DISPARITY AND CONFLICT: ENVISIONING POSTNATIONAL PEACE IN THE SHADOW OF CONSTITUTIONAL EXPANSIONISM

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ABSTRACT

One aspect of the E.U. experience has especially caught the attention of global governance scholars: the interactions of its member states reveal a solution to potential constitutional conflicts within postnational inter-regime relations. This Article provides critical reflections on this optimistic projection of the E.U. experience onto the world order by arguing that the European Union's development as a constitutionalized transnational administration has proceeded side by side with an expansionist vision of its constitutional order. In light of this expansionist tendency, the new world order—in which individual legal regimes are presumed to follow the E.U. path toward constitutionalization—may move in the direction of inter-regime constitutional conflict. In conceiving inter-regime relations in the postnational world, the disparity in the extent of constitutionalization between individual constitutional orders must be considered.

I. INTRODUCTION

The Westphalian world order of nation-state supremacy has evolved into a "postnational constellation" in which supranational arrangements and subnational units constitute important players in the international legal regime.[1] Against this backdrop, global governance has occupied center stage in the recent wave of reform

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1. *See* JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATIONS: POLITICAL ESSAYS 58, 60–68 (Max Pensky ed. & trans., 2001).

in the longstanding movement for the international rule of law.[2] However, the institutional configuration of global governance remains an unsettled issue: while some scholars view global governance through the lens of individual international organizations,[3] others understand its institutional form as an overarching, umbrella-like framework comprising national administrative agencies, international organizations, and other entities that take part in transnational administration.[4]

At the same time, the fragmentation of the international legal order presents another contentious issue arising from the global governance debate. Whether viewed from the perspective of individual international organizations or from an overarching vantage point, global governance consists of distinct regulatory regimes (or units), each of which is in charge of specific regulatory issues.[5] A key question of contemporary international law has thus emerged: how can inter-regime relations be steered to avoid regime collisions—either within or without an overarching framework?[6]

Interestingly, the development of the European Union as the premier model of transnational administration[7] has served as a

2. *See* David Kennedy, *The Mystery of Global Governance*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 37, 43–54 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009); Martti Koskenniemi, *The Fate of Public International Law: Between Techniques and Politics*, 70 MOD. L. REV. 1, 1–3 (2007).

3. *See, e.g.*, JAMES P. MULDOON, JR., THE ARCHITECTURE OF GLOBAL GOVERNANCE: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL ORGANIZATIONS 1, 1–12 (2003); Armin von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, 9 GERMAN L.J. 1909, 1909 (2008).

4. *See, e.g.*, Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 16 (2005).

5. For a discussion on the conceptual distinction and relationship between an international legal regime and an individual international legal system, see Samantha Besson, *Theorizing the Sources of International Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 163, 164 (Samantha Besson & John Tasioulas eds., 2010). This Article does not distinguish between them.

6. *See* Andreas L. Paulus, *The International Legal System as a Constitution*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE, *supra* note 2 , at 69, 69–71 (finding international constitutionalism is a solution). *See generally* Koskenniemi, *supra* note 2 (analyzing constitutionalism and legal pluralism as possible solutions to this question).

7. A terminological clarification is due. While there are overlaps among the meanings of transnational regulation, transnational administration, and global governance, each term may refer to different aspects of the resolution of governance and regulatory issues in the age of globalization. Transnational regulation refers to regulatory measures in response to the issues the resolution of which requires cooperation among states; transnational administration emphasizes the organizational and institutional aspects, while global governance is used as an umbrella term to include the two aspects among others, suggesting a broader version of transnational governance. *See* MULDOON, *supra* note 3, at 4–9.

font of inspiration for the future of global governance.[8] For those who consider the institutional configuration of global governance through the lens of individual international organizations, the decades-long evolution of the European Union into a well-functioning transnational administration stands out as a developmental model.[9] On the other hand, those who conceive of global governance as an overarching framework argue the E.U. success lies in its multilevel structure, in which national and transnational bureaucrats work together with the participation of nongovernmental organizations (NGOs) and other informal administrative bodies to resolve a myriad of governance issues.[10] Moreover, the way national regulatory bodies interact under the E.U. regulatory system indicates that potential regime collisions can be avoided.[11] In this respect, the European Union emerges as the prototype for global governance.

Given the state of other international regulatory regimes, it is doubtful that the E.U. experience will prove to be the model for the development of global governance, especially after the European Union's recent struggles as an institutional player amidst the Euro crisis.[12] It remains to be seen whether the project of regional integration which culminated in the European Union can be replicated on a global scale or projected onto individual regulatory regimes.[13] Even if it can, there is still a long way to go before the institutional form of global governance reaches the stage the European Union has attained.[14] Bearing this in mind, this Article will

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8. *See* Gordon Anthony et al., *Values in Global Administrative Law: Introduction to the Collection*, *in* VALUES IN GLOBAL ADMINISTRATIVE LAW 1, 10 (Gordon Anthony et al. eds., 2011); Edoardo Chiti & Ramses A. Wessel, *The Emergence of International Agencies in the Global Administrative Space: Autonomous Actors or State Servants?*, *in* INTERNATIONAL ORGANIZATIONS AND THE IDEA OF AUTONOMY: INSTITUTIONAL INDEPENDENCE IN THE INTERNATIONAL LEGAL ORDER 142, 154 (Richard Collins & Nigel D. White eds., 2011).

9. *See, e.g.*, Mario Telò, *Introduction: The EU as a Model, a Global Actor and an Unprecedented Power*, *in* THE EUROPEAN UNION AND GLOBAL GOVERNANCE 1, 15–17 (Mario Telò ed., 2009).

10. *See generally* Christian Joerges et al., *A New Type of Conflicts Law as the Legal Paradigm of the Postnational Constellation*, 2 TRANSNAT'L LEGAL THEORY 153 (2011).

11. *See id.* at 482–84.

12. *See* Mark Dawson & Floris de Witte, *Constitutional Balance in the EU After the Euro-Crisis*, 76 MOD. L. REV. 817 (2013) (describing how the response to the Euro crisis destabilized the European Union).

13. *See, e.g.*, J.H.H. Weiler, *Global and Pluralist Constitutionalism—Some Doubts*, *in* THE WORLDS OF EUROPEAN CONSTITUTIONALISM 8, 9–10 (Gráinne de Búrca & J.H.H. Weiler eds., 2012).

14. *Cf.* JEAN L. COHEN, GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM 78 (2012) (explaining that the institutional arrangements in the European Union cannot be generalized to the international system due to the Euro-

answer a pivotal question that scholars have yet to address: what if the development of global governance institutions takes the E.U. path? Furthermore, what would inter-regime relations look like in a postnational world in which all governance players achieve a degree of constitutionalization equivalent to that of the European Union? Would peaceful and stable relations result as each individual unit of global governance is reconceived in constitutional terms—or is postnational peace between constitutional orders simply a noble dream? If so, is constitutional conflict even a concern, considering that it sheds no blood? Such issues are central to the future of global governance.

To sharpen this debate, this Article takes a closer look at the extent to which the E.U. model provides an answer to potential regime conflicts in a transnational legal space. It argues that we should be more cautious in projecting this model onto global governance due to the yet-to-be-fully-appreciated expansionist inclination in the E.U. experience of constitutionalization. Although the idea of constitutional tolerance—which has been praised as the key to Europe's success in resolving constitutional conflict[15]—may prepare judicial bodies in the way they engage with one another, it falls short of providing guidance on how they should position themselves relative to other orders with a lesser degree of constitutionalization, especially when a judicial counterpart is missing in the expected dialogue. Contrary to the institutional precondition of judicial dialogue-oriented proposals in response to constitutional conflict, asymmetrical constitutionalization exposes the limits of contemporary scholarship, which has rallied around the ethos of constitutional tolerance. The disparity in the extent of constitutionalization among individual global regulatory regimes (i.e., asymmetrical constitutionalization) must be taken seriously in order to make this dialogic model effective in steering future inter-regime relations in the postnational world.

To illustrate this principle, Part II will demonstrate the constitutional implications of modeling transnational regimes on the E.U. experience by recounting the process of European integration. While the European Union stands out as the most sophisticated example among numerous innovative experiments with transnational administration, the process of European integration goes

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pean Union's unanimous acceptance of the constitutional-democracy, the general acceptance of the rule of law, the existence and acceptance of its court, and the general sense of inclusion that exists in it).

15. *See infra* Part III.B for a detailed discussion of constitutional tolerance.

beyond the reformation of transnational regulation. Rather, the decades-long integration process has resulted in the constitutionalization of the E.U. legal order. This history shows how the E.U. administrative space[16] has been transformed into an expansive constitutional order from a nascent transnational administration. Moreover, driven by a process of "constitutional expansionism," the E.U. order not only developed its identity but also vocally asserted itself over other component regimes, as revealed by the *Kadi* decision of the Court of Justice of the European Union (CJEU).[17]

Next, this Article will revisit the *Kadi* decision to appraise how inter-regime relations would figure in a postnational world of individual regulatory regimes modeled on the European Union. Rather than simply analyzing the diverse stances surrounding the CJEU's opinion,[18] the Article challenges the strategy of judicial dialogue, which has been proposed as a solution to *Kadi*-like regime collisions.[19] As component regimes undergo processes of gradual constitutionalization, judicial dialogue has been advocated as the desirable solution to potential constitutional conflict.[20] This opti-

16. *See* Kingsbury et al., *supra* note 4, at 18–27 (explaining the administrative space and its implications for the debate on the legal and institutional configuration of global governance).

