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PREFACE

When Elliott Cheatham passed away in January 1972, his loss was felt by his colleagues and friends throughout the nation. It was felt most sharply by the students and faculty at Vanderbilt Law School where he had been an active member of the faculty during the last eleven years of his life. His life was devoted to scholarship, to teaching, and to service to his fellows. All of us at Vanderbilt benefited from his presence here.

This Article is prepared at the request of the Editorial Board of the *Vanderbilt Law Review* in commemoration. It, however, is not designed as a tribute to Cheatham—the man and the teacher. Tributes of that kind were collected and published four years before his death in the December 1968 issue of the *Review*. In this essay, I have attempted to analyze Elliott Cheatham's scholarly contributions in the field of conflict of laws, one of his two major areas of legal research. When I began its preparation, it was with a deep feeling of personal involvement since Elliott was responsible for much of my own early development and growth of understanding in conflict of laws. As the work progressed, however, it became apparent that it was in part unfair to assess the contributions of a single man in a rapidly developing field in which the interactions of many have served as mutual stimuli and in which the end product of each is the result of constant influence by numerous others. Thus, this Article does not attempt to trace and identify all of those sources that influenced Elliott Cheatham in the conclusions he reached, nor will it attempt a comprehensive cataloging of all of the cases, arti-

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cles, and books that his work either directly or indirectly influenced. Rather, this essay resembles an extended book review. Unlike the reviewer of a book who deals with his subject usually within one year of its publication, this "reviewer" has had the opportunity to assess the life's work of an individual in a single area of his expertise. Consequently, the evaluations and commentary can include an assessment of the impact of Cheatham's various works over a period of three decades. The advantages of hindsight are not slight.

This Article is divided into two principal sections. The first deals with Elliott Cheatham's work in federal-state conflict of laws problems. It considers Cheatham's basic theories, his commentary on the development of the Erie Doctrine, his work in international conflicts, his explanation of the sources and development of the body of federal common law, and his search for the appropriate measure of federal control over state choice of law. The second segment considers his work in more traditional interstate choice of law. It discusses his search for the fundamental sources that he believed should guide the formulation of interstate and international choice-of-law rules and includes a comparison of Cheatham's work with the work of other scholars whose theories were closely related to his. To the extent that this Article provides some useful insight into the life's work of a fine scholar and a close friend and colleague, it will not only serve its commemorative function, but perhaps will discharge in small part the large intellectual debt that its author owes to the man who is its subject.

I. INTRODUCTION

Elliott Cheatham's work in the conflict of laws field spanned 36 years, beginning in 1936 with the publication of his first casebook[1] and his first major article in the field[2] and ending only with his death in January, 1972.[3] The major social, economic, and political events of that period—the end of the great depression, the New Deal era, three wars, the polarization of the world in the aftermath of war, the creation of the United Nations, the struggles, successes, and failures of newly emerging nations, the beginning of regional integration in the world

1. E. CHEATHAM, N. DOWLING & H. GOODRICH, CASES AND OTHER MATERIALS ON CONFLICT OF LAWS (1936).

2. Cheatham, *Internal Law Distinctions in the Conflict of Laws*, 21 CORNELL L.Q. 570 (1936).

3. Cheatham's total teaching career covered 52 years, beginning at Emory University in 1920, continuing at the University of Illinois, Cornell University, Columbia University, and ending at Vanderbilt University in 1972.

community, the first major efforts domestically in the area of civil rights and civil liberties, profound questioning of the educational process at all levels, and man's beginnings in space—are all evidence of a world in a state of tumultuous and rapid change, with the basic values and, consequently, the basic premises of our legal system becoming the subjects of a forced review and reevaluation. This process of reevaluation is reflected in major legal events of that 36-year span—the "Erie explosion" of 1938, when the Supreme Court, in two strokes, reversed the sources of applicable law in federal diversity cases by the decision in *Erie Railroad Co. v. Tompkins*[4] and by the promulgation of the Federal Rules of Civil Procedure; the decisions in *United States v. Belmont*[5] and *United States v. Pink*,[6] in which the reach of the law-making power of the federal executive was brought into sharp focus; Justice Harlan Stone's seminal decision in *International Shoe Co. v. Washington*,[7] which irrevocably and substantially altered basic jurisdictional concepts that had been central to assumptions concerning the interaction and range of power of state decision makers; the Supreme Court's flirtation with the creation of federal choice-of-law rules through the due process and full faith and credit clauses;[8] the decisions in *Banco National de Cuba v. Sabbatino*[9] and *Zschernig v. Miller*,[10] which opened new areas of inquiry into the relationships between the state and federal governments and between the branches of the national government as authoritative lawmakers in private international cases; and, as a background to all of these developments, a growing emphasis upon sociological jurisprudence pointed up by the Supreme Court's intensive search, under Chief Justice Warren, for the proper relationships between the individual and his government in a democratic society.

Like the world and the law in the large, the field of conflict of laws was undergoing dramatic change during this period. During those 36 years in which Cheatham wrote, the conflicts field was the scene of a serious and sometimes vituperative intellectual struggle that involved, more than any other field with the possible exception of constitutional law, a clash of values and concepts concerning the function and struc-

4. 304 U.S. 64 (1938).
5. 301 U.S. 324 (1937).
6. 315 U.S. 203 (1942).
7. 326 U.S. 310 (1945).
8. Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953); First Nat'l Bank v. United Air Lines, 342 U.S. 396 (1952); Hughes v. Fetter, 341 U.S. 609 (1951); *See also* Home Insurance Co. v. Dick, 281 U.S. 397 (1930); New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918).
9. 376 U.S. 398 (1964).
10. 389 U.S. 429 (1968).

ture of government and the nature of law and the legal process itself. Cheatham's place in the conflicts spectrum cannot be appreciated fully without a brief survey of the state of scholarship in the area at the time of his entry into the field as a major commentator. By the early thirties, the scholarly battle over the formulation and jurisprudential bases of choice-of-law rules already had been underway for some time. The publication of the first *Restatement of Conflict of Laws* in 1934 represented the last major success of the vested rights theory of choice of law as promulgated by Professor Joseph Henry Beale, the *Restatement's* Reporter. The struggle against this approach, which an emerging group of "legal realists" termed a mechanical and erroneous description of legal operations in the conflicts field, began and increased in intensity during the debates concerning the *Restatement* in the American Law Institute.[11] The principal attacks on the *Restatement's* approach were mounted in the law reviews, especially by Walter Wheeler Cook.[12]

Cheatham's first major article in the conflict of laws field[13] appeared in the *Cornell Law Quarterly* in 1936.[14] In that article, he emphasized policy analysis as a means toward useful decision making in conflicts cases, an approach which he retained until the end of his career. The entire article warned against the uncritical use of definitional concepts from outside the conflict of laws field to identify the relevant considerations for applying a particular state's law in conflicts cases. He particularly disagreed with the rule in the first *Restatement* that made the place of contracting the controlling factor in determining the validity of a contract. He argued that the use of a rule developed from policies appropriate for local contracts law to solve choice-of-law problems amounted to a total disregard of the truly relevant policies that should be the basis for a choice-of-law decision.[15] He reiterated this warning in

11. *See* 6 ALI PROCEEDINGS 454-78 (1927-28) (discussion concerning place of contracting); 3 ALI PROCEEDINGS 222-81 (1925) (discussion concerning domicile). Professor Ernest Lorenzen of Yale Law School resigned as an adviser to the Reporter in opposition to the approach being employed after the first tentative draft was submitted. *See* R. LEFLAR, AMERICAN CONFLICTS LAW § 1 (1968).

12. *E.g.*, W. COOK, THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS (1942); Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333 (1933); *see* Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924).

13. He authored, with 2 others, the *New York Annotations* to the *Restatement of Conflicts* in 1934. This work has been described as practically a treatise on choice of law. *See* Reese, *Elliott Evans Cheatham: A Tribute on the Occasion of his Retirement*, 57 COLUM. L. REV. 459, 465 (1965).

14. Cheatham, *supra* note 2.

15. *Id.* at 583-85.

sharply critical comments concerning two Supreme Court cases that had employed the place-of-making test to determine the constitutional validity of a state's choice of law concerning insurance contracts.[16] He concluded with a statement, which closely resembles the philosophy behind modern approaches, of the need for careful policy and factual analysis in choice-of-law cases.

> The decision of cases in Conflict of Laws may proceed through the selection of a single contact or factor as by itself properly determining the state whose law is to govern. The courts, however, may be unwilling to select a single element as by itself controlling. In many cases the governing law has been determined according to the grouping or massing of factors deemed dominant for the purpose in hand. The selection of a single governing factor or the choice of the dominant group of factors can wisely be made in Conflict of Laws only if the courts refuse to use inappropriate definitions and distinction (sic) of internal law.[17]

By emphasizing policy analysis, Cheatham struck at the heart of the first *Restatement's* assumption that predictable and appropriate choice-of-law rules could be formulated by selecting a few important characterizations that invariably would indicate which state's law properly should govern the transaction in question. Today, Cheatham's analysis of the assumptions made by the drafters of the *Restatement* does not seem strikingly original, but at the time his essay was published, the semantic problems raised by the process of characterization (or the search for "qualifications" as it sometimes was called) were almost unrecognized by American lawyers.[18]

II. THE ANALYTICAL THEORIES

The divisions among competing conflicts scholars were conceptual differences that they considered jurisprudentially basic. Justice Story's early theory, which based conflicts principles upon the concept of comity, had been attacked by Beale and others, and had given way to the Bealean analysis based upon "vested rights." According to this vested rights theory, only the government of a given political division could create duties or grant rights for persons within that territory. Therefore, the rights and duties to be enforced in any court could only be those created by the law of the state in which the last event necessary to create

16. *Id.* at 585-88. The 2 cases were New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918), and Mutual Life Ins. Co. v. Liebing, 259 U.S. 209 (1922). *Cf.* Cheatham, Book Review, 55 HARV. L. REV. 164, 167-68 (1941).

17. Cheatham, *supra* note 2, at 590.

18. A. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 80-81, 245-47 (1940); Beckett, *The Question of Classification ("Qualification") in Private International Law*, 15 BRIT. Y.B. OF INT. L. 46, 81 (1934); *see* Lorenzen, *The Theory of Qualifications and the Conflict of Laws*, 20 COLUM. L. REV. 247 (1920); Cheatham, Book Review, 93 U. PA. L. REV. 112, 113 (1944).

or destroy a legal relationship had occurred.[19] Under Beale's theory, the prospective litigant was like John Bunyan's Christian, carrying on his back a pack of legal rights and duties affixed by the various sovereigns through whose territory he passed, the pack to be opened and distributed by the forum court when the day of judgment arrived.

Beale's basic premise that the law applied by the forum should be the law of the jurisdiction in which the rights or duties of the parties had "arisen" was challenged by Professor Cook's "local law" theory. Cook's position was that legal rights arise only when a decision maker decides that the power of the state will be employed to require or prevent specified actions by persons or other legal entities. Under Cook's theory, law is essentially a process that involves predicting the actions which a specified decision maker will take if presented with a particular factual setting sometime in the future. These predictions are made by examining the past acts of the decision maker in similar cases, using rules of law as guides. According to this approach, when a conflict of laws case comes before the forum, it is the past actions of the *forum*, not of the foreign state, that we examine to determine what outcome to predict, and it is the forum that decides whether the state's power will be employed to affect the relationships of the parties. Consequently, Cook reasoned that conflicts cases involve only the forum's law, including its conflict of laws rules, and the forum is free, barring a prohibition by some higher positive law, such as the Constitution, to decide conflicts cases as it wishes. In these decisions, the forum is guided by its own evaluation of principles and policies and controlled by its own rules of stare decisis. In carrying out this process, however, the forum may, and often does, model its decision upon the legal rules of a foreign state.[20]

Cook's theory served to free conflicts writers, including the judiciary, from feeling tightly bound to foreign law in conflicts cases by emphasizing the status of the forum court as the de facto law maker. It also helped explain many of the decisions that, as Cook accurately pointed out, did not conform in result to the vested rights theory, although they appeared to do so in language. While this approach successfully disposed of the basic premises of the vested rights theory, Cook

19. A crisp statement of Beale's viewpoint is found in the debates concerning the first *Restatement*. In response to a suggestion that an express choice of law by the parties to a contract be given effect as long as that intention was "lawful," Beale replied: "You say it is lawful. If you will state a case you have in mind, I would be glad to take it up, but how you can make that to be lawful which is contrary to the law of the place where it is done, I cannot quite see." 6 ALI PROCEEDINGS 463-64 (1927-28).

20. *See generally* W. COOK, *supra* note 12, at 1-47.

did not suggest a manageable alternative to the existing choice-of-law formulas.[21]

Cheatham was the first scholar to undertake a comparative analysis of these three basic theories (comity, vested rights, and local law) in an effort to identify their strengths and weaknesses. He paid particular attention to their functional utility as an aid in the solution to conflict of laws problems. In "American Theories of Conflict of Law, Their Role and Utility,"[22] he concluded that each of the three theories had something to recommend it, but that none of them adequately met the three tests of consistency, practical utility in dealing with real problems, and effective assistance in "the wise development of the law to meet new situations,"[23] which he felt were the measure of a truly comprehensive theory. His principal criticism, however, was aimed at the basic premise of strict legal territoriality upon which each of the theories rested. His statement regarding this aspect of the three theories merits quoting at length because it identified the beginnings of the principal concept that was to run throughout his later writings in the field—the proposition that the field of conflict of laws does not deal with true "conflict" at all, but rather involves an attempt to "coordinate" the operations of legal institutions.

> There is one point on which the three theories in a measure agree, yet it is a point which in some aspects at least seem [sic] unfounded. The point is that law is exclusively territorial in operation. Now the very nature of even the simplest situation in conflict of laws—an occurrence in State *X* followed by an action in State *F* in which the *X* law is used as guide to decision—calls for a cooperation of the two laws in producing the result. The *X* law (*X*'s internal law) is used as a guide to the result, because the *F* law (*F*'s conflict law) prescribes this as the appropriate result. Any statement which fails to take into account that in this sense both laws are essential avoids the heart of the situation. The question, How, is directed to the method of intellectual combination and statement of the two laws. This question, as stated above, is one of analytical jurisprudence, and the answers are juristic formulations of legal results already known or envisaged. In attempting to state the method of combination of the two laws there may be a tendency to stress one and ignore the other, resulting from philosophical preconception of the individual or of the times.[24]

Thus, he concluded that confiicts of law should be treated in the same manner as other kinds of law, since it, like all law, is derived from precedent, from analogy, from legal reasoning, and from considerations of ethical and social need.[25] Cheatham, however, viewed general state-

21. *See* Cavers, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1212, 1219 (1963); Peterson, *Developments in American Conflicts of Law: Torts*, 1969 U. ILL. L.F. 289, 292.

22. 58 HARV. L. REV. 361 (1945).

23. *Id.* at 372.

24. *Id.* at 390-91.

