compliance specifically, this book brings some much-needed optimism to the field. I came away from the read with a much more positive outlook than prior. I advise you to do the same.

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Proportionality and Facts in Constitutional Adjudication. By Anne Carter. [Oxford: Hart Publishing, 2021. xxvi + 188 pp. Hardback £85.00. ISBN 978-1-50993-698-4.]

It is at this stage trite to note that proportionality review has received disproportionate focus within contemporary public law research – a trend that has contributed to an imbalance in scholarly attention towards principles of common law judicial doctrine. In light of this, perhaps one of the finest compliments that can be paid to Dr. Anne Carter's compelling addition to the Hart Studies in Constitutional Theory series, *Proportionality and Facts in Constitutional Adjudication*, is that it represents a fresh contribution to proportionality scholarship, with fascinating and distinctive insights for the field.

As its title suggests, the book focuses on the role of facts within proportionality reasoning in constitutional litigation. Whether readily acknowledged or not, judicial applications of a proportionality test turn to some extent on empirical knowledge about the world that underpins their analysis. The book brings this reality to the forefront, arguing that factual inquiry is relevant at each stage of proportionality reasoning, most prominently at the necessity stage, and that each stage may require the use of different types of facts. A central argument of the book is that, in order to properly recognise the importance of facts, we must more closely distinguish the types of facts arising at each stage, their different characteristics and the different types of judgements they require, representing a more nuanced and context-specific understanding of facts. This endeavour, Carter also suggests, can inform questions of court procedure. The research is focused primarily on the Australian context, where a majority of judges on the apex court, the High Court of Australia, have recently begun to adopt a more structured test of proportionality – though not without contestation and disagreement on and beyond the bench. This assessment of facts in Australian proportionality reasoning is bolstered by comparison to South Africa, Canada and Germany, three jurisdictions with long-standing proportionality jurisprudence. Given the critical point in its proportionality case law, the book offers a timely and practical analysis of the dynamic Australian field. Yet it also has much to offer an international audience. Proportionality is a global and growing method of review – hence the utility of the book's comparative exercise – and the questions associated with fact-finding in proportionality will, to some extent, arise across jurisdictions. As such, the book, representing as it does a novel doctrinal and comparative analysis of an understudied feature of proportionality reasoning, is well-placed to inform wider debates around the doctrine and judicial power.

The book comprises eight chapters, including an introduction and conclusion. Following the introduction, Chapter 2 presents a general account of the stages of

proportionality reasoning – suitability, necessity, and balancing (or proportionality *stricto sensu*). This content, while necessary, could of course risk feeling familiar, considering the wealth of existing proportionality scholarship. Carter, though, avoids merely restating well-trodden ground by making clear throughout how factual inquiry is infused into each stage of the test, demonstrating convincingly, as the chapter is titled, "The Fact-Dependent Nature of Proportionality". Chapter 3 turns attention to outlining and categorising the nature of the facts arising in proportionality adjudication, informed usefully by scholarship on evidence and the epistemology of knowledge. The chapter's core contribution emerges from engaging with existing taxonomies, most notably the work of the US administrative lawyer, Kenneth Culp Davis, whose distinction between legislative and adjudicative facts in the context of US administrative agencies and courts has proven highly influential in public law. This classification, Carter suggests, is a helpful starting point, but is not sufficient to capture the work that factual inquiry performs in the distinctive task of proportionality reasoning. Accordingly, the chapter distinguishes the types of fact and differences in analysis arising at each stage of the proportionality test. This nuanced approach, tailored to the proportionality doctrine, is returned to throughout the book, and is indicative of a real strength of the work: its practical specificity, outlining the bespoke roles facts play at each stage. Carter makes clear this dynamic is not assumed to apply across constitutional law beyond proportionality, but rather explores the complexity of fact-finding in a particular doctrine, borne out of the case law analysis. As an aside, Carter addresses in this chapter the place of social science material, rightly disagreeing with the view of some scholars that such information ought to be regarded more as "law" than "fact" in how judges should approach the material, and arguing persuasively that social science material more comfortably befits the "fact" categorisation. Beyond this discussion, though, the book is relatively quiet as to the place of social science evidence in public law adjudication, a matter of some prominence at present, at least in this reviewer's domestic context of the UK.

To aid the analysis of proportionality and facts in the Australian context, in Chapter 4, Carter draws upon the approaches to proportionality in South Africa, Canada and Germany. The chapter demonstrates that in each context, and particularly explicitly in Canada, judges have recognised that the application of proportionality reasoning may be fact-dependent. The analysis again demonstrates how courts' reliance on empirical material can differ across the test's stages, and Carter incorporates core institutional questions pertaining to the judicial role and the relationship of facts to these wider issues. The chapter considers, for instance, situations where courts are required to make future-oriented or hypothetical assessments, sometimes associated with concerns of judges exceeding their proper role, as well as the ways in which courts have ascertained facts, which implicates questions of deference to the legislature and the appropriate degree of scrutiny of the legislature's position. The inclusion of the three countries' approaches to proportionality, then, provides useful comparative experience of how the institutional concerns as to the scope of the judicial role can be navigated, and how, procedurally, facts can be ascertained in practice.