17. Joined Cases C-402 & C-415/05 P, Kadi v. Council (*Kadi II*), 2008 E.C.R. I-6351. Following the Court of Justice of the European Union's (CJEU) *Kadi II* decision in 2008, a new legal challenge was brought against the measures adopted by the Commission in response to the CJEU's 2008 decision. The General Court (formerly the Court of First Instance (CFI)) reached its decision on that new legal suit in 2010, annulling the Commission's new measures. Case T-85/09, Kadi v. Comm'n (*Kadi III*), 2010 E.C.R. II-5177. On July 18, 2013, the CJEU dismissed the appeal to *Kadi III*. Joined Cases C-584, C-593 & C-595/10 P, Comm'n v. Kadi (*Kadi IV*) (2013), *available at* http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-584/10%20P&td=ALL#. In this Article, *Kadi II* refers to the CJEU's 2008 decision and the facts that generated the series of legal suits; *Kadi I* refers to the CFI decisions that were appealed and then rescinded by the CJEU's 2008 decision in *Kadi II*. Case T-315/01, Kadi v. Council (*Kadi I*), 2005 E.C.R. II-3649; T-306/01, Yusuf v. Council, 2005 E.C.R. II-3533. *Kadi III* refers to the CFI's 2010 decision on the Commission's new regulatory measures in response to *Kadi II*. In this Article, the CJEU is conveniently adopted to refer both to the old European Court of Justice (ECJ) and the new CJEU after the Lisbon Treaty's entry into force in 2009, while the General Court refers both to the pre-Lisbon Treaty CFI and the current General Court.

18. *See, e.g.*, Gráinne de Búrca, *The European Courts and the Security Council: Between* Dédoublement Fonctionnel *and Balancing of Values: Three Replies to Pasquale de Sena and Maria Chiara Vitucci*, 20 Eur. J. Int'l L. 853, 853–96 (2009).

19. *See, e.g.*, Gráinne de Búrca, *The ECJ and the International Legal Order: A Re-Evaluation*, *in* The Worlds of European Constitutionalism, *supra* note 13, at 105, 141–48.

20. *See, e.g.*, Miguel Poiares Maduro, *Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism*, *in* Ruling the World? Constitutionalism, International Law, and Global Governance, *supra* note 2, at 356, 371–73.

mistic view will be challenged by demonstrating that the judicial dialogue strategy would fail to resolve the issues surrounding *Kadi* even if the CJEU adopted it. The idea of inter-regime judicial dialogue has become a rallying call for scholars interested in constitutional conflict, yet it is premised on the parity of constitutionalization between prospective parties—while the existence (or lack thereof) of a (quasi)-judicial body represents the pivotal determinant of a governance regime's extent of constitutionalization.[21] Furthermore, the *Kadi* decision suggests that the disparity in the extent of constitutionalization between the European Union and the United Nations would lead to the malfunctioning of judicial dialogue, as the U.N. system has yet to attain a functioning judicial mechanism for the protection of fundamental human rights.

Notably, in the shadow of constitutional expansionism, scholars have made pleas for a tolerance-based comity of constitutional orders in response to legal conflict,[22] as each individual regime is likely to assert its own identity throughout the process of constitutionalization. To appreciate the issue of constitutional conflict, however, Part III will argue that we need to extend our focus beyond a postnational comity and look instead to the issue of asymmetrical constitutionalization. Part IV will conclude with tentative suggestions as to how inter-regime relations should be conceived against the backdrop of asymmetrical constitutionalization.

II. Turning a Constitutionalized Administrative Space into an Expansionist Constitutional Order: The Untaught Lessons About Europe

This Part begins with the history behind the development of Europe's legal order, bringing to the fore its unnoticed expansionist inclination through a process of material constitutionalization.[23] Paralleling the formal aspect, which relates to the transformation of the European Union from an international legal order into a

21. *See infra* Part III.

22. *See, e.g.*, Weiler, *supra* note 13, at 12–13.

23. The distinction made here between the formal and material aspect of constitutionalization draws inspiration from Hans Kelsen's distinction between the formal and material constitution but redefines the formal/material distinction. According to Kelsen, to account fully for a constitutional order requires taking account of its formal and material aspects: the formal constitution refers to a single legal document or a set of legal norms that can only be changed with supermajority, while the material constitution "consists of those rules which regulate the creation of the general legal norms." *See* Hans Kelsen, General Theory of Law and State 124–25, 258 (Anders Wedber trans., 1945).

supranational entity, administrative law plays the legitimacy-bestowing role in the material aspect of E.U. constitutionalization.[24] The growth of the E.U. administrative space into a constitutional order suggests that efforts to enhance individual transnational regimes through the principles and values of administrative law could pave the way for the gradual constitutionalization of global governance. The looming tendency toward constitutional expansionism as the evolution of the E.U. legal order continues will then be explored.

A. *From Transnational Administration to Constitutional Order: Discovering Europe's Material Constitution*

It is widely accepted that the European Union has evolved from a six-nation transnational regulatory body, the European Coal and Steel Community, into a supranational legal order resting on a constitutional pedestal through a CJEU-driven process of constitutionalization.[25] Granted, the notion of constitutionalization is rich in meanings: while some scholars refer to the evolution of a legal order into a "system," others emphasize the implementation of the values and principles of constitutionalism in the functioning of legal orders.[26] With respect to the E.U. legal order, however, the focus has been on how it evolved from a system based on international law into a supranational order underpinned by the CJEU's bootstrapping jurisprudence.[27] From this perspective, the impor-

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24. *See* Ming-Sung Kuo, *From Administrative Law to Administrative Legitimation? Transnational Administrative Law and the Process of European Integration*, 61 INT'L & COMP. L.Q. 855, 868–78 (2012).

25. *See* J.H.H. WEILER, THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 292–98 (1999); *see also* Armin von Bogdandy & Jürgen Bast, *The Constitutional Approach to EU Law—From Taming Intergovernmental Relationships to Framing Political Processes*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 1, 1–3 (Armin von Bogdandy & Jürgen Bast eds., 2d rev. ed. 2010) (explaining the constitutional approach to understanding the E.U. law). For a skeptical view of this constitutional account of the E.U. legal order, see PETER L. LINDSETH, POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE (2010).

26. *See* Paulus, *supra* note 6. *See generally* DEBORAH Z. CASS, THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM 97–202 (2005) (discussing the various factors of the constitutionalization debate in the context of the World Trade Organization).

27. *Compare* WEILER, *supra* note 25, at 29–98, *with* Bruno de Witte, *The European Union as an International Legal Experiment*, *in* THE WORLDS OF EUROPEAN CONSTITUTIONALISM, *supra* note 13, at 19. It should be noted that this formal aspect of the E.U. constitutionalization does not suggest that normative issues are omitted from scholarship on European constitutional law. Yet, as is illustrated in Joseph Weiler's discussion on the development of human rights in the CJEU's bootstrapping jurisprudence, the focus is on how to differentiate the CJEU's interpretation of human rights from the way international human rights law is judicially implemented. *See* WEILER, *supra* note 25, at 23–25. Seen in this light, the Euro-

tance of the CJEU lies in its setting the European Union apart from traditional international organizations through the doctrines of direct effect and the supremacy of Community law relative to member states' domestic law.[28] Beyond this formal sense, however, the process by which the European Union obtained legitimacy through constitutionalization remains unaddressed. To fully account for the significance of the E.U. transformation from a post-World War II (WWII) transnational administration, the material aspect that underlies the legitimacy of its constitutional order must be analyzed.[29]

Over time, E.U. member states transferred ever-greater regulatory powers to Community institutions, allowing the European Union to gradually evolve into a transnational administrative space where Europe-wide issues of administrative law could be addressed. Paralleling the continuing transfer of state powers to the European Union, the CJEU's role in the legal order gradually rose through the increased exercise of its administrative jurisdiction.[30] Critically, the CJEU's jurisdiction evolved further into a constitutional role, as it spurred the transformation of the E.U. legal order into a supranational entity through the doctrines of direct effect and supremacy.[31] Notably, however, the fact that the CJEU's administrative jurisdiction has taken on a constitutional character does not guarantee the legitimacy of the E.U. constitutional order. Its legitimacy would instead depend on how the operation of administrative law and justice is perceived by citizens, given that its subject matter concerns the relationship between the government and citi-

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pean Union's formal transformation from one based in international law into a supranational order remains at the heart of literature on the E.U. constitutionalization.

28. The direct effect of Community law in the municipal legal systems of member states was established in the *Van Gend en Loos* decision. Case 26/62, N.V. Algemene Transport (*Van Gend en Loos*), 1963 E.C.R. 1. The supremacy of Community law vis-à-vis the domestic law finds its origin in *Flaminio Costa v. ENEL*. Case 6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 585. For further discussion on the relationship between the CJEU jurisprudence and the formal constitutionalization of the E.U. legal order, see WEILER, *supra* note 25, at 19–25; *see also* RENAUD DEHOUSSE, THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION 37–69 (1998).

29. The material aspect of the E.U. constitutionalization here refers to the *way* that the E.U. legal order obtains legitimacy. Although the *content* of rights also plays a pivotal role in material constitutionalization and its legitimacy-bestowing function, the present discussion focuses on the way the European Union acquired legitimacy through its fundamental rights-underpinned administrative law jurisprudence.

30. *See* JÜRGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW 4–5 (rev. ed. 2006).

31. *See* DEHOUSSE, *supra* note 28, at 37. The doctrines of direct effect and supremacy turn the European Union into a constitutional order in that they make the E.U. law directly applicable in member states without further legislative incorporation and elevate it to a higher status than domestic law, respectively. *See* WEILER, *supra* note 25, 19–22.

zens and thus feeds the legitimacy of the politico-legal system itself.[32] The CJEU's function as the supreme administrative court interpreting the exercise of power by the E.U. institutions represents the material aspect of constitutionalization in which the legitimacy issue is tackled.

