

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 case, 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. Suppose Massachusetts tort law makes fireworks dealers strictly liable for injuries caused by products they sell. So Smith would win. But suppose that under New Hampshire law, fireworks dealers are immune from liability for such injuries if the injuries resulted from misuse. Smith bungled the fireworks; therefore Jones would win. Which state's law should the Massachusetts court apply? And, just as importantly, on what basis should it choose?

The judge facing such a dilemma need not go it alone. Indeed, a crowd of law professors will be eager to guide his hand. According to one of the prevalent modern theories, our judge should consult five different criteria, the most important of which would have him 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."<sup>1</sup> 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 states,<sup>2</sup> although its influence may be considerably more widespread.<sup>3</sup> It has been the subject of considerable controversy, attracting prominent critics and defenders alike.

This Note will examine Leflar's better law approach and will advance a line of critique that has not found voice in the secondary literature. 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 probably cannot be trusted to discover it, and anyway it would offend the notion of equal sovereignty if one state were allowed to prefer its own laws over those prevailing elsewhere for no other reason than that it found those foreign laws distasteful. We can call these objections relativistic, epistemic, or sovereignty-based critiques. This Note shares many of these misgivings. But this Note proposes what

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

<sup>2</sup> Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 AM. J. COMP. L. 217, 279 (2013).

<sup>3</sup> See *infra* notes 4–9 and accompanying text. See generally Joseph William Singer, Commentary, *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).

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might be called a systemic critique. It differs from extant critiques because it applies even when states agree on the “good” to be pursued (and therefore it is irrelevant, for present purposes, whether the good is natural or purely positive), and because it brackets all normative questions turning on the nature of sovereignty: it gives no credence to whatever umbrage one state might take at having its law rejected on better law grounds.

That is, even if we accept the better law theory’s basic but controversial premises — that the good is an objective or at least agreed-upon entity, that private law is instrumental in nature, and that there is nothing wrong with the courts of one state making value judgments about the laws of its sister states — the better law approach should still be avoided. As this Note argues, 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 unison 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. This line of critique draws on insights from inside and outside private law, including from public law institutional design and the general theory of second best in economics. If this Note’s 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 Note 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 Note is on the reasons courts give for the choices they make. This Note’s 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 the criticisms voiced here were taken to heart. Indeed, it is perfectly possible for a reader to accept this Note’s methodological critique without endorsing the illustrative examples discussed at various points.

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).<sup>4</sup> But registering the prevalence of better law analysis is controversial. On one hand, even courts that have selected Leflar's method don't undertake a better law inquiry in every conflicts case. On the other, some scholars argue that all or most of the modern choice of law theories reduce to better law, both in principle and in practice. For instance, Professor Joseph Singer has long maintained that "[b]etter law is the invisible angel of conflicts law. It is the genie stuck in the bottle, unable to come out yet somehow performing its wonders silently and unnoticed."<sup>5</sup> The principles that animate Leflar's approach, contend Singer and his allies, "are actually part of the *Second Restatement*, settled practice in the courts, and recent proposals to modernize conflicts law."<sup>6</sup> Giving credence to these speculations, an exhaustive empirical study conducted in 1992, covering every reported state and federal decision in the country going back as far as 1960,<sup>7</sup> concluded that in practice the modern conflicts approaches "are *not*, by and large, distinguishable from each other."<sup>8</sup> And, most importantly for the purposes of this Note, the study further concluded that "the real issue in conflicts cases is the relative merits of the rules" competing for application,<sup>9</sup> exactly as Leflar would have wanted.

Other scholars are more willing to credit the alternative modern approaches that purport to be content neutral.<sup>10</sup> Still others report that "the influence of Leflar's choice-influencing considerations — particu-

<sup>4</sup> Symeonides, *supra* note 2, at 279.

<sup>5</sup> Singer, *supra* note 3, at 659.