25. *See* RESTATEMENT OF CONFLICT OF LAWS § 5, comment *b* (1934).

ments concerning the nature and purpose of conflicts law as beginnings to investigation rather than as ends in themselves and, in this respect, his approach differed from the theories he had criticized. Addressing this problem in 1945, he wrote:

> There remains the very difficult task of decision under this approach, a task which may be smoothed through further study of narrow problems or of general factors. It may perhaps be said of law what has been said of philosophy—systems are not the things that live, but the experiences on which they rest and the needs to which they respond. The problems of conflict of laws persist, though in a constantly changing form.[26]

Cheatham's call for continued investigation identified the next logical step to be taken once the old theories were found wanting as a basis for establishing a workable and rational system of choice of law.[27] His own views were then in the process of being formulated, but it was to be seven years before he, together with Professor Willis Reese, set them forth in a coherent and organized form.

III. Coordination of Federal and State Law

Cheatham viewed the constitutionally derived rules governing federal-state relationships and the conflict of laws rules of the several states as components of a broadly integrated whole. The task of both components was, in his mind, basically the same: to identify those political entities whose policy determinations appropriately should be given emphasis in adjudicating the variety of human relationships. Thus, state choice-of-law rules were representative of the forum state's policies and were designed to bring into play the policy decisions of the appropriate political entity in light of the particular issues presented for adjudication. In the same sense, federal law was applicable in those situations in which the policy judgments of the federal government, rather than those of the states, should be given effect. The principal difference between the interstate and the federal-state choice-of-law situations was that, in federal-state choices, the judgment concerning the appropriate decision maker was prescribed in the federal constitution, while, in interstate choices, this judgment was necessarily reached by state courts—through the application of common-law principles to determine the allocation of decision-making authority among the states. Through-

26. Cheatham, *supra* note 22, at 394.

27. Cook had viewed his own theory as only a beginning: "What has been suggested is that new initial assumptions need to be formulated and used as tentative working hypotheses in dealing with 'legal phenomena' in the field of conflict of laws, for the reason, among others, that current assumptions have shown themselves inadequate and are, indeed, based upon an outmoded 'logic of inquiry.'" W. Cook, *supra* note 12, at 47.

out all his discussions of "horizontal" and "vertical" choice situations, Cheatham, more than any other writer in the conflicts field, emphasized the concept of "coordination" of legal institutions.[28] His writings frequently emphasize this concept and suggest changes to improve "coordination." His emphatic use of this descriptive term reflects a significant individuality in approach that he brought to all levels of choice-of-law scholarship. For Cheatham, the term "coordination" was more than a personal method of describing the same attitudes brought to similar problems by others in the field. It reflected, rather, a basic philosophical attitude toward the means for best identifying the appropriate interrelationships between governing units, and the attitude that the term connotes had a distinct and identifiable influence on his approach to conflict of laws problems.

Although identified generally as a "horizontal" choice-of-law scholar, Cheatham dealt with federal-state relationships to the same extent that he concerned himself with the development of what more traditionally is thought to be "conflict of laws." During his career, he published sixteen leading articles in the conflicts field. Of those articles, nine were concerned almost wholly with the problems of coordinating federal and state law-making power.[29] In addition, four others devoted important sections to a discussion of these problems.[30] A comparison of his analysis and conclusions regarding federal-state conflicts with his approach to "horizontal" choice-of-law decisions by the states provides a useful vehicle for consolidating and identifying the principal components of his basic approach to conflictof laws problems in general. Furthermore, it will serve to lay the groundwork for a judgment by the

28. *See, e.g.*, Cheatham, *Conflict of Law: Some Developments and Some Questions*, 25 ARK. L. REV. 9, 9-11 (1971); Cheatham & Maier, *Private International Law and Its Sources*, 22 VAND. L. REV. 27, 97-98 (1968); Cheatham, *Some Developments in Conflict of Laws*, 17 VAND. L. REV. 193 (1963).

29. Cheatham & Maier, *supra* note 28; Cheatham, *Does Federal or State Law Apply in International Transactions?*, 23 N.Y. COUNTY B. BULL. 200 (1965-66); *Some Developments in Conflict of Laws*, 17 VAND. L. REV. 193 (1963); *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581 (1953); *A Federal Nation and Conflict of Laws*, 22 ROCKY MT. L. REV. 109 (1950); *Stone on Conflict of Laws*, 46 COLUM. L. REV. 719 (1946); *Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt*, 44 COLUM. L. REV. 330 (1944); *Sources of the Rules for Conflict of Laws*, 89 U. PA. L. REV. 430 (1941); Dowling, Cheatham & Hale, *Mr. Justice Stone and the Constitution*, 36 COLUM. L. REV. 351 (1936).

30. Cheatham, *Conflict of Laws: Some Developments and Some Questions*, 25 ARK. L. REV. 9, 23-33 (1971); *Comment on Babcock v. Jackson*, 63 COLUM. L. REV. 1212, 1231-32 (1963); *The Statutory Successor, the Receiver and the Executor in Conflict of Laws*, 44 COLUM. L. REV. 549 *passim* (1944); *Internal Law Distinctions in the Conflict of Laws*, 21 CORNELL L.Q. 570, 585-89 (1936). [Hereinafter Cheatham's articles will be cited by the name of the publication in which they appeared.]

reader concerning not only the place of Cheatham as a scholar in the conflicts field, but also the extent to which his writings have provided useful insights into the solutions of basic difficulties inherent in coordinating different sovereign policies in a federal state in a diversified world.

A. "Authoritative" and "Fundamental" Sources of Law

Cheatham developed two characterizations to serve as analytical tools for distinguishing between the law-making powers of the states and the national government. The two identifying terms were "authoritative sources" and "fundamental sources" of law.[31] The first term emphasized primarily the distinct and separate roles played by each of the components of the federal union; the second term identified the broad fundamental commonalities that give "energizing force"[32] to both state and national legal policies. Forerunners of these classifications and, consequently, of the analytical technique they reflect appear throughout Cheatham's early writings,[33] but the final and most concise explanation appears in one of his last efforts in the conflicts field. In discussing private international problems, he wrote:[34]

> "Source of law" is a term of many meanings. In this article, two separate uses are employed in succession. The first part of the article deals with the "authoritative

31. The 2 terms hark back to Aristotle's classification of causes. *See* Cheatham & Maier, *supra* note 12, at 95, n.267 (1968).

32. This term, which Cheatham often used as synonymous with what he called "fundamental" or sometimes "substantial" sources, is borrowed from Stone, *The Future of Legal Education* 10 A.B.A.J. 233, 234 (1924).

33. Cheatham did not distinguish various classifications of sources of conflicts rules in his early work, *Sources of Rules for Conflict of Laws*, 89 U. PA. L. REV. 430 (1941), except by reference to the various governmental divisions that had law-making power. The sources that he considered in this work would have been classifled by him at a later date as "authoritative sources." His earliest use of separate terms to describe distinctive source elements underlying conflict of laws rules is found in Book Review, 93 U. PA. L. REV. 112 (1944). In that work, he listed 4 sources: "formal" (this later became "authoritative"), "analytical" (or "theoretical"), "sociological," and "policy" (the last 2 were combined later under the term "fundamental"). He first used the term "authoritative sources" in *A Federal Nation and Conflict of Laws*, 22 ROCKY MT. L. REV. 109 (1950), to describe the process of selecting between federal and state law in vertical conflicts situations. *Id.* at 110. In *Problems and Methods in Conflicts of Laws*, 99 RECUEIL DES COURS 237 (1960) [hereinafter cited as RECUEIL], he adopted his final terminology, citing 3 sources, the formal or authoritative sources, the "politico-legal conceptions as to the scope to operations of law" and the substantial or fundamental sources—"the facts with which the law must deal, together with the values and policies which it is to advance and effectuate." *Id.* at 242. He rejected politico-legal concepts as a useful source of law later in this work. "It is the dominant factors of policy and public interest, not these theories, to which we should direct our main attention." *Id.* at 290.

34. Cheatham & Maier, *supra* note 12. The initial idea for this Article was Cheatham's. All references to it in this paper are to those sections that are primarily his work, unless otherwise indicated. He was responsible for pp. 27-33; 41-44; 54-68 and 94-102.

> sources" of private international law in the United States. It is directed to the question: under our complex system of government, which component has the power to formulate the rules of law to be applied in private international law cases? In more specific terms, to which of our political divisions must the citizen look for the legal directions with which he must comply? . . . The second part of the article is concerned with the "fundamental sources" of private international law; that is, the basic values existing throughout the law of all nations which give direction and content to the legal principles in this field, regardless of the authoritative sources. It is these values, together with the practicalities involved in implementing them, which are the "fundamental sources" of private international law.[35]

Earlier, Cheatham had identified two components of what he called law's "fundamental" sources:

> . . . [T]he substantial sources are of two main kinds. One consists of the social facts, such as those which it is the effort of the social scientists to investigate and understand and describe. . . . The other kind of source is made up of the ideals, values, standards, policies, objectives which the lawmakers seek to advance. They may vary with the nation, or from time to time within the same nation.[36]

To understand the importance of this terminology, it is necessary to understand the relationship between these two sources of law as that relationship affects the structure of the federal government. There is an intimate interrelationship between the need to give effect to fundamental sources of law and the designation of the authoritative sources from which law-making power is to flow. This interrelationship is implicit in Cheatham's analysis of the process of selecting the federal or state law as the source for the appropriate rule of decision in a given case. In describing this interrelationship, he wrote:

> Among the purposes of the Constitution stated in the Preamble were the determination "to form a more perfect Union," which envisaged a stronger nation; and also to "secure the Blessings of Liberty to ourselves and our posterity," which in the light of 1787 meant principally to preserve local (state) self-government. The legal methods used then were two fold. One of them called for national unity through a single national law where that was advisable. The other method continued state diversity where local self-government was more important, but this state diversity was a controlled diversity.[37]

It is clear that the answer to the question which sources of law are authoritative on a given issue is found by examining the constitutive document of the political entity involved, which under our federal system is the Constitution of the United States. When the Constitution designates a particular body of law as authoritative and, with this designation, identifies the decision maker who will control, it also necessarily

35. Cheatham & Maier, *supra* note 12, at 28.

36. 99 RECUEIL at 252. Cheatham used the terms "substantial sources" and "fundamental sources" synonymously.

37. 22 ROCKY MT. L. REV. 109, 111 (1950).

selects the emphasis that will be given to those competing fundamental sources of law which will energize the ultimate decisions under the applicable authoritative body of law. Accommodating competing fundamental sources inescapably requires a weighing process, and the way in which this function will be carried out—whether it involves values, ideals and policies, or the interpretation of social facts derived from empirical investigation—must vary, of necessity, with the perspective of the decision maker. Thus, by designating a decision maker and a source of law for his decision, the Constitution designates also a perspective that is to be brought to the decision-making process. Interpretation of the Constitution in this respect therefore requires a judgment concerning which institutional law maker is the one best qualified to decide what emphasis shall be given to which fundamental sources of law in light of the goals and purposes of the governmental structure that the document envisions. That interpretation must take into account not only the specific text of the constitution, but also the overall functional design of the governmental structure, in order to determine and to give effect to the basic assumptions that influenced its form and specific content. Thus, the political inferences that may be garnered from the document are just as important as its specific textual directions[38] in determining which law maker should be the authoritative decision maker in a given case. Furthermore, interpretation of the document must be sufficiently malleable to suit the changing structure of society and, consequently, the changing propriety of entrusting a given type of decision to one level of government rather than to another.

When localized influences are the appropriate ones to be given effect in selecting and interpreting the fundamental sources that will move and mold the legal process, state law is authoritative because state decision makers should be more responsive to local concerns, mores, and political influences than federal decision makers. Conversely, when a broad perspective, not influenced by local concerns but rather by the combined influences of the entire body politic, is needed, the basic value judgments to be made are assigned to a national decision maker. In these instances, national political, social, and economic value judgments are more consonant with the needs of the envisioned governmental structure than individual state value judgments, which necessarily are based upon a narrower perspective. Illustrations in the federal system are easily found. Federal labor law and securities regulations were pro-

38. *See generally* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

mulgated not only because of the necessity for national uniformity, but also because of the need to apply a national, rather than a local, perspective to the problems involved. Value judgments affecting international relations may conflict with values assessed by local law makers in dealing with decedents' estates[39] or civil rights,[40] and the need for a national perspective will make federal law supreme. The economic and social values of having municipal zoning restrictions will be balanced differently against the values of having racially integrated housing depending upon the decision maker's perspective.[41]

The process by which the fundamental sources of law influence the creation of legal rules has been described excellently by Professor Irvin Rutter.

> The empirical foundation of this formal structure consists of the torrents of life that continue to pour into the logically structured concepts at every level and at every point of their development. The principles and rules are the results of experience, and continue to grow with experience. This experience reflects the social, moral, economic, psychological and institutional forces that have become the separate concern of the extra-legal disciplines. These forces, whose origins are sometimes buried in pre-history, continue to shape the formal concepts, and it is this relationship between form and substance that makes the formal structure an endlessly malleable expression of the underlying substance. The rules reflect a dynamic process of expression of these forces, giving comprehensible form to the chaos of experience. Viewed as sterile verbalisms they are meaningless.[42]

As noted above, this entire process of identifying the authoritative sources of law was seen by Cheatham as being essentially a process involving "coordination" of the interrelated operations of the state and federal governments, each working in its own way toward the achievement of common goals.

B. The Supreme Court as Coordinator

If coordination is the key to the effective functioning of the system, then there must be a coordinator. Cheatham saw the Supreme Court as the appropriate decision-making body for performing this role when decisions concerning the coordination of the law of the several states

39. *Compare* Zschernig v. Miller, 390 U.S. 974 (1967), *with* Clark v. Allen, 331 U.S. 503 (1947).

40. *See, e.g.*, South African Airways v. New York State Div. of Human Rights, 64 Misc. 2d 707, 315 N.Y.S.2d 651 (Sup. Ct. 1970). For a discussion of this aspect of the case see Maier, *The Bases and Range of Federal Common Law in Private International Matters*, 5 VAND. J. TRANSNAT'L L. 133, 169 (1971).

41. *See* Bigham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 VAND. L. REV. 1111 (1972).

42. Rutter, *Designing and Teaching the First-Degree Law Curriculum*, 37 U. CIN. L. REV. 7, 20-21 (1968).

and, in particular, the coordination of the law of state and federal governments were involved. He envisioned this coordination as being carried out by the Court, not through arbitrary fiat, but through a functional evaluation of the needs of the interstate and international systems. The states, however, were not to be excused from responsibility for making the system work effectively. In achieving coordination of law-making powers, Cheatham maintained that both the state and the federal judiciary must emphasize the fundamental sources of conflict of laws and, in particular, must evaluate critically the assumptions underlying the system's structure in reaching decisions in cases before their courts.

From the above discussion, it is apparent that Cheatham did not view the federal system as a group of competing political entities, each attempting to gain power at the expense of the others. To the contrary, he thought that the federal system had as an organizing principle the concept of happy cooperation among the states *inter sese* and between the states and the federal government in a climate of mutual respect.[43]

In expressing this view of the system, he wrote:

> The use of the term "conflict of law" to describe any of these legal complexities within our federal system is misleading. There are diversities of legal rules, but there is no diversity of purpose between the states and the national government or between the various law-makers functioning within the federal system of divided power. The common interest which all components of the system seek to advance is that of all the people of the nation. Thus, the solution to the legal complexities spawned by federalism is best thought of, not as a process of arbitration between conflicting and jealous lawmakers, but rather as a process of coordination of efforts to make the system work well and to provide justice and security for all the nation's people.[44]

In order to identify the best functional means of achieving this cooperation, Cheatham analyzed the authoritative sources of the choice-of-law rules that were being applied by courts in the United States.

