does *must* be defined, in the case of the power to contract, with reference to the normative situation in which there is a contract between A and B (and not with reference to some interim normative situation in which B has the power to accept A's offer). Yet, no contract between A and B is, of course, created unless B *also* agrees to enter into this very contract with A or, in other words, unless B exercises the power to contract, by also 'voting' for these terms, but this is just to say that A and B must exercise the

45. Corbin, who adopts the Hohfeldian analysis of contract formation, emphasises that "the act of the offeror operates to create in the offeree a power, and having so operated it is exhausted; thereafter the voluntary act of the offeree alone will operate to create the new relations called a contract." Corbin, *supra* note 6 at 181-82. Alas, Corbin does not consider the implications of such a reduction of the power to enter into a contractual agreement for understanding what the parties are actually agreeing to.

power to contract *together* or *jointly* to achieve the result at which exercising this power (by either of them) is directed.

Assuming it is accepted that the unilateral power to offer and the joint power to contract are analytically distinct (even if they are exercised by doing one and the same action by A), is there also a similar difference between normative changes generated by the unilateral power to accept and the joint power to contract? It might be thought that the answer to this question should be 'no', as whatever the result of exercising the unilateral power to accept by B might be taken to be, this result, it might be thought, would be immediately 'subsumed' by *entering into a contract*, as with B's exercise of the unilateral power to accept, both A and B will have exercised their power to contract. Yet, even though any difference between the normative situation generated by B's exercise of the unilateral power to accept and the normative situation generated by A's and B's joint exercise of the power to contract will often be of little practical significance, the two normative changes are still distinct analytically. It is submitted that a better way to understand the normative results generated either by the power to offer (including what can be referred to as the power to counteroffer) or by the power to accept is to treat these results as *entering into or entering into and concluding a contract negotiation*.[46]

The difference between entering into a contract negotiation and entering into a contract is arguably most conspicuous in the case of the power to offer and the power to contract, but even if not always apparent, it nonetheless exists in the case of the power to accept and the power to contract. For example, in certain vitiation scenarios, entering into a contract may be invalidated in such a way that the parties will be considered to have never exercised the power to contract, but this will not mean that the parties never entered into a contract negotiation; the latter may occur, inter alia, by exercising either the power to offer or the power to accept, and may itself attract certain legal consequences.

Yet, exercising the unilateral power to offer or the unilateral power to accept is obviously not the only way to enter into a *contract negotiation*. What is then the role of the powers to offer and to accept in contract formation if they are not the powers that generate a contractual obligation? It is submitted that exercising these unilateral powers can, and normally does, create necessary *conditions* for exercising the power to contract jointly. A joint exercise of a normative power requires more demanding conditions than exercising a normative power unilaterally. In some cases, as mentioned earlier, there is a pre-existing framework ensuring that when particular persons do something, they jointly exercise a particular power (such as in the case of the power to vote or in the case of the power to authorise the bank by the holders of a joint account). In the absence of any pre-existing framework, necessary conditions for exercising a power jointly must be created, and that is what, it is submitted, the unilateral powers to offer and to accept do; exercising these unilateral powers creates the conditions in which two persons, not yet in a contractual relationship with each other, can jointly exercise one and the

46. Different ways in which the term 'contract negotiation' can be understood are not examined in this paper.

same power to contract (without any prior arrangement as to exercising this power). An offer proposes the terms of a particular relationship contemplating the parties' reciprocal performances, identifies persons who must jointly exercise the power to contract if this relationship is to come into existence, communicates to the offeree that the offeror has already exercised the power to enter into this very relationship, and stipulates that in order to exercise the power to enter into this very relationship, the offeree must accept the offer.[47] Accepting *this* offer by *this* offeree ensures that the power to contract is exercised jointly, but it is the power to contract that (normatively) brings about the contractual relationship.[48]

Is then exercising the unilateral powers to offer and to accept the only way to create the conditions necessary for exercising the power to contract jointly? It is submitted that it is not, and considering other methods of contracting demonstrates this. It has long been observed that the offer-and-acceptance is 'forced' on the facts as far as some methods of contracting are concerned.[49] One example is entering into a contract by signing a written document. While it might be suggested, not without demonstrating remarkable ingenuity, that the party who happens to sign the contract first (after a (thorough) negotiation of the contract by *both* parties) 'offers' and the other party 'accepts', this is not even the way that contracts appear to be usually signed: a fairly standard way of doing so is that

47. Frederick Pollock preferred to speak about a *proposal* (rather than an offer) made by some or one of the persons entering into a contract, which proposal is accepted by the others or other of them. See Frederick Pollock, *Principles of Contract: Being a Treatise on the General Principles Concerning the Validity of Agreements in the Law of England,* 4th ed (Stevens & Sons, 1885) at 1. This term may now seem somewhat outdated; yet, a *proposal* is what a *contractual* 'offer' essentially is—a proposal to conclude a contract on specific terms between specific persons made by one of them. The term 'proposal' may also be better capturing the richer idea of (contractual) bilaterality than the term 'offer', which may invite, and has indeed invited, a suggestion that one party's 'contribution' to the formation of an agreement as a mere 'passive' acceptance of something offered (the negative non-imposition rationale of acceptance), which may, in turn, better reflect a thinner idea of (non-contractual) bilaterality, which may obtain in gratuitous obligations.

48. Consistently with this analysis, no power to contract is exercised in the case of two *cross-offers* or, in other words, two identical offers made simultaneously in ignorance of each other, as the conditions for exercising the power to contract jointly, described in the main text, are not created; the joint power to contract will be exercised if one of such offers is further accepted by the offeree. See *Tinn v Hoffmann & Co* (1873) 29 LTR 271 (Ex Ch).

