Modern constitutionalism is based on the notion of constituent power. Constituent power signals that constitutional orders are made, not found, and that their authorship of last resort lies with the people. The notion connects the idea that all government needs to be subjected to formal legal rules with a commitment to popular sovereignty, such that without eventual recourse to an authorising people, or against its authoritative expression, claims to constitutional validity will be fraudulent or void. But despite its central place in the modern understanding of constitutional government, constituent power has not played much of a role within global constitutionalism, the study of constitutionalisation in the international realm. On the contrary, leading conceptions have been developed in complete disregard of the question of constituent authorship (Loughlin 2010, 67-69). There are a number of reasons that could be cited for the eclipse. Some authors have claimed that it is incoherent to apply the notion beyond homogeneous nation states (Böckenförde 1991: 94), while others have warned that it necessarily transports an allegiance to mythical founding moments. They have seen the notion of constituent power as superfluous for constitutional government, or even to contain “the seeds of its own destruction” (Dyzenhaus 2007, 129). A widespread suspicion is that in matters of global governance, in the absence of a pre-existing people, adequate carriers of constituent power may be lacking (Krisch 2016). It is not immediately obvious which agents could take on the role of bearers of constituent power in post-national orders, and it may be risky to stretch the notion too far. At the same time, an outright rejection of constituent power, the central legitimating category of the democratic revolutions, would leave constitutionalists in a dilemma. After all, according to what standards will the new and ‘unbound’ processes of constitutionalisation (Wiener 2014, 18) count as legitimate? While Legal Theory may afford to restrict its reconstruction to the internal points of view of judges and legal procedures, International Political Theory needs to reflect the perspectives of those subject to border-crossing constitutional orders. Indeed, democratic constitutionalists have argued that without recourse to constituent power, there can be no constitutionalism proper. In the absence of a plausible narrative of popular authorship, post-state developments of legal integration would either fail to produce a
‘constitution’ in the full sense of the term, or at any rate none that could be considered democratically fully legitimate (Maus 2010; Möllers 2011).

In this chapter, I suggest that reverting to a notion of constituent power in global constitutionalism is necessary, plausible, and useful. Relying on the assumption that the constituent power of the people is a key legitimating feature of state constitutions, I argue that global constitutionalism needs to attend to the question of constituent power as well, in two steps. I first show that international treaties can affect domestic constitutions, unauthorised by constituent power (I). I then argue that a similar problem of ‘constituent usurpation’ arises for supra-state constitutions (II). In attempting to remedy this defect, I argue that it is plausible to extend the concept of constituent power to normative orders beyond the state (III). I focus on the presumptively most promising case, the European Union, and the various candidates that have been proposed as its pouvoirs constituants. However, I do not advocate a one-conception-fits-all view and therefore add some brief reflections on other processes of supra-state constitutionalisation (IV). I conclude that in most, though not all cases (V), ascriptions of constituent power will be relevant in a transformational, not a foundational perspective. The usefulness of the concept of constituent power I locate in three dimensions throughout, in its having an explanatory, a critical-restrictive, and an empowering function in processes of global constitutionalisation.1

I. Although the technical language of the pouvoir constituant was only introduced into constitutionalist language in Emmanuel Sieyes’ What is the Third Estate?, its key features are fully developed already in John Locke’s political theory. In this section, I first want to present its general outline, before moving on to the complications it entails for constitutionalisation beyond the state. Building on earlier influences,2 Locke distinguishes between ‘constituting’ and ‘constituted’ political bodies (1967, II § 157, 212). The authority to constitute and re-constitute institutions of government, first and foremost to allocate legislative authority, lies with a people united in a horizontal compact. In investing the legislator with supreme constituted power, the constituting people binds its creation to operating within its limits.

1 For the purposes of this chapter, I do not invoke a comprehensive notion of ‘constitutionalisation’. As will become clear, I conceive of the allocation and regulation of public decision-making authority as its central feature. In this I follow Markus Patberg (2016), whose work has been an inspiration throughout.

