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Union citizenship

Placing limitations on a human-centred approach?

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1 Introduction

Union citizenship is traditionally viewed as promoting a more human-oriented approach within the European Union. While enjoyment of the freedoms arising from the economic free movement provisions generally requires economic activity, Article 20 TFEU bestows upon *every* person, holding the nationality of a Member State, citizenship of the Union. Putting aside its omission to include third country nationals within its scope,[[1]](#footnote-1) Article 20 would seem to place human beings, as opposed to economic actors, closer to the centre of Union law and policy. For instance, *all* citizens, whether economically active or not, have the right to move and reside freely within the territory of the Member States.[[2]](#footnote-2) Nevertheless, built upon an existing *market* citizenship, the concept of Union citizenship was introduced, at Maastricht, into a climate of scepticism. Criticism has principally focused on the still pertinent question of whether Union citizenship goes *far enough* in recognising the personhood of economically inactive Union citizens when it still vests, largely, in movement,[[3]](#footnote-3) and when the right to move is still essentially subject to limitations and conditions associated with economic activity or economic self-sufficiency.[[4]](#footnote-4)

By contrast, but still focusing on its market origins, this chapter will argue that there is a paradox inherent to current attempts to achieve more human-centredness through the mechanism of Union citizenship: it is the very humanising quality of Union citizenship that, in some situations, can undermine a more compassionate approach to human need. The core right of Union citizenship is the freedom to move and reside in the territory of the Member States. As a result, Union citizenship principally caters for the human need of European citizens by boosting free movement. It infuses free movement with a human quality, attaching it to the personal status of the individual, and treating it as fundamental right. This reinforces a structural prioritisation of free movement over conflicting activity. Consequently, where the human need of European citizens runs *congruent* to free movement, Union citizenship is able to facilitate some very human results. For instance, where a host State has denied access to social welfare to a non-national Union citizen, the fundamental rights quality that Union citizenship lends to free movement has, in some cases, required Member States to show solidarity in relation to the human needs of Union citizens.[[5]](#footnote-5) In this way, it can be argued that Union citizenship has nurtured a more collaborative and caring philosophy within Union law and policy, which has allowed the Court of Justice (the Court/CJEU) to cater for the complexities of human life.[[6]](#footnote-6)

However, there are many instances where the pursuit of free movement *clashes*  with human need, particularly in the context of economic free movement. As one example, in the *Libert* case,[[7]](#footnote-7) Flanders had placed an obligation on developers of land to make available a certain number of their housing units for social housing. Although this rule placed restrictions on free movement, it also served as a means of ensuring a sufficient stock of social housing for local residents, familial and other support networks. It will be demonstrated in this chapter that, since Union citizenship is only able to support human need as a *corollary* of the structural boost it offers to free movement, it is unable to encourage a human-centred approach in this context. In fact, Union citizenship actually serves to *undermine* Member State attempts to deal with their citizens in a caring way. First, as Union citizenship widens the personal scope of free movement, it increases the likelihood that free movement will interact with such endeavours. Second, by elevating free movement to a fundamental right, Union citizenship encourages the perception of *any* activity that clashes with free movement as prima facie‘problematic’ conduct. In this context, the needs of the free mover are prioritised over Member State attempts to protect vulnerable sections of their populations.

The chapter unpacks this argument by first outlining, in [Section 2](#sec_ch7_2), the market origins of EU citizenship. Thus, the section serves as an important reminder that Union citizenship is borne from, and built upon, the internal market. Consequently, a formal EU citizenship has adopted free movement as its core right and utilised the basic legal structures of the internal market to provide it. This historical backdrop is critical since it displays the enmeshed nature of citizenship and economic free movement. [Section 3](#sec_ch7_3) will highlight that, by attaching free movement to the personal status of the EU citizen, Union citizenship has humanised and fundamentalised free movement, presenting it as a fundamental right. This legitimises the use of a procedural bias, in the adjudication of clashes between free movement and conflicting activity, which prioritises the former over the latter. Specifically, a two-stage breach/justification adjudicative methodology, which requires competing activity to *justify* itself against a prima facie wrongful restriction of free movement, places opposing activity on the procedural backfoot. Moreover, since free movement straddles both the personal and economic spheres, this treatment of free movement as a fundamental right occurs also in the economic context. [Section 4](#sec_ch7_4) analyses the potentially negative consequences of Union citizenship’s reinforcement of such structural bias by assessing the impact of a fundamentalised free movement on Member States’ abilities to protect conflicting human needs. Having explained the capacity of Union citizenship, in some instances, to limit the ability of Member States to deal with their resident populations in a compassionate way, [Section 5](#sec_ch7_5) re-frames the discussion in terms of the challenges currently facing Union citizenship. Either Union citizenship must evolve so as to cater better, at the supranational level, for human needs that do not attach to free movement, or it must at least ensure that it does not operate to undermine human efforts taking place at Member State-level.

2 Union citizenship: borne from, and built upon, the internal market

2.1 An incipient form of Union citizenship: recognising the human need of the economic actor

The principal purpose of the European Economic Community was the establishment of a common market.[[8]](#footnote-8) Accordingly, the EEC was introduced, and built upon, an *economic* framework. Although, a social purpose is clearly visible within the Treaty of Rome – for instance, its preamble speaks of the need to ensure social progress in the Member States – Article 2 TR presents this as achievable through the medium of the common market. The attainment of social goals was pursued by making provision for the human needs of *workers*, enjoyed through their status as *economic actors*, and framed, initially at least, in terms of the negative impact that ignoring human need would have on economic integration.

For instance, several provisions within the Treaty sought to improve the employment opportunities, working conditions, and standard of living of Union workers.[[9]](#footnote-9) Since free movement was the cornerstone of the common market, both the Union legislature and the judiciary endeavoured, almost from free movement’s inception, to ensure that certain human needs were met. For instance, Regulation 1612/68 – concerning the freedom of movement of workers within the then-Community – provided that Union workers ‘should enjoy the same social and tax advantages as national workers’.[[10]](#footnote-10) The Court of Justice interpreted this provision widely, holding that it applies not only to social and tax advantages attached to worker status but also to benefits payable by virtue of residence in Member State territory.[[11]](#footnote-11) Regulation 1612/68, and later Directive 2004/38,[[12]](#footnote-12) also permitted Union workers to bring certain family members with them to the host State,[[13]](#footnote-13) and made provision for the children of Union workers to have access to State education.[[14]](#footnote-14) In relation to primary law, in *O’Flynn,*[[15]](#footnote-15)the Court recognised the family links that migrant workers generally maintain with their State of origin, finding UK rules restricting financial support for funerals to those taking place in the UK to be in breach of Article 45 TFEU on free movement of workers. Indeed, the Court of Justice has long appreciated the general importance of treating the worker as a human being.[[16]](#footnote-16)

Nevertheless, although these legislative and judicial developments might represent genuine attempts to adopt a more human-centred approach to Union workers, this could only be processed as a corollary of doing what ‘seem[ed] suitable to facilitate the mobility’ of Union workers.[[17]](#footnote-17) Clearly, the chances of a Union worker moving from one Member State to another would be significantly reduced if restricted access to social, tax, or pension benefits left him/her ‘worse off’ after exercising free movement rights; or if moving to another Member State created legal or practical obstacles to family life.

And yet, as early as 1961, the Commission recognised free movement as ‘*le premier aspect d’une citoyenneté européenne*’.[[18]](#footnote-18) The preamble to Regulation 1612/68 also viewed free movement as a ‘fundamental right of workers…and a means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement’.[[19]](#footnote-19) Thus, free movement quickly emerged as more than just a tool for the creation of an internal market. It presented a means by which a wider form of integration might be achieved *beyond* economic integration; a route to an ‘ever-closer union among [*all*] the peoples of Europe’.[[20]](#footnote-20) Indeed, in *Bettray,* Advocate General Jacobs, considered that the preamble to Regulation 1612/68 gave ‘precedence to the fundamental rights of workers over satisfying the requirements of the economies of the Member States’.[[21]](#footnote-21) Hence, the Court began to stretch the definitions of ‘economic actor’ so as to provide free movement rights to those who were not net contributors to the host State. Those employed on part-time or fixed-term contracts, who relied on host State welfare provision to supplement their earnings, remained ‘workers’, consequently enjoying residence rights and social and tax advantages, as long as their work was ‘genuine and effective’.[[22]](#footnote-22) The Court also introduced the concept of the service recipientto provide free movement rights for those not covered by a strict and literal interpretation of Article 56 TFEU, on the free provision of services.[[23]](#footnote-23) Further, the Union legislature adopted secondary legislation that afforded free movement rights to economically inactive individuals, subject to certain conditions.[[24]](#footnote-24) Thus, free movement began to ‘transcend the character of European integration as a purely economic project and to develop it in the direction of a political community’.[[25]](#footnote-25)

Consequently, the ‘incremental interpretative steps’, highlighted above, ‘became critical components in the legal construction of citizenship rights’.[[26]](#footnote-26) It was therefore logical that, when Union citizenship was formalised in the Maastricht Treaty, a right to move freely between the Member States would be central to the rights associated with it, and that this right would be built on existing internal market frameworks. It is to these ‘gifts’, which the internal market has been able to offer Union citizenship in the form of basic legal structures and historical legitimacy, to which we turn in the next subsection. This discussion will form critical background understanding for the later analysis of the transfer of the increased constitutional significance of free movement within Union citizenship into *economic* free movement, and the consequent exacerbation of structural bias.

