Great Judgments of the European Court of Justice presents a new approach to understanding the landmark decisions of the European Court of Justice in the 1960s and 1970s. By comparing the Court’s doctrines to the enforcement and escape mechanisms employed by more common forms of trade treaty, it demonstrates how the individual rights created by the doctrine of direct effect were connected to the practical challenges of trade politics among the European states and, in particular, to the suppression of unilateral safeguard mechanisms and inter-state retaliation. Drawing on the writings and speeches of French judge and President of the Court, Robert Lecourt, it demonstrates that one of the Court’s most influential judges shared this understanding of the logic of direct effect. This book offers a distinctive interpretation of the Court of Justice’s early years, as well as of the purpose of the fundamental principles of European law.

William Phelan is Associate Professor and Jean Monnet Chair of EU Politics and Law at Trinity College Dublin. His previous book on the European Court of Justice, entitled In Place of Inter-state Retaliation (2015), was awarded the Brian Farrell Book Prize of the Political Studies Association of Ireland.
GREAT JUDGMENTS OF
THE EUROPEAN COURT
OF JUSTICE

Rethinking the Landmark Decisions
of the Foundational Period

WILLIAM PHELAN
Trinity College, Dublin
Great judgments of the European Court of Justice: rethinking the landmark decisions of the foundational period / William Phelan, Trinity College, Dublin.

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We never see the true state of our condition, till it is illustrated to us by its contraries; nor know how to value what we enjoy, but by the want of it.

Daniel Defoe, *Robinson Crusoe* (1719)

Déjà des organismes internationaux ont été créés pour limiter et si possible empêcher les conflits violents entre les peuples et pour substituer le droit à la violence. C’est ce principe qui arrêta autrefois les guerres privées qu’on emploie aujourd’hui pour empêcher les guerres mondiales. C’est l’interdiction pour quiconque, individus ou nations, de recourir à la violence et l’obligation pour tous de s’adresser au juge au lieu de se faire justice à soi-même. Ainsi ce principe s’est-il toujours développé parallèlement avec le Droit. Dès que le Droit s’étend à un domaine nouveau, ce principe apparaît à la base. Son extension est si considérable et si visible que limité autrefois aux conflits d’intérêts privés il tend sans cesse à s’appliquer aux litiges entre les peuples. C’est ainsi qu’en droit international il s’est traduit surtout pendant les dix dernières années, par la création d’organismes internationaux : Société des Nations, conférences internationales (conférences du désarmement), tribunaux internationaux qui jouent un rôle si important dans les rapports des États. Ces organismes sont appelés à empêcher les violences entre les peuples, et à interdire aux nations comme il est depuis longtemps défendu aux particuliers, de se faire justice à soi-même . . .

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ACKNOWLEDGEMENTS

The inspiration for this book began during my time as visiting fellow at the European University Institute (EUI) in Fiesole, just outside Florence, in 2014. There is nowhere better to think deeply about European law than in the EUI’s sunny gardens and shaded cloisters with the company of brilliant students and distinguished scholars. Over many coffees and lunches during those six months, I was repeatedly struck by the divergence between the celebrated works of legal scholarship which placed great emphasis on the European Court of Justice’s (ECJ) rejection of inter-state retaliation in the 1964 Dairy Products case,¹ and the many experts on European law who seemed completely unaware of that judgment. This unfamiliarity was no doubt due to the fact that Dairy Products has been entirely omitted from many accounts of the early years of European law and from prominent collections of the Court of Justice’s classic cases.

It seemed obvious to me, however, that the prohibition on inter-state retaliation announced by the Court in Dairy Products in 1964 was the partner of – perhaps even the inspiration for – the individual rights and role for national courts so famously announced by the Court in Van Gend en Loos in 1963. That view in turn seemed to bewilder most of the European lawyers I met in Fiesole, even though the EUI was simultaneously hosting a well-attended seminar series on the World Trade Organization where the possibility of using direct effect as an alternative to retaliatory enforcement was debated nearly every week. The purpose of this book is to make clear the connection between direct effect and the abolition of inter-state retaliation in the early years of the European legal order, and to embed this connection in our understanding of the Court’s most important judgments. I also well remember my conversation with an eminent professor who pointed out that even if we can now recognize

¹ Those celebrated works of scholarship include the best-known article by the then President of the European University Institute, Joseph Weiler (Weiler 1991: 2422).
ACKNOWLEDGEMENTS

A strong relationship between direct effect and European law’s rejection of inter-state retaliation, there was still the separate question of whether the relevant judges on the Court of Justice understood that relationship back when the foundations of European law were first being built. That observation led me to intensify my research into the remarkable ECJ judge Robert Lecourt and, despite the challenges of closed archives and lost private papers, I hope that this book offers convincing evidence that judge Lecourt was fully aware of that connection.