<sup>6</sup> *Id.* at 660; see also Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 59 (1989) ("[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."). For similar arguments, see Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 735 (1990); Singer, *Real Conflicts*, *supra*, at 45-49; Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 65 n.64 (1991) (noting that "most modern approaches are 'better law' approaches"); and Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595, 600 (1984). Perhaps not coincidentally, these scholars tend to take a favorable view of better law.

<sup>7</sup> Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 359 (1992).

<sup>8</sup> *Id.* at 377.

<sup>9</sup> *Id.* at 383.

<sup>10</sup> See, e.g., Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1967 (1997) [hereinafter Kramer, *Unconstitutional Public Policy Exception*]. But see Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 339 (1990) ("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.").

larly its better law component — is waning,”<sup>11</sup> although such observations must be subject to the caveat that what courts say and what they do, especially in the conflicts realm, evidently are not always the same.

Resolving these debates is beyond the scope of this Note. But whichever camp is correct, it is indisputable that Leflar was tremendously influential.<sup>12</sup> This influence has persisted despite the criticisms leveled at his theory in the decades since he first proposed it. To the extent this Note is able to contribute something new to the debate over better law, it has the potential to prod courts and commentators to appraise better law’s strengths and weaknesses afresh. And of course, if many of the modern approaches really do amount to better law under different names, the argument advanced here might enjoy broader application.

This Note unfolds 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 this Note’s 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 critiques and then develop this Note’s systemic critique at greater length. Part IV concludes.

## I. CHOICE OF LAW THEORY IN HISTORICAL PERSPECTIVE

This Part briefly reviews the historical development of choice of law doctrine. It will prove useful in framing the systemic critique of the better law approach developed in Part III.

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.”<sup>13</sup> The orthodox came from both civil law and common law systems. They include Ulrich

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<sup>11</sup> William M. Richman, *A New Breed of Smart Empirically Derived Conflicts Rules: Better Law than “Better Law” in the Post-Tort Reform Era*, 82 TUL. L. REV. 2181, 2184 (2008) (reviewing SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* (2006)).

<sup>12</sup> 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, 1011–12 (1999).

<sup>13</sup> Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 802 (1983).

Huber, Joseph Story, Friedrich Carl von Savigny, Albert Venn Dicey, and, of course, Joseph Beale.<sup>14</sup>

Beale, a professor at Harvard Law School and Reporter for the first *Restatement of 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.<sup>15</sup> Beale's particular variant emphasized "act-territorialism"<sup>16</sup> and the so-called "vested rights" principle.

Beale's system, heavily indebted to Joseph Story,<sup>17</sup> maintained that a person becomes vested with a cognizable legal right if and only if the law of the jurisdiction in which the relevant acts took place created such a right.<sup>18</sup> Subject to a few exceptions,<sup>19</sup> 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,<sup>20</sup> or in a contract action, the place of formation or performance depending on the precise question at issue.<sup>21</sup> Only that state's law could define the scope of the parties' rights and obligations.<sup>22</sup>

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.<sup>23</sup> 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, "[t]he influence of Hohfeld" on the First Restatement "is nowhere apparent."<sup>24</sup> Beale's realist detractors decried his syllogistic jurisprudence as conceptually vacuous, while application

<sup>14</sup> LEA BRILMAYER, *CONFLICT OF LAWS* 16–17 (1995).

<sup>15</sup> *Id.* at 21.

<sup>16</sup> See Perry Dane, *Conflict of Laws*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 197, 199 (Dennis Patterson ed., 2d ed. 2010) (explaining the difference between person-territorialism and act-territorialism).

<sup>17</sup> Beale dedicated his treatise to Story. 1 JOSEPH H. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* (1935).

<sup>18</sup> See *id.* § 61.1.

<sup>19</sup> See BRILMAYER, *supra* note 14, at 24.

<sup>20</sup> RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 377, 384–397 (AM. LAW INST. 1934).

<sup>21</sup> *Id.* §§ 311 cmt. d, 323, 325, 360.