2.2 Free movement as the core right of Union citizenship: utilising the existing tools of the internal market to add value to a substantive Union citizenship

The Maastricht Treaty formally employed free movement in an explicitly non-economic capacity. Placed in a new Part of the Treaty,[[27]](#footnote-27) free movement between Member States was to be available to individuals by virtue of their personal status as Union citizens.[[28]](#footnote-28) Although other rights were also attached to this status,[[29]](#footnote-29) the right to move and reside freely in the territory of the Member States has been described as the ‘principal right of Union citizens’.[[30]](#footnote-30) Indeed, the vast majority of the Court’s citizenship case-law relates to the free movement rights of the Union citizen.[[31]](#footnote-31) This outcome is explicable when one considers, as we did above, that ‘the codification of citizenship rights within the Treaty marked just one step in a functional lineage of constitutionally enhanced free movement rights’.[[32]](#footnote-32) A Union citizenship that focused on free movement, albeit extending it to a wider cohort, represented an incremental step in an existing, and largely accepted, framework. Moreover, the right to move and reside freely in *all* Member States brings appreciable added-value to a supranational citizenship. Through free movement, Union citizenship is able to offer individuals something that national citizenship does not.

As a result of this historical evolution, free movement under citizenship was built upon the basic legal structures of economic free movement, resulting in permeable boundaries between a market-based freedom and a human-based right. For instance, as within the economic free movement provisions, the wholly internal rule is used within citizenship to define the scope of Union law. In particular, using judicial reasoning established in the context of the economic free movement provisions, the CJEU has held that a Union citizen cannot access the generous family reunification rights that are available under Union law unless there is a cross-border element to his/her situation.[[33]](#footnote-33) This means that any human benefit that Union citizenship is able to offer citizens is only a corollary of its promotion of free movement. A further example of borrowing from internal market structures is visible in relation to permissible restrictions on free movement rights. Article 21 TFEU does not designate specific derogations from the right to free movement it bestows upon Union citizens. Rather, it references ‘limitations and conditions laid down in the Treaties and secondary legislation’. Thus, in interpreting derogations from the free movement rights of Union citizens, detailed in secondary legislation implementing citizenship rights, the Court has drawn on its previous case-law relating to derogations from the free movement of workers and services.[[34]](#footnote-34) Given the beginnings of Union citizenship, this borrowing makes sense. As Nic Shuibhne notes, it might have been legally cleaner to start from scratch and abandon the limitations prescribed by the [pre-Maastricht] residence directives, adopted in relation to the internal market, but it would have been ‘politically stupid’.[[35]](#footnote-35) Nonetheless, as [Section 3](#sec_ch7_3) will demonstrate, this has consequences for how those derogations are used. Union citizenship calls for a stricter approach to derogations from a Union citizen’s right to move. Given that these derogations are shared with the economic free movement provisions, it is likely that a stricter approach will be implemented there too. This might be considered paradoxical where the pursuit of economic free movement negatively impacts on the human needs of Union citizens.

In fact, the existing adjudicative model for assessing derogations from the economic free movement provisions already placed derogating measures on the back-foot. The Court had adopted a two-stage breach/justification approach to resolving tensions between free movement and conflicting activity, which affords structural prioritisation to free movement. The two-stage process asks first whether there has been a breach of free movement. When this is established, conflicting activity is routinely presented as prima facieunlawful conduct and ‘problematic’. Such activity will only prevail if it is *justified*, in light of the restriction it imposes on free movement. As a result, conflicting activities are automatically disadvantaged. The burden of proof rests on the party responsible to defend its prima facie wrongful behaviour by demonstrating that it is pursuing a legitimate purpose in a suitable and appropriate manner. The appropriateness of activity is assessed by reference to whether the relevant legitimate purpose is pursued in a way that imposes the fewest restrictions on free movement. By contrast, at the breach stage, free movement faces no such proportionality assessment.[[36]](#footnote-36) The same two-stage model has been adopted, and strengthened, by Union citizenship. In *Jipa,* the Court held that as ‘derogations’ from the ‘fundamental principle of free movement’, restrictions on Articles 20 and 21 TFEU must be interpreted ‘strictly’.[[37]](#footnote-37) Indeed, [Section 3](#sec_ch7_3) will argue that this architectural bias is enhanced, post-citizenship, by the status of free movement as a fundamental right.

In truth, it is impossible to demarcate cleanly between the economic free movement provisions and the free movement operating pursuant to Union citizenship. Economic actors, such as workers or the self-employed, are *also* Union citizens. It is the same cross-border activity that activates both their human-based rights as Union citizens, and their market-based freedoms as economic actors. Indeed, this straddling of the personal and the economic is recognised by Directive 2004/38, which places the free movement rights of both economically active and economically inactive persons under the same legal framework, although the conditions for the exercise of those rights continues to differ according to whether an individual is economically active or inactive.

These links between Union citizenship and the internal market nevertheless raised questions over the ability of Union citizenship to provide anything more for Union citizens than market citizenship already offered. [Section 3](#sec_ch7_3) will demonstrate that, in order to create something meaningful for economically *inactive* Union citizens, free movement had to attach to the personal status of individuals. In this way, free movement was both humanised and fundamentalised. However, the section will also argue that this applies equally to the economically *active*, since such individuals now also exercise free movement rights as Union citizens. Moreover, a more general cross-pollination of this fundamentalisation of free movement into the economic sphere is inevitable when the free movement operating under Union citizenship shares its basic legal structures with economic free movement. This increases the perceived need for the general structural prioritisation of free movement over competing norms and activity, and legitimises the use of a biased two-stage model, which favours free movement. Free movement becomes a moral good that must be assured if the human needs of economic actors are to be respected. Ironically, however, this also has the potential to undermine efforts to protect the human interests of Union citizens where these conflict with free movement.

3 Legitimising a free movement bias: the ‘humanisation’ and ‘fundamentalisation’ of the economic free movement provisions as a result of Union citizenship

3.1 The humanisation and fundamentalisation of free movement within Union citizenship

Under what is now Part Two of the TFEU, free movement took on a new constitutional significance. It was sited within a list of the *personal* rights of Union citizens, unrelated to their economic status, such as, *inter alia,* the right to vote, the right to petition the European Parliament, and the right to diplomatic and consular protection.[[38]](#footnote-38) Thus, although still an essential cog in the internal market machine, the Union legislature had elevated free movement beyond its economic functions. Free movement was no longer merely a means of attaining an internal market, but a right belonging to Union citizens; an end to be protected in and of itself. As Kostakopoulou has argued, the Maastricht Treaty, and the introduction of Union citizenship, tied the Union law rights of free movement and residence to the political status of the citizen. This, in turn, contributed to a transformation within free movement.[[39]](#footnote-39) From here on, it would frequently be necessary to consider not only the impact on the internal market of a breach of free movement, but also the potential infringement of the key citizenship rights of the individuals concerned.

This conceptual metamorphosis allowed the Court to readjust the components of free movement to cater better for the diversity of Union citizens. Not all citizens were economic actors, but all were human beings enjoying a *personal* right of free movement. Thus, in *Martinez Sala*,[[40]](#footnote-40) the Court made clear that economic status was irrelevant to the availability, in principle, of free movement rights. Free movement was a personal right, inherent and central to an individual’s status as a Union citizen. Moreover, this created a portal to the principle of non-discrimination, pursuant to Article 18 TFEU, providing access to social welfare for Ms. Martinez Sala. Nevertheless, Article 21 TFEU allowed conditions to be placed on the exercise of free movement. For instance, economically inactive individuals could only reside in the host State, pursuant to that provision, if they were economically self-sufficient and thus did not impose an unreasonable burden on the host State. However, in *Grzelczyk*[[41]](#footnote-41) the Court held that individuals could not be automatically expelled from a host State by virtue of their temporary reliance on host State social support.[[42]](#footnote-42) Union citizenship was ‘destined to be the fundamental status of the nationals of the Member States’[[43]](#footnote-43) and, having exercised their right to move, individuals should not be denied access to the fundamental principle of non-discrimination in relation to social welfare. This demonstrated the capacity of Union citizenship to create space in which the Court could be more empathetic to the complexities of people’s lives. Similarly, in *Baumbast*,[[44]](#footnote-44) the Court subjected the requirement, contained in Directive 2004/38, that economically inactive individuals and their family members have comprehensive medical insurance in the host State, to a strict proportionality assessment in light of the impediment it placed on the exercise of free movement rights, a core personal right of Union citizens.

