Cook: Stewing in His Own Juice Why Walter Cook’s “Logical and Legal Basis” Never Had a Chance

Sarah Montana Hart

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INTRODUCTION

Walter Wheeler Cook attempted to articulate a coherent theory for dealing with Conflict of Law problems. He not only failed in his own right, but his failure also negatively affected the entire field of Conflict of Laws. Because of Cook’s inability to adequately employ his own theories, even within his own work, his thesis could never have clarified the “dismal swamp, filled with quaking quagmires,”¹ that is the Conflict of Laws arena. Instead, Cook’s misapplication of his own theory only sank the Conflicts field deeper into the mud.

Cook claimed that any one theory of Conflict of Laws was “at least as good as any other,”² and that there is “no logical foundation”³ for choosing between them.⁴ If Cook truly believed, and were able to apply this hypothesis to Conflict of Laws, however, he would not have showed any preference for one theory over another, nor would he have attempted to use logic and reason to hold one theory out as better than another. Unfortunately, Cook could not meet this challenge. He used logic, and reason to argue that the theories of his predecessors – Story, Dicey, and Beale among them – were incorrect and inapplicable.

Cook rejected the formalism of his predecessors on two grounds: first, because they attempted to impose an order on the law from the outside, and thus attempted to solve Conflict of Laws

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¹ William L. Posser, Interstate Publication, 51 Mich. L. Rev. 959, 971 (1952-53). Obviously, Posser was writing after Cook, so Cook cannot actually be charged with directly attempting to drain the swamp. However, the analogy holds, as Cook was trying to untangle the same tangle to which Posser was later referring.
² Walter Wheeler Cook, The Logical and Legal Bases for the Conflict of Laws, 33 Yale L. J. 467 (1924) [hereafter Cook].
³ Id. at 465.
⁴ Class discussion and lecture on Monday, February 14, 2011 [hereafter class notes].
Law problems by appeal to principles that had no basis in the reality of how the courts acted; and second, because the traditional approach was logically impossible to apply. Instead of these traditional, theoretical approaches, Cook suggested an “effects test” and a “functional basis” analysis, which he insisted are derived from observation of courts’ and lawmakers’ actual behavior.\(^5\) Cook’s arguments – in fact his entire article – is structured in such a way, however, as to directly undermine his assertion that the best theories come from observation and extrapolation. Instead of doing either, Cook adopts the methods used by his predecessors, and asserts theoretical principles which are then superimposed on the case law. Cook therefore espouses one method, but uses another for his own argument, undermining his original assertion that one is better than the other.

Thus, Cook contradicts and undercuts his own arguments in three ways. First, he uses a structure of argument that he specifically and emphatically rejects as inferior. Second, Cook uses logic and reason where he says they cannot be used. Finally, despite his claim of neutrality, Cook clearly prefers the method that he proposes, finding it both logically and reasonably superior to any other. He thus undermines his argument that any one Conflict theory is as good as another. In these three ways, Cook is both inconsistent and self-defeating, and the ramifications for this are devastating for the field of Conflict of Laws.

I. THE BASICS OF COOK’S “LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS”

A. The Functional Approach

In his 1924 article “The Logical and Legal Bases of the Conflict of Laws,” Walter Cook attempted to outline new theory for Conflicts of Laws.\(^6\) His method included a functional

\(^5\) Id.

\(^6\) Cook at 475.
approach to the problem. Instead of hypothesizing about either the reasons or the rational for a particular rule, Cook attempted to use the behavior of courts, and the success of that behavior, to create a theory of Conflict of Laws. As he explains it, “[i]n the present discussion it is proposed, instead of following the a priori method, to adopt the procedure which has proved so fruitful in other fields of science, viz. to observe concrete phenomena first, and to form generalizations afterwards.”

Using this approach, Cook imagined himself to be the equivalent of natural scientists, who are observing the natural world. As Cook explains, scientists used to believe that there were a few principles of universal truth to divine, and once humanity had those principles in hand, we could look at the world and see those principles at work. However, faced with the reality of the data, those same scientists came to the conclusion that this outside-in approach was neither effective nor reflective of reality. The scientific method arose as a result of this conclusion. The result was a scientific community which collects data about the world and then, maybe, generates principles from that data by inductive reasoning. Echoing, and occasionally quoting, John Dewey, Cook follows the same “inductive,” evolutionary thought that the sciences use to track patterns in nature and then form conclusions.