As close analysis demonstrates, the CJEU has transformed the relationship between governing authorities and citizens with respect to fundamental rights through its exercise of administrative jurisdiction.[33] The CJEU, prodded by national judicial interlocutors,[34] has gradually harmonized its administrative law doctrines with those relating to fundamental rights.[35] This opened the actions of E.U. public authorities to the scrutiny of a fundamental rights analysis. Moreover, the CJEU's administrative law decisions influence the relationship between governing authorities and citizens in a fundamental sense.[36] This fundamental rights analysis further impacts national administrations by penetrating into national administrative procedures through the implementation of E.U. law.[37] This implementation of general principles of E.U. law along with the corresponding fundamental rights developed by the CJEU recasts the relationship between administrations and citizens as one resting on fundamental rights. In this way, public authorities obtain legitimacy in the exercise of administrative power within the scope of E.U. law.[38] As a whole, the CJEU jurisprudence thus transforms the political image and legal nature of the European Union while also breathing legitimacy into the constitutionalized legal order.

This focus on the legitimacy-bestowing, material aspect of the E.U. constitutionalization process does not mean that the constitutional order's legitimacy can be completely cut off from E.U. member states or displace constitutional authorship. Rather, it suggests that an integrated version of legitimacy—which is necessary to

32. *See* MARTIN M. SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 17 (1981).

33. *See* SCHWARZE, *supra* note 30, at 1460–65.

34. *See generally* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 271, 1974 (Ger.).

35. *See* SCHWARZE, *supra* note 30, at 1455–65.

36. *See* SHAPIRO, *supra* note 32, at 17.

37. *See* KAREN J. ALTER, *The European Union's Legal System and Domestic Policy: Spillover or Backlash?*, *in* THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS 184, 202, 210 (2009).

38. *See* Kuo, *supra* note 24, at 875–77.

account for the overarching constitutional order[39]—must recognize the parallel development of European administrative law and E.U. constitutionalization. The relationship between fundamental rights and administrative law is pivotal to the evolution of the E.U. constitutional order.[40] More importantly, efforts to enhance other transnational regulatory regimes with administrative law principles could lead to the gradual constitutionalization of global governance.[41] Next, further implications of such development are addressed.

B. *The Drive Toward Constitutional Expansionism in Europe: Failed Political Imagination or Constitutional Destiny?*

As the E.U. legal order evolved, concerns were raised over the possible continuing transformation of the European Union into a federal state.[42] Given the association between classic constitutional orders and nation-states (federal and unitary), some scholars embraced a lesser version of constitutionalism for the European Union.[43] This view asserted that a strong version of constitutionalism would lead to a self-aggrandizing Europe, replicating the nation-state from which the Union was designed to depart; to endure as a new political paradigm it should instead settle on a less-developed framework.[44] In contrast, other commentators argued that the constitutional character of the E.U. legal order is

39. *See, e.g.*, Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, 36 COMMON MKT. L. REV. 703, 705 (1999); Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 COLUM. J. EUR. L. 349 (2009) (describing the struggle between national constitutions and a legitimate E.U.-wide constitution); *see also* Franz C. Mayer, *Multilevel Constitutional Jurisdiction*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, *supra* note 25, at 399, 426–31 (analyzing multilevel constitutionalism jurisdiction in member states and at the European level).

40. *See* SCHWARZE, *supra* note 30, at 1462–63.

41. *See* Ming-Sung Kuo, *Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-C Global Constitutionalism*, 44 N.Y.U. J. INT'L L. & POL. 55, 74–75 (2011).

42. *See* J.H.H. Weiler, *Federalism Without Constitutionalism: Europe's* Sonderweg, *in* THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 54, 64–65 (Kalypso Nicolaidis & Robert Howse eds., 2001).

43. *See, e.g.*, J.H.H. Weiler, *In Defence of the Status Quo: Europe's Constitutional* Sonderweg, *in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 7, 23 (J.H.H. Weiler & Marlene Wind eds., 2003).

44. *See id.* at 17; *see also* Poiares Maduro, *Europe and the Constitution: What If This Is as Good as It Gets?*, *in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE, *supra* note 43, at 74, 101–02 (arguing "paradoxes that are at the core of constitutionalism" should motivate scholars to improve the European model by limiting traditional solutions and adopting innovative approaches).

inevitably different from that of nation-states.[45] According to this viewpoint, continuing European integration should result in "constitutional pluralism," or the coexistence of overlapping constitutional orders comprised of the E.U. systems and member states' diluted national orders.[46] Overall, both viewpoints envision the E.U. constitutional order standing in a new light, apart from the strong version of constitutionalism tied to national constitutions.

Nevertheless, this innovative political vision seems to have been dashed by subsequent developments. For one thing, the now defunct "Constitutional Treaty" reflected the aspiration for a full version of constitutionalism for the European Union, with its intended replacement of the sundry foundational treaties with one comprehensive constitutional document.[47] Despite its defeat in the Dutch and French referenda and later displacement by the Lisbon Treaty, the Constitutional Treaty's ambitious project endures in another form.[48] These developments suggested the provisional character of the European Union as a new paradigm for political orders.[49] Nonetheless, the most striking advance toward a strong version of constitutionalism comes in the vision that the CJEU entertains of the E.U. constitutional order in its *Kadi* decision.

In *Kadi*, the CJEU struck down Council Regulation 881/2002, which was adopted to implement U.N. Security Council (UNSC) resolutions regarding counterterrorism sanctions under Chapter VII of the U.N. Charter.[50] Under the E.U. implementing measures, persons suspected of supporting terrorism, as designated by the UNSC Sanctions Committee, were subject to various sanctions, including a freeze on assets.[51] In 2009, the CJEU annulled the E.U. Regulation, holding that it constituted an unjustified restriction of the target's right to be heard, right to an effective legal remedy, and right to property.[52] As a result, this affected the validity of the

45. *See, e.g.*, Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317, 337 (2002).

46. *See id.* at 349.

47. *See* Neil Walker, *Reframing EU Constitutionalism*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE, *supra* note 2, at 149, 149.

48. *See* Ulrich Haltern, *On Finality*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, *supra* note 25, at 205, 206–09; *see also* THE LISBON TREATY: EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY? 4 (Stefan Griller & Jacques Ziller eds., 2008) (finding that "much of what had been achieved by the Convention remains in the final Lisbon Treaty").

49. Haltern, *supra* note 48, at 233–34.

50. Joined Cases C-402 & 415/05 P, Kadi v. Council (*Kadi II*), 2008 E.C.R. I-6351, I-6512.

51. *See id.* at I-6423 to -6424.

52. *See id.* ¶ 334, at I-6501, ¶ 370, at I-6509.

UNSC resolutions concerned and the authority of the U.N. system itself.[53] The CJEU's opinion in *Kadi* has been criticized as resting on a robust constitutionalist view of the European legal order itself.[54] According to this view, the European legal order not only stands apart as an autonomous legal system but also takes on a sovereign state-like constitutional character.[55] Granted, neither idea is new in light of the CJEU jurisprudence.[56] Thus, to appraise the importance of tying the autonomy of the E.U. legal system to its existence as a constitutional order in *Kadi*, a closer analysis of how the CJEU regards the autonomous, constitutional character of the European Union is required.

Notably, the CJEU regards the fundamental rights established in its jurisprudence as "an integral part of the general principles of law."[57] As part of its role in ensuring that "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles" of the E.U. legal order, the CJEU is obliged to make sure that E.U. authorities observe fundamental rights in the implementation of international obligations, such as treaties or UNSC resolutions.[58] If the implementation of international obligations results in the violation of fundamental rights, it will not only compromise the autonomy of the E.U. legal order but also erode the integral part of its general principles of law—i.e., the identity of the E.U. constitutional order.[59] Seen in this light,

53. *See infra* Part III.A for a detailed exploration of this issue.

54. It should be noted that "constitutionalist" here refers to the strong constitutional claims made in *Kadi II* without regard to the constitutionalist versus pluralist debate concerning the legal configuration of the world order. *See infra* note 92 for a discussion on this debate and the related literature.

55. *See* Jan Klabbers, *The European Union in the Global Constitutional Mosaic*, *in* Europe's Constitutional Mosaic 287, 293–94, 297–99 (Neil Walker et al. eds., 2011).

56. *See, e.g.*, Case 294/83, Les Verts v. Parliament, 1986 E.C.R. 1339, ¶ 23 (regarding the Treaty of Rome as "the basic constitutional charter"); Case 26/62, N.V. Algemene Transport (*Van Gend en Loos*), 1963 E.C.R. 1, 12 (characterizing the Community legal order as "a new legal order"); *see also* Franz C. Mayer, Van Gend en Loos*: The Foundation of a Community of Law*, *in* The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty 16, 20–21 (Miguel Poiares Maduro & Loïc Azoulai eds., 2010).

57. The fundamental rights adopted in CJEU case law are not conclusively defined but regarded as reflecting those recognized in the "constitutional traditions common to the Member States" and the European Convention for Human Rights. *See* Joined Cases C-402 & 415/05 P, Kadi v. Council (*Kadi II*), 2008 E.C.R. I-6351, ¶ 283, at I-6490.

58. *Id.* ¶ 285, at I-6491.

