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# Thoughts on the German Constitutional Court Decision on the ESM

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# Thoughts on the German Constitutional Court Decision on the ESM

–Richard Stith, Valparaiso University

The German Federal Constitutional Court's decision of September 12, 2012, has been welcomed by some as signaling yet another political retreat, yet another "Son of *Solange II*". But what should bring joy to the heart of every American comparative law teacher is that, whether retreat or advance, every new "red line" drawn by the FCC is and must be a contradiction within EU law, and therefore a wonderful subject for the intractable classroom debate that is the hallmark of our peculiar U.S. form of legal education.

Perhaps it will be said that this is nothing new. American Legal Realism and its Critical Legal Theory heirs have long taught that law is inevitably self-contradictory. But this Realist contention is usually just a matter of anti-authoritarian political commitment.

No body of law can bind where it is internally inconsistent. A judge cannot obey contradictory commands. So anti-authoritarians seek to destroy the power of law by claiming that it contradicts itself. Judges, by contrast, insofar as they are committed to following the law must assume that there is a hidden unity to law, that there is a way to resolve every relevant contradiction in order to reach a holding. If a judge holds the law to be binding, she must think it unified. If a Realist chooses not to be bound by the law, neither will he believe there to be hidden ways it binds itself together.

The sense of obligation is thus the ground of legal (and moral) reason. The desire for liberation is the ground of skepticism. But neither side can disprove the other. The Realist simply commits himself to the proposition that there are contradictions in every apparent unity, even in those unities not yet proposed. The conscientious judge simply commits herself to the proposition that there is a unity behind every apparent contradiction, even those not yet discovered. The great French mystic thinker Simone Weil puts the matter better than any Judge Hercules:

Correlations of contraries are like a ladder. Each of them raises us to a higher level where resides the connexion which unifies the contraries; until we reach a spot where we have to think of the contraries together, but where we are denied access to the level at which they are linked together. This forms the last rung of the ladder. Once arrived there, we can climb no further; we have only to look up, wait and love. And God descends. [Gateway to God 64 (1974)].

The Realist simply refuses to wait, or even to start climbing.

In the European Union, however, in the very heartland of the Legal Science tradition, there is no

first rung upon which to step and climb, just a stark antinomy. Despite the venerable *Van Gend en Loos* and *Costa* teachings of the European Court of Justice, compacts among constitutionally limited states cannot logically generate directly effective, supreme, and open-ended substantive or interpretive powers. Only a compact among unlimited, fully autonomous states could do so. *Nemo dat quod non habet*. By insisting otherwise, the ECJ creates a never ending, legally intractable constitutional crisis. There is not and cannot be a single “scientific” answer to the question of whether the EU has exceeded its powers. There is only the answer in European law and the answer in member state law and the Realist prediction of the likely political choice by the court in question (e.g., ECJ or FCC). And now, upon this sand, some propose to raise an ever-heavier construction.

Guy Verhofstadt urges everyone to avoid such problems of “a federation of nation states” by conceiving the EU as a “federal union of European citizens.” *European Voice*, 13-19 September 2012, p. 1. But are Germany’s citizens themselves fully autonomous? Could they alienate their rights to life or to liberty? Would not the *Drittwirkung* principle of the German *Grundgesetz* legally nullify the surrender of one’s vote, for example, even for good reciprocal value received?

Perhaps, however, the insuperable contradictions at the base of European law are a good thing. Should we wish for a unitary Legal Science to govern a whole continent – especially if we cannot imagine how such a legally unitary State could be democratic? [Cf. the work of Santiago de Compostela constitutional law professor Antonio-Carlos Pereira Menaut on post-modern, post-state, deeply pluralist polities.] And what do these European quandaries tell us about our pact among limited American states, or (if you will) among citizens of our states who possessed “unalienable rights... to life, liberty, and the pursuit of happiness”? Are those American “departmentalists” and “popular constitutionalists” who seek to revive similar antinomies underlying U.S. law also doing a good thing?

If there be professorial paradise on earth in the United States of America, it is this, it is this, it is this.