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7 The term “functional approach” comes from class notes Monday, February 14, 2011.
9 Id. at 460.
10 Id. at 457; Class notes Monday, February 14, 2011.
11 Class notes Monday, February 14, 2011.
12 Id.
13 Id.
14 Cook at 475.
16 Cook at 475.
Cook applies this theory to the law, explaining that we should similarly observe and track general patterns in the law – in the outcome of decisions and what judges actually do – to extrapolate theories.\textsuperscript{17} He contrasts this functional approach, based on observation of judicial reality, with the theoretical approaches of Conflicts scholars like Story and Dicey.\textsuperscript{18} Those scholars, in Cook’s estimation, were more akin to the early scientists, attempting to force a divine order on the legal world from the outside-in.\textsuperscript{19} Instead, he argues, we should discover what the purposes of the laws are by examining who is doing what, and why.\textsuperscript{20} In other words, we as lawyers and theorists need to discover the principles of law, rather than use principles to try and discover the law.\textsuperscript{21} He sums up the concept nicely, later in the essay, when he explains:

\begin{quote}
For we as lawyers, like the physical scientists, are engaged in the study of objective physical phenomena. Instead of the behavior of electrons, atoms, or planets, however, we are dealing with the behavior of human beings. As lawyers we are interested in knowing how certain officials of society—judges, legislators, and others—have behaved in the past, in order that we may make a prediction of their probable behavior in the future. Our statements of the “law” of a given country are therefore “true” if they accurately and as simply as possible describe the past behavior and predict the future behavior of these societal agents.\textsuperscript{22}
\end{quote}

The project, then, for Cook, is to actually do the research and collect the data on what courts do, in order to be able to determine what the “true law” is.

\textbf{B. Cook’s First Rejection of Formalism}

For Cook, the theories of Story, Dicey, Beale,\textsuperscript{23} and his other predecessors are akin to those natural scientists, writing before the scientific method arose. He explains that these formalist and “positivist” form a “theoretical method,” which attempts to impose order on the law from the outside.\textsuperscript{24} These theoretical Conflicts scholars, like the early natural scientists,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{18} \textit{Id. at 459.}
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} \textit{Class notes Monday, February 14, 2011.}
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} Cook at 475-476 [internal citations omitted].
\item \textsuperscript{23} Beale fits into this list only with the exception of Beale’s territorial ideas, which Cook accepts.
\item \textsuperscript{24} Cook at 458-459.
\end{itemize}
\end{footnotesize}
believed that there were certain principles of law that, once divined and understood, could predict the way courts would (or at least should) come out on a Conflicts problem. They called these principles “rights” or “duties” and proclaimed they were universal, and therefore could solve the universally suffered problem of conflicting laws. Thus, “[i]t follows that ‘the object of a writer on the conflict of laws [sic] is to discover principles’ of the subject and… ‘show how in accordance with the fundamental principle assumed by the writer’… the specific rules for the decision of concrete cases are or should be reached by all countries.” This outside-in approach was completely unsatisfactory to Cook.

Instead, Cook, like the scientists espousing the scientific method, insists that patterns should not be divined and imposed on the legal world from the outside, but discovered through a close empirical study of what courts actually do. In Cook’s opinion, the behavior of the people making the laws is the only thing that is relevant to discovering and predicting what the law will be and how the courts will act. He explains that, “‘[r]ight,’ ‘duty,’ and other names for legal relations are… not names of objects or entities which have an existence apart from the behavior of the officials in question, but merely terms by means of which we describe to each other what prophecies we make as to the probable occurrence of a certain sequence of events—the behavior of the officials.” Thus, the only way, in Cook’s opinion, that rights and duties exist, is if the correct officials say they do. And the only way to predict the way a court will come out, which,

25 Id.; Class notes Monday, February 14, 2011.
26 Cook at 475
28 Cook at 459-460.
29 Cook at 475-476.
30 Id.
after all, is what we “[a]s lawyers we are interested in knowing.”31 is to judge by the court’s past behavior.