C. The Role of Federal Law

In resolving federal-state conflicts, Cheatham saw federal law as capable of performing three functions: It could prescribe the law to be applied by the states, it could limit the operations of the states, or it could take action designed to encourage or aid desired state action without actually compelling it.[45] In the category of prescriptive national

43. *See* 44 COLUM. L. REV. 330 (1944).

44. Cheatham & Maier, *supra* note 28, at 29.

45. For illustrations in a slightly different context see Cheatham, *The Reach of Federal Action Over the Profession of Law*, 18 STAN. L. REV. 1288, 1290-91 (1966).

action, Cheatham identified three kinds of power that were essential to the effective operation of a federal nation. The government must have power to control foreign relations, it must have power to legislate in certain areas for the entire country, and it must be able to set standards for interstate relations.[46] These first two powers tended to eliminate federalism in favor of centralization; the third was designed to compel fair treatment, but to permit free state operation within established parameters.[47]

For Cheatham, a key turning point in the use of federal law for coordination between the state governments and the national government in private law matters was the decision in *Erie Railroad v. Tompkins*,[48] in which the Supreme Court held that federal courts in diversity cases must apply the substantive law of the state in which they are sitting.[49] Cheatham approved of the decision for two related, but different, reasons. First, *Erie* rejected the assumption that there was a transcendental body of law called "the common law" existing outside the aegis of any particular state and, in so doing, pointed up the law-making responsibilities of the states in private matters that did not involve federal questions. Cheatham applauded this recognition of the appropriateness of local self-government in most matters of private law. Second, and more important, Cheatham viewed the *Erie* decision as making clear the difference between the so-called federal common law that really was applicable only in the federal courts under the rule of *Swift v. Tyson*[50] and the "true" federal common law that was, by *Erie*, freed to develop naturally in those areas in which national interests predominated.[51] Cheatham's last published article in the conflicts field summarized this position forcefully: "In sum, the misnamed federal common law of *Swift v. Tyson* has ended; the federal courts have their own rules of procedure; and the exercise of federal power is filled out and made explicit by a true federal common law. This is where we are and this is where we should be."[52]

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46. 89 U. PA. L. REV. 430, 437 (1941).
47. *Id.*
48. 304 U.S. 64 (1938).
49. *See* Cheatham & Maier, *supra* note 28, at 57.
50. 41 U.S. (16 Pet.) 1 (1842).
51. The explanation of this difference is a principal and continuing theme of Cheatham's work. He dealt with it in at least 7 different articles: 22 VAND. L. REV. 27, 57-58 (1968); RECUEIL, at 261 (1960); 17 VAND. L. REV. 193, 199-200 (1963); 6 VAND. L. REV. 581, 583 (1953); 22 ROCKY MT. L. REV. 109, 115 (1950); 46 COLUM. L. REV. 719, 731 (1946); 89 U. PA. L. REV. 430, 445-46 (1941).
52. 25 ARK. L. REV. 9, 33 (1971).

One effect of *Erie* was, in fact, to increase the influence of federal law in those private matters that peculiarly concerned the national government. The clearest illustration in the purely domestic area is the Supreme Court's decision in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*,[53] in which the Court applied a federal common-law rule on the holder in due course doctrine because the action concerned the rights of a federal agency in assets in which it had acquired an interest in the performance of its federal duty.[54] With reference to that case, Cheatham wrote:

> The law of the land has steadily encroached on the areas of interstate conflict of laws. . . . The encroachment will doubtless continue with increasing centralization. In the past the development has been principally through statutes enacted under the interstate commerce clause. A method of development now becoming more common is that of a national common law,—a common law developed by the Supreme Court of the United States in areas from which the state laws have been ousted and in which national legislation is not specific. It, too, is a part of the "law of the land" to be applied by all courts, and it correspondingly cuts down the area of interstate conflict of laws.[55]

The Supreme Court, in recent years, has demonstrated increased flexibility in giving effect to federal policies that are not set forth explicitly in the language of federal statutes or in the Constitution, but that can be derived from the general policies represented by federal positive law. Three cases are illustrative of this development. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[56] a New York company purchased a business from a New Jersey company. The contract called for continuing assistance in marketing procedures and quality control by the New Jersey company for a designated period in consideration for the purchase price. The agreement also contained an arbitration clause that submitted all disputes under the contract to decision before arbiters from the American Arbitration Association. After the purchase was made, the New York plaintiff discovered that the New Jersey seller was unable financially to carry out its part of the bargain. In addition, there was evidence to indicate that this financial condition had been known to the seller before the contract was signed. When the New Jersey company sought arbitration under the contract because the purchaser had refused to pay further installments on the purchase price, the purchaser refused to arbitrate and brought a diversity suit in a federal court sitting in New York to have the contract declared void for fraud. The

53. 315 U.S. 447 (1942).
54. *See id.* at 465-72 (Jackson, J., concurring).
55. 22 ROCKY MT. L. REV. 109, 112 (1950).
56. 388 U.S. 395 (1967).

seller argued that the court should decline to exercise jurisdiction because there was no allegation of fraud concerning the arbitration clause and the clause was separable from the remainder of the contract. After plaintiff's suit was dismissed below, the Supreme Court granted certiorari. Although it assumed that the entire contract was void under New York law, the Court ruled that the arbitration clause was separable from the remainder of the contract and, therefore, declined to exercise jurisdiction and ordered arbitration. In reaching this decision, the Court relied on the United States Arbitration Act[57] as establishing a policy favoring arbitration and, consequently, creating a rule of construction that was applicable without regard to state law. It is important to note that, although the Court attempted to justify its decision under the language of the federal act, the only supportable basis appears to be the general intent of that act rather than any specific provision.[58]

A second domestic case in which the Court made use of its common-law powers is *Moragne v. States Marine Lines, Inc.*[59] That case involved an action for wrongful death by the widow of a longshoreman based on activity occurring solely within the territorial waters of the State of Florida while her husband was employed by defendant. The complaint alleged that the death was wrongful because the vessel was unseaworthy. Defendant contended that maritime law provided no recovery for wrongful death within a state's territorial waters and that the Florida Wrongful Death Act[60] did not encompass unseaworthiness as a basis for liability. The federal district court dismissed the action and the Fifth Circuit affirmed.[61] On appeal, the Supreme Court reversed those decisions and held that there was a cause of action for wrongful death under general maritime law. In reaching its decision, the Court considered carefully the reasons behind the failure of the common law, upon which the maritime rule was based, to recognize a right of action for wrongful death and found those reasons unsatisfactory.[62] It proceeded

57. 9 U.S.C. §§ 1-14 (1970).

58. 388 U.S. at 408-25 (Black, J., dissenting).

59. 398 U.S. 375 (1970).

60. FLA. STAT. ANN. § 768.01 (1964).

61. The Fifth Circuit, taking advantage of a procedure available under Florida law, referred the question of the scope of the Florida Wrongful Death Act to the Florida Supreme Court. That court ruled that the Florida statute did not provide an action for wrongful death based upon unseaworthiness. Moragne v. State Marine Lines, Inc., 211 So.2d 161 (Fla. 1968).

62. 398 U.S. 375, 379-88 (1970). In doing so, the Court overruled The Harrisburg, 119 U.S. 199 (1886). *Cf.* Gaudette v. Webb, 284 N.E.2d 222 (Mass. 1972). In this case, the court relied on *Moragne* to support a finding that the common law creates a cause of action for wrongful death. The court went on to hold that time limitations contained in the Massachusetts Wrongful Death Statute would be subject to tolling for minority like any general time limitation under the Massa-

to note that every state had created a statutory wrongful death action and that, in light of such action by the states, there appeared to be no general public policy against wrongful death actions. Lastly, the Court examined the federal Death on the High Seas Act[63] and concluded that there was no affirmative indication that Congress had intended to preclude the judicial creation of a remedy for wrongful death for persons in the situation of this petitioner. The Court made it clear that it was not relying upon any specific statutory language, but rather was using its common-law power, energized by the policies expressed in both federal and state statutes creating wrongful death actions, to reach this decision. In articulating the basis of its decision, the Court wrote:

> The legislature does not, of couse, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect. In many cases the scope of a statute may reflect nothing more than the dimensions of the particular problem that came to the attention of the legislature, inviting the conclusion that the legislative policy is equally applicable to other situations in which the mischief is identical. This conclusion is reinforced where there exists not one enactment but a course of legislation dealing with a series of situations, and where the generality of the underlying principle is attested by the legislation of other jurisdictions. . . . [I]t is sufficient at this point to conclude . . . that the work of the legislatures has made the allowance of recovery for wrongful death the general rule of American law, and its denial the exception. Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases.[64]

Once the Court had clearly established its authority to formulate federal common law in this situation, it carefully considered the fundamental sources of the rule that it had created. First, the Court emphasized the relationship between the new rule and the needs of the federal system.

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. [Cases cited]. Such uniformity not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be "a system of law coextensive with, and operating uniformly, in the whole country."[65]

The Court went on to determine that neither the policies of predictability, represented by the principle of stare decisis, nor the need for easy administration of the law were contravened by its decision.

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chusetts tolling statute. This was so because the wrongful death cause of action could no longer be treated as having a statutory base in Massachusetts. *Id.* at 239.

63. 46 U.S.C. § 761 (1970).

64. 398 U.S. at 392-93.

65. 398 U.S. at 401-02.

The third case in which the Supreme Court demonstrated its power to formulate federal common law is *The Bremen v. Zapata Off-Shore Co.*[66] In that case, a German towage company contracted to tow a drilling rig, owned by an American company, from Louisiana to Italy. The contract contained a forum selection clause, which provided that any litigation arising out of the contract should be heard before the High Court of Justice in London. The rig was damaged by a storm in international waters in the Gulf of Mexico. The rig owner brought an admiralty suit in the District Court at Tampa, Florida, seeking 3,500,000 dollars as damages for negligence and breach of contract. Defendant invoked the forum selection clause in the towage contract and asked for a stay, pending submission of the dispute to the London court. The District Court, however, refused to give effect to the forum selection clause and retained jurisdiction. The Fifth Circuit Court of Appeals affirmed. On appeal, the Supreme Court held that the forum selection clause must be given effect, because the needs of the international business community and, in particular, of American business enterprises engaged in foreign commerce demand that such clauses be binding upon the parties in order to assure an orderly and prompt disposition of commercial disputes arising in international trade. The Court wrote:

> For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. Here we see an American company with a special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts.[67]

The Court ruled that a forum selection clause would be upheld in the federal courts, unless it could be shown that trial in the selected forum would be "so gravely difficult and inconvenient" that the party would be deprived of his day in court.[68]

Although the *Zapata* case had international and admiralty aspects, the Supreme Court implied that the rule pronounced in that case would be given general effect in purely domestic cases in federal courts under Rule 4(d)(1) of the Federal Rules of Civil Procedure. The Court described the rule in the instant case as merely the other side of the proposition recognized by the Court in *National Equipment Rental,*

66. 407 U.S. 1 (1972).
67. 407 U.S. at 8-9.
68. 407 U.S. at 18.

Ltd. v. Szukhent,[69] which held that in federal courts "a party may validly consent to be sued in a jurisdiction where he cannot be found for service of process through contractual designation of an 'agent' for receipt of process in that jurisdiction."[70]

These three cases indicate clearly that the Supreme Court will exercise its power to create federal common law when it sees itself, rather than the courts of the states, as the body best qualified to give effect to the fundamental sources of choice of law within the context of the federal system. In each instance, the Court exercised its power in light of the needs of interstate or foreign commerce and gave due attention to considerations of both practicality and justice in terms of the question presented for decision. In doing so, the Supreme Court satisfied Cheatham's hope that, after *Erie*, the federal courts would feel free to fashion a body of federal common law to be applied in situations in which national interests are paramount and in which no other positive federal rule is applicable.[71]

Cheatham saw the development of a true federal common law as having particular importance in cases involving international elements. In his early article on authoritative sources, he had been concerned that private international matters could be regulated by federal law only under the treaty power, the admiralty clause, or the commerce clause of the Constitution. He warned that new aspects of international private transactions might arise in which federal control would be desirable, but in which these clauses would not provide a source of federal authority.[72] Since Cheatham did not doubt that the national courts had the constitutional authority to make law in cases affecting the foreign relations of the United States, he urged the federal courts to exercise this power to meet new developments in the field of international commercial activity. His favorite quotation expressing this viewpoint is from *Belmont v. United States*: "Governmental power over external affairs is not distributed but vested exclusively in the national government. . . . In respect of all international negotiations and compacts and in respect of foreign

69. 375 U.S. 311 (1964).

70. 407 U.S. at 11. This case is similar to 2 recent decisions by the French *Cour de Cassation* concerning the law applicable to maritime contracts. In these cases, the French court did not apply French law expressly because of the international nature of the transactions. Cheatham felt that these cases were excellent illustrations of an appropriate consideration of the fundamental sources of law in arriving at a functional choice-of-law rule. *See* Cheatham & Maier, *supra* note 28, at 96-97; Cheatham, *supra* note 52, at 20-21.

71. The *Erie* doctrine and the usefulness of federal common law still are not accepted universally by American writers. *See, e.g.*, Keefe & De Valerio, *Dallas, Dred Scott and Eyrie Erie*, 38 J. AIR L. & COM. 107 (1972).

72. 89 U. PA. L. REV. 430, 445 (1941).

relations generally, state lines disappear. As to such purposes the state of New York does not exist."[73] In one of his last articles, Cheatham noted five subject matter areas in which federal common-law rules should be developed to remove control of private international matters from the states: private international matters relating to the activities of the federal government and its agencies; private international matters involving reaction to hostile activity by foreign nations; admiralty and maritime problems; private international cases relating to the money power of the national government; and questions concerning the enforcement of foreign judgments and arbitral awards.[74]

In the international area, the Supreme Court has responded to a large extent to Cheatham's suggestions and has reasserted its power to create decisional law, by common-law methods, that is binding upon the states. For example, in *Banco Nacional de Cuba v. Sabbatino*,[75] the Supreme Court made it clear that, since the act of state doctrine concerned the competence of a branch of the federal government to reach a final decision in a case involving activities of a foreign sovereign, the doctrine was part of federal law. This decision was not based upon any explicit provision of the Constitution, but was reached because the application of the doctrine in question required analysis of the structure and function of the national government.[76] In *Zschernig v. Miller*,[77] the Supreme Court struck down a statute of the State of Oregon that prohibited the passing of Oregon estates to foreign heirs unless the claimants could prove both that they would have the benefit and use of the property and that their country would grant reciprocal treatment to American beneficiaries of foreign estates. The Court's opinion left no doubt that federal common law, based on the foreign affairs power of the national government, was the authoritative body of law in these cases.[78] In both cases the Court stressed the need of the national government to have untrammeled sway in dealing with affairs touching upon the relationships of this nation with other nations in the world community. A majority of the Supreme Court recently re-emphasized judicial authority in this area by stating in *First National City Bank v.*

73. 301 U.S. 324, 330-31 (1937). Cheatham quoted this at least 8 times: 25 ARK. L. REV. 9, 29 (1971); 22 VAND. L. REV. 27, 45 (1968); 17 VAND. L. REV. 193, 200 (1963); 99 *Recueil* at 260; 6 VAND. L. REV. 581, 582 (1953); 22 ROCKY MT. L. REV. 109, 112 (1950); 46 COLUM. L. REV. 719, 731 (1946); 89 U. PA. L. REV. 430, 444 (1941).