The notion that Union citizenship was destined to be the fundamental status of Union citizens suggested that free movement was not only being personalised, but also being *fundamentalised*, since free movement was the central right of Union citizenship. Indeed, in *Huber,* Advocate General Poiares Maduro explicitly stated that Union citizenship’s fundamental status was a ‘legal concept’ that went hand-in-hand with specific rights, ‘principal amongst these being the right to enter and live in other Member States’.[[45]](#footnote-45)Within both the Opinions of Advocates General, and judgments of the Court, there are explicit references to free movement as a *fundamental right* of the Union citizen. Indeed, this has led Elsmore and Starup to argue that a formalised Union citizenship pointed to ‘the emergence in law of a *fundamental right, resulting from* a genuine extension of Community jurisprudence to encompass the economically inactive person’s right to free movement [emphasis added]’.[[46]](#footnote-46)

The above case-law suggests that the protection of free movement is essential if the Union is to be more humane. And this is indeed the case when we consider that the marrying of free movement to personal status has made free movement rights available to more diverse, and economically varied, groups. However, free movement remains a tool also for *economic* integration. Moreover, the free movement rights of the economically inactive are built on those that already existed for the economically active. Thus, any fundamentalisation of free movement within citizenship is likely also to fundamentalise the exercise of free movement by the economically active. As free movement is available to a variety of economic actors – in the form of workers, service providers, establishments, and capital movers – the structural boost provided by Union citizenship is still likely to operate frequently for the benefit of powerful societal groups and the economically dominant.[[47]](#footnote-47) For instance, in clashes between free movement and Member State efforts to provide for the fundamental social rights of their citizens, the focus of Union citizenship on the individual right to free movement will, ironically, ‘overlook the individual’ and the duties of society to protect the interests of the vulnerable and centre on the needs of the free mover.[[48]](#footnote-48) This is because the fundamentalisation of free movement legitimises the use of the inherently biased two-stage adjudicative model, outlined above, which favours free movement over conflicting activities. This legitimisation is drawn from the fundamental rights status Union citizenship bestows upon free movement since the two-stage approach is also used, in other legal contexts, when *fundamental rights* clash with public interests.[[49]](#footnote-49)

To explore this further, the next subsection will demonstrate the transfer of the increased constitutional significance of a breach of free movement, from Union citizenship, into the internal market. This lays important groundwork for the discussion, in [Section 4](#sec_ch7_4), of the potentially negative consequences, from a fundamental rights perspective, of the fundamentalisation of the market freedoms.

3.2 Humanising economic free movement: the transfer of the increased constitutional significance of a breach of free movement into the internal market

The free movement that exists pursuant to Union citizenship and the economic free movement provisions are clearly not mutually exclusive. First, in exercising their free movement rights as Union citizens, economically active individuals are plainly still playing a crucial role in the functioning of an internal market. There is a simultaneous triggering, by economic actors, of both economic *and* citizenship free movement by the same cross-border activity. As a result, in many cases, the Court of Justice is tasked with deciding whether both an individual’s right to free movement as a Union citizen *and* his/her ability to move around Europe as an economic actor have been restricted. Consequently, in numerous cases, the Court has treated the general free movement right of EU citizens as a *lex generalis* of the economic free movement provisions.[[50]](#footnote-50) Additionally, the Court frequently uses the term ‘Treaty freedoms’ to group the economic free movement provisions and Article 21 TFEU.[[51]](#footnote-51) The treatment of, for instance, Article 45 TFEU on workers, as a *lex specialis* of Article 21, alters the substance of Article 45. It is no longer merely a mechanism to enable individuals to play their parts as factors of production. It also provides specific expression to the rights of Union citizens, who happen also to be workers, to move and reside freely within the Member States.[[52]](#footnote-52) As Nic Shuibhne notes, both primary and secondary instruments of Union citizenship transform and unify, at least the personal free movement provisions, under the language of *rights*.[[53]](#footnote-53) Within the case-law, Advocate General Poiares Maduro explicitly highlighted a need to reassess the constitutional significance of the economic free movement provisions in the light of Union citizenship:

...it would be neither satisfactory nor true to the development of the case-law to reduce the freedom of movement to a mere standard of promotion between Member States… At present, the freedoms of movement must be understood to be one of the essential elements of the ‘fundamental status of the nationals of the Member States.[[54]](#footnote-54)

As Kostakopoulou put it, Union citizenship has transformed ‘the presence in the territory of a host State of [Union] workers, work-seekers, establishers, [and] service providers…[from] a matter of state toleration…[to] an issue of exercising a fundamental right’.[[55]](#footnote-55)

The new constitutional significance of the personal economic free movement provisions – i.e. those more closely relating to the economic activity of people, such as workers, than business – is reflected in the fact that, post-Maastricht, new areas of Member State law and policy have fallen within the scope of Articles 45 and 56 TFEU. For instance, in *Collins*,[[56]](#footnote-56) the Court departed from its pre-citizenship decision in *Lebon*,[[57]](#footnote-57) and held that ‘in view of the establishment of citizenship of the Union’ it was ‘no longer possible to exclude from the scope of [Article 45(2) TFEU], concerning the equal treatment of workers, a financial benefit intended to facilitate access to employment…for work-seekers’.[[58]](#footnote-58) Similarly, in *Bickel and Franz*,[[59]](#footnote-59) the introduction of Union citizenship strengthened the Court’s pre-Maastricht decisions[[60]](#footnote-60) to include service *recipients* within the scope of Article 56 TFEU. It also reinforced the finding, in *Bickel* itself, that, in restricting German-language criminal proceedings to German-speaking residents, rather than extending it to German-speaking service recipients, Italy had breached Article 56.[[61]](#footnote-61) Thus, the humanising quality of Union citizenship has seeped into the economic free movement provisions. Indeed, as Nic Shuibhne points out, in cases such as *Bickel and Franz*, ‘there was an interchangeability at play with citizenship and the traditional free movement rights often meaning (and conferring) the same thing’.[[62]](#footnote-62) This is also evident in cases such as *Carpenter*[[63]](#footnote-63) where the premise of the judgment, although decided by reference to Article 56 TFEU, ‘is far closer to citizenship than to services’.[[64]](#footnote-64)

The increased ‘breachability’ of the economic free movement provisions in this line of case-law is the result of the humanisation and fundamentalisation of free movement taking place within Union citizenship. This, in itself, legitimises the use of the two-stage breach/justification procedure, described above, when adjudicating clashes between free movement and conflicting activity. If, according to Union citizenship, free movement is pursuing an intrinsically human goal, then activity that conflicts with it should be required to defend itself against this prima facie problematic conduct. Union citizenship has also reinforced and even intensified the need for a strict proportionality assessment to be imposed upon activity that is found to be in breach of the economic free movement provisions. Thus, in *Orfanopoulos*, the Court explicitly stated that:

…a *particularly restrictive* interpretation of the derogations from [the free movement of workers] is required *by virtue of a person’s status as a citizen of the Union*. As the Court has held, that status is destined to be the fundamental status of the nationals of the Member States.[[65]](#footnote-65) [emphasis added]

As [Section 4](#sec_ch7_4) discusses in more detail, this ‘particularly restrictive’ approach could present problems when free movement clashes with Member State efforts to meet human needs. However, it is necessary to consider, first, the extent to which citizenship has infused *all* the market freedoms with a new constitutional significance. Specifically, it has been suggested that Union citizenship offers a constitutional right to move to people, including workers and, in some instances, service providers, whereas ‘businesses enjoy a lesser Community right to move under the original economic free movement provisions’.[[66]](#footnote-66) In other words, Union citizenship’s capacity to strengthen an architectural preference for economic free movement, by humanising and fundamentalising it, might be limited to the personal economic free movement provisions. It is submitted that this is not the case.

It is accepted that Union citizenship is likely to have a less *direct* impact on the non-personal free movement provisions. When goods are prevented from crossing an intra-EU border, their ability to perform their role as factors of production is clearly restricted. However, they are not denied any free movement ‘rights’ attached to their ‘fundamental status’ as ‘Union goods’. This suggests that the non-personal freedoms have not been elevated to fundamental rights status. Indeed, a survey of the services and goods case-law, carried out by Oliver and Roth, found only one reference to fundamental rights terminology in the services and goods case-law.[[67]](#footnote-67)

Nevertheless, the constitutional significance of the non-personal free movement provisions has been increased *indirectly*, in some cases,by focusing on the citizenship rights of the *trader*. Thus, in a number of cases, the Court has demonstrated a willingness to consider the person behind the freedom to provide services. This led to the introduction of the service *recipient* in *Luisi and Carbone,*[[68]](#footnote-68)and *Bickel and Franz*. It also allowed the Court to consider the human need of the service *provider* in *Carpenter*.[[69]](#footnote-69) In addition, the Union legislature has acknowledged that Union citizenship has made it necessary to review the legal framework concerning the self-employed.[[70]](#footnote-70) More recently, in the context of goods, Tryfonidou has contended that ‘a meaningful notion of Union citizenship, which is the “fundamental status of nationals of the Member States” [calls on] the Union to grant a number of minimum rights to all citizens, including the (economic) right to conduct a commercial activity…in an interstate context’.[[71]](#footnote-71) Similarly, Horsley has recently argued that the free movement of capital is an essential facilitator of the free movement rights of ordinary citizens since ‘[c]apital movements’ also cover, *inter alia*, property purchases, mortgages, inheritances, and personal loans – routines economic transactions for millions of mobile Union citizens’.[[72]](#footnote-72) In *Alfa Vita,* Advocate General Poiares Maduro explicitly endorsed a general test of ‘discrimination against the exercise of free movement’ in relation to *all* of the free movement provisions ‘in light of the requirements of a genuine Union citizenship’.[[73]](#footnote-73) Such an approach would raise the substantive importance of *all* of the economic free movement provisions. However, in the final judgment, the Court of Justice did not adopt this approach, making no reference to Union citizenship.