C. The Effects Test (for Jurisdiction)

As an example of this scientific-method approach to the law, Cook examines jurisdiction. In place of the formalism he rejects, Cook suggests that – from the data and observation of what the courts actually do – we can predict how jurisdictional Conflict of Laws problems will be decided by courts. This is called the “effects test.”32

The question is: How are we going to decide who does or does not have jurisdiction in a case where laws conflict? Cook answers: Where the law has an effect, that is where the court has jurisdiction.33 To explain this thesis, cook uses an example of a wrongful death suit with a series of variables: person A, in state X, injures person B, in state Y, and as a result person B dies in state Z:34

According to Cook, any of the three states in this example – X, Y, or Z – could have jurisdiction over the case.35 This presents the Conflict of Laws problem: Which court has jurisdiction over this case? What is going to make the difference, for Cook, is which state physically holds person

31 Cook at 476.
32 Class notes Monday, February 14, 2011.
34 Id.
35 Id.
A. The state that can get physical custody over person A will be the state that will have an effect on person A. Only the court of that state, then, will have jurisdiction over the case. In other words, each state could enforce their criminal law on person A, if they could arrest person A – person A could be subject to the criminal law of states X, Y, or Z. The factor, according to Cook, that will ultimately determine which law is used to prosecute person A, is simply which state can actually have a physical effect on person A.

To support this, and to show that this is, in fact, what courts are really doing, Cook quotes at length from the opinion by Judge Learned Hand in Guinness v. Miller. This was not a criminal action, but a civil suit for damages, confirming that Cook believes his test is applicable across the civil or criminal spectrum. In that case, Judge Learned Hand stated that “no court can enforce any law but that of its own sovereign, and when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign.” The Guinness case came to the conclusion that, even though “[i]n the case of a tort committed in a foreign jurisdiction it is pretty clear that the judgment should be based on the exchange at the time of the loss inflicted,” the foreign sovereign could not expect his law to be applied outside of his sovereign territory. For this reason, Judge Learned Hand declined to impose the foreign law, and concluded that only the law of the forum was applicable.

36 Id.
37 Id.
38 Id.
39 Id.
41 Cook at 474, quoting Guinness, supra note 41.
42 Id.
43 Cook admits that this is very similar to the ideas of Beale, and even accepts Beale’s territorialism, but differs with Beale on the Idea of “renvoi,” which I will discuss later. Cook at 470.
44 Id.
From this case, and presumably from others like it, Cook claims to extrapolate his “effects test.”\textsuperscript{45} His rule holds that only the law of the forum that has actual, physical control over the issue or person in question can ever be applied, as it was in the \textit{Guinness} case. He comments that, “[i]n the conclusion that a court never enforces foreign rights but only rights created by its own law, I see nothing extraordinary,”\textsuperscript{46} although this rule is certainly meant to be a break from the traditional approach of Beale and his predecessors.

II. \textbf{Cook’s Stew: The Second Rejection of Formalism}

In addition to rejecting formalism for its structural defects (applying abstract Conflict principles from the outside onto the law, as opposed to extrapolating them from the inside-out), Cook also argues that the courts do not, and cannot, apply the Conflict of Laws analysis in the way the traditionalists would have them apply it.\textsuperscript{47}

For Cook, the trouble is that a court never actually does apply the “foreign” law that would govern the case at hand, even if they try to.\textsuperscript{48} He explains that, when courts are solving a Conflict of Laws problem, they try to imagine what that foreign state would do if that foreign state were dealing with a purely domestic problem.\textsuperscript{49} The case at hand, however, would not be a purely domestic problem were it in the foreign court – the facts would still include two different people from two different states.\textsuperscript{50} Therefore, Cook argues, the courts are engaging in a complete fiction. If the courts were going to genuinely solve the Conflict of Laws problem, it would have to imagine what the foreign court would do with a non-domestic case (the real facts

\textsuperscript{45} \textit{Id.}
\textsuperscript{46} Cook at 475.
\textsuperscript{47} Cook 468-474; Class notes Monday, February 14, 2011.
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.}
\textsuperscript{50} \textit{Id.}
of the case).\textsuperscript{51} This would entail applying, not the domestic law of the foreign jurisdiction, but the Conflict law of that foreign state.\textsuperscript{52} The courts do not engage in this analysis, according to Cook, because to do so would result in infinite circles, or \textit{renvoi},\textsuperscript{53} which would lead the court nowhere.\textsuperscript{54}