74. Cheatham & Maier, *supra* note 28, at 58-68.

75. 376 U.S. 398 (1964).

76. 376 U.S. at 424-25; *see* Maier, *supra* note 40, at 159-62.

77. 389 U.S. 429 (1968).

78. *See* Maier, *supra* note 40, at 136-41, 151-59.

Banco Nacional de Cuba[79] that the federal judiciary has a federal common-law power to develop legal doctrine from considerations based on the structure and purpose of the Constitution. The Court maintained that the federal common law of foreign affairs is supreme not only over the law of the states but also over policies promulgated by other branches of the federal government, unless and until the common-law rule promulgated by the Court is changed by legislation.[80] Elliott Cheatham, I think, would have approved.

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79. 406 U.S. 759 (1972), *rehearing denied*, 41 U.S.L.W. 3189 (Oct. 10, 1972).

80. In this case, the First National City Bank (City Bank) had loaned some $15,000,000 to the Cuban government and had retained United States Government bonds, owned by the Cubans, as security for the loan. When Cuba defaulted on payment, City Bank sold the collateral, which brought an amount $1,800,000 in excess of the outstanding debt. Cuba brought suit to recover these excess funds and City Bank counterclaimed for the funds as compensation for the Cuban expropriation of the bank's Cuban assets in 1960. The Legal Adviser of the Department of State notified the court "that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases." 402 U.S. at 764. This raised the question of the applicability of the so-called *Bernstein* exception to the act of state doctrine, a question which the Supreme Court had specifically left open in *Sabbatino*. 376 U.S. at 420. The *Bernstein* exception grew out of 2 cases decided after World War II in which a federal court was asked to determine the validity of acts by the Nazi government when that government's representatives seized property belonging to a Jewish shop owner. In the first case, Bernstein v. Van Heyghen Freres, S.A., 163 F.2d 246 (2d Cir. 1947), the court refused adjudication on the merits on the ground that the act of state doctrine prevented judicial examination of the acts of a foreign government done within its own territory. In the second case, Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschippje, 310 F.2d 375 (2d Cir. 1954), the State Department informed the court by letter that application of the act of state doctrine was not necessary to protect the foreign relations interests of the United States, and the court proceeded to an adjudication on the merits.

In *National City Bank*, the lower courts had ruled that the Sabbatino Amendment, which explicitly required adjudication of claims based on international takings in certain circumstances unless the federal executive directs otherwise, was inapplicable. Therefore, the question whether the *Bernstein* exception to the act of state doctrine was good law was squarely raised. Four opinions were submitted in the case. Mr. Chief Justice Burger, and Justices Rehnquist and White voted to recognize the validity of the *Bernstein* exception; Mr. Justice Douglas disapproved the exception, but voted to permit the counterclaim on other grounds; Mr. Justice Powell voted to permit the counterclaim because he would overrule *Sabbatino*, but he indicated his view that the logic of the *Sabbatino* decision implicitly rejects the *Bernstein* exception; Justices Brennan, Stewart, Marshall, and Blackmun voted to disallow the *Bernstein* exception. Thus, although the Court upheld City Bank's claim, 5 of the Justices specifically disapproved the *Bernstein* exception on the ground that the validity of a foreign act of state was a political question and that the question whether it should be reexamined in American courts was therefore a part of federal common law. Consequently, "the Executive Branch, however extensive its powers in the area of foreign affairs, cannot by simple stipulation change a political question into a cognizable claim." 406 U.S. at 789 (Brennan, J., dissenting).

In the related area of sovereign immunity, also usually characterized as a political question by the courts, the United States Department of State has drafted a bill for enactment as a new chapter 97 to title 28 of the United States Code. That bill would establish a statutory regime to incorporate the restrictive theory of sovereign immunity and would leave all decisions under it to the courts. The State Department would no longer file suggestions of immunity with the courts in cases involving foreign sovereigns. U.S. Dep't of State, Press Release No. 321, Dec. 29, 1972.

Throughout his scholarly career, Cheatham retained reservations about the effectiveness of state law as an authoritative source for conflict of laws rules in private international cases. After *Erie Railroad v. Tompkins* was decided, but before *Klaxon v. Stentor Electric Manufacturing Co.*,[81] he expressed concern about requiring federal courts to adopt state choice-of-law rules even for intranational diversity cases on the ground that the federal courts were the "natural arbiters" in weighing the conflicting interests of two or more interested states and, as such, should be allowed to apply their own choice-of-law rules.[82] Concerning international conflicts cases, he wrote:

> A similar reason in perhaps even stronger form is present when the choice of law involves the law of a foreign nation. For in all aspects of foreign relations, it is natural that the agency of the central government should be dominant. It would seem natural for the federal rule choosing between the law of Illinois and the law of France, or between the law of France and the law of Germany, to be binding on the state courts rather than the reverse.[83]

Five years later, he reemphasized the problem:

> In international conflict of laws particularly, there must soon be a reexamination of the application of these two contrasting ideas—of the abrogation of federal courts common law which would seem to leave this part of our international relations to the diverse actions of state laws even when the cases are in the federal courts, and of the national statute or common law which is binding on state as well as federal courts. Here again the nature of our federal system may help to furnish the needed guidance, and authority for national control over international cases may well be implicit in that system.[84]

Cheatham's principal concern was that the states would tend toward parochialism in dealing with unfamiliar foreign rules from other social and legal systems. Thus, the careful weighing of the fundamental sources of law, so necessary in his view to the development of effective choice-of-law rules, would not take place in a sufficiently unbiased atmosphere to assure fairness of result. By 1968, however, the practice of state courts dealing with cases containing international elements had demonstrated that the fears of parochialism which had concerned him were largely unfounded. He wrote:

> Under the structure of the government of the United States the states are the residuary keepers of all governmental powers not delegated to the nation or prohibited to the states. So the control over private international law remains in the states

81. 313 U.S. 487 (1941). In this case, the Supreme Court ruled that a federal court, sitting in a diversity case, is required to use the conflicts law as well as the local law rules of the state in which it was sitting.

82. 89 U. PA. L. REV. 430, 446-47 (1941). He later changed his mind. *See* 17 VAND. L. REV. 193, 199 (1963).

83. 89 U. PA. L. REV. at 447.

84. 46 COLUM. L. REV. 719, 732 (1946). *See also* 22 ROCKY MT. L. REV. 109, 111 (1950).

> unless it is vested in the nation, subject to whatever limitations on the states may be imposed under the Constitution or international law.
>
> There are more positive grounds than mere governmental structure for the conclusion that state law is ordinarily the controlling law. The states have long applied their conflict of laws rules to international cases without hindrance or question. . . . The treatises on conflict of laws . . . apparently assume that ordinarily the state courts will fashion and apply conflict of laws rules for interstate and international cases as well. What is even more important than silence or assumption is the admirable attitude of the state courts in these matters, free as they are of parochialism or nationalism.[85]

In Cheatham's view, this fortunate occurrence resulted from the almost unconscious transfer by American courts of conflicts principles developed in intranational cases to private international decisions.[86] Thus, his later considerations of this question led him to conclude that it was unlikely that the Constitution would be invoked as a basis for general federal control over private international matters.[87] Regarding the question of the applicability of the *Erie* doctrine to private international matters, he wrote: "The reasons given for rejection of a federal courts common law [the rule of *Swift v. Tyson*] apply with full force to private international law . . . for the federal courts."[88] He foresaw, rather, "a slow expansion of federal judicial law in those areas of private international law which are of high federal concern."[89]

IV. CONSTITUTIONAL CONTROL OF CHOICE-OF-LAW RULES

One of the principal concerns of both the practicing bar and conflicts scholars during the period that Cheatham wrote in the conflicts field was the question whether the Supreme Court, acting under the aegis of the full faith and credit clause and the due process clause of the Constitution, would prescribe the content of the choice-of-law rules to be applied by the states or whether these two clauses would serve merely as the basis for establishing limits within which free state action would be permissible. Cheatham had no doubt that power existed under the Constitution to support complete federal control of state conflicts law.[90] The only question for him was the extent to which the power should be exercised.

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85. Cheatham & Maier, *supra* note 28, at 41-42.

86. *See* 99 RECUEIL at 262; 17 VAND. L. REV. 193, 200 (1963); Book Review, 38 COLUM. L. REV. 1328, 1329-30 (1938).

87. Cheatham & Maier, *supra* note 28, at 44.

88. *Id.* at 58.

89. *Id.* at 61; *see* 6 VAND. L. REV. 581, 582-83 (1953); 22 ROCKY MT. L. REV. 109, 112 (1950); 89 U. PA. L. REV. 430, 452 (1941). For an excellent study of developments in international conflicts cases see Hay, *International Versus Interstate Conflicts Law in the United States*, 35 RABELS ZEITSCHRIFT FUR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 429 (1971).

90. 89 U. PA. L. REV. 430, 439 (1941).

A. Foreign Judgments and Full Faith and Credit

Cheatham heartily approved of the Supreme Court's position that the full faith and credit clause requires the enforcement of sister-state judgments and, in fact, suggested that the same policy be extended under the foreign affairs power to cover foreign judgments.[91] In expressing the view that the automatic enforcement of valid sister-state judgments was a *sine qua non* for the effective operation of a federal system, he wrote:

> This explicit requirement, in a matter so fundamental to our federal union that the origins of the requirements go back to the Articles of Confederation, should not be overthrown, either through the permitted use of a second state's rules of conflict of laws, or through toleration of a system of reciprocity which is at variance with the whole purpose of the clause. Nor should it be undermined by employing as the test of credit a conception of reconcilability or legitimate governmental interests.[92]

As is evident from this statement, Cheatham forcefully maintained that both the requirements of justice and the needs of the governmental system demand that full faith and credit be afforded to sister-state judgments; his position was grounded upon basic values in the principle of res judicata and a recognition that rights acquired in one state could not be subject to challenge in others without creating an emphasis on separatism that would be inimical to the concept of federalism. Nevertheless, he recognized that it might be appropriate, under certain circumstances, to place limitations on the general requirement that credit be extended to foreign country judgments,[93] but cautioned that the determination whether such limitations are necessary in a particular case should not be based upon state law because of the paramount federal interest in the area of foreign affairs. In addition, Cheatham thought that it would be improper for a domestic court to refuse to give effect to a foreign country judgment either on the ground that adherence to the foreign judgment would not achieve a just result in an individual case or the ground that the courts of the foreign nation would not grant reciprocity to a similar judgment by an American court. This position was based upon a concern that an emphasis upon fairness in the domestic forum might go beyond demanding procedural fairness in the foreign country forum and be extended to require identity of result at home and abroad as a precondition to domestic enforcement, thus giving free rein

91. 22 ROCKY MT. L. REV. 109, 115 (1950).

92. 44 COLUM. L. REV. 330, 351 (1944).

93. "No rule, however firmly grounded in policy and though embodied in the Constitution itself, can be pressed to its logical extreme. Every rule may be confronted by opposing rules and policies. It will often be questioned and may somewhere be halted." *Id.* at 342.

to "the xenophobia latent in most of us."[94] Cheatham also was concerned that the requirement of reciprocity in the domestic forum would lead to the application of a policy that "would do injustice to Peter in this case because the other nation would do injustice to Paul in some other case."[95]

B. Judicial Jurisdiction and Due Process

Cheatham's position concerning federal control of the state choice-of-law rules that pertain to the application of the laws of a sister state, as distinguished from the judgments of its courts, cannot be understood clearly without an examination of his view of the jurisdictional prerequisites that due process demands in order for a state to have judicial jurisdiction over a particular case. He heartily approved of Justice Stone's landmark opinion in *International Shoe Co. v. Washington*,[96] in which the Court held that, provided the forum has certain minimum contacts with a transaction, the forum may maintain jurisdiction over a case if to do so would not offend "traditional notions of fair play and substantial justice."[97] Cheatham identified three fundamental criteria to be considered in determining whether the "fair play" standard has been met. First, fairness must be assured to the claimant by providing him with a relatively convenient forum in which he can enforce his rights. Secondly, fairness must be assured to the defendant by protecting him from having to appear in a unduly inconvenient or inappropriate court.[98] Lastly, fairness must be assured to the public in those cases in which society as a whole has a special interest in the outcome of the case. For example, the durable connection of a state with one or both of the parties is a relevant consideration in determining whether jurisdiction exists in a particular state under the due process clause.[99]

Cheatham feared that the expansion of state jurisdiction represented by *International Shoe* might become too broad and that the states would begin to exercise jurisdiction in cases in which fundamental notions of fair play and substantial justice to the parties would be given only minimal emphasis. Late in his career, he expressed the concern that the pendulum may have swung too far in favor of protecting the rights of the claimant by increased passage and use of state long-arm statutes and by expanded interpretation of existing jurisdictional laws. In addi-

94. 99 RECUEIL at 273.
95. *Id.* at 274.
96. 326 U.S. 310 (1945).
97. *Id.* at 316.
98. 99 RECUEIL at 264.
99. *Id. See, e.g.*, Alton v. Alton, 207 F.2d 667 (3d Cir. 1953).

tion, Cheatham viewed the rule that permitted judicial jurisdiction to be obtained over an intangible object through garnishment without notice to the garnishee's creditors as unfair and called for needed change from the judiciary.[100] Furthermore, he felt that the mere casual presence of an individual defendant, as distinguished from a corporate defendant, in a particular state should not serve automatically as the basis of judicial jurisdiction in the absence of other substantial connecting factors.[101]

C. Direct Federal Control Over State Choice of Law

Cheatham's conclusion concerning the operation of the full faith and credit clause upon judgments and the effect of the due process clause upon judicial jurisdiction indicate an underlying feeling that the states are not the appropriate governmental units to determine the most effective means for coordinating the legal institutions within the federal system. Whenever interstate matters were concerned, particularly those that required an assessment of system values, Cheatham felt that federal courts using federal law were the best coordinators. To implement this viewpoint, he suggested early in his career that the federal courts in diversity cases should continue to apply federal choice-of-law rules and that this function, in fact, might be one of the basic reasons for having a separate system of federal courts in the first place.[102] Without relatively strict federal limits on state choice of law, Cheatham feared that each state might "seek to press outward its asserted sphere of control to the point of serious conflict with the interests of others."[103] Although Cheatham had early reservations regarding constitutional control over state choice of law,[104] these reservations had grown from a concern that the Supreme Court might write the vested rights theory into the Constitution.[105] When the Court, in two cases involving conflicts between state workman's compensation statutes during the 1930's,[106] analyzed the

100. Specifically, he suggested that Harris v. Balk, 198 U.S. 215 (1905), be overruled.

101. 25 ARK. L. REV. 9, 23-28 (1971).

