



Bundled Systems and Better Law: Against the Leflar Method of Resolving Conflicts of Law

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Kevin M. Neylan, Jr.
Harvard Law School, JD 2015

Bundled Systems and Better Law:
Against the Leflar Method of Resolving Conflicts of Law

Suppose Jones is a New Hampshire fireworks dealer. Smith comes up from Massachusetts, buys a cache, and brings it home. One night Smith sets off a Roman Candle in his backyard, but mishandles it and badly injures himself. He sues Jones in Massachusetts. Massachusetts tort law makes fireworks dealers strictly liable for injuries caused by products they sell. Under New Hampshire law, by contrast, fireworks dealers are immune from liability for such injuries if the injuries resulted from misuse. Which state's law should the Massachusetts court apply? And, just as important, on what basis should it choose?

The judge facing such a dilemma need not go it alone. Indeed, the crowd of law professors eager to guide his decision would be downright overwhelming. According to one of the prevalent modern theories, the judge should consult five different criteria, the most important of which would have the judge choose whichever of the conflicting laws is "better." That is to say, the court should "prefer rules of law which make good socio-economic sense for the time when the court speaks."¹ This five-factor choice of law method, first proposed by Professor Robert Leflar in 1966 and commonly known as the "better law" approach, has been formally adopted in five states² (and is at work "behind the curtain" in perhaps countless more³). Unsurprisingly, it has been the subject of considerable controversy, with prominent critics and defenders alike.

¹ Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1588 (1966).

² Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 AM. J. COMP. L. 217, 278 (2013).

³ Joseph William Singer, *Pay No Attention to that Man Behind the Curtain: The Place of Better Law in A Third Restatement of Conflicts*, 75 IND. L.J. 659 (2000).

This paper will examine Leflar's better law approach and will advance a line of critique that has not, to my knowledge, found voice in the secondary literature. As will be explained in more detail below, most of the scholars who take issue with better law argue that there simply is no such thing as an objectively "better" law, or if there is, judges are unlikely to discover it, and anyway each state has the prerogative to set its own priorities and legislate its own theory of justice. We can call these objections first-order critiques, because they refuse to accept the theoretical possibility, or normative acceptability, of better law adjudication. I share many of these misgivings. But I would like to propose what might be called a second-order critique.

Even if we accept the better law theory's basic but controversial premises—an implicit instrumental theory of private law, for instance, and the normative acceptability of courts making value judgments about their sister states' laws—the better law approach should still be avoided. As I will argue, the better law method is fundamentally flawed because it springs from a bundle-of-rights conception of private law that is overly reductive. More specifically, the better law approach—in theory and in practice—fails to appreciate the possibility that any specific legal rule is part of a system of interrelated laws that are structured to operate in tandem and, whatever effects they produce in the world, do so as a consequence of that structure. This misconception leaves the better law analyst vulnerable to fallacies of isolation, division, and composition, and apt to overlook system effects and tailoring as features of private law domains. In developing this line of critique, I have drawn on insights from inside and outside private law, including from public law institutional design and the general theory of second best in economics. If my claims about the structured nature of private law systems are correct, or even plausible, it is misguided to suppose that a discrete legal rule can be plucked out from the system of which it is a part and

evaluated for the socioeconomic effects it is likely to engender. The better law method is therefore inadequate to the task it sets for itself.

It bears emphasizing that while this paper is exegetical as well as critical, the criticisms it mounts pertain primarily to the justifications courts and scholars offer for given choices of law, rather than to any specific choice in and of itself. Put differently, the focus of this paper is on the reasons courts give for the choices they make. My contention is that better law theory cannot be relied on to furnish good reasons. Hence, while there may well be cases in which the substantive decision would have been different had the analysis proceeded differently, it is also entirely plausible that many cases would have yielded the same result even if my criticisms were taken to heart. Indeed, it is perfectly possible for a reader to accept my methodological critique without endorsing the illustrative examples I discuss at various points.

This paper proceeds in four parts. Part I will offer an overview of the choice of law methods that have influenced courts and scholars over the past century. This brief intellectual history will help elucidate the twentieth century's so-called "choice of law revolution." It will prove helpful for framing my critique of better law later on. Part II will then focus specifically on Leflar's better law approach to conflicts of law. Part III will outline the existing, first-order critiques and then develop my own, second-order critique at greater length. Part IV concludes.

I. Choice of Law Theory in Historical Perspective

This section offers a brief overview of the historical development of choice of law doctrine. Most of this narrative is well known. However, while the story is interesting in its own right, it will also prove useful in framing the second-order critique of the better law approach that I develop in Part III. What follows is necessarily sketchy, passing over many ambiguities and subtleties. Large volumes have been written about each of the discrete points outlined below.

Scholars often cast the history of choice of law jurisprudence in terms of Orthodoxy and Revolution, the latter period developing gradually between the 1920s and the 1960s and bubbling over thereafter. The orthodox approaches, although conceptually varied and spread across time and space, were united in regarding their project as a quest “to deduce universal choice-of-law systems from a priori postulates regarding the nature of law and of government.”⁴ The orthodox came from both civil law and common law systems. They include Ulrich Huber, Joseph Story, Friedrich Karl von Savigny, Albert Venn Dicey, and, of course, Joseph Beale.⁵

Beale, a professor at the Harvard Law School and Reporter for the First Restatement of the Conflict of Laws, was the most influential proponent of the classical approach in the United States. Like the other traditional theorists, Beale was committed to a highly conceptualized jurisprudence developed by legal reasoning from first principles.⁶ Beale’s particular variant emphasized act-territorialism⁷ and the so-called “vested rights” principle.

Beale’s system, heavily indebted to Joseph Story,⁸ maintained that a person becomes vested with a cognizable legal right if and only if the law of the jurisdiction in which the relevant facts took place created such a right. In other words, “the state in which the events assertedly giving rise to a tort or contract obligation occurred, and only that state, had the power to create such an obligation and define its scope and content.”⁹ Subject to a few exceptions,¹⁰ a court adjudicating a dispute had to locate the last act necessary to give rise to the cause of action: the place of injury in a tort suit,¹¹ or in a contract action, the place of formation or performance

⁴ Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 802 (1983).

⁵ LEA BRILMAYER, CONFLICT OF LAWS 16 (1995).

⁶ *Id.* at 21.

⁷ See Perry Dane, *Conflict of Laws*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 199 (Dennis Patterson ed., 2d ed. 2010) (explaining the difference between person-territorialism and act-territorialism).

⁸ Beale dedicated his treatise to Story. 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 61.1 (1935).

⁹ Korn, *supra* note 4, at 803.

¹⁰ See BRILMAYER, *supra* note 5, at 24.