To illustrate his point, Cook returns to the variables that he used to explain the effects test: person A, in state X, injures person B, in state Y, and as a result person B dies in state Z.\textsuperscript{55} Cook then adds another wrinkle: “[s]uppose now that in our hypothetical case of the wrongful death, the action is not brought in X, Y, or Z, but in the courts of a fourth state, Q.”\textsuperscript{56} The question then becomes, “shall Q apply X’s ‘law,’ or Y’s ‘law,’ or Z’s ‘law’?”\textsuperscript{57}

Cook then explains that, in attempting to apply the traditional Conflict of Laws theory, the court of state Q would partake in a legal fiction.\textsuperscript{58} He asks, “[i]f, for example, we say that Q is to ‘apply the law of Z,’ do we mean that Q is to decide the case, with its factual elements involving X, Y, and Z, in exactly the same way that the courts of Z would decide it?”\textsuperscript{59} In other words, “do we mean that the court in Q is to find out whether or not the courts of Z would give \textit{these plaintiffs} (B’s dependents) a judgment against \textit{this defendant} (A) if the action had been brought there?”\textsuperscript{60} Cook answers his own questions by stating emphatically that the Q court will

\begin{footnotesize}
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} From the French “sending back,” the doctrine under which a court in resorting to foreign law adopts as well the foreign law's conflict-of-laws principles, which may in turn refer the court back to the law of the forum; The problem arising when one state's rule on conflict of laws refers a case to the law of another state, and that second state's conflict-of-law rule refers the case either back to the law of the first state or to a third state. Blacks Law Dictionary (9th ed. 2009), “renvoi.”
\textsuperscript{54} Cook 468-474; Class notes Monday, February 14, 2011.
\textsuperscript{55} Id.
\textsuperscript{56} Cook at 468.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\end{footnotesize}
not actually apply the Conflict law of any of those states, but the domestic law, changing the meaning of the word “law,” and the facts of the case, to prevent it from entering the *renvoi* vortex.\(^61\)

...[T]he court in Q is compelled to study the decisions of the courts in Z upon the conflict of laws, for, be it noted, a suit by B's dependents against A in the case supposed will wherever it is brought present a problem in the conflict of laws. If the court in Q were to examine Z's decisions on the conflict of laws—assuming Q had decided to apply Z's “law” applicable to this very case—it might well find that those decisions would say, “This case is governed by the ‘law’ of Y, since the injury and not the death is the cause of action.” Q would therefore find itself sent on to Y. If now the word “law,” in the statement quoted from the hypothetical opinion of the court in Z, again means that Z would decide the very case exactly as Y's courts would, it is logically conceivable that Q would find itself sent back by Y to Z, on the ground that the death happened there and that therefore Z's law should govern.

This of course is not what happens. The reason is that, probably without being fully conscious of the logic involved, Anglo-American courts have refused to adopt the “*renvoi*.” The escape is actually due to a refusal to give to “law” the meaning that leads to these difficulties, i.e., a refusal to mean by it that Q is to decide the case exactly as Z would.\(^62\)

With this passage, Cook is attempting to prove that the traditional approach to Conflict of Laws, as espoused by his predecessors (Beale especially), is incoherent and impossible. He argues that, in order to avoid the whirlpool of *renvoi*, the court must have hypothetical facts working in place of the actual facts of the case – domestic facts in place of the real, extra-territorial facts.

In addition to presenting the situation in variable form, Cook uses the case of *Milliken v. Pratt*\(^63\) as an example of the court actually doing this sort of fictional analysis.\(^64\) He explains that the Supreme Court of Massachusetts, in *Milliken*, was presented with a Conflict between Maine and Massachusetts law.\(^65\) Rather than attempt to determine the actual law that would be applicable to the case – the Conflict law – the Massachusetts Supreme Court used the domestic law to answer the relevant question in the case.\(^66\) Cook explains that (where \(W\) is a foreign

\(^{61}\) *Id.*

\(^{62}\) Cook at 467-468.

\(^{63}\) 125 Mass. 374 (1878).

\(^{64}\) Cook at 471.

\(^{65}\) *Id.*; Symeon Symeonides, et al., CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 30 (2nd ed. 2003).

\(^{66}\) Cook at 471.
woman), “[w]hat we really start with is a knowledge of the Massachusetts law applicable not to this W but to another W, in a hypothetical case similar to this but differing in that all the facts are, so to speak, Massachusetts facts.” 67 He then reiterates that “[i]n other words, all we know is the Massachusetts ’domestic rule,’” and not the Conflict rule that would tell us what a Massachusetts court would do with a foreign woman in this situation. 68

Between the hypothetical and the case citation, Cook believes himself to have asserted that the traditional approach, as put forward by Beale and his other predecessors, is both impossible to apply and illogical. He may have proved his point, but the interesting thing is not that he did prove it, but how he proved it. The way that Cook goes about demonstrating and substantiating his thesis will eventually be his undoing, for he undermines his own arguments in the process.