102. 89 U. PA. L. REV. 430, 446-47 (1941). He later modified this position on diversity cases, but maintained his interest in federally dictated, or, at least, federally controlled state choice of law. *See* page 241 *infra*.

103. 21 CORNELL L.Q. 570, 588 (1936).

104. *See id.* at 585-88.

105. *See* 63 COLUM. L. REV. 1212, 1231 (1963). The 2 cases that were his principal objects of criticism were New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918), and Mutual Life Ins. Co. v. Liebing, 259 U.S. 209 (1922). In these 2 substantially similar cases, the Court reached opposite results through a technical application of the place-of-contracting rule in determining the constitutionality of a Missouri statute regulating insurance policies.

106. Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935).

constitutional problems under both full faith and credit and due process in terms of the substantial contacts and relevant governmental interests that the states involved had with the transaction and the parties, Cheatham suggested that these decisions made possible "the development of the constitutional limitations in the field without subservience to technical conceptions of territorial sovereignty."[107] Approving Mr. Justice Stone's opinion in these two cases, Cheatham wrote:

> Under the test of constitutional control of choice of law laid down by the Supreme Court, it may appear that the full faith and credit clause adds nothing to the due process clause. If the laws of both of the states are "competent," then the due process clause allows either law to be applied, and the full faith and credit clause does not enforce either law on the other state. If the law of one state alone is "competent," then the due process clause would prevent the application of the law of any other state. The full faith and credit clause, however, may have an affirmative effect which the due process clause lacks, requiring not only that the right law be used if the forum entertains the action, but that the forum entertain the action.[108]

Cheatham read these cases as laying down a measure of constitutional control over choice of law that was "not a precise specification of the law to be used, but a limitation within the bounds of reasonableness."[109] Later, he was to suggest that the combined effect of the due process and full faith and credit clauses might be used to create a federal choice-of-law system that was binding upon the states.[110]

There is little doubt that Cheatham would have preferred a somewhat stricter constitutional control over state choice of law than the Supreme Court has imposed so far. In discussing the decision in *Hughes v. Fetter*,[111] Cheatham accurately concluded that the tests for determining whether due process should forbid the application of the forum's law and for determining whether full faith and credit should command the application by the forum of a sister state's law were, in essence, the same.[112] In *Hughes*, the Supreme Court had decided that Wisconsin could not refuse to entertain a wrongful death action based on an Illinois statute simply because the cause of action arose out of state, when Wisconsin had no strong local public policy against hearing this type of suit.[113] Cheatham welcomed the Court's holding that the full faith and credit clause did apply to sister-state statutes as well as to sister-state judgments.[114] He sought, however, a stricter due process test than

107. 46 COLUM. L. REV. 719, 722 (1946).
108. *Id.* at 723.
109. *Id.* at 722.
110. 22 ROCKY MT. L. REV. 109, 113-14 (1950).
111. 341 U.S. 609 (1951).
112. 6 VAND. L. REV. 581, 600 (1953).
113. *See also* First Nat'l Bank v. United Airlines, Inc., 342 U.S. 396 (1952).
114. 6 VAND. L. REV. 581, 590 (1953). The *Hughes* case dealt only with causes of action

the Court had applied for determining the appropriateness of allowing the forum to apply its own law. In criticizing a suggestion[115] that the test for a fair choice of law under the due process clause should be the same as the test applied to determine the fairness of a state's local law under the due process clause, he wrote:

> Even if the test is verbally the same in the two situations, its application and content may well be different because of the difference in the subject matter. It is one thing when the case in question is wholly local and the state regulation questioned affects only local matters. It is quite another thing when the case is interstate in character and the controversy concerns which of two states should apply its law. In the interstate case, it is quite in accord with the purpose of our federal system that there should be more restraint and more federal control on state action.[116]

The decision in these cases should be made, he said, not only by determining whether the state's choice of law was "fair," but also by "appraising the various factors and . . . determining the limits of federal control [in light of] the nature and needs of our federal system."[117] It was on this point that he made his most lucid statement of the value struggle that constituted the primary focus of his scholarly analysis.

> The extension of federal control over conflict of laws might bring substantial advantages. Through the creation of a single conflicts rule for all courts, federal control would help to produce that uniformity in result which is a principal purpose of conflict of laws, and it would thus permit more reliable planning and prediction in interstate cases. It would also prevent the harmful results of state provincialism and jealousy, which was a primary purpose of the Constitution. It may well be thought that federal control is particularly appropriate in conflict of laws, which by its nature involves interstate and international matters and not matters of merely local concern.
>
> Uniformity and certainty, however, will be purchased at a price. The price is the destruction or diminution of state power, with the consequent weakening of local self-government. In conflict of laws it may be unwise, or at least premature, to sacrifice state independence and diversity. Conflict of laws is a fairly young subject in the common law, with many of its basic ideas still vague and unformulated. It reaches into every aspect of law, and the combination and variety of the situations it presents are almost unlimited. This may be the kind of subject where the diversity of state views and the trial and error method in state courts should be maintained. . . .
>
> One result is clear. The old, seemingly complete freedom of the state is at least modified.[118]

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created by state statute and did not indicate whether it would be applied to common-law causes of action. Cheatham felt, however, that the reasoning of this and other cases, together with the 1948 amendment to the statute implementing the full faith and credit clause, made it unreasonable to distinguish between statutory and common-law causes of action for purposes of determining the requirements of full faith and credit. *Id.* at 602-03.

115. *See* New York Life Ins. Co. v. Dodge, 246 U.S. 357, 382 (1918) (Brandeis, J., dissenting).

116. 6 VAND. L. REV. 581, 601 (1952).

117. *Id.* at 601-02.

118. *Id.* at 587-88. *See* Comment, *The Place of the Constitution of the United States in*

Cheatham noted that there was already in existence some measure of federal control, but that identification of its full scope would have to await either additional developments in the Supreme Court or federal legislation under the full faith and credit clause.[119]

In three later cases, the Supreme Court has indicated that, to the extent that there was some measure of federal control over state choice of law, it was of very limited scope. In *Wells v. Simonds Abrasive Co.*,[120] the Court held that the full faith and credit clause did not prevent Pennsylvania, the corporate domicile of defendant, from applying its own statute of limitations to a cause of action for wrongful death arising in Alabama, even though the Alabama Wrongful Death Act contained a longer limitation period. The Court seemed to indicate that the full faith and credit clause would prevent only arbitrary discrimination against out-of-state causes of action. Since Pennsylvania was the domicile of defendant corporation and thus had a minimal contact with the transaction, and since there was no per se discrimination against a foreign cause of action, the requirements of the full faith and credit clause were satisfied. In the dissent, Justice Jackson argued that the primary function of the full faith and credit clause was to create uniformity in the federal system and that it should achieve this result by prescribing the specific content of state choice-of-law rules.[121]

In *Watson v. Employers Liability Assurance Corp.*,[122] the Court ruled that Louisiana could apply its local direct action statute to permit a suit against the insurer of a manufacturer whose product had injured plaintiff in Louisiana, even though the insurance contract was made elsewhere and specifically contained a clause prohibiting direct actions against the insurer. The Court said that the location of the injury in Louisiana was sufficient to meet due process requirements for choice-of-law purposes and, in addition, to release Louisiana courts from any full faith and credit requirements. The Court wrote: "[The full faith and credit clause] does not automatically compel a state to subordinate its own contract laws to the laws of another state in which a contract happens to have been formally executed. Where, as here, a contract affects the people of several states, each may have interests that leave it free to enforce its own contract policies."[123]

Conflict of Laws, in E. CHEATHAM, H. GOODRICH, E. GRISWOLD & W. REESE, CASES AND MATERIALS ON CONFLICT OF LAWS 635-36 (5th ed. 1967).

119. 6 VAND. L. REV. at 600.

120. 345 U.S. 514 (1953).

121. *Id.* at 521 (Jackson, J., dissenting). *See also* Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 26-27 (1945).

122. 348 U.S. 66 (1954).

123. *Id.* at 73. A similar result was reached in a case involving an insurance contract, Clay

The third case illustrating the limited scope of federal control over state choice of law is *Carroll v. Lanza*.[124] In that case, the Court ruled that Arkansas could permit a suit for common-law damages by a workman injured within its borders in the face of the exclusive remedy provided by the Missouri workman's compensation law under which the workman has been receiving benefits. The only contact with Arkansas in this case was that it was the place where the work was being performed and, thus, the place of the injury. All other elements surrounding the transaction took place or were located in Missouri, and the workman had been removed to that state for treatment immediately after the accident. Regarding the issues of full faith and credit and due process, the Court wrote: "[Arkansas'] interests are large and considerable and are to be weighed not only in the light of the facts of this case but by the kind of situation presented. For we write not only for this case and this day alone but for this type of case. The state where the tort occurs certainly has a concern in the problems following in the wake of the injury."[125] Since the only "problems following in the wake of the injury" were Missouri-related, this case made it clear that any minimum significant contact with the forum would be sufficient to permit the forum to apply its own law without violating due process and to avoid any compulsion under full faith and credit to apply the law of another state.[126] Thus, today, these two constitutional clauses set, at most, very broad limitations upon the freedom of the states to choose law in conflicts cases.[127]

In his last references to the subject, Cheatham assumed that, for the foreseeable future, neither the Supreme Court nor the Congress would likely expand the scope of federal control of state choice of law. He seemed to have hoped, however, that this situation might not last,

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v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964). In that case, the insured moved to Florida shortly after he had taken out an insurance policy in Illinois. The policy contained a 12-month time limitation for bringing suit. The Supreme Court held that Florida could apply its own statute, which nullified such time limitations shorter than 5 years, without violating either the full faith and credit clause or the due process clause. The insured had substantial contacts with Florida at the time when the cause of action arose and when the suit was brought. The Court implied that the policy necessarily contemplated movement by the insured and his property into other states and that there was no indication that Illinois law or the provisions of the contract contemplated that the 12-month limitation would be evaluated solely under the law of Illinois.

124. 349 U.S. 408 (1955).

125. *Id.* at 413.

126. There are specialized areas in which stricter control is exercised. *See, e.g.*, Sovereign Camp v. Bolin, 305 U.S. 66 (1938) (fraternal benefits); Security Savings Bank v. California, 263 U.S. 282 (1923) (government seizure).

127. For an excellent and exhaustive judicial analysis of the state of the law in 1962 see Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962).

and he approved the functional approach that the Court had used in the state choice-of-law cases it had considered. In 1971, he wrote:

> The choice of the applicable law is also merely held within the limits of reasonableness, though there is the same constitutional basis for precise federal law as there is as to judgments—the full faith and credit clause and statute. The Supreme Court has not desired to take on the task of developing a detailed body of interstate conflict of laws and is content to leave the subject for the most part to the states.
>
> The Congress or the Supreme Court may change its mind and take over the task of umpiring federal conflict of laws. . . . This continuing groping for a rule, that is fair, easy to apply and generally acceptable, is an assurance of wise action guided by functional considerations if the Court broadens the scope of federal control of conflict of laws.[128]

Cheatham's work in the vertical conflicts area identifies him as a "national federalist." He saw justice for all as the pervasive objective of law, but he also saw that such justice might be achieved only by means of an effective system of interrelated power that could appropriately bring the fundamental sources of law to bear upon the needs of the nation through fair, just, and expeditious decision making. Local matters were, for him, clearly the concern of the states; national matters were clearly the concern of the federal government. The appropriate referents of the terms "local" and "national" were to be identified by a functional analysis of the inherent assumptions underlying the structure of the federal system. Further, these labels were, for him, not immutable or sacrosanct. Their meanings could be derived initially from the great state papers of the United States, but their denotations would vary with the times and change with the changing needs of the political society whose creation those papers evidence. Generally, Cheatham saw the creation of an effective system of conflict of laws for the states *inter sese* and between the states and the national government as a matter of national concern. He sought that decision maker who would best be able to identify and give effect to the appropriate fundamental sources of law in his decisions by wise coordination of the multiple legal institutions that comprise the federal system. Thus, to the extent that Cheatham looked toward an eventual nationalization of conflict of laws, he did so as a means of preserving effective state government rather than as a road to its destruction.

V. STATE CHOICE OF LAW

A. The Principle of Federal Fidelity

In spite of the substantial power vested in the central government that would enable it to serve a coordinating function in resolving conflict

128. 25 ARK. L. REV. 9, 29-30 (1971). *See also* 22 VAND. L. REV. 27, 61 (1968).

of laws problems, Cheatham believed that the federal system also imposed upon the states an implicit "obligation to achieve coordination through the principles of conflict of laws as a part of 'law's total task.' "[129] With reference to Justice Stone's consideration, in *Milwaukee County v. M.E. White Co.*,[130] of the federal system's need for coordination of its decision-making institutions, Cheatham wrote:

> These policies are given partial expression only in the provisions of the national constitution. The same policies, even though not cast in legally mandatory form, are present in all cases of conflict of laws. The courts and the legislatures of the component states, too, have it as one of their functions to guard the "union against the disintegrating influence of provincialism in jurisprudence."[131]

In this respect, Cheatham's attitude closely parallels the German Constitutional principle of *bundestreue*—federal fidelity. This unwritten constitutional principle requires that the constituent states of the Federal Republic of Germany, as well as the central government, observe the interest of the union in the exercise of their powers and limit their powers to the extent that the interests of the union require it.[132] If the application of a state's law would affect other states or the federation, the principle of federal fidelity requires restraint and concern for the common interest in the exercise of legislative jurisdiction.[133]

In some instances, Cheatham saw it as the responsibility of the states to go further than required by federal law in giving effect to system policies. For example, in the enforcement of sister-state and foreign judgments, he suggested that the states should go beyond the minimum requirements of the full faith and credit clause.[134] He also warned against an uncritical reading by state courts of state local law statutes in an attempt to avoid the difficult task of considering the policies underlying a particular choice-of-law decision by finding a legislative choice of law in situations in which none was intended. On the other hand, he maintained that state legislatures did have the power, within constitutional limits, to establish choice-of-law rules and that state courts were bound by these rules.[135] In addition, Cheatham emphasized the state's responsibility to go beyond the minimum requirements of the due process clause to assure that the forum's application

129. 25 ARK. L. REV. 9 (1971).

130. 296 U.S. 268 (1935).

131. 99 RECUEIL at 306; *see* Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 960-61 (1952).

132. P. HAY, FEDERALISM AND SUPRANATIONAL ORGANIZATIONS 194 (1966).

133. *Id.*

134. 89 U. PA. L. REV. 430, 448 (1941).

135. *Id.* at 448-51; 52 COLUM. L. REV. 959, 961 (1952).

of local law in a given case could be considered truly fair and just. Regarding this matter, he asked:

> Is it wise for a court to hold or a legislature explicitly to provide that a state statute shall extend as broadly as the due process clause permits? A legislature or a court ordinarily seeks to make laws that are fair—fair to all sides. The due process clause of the Constitution, however, is a very special kind of law. It does not prescribe; it only limits. It requires, not that a law be fair, but that it be not too unfair, not grossly unfair. . . . To say that a law does not violate the due process clause, is to say the least possible good about it.[136]

As evidenced above, Cheatham's writing in this field was directed toward suggesting the means by which states could carry out most effectively their governmental responsibilities in making choice-of-law decisions.