2 One important predecessor is Lawson (1992), see Franklin (1978) and Niesen (2012).
Locke insists that the people have relinquished the power "only to make laws, and not to make legislators" (II § 141). This restriction holds for the subordinate executive and 'federative' (foreign policy) powers as well: No constituted power can change the conditions under which they are authorised to operate, and none can convey their authorisation to another. Where the legislative power allows this to happen, the people may revert to their constituent role (II § 212). In such cases, legislative power falls back to the people, who are then free to "constitute a new form of government" (II § 132). In the French Revolution, Emmanuel Sieyes only had to systematise the central features of Locke’s conception in contrasting a single *pouvoir constituant* with the various *pouvoirs constitués*. He went beyond Locke in asserting that, under all circumstances, the *pouvoir constituant* remains unbound by an existing constitution and is free to give itself a new one whenever it so pleases (Sieyes 2003, 138). In Sieyes, the constituent power of the people does not have to be triggered into existence through a transgression on the part of the constituted powers. This move separates the doctrine of constituent power from earlier conceptions of justified resistance against tyrannical rule, including Locke’s.³ Whereas Locke did not say much about the activity of exercising constituent power, Sieyes emphasised two aspects. He pointed out that one can never fully specify in advance which form(s) the activity of constitution-making is to take. He also thought that there is no principled reason not to delegate constituent power to separate institutions, yet insisted, with Locke, that it could never be delegated to other constituted powers (2003, 139). In contrast to Locke’s voluntaristic understanding of how a constituent people comes about, Sieyes thought it followed from natural law (2003, 136f.). For both, the question with whom constituent power lies only afforded a single, tautological answer (“the people”), and the composition of the people was fixed, prior to the activity of constitution-making. Both expected the constituent power to take the initiative in processes of constitution-making, and exert causal force (Locke II § 96; Sieyes 2003, 134).

Despite their differences, the joint legacy of the Locke-Sieyes-tradition is the twofold role it ascribes to the category of constituent power. From the outset, it is introduced to capture two ideas simultaneously: the idea of a claim to continuous institution-making and institutional change on the part of the people, as well as the idea of a permanent block to

³ We owe to Ingeborg Maus the sharp confrontation of constituent power and resistance-based conceptions of democratic entitlements, see Maus (1992, 43-148) and below sec. V. For the opposite view that “resistance against tyrannical rule is a manifestation of constituent politics and an affirmation of popular sovereignty,” see Kalyvas (2013).
the threat of constituent usurpation, i.e. the absorption of competence-changing authority by constituted powers.

We are now in a position to see how a problem of legitimacy can be seen to arise, based on the distinction between constitutive and constituted powers, from developments in international law, and thereby prepare the challenge to global constitutionalism. For matters of foreign policy, Locke proposes to institute a third constitutional branch, besides the legislative and the executive. The ‘federative’ power is to encompass the authority to declare war, negotiate peace, and enter into treaties and alliances with other states. Just like executive power, federative power is accountable to the legislative as the supreme constituted power (II § 153), not to the constituent people. Yet some federative treaties can circumscribe the legislator’s competences and thereby modify the provisions set out by constituent power. As an example, consider a free trade treaty that signs away the right to subsidise domestic products through public funds. In establishing such a treaty, the federative power effects a change to the existing constitution (given that in the default case, the use of public funds was unregulated) in restricting the scope of legislative activity, something the legislative power itself could not authoritatively abdicate, even if it wanted to, under Locke’s assignment of competences. The usual democratic control mechanism for ‘federative’ decision-making which Locke only hints at, parliamentary ratification, cannot set right a violation of the separation of powers – in this case, the separation of constituent and constituted powers (Patberg 2016) –, since the constituted legislative will be acting ultra vires in modifying its own scope and conditions of operation. Even where international treaties do not aspire to constitutional status themselves, they will often have domestic constitutional impact. In practice, they come into effect in most cases in bypassing constituent power. The problem is much exacerbated once international treaties establish separate and independent decision-making bodies. Consider a free trade agreement that not only regulates legislative competences, but installs an independent panel for the arbitration of conflicts, as envisaged, for example, for conflicts over direct foreign investments in the projected TTIP and CETA treaties (Kumm 2015). Here, the several ‘federative’ powers aim to establish bodies that not only effectively limit the scope of the member state legislatives but create new decision-making and perhaps, in the long term, norm-setting agents. Just as