And yet, there is evidence of growing convergence between all of the economic free movement provisions and Article 21 TFEU. Increasingly, the Court faces the question of whether a certain activity breaches a wide range of the free movement provisions. In dealing with this task, the Court often groups the free movement provisions together. The joint assessment of Article 21 and the economic free movement provisions can mean that the increased constitutional significance of free movement in the citizenship context cross-pollinates into the analysis of breaches of the other free movement provisions.

This occurred in *Libert*. In that case, the Court assessed whether Articles 21 (citizenship), 45 (workers) and 49 (establishment) *together* precluded a Flemish rule, which made the transfer of immovable property in certain *communes* subject to the requirement that there existed a ‘sufficient connection’ between the prospective buyer/tenant and the *commune*.[[74]](#footnote-74) In its analysis the Court focused on the general right to movement of the Union citizen to establish a breach of *all* of these provisions.[[75]](#footnote-75) In its separate examination of whether Article 56 (services) had been restricted, the Court nevertheless noted that ‘business activities’ and ‘undertakings’ would be unable to sell or lease property to ‘just any Union citizen’. Similarly, the Court’s statement, that the Decree restricted the free movement of capital because it was likely to discourage residents of one Member State from making investments in immovable property in other Member States, acknowledges the Union citizen decision-maker who (usually) sits behind the economic actor.[[76]](#footnote-76) Moreover, having established a restriction of Articles 21, 45, 49, 56 and 63, the Court assessed potential derogations from all of these provisions at once. This meant that the Court did not differentiate between *personal, fundamental* free movement rights, which, as *Orfanopoulos* stipulated, require a ‘particularly restrictive’ approach to derogations, and what White referred to as the ‘lesser Community rights’ of business undertakings. This allows the enhanced prioritisation of free movement under citizenship to be transferred into the economic free movement provisions. Moreover, as the Court is increasingly formulaic in its application of the breach/justification procedure, it is unlikely that clear distinctions will be made in relation to precisely how much architectural priority should be afforded to free movement in a given situation, even in cases onlyinvolving economic free movement.

In a different context, the ‘real link’ case-law provides an obvious example of the transfer of approaches specific to Union citizenship across the shared free movement architecture into the internal market. Thus, in the cases of *Geven* and *Hartmann*,[[77]](#footnote-77) concerning frontier *workers*, the Court applied the ‘real link’ test, a concept used in Union citizenship to determine access to social benefits for economically *inactive* individuals. As a result, the workers were required to demonstrate that their work was substantial in order to prove a real link to the host State. This approach contradicted the well-established rule, applied in a wealth of Article 45 TFEU case-law, that workers were entitled to equal access to social welfare provided that their work was ‘genuine and effective’ and not ‘marginal and ancillary’.[[78]](#footnote-78)

Thus, to a greater or lesser extent, Union citizenship appears to have both legitimised and enhanced the structural bias that exists in relation to clashes between economic free movement and conflicting activity. The dual status of certain individuals as both Union workers and Union citizens has resulted in Union citizenship making a direct contribution to the increased constitutional significance of Article 45 TFEU. At times, this has also been true for service providers and establishers. At other times, Union citizenship has made more indirect contributions to fundamentalising the provisions on services and establishment, as well as goods and capital.

As the next section explains, this humanising of the economic free movement provisions can, in fact, lead to *less* human-centred results. Union citizenship, first, has resulted in greater interaction between the requirements of free movers and the duty of the Member States to protect the vulnerable. Moreover, the two-stage breach/justification process, bolstered by Union citizenship, dictates that these interactions are assessed through a free movement lens. The pursuit of free movement is procedurally favoured over attempts to address inequality and imbalances of power within society.

4 ‘Humaneness’ through a free movement lens: the impact of a fundamentalised free movement on Member State ability to protect *conflicting* human need

Owing to its focus on movement as the core right of the Union citizen, Union citizenship is, in reality, only able to meet the human needs of Union citizens as a side-effect of promoting the exercise of free movement. This also facilitates the broader integrative aims of the Treaty. This outcome would seem, therefore, to be mutually beneficial for Union citizens, for the internal market, and for wider integration. However, a deeper analysis reveals that this is not always the case. While Union citizenship is able to protect, to some extent, the human needs of the economically inactive *free mover*, the most vulnerable members of society might also be the least likely to exercise their free movement rights. Movement is not an ‘inevitable, neutral, or “natural” selective tool’.[[79]](#footnote-79) It requires an individual to have the financial means, (often) the linguistic ability, the general confidence, and the knowledge of one’s rights as a Union citizen, before he/she will move in practice.[[80]](#footnote-80) The focus of Union citizenship on *movement* to activate rights under Union law currently precludes the use of Union citizenship as a tool for enhancing the rights of non-movers. In this context, this task still largely falls to the Member States.

However, the focus of Union citizenship on movement has, in fact, posed a challenge to Member States’ ability to perform this function. First, the human focus of Union citizenship has led a broader range of Member State measures to clash with, and constitute a breach of, Union law. This includes Member State efforts to meet the wider human needs of the community. By contrast, where the needs of individuals run congruent to free movement, ironically Union citizenship has, in some instances, served to *reduce* the breachability of the free movement provisions, reversing established inclusive approaches. Second, the human quality that Union citizenship lends to free movement increases connotations of wrongful conduct in relation to breaches of free movement. Free movement is viewed as a moral ‘good’, implying that any breaches of it are a moral ‘wrong’. This warrants special protection for free movement, exposing to a strict proportionality assessment Member State efforts to offer programmes of fundamental social protection where they conflict with free movement. The two-stage breach/justification approach does not impose any proportionality test on free movement and, therefore, prevents the consideration of the detrimental impact that free movement can have on the sometimes very human endeavours of the Member States. Moreover, this method of proportionality assessment requires that the Member States design programmes of fundamental social protection in a way that imposes the fewest possible restrictions on free movement. While offering the best outcome for *free movers*, this might not be the most humane result for other individuals. Nevertheless, free movement is seen as the *most* fundamental right, and the most ‘human’ endeavour.

4.1 The altered ‘breachability’ of free movement by the pursuit of fundamental social rights post-citizenship

The increased ‘breachability’ of free movement in light of citizenship can be seen in the cases of *Martinez Sala, Grzelczyk,* and *Collins,* mentioned above. In those cases, restrictions imposed on the access to social welfare of economically inactive Union citizen were considered to be restrictions of free movement, some in relation to Articles 21 TFEU, but others pursuant to the *economic* free movement provisions. Similarly, in *Bickel and Franz*, a breach of Article 56 TFEU on services was more readily established in light of Union citizenship. In *Carpenter,* the recognition of the family needs of a service provider triggered a breach of Article 56. In these contexts, the increased breachability of free movement benefited the individuals concerned, since their needs ran congruent to the exercise of free movement.

However, the above analysis neglects to appreciate that this increased breachability can also result in the presentation of activity that seeks to cater for human needs, as prima facie wrongful behaviour, where this activity *clashes* with free movement. For instance, in *Watts*,[[81]](#footnote-81) UK rules on the reimbursement of healthcare obtained in other Member States interfered with Mrs. Watts’ ability to exercise her free movement rights as a service recipient, a concept with its origins in market citizenship and later confirmed as essential to a formalised Union citizenship.[[82]](#footnote-82) Although complementing Mrs Watts’ right to healthcare, the finding of a breach of free movement also brought it into conflict with the UK’s method of offering free, publicly funded healthcare for *all* its citizens, since a system of reimbursement is alien to a nationalised health service. Reimbursement would have to be funded by diverting resources meant for other services within the healthcare system. In short, Union citizenship, and the two-stage approach, risks prioritising the human needs of those ‘worthy’ and ‘responsible’ Union citizens who work or, at the very least, play their part as Union citizens by personifying the integration project and moving to another Member State. In reality, the introduction of a reimbursement mechanism might have been relatively easy, and its existence might not have led to a crippling number of claims from those who had received medical treatment abroad. But that is not really the point. The low evidentiary burden placed on the establishment of a breach of free movement requires no consideration of the potential consequences of a finding of a violation of free movement on a Member State’s ability to meet its duties to other Union citizens. Any examination of these duties that does take place does so at the justification stage and is viewed through the lens of what is least restrictive of free movement. From our perspective, the prioritising of Mrs Watts’ free movement rights risks jeopardising the human-centred endeavours of a national health service. And yet, by channelling proportionality questions towards what is least restrictive of *free movement*, the citizenship-enhanced two-stage model leaves little legal space for these considerations.

Similarly, although necessary to show social solidarity and concern for the welfare of each other’s nationals, cases such as *Martinez Sala, Grzelczyk,* and *Collins* also created new interfaces between the rights of the individual free movers concerned and Member State programmatic planning in relation to social welfare. That is not to say that the substantive outcomes of those judgments were inappropriate. Clearly, citizenship is providing an important means by which individual EU citizens can confront discrimination and access fundamental social rights. Rather, the purpose of this analysis is simply to highlight that, in automatically favouring free movement, the procedure for reaching those decisions might leave insufficient room for the consideration of other public endeavours of fundamental importance. The Court has sought to address this through the introduction of the ‘real link’ test, mentioned above. While this limitation on ‘breachability’ arguably ‘makes sense in the economically inactive citizenship context’, it also served in *Geven* and *Hartmann* to *reduce* the breachability of the *economic* free movement provisions, ‘reversing a more inclusive approach long established in the case-law on free movement of workers’.[[83]](#footnote-83) The Court has since addressed this issue in *Commission v The Netherlands*, by holding that genuine and effective work ‘in principle’ meets the requirements of the real link test, since migrant workers contribute to the financing of the social policies of the host State.[[84]](#footnote-84) However, the use of the phrase ‘in principle’ leaves the door open for the real link test to restrict the fundamental social rights of Union workers in the future.