A project of this sort is only possible with the support of many friends and collaborators. A number of generous colleagues were kind enough to read part or all of the book in draft form, or commented on draft chapters at conferences or workshops. I am grateful for comments and criticism from Gerald Butler, Gareth Davies, Peter Lindseth, Mario Mendez, Fernanda Nicola, and Fabien Terpan. Those who offered helpful feedback over coffee or otherwise from the very beginning include Loïc Azoulai, Marise Cremona, Bruno de Witte, Oran Doyle, Nial Fennelly, Dimitry Kochenov, Brigid Laffan, Petros Mavroidis, Ernst-Ulrich Petersmann, Diarmuid Rossa Phelan, and Michel Waelbroeck, as well as patient colleagues at both the Department of Political Science and the School of Law here at Trinity College Dublin. I have also benefited from the writings and encouragement of many of the “new historians” of European law, particularly Bill Davies, Morten Rasmussen, Antoine Vauchez, and again Peter Lindseth, without whose prior historical researches this book could never have been written. Two Trinity College PhD students – Brady Gordon and Dáire McCormack-George – offered outstanding research assistance.

For the invitation to visit at the EUI, and for many conversations on France, Germany, and Europe over the years, I am especially indebted to Ulrich Krotz. For an unexpected welcome in Fiesole, I thank Duncan McDonnell and Elena Messina. I would like to thank Paolo Gori for our conversations about his early years at the Court of Justice, and for a wonderful tour of Prato. I am particularly grateful to Joseph Weiler who understood the project immediately, encouraged it warmly, and advised me to keep the book short. I have done my best, but for any failings on that account, or any other, I must remain solely responsible.

This project has been generously supported by the Jean Monnet Chair in EU Politics and Law at Trinity College Dublin and by Trinity College’s Arts and Social Sciences Benefactions Fund. Draft papers or chapters were presented at meetings of the Irish Association of Law Teachers in Maynooth and the European Union Studies Association in Miami, and
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Of course it is family that helps us through the challenges of long and demanding projects, and one of the pleasures of sabbatical leave near Florence is that your family members are keen to come and visit, including my parents, Cel and Bill, who have supported first my own opportunities and now our growing family in so many ways. I cannot begin to properly express my gratitude for all their sacrifices. Above all my love to Haiyan and to our wonderful boys – Hubert who enjoyed our daily visits to Pasticceria Alcedo on the Via Gramsci and Bill who still has that delight to look forward to.
# ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECSC</td>
<td>European Coal and Steel Community</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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EUROPEAN COURT OF JUSTICE CASES

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PREAMBLE AND SELECTED PROVISIONS
OF THE TREATY OF ROME

In the discussions of the decisions of the European Court that follow, we will refer repeatedly to certain provisions of the Treaty of Rome, above all Articles 5, 164, 169, 170, 171, 177, 189, 219, and 226, as well as the Treaty’s Preamble. These texts are set out here for ease of reference, and following there is a table setting out how these provisions of the Treaty of Rome relate to provisions of the current European Treaties as of 2018.

Preamble

DETERMINED to lay the foundations of an ever-closer union among the peoples of Europe,
RESOLVED to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe,
AFFIRMING as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples,
RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,
ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions,
DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,
INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,
RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts, HAVE DECIDED to create a European Economic Community . . .

Article 5

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardise the attainment of the objections of this Treaty.

Article 164

The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.

Article 169

If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

Article 170

A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission. The Commission shall deliver a reasoned opinion after each of the States concerned has been given the
opportunity to submit its own case and its observations on the other party’s case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice.

**Article 171**

If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

**Article 177**

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community;
(c) the interpretation of the statutes of bodies established by an act of the Council,

where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

**Article 189**

In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force.

**Article 219**

Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.

**Article 226**

1. If, during the transitional period, difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area, a Member State may apply for authorisation to take protective measures in order to rectify the situation and adjust the sector concerned to the economy of the common market.

2. On application by the State concerned, the Commission shall, by emergency procedure, determine without delay the protective measures which it considers necessary, specifying the circumstances and the manner in which they are to be put into effect.

3. The measures authorised under paragraph 2 may involve derogations from the rules of this Treaty, to such an extent and for such periods as are strictly necessary in order to attain the objectives referred to in paragraph 1. Priority shall be given to such measures as will least disturb the functioning of the common market.
EQUIVALENCE TABLE OF TREATY ARTICLES

Treaty of Rome (1957) – Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU), the consolidated foundational treaties of the European Union, as constituted and amended by the Single European Act, the Maastricht Treaty, the Amsterdam Treaty, the Nice Treaty and the Lisbon Treaty.

<table>
<thead>
<tr>
<th>Treaty of Rome</th>
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<tr>
<td>Article 5</td>
<td>Replaced in substance by art 5 TEU.</td>
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<tr>
<td>Article 164</td>
<td>Repealed and replaced in substance by art 19 TEU.</td>
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<tr>
<td>Article 169</td>
<td>Amended by art 2(7) Lisbon Treaty; now art 258 TFEU.</td>
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<td>Article 170</td>
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<td>Article 171</td>
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<td>Article 177</td>
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<td>Article 189</td>
<td>Amended by art 2(234) Lisbon Treaty; now art 288 TFEU.</td>
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<td>Article 219</td>
<td>Art 344 TFEU.</td>
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<td>Article 226</td>
<td>Repealed by art 6(75) Amsterdam Treaty.</td>
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