59. This point was later picked up by the German Federal Constitutional Court (GFCC) in its *Lisbon Treaty* decision. In the eyes of the GFCC, the CJEU in *Kadi II* asserted "its own identity as a legal community." *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 2267 (¶ 340), 2009 (Ger.); *see also* Dieter Grimm, *Defending Sovereign Statehood*

"constitutional integrity" is the determinant of the CJEU's interpretation of the autonomy of the E.U. legal order vis-à-vis the international legal system.[60]

Moreover, the CJEU attributes the founding of the underlying constitutional principles concerning the autonomy of the E.U. legal order vis-à-vis the U.N. legal system to its own case law.[61] In this way, the CJEU demonstrates that the constitutionalization process it helped to set off culminates in an autonomous E.U. legal order underpinned by constitutional principles. This point was further illustrated by the Opinion of the Advocate General (AG), which was authored by the then AG Poiares Maduro. When asked about the relationship between the European Union and the international legal system, he postulated, "[t]he logical starting point of our discussion should, of course, be the landmark ruling in *Van Gend en Loos*, in which the Court affirmed the autonomy of the Community legal order."[62] In other words, the autonomy of the E.U. legal system is the underlying principle governing the relationship between the European Union and the international legal system, which lies at the heart of *Kadi*. Furthermore, AG Maduro characterized this new, autonomous legal order as "municipal,"[63] although the CJEU shunned this classic international law term—which is normally reserved for a state's domestic legal order—instead choosing the more ambiguous phrase "the *internal* and autonomous legal order."[64] Nevertheless, as observed by Daniel Halberstam and Eric Stein, two leading E.U. law scholars, the internal/external distinction alluded to in *Kadi*[65] revealed the CJEU's intent to "*complete* the original promise of the Court to define the

Against Transforming the European Union into a State, 5 EUR. CONST. L. REV. 353, 370 (2009) ("The transformation of the EU into a state is not just a purely theoretical possibility.").

60. *See* Daniel Halberstam & Eric Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 COMMON MKT. L. REV. 13, 62 (2009).

61. *See* Joined Cases C-402 & 415/05 P, Kadi v. Council (*Kadi II*), 2008 E.C.R. I-6351, ¶ 283, at I-6447, ¶ 335, at I-6502, ¶ 355, at I-6506.

62. *Id.* ¶ 21, at I-6370.

63. *Id.* For the implications of "municipal" in international law, see Halberstam & Stein, *supra* note 60, at 47.

64. *Kadi II*, 2008 E.C.R. ¶ 317, at I-6498 (emphasis added); *see id.* ¶ 321, at I-6499.

65. *See generally* Dieter Grimm, *The Constitution in the Process of Denationalization*, 12 CONSTELLATIONS 447, 453 (2005) (arguing that constitutions have presupposed an essential clear internal/external distinction); Ming-Sung Kuo, *The End of Constitutionalism as We Know It? Boundaries and the State of Global Constitutional (Dis)Ordering*, 1 TRANSNAT'L LEGAL THEORY 329, 345–51 (2010) (describing the internal/external distinction).

European Community as an 'autonomous legal order.'"[66] The position of the CJEU regarding the UNSC resolutions is simply the logical conclusion of *Van Gend en Loos*, in which the E.U. legal order began to take on its autonomous and constitutional character. As a whole, the CJEU seems to take the position that an autonomous legal order falling short of a state-type comprehensive constitutional order, which defends its identity internally and externally, would remain a work in progress.[67] Relative to this ongoing constitutionalization process, the *Kadi* decision looms as the dramatic moment in which the external dimension of European constitutionalism is clarified and thus the "promise first delivered in . . . *Van Gend en Loos* . . . in 1964" is fulfilled.[68]

Viewed in this light, *Kadi*'s conception of legal autonomy falls in line with the CJEU case law and portrays an image created on the model of a national constitutional order because its tone resonates well with the call for completeness or totality associated with state-type constitutions.[69] This drive to completeness is also evidenced by the portrayal of the European Union as an international actor in constitutional terms. Since its inception in *Van Gend en Loos*, the main goal of continuing constitutionalization has been the increased autonomy of the E.U. legal system relative to its member states.[70] To this end, the CJEU has endeavored to build a fully-fledged constitutional value system as a shield, guarding the E.U. legal system against jurisdictional encroachments from national courts. Despite this, the E.U. system can only claim a legal autonomy on par with national legal orders via its distinction from international law, as evidenced in *Kadi*.[71] Thus, the CJEU held that "an international agreement cannot affect the allocation of powers fixed by the Treaties" and considers this principle to be the core of

66. *See* Halberstam & Stein, *supra* note 60, at 46–47 (emphasis added); *see also* Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law 169–70 (2010) (acting "as a constitutional court, protecting the core of European law"). *But cf.* N. Türküler Isiksel, *Fundamental Rights in the EU After* Kadi *and* Al Barakaat, 16 Eur. L.J. 551, 567–68 (2010) (asserting that use of the phrase "new legal order" by the CJEU indicates that the Community legal order is not a "straightforward municipal or dualist blueprint like the sovereign state under international law").

67. *See* Grimm, *supra* note 59, at 370–72.

68. Gráinne de Búrca, *The European Court of Justice and the International Legal Order After* Kadi, 51 Harv. Int'l L.J. 1, 44 (2010).

69. *See* Anne Peters, *The Constitutionalisation of International Organisations*, *in* Europe's Constitutional Mosaic, *supra* note 55, at 253, 285; Mattias Kumm, *Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 German L.J. 341 (2006).

70. *See* Halberstam & Stein, *supra* note 60, at 62.

71. *See id.* at 62–63.

"the autonomy of the Community legal system."[72] Moreover, underlying this allocation of powers is the role of the CJEU in ensuring that "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles" of the E.U. legal order.[73] Put bluntly, the ultimate goal of the CJEU-initiated process of constitutionalization cannot be fully achieved without extending further to the external dimension of the E.U. legal order vis-à-vis the international legal system.[74]

Taking this external dimension into account, it becomes obvious why the *Kadi* decision falls in line with so-called "outlier" cases that denied direct effect to the law of World Trade Organization (WTO) and its predecessor in the E.U. legal order.[75] Notably among international regulatory regimes, the WTO has exerted a greater impact on municipal legal systems than its counterparts have, to the extent that it may even display some features of constitutionalization.[76] With the looming possibility of the WTO law as an international economic constitution, the autonomy of the E.U. legal order would have been compromised by granting direct effect to the WTO regulations.[77] Denying direct effect to the potentially pervasive, highly consequential WTO law in most situations,[78] the CJEU has ensured the autonomy of the European legal order and enabled its political branch to play an active role in the international stage, thereby making the European Union a more significant global player.[79] Thinking along these lines, the *Kadi* decision

72. Joined Cases C-402 & 415/05 P, Kadi v. Council (*Kadi II*), 2008 E.C.R. I-6351, ¶ 282, at I-6490.

73. *Id.* ¶ 285, at I-6491.

74. *See* Samantha Besson, *European Legal Pluralism After* Kadi, 5 EUR. CONST. L. REV. 237, 255 (2009); *see also* Christina Eckes, *Protecting Supremacy from External Influences: A Precondition for a European Constitutional Order?*, 18 EUR. L.J. 230 (2012). Concerns over the autonomy of the E.U. constitutional order vis-à-vis other international legal orders have become more evident with the establishment of court-like tribunals such as the International Court of Justice (ICJ), which now look to the E.U. principles to guide aspects of their decisions). *See* Matthew Parish, *International Courts and the European Legal Order*, 23 EUR. J. INT'L L. 141, 142–43 (2012).

75. *See, e.g.*, Case C-149/96, Portuguese Republic v. Council, 1999 E.C.R. I-8395; *see* de Búrca, *supra* note 68, at 6 n.21.

76. *See* CASS, *supra* note 26, at 149–50.

77. *See* Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 INT'L J. CONST. L. 397, 404–12 (2008); Marco Bronckers, *From "Direct Effect" to "Muted Dialogue": Recent Development in the European Courts' Case Law on the WTO and Beyond*, 11 J. INT'L ECON. L. 885, 887 (2008).

78. An example of the limited exceptions is Case C-69/89, Nakajima All Precision Co. v. Council, 1991 E.C.R. I-2069.

79. *See* Bronckers, *supra* note 77, at 895–97.

defended the autonomy of the constitutionalized E.U. legal order against the UNSC's potential encroachment.

Taken as a whole, the *Kadi* decision reveals that the self-image of the E.U. constitutionalized legal order corresponds to the expansionist move implicit in national constitutionalism. National constitutional practices show that the function of fundamental rights provisions often becomes inflated, projecting the constitutional order as a comprehensive and total normative regime. The constitution is expected to serve as a comprehensive framework of reference within which the totality of the exercise of political power and the relationship between government and citizens are understood.[80] In light of this expansionist tendency embedded in national constitutionalism, the European Union's constitutionalization appears destined to expand similarly, as evidenced by *Kadi*. If so, what light would the E.U. system's history cast on the aspiration to replicate it on a global scale? How would the resulting inter-regime relations function? These questions will be addressed next.

III. When Europe Meets the World: Constitutional Conflict and Postnational Inter-Regime Relations

In her commentary on the post-*Kadi* transnational legal landscape, Samantha Besson notes that "one cannot exclude that the international legal order, or the UN regime at least, may at some point develop into [a legal configuration] on the model of the European legal order."[81] Furthermore, a constitutionalist reading of the U.N. Charter has been positioned as a possible conception of the future institutional configuration of global governance.[82] In order to further explore the implications of this aspirational global governance positioning,[83] this Part will assume that the E.U. constitutionalization experience will be replicated on a global scale as the processes of partial and gradual constitutionalization of individual transnational regimes are set in motion[84] and will then analyze the prospective inter-regime relations of a postnational world

80. *See* Kumm, *supra* note 69, at 341–45; *see also* Ming-Sung Kuo, *Reconciling Constitutionalism with Power: Towards a Constitutional* Nomos *of Political Ordering*, 23 Ratio Juris 390, 391–94 (2010).

81. Besson, *supra* note 74, at 263.

82. *See* Cohen, *supra* note 14, at 69; Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 Colum. J. Transnat'l L. 529 (1998).

83. *See* Cohen, *supra* note 14, at 290.