More recently, the breachability of the free movement provisions was also reduced as a result of Union citizenship, to the potential detriment of the family life of the Union citizen, in *Iida*.[[85]](#footnote-85) In this case, the usual cross-border test for bringing a matter within the scope of EU law was conflated with the recently introduced ‘genuine enjoyment test’, introduced by the Court of Justice in *Ruiz Zambrano*.[[86]](#footnote-86) The threshold for establishing that an individual’s circumstances involve a cross-border situation is very low. Indeed, the connection between cross-border activity and the facts of the *Carpenter* case have been described as ‘ephemeral’.[[87]](#footnote-87) By contrast, increasingly, it appears that Union citizens must be *absolutely* deprived of the ‘genuine enjoyment’ of the rights associated with Union citizenship before EU law can be triggered through this means.[[88]](#footnote-88) The conflation of the two tests in *Iida* raised the threshold of the cross-border test, leading the Court of Justice to hold that the free movement rights of the Union citizen in that case had not been denied as she had already crossed an EU border without impediment to movement. The Court refused to engage with the possibility that cross-border movement might be inhibited in the future, despite the fact that it has already been established in the case-law that potential/future restrictions to cross-border movement can trigger EU law.[[89]](#footnote-89) As a result of this higher threshold, the matter did not fall within the scope of Union law, and Article 21 TFEU could not be utilised to secure residence rights for the father of a Union citizen child. Interestingly, this conflation between the cross-border requirement and the genuine enjoyment test seems to be the result of the Court’s finding, in *Iida,* that there is an ‘intrinsic connection’ between free movement and the genuine enjoyment of the rights enjoyed under citizenship.[[90]](#footnote-90) Accordingly, the maintenance of historical and architectural ties between citizenship and free movement and their effects are manifest in that case.[[91]](#footnote-91)

Thus, Union citizenship has simultaneously served both to increase and reduce the breachability of the free movement provisions. Where human needs run *congruent* to free movement, ironically, Union citizenship has, at times, made it more difficult for individuals to establish a restriction on free movement rights. More commonly, however, in instances of *clash* between free movement and conflicting human-centred law and policy, Union citizenship has increased the breachability of the free movement provisions. This has led to a widening evidentiary gap between establishing restrictions on free movement and demonstrating justifications. Consequently, there is less opportunity for activity pursuing human needs to overcome a prima faciefinding of a breach of free movement. It is to this issue that we now turn.

4.2 Exacerbating an uphill struggle: reducing opportunity for justifying a breach of free movement

As [Section 3](#sec_ch7_3) outlined, Union citizenship appears to require the use of higher evidentiary hurdles at the justification stage, since activity in breach of the free movement provisions restricts the fundamental free movement rights of the Union citizen. Thus, as will be recalled, in *Orfanopoulos*, the Court stated that a ‘particularly’ restrictive interpretation of derogations from free movement was required by virtue of a person’s status as a Union citizen.

The recent case of *Libert* demonstrates the potential effects of a particularly restrictive approach to justifications on a Member State’s ability to protect the vulnerable.[[92]](#footnote-92) A Flemish Decree, which required potential buyers/tenants to demonstrate a ‘sufficient connection’ to certain *communes* before they could buy or long-term rent immovable property there, was found to be in breach of Articles 21, 45, 49, 56 and 63 TFEU. It will be recalled that the effects of the rule upon the Union citizen were, to a greater or lesser extent, behind this finding. The Flemish Government argued that the ‘sufficient connection’ requirement was justified, *inter alia*, by the need to guarantee sufficient housing for low-income, or otherwise disadvantaged, sections of the population. The Court accepted that this was permissible in principle but, as required by the two-stage approach, proceeded to conduct a strict proportionality assessment to ascertain whether the measure was justifiable in practice based on what was least restrictive of free movement. In fact, the Court evaluated whether the actions of the Flemish Government were ‘necessary and appropriate to attain its aim’ with even more rigour than usual. For instance, the Court noted that the conditions put in place by the Flemish Government for establishing a sufficient connection to the commune would not be *exclusively* met by the less-affluent population. People other than those on a low-income could meet the criteria. Accordingly, the Flemish measure went beyond what was necessary to obtain the objective pursued. The Court proceeded to provide very prescriptive guidance on *how* Member States could protect disadvantaged families whilst still respecting free movement rights. It suggested that ‘[p]rovision could, for example, be made for subsidies for purchase or other subsidy mechanisms specifically designed to assist less affluent persons, in particular those who are able to prove that they have a low income’.[[93]](#footnote-93)

This guidance is arguably questionable from a human perspective. Specifically, it does not consider the practical aspects, faced by a State when meeting its obligations to its citizens. For instance, the ‘sufficient connection’ test is negative in character and therefore likely to be low-cost. By contrast, the Court’s proposed alternative is more positive in nature. It does not allow Flanders simply to restrict access to a geographical area for certain individuals but instead suggests that Flanders take more positive steps to ensure housing for less affluent people by providing subsidies. There is no consideration of whether the Flemish Government, with its finite resources, will be able to offer such a mechanism. It is sufficient that measures less restrictive of free movement exist in principle. There is no analysis of the possibility that, if the scheme is not workable from a financial or logistical point of view, protection for low-income families may be abandoned altogether. In other words, there is no examination of whether free movement is being pursued in a way that is least restrictive of programmes of social protection, which often encompass complex decisions of policy requiring consideration of practical effectiveness and financial and administrative cost. This is arguably exacerbated by the need for a ‘particularly restrictive’ approach to derogations following the formalisation of Union citizenship.

Some might question whether the Court’s prescriptiveness in the *Libert* case was a result of the particular political and factual background to the case and also query the effect of a subsidy scheme on relatively wealthy regions such as Flanders. Indeed, the Advocate General acknowledged the argument that the ‘sufficient connection’ test existed not to limit the effects of gentrification but rather to preserve the Flemish nature of the population of the target communes. And yet, the Advocate General explicitly stated that such a reason could not constitute an overriding reason in the public interest even in principle.[[94]](#footnote-94) He then proceeded to assess whether the restrictions imposed by the Flemish decree could be justified in light of the legitimate aim ‘of meeting the accommodation requirements of the less affluent endogenous population’.[[95]](#footnote-95) It was in this assessment that the Advocate General provided the very prescriptive guidance on how Flanders might pursue this goal, later largely adopted by the Court. Moreover, while less prescriptive and leaving the final application to the national court, the Court’s assessment of Book 4 of the same Flemish instrument, which required land developers to make a certain number of housing units available for social housing or make payment in kind, exposed that provision to the same proportionality hurdles. And yet, the ‘social obligation’ provided a relatively cheap way of adding to social housing stock. Thus, the *Libert* case is an example of a broader issue concerning whether the Court is a suitable locus for the complex decisions of policy that accompany the design of programmes of social protection. This is especially true when the Court’s two-stage approach concentrates the analysis on what is least restrictive of free movement, with little legal space for considerations of the practicalities of policy design or the balancing of Member State budgets. As Nic Shuibhne and Maci have reflected, ‘the Court of Justice has opened a precarious avenue of review in the suggestion that it, or any court, can work out the financial “balance” of an entire budget by reflecting on whether *one* policy choice could have been implemented less restrictively’.[[96]](#footnote-96) Thus, even if Flanders might be able to afford a subsidy mechanism, the Court’s approach is of wider significance. Indeed, the European Parliament has recently acknowledged the need to develop social housing so as to avoid gentrification but has also, nevertheless, recognised the impact of the current economic climate on Member States’ abilities to provide subsidies to meet the accommodation needs of their resident population.[[97]](#footnote-97)

As well as encouraging a more prescriptive approach in relation to whether measures are ‘necessary’ to meet the human aim pursued by the Member State, it is submitted that Union citizenship has contributed to a stricter approach to proportionality in a more general sense. Following the *Baumbast* ruling, which imposed a requirement that Member State decisions to deport individuals would be subject to the proportionality assessment even where individuals did not meet the clear residence requirements laid down in Directive 2004/38, Dougan postulated that this more stringent use of proportionality, inspired by Union citizenship, might be extended to cover other conditions attached to the exercise of economic activity. For instance, he argued that Member State implementation of Article 3(1)(c), Directive 96/71 might be exposed to questions of proportionality. This provision obliges Member States to apply domestic rules on minimum pay to non-national undertakings who, in exercising their freedom to provide services, have posted their own employees to the host State.[[98]](#footnote-98) These concerns were partially realised in *Commission v Luxembourg*.[[99]](#footnote-99) Here, the Court held that a Luxembourg wage index, which took the cost of living in different areas into account in relation to *all* wage categories, could not fall within Article 3(1)(c) Directive 96/71 or Article 3(10), which permitted host States to impose additional domestic terms and conditions for reasons of public policy, not contained in the Directive. The Court interpreted Article 3(10) as a derogation from the fundamental freedom to provide services and consequently required that provision to be interpreted strictly. The situation in *Commission v Luxembourg* is not as clear-cut as the example provided by Dougan. Evidently, Article 3(10) is not a clearly worded provision of secondary legislation the application of which has, nevertheless, been exposed to a strict proportionality assessment. However, when it came into force, Directive 96/71 was largely viewed as an anti-social dumping measure, targeted at preventing service providers from competing on cost in a host State by relying on the lower standards of social protection applicable within home State systems.[[100]](#footnote-100) The Court’s application of the principle of proportionality in *Commission v Luxembourg* is in direct contrast with this original purpose. The proportionality test focuses exclusively on the impact on free movement of national measures targeted at protecting workers. It does not consider the consequences for worker protection of the finding of a breach of free movement. Thus, the two-stage approach, boosted by Union citizenship, favours the free movement rights of the service provider – the economic elite – over the needs of workers, who are already the weaker party in this social dynamic.

