(p. 280). It is an intriguing view, especially if one adds (consistently with the views of many commentators) that currently courts are reading the obligation of good faith (in US law) far more narrowly than they did 20 or 30 years earlier. Does a changing understanding of good faith thus indicate a changing view about "recognition and respect", or at least a different moral or policy-based balancing of "how contracting parties must balance self- and other-regard" (p. 280)? Or does it merely indicate a widely shared error either in the earlier broader understanding of good faith or in the current narrower understanding? Also (this returns to the question of theoretical scope), while good faith in US contract law applies only to performance, other legal systems understand the obligation of good faith as extending to negotiations. It would seem, under Markovits's analysis, that the essence of contract law, or at least the essence of contractual relations, in those (non-US) legal systems must be seen as different from their US counterparts. Should we also conclude that those legal systems have a different understanding of what it means to "recogni[se] and respect" those with whom we contract?

Mindy Chen-Wishart, developing ideas from H.L.A. Hart's early work, provides a two-step defeasibility approach to understanding contractual defences like misrepresentation, mistake, duress, and undue influence; this defeasibility analysis improves upon the more conventional one-step analysis grounded on party consent and voluntariness. George Letsas and Prince Saprai offer a fairness-based analysis of mitigation, which they reason is superior to an earlier analysis by Charles Fried based on altruism. Stephen Smith argues (contrary to the views of John Gardner, Joseph Raz, Ernest Weinrib, and others) that many forms of contract law damages are best understood as the redress of a wrong (of breach of contract), rather than as simply enforcing (giving effect to) the original contractual right. As part of the same analysis, Smith claims that damage orders should be seen as creating new duties, not simply reporting existing duties (or inchoate duties). And Gregory Klass explains the idea of "efficient breach" in a way far more sophisticated than the conventional (non-economist) understanding – an explanation that displays clearly certain important connections between remedies, price, and efficiency, and between efficiency, non-efficiency objectives, and contract design.

The book contains occasional misstatements (e.g. when Liam Murphy states that "reliance damages . . . is nowhere awarded for breach of contract" (p. 162) – but see, for example, *Restatement (Second) of Contract Law* §349 ("As an alternative to the measure of damages stated in §347 [expectation damages], the injured party has a right to damages based on his reliance interest") and G.H. Treitel, *An Outline of The Law of Contract* (6th ed., Oxford, 2004, p. 377 (reliance damages)), but these are rare. The primary impression the collection leaves is quite different: *Philosophical Foundations of Contract Law* is exemplary in the consistently high quality of the pieces, from first to last.

Brian H. Bix
University of Minnesota

Comparative Matters: The Renaissance of Comparative Constitutional Law. By Ran Hirschl [Oxford: Oxford University Press, 2014. 304 pp. Hardback £29.99. ISBN 9780198714514.]

In *Comparative Matters: The Renaissance of Comparative Constitutional Law*, Ran Hirschl considers the contemporary state of comparative constitutional law and

surveys some of the highlights in its rich and varied intellectual heritage. Hirschl ponders the future of the field and argues that comparative constitutional research could be enriched if scholars adopted a more interdisciplinary approach. According to Hirschl, artificial divides among closely related disciplines examining the same constitutional law phenomenon, "limit the scope, depth, and breadth of the questions we can address, the choice of methods we make, and the kinds of accounts we can offer" (p. 190). In particular, Hirschl seeks a closer connection between constitutional comparativists and the social sciences which offer "[m]any of the tools necessary to engage in the systematic study of constitutionalism across polities" (p. 190). By encouraging interdisciplinarity, Hirschl envisions scholars moving beyond "thin" doctrinal comparisons of constitutional law to engage more with context, which can provide a fuller understanding of constitutional developments – an approach Hirschl terms "comparative constitutional studies".