<sup>22</sup> For an iconic example, see *Alabama Great Southern Railroad v. Carroll*, 11 So. 803 (Ala. 1892). Note that Beale's system allowed a forum state to decline to apply foreign law if that law was sufficiently offensive to its own public policy. RESTATEMENT (FIRST) OF CONFLICT OF LAWS, *supra* note 20, § 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 16, at 199.

<sup>23</sup> See Dane, *supra* note 16, at 199–200.

<sup>24</sup> George R. Farnum, *Terminology and the American Law Institute*, 13 B.U. L. REV. 203, 217 (1933).

of the First Restatement was derided as arbitrary, indeterminate, and a stumbling block to reform.<sup>25</sup>

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 that law was a purposive human activity, not a conceptual enterprise.”<sup>26</sup> Raising a common objection, Professor Elliott Cheatham implored that “vital problems of social and economic policy must be considered before a wise choice between conflicting rules can be made.”<sup>27</sup>

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.<sup>28</sup> Currie declared that his proposal would replace the “meta-physical 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.”<sup>29</sup> 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.”<sup>30</sup>

Dubbed “governmental interest” analysis,<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> Only if both states had an interest did a “true con-

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<sup>25</sup> See BRILMAYER, *supra* note 14, at 33–41.

<sup>26</sup> *Id.* at 37.

<sup>27</sup> Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 370 (1945).

<sup>28</sup> See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963) (collecting his articles on the subject).

<sup>29</sup> BRAINERD CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, *supra* note 28, at 177, 180.

<sup>30</sup> *Id.* at 183.

<sup>31</sup> BRAINERD CURRIE, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, *supra* note 28, at 188, 188–89.

<sup>32</sup> See CURRIE, *supra* note 29, at 183–84.

<sup>33</sup> See *id.*

<sup>34</sup> See *id.* at 185–87; see also BRILMAYER, *supra* note 14, at 61–66.

flict” 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.<sup>35</sup>

Modern choice of law theorists writing in Currie’s wake largely agreed with his assessment of state interests, but — importantly — they refused to accept his conclusion 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 alternatives — including ones called “comparative impairment” theory<sup>36</sup> and the approach taken in the *Second Restatement of Conflicts of Law*<sup>37</sup> — 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.”<sup>38</sup>

## II. BETTER LAW

In 1966 Professor Robert Leflar entered the fray. His own proposed choice of law method listed five “choice-influencing considerations” that 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 (5) application of the better rule of law.<sup>39</sup> However, according to Professor Lea Brilmayer, “the cases applying Leflar’s system have not paid much attention to the factors of predictability and maintenance of interstate order.”<sup>40</sup> Instead, Leflar’s fourth and fifth factors predominate in court decisions that employ his method.<sup>41</sup> Leflar’s fifth factor represents his primary innovation, and the one that has inspired the most spirited responses.

<sup>35</sup> CURRIE, *supra* note 29, at 181; *see also* BRILMAYER, *supra* note 14, at 66, 88.

<sup>36</sup> Comparative impairment theory asks which state’s policies would be least impaired if the other state’s law were applied. *See* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 18 (1963).

<sup>37</sup> The Second Restatement employs an amorphous test to identify the state with the “most significant relationship” to each issue in a given case. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (AM. LAW INST. 1971).

<sup>38</sup> Kramer, *Unconstitutional Public Policy Exception*, *supra* note 10, at 1995. These approaches have all been subject to extensive critique on many grounds, most of which are beyond the scope of this Note. *See generally* BRILMAYER, *supra* note 14, at 76–125.

<sup>39</sup> Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966).

<sup>40</sup> BRILMAYER, *supra* note 14, at 71.