B. Contemporary Scholarship in the Field of State Choice of Law

Before proceeding to a consideration of Cheatham's contributions to the development of choice of law at the state level, it may be helpful to consider the basic positions of some other leading scholars. Since World War II, the choice-of-law field has become an academicians' playground. Current activity in it represents "an unprecedented competition of ideologies, largely of academic origin, to explain and reconstruct a whole field of law, each purporting or aspiring to achieve a single universal principle."[137] These modern theorists can be divided (somewhat arbitrarily, it is admitted) into three general groups: the "unified field theorists," the "multiple rulemakers," and the "fundamentalists."[138]

The "unified field theorists" attempted to establish a single general principle that would serve the court as a regular starting point in choice-of-law cases. Once the general premise was accepted, a number of exceptions could be developed to meet the needs of special situations. Representatives of this group include Professors Albert Ehrenzweig,

136. 25 ARK. L. REV. 9, 25 (1971).

137. Neumeier v. Kuehner, 31 N.Y.2d 121, ___, 286 N.E.2d 454, 459, 335 N.Y.S.2d 64, 72 (1972) (Breitel, J., concurring).

138. The writer is fully aware of the difficulties involved in making such a separation. All of the major writers in the conflicts field during the last 3 decades have been concerned with fundamentals in such a way as to present a comprehensive approach to conflict of law problems. The division, I suggest here, indicates primarily the extent to which each group reduced its initial analysis of fundamentals to a utilitarian approach to conflicts cases. Secondly, the writer apologizes in advance for the rather short shrift given to the theories of the major scholars included in this brief survey. The reader should be aware of the oversimplification involved in attempting to restate the content of dozens of law review articles and treatises in a paragraph. For an excellent extended discussion of each of these approaches from a functional viewpoint see Peterson, note 21 *supra*.

Brainerd Currie, Arthur von Mehren, and Donald Trautman. Professor Ehrenzweig's approach postulated the assumption by the forum that its own law would apply to every transaction that it was charged to adjudicate, unless one of a few generally recognized basic exceptions to the *lex fori* rule was applicable.[139] An important corollary to this rule was the development of a common law of "forum conveniens" under which a state would take jurisdiction of only those causes of action with which it had sufficient contact to justify the application of its own local law rule.[140] Professor Currie's theory is similar, at least superficially, to Ehrenzweig's.[141] Currie suggested that the forum should apply its own law whenever it had a governmental interest in the application of its own policies. In its original formulation, this approach did not involve a weighing of governmental interests directed toward application of the law of the state having the greater interest, but rather it called for the automatic application of forum law whenever the forum had a significant interest in the outcome of the case.[142] Currie later modified this approach to permit the application of foreign law in some instances when the forum had an identifiable governmental interest.[143]

Professors von Mehren and Trautman recommended that the forum court conduct a "functional analysis" that would necessitate examining critically the governmental interrelationships involved in a given case and, from this examination, determining the appropriate law to be applied. The operative principles of this approach involved the identification of all "concerned" jurisdictions and the selection (or construction) of a "regulating rule" that would govern the rights of the parties.[144]

The "multiple rulemakers" are represented principally by Profes-

139. The exceptions included reference to personal law for status questions, rules of "validation" for nonadhesion contracts and for trusts and wills, and the use of the law of the situs for questions concerning real and, to some extent, personal property. *See generally* A. EHRENZWEIG, CONFLICT OF LAWS 307-46 (1962).

140. *See* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

141. There was, however, hardly general agreement between the two. *See, e.g.*, Currie, Book Review, 73 HARV. L. REV. 801 (1960). For a concise statement of the difference between Currie's and Ehrenzweig's positions see Rheinstein, Book Review, 32 U. CHI. L. REV. 369, 371 (1964).

142. *See* Currie, *Notes on Methods and Objectives in the Conflicts of Laws*, 1959 DUKE L.J. 171, 177-79.

143. *See* W. REESE & M. ROSENBERG, CASES AND MATERIALS ON CONFLICTS OF LAWS 523-24 (6th ed. 1971). *See also* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

144. *See* A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 76-79 (1965). The authors also set forth a catalogue of policies to be considered in selecting the regulating rule. *Id.* An excellent review of the book that discusses the theory presented as well as its usefulness as a teaching tool is Gorman, Book Review, 115 U. PA. L. REV. 288 (1966).

sor David Cavers, who began his studies in this field with a thoughtful analysis of the basic considerations that should be dealt with by courts in conflict-of-laws cases. His main point was that a court in a conflicts case is selecting an appropriate rule of decision rather than an appropriate territorial jurisdiction; therefore the rule should be selected with an emphasis upon its usefulness in obtaining justice between the individual parties in the case before the court.[145] In the most comprehensive statement of his revised views, Cavers uses this basic approach to construct a series of "principles of preference." These principles, if they did not amount to choice-of-law rules of decision themselves, were designed to supply quite specific guidelines for the development of narrow rules.[146] The drafters of the *Restatement (Second) of Conflict of Laws* also formulated a large number of individual choice-of-law rules for various types of conflicts cases. For the most part, the narrow *Restatement* rules were drawn from court decisions that indicated wide acceptance of the particular rule by the courts. Another category of "rules" in the *Restatement*, including especially those relating to torts and contracts, contains less precise formulations, but those formulations are closer to specific rules than to general statements of policy. To this extent, the *Restatement (Second)* can be classified as one of the "multiple rule makers."[147]

The third group of conflicts theorists, the "fundamentalists," include Professor Robert A. Leflar, the American Law Institute in section 6 of the *Restatement (Second)*, and Professor Cheatham himself.[148] This group of writers placed greatest emphasis upon the identification of the fundamental elements that should be considered by the courts in making choice-of-law decisions. Generally, they assumed that, once these fundamentals were identified, the task of working out their specific applications to diverse factual situations should be left to the courts. Cheatham was the first of this group to set forth a list of the "fundamental sources" or policies that should be considered in making choice-of-law decisions. The principal statement of this analysis is found in the article "Choice of the Applicable Law," which Cheatham authored with Professor Wil-

145. *See* Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

146. *See* D. CAVERS, THE CHOICE OF LAW PROCESS 139-203 (1965).

147. *See* Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679, 690-99 (1963).

148. Professor Willis Reese also falls into this category, but his work is not discussed separately in view of his close connections with both the *Restatement (Second) of Conflicts* as its Reporter and his joint work with Cheatham in preparing the original list of "fundamentals." *See* note 60 *supra*. Professor Hessel Yntema also prepared a list of "fundamentals," but that list was so long and unwieldy that it has exerted little identifiable influence on court decisions. For a list of Yntema's considerations, see R. LEFLAR, AMERICAN CONFLICTS LAW 142 (student ed. 1968).

lis Reese in 1952.[149] These authors listed nine policies that should be taken into consideration by the courts in making a choice of law in multistate situations. The nine policies to be considered were:

(1) the needs of the interstate and international systems;
(2) a court should apply its own local law unless there is good reason for not doing so;
(3) a court should seek to effectuate the purpose of its relevant local law rule in determining a question of choice of law;
(4) certainty, predictability, and uniformity of result;
(5) protection of justified expectations of the parties;
(6) application of the law of the state of dominant interest;
(7) ease of determination of applicable law, convenience of the court;
(8) the fundamental policy underlying the broad local law field involved;
(9) justice in the individual case.[150]

The list contained in the *Restatement (Second) of Conflict of Laws* is quite similar to the list propounded by Cheatham and Reese.[151] It reads as follows:

§ 6, Choice of Law Principles—

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

The *Restatement* list omits two of the policies mentioned by Cheatham and Reese. It does not direct the court to assume that its local law would apply unless good reason could be shown for doing otherwise, and it does not list separately the value of attaining justice in the individual case, presumably because that value is already reflected in the other fundamentals listed. The comments to section 6 make it clear that almost all of the considerations noted by Cheatham and Reese underlie the list of relevant factors contained in the *Restatement*.[152]

149. Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952).

150. *Id.* at 962-81. This list, of course, was a joint product. A second list that varies slightly from this one is found in 99 RECUEIL at 291-307.

151. This is hardly surprising, since Professor Reese served as Reporter for the *Restatement (Second)*. The list differs from the one in the Cheatham-Reese article, probably as a result of discussions in the American Law Institute during the formulation of the *Restatement*.

152. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 comments *a-k* at 11-17. Many of the later sections of the *Restatement* incorporate § 6 by reference, thus bringing these funda-

In 1966, Professor Robert A. Leflar published a list of five "choice-influencing considerations," which represented a consolidation and incorporation of those elements listed in the Cheatham-Reese article. Leflar's choice influencing considerations were:

(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;
(5) application of the better rule of law.[153]

These commentators have attempted to reduce the problems concerning choice-of-law decisions to their most fundamental elements. The fundamental consideration underlying all law is the achievement of justice for the persons exposed to the legal process. Justice in this legal sense, as distinguished from the abstract philosophical use of the term, results from the operation of three broad sets of policies. These policies can be characterized as "governmental system policies," "substantive rule policies," and "policies of practical utility." Application of the governmental system policies promotes justice by establishing a regularized decision-making system that creates and applies legal norms to subjects designated by the system. Application of the substantive rule policies achieves justice by giving effect to the values that underlie local law rules. The policies of practical utility protect against denials of justice by creating a manageable decision-making process in which the machinery functions in an identifiable and predictable manner so that the values represented by the governmental system and substantive rule policies will not be subverted by mechanical breakdown.

It is easier to give effect to these three sets of policies in purely intrastate situations than in conflict of laws cases. In the intrastate situation, value judgments concerning the governmental system—who is to be the lawmaker and through which of his organs is he to operate—are not generally in issue. Furthermore, difficulties in attaining practical utility are somewhat lessened since those operating under the rules—the local bar, the courts and other decision-makers—have a common experience on which to draw and are more readily able to accommodate themselves to the mechanics of the system because of their continued operation under it. The principal focus in the intrastate case is thus upon the implementation of the policies represented by the relevant local law rules.

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mental policy considerations into play, even when a more precise formulation of a rule has been stated.

153. *See* Leflar, *Choice Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 282 (1966).

In the interstate or international case, the decision-making process becomes much more complex. Every choice-of-law case consists of two steps in decision making. The first is the selection of the political unit whose policy formulations will govern the rights of the parties; the second is the application of those norms to the case before the court. The principal complexity arises from the necessity of identifying appropriate governmental system policies, and, at the same time, dealing with considerations that involve policies of practical utility and substantive rule policies. Decisions concerning governmental system policies in an interstate case are by far the most difficult for the decision maker. This is so for at least two reasons. First, the decision requires mental operations at a level of abstraction considerably higher than that demanded by a determination whether *X* should pay *Y* or whether a rule directing service of process in a certain way is clear. The concept of "government" is an abstract construct and the level of abstraction is so high that it is a difficult task to sort out relevancies and irrelevancies in order to lay bare the basic policy decisions which the complete governmental system represents. It is by these governmental system policy decisions that choice-of-law rules are primarily created. Each of the lists of considerations of the "fundamentalists" considered above includes elements that can be placed under one of the three policy groups. Most of the fundamental sources of conflicts rules that they identify, however, relate, either in whole or in part, to governmental system policies.

C. Governmental System Policies

The distinguishing feature of Cheatham's approach to the analysis of these fundamental sources is the emphasis that he places on the importance of the policies underlying the structure of the governmental system. It is clear that the implementation of the policies necessary to create and to operate a smoothly functioning interstate and international governmental system was his principal concern. This emphasis is a natural corollary to his attitude that the conflicts field is concerned primarily with the coordination of the actions of the decision-making institutions that comprise the federal and international systems rather than with "conflict" between these institutions. A precondition to effective justice is an effective system; therefore, Cheatham emphasized that the governmental system itself has a principal intrinsic value. It is the continuing and overriding emphasis that Cheatham gave to these system policies that sets him apart from other conflicts scholars and represents

perhaps his most significant contribution to the conflict of laws field.[154] This emphasis is pointed up sharply in "Choice of the Applicable Law":

> Except in the comparatively rare situations where a court must follow the explicit directions of its legislature, the smooth functioning of the interstate and international systems in private law matters should be the basic consideration in the decision of every choice of law case. In no country are the needs of the interstate system more important than in the United States where business and social activities almost ignore state lines. The nature and needs of that system have been looked to by the Supreme Court for guidance in cases of constitutional control of choice of law. The same factors should also be taken into account by state and lower federal courts when fashioning rules on the subject in areas that are not as yet governed by the Constitution. Likewise, the rules of international choice of law should be derived from the interests of international society.
>
> Of necessity, this overriding policy is so vaguely worded as to be difficult of application . . . Nevertheless, difficult though the task may be, *the general policy itself deserves consideration in every case.* This for two reasons. It is most unlikely that the lesser policies, when grouped together, form a complete whole . . . Then, too, each of the lesser policies represents a different value. *In situations where two or more of these values conflict, resort to the basic policy may be necessary to determine which of them shall carry the day.*[155]

Of the three lists of fundamental choice-of-law polieies previously discussed, only the Cheatham-Reese list establishes an order of priority indicating their relative importance. Not only are the needs of the interstate and international system listed first, but policies that reflect considerations other than system values are given very low priority. In contrast, both Professor Leflar and the *Restatement (Second)* explicitly state that no particular order of priority should be assigned to the factors that they list.[156]

For purposes of analysis, it is appropriate to divide the policies underlying the governmental system into three distinct, but related, groups: those relating to the recognition of the territorial rights and duties of the forum, those requiring respect for the territorial rights and duties of other governmental units, and those reflecting the need to soften the effects of the diversities of a multistate governmental system

154. I do not mean to suggest that the other scholars, including the two "fundamentalists" discussed, did not consider system policies important. None of them, however, with the exception of von Mehren and Trautman, place as much emphasis upon system policies as Cheatham did when dealing with the problems of state choice of law. In Cheatham's comments concerning the work of other scholars, a regular object of praise or criticism was their emphasis or lack of it upon system needs as a primary consideration in conflicts cases. *See* Book Review, 19 VAND. L. REV. 558, 561 (1966) (Cavers); Book Review, 45 A.B.A.J. 1190 (1959) (Ehrenzweig); Book Review, 62 HARV. L. REV. 717, 719 (1949) (Lepaulle); Book Review, 48 COLUM. L. REV. 1267 (1948) (Rabel); Book Review, 44 MICH. L. REV. 443 (1945) (Rabel); Book Review, 93 U. PA. L. REV. 112, 113 (1944) (Cook).