In the first chapter, Hirschl asks the revealing questions of how and why courts engage in comparative constitutional law research. In interpreting broadly worded rights guarantees that are open to different interpretations, judges cannot avoid engaging with politics (whether this is acknowledged or not). As part of the decision-making process in such cases, judges might look at jurisprudential developments elsewhere, typically in a select club of countries that are perceived to share similar values – something Hirschl describes as "cherry-picking". This foreign jurisprudence is used by courts for a number of purposes including principled consideration, self-reflection, and opportunism in the sense that foreign law can provide a grounding for the legal reasoning to be applied in the case. Hirschl then evaluates these views through a detailed case study on the use of comparative law at the Supreme Court of Israel. The book's second chapter finds Hirschl drawing parallels between the questions debated by modern constitutional comparativists and the history of interactions between Jewish law and its legal environment, which includes many of the world's past and present legal traditions. The aim here is to better understand the driving forces behind selective comparison while the broader point is that constitutional comparativists have an untapped opportunity to shed light on current issues by examining how past traditions viewed and dealt with similar problems. According to Hirschl, "the near-exclusive focus on the present in comparative constitutional studies obscures the fact that some of the core conundrums the field is facing are not new" (p. 80).

In the third chapter, Hirschl traces the development of the field by highlighting "epistemological leaps" in comparative constitutional law from the sixteenth century to the present by way of short profiles that highlight contributions of key figures including John Bodin (questioning the relevance of Roman law in France through wide-ranging comparative studies), John Selden (studying Jewish law as a potential source of universal legal norms), Montesquieu (analysing and classifying laws and governments), and Simón Bolívar (using insight gleaned from comparing constitutional developments to advance a political agenda). From this historical foundation, Hirschl advances his own leap forward by making the case for a transition of the field of comparative constitutional law, which has been dominated by law schools, to the broader discipline of "comparative constitutional studies" (chapter 4). Here Hirschl advocates a closer connection between legal scholarship and the social sciences, which offer well-developed theories of judicial behaviour that promise to improve our understanding of constitutional developments beyond the "thin, ahistorical, and overly doctrinal or formalistic accounts" offered by exclusive or predominant legal analysis. In Hirschl's view, "[c]ulture, economics, institutional structures, power, and strategy are as significant to understanding the constitutional universe as jurisprudential and prescriptive analyses" (p. 152). Put another way, the

broader perspective provided by the social sciences can better situate constitutional laws and institutions within their contextual environment and provide a more fulsome understanding of the various attributes of those laws and institutions.

In light of his call for scholars to move toward "comparative constitutional studies", Hirschl takes stock of the epistemological and methodological challenges that face modern constitutional comparativists (chapter 5). One especially illuminating part of the chapter is Hirschl's discussion of the tension between "universalists" (who focus on common elements among different legal systems and traditions) and "particularists" (who emphasise the unique and idiosyncratic nature of individual legal systems). Hirschl focuses on the universalist versus particularist debate in the area of legal transplants, looking to the work of universalists such as Alan Watson and contrasting it with culturalists like Pierre Legrand. The debate continues in the tension between supranational norms and local traditions and Hirschl provides a number of intriguing illustrations. The chapter moves on to discuss the so-called "northern selection bias" in the design of many English-language studies, which tend to focus on constitutional developments in the liberal democracies of European and North American states. Hirschl rightly points out that very few studies examine or even refer to the laws or institutions of highly populated and globally significant countries such as Indonesia, Pakistan, Nigeria, Bangladesh, Mexico, the Philippines, and Vietnam (pp. 211–12). Instead, constitutional comparativists tend to make generalisations from small and unrepresentative samples and present these observations as universal truth. While accepting the basic premise of the northern selection bias, Hirschl deconstructs the problem and highlights methodological difficulties that will be encountered by scholars seeking to study constitutional developments outside the club of northern liberal democracies.