III. HOW COOK FAILS HIMSELF

A. Outside-In or Inside-Out: Problems With Cook’s Effects Test

While Cook alleges in the first pages of his article that he will work from the inside-out, using observations of the courts’ actual behavior to formulate his theories, this is not, in fact, how he structures his theory. Nor, does it seem, that this is how he structures his thoughts, although that can only be guessed. If we look at the structure of Cook’s argument, rather than working from data, as his esteemed natural scientists would, Cook instead works in theory and supports his conclusions with data, as his dreaded predecessors did. Thus, Cook works from the outside-in, rather than from the inside-out, as he argues all Conflict of Laws scholars should.

The best example is during his explanation of the “effects test.” Although Cook allegedly draws the test from the behavior of real courts, his analysis builds from the theoretical,

67 Id. [emphasis in original].
68 Id.
and then he finds support for that theoretical argument from the case law.\textsuperscript{69} To make matters worse, he only cites one case – \textit{Guinness} – as a positive example of his theory in practice.\textsuperscript{70} In contrast, he cites at least eight other cases throughout his article, all of which use reasoning that he disdains: \textit{Commonwealth v. Macloon},\textsuperscript{71} \textit{State v. Hall},\textsuperscript{72} \textit{Milliken v. Pratt},\textsuperscript{73} \textit{Slater v. Mexican National Railway},\textsuperscript{74} \textit{Stout v. Wood},\textsuperscript{75} \textit{Dennick v. Railroad Co.},\textsuperscript{76} \textit{Smith v. Condry},\textsuperscript{77} and \textit{Loucks v. Standard Oil Co.},\textsuperscript{78} not including the three other cases that Cook cites but on which he chooses to “express no opinion.”\textsuperscript{79} Using only the cases in Cook’s own work, then, it appears that the “data” of what courts actually do points in exactly the opposite direction of what Cook claims. Even if the ratio in the real world cases (as opposed to just those in Cook’s work) were not as drastic as eight-to-one (acceptable versus unacceptable to Cook), there would still be the fact that Cook follows his theory with case support, rather than the other way around. First, he explains the effects test using abstract symbols – mathematical variables really – of A, B, X, Y, and Z.

Although he does reference a case from which his theoretical problem might arise, \textit{State v. Hall}, he casts aside the actual reasoning of the court in that case, and constructs a different hypothetical.\textsuperscript{80} He does not use the actual data from the case, and then construct a theory from that, but rather constructs a logical hypothetical to illustrate his theoretical thesis. Only then,

\textsuperscript{69} See Cook at 464-488.
\textsuperscript{70} See Cook at 474. It might be argued that Cook also cites \textit{State v. Carter}, 3 Dutcher 499 (N.J. Sup. Ct. 1859), with some approval. Cook at 461. The approval, however, is for the outcome, and not clearly for the reasoning that was used. He does not discuss the reasoning at all, and so it should not be counted as supporting (or offering evidence to produce) his argument.
\textsuperscript{71} 101 Mass. 1 (1869); Cook at 461.
\textsuperscript{72} 20 S.E. 729 (1894); Cook at 463.
\textsuperscript{73} 125 Mass. 374 (1878); Cook at 471.
\textsuperscript{74} 194 U.S. 120 (1904); Cook at 479.
\textsuperscript{75} 1 Blackf. 71 (Ind.); Cook at 479.
\textsuperscript{76} 103 U.S. 11, 18; Cook at 479.
\textsuperscript{77} 1 How. 28; Cook at 480.
\textsuperscript{78} 120 N.E. 198 (1918); Cook at 480.
\textsuperscript{79} \textit{Fountleroy v. Lum, New York Life Insurance Co. v. Head}, and \textit{New York Life Ins. v. Dodge}. Cook at 484.
\textsuperscript{80} Cook at 463.
after describing the hypothetical, does he find one case that supports his theory. Thus, Cook “discover[s] principles’ of the subject and… ‘show[s] how in accordance with the fundamental principle assumed by the writer’… the specific rules for the decision of concrete cases are… reached.”\(^{81}\) He does not “adopt the procedure which has proved so fruitful in other fields of science, viz. to observe concrete phenomena first and to form generalizations afterwards.”\(^{82}\) Cook constructs a theory and imposes it onto the cases; he does not observe the natural order of the cases and draw out a universal hypothesis. In other words, he works from the outside-in.