84. For the constitutionalization of individual regimes of global governance, see Peters, *supra* note 69, at 285; *see also* Gunther Teubner, Constitutional Fragments: Soci-

order. This thought experiment will show that the tendency toward expansionism implicit in the process of constitutionalization will sow the seeds of constitutional conflict in global governance. To sharpen the debate over the potential solution to constitutional conflicts arising from such regulatory regimes, *Kadi* must first be revisited. The focus, however, will not be on the merits of the decision but rather on the idea of judicial dialogue. This concept has been attributed to AG Maduro's opinion and preferred to the CJEU decision as a better strategy to cope with potential regime collisions and constitutional conflicts. After establishing that judicial dialogue will fail to resolve constitutional conflict so long as one regime has yet to attain a functioning judicial body, a note of caution shall be struck on the idea of a tolerance-based comity of constitutional orders in postnational inter-regime relations. The issue of asymmetrical constitutionalization must be taken seriously in the face of more complicated conflicts driven by constitutional expansionism.

A. *Managing Constitutional Conflict Through Judicial Dialogue: Second Thoughts on the* Kadi *Solution*

At first glance, *Kadi* does not seem noticeably different from traditional conflict-of-laws cases. Although the CJEU centers its reasoning on the integrity of the E.U. constitutional order without taking a position on the validity of the UNSC resolutions which were at the core of the suit, the ramifications are clear: the resolutions were effectively placed under the CJEU's exacting scrutiny and interpreted in light of the E.U. constitutional principles.[85] In other words, the underlying issue of *Kadi* is the conflict between the E.U. and the U.N. legal regimes—a classic conflict of laws.[86] However, the resulting conflict becomes more complicated when the U.N. legal regime is recast in constitutional terms.[87] To the extent that the hierarchical distinction between a higher law and

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ETAL CONSTITUTIONALISM AND GLOBALIZATION 4, 9–10 (2012) (discussing the constitutionalization of individual transnational regimes).

85. *See* Ramses A. Wessel, *The* Kadi *Case: Towards a More Substantive Hierarchy in International Law?*, 5 INT'L ORG. L. REV. 323, 326 (2008); Erika de Wet, *The Role of European Courts in the Development of a Hierarchy of Norms Within International Law: Evidence of Constitutionalisation?*, 5 EUR. CONST. L. REV. 284, 301–02 (2009); *see also* Stefan Griller, *International Law, Human Rights and the European Community's Autonomous Legal Order: Notes on the European Court of Justice Decision in* Kadi, 4 EUR. CONST. L. REV. 528, 535–39 (2008) (discussing court's handling of the U.N. Security Council's (UNSC) resolutions).

86. This norm-conflict aspect of the *Kadi II* case came to the fore in *Kadi I*. *See* Besson, *supra* note 74, at 250–51 (discussing the E.U. and the U.N. conflict of laws).

87. *See* COHEN, *supra* note 14, at 78; Fassbender, *supra* note 82, at 529, 568.

the rest of a legal system characterizes the system as a constitutional order,[88] the U.N. legal system may be seen as having taken on a constitutional character (especially regarding the UNSC measures) as it occupies a higher legal status than the rest of the international system.[89] Viewed this way,[90] the tension between the E.U. and the U.N. legal regimes would turn into one of constitutional conflict, similar to clashes between the E.U. order and its member states' constitutions. Unlike classic problems involving a conflict of treaties or overlapping jurisdictions, this type of schism involves the normative fundamental principles of conflicting legal orders rather than the differing policy choices behind their rules.[91] To appraise cutting-edge issues of inter-regime relations in an emerging postnational world order, this discussion will focus on the inter-relationships between the component regimes of global governance undergoing constitutionalization and thus situate the *Kadi* debate in the vortex of constitutional conflict.

Accordingly, the debate surrounding the *Kadi* case centers on whether the CJEU's robustly pluralist opinion suggests a collision course for the relationship between the E.U. and the U.N. legal regimes.[92] Critics of *Kadi* are troubled by the strong assertion of E.U. autonomy without regard to its relationship with the United Nations. In contrast, the AG Opinion has been praised for its

88. *See* Frank I. Michelman, *Constitutional Legitimation for Political Acts*, 66 MOD. L. REV. 1, 9 (2003).

89. *See* COHEN, *supra* note 14, at 282–91 (discussing the constitutional nature of interpreting the U.N. Charter); Fassbender, *supra* note 82, at 577–78 (discussing the elevated legal status of the U.N. Charter).

90. It should be noted that the constitutionalist reading of the U.N. Charter remains contested. *See* Michael W. Doyle, *The UN Charter—A Global Constitution?*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE, *supra* note 2, at 113. It could also be considered another form of global governance without judicial review. As this Article aims to test the proposed way that constitutional regimes should interact with each other, this discussion shall be confined to the constitutionalist reading of the U.N. Charter.

91. For the role of public policy in traditional choice of law decisions, see generally Gary J. Simson, *The Public Policy Doctrine in Choice of Law: A Reconsideration of Older Themes*, 1974 WASH. U. L.Q. 391.

92. Gráinne de Búrca characterizes the CJEU's opinion as well as the Opinion of Advocate General (AG) Maduro as "strong pluralist" in terms of the CJEU's assertion of the autonomy of the E.U. legal order and the implied rigid divide between the E.U. and the U.N. legal regimes. *See* de Búrca, *supra* note 68, at 31. As far as the *Kadi I* decision is concerned, de Búrca considers it a "strong constitutionalist" stance because the General Court approaches the issue from a unitary view of the world order in which *jus cogens* norms function as the world constitutional law. *Id.* at 168; *see also* KRISCH, *supra* note 66, at 167–68 (discussing the tensions between the two legal regimes in the context of European Court of Justice opinions in relation to the United Nations).

vision of the E.U.-U.N. relationship.[93] According to this view, when effective protection for fundamental rights is instituted within the U.N. legal regime, the CJEU will be able to take a less aggressive stance toward the UNSC resolutions without compromising the constitutional integrity of the E.U. legal order.[94] This stance is regarded as aspiring to a *Solange*-type solution,[95] which laid the groundwork for a peaceful relationship between national high courts and the CJEU.

The idea of judicial cooperation through dialogue lies at the core of the *Solange* jurisprudence from the German Federal Constitutional Court (GFCC)—a series of decisions that addressed whether the GFCC should exercise jurisdiction, despite the CJEU's final say on the interpretation of Community law, to the extent that the consistency of contested Community laws with the fundamental rights provisions in the German Basic Law was at issue.[96] As jurisdictional conflict arose in the 1970s, the GFCC did not assert its jurisdiction to the exclusion of the CJEU and Community law. Rather, in a legal fight involving German national courts and the CJEU,[97] the GFCC in *Solange I* emphatically based its continuing exercise of jurisdiction on the insufficient protection of fundamental rights provided by the E.U. legal order.[98] After the CJEU responded to this lengthy saga by establishing the fundamental rights protection inherent in the Community legal order,[99] the GFCC exercised judicial prudence in its next ruling, *Solange II*. The GFCC noted the emergence of the European legal order as a supranational regime responsible for the protection of fundamental rights and therefore suspended its constitutional jurisdiction

93. *See* Halberstam & Stein, *supra* note 60, at 59–64.

94. *See* Joined Cases C-402 & 415/05 P, Kadi v. Council (*Kadi II*), 2008 E.C.R. I-6351, ¶ 54, at I-6430.

95. *See, e.g.*, Daniel Halberstam, *Legal, Global and Plural Constitutionalism: Europe Meets the World*, *in* THE WORLDS OF EUROPEAN CONSTITUTIONALISM, *supra* note 13, at 150, 192–93; KRISCH, *supra* note 66, at 164–65; de Búrca, *supra* note 68, at 22–23; Halberstam & Stein, *supra* note 60, at 63–64.

96. With respect to the GFCC, Ernst-Ulrich Petersmann identifies five judicial decisions in line with the *Solange* principle as of 2008. *See* Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and "Constitutional Justice"*, 19 EUR. J. INT'L L. 769, 782–83 (2008).

97. This is the famous *Internationale Handelsgesellschaft* litigation. For the background of this litigation, see ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE 88 (2004).

98. *See* MONICA CLAES, THE NATIONAL COURTS' MANDATE IN THE EUROPEAN CONSTITUTION 598–600 (2006).

99. *See, e.g.*, Case 36/75, Rutili v. Minister for the Interior, 1975 E.C.R. 1219, 1220, 1224–25, 1231; Case 4/73, Nold v. Comm'n, 1974 E.C.R. 491, 502–03, 507, 513–14; *see also* SWEET, *supra* note 97, at 87–89.

regarding secondary E.U. legislation "so long as" (*solange*) the E.U. legal order under the CJEU provided the same level of fundamental rights protection as the German Basic Law.[100] This interaction between the CJEU and the GFCC as well as other national jurisdictions embodies the idea of judicial dialogue.[101]

Another example is found in the famous *Bosphorus* decision, in which the European Court of Human Rights (ECtHR) resolved a possible conflict between the E.U. law and the European Convention for Human Rights (ECHR) on the model of *Solange*-type judicial dialogue, without asserting its own jurisdiction at the expense of the CJEU.[102] In sum, this idea is embraced as providing a method for courts and other judicial bodies to deal with future constitutional conflicts.[103]

In light of these examples of judicial dialogue, *Kadi*'s critics charge the CJEU with effectively pitting the European constitutional order against the U.N. legal regime by asserting European autonomy in a mood of "constitutional resistance," which threatens

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100. *See* CLAES, *supra* note 98, at 601.

101. *See id.* at 559–650.

102. The European Court of Human Rights in *Bosphorus* decided in a *Solange* style that, given the equivalent protection regarding fundamental rights provided by the E.U. law, it will not exercise its jurisdiction as to whether the European Convention for Human Rights is violated by a state party's implementation of E.U. law. *See* Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi (*Bosphorus Airways*) v. Ireland, 2005-VI Eur. Ct. H.R. 107, 158; *see also* KRISCH, *supra* note 66, at 289; de Búrca, *supra* note 68, at 16.