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4 For the recent debate surrounding ‘Economic Partnership Agreements’ between European and African States, see Hurt et al. 2013.
legislators are limited to making laws and cannot establish new legislators, the constituted ‘federative’ power cannot outsource its decision-making capacities and constitute new bodies to this effect. Bracketing, for the moment, the issue of when international treaty regimes, in setting up independent arbitration panels or courts, could themselves legitimately claim constitutional status, it is clear that they will modify existing domestic constitutional orders in an unauthorised way, even under conditions of full legislative ratification.

Before we turn to supra-state constitutional orders, it seems worth insisting that even where the subjects of international law are properly constituted democratic states, with parliamentary oversight of their ‘federative’ powers in place, they can fail to comply with the democratic program of instituting public power domestically. This does, however, not entail that international treaties necessarily compromise the democratic credentials of constituent power, or that any consensual coordination between states must violate constitutional government. The systematic issue could be addressed by bringing constituent power back into federative decision-making. If the people, and not the legislative, were in control of the federative (cf. II § 168), the separation of constituent and constituted powers could be upheld. For example, where treaties are subjected to ratification through constituent power, or to extraordinary representative bodies, their constitution-changing impact can begin to be reined in. A general practice of the coordinated, simultaneous articulation of existing constituent powers would go some way towards reconciling international treaty-making with the priority of domestic constituent power. Also, the pouvoir constituant can provide negotiation mandates for the federative power, be it in the name of peace, liberty or welfare, in the constitution itself. However, even if domestic constitutions could in principle be immunised against international legal encroachment through the activation of domestic constituent powers, this may not entail that the same strategy worked for supra-state constitutions, to which we now turn.

II. Seen from the perspective of the Locke-Sieyes tradition, constitutionalisation processes transcending the jurisdiction of single states have been propelled almost exclusively through constituted powers like heads of the executive, arbitration panels, courts, and even non-authoritative ‘systemic’ actors like professional lawyers. Gunther Teubner’s ‘societal constitutionalism’ is especially impressive in its diagnosis of ‘emergent’ regimes that make a
travesty of the traditional political logic of authorisation and implementation, and ascribe “constitutional self-validation” to the autonomous coordination of legally constituted private actors (Teubner 2014, 92). Even where we restrict our view to international organisations capable of claiming public authority, it is obvious that the most productive and resilient examples of global constitutionalism do not flow from popular activity, or the setup of extraordinary constituent bodies. On the contrary, it is widely agreed that they result from the combination of two factors. The international legal pedigrees of organisations like the UN and EU result from member state consensus, likewise those of the WTO and the human rights regime of the Council of Europe. At the same time, processes of constitutionalisation and constitutional transformation of international organisations have been propelled by the autonomous operation of internally established decision-making bodies such as the Security Council, the European Court of Justice, the Appellate Body of the WTO Dispute Settlement Panel, or the European Court of Human Rights. To the extent that they have not sought authentification from constituent power, both strands of this dual dynamic are bound to violate, as we have seen in the preceding section, the architecture at least of domestic constitutional validity. But state-unbound constitutionalisation processes differ from the cases discussed above in creating comprehensive legal orders that themselves claim constitutional status. It is not clear that we can project either the diagnosed problem or suggested solutions upon them.