<sup>41</sup> *Id.* Notably, courts assessing “governmental interests” under Leflar’s rubric have taken a somewhat more expansive view than the sorts of interests Currie had envisioned. For instance, the Minnesota Supreme Court has described Minnesota’s interest as a “justice-administering state,” *Milkovich v. Saari*, 203 N.W.2d 408, 414 (Minn. 1973), an interest that Currie never explicitly rec-

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,”<sup>42</sup> or, second, “justice in the individual case.”<sup>43</sup> 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,”<sup>44</sup> and elsewhere, that the better law analysis “has to do with preferred law, not preferred parties.”<sup>45</sup> Although choosing the better law might often produce a just outcome as between plaintiff and defendant, concluding that the plaintiff or defendant should win as a matter of justice or fairness 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.<sup>46</sup>

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.”<sup>47</sup> This “preference is objective, not subjective,” and in many instances should not require the judge to undertake an analysis very different from the one he would use to resolve a purely domestic case.<sup>48</sup> 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.”<sup>49</sup>

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ognized and that would seemingly allow the state to take a more cosmopolitan approach than one that simply favors locals.

<sup>42</sup> Leflar, *supra* note 39, at 296.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 296–97.

<sup>45</sup> Leflar, *supra* note 1, at 1588.

<sup>46</sup> Professor Singer, a strong proponent of the better law approach, sometimes seems to equate the “better law” inquiry with “doing justice in the individual case.” *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).

<sup>47</sup> 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 1587–88.

<sup>48</sup> *Id.* at 1588.

<sup>49</sup> Singer, *Real Conflicts*, *supra* note 6, at 81.



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.<sup>50</sup> Leflar offered "Sunday laws, the fellow-servant rule, and married women's incapacity to contract"<sup>51</sup> as illustrations of laws that are "behind the times"<sup>52</sup> and hence a "drag on the coat tails of civilization."<sup>53</sup> Courts have followed this advice: for example, when the Wisconsin Supreme Court heard a tort suit between two 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[es] not reflect present day socio-economic conditions."<sup>54</sup> 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."<sup>55</sup>

In multistate cases not involving anachronistic or aberrational 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.<sup>56</sup> Indeed, as Professor Singer maintains, "multistate cases should ordinarily be resolved by application of what the forum considers to be the substantively best policy."<sup>57</sup>

The 1970s and 1980s were especially heady days for courts employing Leflar's method. Opinions from these courts demonstrated striking solicitude in favor of forum over foreign law, plaintiffs over defendants, and domestic over foreign litigants.<sup>58</sup> By the turn of the millennium, however, the more overt fits of better law enthusiasm had become less frequent, as courts began to caution "restraint and moderation" in utilizing better law, began to incorporate analytical features traditionally associated with the other modern approaches, and in some cases even confessed a loss of confidence in their ability to discern the better law.<sup>59</sup>

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<sup>50</sup> See Leflar, *supra* note 39, at 299.

<sup>51</sup> *Id.* at 299 n.113.

<sup>52</sup> *Id.* at 299.

<sup>53</sup> *Id.* (quoting Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 980 (1952)); see also Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1216 (1946).

<sup>54</sup> *Conklin v. Horner*, 157 N.W.2d 579, 586–87 (Wis. 1968).

<sup>55</sup> *Id.* at 587.

<sup>56</sup> Kramer, *Unconstitutional Public Policy Exception*, *supra* note 10, at 1967.

<sup>57</sup> Singer, *Real Conflicts*, *supra* note 6, at 83. For one recent example, see *Harodite Industries, Inc. v. Warren Electric Corp.*, 24 A.3d 514 (R.I. 2011).

<sup>58</sup> PETER HAY ET AL., *CONFLICT OF LAWS* 58–60 (5th ed. 2010).

<sup>59</sup> *Id.* at 60.

Nevertheless, these relatively recent historical developments “are symptomatic of the increased eclecticism and independence exhibited by many courts in employing the modern choice-of-law methodologies, but do not necessarily reduce the validity of the criticisms directed against the original version of Leflar’s approach.”<sup>60</sup> Indeed, it will come as no surprise that the better law approach has been controversial from the beginning. Some of the more prominent criticisms will be outlined below; this Note’s own critique will follow.

### 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 criticisms, labeled here as relativistic, epistemic, and sovereignty-based critiques, are briefly outlined below.