103. *See* Samantha Besson, *Whose Constitution(s)? International Law, Constitutionalism, and Democracy*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE, *supra* note 2, at 381, 405; de Búrca, *supra* note 19, at 141–48; Halberstam, *supra* note 95, at 192–99; KRISCH, *supra* note 66, at 170–71, 286–91; Maduro, *supra* note 20, at 371–74; Mayer, *supra* note 56, at 421–23; de Búrca, *supra* note 68, at 42–44; Halberstam & Stein, *supra* note 60, at 64–68; *see also* Bronckers, *supra* note 77, at 885 ("[T]he WTO case law also illustrates that the ECJ has found more subtle ways than direct effect to give domestic law effect to international agreements. Examples are treaty-consistent interpretation, judicial dialogue with international tribunals, and transformation of international law into European legal principles."); CLAES, *supra* note 98 (explaining recent developments in European legal principles incorporating the core European value of international law); Juliane Kokott, *Report on Germany*, *in* THE EUROPEAN COURTS AND NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE 77, 79 (Anne-Marie Slaughter et al. eds., 1997) (discussing "the questions of the relationship between European law and German constitutional law and of the relationship between the ECJ and national courts"); Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE, *supra* note 2, at 258, 259 (suggesting judicial dialogue as a solution to constitutional conflict). *But cf.* Julio Baquero Cruz, *An Area of Darkness: Three Conceptions of the Relationship Between European Union Law and State Constitutional Law*, *in* EUROPE'S CONSTITUTIONAL MOSAIC, *supra* note 55, at 49, 62–70 (questioning the effectiveness of judicial dialogue in easing constitutional conflict).

to stir up constitutional conflict.[104] Regardless of whether the E.U. and the U.N. regimes are conceived as existing in a constitutionalist or pluralist legal universe, the CJEU's interlocutors rally around the idea of constitutional pluralism as the governing principle of inter-regime relations, under which the distinct constitutionalized legal regimes of global governance may be accommodated.[105] Moreover, corresponding to the prominent role of the judicial body in the domestic context, conflicts of norms between legal regimes resolve into jurisdictional conflicts.[106] It is therefore argued that the strategy of judicial dialogue, as adopted by the GFCC and the ECtHR, provides the best hope for resolving constitutional conflict amidst the constitutionalization of global governance.[107]

Nonetheless, the efficacy of the dialogue approach is doubtful when it comes to situations like *Kadi*. As the successes of the CJEU, the ECtHR, and other national jurisdictions suggest, judicial dialogue as a solution to constitutional conflict is premised on the transferability of functions among different jurisdictions in a crisscrossing European constitutional landscape.[108] For example, the GFCC's suspension in *Solange* of jurisdiction over the compatibility of E.U. law with the German Basic Law did not indicate a forfeiture by the national court of its role in fundamental rights protection. Rather, it suggested a view by the German constitutional order that the CJEU serves as a functional equivalent in providing the German Basic Law-required level of fundamental rights protection.[109]

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104. *See* Halberstam & Stein, *supra* note 60, at 67.

105. *See* Krisch, *supra* note 66, at 290–91; de Búrca, *supra* note 68, at 41–44; Halberstam & Stein, *supra* note 60, at 63–68.

106. *See* Ming-Sung Kuo, *Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape?*, 26 Can. J.L. & Juris. 341, 360 (2013). Notably, Samantha Besson distinguishes norm conflict from jurisdictional conflict. *See* Besson, *supra* note 74, at 240–41. Although it is true as a matter of legal concept, norm conflict is sharpest when it comes to who has the final say on conflicting norms. Moreover, with the judicial body occupying center stage in the process of constitutionalization of international legal regimes, jurisdictional conflict seems to shape up as the foremost type of constitutional conflict. *Cf.* Peters, *supra* note 69, at 269 (stating that courts' jurisdiction is a driver of constitutionalization).

107. *See* Maduro, *supra* note 20, at 371–79; *cf.* Krisch, *supra* note 66, at 285–91 (acknowledging judicial dialogue to be vital in decreasing conflict in pluralist constitutional order and suggesting that the differing approaches of "taking into account," "conditional recognition," and minimalism could contribute to that effort).

108. *See* Krisch, *supra* note 66, at 291–94; *cf.* de Búrca, *supra* note 68, at 10 (noting that the international legal environment is characterized by competing, multitiered, and overlapping national and international authorities that raise accountability and jurisdictional problems as played out in the *Kadi II* case).

109. *See* Claes, *supra* note 98, at 648.

National constitutional orders and the E.U. legal order are therefore embraced under a multilevel governance structure of a common political project.[110]

Against this backdrop, adoption of the judicial dialogue strategy suggested by AG Maduro would presuppose that both the E.U. and the U.N. legal regimes belong to an integrated legal order.[111] If the *Kadi* decision were made on this model, the CJEU would "act[ ] not only as a court of the European Union, but also as a court of the international legal system."[112] Any possible regime collision between the E.U. and the U.N. legal orders would therefore be expected to resolve itself through judicial dialogue.[113]

As both the CJEU decision and the AG Opinion in *Kadi* indicate, however, the European legal order is an internal (if not municipal) autonomous legal system with fundamental rights protection at the core of its identity.[114] The CJEU's major concern lies in maintaining the integrity of the E.U. constitutional order.[115] Notably, this condition is required for the E.U. legal order to be accepted by national constitutional (or supreme) courts as their functional equivalent in fundamental rights protection due to the power transfer previously discussed.[116] Therefore, the E.U. constitutional order can be conceived as coexisting with national constitutional

110. *See* Cohen, *supra* note 14, at 301–02; Maduro, *supra* note 20, at 372–75; *see also* Petersmann, *supra* note 96, at 775–87 (illustrating the interplay of different domestic and international courts in Europe—including the European Convention for the Human Rights, European Commission, and European Free Trade Association Courts—in protecting individual rights and noting this process as an integral part of European integration).

111. *See* Besson, *supra* note 74, at 261–63; Griller, *supra* note 85, at 544–45, 550. For the dialogic type of judicial techniques, see Krisch, *supra* note 66, at 164–65, 290–91; Bronckers, *supra* note 77, at 888–94; de Búrca, *supra* note 68, at 39.

112. *See* Halberstam & Stein, *supra* note 60, at 72; *see also* Krisch, *supra* note 66, at 291 (noting Maduro's argument that a "reinforced teleological" approach to pluralism challenges in the European legal order would increase judicial accountability and discursive engagement among the judicial institutions); Griller, *supra* note 85, at 547–49 (illustrating, with respect to the terrorist cases, how the European domestic courts could compensate for deficiencies in judicial review of human rights obligations in Security Council until the proper procedures and institutions are developed at the U.N. level).

113. *See* Daniel Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, *in* Ruling the World? Constitutionalism, International Law, and Global Governance, *supra* note 2, at 326, 352–53; Maduro, *supra* note 20, at 371–79; Petersmann, *supra* note 96, at 787–92.

114. *See* Halberstam & Stein, *supra* note 60, at 58–61.

115. *See* Joined Cases C-402 & 415/05 P, Kadi v. Council (*Kadi II*), 2008 E.C.R. I-6351, ¶ 283, at I-6490.

116. *See* Eckes, *supra* note 74, at 248–49.

orders under a multilevel regime.[117] Under this view, the integrity of the existing E.U. constitutional order, which is embedded in the web of national orders,[118] constitutes the condition on which the CJEU continues to operate as a functional equivalent to its national counterparts.

This approach also explains the relationship between the CJEU and the ECtHR. Before the ECtHR's *Bosphorus* decision, another example of judicial dialogue,[119] the ECtHR regime had already been embraced by the CJEU as the bedrock of the E.U. fundamental rights protection system[120] and a model for the E.U. legal order to follow during its early constitutionalization. When the *Bosphorus* case reached the ECtHR in 1998,[121] the development of the E.U. fundamental rights protection regime had grown to the extent that the issue centered on how to coordinate the ECtHR and CJEU jurisdictions as applied to contracting parties' implementation of the E.U. law rather than on simply which court offered better rights protection where their jurisdictions overlapped.[122] Given that the U.N. legal regime is much less developed, however, it is inconceivable that the E.U. and the U.N. legal orders can be viewed as embedded in a multilevel constitutional system without compromising the integrity of the existing E.U. order.[123]

A thought experiment will more clearly illustrate the resulting impact on judicial dialogue stemming from the disparity between these legal orders: suppose the CJEU decided *Kadi* according to AG Maduro's suggestion. In this hypothetical scenario, the CJEU

117. This is the underlying reason for drawing a distinction between internal and external constitutional pluralism. *See* COHEN, *supra* note 14, at 301–11; Maduro, *supra* note 20, at 372–79.

118. *See* Christoph Möllers, *Pouvoir Constituant—Constitution—Constitutionalisation*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, *supra* note 25, at 169, 196.

119. *See* KRISCH, *supra* note 66, at 131–32.

120. *See* Jürgen Kühling, *Fundamental Rights*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, *supra* note 25, at 479, 482–84.

121. Although *Bosphorus Airlines* was decided in 2005, the legal saga resulting in the European Court of Human Rights' 2005 decision can be traced back to 1993 when the former Socialist Federal Republic of Yugoslavia was breaking up. *See* Frank Schorkopf, *The European Court of Human Rights' Judgment in the Case of* Bosphorus Hava Yollari Turizm v. Ireland, 6 GERMAN L.J. 1255, 1255–59 (2005).

122. *Id.* at 1263–64.