5 Moving beyond the legacy of a market citizenship: ongoing challenges for Union citizenship

The above sections have demonstrated the existence of a paradox within Union citizenship. Emerging from a market citizenship, Union citizenship has utilised the basic legal structures of the internal market and adopted, as the core right of the Union citizen, the freedom to move and reside in the territory of the Member States. In this way, Union citizenship brings the human being closer to the centre of the Union law and policy. And yet, it is this same humanising quality that has elevated free movement, also in the *economic* context, to the level of a fundamental right, encouraging the structural prioritisation of free movement over competing human needs.

However, this paradox is not unique to Union citizenship. In the wider context of citizenship, the term ‘citizen’ has historically served as a symbol of equality, casting off the inequalities of aristocratic titles and personal subservience.[[101]](#footnote-101) This notion of equality complemented liberal economics and capitalism. As Heater notes, ‘the free exercise of individual initiative is the very essence of capitalism…Initiative…required the partitions between social class to be permeable. The concept of citizenship took this alteration to the logical conclusion of equality of status. A citizen is a citizen is a citizen: no differentiation’.[[102]](#footnote-102) However, ‘lurking behind [this], is the counterbalancing economic inequality induced by unfettered capitalism’.[[103]](#footnote-103) In short, ‘capitalism weakens [the] egalitarian political structure [upon which it is based] by giving primacy to economic relationships. New class divisions open up, separating the wealthy entrepreneurs from the general populace, a gulf condoned by the liberal virtue of individual enterprise’.[[104]](#footnote-104) For Marshall, the way to address this new equality was to embrace the *social* elements of citizenship.[[105]](#footnote-105) According to him, citizenship required equal social worth, not merely equal natural rights.[[106]](#footnote-106) For instance, the provision of a welfare state ‘is necessary to raise the relatively poor to a condition in which they can enjoy the citizenly condition of full autonomy, freedom, and participation’.[[107]](#footnote-107) Nevertheless, this results in a paradox. Adding a social element to civic and political citizenship often necessitated the favouring of the community over the needs of the individual. For instance, the funding, from taxation, of social housing and free education would impinge on an individual’s ability to reap fully the rewards of his/her individual initiative. Having previously complemented capitalism, the call, under citizenship, for a *fuller* equality challenged the development of a socially unequal capitalism. Macedo has argued that this paradox can, in fact, be addressed through liberalism itself. While liberalism focuses on the freedom of the individual, this does not equate to a ‘free-for-all’. It, instead, requires the moral qualities of ‘tolerance, self-criticism, moderation, and a reasonable degree of engagement in the activities of citizenship’.[[108]](#footnote-108) As Heater summarises:

…the liberal citizen understands and accepts the plurality of society, a condition that demands toleration, lest society plunge into communal or civil discord. Citizenly virtue must therefore incorporate an attitude of live-and-let-live; it requires the cultivation of empathy. People as individuals or as groups are different, but they are all fellow citizens and should be respected as such.[[109]](#footnote-109)

This admittedly brief consideration of the wider citizenship discourse illustrates some of the challenges facing Union citizenship in its current stage of development. Although Union citizenship has already achieved more, for a wider range of Union citizens, than its initial critics might have expected,[[110]](#footnote-110) it is only able to do this through the structural boost it provides to free movement. Since movement itself is not a ‘neutral…selective tool’,[[111]](#footnote-111) there is a potential danger here that, as with earlier forms of citizenship, primacy will be given to economic relationships over the needs of other societal groups. The breadth and strength of free movement, bolstered partly by Union citizenship, can reconceptualise policies adopted with the aim of improving levels of social protection in the Member States into an issue of a breach of free movement law. Moreover, by viewing the issue from a (usually) economic perspective, a free movement-oriented European standard might not reflect the Union’s own commitment to social advancement. Indeed, Poiares Maduro has remarked upon the stark contrast in the reactions to Union law by social lawyers, depending on how social issues are conceptualised within the European legal framework. He notes that negative market integration is generally viewed as ‘negative’ by social lawyers because it restricts the capacity of Member States to enact social provisions. Conversely, the opposite is the case when Union law is assessed through the lens of positive integration in the form of social legislation enacted at the EU level.[[112]](#footnote-112)

Thus, Union citizenship is at a cross-road. The real challenge facing EU citizenship is how it can best reflect and cater for the variety of human need within the Union, including those that do not attach to movement. Indeed, if social issues are increasingly supranational concerns, then Union citizenship must allow them to be taken seriously at EU-level. But, at the very least, EU citizenship should not be used as a tool by which market integration can diminish efforts to promote social rights, such as the right to health, education, and fair working conditions, at national-level. The question now, therefore, is where the line should be drawn. For instance, Union citizenship might seek to find a way to progress beyond its historical, market-focused beginnings and detach itself from movement so as to recognise better the diversity of human needs across Europe. A more social form of EU citizenship can be used to mainstream the variety of human concerns into Union law and policy, including into the definition of free movement. This may arguably also lead to a more efficient internal market. In the context of labour law, for instance, commentators have recognised the need for worker voice, through rights of participation and representation, in order to increase efficiency and wealth maximisation: ‘Such rights [also] enhance the concept of European citizenship by providing a new forum of decision-making which is normally ignored in the debates regarding the democratic deficit: the European common market’.[[113]](#footnote-113) Alternatively, we might ask whether, for the time being at least, Union citizenship should develop, through its central tenet of equality, so as to ensure, as a minimum, that market integration is more respectful of any effort taking place at Member State-level to protect the vulnerable.

6 Conclusion

Union citizenship is borne from, and built upon, the internal market. It has adopted, as its core right, the freedom to move and reside within the territory of the Member States. This has meant that free movement, in both the personal and economic spheres, has been infused with a human quality, since Union citizenship attaches to the *personal* status of the individual. This has legitimised the use of a structural bias that procedurally advantages free movement over conflicting activity, treating the former as a *fundamental right*. However, Union citizenship has, in fact, brought the free movement provisions into more frequent contact with Member State efforts to protect the vulnerable. In this context, Union citizenship, triggered by the exercise of free movement, is not only unable to assist such individuals, but, in fact, serves to undermine Member State efforts to take a compassionate approach, since the desires of the economic-elite are prioritised over other human needs. This raises fundamental questions about the contemporary challenges faced by Union citizenship. Through its continuing attachment to movement, Union citizenship is not only limited in its ability to progress beyond market citizenship, but also in its capacity to appreciate fully the diversity of human concerns within Europe. A pertinent task for Union citizenship, therefore, is how to evolve in a way that allows the needs of non-movers to be taken more seriously at European-level or, at the very least, how to ensure that it does not operate to *undermine* any Member State attempts to deal with this concern.