¹¹ RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 377, 384 et seq. (1934).

depending on the precise question at issue.¹² Only that state's law could define the scope of the parties' rights and obligations. Thus, if a train employee is injured on the job in Mississippi, Mississippi is the only state whose law may define his right to recover—even if the negligent acts that caused the injury occurred earlier along the train's route in Alabama.¹³

Beale and the classical theorists understood their system to be a regime of rules that were objective, automatic, easy to administer, predictable, and largely neutral as to substantive outcomes and the interests of the states whose laws were in conflict.¹⁴ Beale's efforts showed few signs of encounter with the legal realists or the earlier jurisprudential innovations that had a profound effect on them. For instance, remarked one contemporary, "The influence of Hohfeld" on the First Restatement "is nowhere apparent."¹⁵ Beale's realist detractors were scathing. According to Walter Wheeler Cook, "the syllogistic reasoning that had led Beale to the vested rights theory was 'an outrageous bit of nonsense.'"¹⁶ Beale's jurisprudence was decried as conceptually vacuous, while application of the First Restatement was derided as arbitrary, indeterminate, and a stumbling block to reform.¹⁷

This critical enterprise was motivated primarily "by a new and different perspective on the nature and functions of law, namely legal realism."¹⁸ Above all, the realists could not abide the classical approach because of its professed indifference to the substantive policies and purposes that lay behind the legal rules in each case. The classical approach "neglect[ed] the fact

¹² *Id.* §§ 311 cmt. d, 323, 325, 360.

¹³ *See, e.g.,* Ala. G.S.R. Co. v. Carroll, 11 So. 803 (Ala. 1892). Note that even under Beale's system, a forum state retained discretion to decline to apply foreign law if that law was sufficiently offensive to the public policy of the forum state. RESTATEMENT (FIRST), *supra* note 11, § 612. However, "this idea only referred to the forum's prerogative to dismiss a case without reaching the merits. It was not a general warrant for a forum to apply its own law." Dane, *supra* note 7, at 199.

¹⁴ Dane, *supra* note 7, at 199–200.

¹⁵ George R. Farnum, *Terminology and the American Law Institute*, 13 B.U. L. REV. 203, 217 (1933).

¹⁶ LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960*, at 25 (2011).

¹⁷ *See* BRILMAYER, *supra* note 5, at 33–41.

¹⁸ *Id.* at 33.

that law was a purposive human activity, not a conceptual enterprise.”¹⁹ Raising a common objection, Elliott Cheatham implored that “vital problems of social and economic policy must be considered before a wise choice between conflicting rules can be made.”²⁰

Gradually, the rebellion against Beale gave birth to alternative methods grounded in legal realist convictions. The first appeared with the work of Professor Brainerd Currie in the late 1950s and early 1960s.²¹ Currie declared that his proposal would replace the “metaphysical apparatus of [the First Restatement’s] method” with a rational technique that would avoid “defeating the interest of one state without advancing the interest of another.”²² Currie, like many reform-minded scholars, was convinced that “we would be better off if we would admit the teachings of sociological jurisprudence into the conceptualistic precincts of conflict of laws.”²³

Dubbed “governmental interest analysis,” Currie’s method would have judges in multistate cases (as in domestic cases) interpret legal rules in order to discover the purposes or policies those rules were designed to promote. The judge should then ask whether the policies underlying each state’s rule would actually be advanced if the rule were applied to the facts of the instant case. If a state’s policies would be advanced, that state was said to have an “interest” in the outcome of the choice of law dispute. Crucially, Currie assumed that each state had an interest in applying its law only if doing so would advantage its domiciliary in the litigation, either by compensating him or shielding him from liability.²⁴ Only if both states had an interest

¹⁹ *Id.* at 37.

²⁰ Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 370 (1945).

²¹ See 1 BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963) (collecting his articles on the subject).

²² *Id.* at 180.

²³ *Id.* at 183.

²⁴ See *id.* at 85–87; BRILMAYER, *supra* note 5, at 61–66. As Dean Ely noted, a large “aspect of the local-protection premise . . . holds that a state can be interested only in helping its own by applying its rules so as to assure that they will win their lawsuits, that consequently it can have no interest in causing a local to lose his or her case.” John Hart Ely, *Choice of Law and the State’s Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 196 (1981).

did a “true conflict” exist. These cases were basically intractable; Currie advocated the judge simply apply forum law. Currie expressly disavowed resolving true conflicts by assessing the desirability of the competing rules. Indeed, Currie contended, “where several states have different policies, and also legitimate interests in the application of their policies, a court is in no position to ‘weigh’ the competing interests, or evaluate their relative merits, and choose between them accordingly.”²⁵

Modern choice of law theorists writing in Currie’s wake largely agreed with his assessment of state interests, but they dissented from his recommendation that courts facing true conflicts should simply apply forum law. Leflar’s better law theory is one of three influential modern schools that developed in reaction to Currie. The goal of each was to set forth a more satisfactory way to resolve genuine conflicts. Notably, unlike Leflar’s theory, the other two alternatives—called “comparative impairment” theory²⁶ and the Second Restatement of Conflicts of Law²⁷—were “carefully constructed to make sure that choice-of-law decisions would not turn on judgments about the desirability or obnoxiousness of the conflicting substantive policies.”²⁸

II. Better Law

In 1966 Professor Robert Leflar proposed his own choice of law method. Leflar listed five “choice-influencing considerations” courts should take into account when deciding true conflicts: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum’s governmental interests; and

²⁵ CURRIE, *supra* note 21, at 181; *see also* BRILMAYER, *supra* note 5, at 66, 88.

²⁶ Comparative impairment asks which state’s policies would be more impaired if the other state’s law were applied. *See generally* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 18 (1963).

²⁷ The Second Restatement employs an amorphous test to identify the state with the “most significant relationship” to each issue in a given case. 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

²⁸ Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1995 (1997). These approaches have been subject to extensive critique on many grounds, most of which are beyond the scope of this paper. *See generally* BRILMAYER, *supra* note 5, at 76–125.

(5) application of the better rule of law.²⁹ However, according to Professor Brilmayer, “the cases applying Leflar’s system have not paid much attention to the factors of predictability and maintenance of interstate order.”³⁰ Instead, Leflar’s fourth and fifth factors predominate in court decisions that employ his method.³¹ However, Leflar’s fifth factor represents his primary innovation, and the one that has inspired the most spirited responses.