Even in his arguments against formalism, Cook maintains the same structure, working first from a hypothetical model, and then supporting his argument with a single case (\textit{Milliken}).\(^{83}\) Although it is not as striking as the effects test example, because the second argument is interlaced with, and perhaps even subordinate to, the first one, there is still a repeating internal pattern to be found. Both of Cook’s arguments are structured with theory first, and support second, despite his assertions that the opposite is preferable. Thus, he works from the outside-in, just as Dicey, Beale, and Story did, rather than from the inside-out, as he proposes all Conflict scholars, and even all lawyers, should do. Cook therefore does not even follow his own structural, metaphysical guidelines, let alone his own thesis.

\textbf{B. Do As I Say, Not As I Do: Problems With Cook’s Second Rejection of Formalism}

Cook argues that there is “no logical foundation”\(^{84}\) for choosing between all the Conflict of Laws theories that exist.\(^{85}\) He immediately contradicts himself, however, by using logic and reason to show exactly why the traditional, formal approach to Conflict problems is illogical and impossible to apply. Ironically, Cook does this even after he accuses his predecessors of doing

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\(^{81}\) Cook at 458, quoting Dicey, \textit{THE CONFLICT OF LAWS} 18 (3d ed. 1922).
\(^{82}\) \textit{Id.} at 460.
\(^{83}\) Cook at 471.
\(^{84}\) \textit{Id.} at 465.
\(^{85}\) Class discussion and lecture on Monday, February 14, 2011 [hereafter class notes].
the same thing, stating “[i]t must however be noted that the writers of neither school have
succeeded in adhering consistently to their main point of view.” Cook’s arguments, therefore,
dermine his thesis that there is no logical way to choose between the Conflict theories. If that
were true, or even if he believed it to be true, how could he possibly use logic to show that his
theory was better than the others? But this is exactly what he does.

Cook actually uses several reasoned arguments to discount formalism. At first, he rejects
it based on the success of the inside-out approach of the scientific method, which he asserts the
traditional Conflict methods do not adopt. Then, he offers an alternative theory, his effects test,
to show a (hypothetically) superior approach to Conflict problems. His most strikingly logical
argument, however, is his second rejection of formalism. Starting at page 468, Cook uses an
almost mathematical hypothetical to show how, with a conflict between the laws of “X,” “Y,”
and “Z,” an imaginary state “Q” cannot adopt the traditional approach without being consumed
by renvoi. This argument – full of variables looking remarkably similar to a logic problem – is
certainly attempting to offer a “logical foundation” for the rejection of traditionalism.

If that algebraic argument were not enough, Cook also adds to his analysis by arguing,
logically and reasonably, that case law (namely Milliken) proves his assertions to be correct.
This is an age-old tool that lawyers use to support their arguments, and it is a form of reason and
logic accepted by every court in the country. It is simply impossible to write a good brief
without supporting your argument with case law. Cook thus uses his lawyerly skills to reason

86 Cook at 459.
87 Id. at 468–471.
88 Id. at 465.
89 Id. at 471–474.
his way through the problems with the traditional approach. This is a second way that Cook attempts to offer a “logical foundation” for rejection the formalism of his predecessors. 90

Merriam Webster defines logic as that which “deals with the principles and criteria of validity of inference and demonstration” and “formal principles of reasoning”. 91 Cook uses all of these tools to prove that the traditional, formal approach of his predecessors is both illogical and impossible to apply. Cook therefore undermines his own argument that there is “no logical foundation” 92 for a choice between Conflict of Laws theories. If this were true, and there really were no logical basis for distinguishing theories, why would Cook attempt it? He undermines his own theory by using exactly what he says cannot be used. He logically and reasonably argues that the traditional approach, when correctly applied, ends in renvoi and is therefore neither practical nor logical, and should be discarded. Cook therefore clearly cannot believe his own thesis that there is no way to logically choose between theories.