Two examples can help illustrate how the problem of constituent usurpation reappears in constitutionalisation beyond the state. While the first records the constitutionalisation of an international organisation, the second describes institutional change within an already constitutional framework. The first example concerns the Appellate Body of the WTO Dispute Settlement Panel. In cases like Shrimp/Turtle or Bananas IV, the Appellate Body broadened its decisional competences by introducing unifying, “constitutionalising” principles and values that were arguably heterogeneous to the existing WTO treaty regime, among them “balancing” and “proportionality”, but also by relying on substantive figures of argument like “equal treatment” and even “positive discrimination” in order to safeguard equality of opportunity in trade law (Cass 2001, Petersmann 2006). Sympathetic observers equate this strategy with “constitution-making by judicial interpretation”, a practice identified as the regular mode of operation of, for example, the U.S. Supreme Court (Cass 2005, 241f.). In contrast to the U.S. Supreme Court working away on a pre-existing
constitution, however, the Appellate Body, through generating and determining constitutional values, contents and judicial methods for the WTO regime, has contributed to creating a constitutional order that did not exist beforehand, in claiming access to a higher law of its own making. While the Body based its claims to authority on widely shared principles, it has not clarified their status with regard to a *pouvoir constituant*. In cementing the constitutionalisation of international trade law, the Appellate Body therefore violated the Locke-Sieyes condition that constituted actors cannot themselves assume constitution-making powers. It exemplifies the “displacement of constituent or democratic power towards judicial actors” acting as if they were the “primary bearers of constitution-making power” (Thornhill 2012, 357).

The second example is slightly more contentious. The UN Security Council, in its post 9/11 anti-terrorist resolutions, has not only been accused of strengthening arbitrary domestic and global executive rule, but also of assuming and abusing constituent power. In deciding to hold member states responsible for the freezing of terror suspects’ accounts, on the basis of blacklists open to arbitrary emendation, it transcended its existing legal mandate to decide single cases and assumed the capacity to “legislate” prospective general rules that have a deep and broad impact on states and individuals (Cohen 2012). In taking on legislative functions, the Security Council has been argued to violate the Locke-Sieyes constraint that constituted bodies are not in a position to authorise changes in their competences. Note that this criticism sticks regardless of potential disagreements over where the authority to change competences in the organisational setup of the UN lies. While the Appellate Body’s closet constitution-making in the WTO has not faced much critical scrutiny, the “‘usurpation’” of constituent authority through the five permanent members of the Security Council, “not in order to protect an existing constitutional order but to institute a new one”, has been seen as cause for alarm (Cohen 2012, 277). A transfer of authority from the constitutive or legislative to the executive branch is no less contested in international than in domestic constitutionalism, where the 1933 Enabling Act (*Ermächtigungsgesetz*), in which a depleted and intimidated German Parliament handed over legislative power to the National Socialist government, still provides a paradigm illustration (Maus 2010). While the WTO and UN examples display constitution-shaping practices by widely different types of actors, in different bodies, both raise the question of who ought to be conceived of as authoritative...
constituting and constitution-changing actors. In this, they exhibit the critical function the notion of constituent power can take on in global constitutionalism.

III. While the constitutionalist paradigm in international law originated as much in discussing the United Nations as the European Union (Fassbender 1998, Weiler 1999), much of the ‘emerging’ debate on constituent power in global constitutionalism (Patberg 2013) has focused on the EU. The existence of the European Union can be traced back to quasi-Lockean treaties, entered into by the member states’ ‘federative’ powers, and has since taken on the character of a ‘federation of states’ (fr. fédération, ger. Bund, see Beaud 2009). Federations of states are set up as permanent associations, yet committed to upholding the separate political existence of their member states (Schmitt 2008, 386). While federative law is supreme in important areas, no federal monopoly on law enforcement needs to exist (Brunkhorst 2005). Members are free to join or exit. Crucially, although the constitutional theory of federations of states, at least in Carl Schmitt’s influential 1928 treatise, sees them emerge from a comprehensive “constitutional treaty” or “contract”, it rejects the view that a federation can rely on “its own constitution-making authority” (Schmitt 2008, 385, 396). In line with the dual dynamic identified earlier (see above, II) the constitutionalising empowerment of separate decision-making bodies in the EU has relied both on treaty-based investiture (European Parliament) as well as on flagrant self-authorisation (for the self-empowering jurisprudence of the European Court of Justice, see Thornhill 2012). Besides the intergovernmental European Council, which raises questions about domestic constituent legitimacy (see above, section I), both Parliament and Court contribute to communal norm-setting through legislation and activist, law-shaping interpretation. Their activity thus risks to run foul of Locke’s warning that “when any one, or more, shall take upon them to make laws, whom the people have not appointed so to do, they make laws without authority” (II § 212). But it is not clear who could replace ‘the people’ in a supra-state context, or what ‘appointment’ procedures could confer authority on their law-making.