In chapter 6, Hirschl maps out and critiques the approaches to comparative constitutional law case selection and research design. Hirschl provides a valuable account of the prevailing methodological approaches including studies that focus on the most similar cases, the most different cases, the prototypical cases, the most difficult case, and the outlier cases. He also classifies the objectives of comparative constitutional law studies into a deep, contextualised understanding of a single case, self-reflection, or betterment through analogy, distinction, and contrast, generating concepts and analytical frameworks for thinking critically about constitutional norms and practices, and theory-testing and explanation through causal inference. The chapter reveals the wide range of approaches used by constitutional comparativists. In the end, Hirschl encourages scholars to diversify their approaches in order to "reach stronger, more meaningful conclusions about constitutional law and institutions worldwide" (p. 277). In particular, Hirschl advocates the use of large-N studies, being large-scale empirical surveys, which can offer a refreshing dimension to studies in comparative constitutional law by "[t]racing broad patterns and formulating general rules applicable across contexts" (p. 276). While large-N studies might overlook nuance and contextual detail in individual cases, they can provide a useful addition to the methodological choices of scholars and can be combined with smaller case studies to utilise the advantages of both approaches.

Given a renewed interest in comparing constitutional law and legal institutions across states in the pursuit of good governance, *Comparative Matters* will be relevant to a broad audience of scholars, especially those with an interest in the history, theory, and method of legal comparison. It will also be of use to judges, especially those of appellate courts, who occasionally engage in comparative constitutional research (as discussed by Hirschl in chapter 1). The book is easy to read, being replete with interesting anecdotes and short case studies. Hirschl's call for legal scholars to adopt a more contextualist perspective in their research, which has been advocated

by others such as Armin von Bogdandy, should be applauded. There is much merit in the view that context matters and legal scholars have a great deal to learn from other disciplines. Law and its institutions do not exist, operate, or evolve in a vacuum. There is some degree of risk, however, in encouraging interdisciplinarity, particularly if comparative constitutionalists begin to dabble in fields outside their expertise. As Koen Lemmens has observed, comparative lawyers have been known to incorporate "bits and pieces" from other established disciplines, such as economics, history, and political science, without having received the necessary training or having a good understanding of those fields (particularly their limitations). Legal comparativists might therefore engage with other disciplines on a superficial – or, even worse, misguided – basis. This risk might be managed by a detailed review of the methodological choices made and the results obtained from experts within the relevant disciplines. A second challenge to Hirschl's argument is that, by emphasising context and invoking the methodological tools and perspectives of other disciplines to help explain legal phenomena, the quality and rigour of *legal* analysis in the scholarship might decline in favour of these non-legal fields. Despite these risks, there is much room in the field for a diversity of approaches to flourish and Hirschl's view of "comparative constitutional studies" set out in *Comparative Matters* makes a valuable contribution to that end. Its influence is likely to be felt for years to come.

Lorne Neudorf
Thompson Rivers University

Taking Economic, Social and Cultural Rights Seriously in International Criminal Law. By Evelyne Schmid [Cambridge: Cambridge University Press, 2015. 359 pp. Hardback £75. ISBN 978-1-107-06396-9.]

At least since the 1993 Vienna Declaration of the World Conference on Human Rights, there has been a push towards breaking down the separation between civil and political rights and economic, social, and cultural rights. Because all human rights are indivisible and interdependent, they should be treated equally and given the same emphasis. This realisation has led to calls for paying more attention to economic, social, and cultural rights (ESCR). International criminal law has not been immune to this trend. *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* charts in detail the area where ESCR and international criminal law meet. Evelyne Schmid argues that current definitions of international crimes overlap with violations of ESCR.

The starting point of Schmid's analysis is that there is a general belief that, while international criminal law targets conduct that can also be considered a violation of civil and political rights, it does not equally cover ESCR breaches. This assumption is even shared by those who advocate for further engagement of international criminal law with ESCR but think that this would require legal reforms. She calls this the "legal impossibility argument", meaning that there is a legal barrier for international criminal law to tackle ESCR violations. Therefore, she sets about showing how international criminal law, as it stands today, already criminalises acts that can also be considered violations of ESCR. In order to do that, she painstakingly goes through each crime, examining its mental and material elements, and identifying violations of ESCR which would fall under that definition. As a consequence, the author concludes that international tribunals, national courts, and non-judicial mechanisms could and should engage further with ESCR violations.