What exactly did Leflar mean by “better law,” and how have courts generally implemented it? At first blush Leflar might have had either of two distinct ideas in mind. First, “[s]uperiority of one rule of law over another, in terms of socio-economic jurisprudential standards,”³² and second, “justice in the individual case.”³³ But Leflar himself acknowledged that these inquiries are different, and that justice in the specific case does not exhaust his conception of better law. For instance, Leflar noted that “justice in a particular case calls for individualization of decisions, a choice of the better party in the litigation rather than of the better law,”³⁴ and elsewhere, that the better law analysis “has to do with preferred law, not preferred parties.”³⁵ Likewise, Leflar argued that “[t]he law’s legitimate concerns with ‘justice in the individual case,’ sometimes spoken of as a choice-of-law objective, and with that ‘protection of justified expectations of the parties’ . . . are furthered by deliberate preference for the better rule of law.”³⁶ Hence, Leflar was confident that choosing the better law would often produce a just outcome as between plaintiff and defendant; nevertheless, concluding that the plaintiff or

²⁹ Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966).

³⁰ BRILMAYER, *supra* note 5, at 71.

³¹ *Id.* Notably, courts assessing “government interests” under Leflar’s rubric have taken a somewhat more expansive view than Currie recommended. For instance, the Minnesota Supreme Court has described Minnesota’s interest as a “justice-administering state,” an interest Currie never explicitly recognized. *Milkovich v. Saari*, 203 N.W.2d 408, 414 (Minn. 1973).

³² Leflar, *supra* note 29, at 296.

³³ *Id.*

³⁴ *Id.* at 296–97.

³⁵ Leflar, *supra* note 1, at 1588.

³⁶ *Id.*

defendant should win as a matter of justice, fairness, or the like, would not inevitably imply that the plaintiff-protecting or defendant-protecting law, *as law*, is better. After all, even rules of law universally agreed to be sound can lead to unjust results given the equities of particular circumstances. So it would be a mistake to reduce Leflar's fifth factor to the simple command to do justice in the individual case.³⁷

A judge doing better law must therefore focus his inquiry on each rule's tendency to promote the general welfare. As Leflar himself put it, "any reasonable court" ought to "prefer rules of law which make good socio-economic sense for the time when the court speaks, whether they be its own or another state's rules."³⁸ This "preference is objective, not subjective," and in many instances should not require the judge to undertake an analysis very different from the way he would resolve a purely domestic case.³⁹ Professor Singer advocates a similar approach, instructing courts to determine "which substantive law is best as a matter of social policy and justice," a determination that "should be made on the same basis as determinations of domestic substantive law, relying on the same moral, economic, and social policy considerations applicable in domestic cases."⁴⁰

³⁷ Equating the "better law" inquiry with "doing justice in the individual case" appears to be what Professor Singer, a strong proponent of the better law approach, means by his version of better law. *See, e.g.*, Singer, *supra* note 3, at 665 (advocating a robust theory of better law that would urge courts to heed their "natural inclinations to do justice," and never to "ignore the substantive result" in a particular multistate case).

³⁸ Leflar, *supra* note 1, at 1588. It should be noted that Leflar's project was both positive and normative. That is, he sought to describe the factors he believed actually motivated courts in resolving conflicts cases, as well as to encourage them to take his five specified considerations into account. *See id.* at 1587 ("If choice of law were purely a jurisdiction-selecting process, with courts first deciding which state's law should govern and checking afterward to see what that state's law was, [the better rule of law] consideration would not be present. Everyone knows that this is not what courts do, nor what they should do.").

³⁹ *Id.* at 1588 ("In conflicts cases, just as in other cases, courts have always taken the content of competing rules into account.").

⁴⁰ Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 81 (1989). Professor Kramer makes a similar, but different point, when he argues that "moving from wholly domestic cases to cases with multistate contacts does not change the essential nature of the interpretive problem." Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 290 (1990).

In some true conflicts, the theory goes, the better law will be easy to spot. Such is especially true when one state's law is "anachronistic" or "aberrational."⁴¹ Leflar offered "Sunday laws, the fellow-servant rule, and married women's incapacity to contract"⁴² as illustrations of laws that are "behind the times"⁴³ and hence "a 'drag on the coat tails of civilization.'"⁴⁴ Professor Freund had made a similar argument two decades earlier, writing that "[i]f one of the competing laws is archaic and isolated in the context of the laws of the federal union, it may not unreasonably have to yield to the more prevalent and progressive law, other factors of choice being roughly equal."⁴⁵ Courts have followed this advice: for example, when the Wisconsin Supreme Court heard a tort suit between Illinois residents whose car had crashed into a tree in Wisconsin, the court refused to apply Illinois's guest statute, denouncing it as one of those "anachronistic vestiges of the early days of the development of the law-of-enterprise liability [that] do not reflect present day socio-economic conditions."⁴⁶ The court invoked the better law rationale to allow recovery under Wisconsin law despite the fact that all of the parties involved were from Illinois. "We emphasize," concluded the court, "that we prefer the Wisconsin rule of ordinary negligence not because it is Wisconsin's law, but because we consider it to be the better law."⁴⁷

In multistate cases not involving outlier rules, courts following Leflar's method are no less encouraged to "choose among conflicting laws by picking the one deemed to reflect more enlightened policy" according to some external or objective standard.⁴⁸ Indeed, as Professor

⁴¹ See Kramer, *supra* note 40, at 336.

⁴² Leflar, *supra* note 29, at 299 n.113.

⁴³ *Id.* at 299.

⁴⁴ *Id.* (quoting Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952)).

⁴⁵ Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1216 (1946).

⁴⁶ Conklin v. Horner, 157 N.W.2d 579, 586–87 (Wis. 1968).

⁴⁷ *Id.* at 587.

⁴⁸ Kramer, *supra* note 28, at 1967.

Singer maintains, “multistate cases should ordinarily be resolved by application of what the forum considers to be the substantively best policy.”⁴⁹ Recently, the Rhode Island Supreme Court considered a tort suit brought by a Massachusetts textiles company against a Rhode Island heater manufacturer.⁵⁰ According to the Massachusetts company, the Rhode Island corporation had sold it a defective oil pre-heater that caused damage to its factory and other property. Massachusetts’s statute of limitations would have barred the suit, but under Rhode Island’s longer limitations period the suit could proceed. The Rhode Island Supreme Court chose to apply Rhode Island’s statute of limitations (even though doing so would come at the expense of the Rhode Island defendant), and went out of its way to express its “particular agreement with the hearing justice’s analysis of the fifth policy consideration — ‘the better rule of law,’”⁵¹ insisting that the Rhode Island statute is better because it “affords more protection for those who suffer property damage resulting from defective products.”⁵²

It will come as no surprise that the better law approach has been controversial. Some of the more prominent criticisms will be outlined below, but first we should ask how consequential this approach has been in practice. Otherwise there might be little point to critiquing it.

Leflar’s better law method has been formally adopted in five states: Arkansas (for torts); Minnesota (for torts and contracts); New Hampshire (torts); Rhode Island (torts); and Wisconsin (torts and contracts).⁵³ Beyond that, registering the prevalence of better law analysis is controversial. Even courts that have selected Leflar’s method don’t undertake a better law inquiry in every conflicts case. On the other hand, some scholars argue that all or most of the

⁴⁹ Singer, *supra* note 40, at 83.