From the perspectives of Locke, Sieyes, or Schmitt, there is no constituent power in the European Union besides those of its member states. A pan-European pouvoir constituant in the traditional understanding would require to “cut off the chain of authorisation to the Member states and establish itself as the original source of a supranational European
authority” (Preuss 2011, 84). A unified demos to institute a unified polity would divest the member state demoi of their authority. Nobody believes that such a homogeneous macro-subject exists, or can serve as an explanatory basis for the EU’s current constitutional set-up. Instead, a variety of alternative bearers of constituent power have been proposed, bearing in mind the EU’s character as a multi-level polity. They can be organised along the lines of ‘monistic’ and ‘split’ conceptions. At the two opposite ends of the monistic spectrum are the demoi-cratic and the ‘regional cosmopolitan’ views. The regional cosmopolitan reading of the EU acknowledges the continued legal and political relevance of the member states in the multilevel polity, but restricts constitutional relevance to individuals: “At the foundational level, there is no competition between the member states and the European level; the basic unit for which both levels can claim legitimacy is the individual, her dignity and autonomy. There is and there can only be one constituting subject even in a multilevel configuration like the EU” (Eriksen 2016, 199f.). The demoi-cratic literature rejects the individualist as well as the supranationalist orientation of the regional cosmopolitan account, but is similarly reductionist in ascribing the role of a “plural pouvoir constituant” exclusively to the peoples of the EU member states (Nicolaïdis 2013, 352). Although demoi-crats grant that, genetically speaking, the member states, not their peoples, have brought into existence the European federation of states, they invest member state peoples with constituent authority in order to underline their inter-connectedness and openness in taking each other’s claims into account. Constituent power in the demoi-cratic imagination lies in the peoples severally, not collectively speaking: The aggregate of plural pouvoirs constituants does not create a new pouvoir in addition to those of the several peoples (for the latter alternative, see Cohen 2012, 132). The member demoi reflect the enlarged mind-sets of their citizens, but again, in contrast to regional cosmopolitanism, individuals figure as (suitably idealised) members of states rather than of the federative Union. Therefore, under the demoi-cratic interpretation, “the accession to a specific democratic multilateral order [or] the exit from such an order”, but also “the design and change of the basic rules” remain in the exclusive competence of the European peoples (Cheneval & Schimmelfennig 2013, 342).

In employing the term ‘monistic’, I am not subsuming positions to the Locke-Sieyes-Schmitt conception of a pre-existing collective subject, but draw attention to the fact that they allocate multi-level constituent power at a single level of the complex polity.
In criticising the idea that the allocation of constituent power is an all-or-nothing affair, Walker (2009, 172f.), Preuss (2011, 91) and Habermas (2012) have all turned against the traditional unitary conception of constituent power, as well as against demoi-cratic and regional cosmopolitan reductionism. Habermas locates the EU’s hybrid constituent authority in a *pouvoir constituant mixte*, i.e. in the dual roles of its individual citizens, as members of their nation-states and as members of the European federation (2012, 34–7). In recognising member state ‘peoples as the other constitution-founding subject’ besides the federated citizenry (2012, p. 35), he acknowledges the demoi-cratic impulse that supra-state constitutionalisation is a higher-order process, starting from constituted elements and committed to preserving their integrity. In Habermas’ view, the justification for the staying power of single state *pouvoirs constituants* in multi-level systems is that they are to guarantee the preservation of historically accomplished levels of justice and individual rights (2012, 39f.). While the domestic *pouvoirs constituants* are to channel this conservationist function, their Union-wide pendant is to ensure that European citizens, and not executive or judicial elites, are invested as co-masters of their constitutional order. In a reversal of actual EU genealogy, the European component of its split *pouvoir constituant* is to reflect the contemporary features of the federative polity and provide for a separate, free-standing authorisation of supra-state constitutionalism. One main indicator for the existence of such a Union-wide component of constituent power is the European Parliament, the legislation of which is authorised in direct elections by European citizens (Habermas 2016; Preuss 2011, 89).