#### A. Extant Critiques

1. *Relativistic Critiques.* — 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 Larry 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.”<sup>61</sup> Nothing is “good” except what the sovereign says is good, and hence, when two sovereigns disagree, there simply is no higher principle to pronounce which vision is “better.” 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.<sup>62</sup>

2. *Epistemic Critiques.* — A milder form of critique maintains that even if there is such a thing as “better” law, it is beyond judicial competency (or perhaps anyone’s competency) to discover it. Going further, 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, there are deep institutional reasons to doubt that

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<sup>60</sup> *Id.* (footnote omitted).

<sup>61</sup> Kramer, *Rethinking Choice of Law*, *supra* note 10, at 280.

<sup>62</sup> *Id.* at 344; see also Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 893–94 (2002); Leo Kanowitz, *Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws*, 30 HASTINGS L.J. 255, 292 (1978).

the judges of State A could be trusted to employ that method dispassionately. As better law's first few decades made clear, judges are likely to be biased in favor of local law, especially if they played a role in adopting it.<sup>63</sup> In short, better law rests on epistemic and institutional foundations that are highly contestable.

3. *Sovereignty-Based Critiques.* — 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 *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. "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."<sup>64</sup> North Carolina, which in the past decade has seen several million-dollar verdicts for archaic torts like alienation of affections and criminal conversation,<sup>65</sup> would likely agree. Yet states employing better law often cannot avoid making a straightforward value judgment about the desirability of their sister states' competing substantive policies.<sup>66</sup> Kramer has gone so far as to call the better law approach unconstitutional as an affront to the Full Faith and Credit Clause.<sup>67</sup>

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These critiques are powerful. However, as indicated, this Note suggests that better law theory can be criticized on other grounds as well. These extant critiques focus 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.<sup>68</sup> By what method can a court credibly purport to reconcile these warring gods? "Well, each to his own," as Currie said — "[I]et

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<sup>63</sup> See, e.g., Guzman, *supra* note 62, at 896–97.

<sup>64</sup> Kramer, *Rethinking Choice of Law*, *supra* note 10, at 339.

<sup>65</sup> 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).

<sup>66</sup> 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.").

<sup>67</sup> Kramer, *Unconstitutional Public Policy Exception*, *supra* note 10, at 1997.

<sup>68</sup> See *Milliken v. Pratt*, 125 Mass. 374 (1878).

Maine go feminist and modern; as for Massachusetts, it will stick to the old ways.”<sup>69</sup>

By contrast, the critique this Note advances does not necessarily require a disagreement over fundamental values. The states whose laws are in conflict obviously disagree over which specific legal rule is desirable. 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 this alignment would be the case more often than not.<sup>70</sup> Assuming that much, the question then becomes whether the 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. This Note claims 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 sets of individual legal rules.

### B. Systemic Critique

The better law inquiry is unsound because it overlooks important structural features of private law. This Note argues 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.<sup>71</sup> Specifically, Leflar’s approach leaves courts vulnerable to several errors, 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.

<sup>69</sup> BRAINERD CURRIE, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, *supra* note 28, at 76, 85–86.

<sup>70</sup> Leflar, *supra* note 39, 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.”).

<sup>71</sup> See generally ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 *GEO. L.J.* 513, 553–60 (2003).

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 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, and that the bundles exhibit deliberate structures that depend on the dynamic interplay among their constituent legal rules. Such structuring could arise through common law adjudication, or through positive law, or some combination of the two; lawmakers in either institutional setting are capable of considering system effects and the like when crafting the discrete rules that together make up private law. If these propositions are 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 ask which rule makes better socioeconomic sense. Better law is misguided even on its own terms.

Before proceeding, two clarifying points are in order.

First, one might take the nature of this Note’s critique to be that a better law inquiry is impossible, in a strong sense akin to the relativistic critique canvassed above, or instead that a better law inquiry is merely beyond the judicial ken, on epistemic and institutional grounds comparable to those set forth previously. The latter characterization is good enough for present purposes; this Note need not rule out the possibility that a Judge Hercules might one day emerge, against whom its critique would not prevail. But that possibility seems decidedly remote. We are far from Nirvana, and it would be a mistake to hold fast to a method that is likely to confound and mislead those who actually wield it.