⁵⁰ *Harodite Indus., Inc. v. Warren Elec. Corp.*, 24 A.3d 514 (R.I. 2011).

⁵¹ *Id.* at 534–35.

⁵² *Id.* at 528 (quoting the trial court). Interestingly, the court could have reached the same result by holding the statute of limitations to be procedural and adopting a rule that the forum should apply its own procedures. *See id.* at 538 (Flaherty, J., dissenting in part and concurring in the result) (citing twenty-five states that follow the procedural characterization).

⁵³ Symeonides, *supra* note 2, at 278–79.

modern choice of law theories reduce to better law, both in principle and in practice.⁵⁴ Still other scholars appear willing to credit the alternative modern approaches that—on their own terms, at least—present themselves as content-neutral.⁵⁵

Resolving that debate is beyond the scope of this paper. But no matter which camp is correct, it seems indisputable that Leflar was tremendously influential,⁵⁶ and his better law approach continues to have a significant impact on the way courts resolve true conflicts. This influence has persisted despite the various criticisms leveled at the theory in the decades since Leflar first proposed it. Therefore, to the extent this paper is able to contribute something new to the debate over better law, it has the potential to prod courts and commentators to appraise its strengths and weaknesses afresh. And of course, if it's true that many of the modern approaches really amount to better law under different names, the argument I will advance might enjoy broader application.

III. Critiquing Better Law

As noted at the outset, Leflar's better law approach has been subject to a number of spirited critiques. The most powerful extant counterarguments are briefly outlined below. I have

⁵⁴ Perhaps not coincidentally, these scholars tend to take a favorable view of better law. *See, e.g.*, Singer, *supra* note 40, at 59 (“[All of the modern theories] require consideration of which social policy should be favored in multistate cases; they ask us to create presumptions about which policies should prevail. These presumptions, by necessity, refer to the better law.”); Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 94 (1991) [hereinafter Weinberg, *Against Comity*] (noting that “most modern approaches are ‘better law’ approaches.”); Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595, 600 (1984) (“Carried to their logical conclusion, then, current approaches to the resolution of nonfalse conflicts will tend to reduce to variations on the ‘better law’ formulation of Professor Leflar. The litmus test is multistate policy: a departure from forum law will be justified when there is ‘better law’ in the nonforum state, law more representative of multistate policy.”).

⁵⁵ *See, e.g.*, Kramer, *supra* note 28, at 1967 (“[A]part from ‘better law’ analysis—which permits courts to choose among conflicting laws by picking the one deemed to reflect more enlightened policy . . . —modern approaches to choice of law are all carefully structured to avoid inquiries about whose law is preferable or superior as a substantive matter.”). *But see* Kramer, *supra* note 40, at 339 (“Most approaches assume that there is an overarching theory of justice, not derived from the positive law of any state, that provides a ‘right’ answer to conflicts of law. Leflar’s ‘better law’ approach makes this assumption explicitly, directing judges to choose the better law according to some undefined, objective theory of the good.”).

⁵⁶ *See, e.g.*, William H. Allen & Erin A. O’Hara, *Second Generation Law and Economics of Conflict of Laws: Baxter’s Comparative Impairment and Beyond*, 51 STAN. L. REV. 1011, 1011 (1999) (naming Leflar as one of the three or four “truly influential choice-of-law scholars” of the twentieth century).

called them first-order critiques because, for the most part, they deny that Leflar's vision is theoretically possible or normatively defensible.

It should also be noted that each of the first-order and second-order critiques is more potent when directed at courts who use Leflar's method to justify rejecting foreign law.⁵⁷ Hence, the arguments that follow primarily highlight difficulties with the better law approach as a justification for preferring forum law over the law of another state.

1. First-Order Critique

Many critics have seized on Leflar's presupposition that there are right and wrong answers to conflicts cases. Problems with this premise abound. In the first place, many scholars simply dispute that there is any objective standard capable of resolving true conflicts. Professor Kramer, for instance, "rejects the notion that an overarching theory of justice, not derived from the positive law of any state, defines objectively 'correct' answers to conflict cases. On the contrary, . . . true conflicts are difficult precisely because there is no general theory against which to measure the justice of the conflicting laws of different states."⁵⁸ Ironically, the proposition that there exists some neutral socioeconomic measure of the objectively "better law" has been tarred as emerging from the same sort of "conceptual fog" that enshrouded Beale's First Restatement.⁵⁹

In addition to their skepticism about the existence of objectively right and wrong answers, critics have also maintained that the better law approach offends the nature of state sovereignty in a federal system. In other words, not only do they doubt that a judge of State A

⁵⁷ Courts rarely declare their own law to be worse, although that practice raises problems of its own. *See, e.g.,* Weinberg, *Against Comity*, *supra* note 54.

⁵⁸ Kramer, *supra* note 40, at 280.

⁵⁹ *Id.* at 344; *see also* Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 893–94 (2002) ("[T]here may be no meaningful criteria to identify the better law, especially if the competing policies are incommensurable."); Leo Kanowitz, *Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws*, 30 HASTINGS L.J. 255, 292 (1978) (arguing that the better law approach "necessarily rests on what can only be described as a 'natural law' approach to the nature and function of law, a presumption that a super-law-giver, whether denominated a deity, or Reason, or Progress, prescribes the right rules of human behavior").

can choose his own state's law on grounds that it is "better" in any meaningful sense, but in any event such a judge *should not* justify his decision on those grounds because in a union of coequal sovereigns each jurisdiction has the same authority to legislate its own conception of the good. "Within the broad limits permitted by the Constitution," Kramer argues, "[e]ach state is free to define its own version of the 'just' result, and it is axiomatic that there is no perspective from which to judge one version 'better' or more just."⁶⁰ North Carolina, which in the past decade has seen several million-dollar verdicts for archaic torts like alienation of affections and criminal conversation, would likely agree.⁶¹ Yet states employing better law often cannot avoid making a straightforward value judgment about the desirability of their sister states' competing substantive policies.⁶² Kramer has gone so far as to call the better law approach an unconstitutional affront to the Full Faith and Credit Clause.⁶³

A related but distinct objection maintains that even if there were some impartial method capable of discerning that the law of State A makes better socioeconomic sense than the conflicting law of State B, it is highly doubtful that the judges of State A can be trusted to employ that method dispassionately. Judges are likely to be biased in favor of local law, especially if they played a role in adopting it.⁶⁴ There are also serious problems with the assumption that outlier laws are worse than mainstream policies, or that new laws are better than old ones. On the one hand, as Currie recognized, "not all minority rules are archaisms. Almost all

⁶⁰ Kramer, *supra* note 40, at 339.