C. My Way or the Highway: Cook’s Alleged Indifference and His Actual Bias

Cook is inconsistent. On the one hand, he argues that any one theory of Conflict of Laws is “at least as good as any other,” 93 and “it may be suggested that in many cases it makes little difference which rule is adopted.” 94 On the other hand, however, Cook also asserts, of his own argument, that “[i]indeed, if we examine into the meaning of the terms ‘law’ and ‘right’ as they are used by judges and lawyers, I think we shall conclude that this way of stating the matter is the only satisfactory way.” 95

90 Id. at 465.
92 Id. at 465.
93 Cook at 487.
94 Id. at 488.
95 Id. at 475.
If Cook were to follow his own advice – that no Conflict theory is better than another – then at the end of his work, he would have admitted that *his* theory was just as good as the traditional approach, espoused by Beale, Story, and Dicey. Instead of doing so, however, Cook asserts, in his last paragraph, that “[i]n the field of the conflict of laws, it is unfortunately true that past judicial phenomena are so confused,” and by implication (and a footnote) blames his predecessors for that confusion.\(^96\) After this, Cook boldly asserts that “[i]n making a choice between such rules, it is obvious that here as elsewhere the basis must be a pragmatic one— of the effect of a decision one way or the other in giving a practical working rule.”\(^97\) Since Cook (at least in his own opinion) has spent the last 30 pages proving that the traditional approach is neither pragmatic, nor practical (but rather illogical and impossible to apply) Cook certainly does not mean that the traditional approach can be considered in this calculus. Instead, he means to assert that *his* rule, the effects test, which is (allegedly) an evidence-based extrapolation from courts’ actual behavior, is the only rule that is “reasonably simple and definite and after its adoption is not departed from in cases clearly falling within it.”\(^98\)

**Conclusion**

Cook attempted to articulate a new and superior theory for dealing with Conflict of Law problems. Although he may have articulated a good point, and proved it to the satisfaction of many, his inconsistency, and internal contradiction undermine his entire work. Cook uses a structure for his argument – an outside-in approach – which he specifically rejects as inferior in the opening pages of his article. He uses logic and reason where he says they do not apply or exist, and thus disproves his own assertions about the choice between Conflict theories. Finally,

\(^96\) Cook at 488.
\(^97\) *Id.*
\(^98\) *Id.*
Cook explicitly promotes a conflict theory – namely his own – after he says that one is just as good as the other. Cook thus fails to hold himself to his own standards, and follow his own guidelines, undermining all of his arguments.

Cook’s failure also negatively affected the entire field of Conflict of Laws. Because of Cook’s inability to adequately employ his own theories, even within his own work, his thesis could never have clarified the “dismal swamp” of Conflict analysis. Instead, Cook’s misapplication of his own theory only sank the Conflicts field deeper into the mud. Cook’s own confusion translated itself into the field of Conflicts, which, despite Cook’s insistence that there was no logical distinction between theories, still struggled to find a better – or the best – theory of Conflict analysis for years to come. Perhaps, if Cook had more strongly held to his assertion that there was no logical way to decide between theories, Conflicts would have been better served. Perhaps, rather than continuing to wander through the swamp, searching for a beacon or a street sign that was never going to appear, Conflict scholars would have given up and enjoyed the view, if Cook had successfully persuaded them that the search was futile. Instead, by blindly marching on, Cook ignored the only glimmer of reality that he actually came upon.

Only recently, with the onset of true globalization, have we begun to recognize that there are no signposts or lighted buoys in this Conflict of Laws swamp. Almost 90 years after Cook was writing, scholars are only now coming to terms with the fact that there really is not any logical hierarchy to the theories of Conflict analysis, and giving up the search to enjoy the chaotic view. If, however Cook had succeeded in following his own advice, and truly

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99 William L. Posser, supra note 1.
100 For this proposition, I can only site our class discussions. I would like to specifically reference the “clusterfuck” conversation, in which we established that as the best description of the current state of Conflict affairs. Also, the way in which the class was taught, attacking all theories equally, and with the premise –from the beginning – that there was no good answer. I remember you repeatedly saying on the first day of class that if we were the kind of students who liked concrete answers, this was not the class for us, because there were none in this field. Instead,
renounced the idea that there is any logical way to decide between Conflict theories, we could have all reached this position a little earlier – and then the last 90 years would have perhaps produced something entirely different.

there were only a bunch of theories about how things could be done, with no clear front runner. This is the position to which I refer, although I do not have a concrete source to cite for it.