Second, this Note’s argument depends on an unproved, basically empirical proposition: that private law systems are in fact bundled, to greater or lesser degrees depending on the domain, at least some of the time — or often enough that it would be foolish for judges to ignore the possibility in the ordinary case. Actually proving that proposition is beyond the scope of this Note, although the analysis and the examples discussed below demonstrate its plausibility.

1. *Two Views of the Bundle.* — 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.”<sup>72</sup> This tendency to focus on

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<sup>72</sup> Leflar, *supra* note 39, at 296.

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 Thomas Merrill and Henry 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.”<sup>73</sup> 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.”<sup>74</sup> Insofar as the bundle picture implicitly 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.<sup>75</sup> The method has been embraced by nearly all modern choice of law theorists, especially better law proponents.<sup>76</sup> 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.*,<sup>77</sup> two Colorado citizens got into a car crash in Iowa, for which the plaintiff brought suit in Colorado.<sup>78</sup> Under Iowa law, the defendant was illegally parked and was therefore negligent *per se*.<sup>79</sup> 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 to be negligent at all. 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,

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<sup>73</sup> 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.”).

<sup>74</sup> Henry E. Smith, Response, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 962–63 (2009).

<sup>75</sup> See generally Willis L.M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973).

<sup>76</sup> See, e.g., Singer, *A Pragmatic Guide to Conflicts*, *supra* note 6, at 748 & n.46.

<sup>77</sup> 536 P.2d 1160 (Colo. App. 1975).

<sup>78</sup> *Id.* at 1162.

<sup>79</sup> *Id.* at 1165.

thereby repackaging the legal rules to enable a recovery the plaintiff could not have obtained under the purely domestic law of either state.<sup>80</sup>

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 that focusing on individual rules issue-by-issue will best allow judges to 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.”<sup>81</sup> 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.<sup>82</sup> 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 stingier alternative.

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.<sup>83</sup> Can the

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<sup>80</sup> See WILLIAM M. RICHMAN ET AL., UNDERSTANDING CONFLICT OF LAWS 189 (4th ed. 2013).

<sup>81</sup> Kramer, *Rethinking Choice of Law*, *supra* note 10, 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.”).

<sup>82</sup> This hypothetical 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.

<sup>83</sup> Kramer offers a similar variant on the famous conflicts case *Hurtado v. Superior Court*, 522 P.2d 666 (Cal. 1974). See Kramer, *Rethinking Choice of Law*, *supra* note 10, at 309 n.105.

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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 ground that it is "worse"?

It is this Note's 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 ingredient. 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."<sup>84</sup> 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."<sup>85</sup> 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 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 between charitable immunity or non-immunity in conjunction with other rules, institutions, and the like.

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

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<sup>84</sup> Allen & O'Hara, *supra* note 12, at 1035 (footnote omitted).

<sup>85</sup> 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 74, at 976 (discussing the "tendency, which flirts with the fallacy of division, to assume that proper parts of the mechanism must share the desirable properties we should be looking for in the whole").



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 interdependent 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 be deemed obsolete only in the special sense Kramer has proposed, namely, “inconsistent with prevailing legal and social norms *in the state that enacted it*.”<sup>86</sup> 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 a *majority* of 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 relativistic, epistemic, and sovereignty-based criticisms outlined above. The systemic critique would be 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 fallacious reasoning. Possible examples include *Milliken v. Pratt*,<sup>87</sup> 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*,<sup>88</sup> 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.”<sup>89</sup>

In these cases, the argument would go, 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 difficul-

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<sup>86</sup> Kramer, *Rethinking Choice of Law*, *supra* note 10, at 334 (emphasis added).

<sup>87</sup> 125 Mass. 374 (1878).

<sup>88</sup> 264 P.2d 944 (Cal. 1953).