This is not the place to discuss the merits and difficulties of the notion of a *pouvoir constituent mixte*, and the respective virtues and weaknesses of the competing accounts (but see Patberg (ed.) forthcoming). What seems important is that while the accounts diverge in their allocation of a European *pouvoir constituant*, their authors broadly concur in the function they are meant to serve. None of the proposed allocations of constituent power are offered as historical or causal theories of European Union constitutionalisation, but as reconstructions that speak to the question of EU legitimacy. Unlike the hard-nosed sociological accounts of Thornhill or Teubner, or the attempts of IR scholars to rationalise the steps taken toward constitutionalisation (Rittberger & Schimmelfennig 2007), their

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6 I choose Habermas as exponent of ‘split’ or ‘shared’ allocations of constituent power since his account is the most detailed to date.
accounts propose readings of what makes best normative sense of European integration as it is. According to Habermas, for example, the hypothesis of a *pouvoir constituant mixte* is capable of explaining features of the political system of the EU that would otherwise appear as constitutional anomalies: the right to exit the federation, or the rule of degressive proportionality in the distribution of seats in the European Parliament. Its structural idiosyncrasies are said to make coherent sense once we imagine a hybrid *pouvoir constituant* would have chosen them (Habermas 2016). None of the authors discussed is under any illusions about the genetic priority of executive agreement, or the stealth integration powers of the European Court of Justice. This leaves us with the question: How can counterfactual allocations of constituent power help resolve the critical issue of constituent usurpation?

My suggestion is to read the accounts discussed as initiating, in the allocation of constituent power, a bootstrapping process that may help redress the obvious lacuna of *ex ante* warrant in EU constitutionalisation. In an inversion of Locke’s view that constituted powers cannot establish new legislators (II § 141), EU constitutionalists hold that they can do so only on pain of creating new constituent powers that will then partially subject them to their authority. The authors appear resigned to the fact that most processes of constitutionalisation are *de facto* usurped, but their interpretations yield criteria of future legitimacy: Legal orders that aspire to constitutional validity can be seen to take on obligations to institutionalise democratic authorisation *ex post*, reflecting their respective allocations of constituent power. While a *demoïcratic* reading will suggest involving the member state peoples, the *pouvoir constituant mixte* and regional cosmopolitan accounts will aim at effectively empowering European citizens to convey or withhold institutional authorisation. While such bootstrapping empowerments will not obliterate unauthorised original acts of constitutional founding, they may help hold at bay future encroachment by constituted actors.

IV. The EU is a special case, and it would be implausible to transfer the results of the preceding section to the allocation or role of constituent power in other contexts of global constitutionalisation. While the advanced status of integration in the EU multi-level order requires a complex, perhaps hybrid account of constituent power, other, less integrated international constitutional orders like that of the United Nations may best be analysed along *demoï-cratic* or internationalist lines (Fassbender 2007, Cohen 2012). Also, not all
developments within global constitutionalism are best approached from the federative perspective of state consensus. While such a ‘molecular’ aggregation of constituted ‘atoms’ may give a convincing account for federations of states, the holistic perspective of systems theory may provide a more adequate theoretical framework for the functional integration of sectoral regimes (Teubner 2014, Thornhill 2012). Finally, some international orders, although arguably aspiring to constitutional status, may best be characterised by their avowed absence of constituent power, and therefore demand a different analysis altogether. The United Nations Convention on the Law of the Sea (UNCLOS), in invoking the figure of a “common heritage of mankind” (Art. 136, cf. Pardo 1977) appears to exclude the potential legitimacy of constructive constituent activity in advance, in constitutionalising a hands-off approach under a traditional category of natural law. Despite this diversity, it seems that if the methodology employed in allocating a European pouvoir constituant in the preceding section is sound, an a posteriori approach can be followed throughout to ascribe constituent power based on structural features of the organisations envisaged. This will not capture all of the hopes that were traditionally connected with the notion of a pouvoir constituant, such as the ex nihilo foundation of constitutional orders, or the re-founding in their totality of orders that are conceived of as fundamentally illegitimate (Sieyes 2003, 137). In its employment in global constitutionalism, the notion of constituent power will morph from a (presumptively) foundational into a largely transformational category.