123. This position corresponds to the distinction between internal and external pluralism. *See* Maduro, *supra* note 20, at 356–57; Besson, *supra* note 74, at 259–63; *see also* COHEN, *supra* note 14, 301–11. This by no means suggests that equivalent constitutionalization is *sufficient* for multiple legal regimes to be subsumed under a multilevel governance structure. Rather, the point is that it is *necessary* for legal regimes involved to reach an equivalent extent of constitutionalization if they are to be conceived as components of a multilevel governance structure.

would thus suspend judicial review of the consistency of E.U. implementing legislation with its constitutional law *so long as* the United Nations could protect fundamental rights on an equivalent level to that required by the E.U. constitutional order. Nonetheless, there is no judicial body aligned with the UNSC that has jurisdiction over individual complaints concerning counterterrorism sanctions.[124] The judicial arm of the United Nations, the International Court of Justice (ICJ), may only adjudicate controversies between states and issue advisory opinions.[125] Thus, a hypothetical *Solange*-style ruling would effectively demand an institutional reform of the United Nations—including the installation of judicial review over the UNSC decisions—to achieve effective judicial protection of fundamental rights.[126] Considering the prominent role of the UNSC in the allocation of powers under the U.N. Charter,[127] this reform message would sound less like a cooperative judicial dialogue and more like a unilateral decree to commence revolutionary change by installing judicial review.

It is true that the UNSC may not be entirely exempt from judicial review, as some scholars have argued:[128] the ICJ could enter the fray by exercising its advisory opinion jurisdiction to decide the legality of the UNSC resolutions.[129] Thus, for the sake of argument, a *Solange*-style opinion from the CJEU might draw attention from the ICJ and result in gradual reforms to the U.N. legal system.[130] Moreover, the CJEU could use judicial dialogue by making requests or suggestions to the ICJ rather than commanding a result, thereby paving the way for more constructive dialogue. Nev-

124. *See* de Búrca, *supra* note 19, at 115 n.31.

125. *See* Halberstam & Stein, *supra* note 60, at 31–32.

126. Writing in 2010, Nico Krisch noted that even though an ombudsperson has been appointed to address the concern raised in *Kadi II*, it appears unlikely to satisfy European judicial minds given its nonjudicial character. *See* KRISCH, *supra* note 66, at 159–60; *see also* Case T-85/09, Kadi v. Comm'n (*Kadi III*), 2010 E.C.R. II-5177, II-5194 to -5197. The ICJ's role currently stands as an advisory institution to the UNSC. *See* U.N. Charter art. 96, para. 1.

127. *See* W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 83 (1993); COHEN, *supra* note 14, at 289; Paul W. Kahn, *War Powers and the Millennium*, 34 LOY. L.A. L. REV. 11, 33–35 (2000).

128. *Compare* Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1 (1996) (arguing that the UNSC is subject to aspects of review by the ICJ and that a balance needs to be struck between the ICJ and UNSC to maintain institutional legitimacy), *with* Bernd Martenczuk, *The Security Council, the International Court and Judicial Review: What Lessons from* Lockerbie?, 10 EUR. J. INT'L L. 519 (1999) (arguing that the ICJ decision in the *Lockerbie Case* represents an important step toward judicial review of the UNSC).

129. *See* Alvarez, *supra* note 128, at 8–9.

130. In terms of the current jurisdictional rules in the Statute of the International Court of Justice, this scenario is very unlikely.

ertheless, the CJEU would effectively subject the U.N. legal system to the scrutiny of the E.U. constitutional order as long as the benchmark requirement of effective judicial remedy remains,[131] even if its message is conveyed in a less demanding style. Seen in this light, before the U.N. legal system attains the target of effective judicial remedy set by the CJEU,[132] it would remain under the European Union's constitutional trusteeship.

Alternatively, the CJEU could instead take the *Bosphorus* approach adopted by the ECtHR and grant a "margin of appreciation" to the UNSC. This would prove problematic, however; by giving up the CJEU's long insistence on effective judicial review to protect fundamental rights, the integrity and consistency of the E.U. legal order would be compromised. Specifically, the margin of appreciation doctrine developed by the ECtHR accommodates the diverse legal systems and historical backgrounds of state parties to the ECHR without compromising the integrity of the protection of human rights enshrined within it.[133] Under this doctrine, the stringency of the proportionality test—the standard of judicial review prevalent within the ECHR system[134]—is limited to allow more context-specificity in the implementation of fundamental rights without chipping away at their core.[135] In contrast, if the CJEU granted a margin of appreciation to the UNSC or other U.N. bodies, it would constitute the inception of a nonjudicial, institutional dialogue. Through this nonjudicial dialogue, a new model of inter-regime relations could emerge to accommodate the U.N. legal order as an alternative form of global governance lacking judicial review.[136] Unfortunately, this choice would likely result in the CJEU being accused of abdicating its role in ensuring the integrity of fundamental rights in the E.U. constitutional order by delegating the protection of E.U. citizens to political institutions—

131. *See* Anthony Arnull, *The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?*, 36 EUR. L. REV. 51, 68–69 (2011).

132. This point is well illustrated in *Kadi III*, where the General Court held that the creation of the focal point and the Office of the Ombudsperson within the UNSC Sanctions Committee, which was in response to *Kadi II*, "cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee." Case T-85/09, Kadi v. Comm'n (*Kadi III*), 2010 E.C.R. II-5177, ¶ 128, at I-5227.

133. *See* John L. Murray, *The Influence of the European Convention on Fundamental Rights on Community Law*, 33 FORDHAM INT'L L.J. 1388, 1414–15 (2011).

134. *See* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 147–52 (2008).

135. *See* KRISCH, *supra* note 66, at 140–41.

136. *Cf.* Alvarez, *supra*note 128, at 7 (discussing the flaws with the current conception of international judicial review).

suggesting a return to the channel of diplomatic protection found in traditional international law.[137] The dialogue approach would thus seem to be of little help in steering inter-regime relations between the European Union and the United Nations because the CJEU lacks a U.N. judicial counterpart with which to engage. The proposed dialogue would be frustrated at best if the CJEU modeled *Kadi* after either the *Solange* jurisprudence or the related margin of appreciation doctrine.[138]

In sum, the absence of a functioning judicial or quasi-judicial body capable of fundamental rights protection within the United Nations indicates a rudimentary level of constitutionalization of its legal regime (or other form of global governance).[139] As discussed above, it is questionable whether the constitutional conflict between the E.U. and the U.N. legal orders can be effectively resolved through judicial dialogue. This is because judicial dialogue falls short of a functioning model for managing inter-regime relations where asymmetrical constitutionalization exists due to the absence of a functioning judicial or quasi-judicial body in one of the partners.

B. *Beyond a Tolerance-Based Constitutional Comity: Taking Asymmetrical Constitutionalization Seriously*

The inability of judicial dialogue to provide an effective solution to constitutional conflict in *Kadi*-like situations casts light on the limits of contemporary scholarship regarding postnational inter-regime relations. Constitutional conflict between distinct legal regimes in the postnational world has been attributed to the expansionist attitude of individual constitutional orders;[140] this unrestrained expansionism could directly lead to constitutional

137. *See* James Crawford, Brownlie's Principles of Public International Law 610–12 (8th ed. 2012).

138. *See also* Isiksel, *supra* note 66, at 565.

139. Jean Cohen observes, "the constitutionalist dimension of the UN Charter is at best rudimentary in the well-rehearsed respects: there is no court with compulsory jurisdiction to police the formal constitution or enforce the material one" and "[t]hus the constitutionalist reading has to be seen as aspirational." Cohen, *supra* note 14, at 290 (emphasis omitted); *see also* Christian Walter, *International Law in a Process of Constitutionalization*, *in* New Perspectives on the Divide Between National and International Law 191, 195–98, 212–15 (Janne Nijman & André Nollkaemper eds., 2007) ("The idea of the Charter being the constitution of the international community does not sufficiently take into account the sectoral differentiation of the international system."). Anne Peters argues that judicialization is the main driver of the constitutionalization of international legal regimes. *See* Peters, *supra* note 69, at 269–71.

140. *See* Klabbers, *supra* note 55, at 292, 296, 298–99, 302, 304–05, 307; *see also* Weiler, *supra* note 42, at 57, 59, 64–65, 67; Weiler, *supra* note 13, at 17.

conflict. Such an emerging new world order would see more inter-regime collisions, falling far short of a postnational peace between legal systems. In response, constitutional tolerance has been prescribed as the guiding principle for inter-regime relations, with the aim of dissolving conflict.[141] Under this principle, constitutional pluralism should be taken as the starting point for postnational inter-regime relations, and overlapping constitutional orders should engage with each other with a view to coexisting in a comity based on tolerance.[142] The underlying rationale is that individual constitutional orders must reposition themselves as "partial" normative regimes, relinquishing the comprehensive or total normative claims of traditional constitutional orders in order to accommodate their counterparts' claims with equal respect.[143] In this way, a postnational peace can be achieved among distinct legal regimes.

The popularity of judicial dialogue among scholars specializing in inter-regime constitutional conflict reflects the wide appeal of a tolerance-based constitutional comity. As discussed above, at the heart of European success stories is the mutual accommodation by judicial bodies of the values developed through the interplay of normative regimes.[144] Through judicial decisions, constitutional orders signal to their counterparts the conditions and extent to which self-restraint will be exercised to avoid adjudicating others' normative systems. Instead of sitting on the sidelines and waiting for political actors to take the lead, the receiving judicial body responds to this invitation to find the point of convergence among various constitutional orders through its own case law. Judicial dialogue thus conceived is not simply an act of signaling initiated by a judicial body; it is a two-way judicial conversation.[145] Yet the form of judicial dialogue in and of itself does not solve the problem of constitutional conflict—its success turns on a particular judicial

141. *See* COHEN, *supra* note 14, at 73–74, 299–302; Weiler, *supra* note 42, at 65–70; Weiler, *supra* note 43, at 21; *see also* Weiler, *supra* note 13, at 10–11 (noting the dissolving of legal conflicts between regimes as a function of tolerance).