<sup>89</sup> Kramer, *Rethinking Choice of Law*, *supra* note 10, at 335.

ties. 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.

2. *Tailoring.* — Dynamic bundling demonstrates 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's.

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 extralegal 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 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.<sup>90</sup> Suppose that 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 with preventing people from exceeding sixty-five miles per hour. But suppose 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

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<sup>90</sup> The following speed limit hypotheticals are drawn, with slight modifications, from Allen & O'Hara, *supra* note 12, at 1036.

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hour, he should know that he's exceeding fifty-five even if his speedometer is faulty.

Judges doing better law analysis are liable 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,"<sup>91</sup> and that whether a specific rule should be desired depends on the combination of other rules and extralegal 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 of 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.<sup>92</sup> 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 stockbrokers, a court will have a hard time choosing which rule to enforce based on better law criteria alone.

3. *System Effects and Second Best Law.* — The arguments advanced so far are bolstered by public law treatment of so-called "system effects," and are also consistent with a principle in economics known as the "general theory of the second best."

Starting with the former, a system effect arises "when the properties of an aggregate differ from the properties of its members, taken one by one."<sup>93</sup> 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, 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 parliamen-

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<sup>91</sup> *Id.*

<sup>92</sup> *See, e.g.,* *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 248 N.E.2d 576 (N.Y. 1969).

<sup>93</sup> Vermeule, *supra* note 85, at 6.

tary system with proportional representation, it does not follow that proportional representation is still desirable in a system with an independently elected executive.”<sup>94</sup> 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, charitable immunity, or various negligence regimes: whether a given rule represents the better, more enlightened, or more desirable law depends on the architecture of the system in which it is embedded.

This critique is reinforced by insights drawn from the general theory of second best in economics.<sup>95</sup> 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.”<sup>96</sup> 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.”<sup>97</sup>

To illustrate by way of example, suppose a monopolist controls the supply of water.<sup>98</sup> It should seem obvious that breaking up the monopoly would make good socioeconomic sense: the 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

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<sup>94</sup> *Id.* at 20–21.

<sup>95</sup> 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).

<sup>96</sup> *Making the Second Best of It*, *THE ECONOMIST: FREE EXCHANGE* (Aug. 21, 2007, 3:46 PM), [http://www.economist.com/blogs/freeexchange/2007/08/making\\_the\\_second\\_best\\_of\\_it](http://www.economist.com/blogs/freeexchange/2007/08/making_the_second_best_of_it) [<http://perma.cc/U5KQ-CG6Z>].

<sup>97</sup> Vermeule, *supra* note 85, at 18.

<sup>98</sup> 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).

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.”<sup>99</sup> If that inference 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.”<sup>100</sup> 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.”<sup>101</sup> Perhaps it’s unsurprising that choice of law theorists and legal economists have neglected system effects and second-best effects, given the influence that Hohfeld’s bundle picture — and legal realism in general — has had on modern choice of law theory as well as law and economics.<sup>102</sup> 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.

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<sup>99</sup> *Id.* at 191.

<sup>100</sup> *Id.*

<sup>101</sup> Guzman, *supra* note 62, at 885–86.

<sup>102</sup> See, e.g., Smith, *supra* note 74, 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.”).

Obviously, system effects and the general theory of second best have implications far beyond the domain of choice of law.<sup>103</sup> How judges who engage in economic or efficiency analysis should respond to their challenges is far beyond the scope of this Note. 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.<sup>104</sup> When it comes to choice of law, it is enough for this Note's 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 Note 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 acceptability of courts in one state making value judgments about the wisdom of laws enacted in its 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 or even consider the extent to which private law domains are or might be 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, this Note's 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 that would be necessary to justify the better law approach. The costs involved are likely to be prohibitively high, however, and the odds of success sufficiently low, that the better law approach to true conflicts should be abandoned.

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<sup>103</sup> Ulen, *supra* note 98, 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.”).

<sup>104</sup> *Id.* at 217.