1. See J. Shaw, ‘Citizenship of the Union: Towards Post-national Membership’, Jean Monnet Working Paper 97/6, www.jeanmonnetprogram.org; S. Peers, ‘Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union’, (1996) 33 CMLRev 7. [↑](#footnote-ref-1)
2. Articles 20(2)(a) and Article 21 TFEU. [↑](#footnote-ref-2)
3. C. O’Brien, ‘I Trade, Therefore I Am: Legal Personhood in the European Union’ (2013) 50 CMLRev 1643; A. Tryfonidou, ‘Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens’ Europe’, (2008) 35 IEI 43; N. Nic Shuibhne, ‘Free Movement of Persons and the Wholly Internal Rule: Time to Move On?*’* (2002) 39 CMLRev 731; see also P. J. Neuvonen, ‘EU Citizens’ Whimsical Status: Persons or Actors on their Way to Full Agency’, a contribution to this debate in this book. [↑](#footnote-ref-3)
4. M. Everson, ‘The Legacy of the Market Citizen’*,* in J. Shaw and G. More (eds), New Legal Dynamics of European Union (Oxford: OUP 1995), p.73; C. Lyons, ‘Citizenship in the Constitution of the European Union: Rhetoric or Reality?’ in R. Bellamy (ed), Constitutionalism, Democracy and Sovereignty: American and European Perspectives (Aldershot: Averbury, 1996), p.96; D. Kochenov, ‘Ius Tractum of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights’, (2009) 15 CJEL 169. [↑](#footnote-ref-4)
5. Case 85/96 *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691; Case C-184/99 *Rudy Grzelczyk v CPAS* [2001] ECR I-6193; Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703; Case C-413/99 *Baumbast and R v SSHD* [2002] ECR I-7091. [↑](#footnote-ref-5)
6. See the introductory chapter to this collection, which considers a caring approach and consideration of an individual’s context to be central to a more human-centred Union, citing J. Rifkin, The Empathic Civilization: The Race to Global Consciousness in a World in Crisis (New York: Tarcher, 2009). [↑](#footnote-ref-6)
7. Joined Cases C-197/11 and C-203/11 *Libert* (nyr), judgment 8th May 2013. [↑](#footnote-ref-7)
8. Article 2 TR. [↑](#footnote-ref-8)
9. See Part Three, Title III TR, in particular [Chapters 1](#bp_ch1) and [2](#bp_ch1), concerning social policy and the European Social Fund. [↑](#footnote-ref-9)
10. Articles 7(2) and 9, Regulation 1612/68 Free movement of workers [1968] OJ L257/2. [↑](#footnote-ref-10)
11. Case 32/75 *Cristini v SNCF* [1975] ECR 1985; Case 207/78 *Even* [1979] ECR 2019. [↑](#footnote-ref-11)
12. Directive 2004/38 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77. [↑](#footnote-ref-12)
13. Articles 10–12, Regulation 1612/68; Articles 6(2) and 7(2), Directive 2004/38. [↑](#footnote-ref-13)
14. Article 12 Regulation 1612/68, which remained in place after the amendments introduced by Directive 2004/38. The substance of Article 12, Regulation 1612/68 is maintained by Article 10 of Regulation 492/2011 [2011] L141/1, replacing Regulation 1612/68. [↑](#footnote-ref-14)
15. Case C-237/94 *John O’Flynn v Adjudication Officer* [1996] ECR I-2617, although this case post-dates the introduction of Union citizenship, it nevertheless provides a useful example of the Court’s understanding of the utility of recognising the human needs of *workers*. [↑](#footnote-ref-15)
16. AG Trabucchi recognised in Case 7/75 *Mr. and Mrs. F* [1975] ECR 679, 696 that, ‘the migrant worker is not to be regarded by Community law…as a mere source of labour but is viewed as a human being’. [↑](#footnote-ref-16)
17. Case 207/78 *Even*, para.22. [↑](#footnote-ref-17)
18. European Commission, P.E. Deb., No.48, 135. 22 November 1961. [↑](#footnote-ref-18)
19. Recital 3. [↑](#footnote-ref-19)
20. This was already an aim contained in the preamble to the TR. [↑](#footnote-ref-20)
21. Case 344/87 *Bettray* [1989] ECR 1621, para.29. [↑](#footnote-ref-21)
22. Case 53/81 *Levin* [1982] ECR 1035; Case 139/85 *Kempf* [1986] ECR 1741; Case 66/85 *Lawrie-Blum* [1986] ECR 2121; Case C-43/1/01 *Ninni-Orasche* [2003] ECR I-9607. [↑](#footnote-ref-22)
23. Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministerio del Tersoro* [1984] ECR 377; Case 186/87 *Cowan v Tresor Public* [1989] ECR 195. [↑](#footnote-ref-23)
24. Directive 90/364/EEC (economically self-sufficient citizens); Directive 90/365/EEC (retired citizens); Directive 93/96/EEC (students). Although these very conditions led to these instruments being collectively termed the ‘Playboy Directives’. See e.g. K. Hailbronner, ‘Union Citizenship and Access to Social Benefits’ (2005) 42 CMLRev 1245. [↑](#footnote-ref-24)
25. F. Wollenschläger, ‘A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration’ (2011) 17 ELJ 1, 14. [↑](#footnote-ref-25)
26. N. Nic Shuibhne, ‘The Third Age of EU Citizenship’, in P. Sypris (eds), The Judiciary, the Legislature and the EU Market (Cambridge: CUP, 2012) 331, footnote 15. [↑](#footnote-ref-26)
27. Part Two of the TEC, “Citizenship of the Union”; now, Part Two of the TFEU, “Non-Discrimination and Citizenship of the Union”. [↑](#footnote-ref-27)
28. Articles 20(2)(a) and 21 TFEU. [↑](#footnote-ref-28)
29. Articles 20, 22, 23 and 24 TFEU provide Union citizens with the right to vote in municipal and European parliamentary elections in the host State; the right to consular protection by Member States in third countries where their own Member State is not represented; and the right to petition the European Parliament and apply to the Ombudsman in any of the Treaty languages and receive a reply in the same language. [↑](#footnote-ref-29)
30. AG Poiares Maduro, Case C-524/06 *Huber* [2008] ECR I-9705, para.19; AG Colomer, Joined Cases C-11 & 12/06 *Morgan and Bucher* [2007] ECR I-9161; M. Everson, *Legacy of the Market Citizen,* 73–74. [↑](#footnote-ref-30)
31. N. Nic Shuibhne, ‘The Resilience of EU Market Citizenship' (2010) 47 CMLRev 1597, 1612. She notes that the exceptions to this trend are Case C-145/04 *Spain v United Kingdom* [2006] ECR I-7917 (voting rights); Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055 (voting rights). [↑](#footnote-ref-31)
32. Nic Shuibhne, ‘EU Market Citizenship’, 1627. [↑](#footnote-ref-32)
33. Joined Case C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, relying on *inter alia* Joined Cases 35/82 and 36/82 *Morson and Jhanjan v Netherlands* [1982] ECR 03723; Case 147/87 *Zaoui v CRAMIF* [1987] ECR 05511. The wholly internal rule, in the citizenship context, was recently called into question by the Court’s finding in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-01177. D. Kochenov and R. Plender, ‘EU Citizenship: From an Incipient Form to an Incipient Substance?’ (2012) 37 ELRev 369; N. Nic Shuibhne, ‘(Some) of the Kids Are Alright: Commentary on *McCarthy* and *Dereci*’, (2012) 49 CMLRev 349, 364–366. However, recent case-law appears to have limited the transformative potential of *Ruiz Zambrano* in this regard. See Case C-40/11 *Yoshikazu Iida v Stadt Ulm* [2013] (nyr), judgment 8th November 2012. For comment, S. Reynolds, ‘Exploring the ‘Intrinsic Connection’ between Free Movement and the Genuine Enjoyment Test: Reflections on Union Citizenship after *Iida*’*,* (2013) 38(3)ELRev 376. [↑](#footnote-ref-33)
34. See the citizenship case of Case C-33/07 *Jipa* [2008] ECR I-05157, para. 23, in which the Court relied on pre-citizenship cases such as Case 36/75 *Rutili v Ministre de l’intérieur* [1975] ECR 01219; Case 30/77 *R v Bouchereau* [1977] ECR 01999. [↑](#footnote-ref-34)
35. N. Nic Shuibhne, ‘The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?*’* in C. Barnard and O. Odudu (eds), The Outer Limits of European Union Law (Oxford: Hart, 2009) 167, 175. [↑](#footnote-ref-35)
36. Early examples of the two-stage approach can be seen in Case C-55/94 *Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; Case 95/81 *Commission v Italy* [1982] ECR 2187; Case C-4/75 *Rewe Zentralefinanz eGmBH v Landwirtschaftskammer* [1975] ECR 00843; Case C-192/73 *Van Zuylen Frères* [1974] ECR 00731 paras.6–9. [↑](#footnote-ref-36)
37. N.34. [↑](#footnote-ref-37)
38. N.29. [↑](#footnote-ref-38)
39. D. Kostakopoulou, ‘European Union Citizenship: Writing the Future’*,* (2007) 13(5) ELJ 623, 634. [↑](#footnote-ref-39)
40. N.5. [↑](#footnote-ref-40)
41. N.5. [↑](#footnote-ref-41)
42. Para.46. [↑](#footnote-ref-42)
43. Para.31.Though the Court has reiterated in the recent judgment Case C-333/13 *Dano v Jobcentre Leipzig* [2014] (nyr), judgment 11th November 2014 that access to special non-contributory cash benefits within a host State can, in general, be made dependent on an EU citizen having a ‘right to reside’ in the host State. While *Grzelczyk* dictates that a certain amount of financial solidarity is required between the Member States in relation to periods of temporary financial need, and that resort to social support cannot lead to automatic exclusion from the host State, an economically inactive individual’s right to reside, at least under Directive 2004/38, does generally rest on their having sufficient financial resources to sustain themselves. [↑](#footnote-ref-43)