49. See e.g. *The Eurymedon, supra* note 27 at 167. Lord Wilberforce's observation that the offer-and-acceptance analysis is 'forced' on the facts in some methods of contracting was referred to by Lord Denning when he suggested (*obiter dictum*) a broader test to establish whether the parties reached an agreement on all material points, without having to find the offer and the acceptance. See *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd,* [1979] 1 WLR 401 (CA) at 404. He repeated this broader approach in *Gibson v Manchester City Council,* [1978] 1 WLR 520 (CA) at 523, observing that "it is a mistake to think that all contracts can be analysed into the form of offer and acceptance" and that "there is no need to look for a strict offer and acceptance." Lord Denning's broader approach was rejected on appeal by the House of Lords, but Lord Diplock stated that "there may be certain types of contract … which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance," adding that "a contract alleged to have been made by an exchange of correspondence between the parties in which the successive communications other than the first are in reply to one another, is not one of these." *Gibson v Manchester City Council,* [1979] 1 WLR 294 (HL) at 297. See also *G Percy Trentham Ltd v Archital Luxfer Ltd,* [1993] 1 Lloyd's Rep 25 (CA); *Tekdata Interconnections Ltd v Amphenol Ltd*, [2009] EWCA Civ 1209.

each party signs a copy of the contract, swapping the copies and signing them again (although the last stage might be thought to be largely redundant); in such a scenario, the parties sign the contract simultaneously, which arguably makes it impossible to distinguish two steps at which the parties would exercise the powers to offer and to accept, but more importantly, if there is a written contract between the parties, there is arguably no need to try to 'invent' any offers and acceptances;[50] a prior negotiation of a contractual relationship between particular parties culminating in signing, by these parties, the document containing the terms of this relationship (contemplating the parties' reciprocal performances) creates the necessary conditions for exercising by these parties the power to enter into this relationship jointly. A similar reasoning also helps to rationalise the scenarios in which the parties conclude the contract by shaking hands, and in so doing agree *to* a particular contractual relationship between them, after agreeing, in the process of a prior negotiation, *with* the terms of this relationship.

In conclusion, it might be observed that when different contracting scenarios are considered, it becomes more obvious that while simultaneity or a temporal gap may characterise exercising the power to contract in different methods of contracting, neither simultaneity nor a temporal gap is essential for exercising the power to contract jointly, as considering multilateral contracts in the previous subsection has also demonstrated; moreover, it is also not necessary, and arguably quite misleading, to try to 'marry' the idea of simultaneity and the idea of a temporal gap to explain how the parties enter into a contract; exercising a joint normative power in a particular sequence does not 'destroy' the joint nature of such a power, while exercising a normative power simultaneously does not make such a normative power a joint power. The unilateral normative powers to offer and to accept, which are exercised in a particular sequence, create the conditions for a joint exercise of the power to contract, which is, in this case, also exercised in a particular sequence, but exercising the unilateral powers to offer and to accept is not the only method of creating the conditions for a joint exercise of the power to contract. It is, however, this power, whether it is exercised in a particular sequence or simultaneously, that creates *any* contractual relationship regardless of the method of contracting, and it is the power that persons have *ab initio,* i.e., without being empowered by somebody else.

It might be asked, however, "How can persons, taken individually, have the power to contract (and not just what could be referred to as the 'competence' in the sense of some (general) 'ability' or capacity to contract) if this power can only be exercised *together* with others?" This is how Carl Wellman explains how an individual can have the (liberty-) right of assembly:

> No individual could exercise the liberty to assemble, because it requires more than one person to assemble, just as it takes two to tango. Still, for two to tango simply is for both partners to dance their respective parts together. Similarly, for a group to assemble is merely for every member of the group to come together with the others.

50. See e.g. Burrows, *supra* note 20 at 53.

> Now, coming together, moving to a place where there are others, is something that an individual can, and often does, do. To be sure, no individual can come together *all by herself.* Only when one or more other individuals are in place can an individual come together with that person or persons. But every action presupposes a set of necessary conditions. . . . [A]lthough the individual can exercise her moral right to assemble only on condition that one or more others are present or reachable, it remains true that she can assemble with them by her individual act of coming together with them.[51]

As Jeremy Waldron, who also refers to this example in his discussion of the power to vote, observes: "Assembly is not the exercise of a power; but the logical point is similar. One person can have a liberty or a power in relation to an action or outcome whose relevant description makes essential reference to the actions of others."[52] Similarly, a person can, and does, have the power to contract even if exercising this power together with at least one other person is necessary to effect the normative result at which exercising this power is directed—entering into a contractual relationship.

5. Conclusion

This paper has argued that in order to enter into a contractual relationship, persons must *jointly* exercise the *power to contract*; this power is a *sui generis* normative power, not reducible to the *unilateral* powers to offer and to accept and not representing some amalgam of the two. Exercising the unilateral powers to offer and to accept (at two steps) does not (normatively) bring about a contractual relationship, but can, and normally does, create the *conditions* necessary for a joint exercise of the power to contract, while not representing the only way in which such conditions can be created. Regardless of ways in which such conditions are created, however, or regardless of *methods of contracting*, it is exercising the joint power to contract, whether this power is exercised simultaneously or in a particular sequence, that (normatively) brings about a contractual relationship.

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51. Wellman, *supra* note 11 at 168 [emphasis in original].
52. Waldron, *supra* note 11 at 56.