155. Cheatham & Reese, *supra* note 149, at 962-63 (emphasis added).

156. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 6, comment *c* (1971). *See* Cheatham & Reese, *supra* note 149, at 960; Leflar, *supra* note 153, at 282.

upon the legal rights of its inhabitants. The first division of governmental system policies calls for the forum court to recognize that territorial division of authority has imposed upon every court the responsibility to give effect to the substantive rule policy decisions made by its own constituency. Thus, Cheatham urged that a court give effect to its own local law rule or, at least, to the policies underlying it whenever possible.[157] This is a proper approach, since one of the basic tenents of a federal system of government is that local self-government should be preserved whenever that preservation does not conflict with broader national aims. The second division of governmental system policies complements the first division by asking the forum to respect the duty of foreign law makers to represent their local constituencies. The forum may implement this consideration by guarding against the extension of its legislative jurisdiction beyond the area that its rule was intended to regulate. Generally, local law should not be extended to cover out-of-state activities, unless the rule clearly was intended to reach them.[158] In addition to restrictions upon the application of local law to out-of-state activities, strict limitations should be placed on the use of the public policy exception to the general rule that the forum should enforce out-of-state causes of action. Cheatham thought that the application of this exception was limited by the due process clause[159] and, in particular, by the Supreme Court's decision in *Hughes v. Fetter*.[160] Nevertheless, to the extent that the exception was still viable after the *Hughes* case, Cheatham advocated that it be exercised only in those situations in which the foreign cause of action did violence to "some fundamental principle of justice, some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal."[161]

To coordinate the functions of the diverse territorial law makers when differing local policy decisions come into potential conflict, Cheatham emphasized that the forum court must determine to which of the law makers the governmental system has assigned the policy decision under consideration. To determine this, a critical analysis of the governmental interests of the states involved is essential. These interests are not generalized interests in human affairs, but rather those interests that grow out of the charge made by the system to each state to deal with local matters related to the welfare of individuals operating within its

157. Cheatham & Reese, *supra* note 149, at 959-69; 99 RECUEIL at 298.
158. Cheatham & Reese, *supra* note 149, at 961.
159. *See* 23 ROCKY MT. L. REV. 109, 114 (1950).
160. 341 U.S. 609 (1951).
161. Loucks v. Standard Oil Co. v. New York, 223 N.Y. 99, 111, 120 N.E. 198, 202 (1918). *See* 52 COLUM. L. REV. 959, 969 (1952).

boundaries.[162] This analysis involves an examination of the interaction between the governmental power of the forum as the ultimate law maker in the case before it and the power of foreign governmental units to control matters related to *their* assigned governmental functions. In Cheatham's view, achieving a proper balance between these two legitimate concerns was the basic consideration in coordinating the legal institutions in our federal system. Criticizing the all-encompassing nature of Cook's local law theory, Cheatham wrote:

> Laying the emphasis on the freedom of the forum state to do what it wishes . . . may engender the unfortunate attitude that the freedom should be widely used. While in the early stages of the off-type cases of any field of law it is essential that courts have freedom to achieve justice, in the developed stages and the ordinary cases the need is for doctrine which will point to the appropriate decision. So counter-balancing emphasis is needed on the wisdom of ordinarily employing the foreign law as guide in foreign transactions.[163]

The third and, perhaps, most important division of the governmental system policies recognizes the need to soften the adverse effects that the diversities of the federal system may have upon those who are governed by it. An important means to this end is the adoption of a policy of protecting vested rights. Cheatham distinguished this *policy* from the vested rights theory of choice of law, which automatically gave ultimate effect to the authority of the sovereign within whose territory the last legal event that gave rise to the cause of action occurred. Cheatham welcomed that theory's demise, but found the local law theory that replaced it equally inappropriate.[164] In criticizing these theories but, at the same time, advocating a policy that would afford protection to vested rights, Cheatham said:

> A plague on both your houses when you press your claims each to the exclusion of the other, or, rather, appreciation for both your houses when you keep your claims within bounds. The fact is that, subject to constitutional requirements, the forum employs the foreign law, but only so much of the foreign law as the forum's own conflict-of-laws rule deems appropriate in the decision of the case. A combination of the two laws, the forum's choosing law and the foreign state's applied law, leads to the decision. To change either of these laws is to change the result. . . . *In our country, with a nationwide economic system and a checker board set of legal systems divided into fifty and more legal units, the vested rights policy of protection of foreign based legal interests (not the vested rights theory of choice of law) is highly important* . . . With Americans driving and flying by tens of millions across state lines every day *it would be intolerable if a person had to consider whether its legal interests, such as his status as a married man or the title to his car or to his*

162. 52 COLUM. L. REV. 959, 972 (1952). *But cf.* Leflar, *supra* note 153, at 290-95, 312.
163. 58 HARV. L. REV. 361, 386 (1945).
164. *See* note 24 *supra.*

other personal or real property, were subject to a new law every time he crossed a state line.[165]

Cheatham's emphasis upon this aspect of governmental system policies is present in several other considerations to which he recommended that weight should be given in making choice-of-law decisions. For example, he emphasized the need for uniformity in conflict of laws rules in order to reduce the difficulties faced by a person when he comes in contact with different legal systems.[166] Thus adherence to this policy might lead to a retention of the place of the wrong rule in tort cases and the place of contracting rule in contract cases, in the absence of convincing evidence that it would be more appropriate to apply the law of another jurisdiction.[169] Cheatham also noted the desirability of formulating choice-of-law rules that would not create opportunities for forum shopping and would therefore lessen the effect of the vagaries of our multigovernmental system upon the legal rights of those who live within it. This emphasis is correct and important. The existence of different potential fora results from decisions based on governmental system policies and not from decisions based on policies related to substantive rights. Therefore, to permit a difference in forum to make a difference in legal result is to risk substituting governmental system policies for substantive rule policies as the principal influence in determining the final outcome of a case. The vested rights policy also encourages the courts to give effect to the general policies underlying the field of law involved, rather than to strike down a cause of action or a defense merely because of technical differences in the implementation of those policies by sovereigns who are in basic agreement. Illustrative here are cases involving usury, trusts and wills, and the rule of validation in contraets.[168]

An excellent discussion of the coordination of state law by appropriate attention to federal system policies is found in Cheatham's consideration of the right of the statutory successor—the administrator or the executor—to sue in a state other than the one in which he was appointed. Cheatham indicated that generally courts refused to recog-

165. Cheatham, *Symposium: Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 624, 625 (1968). For an excellent illustration of the difference between the vested rights theory and the vested rights policy *compare* New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918), *with* Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

166. 52 COLUM. L. REV. 959, 970 (1952).

167. For a case retaining the traditional place-of-the-wrong rule for exactly this reason see Abendschein v. Farrell, 382 Mich. 510, 170 N.W.2d 137 (1969).

168. *See* Cheatham & Reese, *supra* note 149, at 978-80. The vested rights policy is the need to protect the justified expectations of the parties. This policy, however, is not really a choice-of-law policy at all, except in the broadest sense.

nize the standing of an out-of-state representative in order to protect local creditors against discrimination by foreign representatives in favor of foreign creditors and to guard against ineffective administration by a representative who was not under the supervision of the forum court. Cheatham approved of these relevant local law considerations, but pointed out that, once the Supreme Court in *Blake v. McClung*[169] had held that it was unconstitutional under the privileges and immunities clause for a representative to give preference to citizens of one state over those of another, the reasons for refusing the right to sue to a representative appointed in another state disappeared. Consequently, Cheatham maintained that effect could be given to the governmental system value of recognizing the right of a foreign representative to bring suit, and thus carry out the purpose for which he was appointed, without violating a legitimate local policy.[170] It is appropriate to note that Cheatham's emphasis upon governmental system policies goes beyond the concern that choice-of-law decisions might otherwise cause interstate tensions and interference with the free flow of people and commerce across state lines. Rather, his approach calls for the identification and consideration of all system values that underlie a structure of divided territorial authority.

D. The Need to Simplify Choice of Law Rules

The difficult evaluations involved in identifying governmental system policies make it important to create choice-of-law rules that serve as clear and understandable guides to the lawyers and judges who must administer the system.[171] Thus, all three of the "fundamentalists" include in their lists of relevant concerns the need to simplify choice-of-law rules in order to avoid having to reconsider the basic governmental system policies involved each time a choice-of-law question arises. On the other hand, a too simplified set of rules might give clear guidance to lawyers and judges, but might also fail to reflect the subtleties of the system whose needs the rules are intended to identify. There are, however, substantial reasons for opting in favor of more concrete and predictable choice-of-law rules. First, there are relatively few choice-of-law cases compared to the number of purely intrastate cases and, consequently, the practicing bar and the courts are relatively unfamiliar with choice-of-law operations. Secondly, conflict of laws rules do not have a

169. 172 U.S. 239 (1898).

170. *See* Note, *The Statutory Successor, The Receiver and the Executor in Conflict of Laws*, 44 COLUM. L. REV. 549 (1944).

171. Cheatham & Reese, *supra* note 149, at 977.

readily identifiable counterpart in human experience. They are conceptual constructs used to effectuate and explain another conceptual construct—the concept of government. Given their high level of abstraction, choice-of-law rules should be as clear and predictable as possible in order to avoid unjust results because of the inability of attorneys and courts to interpret the legal data represented by unclear rules.

Throughout his career, Cheatham was concerned about the needs of the office lawyer and the judge.[172] It was not only the importance of governmental system policies, but also considerations of practicality that led him to endorse, in some instances, application of the place-of-the-wrong rule and to recommend the use of forum law whenever appropriate.[173] In this context, he voiced a valid criticism of conflicts teaching, suggesting an overemphasis upon analytical theory and too little emphasis upon the needs of those who work within the system.

> We law teachers have contributed to the false emphasis. Our courses—*mea culpa*—have been based on opinions of judges handed down in the public legal process of deciding litigated cases. They have not been based on the private legal process of lawyers handling clients' problems in law offices, much less on the legislative process of perceiving society's needs and hopes and devising and forwarding measures to achieve the ends desired.[174]

It was also this concern that led him to emphasize continually that the investigations of scholars in the conflicts field should not be aimed at reforming the entire system at one stroke, but rather should serve to identify for those who operate within the system the considerations that should underlie their principal function of deciding specific cases or of advising clients on specific cases. He was a firm believer in "the application to conflict of laws of the traditional common law method: narrow issue, breadth of view, reasoned decision."[175] This attitude is common to all of the "fundamentalists," but the most effective statement of the need, I believe, was made by Cheatham. Reviewing the opinion in *Reich v. Purcell*,[176] he wrote:

> This case, like most of the recent leading conflicts cases, is a torts case in which planning and predictability are at a minimum. Yet there is still a need for rules of choice-of-law as for other rules of law. Rules of law are reconciliations of compet-

172. The first edition of Cheatham's casebook contained a special section devoted to the problems and needs of the office lawyer. *See* E. CHEATHAM, N. DOWLING, & H. GOODRICH, *supra* note 1, at 1133-37; Leflar, Book Review, 2 MO. L. REV. 126, 128 (1937). Later editions of the book omitted this section, but there was always emphasis throughout each text on the needs of the office practitioner and the judge.

173. *See* Cheatham & Reese, *supra* note 149, at 976 (1952); 99 RECUEIL at 298.

174. 25 ARK. L. REV. 9, 13-14 (1971).

175. Cheatham, Book Review, 19 VAND. L. REV. 558, 561-62 (1966).

176. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

ing social policies stated in a form as readily applicable to specific cases as the subject permits. Law works best when it is so definite, as well as just, that the parties and their lawyers will handle the matter without litigation. Most litigated cases are settled at the trial court level, and the trial judge needs a rule that is readily applicable. Most legal matters are handled by lawyers in their offices, helping their clients to plan and then reducing the plans to dependable form. When the rules of law are clear and the lawyers competent, these matters dealt with in the office never come before the courts.[177]

E. The Need for Predictability and Certainty

The three "fundamentalists" have failed to distinguish adequately between the need for predictability and certainty for lawyers and the need for protection of the justified expectations of the parties, although they each have suggested that, with respect to the expectations of the parties, a significant distinction exists between cases in which a planning element is present and cases in which no planning element is present.[178] Their failure to make the first distinction made it necessary for them to make the second distinction, which is a misleading one. This writer submits that the *parties* to a case never have expectations concerning which rule of law will govern their rights except for those expectations that are created by their lawyers. An examination of the functions that a rule of law performs will substantiate this proposition. A rule of law describes past decisions to a court in a generalized and abstract form. A rule also serves as a guide to future decisions so that past decisions may be followed and consistency attained, or, if they are not followed, so that the departure may be a conscious one, not one wholly governed by the psychological condition of the decision maker at the time the decision is made. In this sense, a rule of law provides a certain continuity for social policy decisions that is an important element of justice. Both lawyers and laymen rely on this continuity, but they rely on it in different ways. At trial and on appeal, lawyers argue for the adoption of particular rules and policies in an attempt both to assist the courts in carrying out the judicial function and to protect their client's interests. Before litigation, lawyers use rules of law as data from which inferences are drawn that can be used by the attorney to predict the decision maker's response. This reliance occurs not only at the stage of the creation of legal rights and obligations, as when a contract or a will is drafted, but also during decision making *after* legally significant events have occurred. Thus, even in a case involving an accidential injury, a

177. Cheatham, *Symposium: Comments on Reich v. Prucell*, 15 U.C.L.A.L. REV. 624 (1968).

178. *See* Leflar, *supra* note 153, at 282-83, 297, 310, 317; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, comment *g* at 15 (1971); Cheatham & Reese, *supra* note 149, at 971.

rule of law serves a lawyer's planning function on which his client relies. For example, the lawyer must decide on the basis of the available data whether his client should sue[179] and, if so, where he should sue.[180] Each of these decisions involves some prediction by the lawyer regarding which rule will be applied by a potential court to various aspects of the case. In this sense, attorneys have justified expectations concerning the rules of law that will be applied to a given factual situation. These expectations, however, are the values represented by the concept of predictability, and they are present in *all* types of cases.

The layman's expectations, on the other hand, are different in kind and in degree. His expectations are based on data that consists of felt conceptions of justice and acquired knowledge concerning the political and social organization of society. Rarely, if ever, are his expectations based on specific data derived from court decisions.[181] On the contrary, the layman relies on the existence of rules, but not on the content of the rules themselves; that is, he assumes that there are rules which created and have perpetuated a system that will protect his rights against arbitrary treatment. Therefore, it is inaccurate to say that parties have no justified expectations in cases involving an accidental injury. In these cases, parties have the same generalized expectations about the governmental system in which they live as they have in all other cases, and in order to give effect to these justified expectations, emphasis must be placed upon the policies of the governmental system that create and energize the system upon which the laymen relies. The layman's justified expectations involve predictability of the specific result in a given case only to the extent that he assumes that the rules within the system will provide sufficient predictability to enable his attorney to advise him of his rights.

If the "fundamentalists" meant to suggest that, in certain kinds of cases, lawyers do not need a basis for making predictions, then they are incorrect. To the extent that the attorney is unable to predict from the forum's choice-of-law rules what local law will be applied in a particular case, the rules fail to satisfy practical needs that are important to the

179. The great majority of tort cases are settled before trial. A recent survey shows that, in automobile accident cases, 34% of those in which an attorney was hired were settled before trial began. Of all the cases surveyed, only 5% actually went to trial. *See* A. CONRAD, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS 184 (1964).

180. *See, e.g.*, Davidson, *Factors Influencing Choice of Forum in Aircraft Disaster Litigation*, 37 J. AIR. L. & COM. 309 (1971).