⁶¹ See Jean M. Cary & Sharon Scudder, *Breaking Up Is Hard to Do: North Carolina Refuses to End Its Relationship with Heart Balm Torts*, 4 ELON L. REV. 1, 2 (2012).

⁶² See, e.g., *Milkovich v. Saari*, 203 N.W.2d 408, 417 (Minn. 1973) ("In our search for the better rule, we are firmly convinced of the superiority of the common law rule of liability to that of the Ontario guest statute.").

⁶³ Kramer, *supra* note 28, at 1997 (arguing that Leflar's theory violates the federal Full Faith and Credit Clause).

⁶⁴ See, e.g., *Guzman*, *supra* note 59, at 896–97 ("Even a court seeking to be impartial is made up of judges that are steeped in the legal and intellectual traditions of their own jurisdiction. In attempting to identify the best law, therefore, one would expect them to have views that are similar to the views of their own legislature.").

progressive innovations in the law are in the minority for a while.”⁶⁵ On the other hand, it is far from clear whether better law enthusiasts would be as sanguine about “emerging law” when the trend is in favor of tort reform or some other, perhaps less than progressive, development.

These critiques are powerful. However, as indicated, I would suggest that better law theory can be criticized on at least two levels. The first level of critique, which we have just seen, focuses principally on the clash of ultimate values. Thus, when Massachusetts insists that married women lack capacity to guarantee their husbands’ contracts, it elevates married women over their husbands’ creditors; this judgment seems diametrically opposed to Maine’s commitment that freedom of contract should prevail even at the expense of a vulnerable class of debtors like married women.⁶⁶ By what method can a court credibly purport to reconcile these warring gods? “Well, each to his own,” as Currie said. “Let Maine go feminist and modern; as for Massachusetts, it will stick to the old ways.”⁶⁷

The second level, the level at which my present critique operates, does not necessarily require a disagreement over fundamental values. The states whose laws are in conflict obviously disagree about the specific legal rule before the court. But, nevertheless, let us assume that we can be certain that the states involved will often desire the same, or substantially similar, ultimate goals with respect to socioeconomic welfare. Leflar, at least, was confident that such would be the case more often than not.⁶⁸ Assuming that much, the question then becomes whether the

⁶⁵ Brainerd Currie, *The Disinterested Third Estate*, 28 LAW & CONTEMP. PROBS. 754, 780 (1963); *see also* Kanowitz, *supra* note 59, at 289 (“The history of the guest statutes is itself an effective refutation of the better law approach which intimates that newer is better. When enacted the guest statutes themselves represented the newer law modifying the preexisting common law which had allowed guests to recover from their hosts for the latter’s ordinary negligence.”).

⁶⁶ *Milliken v. Pratt*, 125 Mass. 374 (1878).

⁶⁷ Currie, *supra* note 21, at 85–86.

⁶⁸ Leflar, *supra* note 29, at 294 (“Ordinarily differences in common-law rules between states do not represent deep and genuine differences in social policy. . . . As far as social policy in the two states is concerned, despite the differing decisions, it is apt to be about the same.”).

court may permissibly choose its own law based on the conclusion that its rule is better, as in more likely to promote whatever the end goal is in a given scenario. My contention is that this sort of inquiry is far more difficult than the better law theory and its defenders suppose, primarily because the theory begins from an overly simplistic view of private law systems as unbundled amalgamations of individual legal rules.

2. Second-Order Critique

The better law inquiry is unsound because it overlooks important structural features of private law. I will argue that, perhaps given its debt to legal realism, the better law approach—in theory and in practice—reveals a conception of private law as a collection of individual legal rules that are atomized and functionally independent of one another. Such an implicit theory of private law, which has a deep affinity with Hohfeld’s famous picture of property as a formless bundle of malleable interests, goes a long way to explaining better law theory’s confidence that it can focus on individual laws, one by one as the cases arise, and assess each specific rule for its tendency to promote socioeconomic welfare. This methodology is problematic, as is the basic vision of private law that undergirds it.⁶⁹ Specifically, Leflar’s approach leaves courts vulnerable to several fallacies, including the related fallacies of isolation, composition, and division. It overlooks system effects and tailoring as important features of private law institutional design. And it remains vulnerable to critique from the general theory of second best in economics. While these various bases of criticism are somewhat far-flung, their important common ground is the insight that legal rules often hang together and function in tandem as part of a global system. Consequently, it is unsophisticated to ask whether one or another specific legal rule, considered in isolation, “better” advances a specified end. Hence, even in those situations where the ends are

⁶⁹ See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995). See generally John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 553–60 (2003).

not controversial, the above theories place important—but largely overlooked—constraints on the capacity of better law analysis to furnish good reasons to choose one rule over another.

In short, the better law approach largely ignores the possibility that private law domains are in fact bundled, but that the bundles exhibit deliberate structures that depend on the dynamic interplay among their constituent legal rules. If that proposition is correct even some of the time, it makes little sense to reflexively pluck out a rule from State A’s bundle and a rule from State B’s bundle and then to ask which rule makes better socioeconomic sense. Better law is misguided even on its own terms.

A. Two Views of the Bundle and System Effects

Better law theory instructs judges to consider legal rules one by one, as each is brought by the litigants before the court. The objective of this dispassionate inquiry is to determine the “[s]uperiority of one rule of law over another, in terms of socio-economic jurisprudential standards.”⁷⁰ This tendency to focus on individual rules, and to appraise each in light of what we take to be its purpose or effects, ties into the legal realist conviction that private law has no architecture but is instead a bundle of interchangeable regulatory devices. Indeed, as Professors Merrill and Smith have written specifically with respect to property law, “the main lesson of the bundle of rights picture of property is that property is a collection of interests and property law is a collection of individual policy-driven rules.”⁷¹ On this way of thinking about private law, it makes good sense for analysts to “evaluate[] individual legal rules according to whether they serve the overall maximization of . . . social welfare.”⁷² Insofar as the bundle picture implicitly

⁷⁰ Leflar, *supra* note 29, at 296.

⁷¹ Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle? The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681, 707 (2014); *see also id.* at 682–83 (“Hohfeld’s analysis of legal concepts was associated with a substantive theory of property as a formless and infinitely malleable collection of rules to be shaped in accordance with ad hoc perceptions of public policy.”).

⁷² Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 962–63 (2009).

authorizes picking and choosing among legal rules to advance the social good as the opportunities arise, it shouldn't be surprising that the scholars who ushered in the post-Bealian choice of law era found this basic vision hospitable to their project of progressive reform.