At the same time, an empirical, yet legitimacy-oriented approach to the various contexts of global constitutionalisation suggests that in transcending the Locke-Sieyes doctrine, global constitutionalism can no longer presume that the allocation of constituent power allows for a tautological answer, or identifies a single definite actor capable of decision-making. Its logic of discovery of constituent powers is largely reactive: It traces their emergence as a by-product of processes of constitutionalisation. Where constitutions emerge, they create their own authorities, thereby superseding the alleged social contract or natural law basis of pouvoirs constituant. We can no longer assume that membership in a pouvoir constituant is fixed before constitution-making has been brought to a definitive end. Since we also assume that under the doctrine of constituent power, processes of constitutionalisation do not allow
of a definitive point of termination, this entails that global constitutionalism needs to conceive of the composition of its *pouvoirs constituants* as open in principle.

V. In the preceding sections, I have argued that processes of global constitutionalisation necessarily trigger the question of constituent power once they institute decision-making bodies, thereby raising claims to authority in limiting domestic and enabling supra-state powers. I have suggested that it is not implausible to continue to describe the need for the popular authorisation of public decision-making by sticking to the notion of constituent power, at least if we manage to sever its traditional connection to a single state *demos* and allow for its complex allocations to various individual and/or collective actors. The critical bite of this revised notion lies in its capacity to diagnose constituent usurpation in constitutionalisation processes beyond the state, just like its predecessor conception did for the domestic case. Its explanatory potential lies in its contribution to reconstructive accounts of claims to authority that are embodied in supra-state orders aspiring to constitutional status, claims that may be fully discharged only through large-scale institutional change, empowering individuals and peoples to decide on decision-making structures or mandates that were created without their authorisation.

Against Locke and Sieyes, it seems right not to overstate the role a *pouvoir constituant* can play in founding institutions *ex nihilo*, in taking on an initiative role besides the reactive and transformative roles described above. This does not entail that the category is of no empirical relevance, as the recent surge of interest in the category of constituent power in the EU in times of crises suggests. At least *ex negativo*, the EU’s lack of capability to effectively and legitimately respond to the contemporary financial, migration, and geopolitical crises may be traced back to the fact that its processes of constitution-making have so far all but lacked popular contributions (Ackerman 2015). Yet not all plausible uses of the notion of constituent power in global constitutionalisation can be restricted to the *ex post* empowerment of future constitution-owning actors. In ending this chapter, I want to draw attention to one such use.

Recall Sieyes’ point that neither can a *pouvoir constituant* be bound by an existing constitution, nor can it be restricted in its forms of expression. This means that besides its
institutional function in the formal authorisation of constituted bodies, there is a creative side to the exercise of constituent power that can never be fully institutionalised (Maus 2011, 91). Also, in contrast to the state-based understanding of constituent power, a pre-institutional self-activation is always up for grabs in global constitutionalism. No authorisation is needed for people to claim that all authorisation derives from them. This conceptual feature suggests that constituent power is a useful candidate for the self-description of the claims of border-crossing protest movements. Of course, such movements have grown accustomed to using the reactive languages of ‘resistance’ and ‘disobedience’. While continuing to contest the usurpation of authority, however, it seems that movements can formulate more far-reaching claims to political impact where they use the language of constituent power. The World Social Forum is one case in point. Besides its role as a fundamental opposition movement and ritual, its “alter-globalisation agenda” transcends protest and critique. It can be captured in the language of constituent power, in that it attempts to create “institutional space(s) that are capable of advancing rights in new and unexpected ways” (Lang forthcoming). Like claims to justified ‘disobedience’, invoking constituent power gives dissidents a claim to non-compliance with usurped authority. More constructive in its aims than mere ‘resistance’ claims, ‘constituent’ language channels claims to eventual self-government, not just the absence of tyranny.

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