181. When commercial persons are concerned, this statement is a bit too broad. Many commercial persons do know "the law" and operate on somewhat the same sets of data as lawyers do. Insofar as this is true, however, they hardly can be called laymen.

attorney in *all* cases. Post-event, pre-trial planning is just as vital to the legal process as is any other kind of planning. In order to make the choice-of-law system work effectively, the need for predictability must be considered in all types of cases and given due consideration in structuring choice-of-law rules.

F. Substantive Rule Policies

The last set of policies to be considered in this examination of the choice-of-law process are the substantive rule policies expressed in the local law rules. It already has been noted that the policies underlying the local laws involved in a given case should be considered in determining which governmental unit is the appropriate one to give effect to these policies by having its rule of law applied. Although Leflar, Cheatham, and Professor David Cavers have correctly pointed out that choice-of-law rules select local law rules and not jurisdictions, conflicts rules *are* jurisdiction-selecting in the sense that the selection of a local rule of law also amounts to the selection of the local legal process that created the rule. Since a local law rule cannot be separated completely from the jurisdiction's evaluation of the fundamental sources of law pertinent to its formulation, a jurisdiction's legal process, not merely a rule, is selected whenever a foreign local law rule is applied in the forum.

Although it is proper to examine the content of the local law rules in order to identify the operative governmental system policies that will be given effect by the selection of one state's rule rather than another's, an evaluation of the substantive content of local law rules should not be an important consideration in making choice-of-law decisions. In most cases, the local law rules should not be evaluated at all. To call for an evaluation of local law rules as part of the analysis in law selection risks diverting the court's attention from admittedly more difficult determinations involved in identifying and weighing appropriate governmental system policies and policies of practical utility to an easier and less controlled determination unrelated to the principal goals of choice-of-law rules. In other words, if selection of a "better rule" of local law is recognized explicitly as a valid consideration in choice-of-law situations, there exists the danger that this consideration will be used to the exclusion of other considerations and thus serve as a substitute for analysis. Evaluating local law policy in conflict of law cases raises the same danger that exists in connection with the public policy exception under the Bealean vested rights approach. "[T]he concepts stand in the way of careful thought, of discriminating distinctions, and of true policy

development in the conflict of law."[182]

Professor Robert Leflar is the principal advocate of including the search for the "better rule of law" as part of the court's choice-of-law considerations.[183] Cheatham, however, took the position that evaluation of the local law rule might be a useful approach in a limited number of choice-of-law cases. He wrote:

> One kindred consideration deserves brief mention. Sometimes a court is faced with a situation in which one of the possibly applicable laws is in tune with the times and the other is thought to drag on the coat tails of civilization. . . . On occasion, indulgence in such a practice will be forbidden by one or more of the policies mentioned above. But where this is not the case, it is hardly open to criticism. After all, choice-of-law decisions, in common with all others, should keep up with the times.[184]

The *Restatement of Conflicts* omits choice of the better rule as a consideration in choice of law.

It would be beyond the scope of this Article to engage in a lengthy examination of the merits and demerits of including the "better law" evaluation as an appropriate consideration in choice-of-law cases. As part of this analysis of Cheatham's writings, however, the following comments are appropriate. First, Cheatham saw in Leflar's general approach a much-needed emphasis upon honest and accurate statements by the courts of their analytical process in choice-of-law cases, as well as effective use of fundamental sources of law to arrive at useful choice-of-law decisions.[185] It is doubtful, however, that Cheatham approved of the emphasis that Professor Leflar places on the need for open comparative evaluation of local law rules as an appropriate fundamental source of choice-of-law decisions. In the same article in which he stated his approval of aspects of Leflar's approach, Cheatham reemphasized the need for primary emphasis to be placed in choice-of-law decisions upon federal and international system values[186] and advocated the adoption of choice-of-law rules that are "fair, easy to apply and generally acceptable."[187] This writer suggests that emphasis upon the search for a better

182. Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 1016 (1956); *see, e.g.*, Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936).

183. *See* Leflar, *supra* note 153, at 295-304; R. LEFLAR, AMERICAN CONFLICTS LAW 254-59 (1969).

184. 52 COLUM. L. REV. 959, 980 (1952).

185. On one occasion, Cheatham said: "I am a follower of Professor Leflar's views. The basic guiding considerations must be general; they must be capable of adaptation to the immense varieties of situations with which the law deals; they must be functional in character so as not to lose sight of their reason." 25 ARK. L. REV. 9, 19 (1971).

186. *Id.* at 20-23.

187. *Id.* at 30.

rule of law in choice-of-law decisions is the antithesis of emphasis upon federal system policies and policies of practical utility. Courts, of course, do seek to apply the best available rule of decision in purely local cases. The significant difference between this intrastate search for the best rule and one carried out in the context of a choice-of-law decision is stated excellently by Professor David Cavers. He wrote:

> In a domestic case, a court faced by conflicting rules properly chooses the better one. It is charged with developing its own state's law, and any other choice would be perverse. In a choice-of-law case, however, if a State *X* court is willing to displace its own rule of law for State *Y*'s rule of law, it is moved to do so by facts relating the parties or the controversy to State *Y* and hence to State *Y*'s rule. These facts are not germane to the relative merits of the *X* and *Y* rules in their respective domestic legal systems. Moreover, the *X* court is not charged with developing *Y* law and would not be doing so by rejecting the *Y* rule for the "better" *X* rule. Thus, in the improbable case in which an *X* court expressly applies *Y* law because *Y*'s rule is "better," the *X* court would not be developing its own legal system whose inferior rule would remain unchanged. Therefore, I see the "better law" criterion applied in domestic cases as affording a false analogy, an escape that is not responsive to a choice-of-law problem confronting the court.[188]

In a system of divided governments in which "coordination" is the key, the better law analysis disregards the direct allocation to each state of the responsibility to develop a body of local law that is responsive to the needs of its citizenry. At present, we have not yet become so much a unitary nation that this basic feature of federalism can be ignored.

Two recent cases serve as useful illustrations of this problem. In *Conklin v. Horner*,[189] an Illinois resident, while riding as a passenger in the car of another Illinois resident, was injured in an accident in Wisconsin. He brought suit in the Wisconsin courts in order to take advantage of Wisconsin's statute permitting direct actions against liability insurers. The law of Illinois prohibited suits between guest and hosts, while the law of Wisconsin did not. In a series of previous cases, Wisconsin had moved from the Bealean place-of-the-wrong rule to the *Restatement*'s "most significant contacts-governmental interest" theory to Professor Leflar's choice-influencing considerations approach. In the *Conklin* case, the court analyzed the facts in light of Professor Leflar's five choice-influencing considerations and held that the Wisconsin rule was applicable. The court applied the Wisconsin rule on the ground that Wisconsin had sufficient interest in the outcome of the case to justify the application of its own law in order to "advance its governmental interest." The interests cited by the court, however, are almost entirely

188. Cavers, *Conflict of Laws Round Table: The Value of Prineipled Preferences*, 49 TEXAS L. REV. 211, 215 (1971). *But see* Ehrenzweig, *"False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law*, 53 VA. L. REV. 847, 853 (1967).

189. 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

spurious. First, the court cited the interest of Wisconsin in controlling conduct on her highways. The guest-host rule clearly is irrelevant to this consideration. Secondly, the court maintained that the general policy of Wisconsin's tort law is to compensate those who are injured by negligent acts and that the furtherance of this policy justified the application of the Wisconsin rule. The Illinois guest statute, however, did not represent a rejection of this general policy but only a narrow exception to it. The key to the decision was clearly that guest statutes were disfavored in Wisconsin courts and, consequently, the Wisconsin forum chose to apply its own rule as the better rule. Judge Hallows, in dissent, vigorously argued that the Wisconsin court had not attempted to coordinate the law-making powers of Wisconsin and Illinois, but rather merely had exercised the power it derived from its position as the forum to apply the forum's rule. Judge Hallows wrote: "if the advancement of the local concerns of the forum is to be the controlling factor, as the majority seems to indicate, then we . . . are committed to applying the law of the forum because it is always our duty to advance Wisconsin governmental interests and to apply our better law in every conflicts case before us."[190]

The effect of this decision, it is suggested, was to apply a kind of "forum court's law," which represented an ad hoc value judgment uncontrolled by the past acts of Wisconsin law makers. In effect, the decision presupposes a single body of law, outside the aegis of any particular sovereign, on which the court may draw for its local law decision. The value of honesty in judicial decisions is not to be underrated, but encouraging a court to be honest about making poor choice-of-law policy judgments does not improve the quality of the judgment made. The *Conklin* case represents almost a "free law" approach in which the court uses the moral suasion provided by Professor Leflar's fifth consideration to justify completely ignoring both governmental system policies and policies of functional utility in formulating choice-of-law rules.[191]

The recent case of *Neumeier v. Kuehner*[192] serves as a useful comparison. In this case, a domiciliary of Ontario, Canada was killed when

190. *Id.* at 488; 157 N.W.2d at 589.

191. *Conklin v. Horner* is the classic case of a court automatically dismissing the factor of predictability on the ground that it is dealing with an accident case and dismissing the needs of the governmental system on the ground that the foreign state is not likely to engage in retaliatory conduct if forum law is used. *Id.* at 478, 157 N.W.2d at 984. *See* Milkovich v. Saari, No. 230 (Minn. Sup. Ct., Jan. 5, 1973). This kind of lip-service to important policy considerations is exactly the kind of judicial activity that is encouraged by sanctioning the comparative evaluation of local law policies as a co-equal consideration in choice of law.

192. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

the automobile in which he was riding collided with a train in Ontario. The automobile was owned and driven by a New York resident. The trip began and was to have ended in Ontario. The issue in the New York court was whether the Ontario guest statute would bar a suit by the estate of the guest against the estate of the negligent host. The New York court gave effect to the Ontario guest statute and dismissed the suit. The three opinions in the case point up sharply the differences between the choice-of-law results obtained when governmental system values and policies of practical utility are given emphasis and when substantive law policies of the local law rules are allowed to control. Chief Judge Fuld, writing for the majority, stated the controlling rule as follows:

> [W]hen the passenger and the driver are domiciled in different states . . . the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will adance the relevant substantive law purposes *without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.*[193]

Judge Fuld's opinion correctly analyzes the governmental system policies involved. He refused to find a special interest in the state of New York either because the host driver was a domiciliary or because New York's compulsory insurance law would provide a fund from which the plaintiff could recover. The purpose of the insurance statute was not a conflict of laws purpose, but a purpose purely connected with local law. Thus, it did not support the finding of a governmental interest in New York in having its own law applied. Quoting Professor Willis Reese with approval, the court asked "Was the New York rule really intended to be manna for the entire world?"[194] It answered in the negative: "While New York may be a proper forum for actions involving its own domiciliaries, regardless of where the accident happened, it does not follow that we should apply New York law simply because some may think it is a better rule, where doing so does not advance any New York State interest, nor the interest of any New York State domiciliary."[195] Judge Breitel concurred in the result, but expressed doubts concerning the formulation of such specific choice-of-law rules without more case experience to support them. He preferred to assume that the traditional choice-of-law rule pointing to the place of the accident would govern, except where there were sufficient reasons to seek another result.

Judge Bergen's dissent, on the other hand, failed to take into ac-

193. *Id.* at ___, 286 N.E.2d at 458, 335 N.Y.S.2d at 70, *quoting from* Tooker v. Lopez, 24 N.Y.2d 569, 585, 249 N.E.2d 394, 404, 301 N.Y.S.2d 519, 533 (1969).

194. *See* Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 563 (1971).

195. 31 N.Y.2d at ___, 286 N.E.2d at 457, 335 N.Y.S.2d at 68.

count governmental system policies. He objected to the majority's decision on the grounds that it failed to apply New York standards of justice and, in guest statute cases, would treat defendants differently depending upon the domicile of the plaintiff. The refutation of this position is stated effectively by Judge Fuld in terms of governmental system policies.

> It is quite true that, in applying the Ontario guest statute to the Ontario-domiciled passenger, we, in a sense, extend a right less generous than New York extends to a New York passenger in a New York vehicle with New York insurance. That, though, is not a consequence of invidious discrimination; it is, rather, the result of the existence of disparate rules of law in jurisdictions that have diverse and important connections with the litigants and the litigated issue.[196]

The majority opinion correctly strikes the balance between the use of mechanical rules that do not reflect the true fundamental sources of choice-of-law decisions and the use of an unrestrained consideration of comparative local law policies. Judge Fuld gives overriding emphasis to the needs of the interstate and international systems and to policies of practical utility. Judge Breitel may be correct in stating that it is too early for appropriate rules to be formulated, but it is likely that the practicing bar will welcome, in the confused areas of guest statute cases, the steps toward clarification that the New York Court of Appeals took in *Neumeier*.[197]

Cheatham was vitally concerned with the necessity for striking such a balance between mechanical rules and policy analysis, and he saw it as the chief goal of modern conflict of laws decisions. He wrote:

> Yet policies, fundamental though they be, are not enough. Something more definite is needed—rules of law—as guides to advice and conduct and decision. Rules of law have as their purpose, as Professor Leflar's specific chapters show, to give guidance in the application of relevant policies in particular fields. They are reconciliations of competing social policies stated in a form as readily applicable to individual cases as the subject permits. Law does its work best when its precepts are so definite as well as so wisely based that there can be little controversy over them. With such precepts the tens of millions of conflict of laws situations every day in this country will breed only a few conflicts cases in court.[198]

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196. *Id.*

197. Professor Leflar interprets the case quite narrowly. He writes: "If the case states a new 'rule' it appears to be the narrow one that the forum's plaintiff-protective law will not be applied against a forum resident in favor of a nonresident domiciled at the place of the alleged tort if the latter place (state) does not by its law protect its own resident. Any broader interpretation of the new decision would carry it beyond its own facts, which would be dangerous, since the approach now seems to be one of laying down a separate 'rule for each specific set of facts that comes before the court.'" Leflar, *Conflict of Laws*, 1971-72 ANN. SURV. OF AM. L. ——, ——.

198. 25 ARK. L. REV. 9, 20 (1971).

VI. CONCLUSION

This survey of Elliott Cheatham's scholarly work has many omissions. A principal one is its failure to examine his casebooks as significant contributions to the development of teaching in the field of conflict of laws. Those books contain original notes and short essays—many of which were written by Cheatham and are crystalline examples of effective legal writing and thought. Cheatham was the moving spirit behind the casebooks, and his role in this respect was acknowledged by his co-authors.[199] Cheatham's writings have made a lasting contribution to the field of conflicts of law. His less publicly evident contribution is in the minds and hearts of the present practitioners, law teachers, and judges who studied under him or who came under his influence during a lifetime devoted to legal education. There was never a *Cheatham on Conflicts*, although he had talked of plans for one at the time of his death. Reviewing Walter Wheeler Cook's book, *The Logical and Legal Bases of the Conflict of Laws*, Cheatham wrote:

> Mr. Cook's wide influence on the law came largely through his powers as a rare and gifted teacher. His students and his colleagues reveal his ability to stir others. It is a mark of his devotion to teaching as well as of the meticulous character of his writing that, casebooks aside, this is his first as well as his last book.[200]

That statement is as true of its author as it was of the man of whom he wrote.

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199. *See* Reese, *supra* note 13, at 465 (1957).

200. Book Review, 93 U. PA. L. REV. 112 (1944).