A vivid application of the bundle-based view is the choice of law technique known as *dépeçage*, or the process of applying the laws of different jurisdictions to discrete issues in the same case.⁷³ The method has been embraced by nearly all modern choice of law theorists, especially better law proponents.⁷⁴ Strikingly, by combining and recombining legal rules according to their best sense of public policy, courts employing *dépeçage* will sometimes reach outcomes that could not have been obtained under the domestic law of any of the states involved. For example, in *Sabell v. Pacific Intermountain Express Co.*,⁷⁵ two Colorado citizens got into a car crash in Iowa, for which the plaintiff brought suit in Colorado. Under Iowa law the defendant was illegally parked and was therefore negligent per se. However, the plaintiff was also negligent, and would have been barred from recovering under Iowa's rule of contributory negligence. By contrast, Colorado's comparative negligence regime would have permitted the plaintiff to recover, but may not have held the defendant negligent. Engineering what it thought to be the correct outcome, the Colorado Supreme Court applied Iowa law to the defendant, but Colorado law to the plaintiff, thereby repackaging the legal rules to enable a recovery the plaintiff could not have obtained under the purely domestic law of either state.⁷⁶

To be sure, *dépeçage* and better law theory are distinct concepts within choice of law, but they flow from the same conviction that private law bundles have no necessary structure, and

⁷³ See generally Willis L.M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973).

⁷⁴ See, e.g., Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 748 & n.46 (1990).

⁷⁵ 536 P.2d 1160 (Colo. 1975).

⁷⁶ See WILLIAM RICHMAN ET. AL, UNDERSTANDING CONFLICT OF LAWS 189 (4th ed. 2013).

that focusing on individual rules issue-by-issue will best allow judges rationalize private law to promote the public good.

But there is a danger in this outlook, even if we accept the instrumentalist theory of private law on which it is premised. The danger lies in failing to perceive that sometimes legal rules are bundled deliberately, in the sense that certain combinations of rules promote the social good in ways that are hard to recognize when the rules are considered one by one. Kramer alludes to this idea when he remarks that, generally speaking, “the laws of a state are part of a system of laws and are intended to fit together.”⁷⁷ This insight has important implications for the wisdom, or even coherence, of the better law analysis.

To take a very simple example, suppose a resident of Nevada is killed in Arizona by an Arizona tortfeasor. His surviving wife and children, who are also Nevada residents, bring a wrongful death suit in Nevada.⁷⁸ Both Nevada and Arizona provide a cause of action for wrongful death, but Arizona caps the damages that can be recovered. Suppose all reasonable courts agree that laws favoring recovery make better socioeconomic sense, from the perspective of compensating injured parties and deterring future antisocial behavior. Would that stipulation provide a sufficient justification for the Nevada court to choose its own unrestricted damages regime? If the court considers only the articulated goal—to spread the losses from injury and to deter bad behavior—and the conflicting rules at issue—capped versus uncapped damages—better law theory would appear to give a compelling reason for Nevada to choose its own unlimited recovery over Arizona’s more stingy alternative.

⁷⁷ Kramer, *supra* note 40, at 286; cf. Perry Dane, *Vested Rights, “Vestedness,” and Choice of Law*, 96 YALE L.J. 1191, 1222 (1987) (“A system of norms fits together. It is capable, as a whole, of forming the basis for judging behavior and establishing rights and duties.”).

⁷⁸ This assumes the court can obtain personal jurisdiction over the defendant. If the defendant is a corporation, perhaps it is incorporated in Nevada. If the defendant is an individual, he could be domiciled in Nevada even though he spends the bulk of his time in Arizona.

But now suppose that the wrongful death cause of action in Arizona has fewer elements, or allocates the burdens of proof in such a way as to make recovery easier in Arizona than it is in Nevada.⁷⁹ Can the Nevada court still say with confidence that its unlimited damages rule strikes a more enlightened balance between compensation and deterrence? Would it be reasonable to reject Arizona's damages cap on grounds that it is "worse"?

It is my contention that asking the question in that way—asking "which substantive law is best as a matter of social policy and justice"—is ill advised. Neither state's damages rule operates alone; each is part of a bundle, and whatever instrumental value each rule has will depend to a large degree on the other legal rules that make up the system of which it is only one element. If these analytical difficulties plague ordinary common law adjudication, they are likely to be even more vexing when a court undertakes to consider the rule of another state with whose system the court will be less familiar. Indeed, when a rule is "evaluated without reference to the rest of its bundle," the "evaluator has committed what is known in law and economics as the 'isolation fallacy.' When a rule is considered in isolation without regard to the general policy of which that rule may be only a part, the outcome may be bad policy."⁸⁰ The fallacy of isolation is closely related to fallacies of division and composition, each of which "mistakenly assumes that what is true of the aggregate must also be true of the members, or that what is true of the members must also be true of the aggregate."⁸¹ Courts doing better law are especially vulnerable to fallacious reasoning along these lines, insofar as they are apt to assess a single rule to the exclusion of its counterparts, thereby neglecting the ways in which it interacts dynamically with

⁷⁹ Kramer offers a similar variant on the famous conflicts case *Hurtado v. Superior Court*, 522 P.2d 666 (Cal. 1974). See Kramer, *supra* note 40, at 309 n.105.

⁸⁰ Allen & O'Hara, *supra* note 56, at 1035.

⁸¹ Adrian Vermeule, *The Supreme Court, 2008 Term — Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 6 (2009); see also Smith, *supra* note 72, at 976 ("[T]he fallacy of division . . . assume[s] that proper parts of the mechanism must share the desirable properties we should be looking for in the whole. . . .").

its surrounding context. This blind spot makes it more difficult for courts to accurately discern a given rule's purposes and effects, complicating the task of determining which law is really better.

To take another brief example, suppose New Jersey has a law of charitable immunity. If New Jersey immunizes charities from negligence liability, maybe it does so because New Jersey also makes it comparatively more difficult for an organization to register as a charity in the first place. If that's true, a court in a state that doesn't have charitable immunity wouldn't get the full picture simply by asking whether charitable immunity or non-immunity is the "better" way to advance socioeconomic welfare; the question is charitable immunity or non-immunity in conjunction with what other rules, institutions, and the like.

This line of critique is bolstered by public law treatments of so-called "system effects." A system effect arises "when the properties of an aggregate differ from the properties of its members, taken one by one."⁸² Hence, an analyst who seeks to evaluate a given legal rule or institutional feature, but fails to recognize system effects, opens himself to the same sorts of fallacies described above. The idea here is very similar to that just discussed, namely that it makes little sense to ask whether or not a specific variable is desirable, unless we know the other variables it will interact with. For example, "[i]f the constitutional first best is a parliamentary system with proportional representation, it does not follow that proportional representation is still desirable in a system with an independently elected executive."⁸³ Thus, even if all agree that our public institutions should be designed to reinforce representation, someone asking whether proportional representation is the "better" rule would not arrive at a coherent answer without knowing the surrounding legal topography. The same could be said of uncapped damages or

⁸² Vermeule, *supra* note 81, at 6.