142. *See* COHEN, *supra* note 14, at 66–76, 296–311; Kumm, *supra* note 103, at 266–67; NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH 113 (1999); Miguel Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, *in* SOVEREIGNTY IN TRANSITION 501, 526–27 (Neil Walker ed., 2003); Walker, *supra* note 45, at 349; *see also* Weiler, *supra* note 42, at 66–67 (explaining the regime of constitutional tolerance in the European Union as a means of further uniting the E.U. member countries).

143. *See* Peters, *supra* note 69, at 285.

144. *See* Petersmann, *supra* note 96, at 776–81.

145. *See, e.g.*, KRISCH, *supra* note 66, at 124–26.

attitude or mindset. Within this mindset, judicial bodies engaged in a contest over normative claims will take measures to avert encroachment upon their counterpart's jurisdiction. Only with this attitude of mutual tolerance and judicial comity can a successful judicial dialogue take place.[146] In sum, judicial dialogue boils down to the institutional embodiment of constitutional tolerance; constitutional tolerance becomes the ethos underlying the interaction of constitutional orders.

Taking this to the next step, judicial dialogue is hailed as a solution to the ongoing challenge in Europe's constitutional landscape surrounding the so-called *ultra vires* review jurisdiction. *Ultra vires* is a special and particularly unsettling form of constitutional conflict, in which a judicial body exercises jurisdiction and reviews whether the legal claim made by another constitutional order is beyond the latter's competence.[147] If so, the legal claim under review is invalid and deserves no respect from the former constitutional order.[148] In contrast to issues concerning the equal protection of fundamental rights seen in *Solange*, *Bosphorus*, and *Kadi*, the controversy over the *ultra vires* review jurisdiction concerns regime competence, which cuts to the heart of constitutional conflict. Regime competence has been regarded as impervious to a *Solange*-type settlement.[149] Specifically, once an equal protection of fundamental rights is established in a constitutional order, the settlement reached through judicial dialogue is expected to endure unless the protection afforded suffers an unexpected decline. In contrast, interpretation of the foundational treaties and other legal instruments establishing the competence of a constitutional order is not always clear, and the body responsible for making the final determination matters in deciding a constitutional order's competence.[150] For this reason, the controversy over the *ultra vires* review jurisdiction translates into competition for the so-called judicial

146. *See* COHEN, *supra* note 14, at 302–03; Klabbers, *supra* note 55, at 303–06; KRISCH, *supra* note 66, at 290–91; *see also* Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES L. 9, 13–15 (2007) (emphasizing different legal mindsets in the face of international law issues).

147. *See* Mayer, *supra* note 39, at 412–15.

148. *See* Kumm, *supra* note 106, at 264. It is noteworthy that controversies over the *ultra vires* review jurisdiction may also arise in two separate legal regimes with no overarching constitutional structure governing both, such as the relationship between the E.U. and the U.N. systems. Samantha Besson notes that the General Court's approach in *Kadi I* suggests a possible constitutional conflict concerning the *ultra vires* review jurisdiction. *See* Besson, *supra* note 74, at 250–51.

149. *See* Mayer, *supra* note 39, at 413.

150. *See* Grimm, *supra* note 59, at 370–72.

Kompetenz-Kompetenz: which judicial body holds the ultimate jurisdiction to decide the competence of overlapping legal orders.[151]

Conflict over regime competence as epitomized in the controversy over *ultra vires* review jurisdiction is more complicated than constitutional conflicts concerning cross-regime equal protection of fundamental rights; nevertheless, tolerance may well function to keep conflicting constitutional orders from running amok.[152] As long as constitutional pluralism is borne in mind, the judicial bodies of both orders are expected to engage with each other in a manner capable of realizing the abovementioned tolerance-based constitutional comity. Given that no normative order is entitled to make comprehensive constitutional claims, neither judicial body is in a position to assert judicial *Kompetenz-Kompetenz*.[153]

Up to this point, a tolerance-based comity seems promising in tackling constitutional conflict in a postnational world, even with respect to those particularly unsettling contests over *ultra vires* review jurisdiction.[154] Nonetheless, as previously indicated, the asymmetrical constitutionalization between regimes dampens this optimism. Furthermore, the growing tendency toward judicial supremacy in the domestic constitutional landscape indicates that a judicial body may be tempted to make a comprehensive normative claim on the competence of both itself and a conflicting constitutional order when the latter lacks a functioning judicial body.[155] In such a situation, the relationship between these two asymmetrically constitutionalized regimes would be plunged into a systemic instability, with judicial *Kompetenz-Kompetenz* effectively in the grip of a single order. Formal jurisdictional conflict may be thus kept at bay, but this lopsided relationship would only sow the seeds for more intense constitutional conflict and dash any hopes of resting inter-regime relations in constitutional terms.

Overall, constitutional tolerance may prepare judicial bodies to engage with their counterparts in order to avert conflict, but it falls short of providing guidance on how they should position them-

151. *See* Kumm, *supra* note 106, at 264, 295–96.

152. Whether this conciliation rests on a precarious condition or solid ground is yet to be addressed further. *Cf.* Klabbers, *supra* note 55, at 303–05; Charles F. Sabel & Oliver Gerstenberg, *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order*, 16 Eur. L.J. 511, 543–50 (2010).

153. *See* Walker, *supra* note 45, at 348–53.

154. *But see* Mayer, *supra* note 39, at 413. The recent GFCC decision (2 BvR 2728/13 (Jan. 14, 2014)) on the legality of the Outright Monetary Transactions adopted by the European Central Bank amidst the Euro crisis brought this issue to the fore. *See* Udo Di Fabio, *Karlsruhe Makes a Referral*, 15 German L.J. 107 (2014).

155. *See* Kuo, *supra* note 106, at 346–60.

selves relative to constitutional orders with a lesser degree of constitutionalization. Asymmetrical constitutionalization poses a fundamental challenge to judicial dialogue-oriented proposals to resolve constitutional conflict. It is time to go beyond tolerance-based constitutional comity and take asymmetrical constitutionalization seriously.

IV. Conclusion

The world order is undergoing great transformation, yet its ultimate direction is unclear. With the traditional international structure unraveling, the postnational world order seems to be standing at the crossroads of peace and chaos. To shed light on the prospect of a new world order, scholars have scrambled over historical precedents or comparative examples for inspiration. Among numerous analogies, the experience of the integration of Europe—which originated as a regional regulatory body and grew into a well-functioning transnational administration—has appealed to those interested in analyzing global governance as a feature of the postnational world order. Seen in this light, a postnational peace between governance units is expected to come to fruition through the E.U. model.

This Article has provided critical reflections on this optimistic projection of the E.U. experience onto the institutional configuration of global governance. In discussing the implications for global governance of the E.U. experience, it argued that the European Union's development as a transnational administration has also given rise to its own constitutionalization. However, an expansionist vision of the E.U. constitutional order looms out of this continuing process of constitutionalization. In view of this tendency, the new world order—in which individual global governance regimes are presumed to be following the E.U. path—may move toward inter-regime constitutional conflict rather than postnational peace. A chaotic scenario of constitutional conflict may arise in the shadow of constitutional expansionism; however, this Article demonstrated how such conflict may be averted as the process of constitutionalization penetrates legal regimes. As *Kadi*'s interlocutors have suggested, judicial dialogue based on constitutional tolerance appears to be the solution. A tolerance-based comity in which overlapping orders coexist with no single regime making comprehensive constitutional claims appears to be the most desirable result of a new world order based on the E.U. experience. Yet this judicial dialogue will malfunction where there is great disparity in

the extent of constitutionalization between individual constitutional orders.

Unfortunately, the lessons drawn from an analysis of inter-regime judicial dialogue do not appear very encouraging. When viewed in perspective, however, the role of constitutional comity in steering inter-regime relations can be fairly assessed and thus better serve the evolving postnational world order. The aspiration to constitutional peace mirrors liberal legalism, which has left a long shadow in the reform of international relations aimed at reining in *realpolitik*.[156] Recast in the language of constitutionalization and dialogue, international relations seem to be moving away from the strategic calculation of interest and power in favor of inter-regime deliberation.[157] Nevertheless, this rosy image conceals the reality of asymmetrical constitutionalization and thus sweeps the political nature of judging under the rug. To seriously address inter-regime relations in global governance, we should first stop envisioning the interaction between constitutional orders in depoliticized terms. Dubbed dialogue or not, contestation lies at the heart of the postnational world order. Judicial contestation may not sound as amicable as institutional deliberation or transnational dialogue, but it reflects the contentious and sometimes combative inter-regime relations in disparity-trapped global governance, which may turn out to be jurisgenerative. Although there is no guarantee that judicial contestation will serve as jurisgenesis in the construction of a global *nomos*,[158] this openness to remaking juridical orders is what we should feel cheerful about at the discovery of asymmetrical constitutionalization.

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156. *See generally* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, at 11–97 (2001) (providing a history of the effects of "legal conscience" on the emergence of modern international law and the latter's framing of international politics).

157. *See, e.g.*, Daniele Archibugi, *Principles of Cosmopolitan Democracy*, *in* RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY 198, 205–09, 210–11 (Daniele Archibugi et al. eds., 1998); Hauke Brunkhorst, *Globalising Democracy Without a State: Weak Public, Strong Public, Global Constitutionalism*, 31 MILLENIUM: J. INT'L STUD. 675 (2002); Christian Joerges, *"Deliberative Supranationalism"—Two Defences*, 8 EUR. L.J. 133 (2002). For critical perspectives of deliberative democracy, see Jane Mansbridge, *Using Power/Fighting Power: The Polity*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 46 (Seyla Benhabib ed., 1996); CHANTAL MOUFFE, THE RETURN OF THE POLITICAL (1993).

158. *See* KRISCH, *supra* note 66, at 172–74, 282–83, 301–02. For the jurisgenerative version of legal orders and the concept of jurisgenesis, see Robert M. Cover, *The Supreme Court, 1982 Term: Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 9 (1983).