44. N.5. [↑](#footnote-ref-44)
45. N.30. [↑](#footnote-ref-45)
46. AG Geelhoed in Case C-209/03 *Bidar* [2005] ECR I-2110, para.50; Case C-200/02 *Zhu and Chen v SSHD* [2004] ECR I-9925, para.33; M. Elsmore, P. Starup, ‘Union Citizenship – Background, Jurisprudence and Perspective: The Past, Present and Future of Law and Policy’, (2007) 36(1) YBEL 57, 58. [↑](#footnote-ref-46)
47. Poiares Maduro has argued that the European Constitution, and its approach to fundamental rights, is a product of a judicial construction fuelled by litigation dominated by companies who can afford the information and organisation costs arising from participation in the Union judicial process and who push to see their economic free movement rights respected. M. Poiares Maduro, ‘Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU’, in P. Alston et al, The EU and Human Rights (Oxford: OUP 1999), p.449. [↑](#footnote-ref-47)
48. O’Brien, ‘I Trade Therefore I Am’, 1676 discussing the use of the market ‘as a new morality’. [↑](#footnote-ref-48)
49. In the context of the ECHR, see *Kudla v Poland* (2002) 35 EHRR 198, paras.110–114, concerning Article 5 ECHR; *Rowe and Daniels v UK* (2000) 30 EHRR, para.61, concerning Article 6 ECHR. [↑](#footnote-ref-49)
50. Case C-155/09 *Commission v Hellenic Republic* [2011] ECR I-00065; Case C-233/12 *Somone Gardella v INPS,* (nyr), judgment4th July 2013, para.38–41. [↑](#footnote-ref-50)
51. Case C-589/10 *Wencel v Zakład Ubezpiecczén Społecznych w Białymtoku,* (nyr) 16th May 2013, para.69; Case 379/11 *Caves Krier Frères SARL v Directeur de l’Administration de l’emploi*, (nyr) 13th December 2012. [↑](#footnote-ref-51)
52. See the Opinion of AG Jacobs in Case C-168/91 *Konstantinides v Stadt Altensteig* [1993] ECR 1-1191, 1211 [↑](#footnote-ref-52)
53. ‘Outer Limits’*,* 184–185. [↑](#footnote-ref-53)
54. Joined Case C-158/04 and C-159/04 *Alfa Vita* [2006] ECR I-08135, para.40. [↑](#footnote-ref-54)
55. ‘Writing the Future’*,* 634. [↑](#footnote-ref-55)
56. N.5. [↑](#footnote-ref-56)
57. Case 316/85 *Lebon* [1987] ECR 281. [↑](#footnote-ref-57)
58. Para.63. [↑](#footnote-ref-58)
59. Case C-274/96 *Bickel and Franz* [1998] ECR I-7637. [↑](#footnote-ref-59)
60. N.23. [↑](#footnote-ref-60)
61. N.59, para.15. [↑](#footnote-ref-61)
62. ‘Outer Limits’, 170. [↑](#footnote-ref-62)
63. Case C-60/00 *Carpenter v Home Secretary* [2002] ECR I-6279. [↑](#footnote-ref-63)
64. N. Nic Shuibhne, Outer Limits, 174. See also, E. Spaventa, ‘From Gebhard to Carpenter: Towards a (Non)-Economic European Constitution*’*, (2004) 41 CMLRev 743. [↑](#footnote-ref-64)
65. Case C-493/01 *Orfanopoulos and Oliveri v Land Baden-Wüttermberg* [2004] ECR I-5257, para.65. [↑](#footnote-ref-65)
66. R. White, Workers, Establishment and Services in the European Union(Oxford: OUP, 2004), 260–261. [↑](#footnote-ref-66)
67. Case C-228/98 *Dounias v Minister for Economic Affairs* [2000] ECR I-577, concerning goods; P. Oliver and W-H. Roth, ‘The Internal Market and the Four Freedoms*’*, (2004) 41 CMLRev 407. See also N. Nic Shuibhne, *Outer Limits,* 184–185. [↑](#footnote-ref-67)
68. N.23. [↑](#footnote-ref-68)
69. N.63. [↑](#footnote-ref-69)
70. Recital 3, Directive 2004/38. [↑](#footnote-ref-70)
71. A. Tryfonidou, ‘Further Steps on the Road to Convergence among the Market Freedoms’*,* (2010) ELRev (2010) 36, 41–43, relying on Case C-441/04 *A-Punkt* [2006] ECR I-519. Consider also, in the context of goods, Case C-110/05 *Commission v Italy (mopeds)* [2009] ECR I-519; Case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273. [↑](#footnote-ref-71)
72. T. Horsley, ‘Death, Taxes and (Targeted) Judicial Dynamism: The Free Movement of Capital in EU Law’, in A. Arnull and D. Chalmers (eds), The Oxford Handbook of European Union Law(Oxford: OUP, 2014), ch. 23 (forthcoming). [↑](#footnote-ref-72)
73. N.54, para.46. [↑](#footnote-ref-73)
74. N.7. [↑](#footnote-ref-74)
75. Paras.38–41 [↑](#footnote-ref-75)
76. Paras.43–44. Moreover, AG Mazák did not separate any of the freedoms at all in his analysis of the dispute, paras.26–28. [↑](#footnote-ref-76)
77. Case C-213/05 *Geven v Land Nordrhein-Westfalen* [2007] ECR I-6347; Case C-212/05 *Hartmann v Freistaat Bayern* [2007] ECR I-6303. [↑](#footnote-ref-77)
78. See *Levin;* *Kempf;* *Lawrie-Blum; Ninni-Orasche*, n.22. For comment, see C. O’Brien, Case Comment, (2008) 45 CMLRev 499. [↑](#footnote-ref-78)
79. O’Brien, ‘I Trade Therefore I Am’, 1660. [↑](#footnote-ref-79)
80. Reynolds, ‘Reflections on EU Citizenship after *Iida*’, 388; O’Brien, above. [↑](#footnote-ref-80)
81. Case C-372/04 *Watts v Bedford Primary Care Trust* [2006] ECR I-4325. [↑](#footnote-ref-81)
82. See *Bickel and Franz*, n.59, para.15. [↑](#footnote-ref-82)
83. N. Nic Shuibhne, ‘Outer Limits’, 182. [↑](#footnote-ref-83)
84. Case C-542/09 *Commission v The Netherlands* (nyr), 14th June 2012. Although this focus on linking access to social security with the direct financing of social security systems arguably infuses economic activity with a moral glow, diminishing the perceived value of unpaid work. See O’Brien, ‘I Trade Therefore I Am’. [↑](#footnote-ref-84)
85. N.33. [↑](#footnote-ref-85)
86. N.33. [↑](#footnote-ref-86)
87. Nic Shuibhne, ‘Commentary on *McCarthy* and *Dereci’,* 374. [↑](#footnote-ref-87)
88. See Reynolds, ‘Reflections on EU Citizenship after *Iida*, 385–388; Case C-256/11 *Dereci* [2011] ECR I-11315. [↑](#footnote-ref-88)
89. Case C-148/02 *Garcia Avello* [2003] ECR I-11613*;* Case C-353/06 *Grunkin-Paul* [2008] ECR I-07639. [↑](#footnote-ref-89)
90. N.33, para.72. [↑](#footnote-ref-90)
91. See Reynolds, ‘Reflections on EU Citizenship after *Iida*’. [↑](#footnote-ref-91)
92. N.7. [↑](#footnote-ref-92)
93. Para.156. [↑](#footnote-ref-93)
94. Para.34. [↑](#footnote-ref-94)
95. Para.35. [↑](#footnote-ref-95)
96. N. Nic Shuibhne and M. Maci, ‘Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law’ (2013) 50 CMLRev 965, 1003. [↑](#footnote-ref-96)
97. European Parliament Resolution of 11 June 2013 on social housing in the European Union (2012/2293(INI)). [↑](#footnote-ref-97)
98. M. Dougan, ‘The Constitutional Dimension to the Case Law on Union Citizenship’, (2006) 31 ELRev 613, 618–619 and 636. Prior to the coming into force of Directive 96/71, the Court had already imposed a proportionality test in relation to minimum pay in Case C-165/98 *Mazzoleni* [2001] ECR I-2189. [↑](#footnote-ref-98)
99. Case C-319/06 *Commission v Luxembourg* [2008] ECR I-04323; see also Case C-346/06 *Rüffert* [2008] ECR I-01989; see also Case C-346/06 *Rüffert* [2008] ECR I-01989. [↑](#footnote-ref-99)
100. Consider for instance: the accompanying text to the initial legislative document – “*Les entreprises non nationales seront ainsi mise à égalité avec les entreprises nationales.*” COD/1991/0346: 28/06/1991; “Il faut tout à la fois encourager les entreprises à accorder à tous leurs travailleurs un minimum de conditions sociales, tout en mettant les entreprises des pays d’accueil à l’abri d’un dumping de la part des entreprises extérieures.” A. Lulling, MEP COD/1991/0346: 13/05/1992. [↑](#footnote-ref-100)
101. Consider the use of the term ‘citoyen/citoyenne’ by French revolutionaries. [↑](#footnote-ref-101)
102. D. Heater, What is Citizenship? (Hoboken: Wiley, 2013), pp. 8–10, [↑](#footnote-ref-102)
103. p.9 [↑](#footnote-ref-103)
104. p.10 [↑](#footnote-ref-104)
105. T. Marshall, Citizenship and Social Class, T. Bottomore (ed), (London: Pluto, 1992), pp. 20–21. This social liberal approach is of course contested, for instance by the neo-liberal school. [↑](#footnote-ref-105)
106. Above, p.24. [↑](#footnote-ref-106)
107. See Heater, *What is Citizenship*, p.25. [↑](#footnote-ref-107)
108. S. Macedo, Liberal Virtues, (Oxford: Clarendon, 1990), p.2. [↑](#footnote-ref-108)
109. Heater, *What is Citizenship*, p.82. [↑](#footnote-ref-109)
110. S. O’Leary notes that the Court of Justice has interpreted the provisions of Union citizenship in a way that can be said to ‘explode the linkages’ between the right to move and reside freely within the Union and economic activity: ‘Putting Flesh on the Bones of European Union Citizenship’ (1999) 24 *ELRev* 68, 77–78. [↑](#footnote-ref-110)
111. O’Brien, ‘I Trade Therefore I Am’, 1660. [↑](#footnote-ref-111)
112. *Striking the Elusive Balance*, p.465. [↑](#footnote-ref-112)
113. Above, p.470. [↑](#footnote-ref-113)