⁸³ *Id.* at 20–21.

charitable immunity: whether either rule represents the better, more enlightened or desirable law depends on the architecture of the system in which it is embedded.

These insights are relatively simple but they complicate the better law analysis a great deal. Of course, the court in a conflicts case faces a choice between individual rules rather than whole systems. But the point is that choosing a rule on the ground that it is in some sense “better”—without accounting for the rule’s place in a larger legal regime—is not a good reason to justify the choice. Other reasons must be supplied.

Interestingly, recognizing the potentially bundled nature of legal rules might provide justification for a modified version of at least one of the moves favored by better law theorists: the refusal to enforce obsolete laws. But a law should only be deemed obsolete in the special sense Kramer has proposed, namely, “inconsistent with prevailing legal and social norms *in the state that enacted it*.”⁸⁴ This notion is very different from the idea, held by Leflar and others, that courts can confidently deem a legal rule “bad” if it is out of step with the laws of other jurisdictions.

In theory at least, if a given case presented a conflict between two rules and we could know with certainty that the foreign law did not in fact contribute to any system of rules and norms, but had been kept on the books out of sheer inertia or perhaps oversight, that might in principle provide a valid reason to decline to enforce it and to choose forum law instead. Of course, resolving such a case by the better law approach would leave a court open to all of the first-order criticisms outlined above. The second-order critique would be arguably weaker, however, to the extent that we could be assured the law under consideration was not part of a genuine bundle, did not contribute to any emergent properties of the system, did not function through indirection, and the like: assessing the rule on its own would therefore pose less risk of

⁸⁴ Kramer, *supra* note 40, at 334 (emphasis added).

fallacious reasoning. Possible examples include *Milliken v. Pratt*,⁸⁵ in which the Massachusetts Supreme Judicial Court considered whether to enforce a law that prohibited married women from making contracts, but where the law had been abrogated by the time the case came up on appeal. Similarly, Kramer cites *Grant v. McAuliffe*,⁸⁶ which “involved an Arizona rule that tort actions abate if not brought before the death of the tortfeasor. This rule rested on an outmoded theory that civil liability is punitive, whereas the rest of Arizona’s tort law had long since been modified to reflect modern notions of compensation and deterrence.”⁸⁷

In these cases, the argument goes, better law reasoning is less objectionable because the other state’s rule is more appropriately singled out. Even if that is true, however, determining that a law is obsolete in this special sense will almost surely entail tremendous difficulties. Given the herculean nature of the empirical task and the opportunities for abuse of the method, courts should refrain from undertaking this sort of analysis at all.

B. Tailoring

Dynamic bundling and system effects demonstrate the easily overlooked ways in which legal rules interacting with one another can produce effects that would be hard to discern if each rule were considered individually. The takeaway is that it is misguided to pose as an abstract question whether one state’s rule is better than another. A parallel but distinct criticism highlights better law theory’s tendency to neglect the ability of private law to tailor legal rules to the prevailing extra-legal conditions in a given jurisdiction. By “tailoring” I mean to focus primarily on the relationship between law and the facts on the ground, as opposed to the relationship between different laws in the same system. But the upshot is similar: the possibility that a rule under consideration has been tailored to fit some particular set of circumstances has

⁸⁵ 125 Mass. 374 (1878).

⁸⁶ 264 P.2d 944 (Cal. 1953).

⁸⁷ Kramer, *supra* note 40, at 335.

the potential to confound the better law inquiry, insofar as the analyst evaluating a foreign rule's desirability is liable to overlook important features of the rule's surrounding context.

For example, suppose Vermont and Maine both set a speed limit of sixty-five miles per hour on their comparable highways.⁸⁸ In Vermont, driving above the limit is negligence per se, while in Maine it is not. Presumably Vermont and Maine agree that their aim is to encourage safe driving. Vermont's per se negligence rule might make very good socioeconomic sense if, for a variety of reasons, Vermont finds it more difficult or more costly to police its highways. In that case, providing a stronger threat of civil liability via a per se negligence rule might contribute some measure of deterrence to make up for the visible absence of state troopers. Maine, for its part, might find it cheaper to make use of a robust police force, in which case a rule of negligence per se makes less sense.

Or suppose Maine drops its speed limit to fifty-five miles per hour, and still has no per se negligence rule. This bundle of laws makes good socioeconomic sense under the following conditions: Suppose that Maine, like Vermont, is concerned primarily to prevent people from exceeding sixty-five miles per hour. But Maine lawmakers have reason to worry that speedometers are sometimes inaccurate; in that case, a rule that speeding is negligent per se might be unfair to people who speed unknowingly. So they drop the limit to fifty-five but instruct police not to ticket a driver unless he is clocked at sixty-five or above, on the theory that if a driver is flying by at seventy miles per hour, he should know that he's exceeding fifty-five even if his speedometer is faulty.

⁸⁸ The following speed limit hypotheticals are drawn, with slight modifications, from Allen & O'Hara, *supra* note 56, at 1036.

Similarly, the substantive rules of contract law can be tailored to reflect local conditions in different communities.⁸⁹

Judges doing better law analysis are vulnerable to overlook these features of foreign law, and therefore to misapprehend the variety of means by which agreed upon ends can be pursued. Indeed, what these considerations reveal is that “states can use differing bundles of mechanisms to produce a given ex ante behavioral incentive,”⁹⁰ and that whether a specific rule should be desired depends on the combination of other rules and extra-legal circumstances that prevail in the jurisdiction. And there are undoubtedly a complex of other variables, like the availability of insurance coverage or the prevalence of pedestrians and crosswalks, that affect the wisdom of a package of rules. The simple point is that courts deciding true conflicts should not structure their analysis around the question whether negligence per se, or the parol evidence rule, makes better socioeconomic sense than a different home state law.

Note that the type of tailoring discussed in this section has assumed that states with different legal rules designed their institutions to promote the same ends: traffic safety, efficient contracting, and the like. That need not be the case, of course. New York might insist on a stringent statute of frauds in order to encourage out of state residents to rely on New York stockbrokers, while New Jersey, not being an enterprise state, might adopt a more relaxed statute of frauds in part because its priorities are different.⁹¹ This divergence between the states is undoubtedly an example of tailoring, and if it makes good socioeconomic sense to encourage New Jersey residents to do business with New York stock brokers, a court will have a hard time choosing which rule to enforce based on better law criteria alone.

⁸⁹ See, e.g., Gregory Klass, *Convergence by Design, or Who Contracts and the Plural Functions of Contract Law* 73–74 (Jan. 2014) (unpublished draft) (on file with author).