In the remainder of the book, attention turns specifically to the Australian jurisprudence, and from here the book truly flourishes. First, Carter provides an account of the development of proportionality in Australian case law, a trajectory characterised by uncertainty and division. Though a structured proportionality test

has become increasingly endorsed in the context of the implied freedom of political communication, its status remains unclear beyond that, having been variously endorsed and resisted in other contexts. Some reluctance persists to embrace balancing, and its explicitly value-laden approach, which Carter links to deeper concerns within the court as to its proper constitutional role and strict adherence to the separation of powers. This emphasis on how concerns around judicial power have influenced a reluctance on the court's part to embrace structured proportionality finds parallels in Chapter 6, which focuses on facts in Australian proportionality case law. Here, Carter notes the court has been hesitant to develop standards reliant on fact-finding and has preferred abstract analysis which obscures the factual features of decisions, concerned not to be drawn into sociopolitical matters beyond the judicial function, and to avoid unpredictability. Crucially, the chapter identifies and articulates a puzzle in the patterns of fact-finding in the Australian proportionality jurisprudence. Namely, as the approach to proportionality has become increasingly structured in nature, we might expect fact-finding to be raised as a more explicit question and, accordingly, for the court to recognise the relevance of facts to a greater degree. Yet Carter argues, using a case law analysis across the court's different approaches, that no such simple correlation can be said to exist – even when judges consider alternative measures, where factual inquiry may be particularly prominent. Indeed, not only is a consistent framework for the place of facts yet to emerge despite the increasing structure of reasoning, Carter even notes that judges applying more traditional approaches have sometimes engaged more explicitly with facts than the majority using structured proportionality. This argument is valuable and persuasive – the framing of the constitutional test may influence the court's approach to facts, but does not necessarily do so, and Carter offers other potentially relevant factors such as the individual style of judges.

In the book's final substantive chapter, Carter addresses the implications for court procedure associated with greater recognition of the role of facts in proportionality adjudication. The chapter first demonstrates how the High Court's approach to procedure facilitates its avoidance of factual disputes. It is refreshing to read such an analysis – although unfortunately brief, it is a welcome reminder that judicial procedure can exert substantive effects on the nature and shape of the caseload, and is far from a dry technicality. The primary focus of the chapter, though, is to look not at the influence of procedure on facts, but the influence that more explicitly acknowledging the role of facts can have on approaches to procedure, drawing usefully on the comparative analysis introduced in Chapter 4. Taking three unresolved questions concerning the High Court of Australia's approach to procedure – the appropriate burden and standard of proof, the limits of judicial notice, and the degree of deference or restraint afforded to factual determinations made by other branches of government – Carter argues that a more precise and nuanced articulation of the facts relevant across the different stage of the proportionality test can inform resolution of the three issues. The book concludes by briefly summarising the importance of factual inquiry to proportionality reasoning. Carter suggests that identifying where facts are relevant to inquiry can: increase the transparency of judicial decisions by making clear what judges are really doing in proportionality analysis and where value judgments arise; inform the approach to the appropriate intensity of scrutiny applied in a particular context; and ensure judicial decisions more closely reflect the empirical world. These concluding thoughts touch upon how the research contributes to informing

long-standing questions of judicial power, but this discussion could have been expanded, or dealt with at greater length in the substantive chapters. The book is first and foremost a practical contribution that is to be lauded in a field arguably overly replete with theory. Yet, given the important implications for debates around the exercise of judicial power that a better understanding of fact-finding may present, it would have been interesting to dedicate more attention to how this novel and robust research might inform, or subvert, understandings of the judicial institutional role.

In sum, this book should be widely read across jurisdictions. It contributes something new in proportionality, which is hardly to be understated, and rigorously captures the nature of the field in an understudied area of practice, addressing "how" questions while feeding into wider debates around proportionality in Australia and beyond. The reasons for which Carter argues facts matter – improved transparency and understanding of the judicial role, and closeness to empirical reality – also point to the importance of this book, and of its practical and detailed endeavour. This reviewer hopes that the book will galvanise further discussion on, and close scrutiny of, the place of facts in public law adjudication.

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The Constitutional Theory of the Federation and the European Union. By Signe Rehling Larsen. [Oxford University Press, 2021. xvi + 212 pp. Hardback £88.00. ISBN 978-0-19885-926-0.]

Signe Rehling Larsen's book on the constitutional theory of the federation and the EU provides a novel analytical framework for thinking about the nature of the EU. The EU, Rehling Larsen argues convincingly, should be conceived of as a federation rather than a *sui generis* entity. Although this is by no means a novel claim, the implications that Rehling Larsen attaches to the concept of federation weave together a rich framework for understanding the emergence of the EU, the political tensions between the EU and the Member States, and the management of the Eurozone crisis.

According to Rehling Larsen, the federation is a distinct political form that differs from the other two political forms of modernity, namely the state – including the federal state – and the empire (p. 1). Following Carl Schmitt's federal theory, she argues that states participate in federations to preserve their political existence, or sovereignty (p. 49). By constituting a federation, however, they also create an entity with autonomous political existence (p. 77). The relative autonomy of the federation and of the Member States creates friction, as the federation seeks to secure homogeneity among the Member States and thus tends to push for ever further integration, while the Member States see the federation as a means to preserve their sovereignty and are, therefore, opposed to federal encroachments to it (p. 104). The tension becomes clearest in the case of an emergency (p. 149). Both the federation and each individual Member State claim authority to resolve

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