⁹⁰ Allen & O’Hara, *supra* note 56, at 1036.

⁹¹ See, e.g., *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 248 N.E.2d 576 (N.Y. 1969).

C. Second Best Law

The arguments advanced so far are also consistent with insights drawn from a principle in economics known as the “general theory of the second best.”⁹² To get the basic idea, suppose we have a system with multiple variables. For the system to function optimally, each individual component part must take on a specific state, call it the prime state. But suppose one of those component parts cannot attain its prime state; that is, suppose one of the variables is constrained such that it cannot play the role it would have to play in order to bring about the optimal system. So the best system cannot be achieved. Under those conditions, there is a powerful intuition that we can produce the next best system by holding as many of the other variables as possible at each of their own prime states. But that’s false: holding all of the other variables at their prime states might not produce a second best system overall. In other words, “the absence of any of the jointly necessary conditions [for the optimal state] does not imply that the next-best allocation is secured by the presence of all the other conditions. Rather, the second-best scenario may require that other of the necessary conditions for optimality also be absent—maybe even all of them. The second-best may look starkly different than the first best.”⁹³ This is true because “the variables interact,” and as a consequence, “a failure to attain the optimum in the case of one variable will necessarily affect the optimal value of the other variables.”⁹⁴

To illustrate by way of example, suppose a monopolist controls the supply of water.⁹⁵ It should seem obvious that breaking up the monopoly would make good socioeconomic sense: the

⁹² For the classic account of the theory of second best, see generally R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956); see also WELFARE ECONOMICS OF THE SECOND BEST (Dieter Bös & Christian Seidl eds., 1986) (providing a review of the literature following Professors Lipsey and Lancaster’s article).

⁹³ *Making the Second Best of It*, Free Exchange, THE ECONOMIST (Aug 21, 2007, 3:46 PM), http://www.economist.com/blogs/freeexchange/2007/08/making_the_second_best_of_it.

⁹⁴ Vermeule, *supra* note 81, at 18.

⁹⁵ I borrow this illustration from Thomas S. Ulen, *Courts, Legislatures, and the General Theory of Second Best in Law and Economics*, 73 CHI.-KENT L. REV. 189, 204–07 (1998).

price of water would fall, supply would rise to meet true levels of consumer demand, and so forth. But suppose further that one of the principal consumers of water is a manufacturer whose factories pollute the air. Once water is priced and produced at a competitive level, water becomes cheaper, and so the factory might increase its production, boosting levels of pollution as well. The harms from the increased levels of air pollution might overtake the benefits from the cheaper, more plentiful water, leaving society worse off than it was when water was under monopoly control. Moving on to try and devise a new rule to deal with the polluting factory runs the same risk, namely, that it will produce new and different second-best effects harmful in the aggregate. Other second-best effects are not difficult to imagine.

The implication is that “seriatim correction of market imperfections will not necessarily improve overall social welfare,” and that “piecemeal correction, or correction of a subset of the imperfections, might reduce social well-being.”⁹⁶ If that is true, it seems to follow that considering the desirability of legal rules seriatim—as Leflar’s theory proposes—is likely to provide a distorted analysis of their actual individual tendency to promote the social good. The basic point is that assessing the desirability of one specific rule can be very difficult without understanding how the rule interacts with its surrounding rules and circumstances. Consequently, what can appear to be good, enlightened policy might not be, and vice versa.

Strikingly, “[n]either private nor public law economic analysts . . . have paid much attention to . . . the General Theory of Second Best.”⁹⁷ Choice of law scholarship is no exception. In fact, “efficiency analysis in general, and law and economics in particular, has, to date, had only a minor impact on choice of law.”⁹⁸ Perhaps it’s unsurprising that choice of law theorists and legal economists have neglected system effects and second-best effects, given the influence

⁹⁶ *Id.* at 191.

⁹⁷ *Id.*

⁹⁸ Guzman, *supra* note 59, at 885–86.

that Hohfeld's bundle picture—and legal realism in general—have had on modern choice of law theory as well as law and economics.⁹⁹ As previously argued, the bundle framework is agreeable to the kind of issue-by-issue analysis those scholars have favored. But the insights derived from the theory of second best place serious constraints on the type of analysis better law proponents find appealing. The theory of second best calls into question the wisdom of the whole enterprise.

Obviously, the general theory of second best has implications far beyond the domain of choice of law.¹⁰⁰ How judges who engage in economic or efficiency analysis should respond to its challenge is far beyond the scope of this paper. Indeed, even though in principle it should be possible for a highly sophisticated analyst to incorporate second-best and system effects when crafting legal rules, doing so is almost certainly beyond the competence of state and federal judges.¹⁰¹ When it comes to choice of law, it is enough for my purposes to say that courts should justify their choices based on reasons that do not turn on projections about the relationship between the specific rules and socioeconomic welfare, however defined.

IV. Conclusion

As a choice of law theory, Leflar's better law approach has always been controversial. This paper has sought to supply additional reasons to be wary of the sort of analysis that asks whether one or another specific legal rule is a better instrument of social welfare. Hence, even if we accept an instrumentalist theory of private law, and even if we sign off on the normative

⁹⁹ See, e.g., Smith, *supra* note 72, at 962–63 (“Law and economics evaluates individual legal rules according to whether they serve the overall maximization of wealth or social welfare. This focus has led law and economics to embrace the bundle-of-rights picture because it conveniently chops up property questions into bite-sized portions.”); Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1178 (2006) (“[L]aw and economics inherits the anticonceptualism and antiformalism of the legal realists.”).

¹⁰⁰ Ulen, *supra* note 95, at 191–92 (“Professor Richard Markovits has almost single-handedly shown the potentially devastating implications of the General Theory of Second Best for the general claim of efficiency in law and economics. Thus far, the mainstream of law and economics has not responded.”).

¹⁰¹ *Id.* at 217.

acceptability of courts in one state making value judgments about the wisdom of laws enacted in their sister states, there remain serious reasons to doubt the soundness of the better law method.

The better law method proceeds from a vision of private law that is overly simplistic and ultimately reductive, primarily because it fails to recognize the extent to which private law domains are systems, deliberately bundled and tailored in light of their constituent features and the landscapes in which they operate. This basic oversight leaves courts vulnerable to a variety of logical fallacies when they evaluate foreign law. This critique remains true even if some legal domains are better engineered than others. Indeed, my argument does not depend on the proposition that every law operates coherently with its fellow laws. That broad proposition admittedly seems implausible; laws may often work at cross-purposes. In theory, therefore, it might be possible for courts to do the sort of rigorous systemic analysis I think would be necessary to justify the better law approach. However, the costs involved are likely to be prohibitively high, and the odds of success sufficiently low, that the better law approach to true conflicts should be abandoned.

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