

Jurisprudence by Aphorisms: Francis Bacon and the “Uses” of Small Forms

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Abstract

The belief that Francis Bacon was, from the start, a stalwart defender of royal absolutism has prevailed in scholarship despite occasional comments about Bacon’s pluralist or collaborative legal and political imagination. Building on recent revisionist work, this article questions the standard historiography. It argues that Bacon’s jurisprudential outlook – particularly with respect to the question of legal authority – changed over the course of his career. A comparative analysis of his early and late legal writing clarifies the nature of the shift. In *The Maxims of the Common Law* (1596/7), Bacon theorizes a collaborative model of legal interpretation. Drawing inspiration from the use, a popular legal device and precursor of the modern trust, Bacon likens himself to a grantor who invites his readers, the grantees, to “make use of” the knowledge contained in the maxims and rules. “Learned” and “sensible” readers are welcomed as trustees of the law – provided they comply with the author’s terms of use. The collaborative, game-like spirit of this Elizabethan text is conspicuously absent in his Jacobean treatises. When Bacon revisits the subject of legal aphorisms in *An Example of a Treatise on Universal Justice . . . by Aphorisms* (1623), he restricts the art of legal interpretation to experts: the sovereign and a handful of elite interpreters of the law (jurisconsults). The two texts and the different jurisprudential contexts they evoke, common law and Roman law, point to a hardening of Bacon’s politics and aphoristic theory over time.

Keywords

Francis Bacon, common law, Roman law, the use (law), Statute of Uses, trust, maxims, aphorisms, rules, jurisprudence, jurisconsult, royal prerogative, Elizabeth I, James I, law reform, historical formalism

In the course of his four-decade career in law and politics, Sir Francis Bacon dedicated numerous speeches, letters, and treatises to the “general amendment” of the laws of England

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(*SEH* 7: 316).¹ To his first royal patron, Elizabeth I, Bacon lamented that “many subjects” were prevented from getting justice because the “laws are multiplied in number, and slackened in vigour” (*SEH* 7: 315, 316). Years later, while serving as attorney general, Bacon entreated James I to support his plan for “perfiting” the “registry” of laws by reducing them to maxims, aphorisms, and rules modeled after the Roman *De regulis juris* (*SEH* 13: 63).² For Bacon, the success of civic reform lay in finding the right balance between legal matter and form. Unfortunately for him, neither Elizabeth nor James acted on his suggestions. Yet the comments by Bacon that emerged over these decades provide scholars with a blueprint for understanding the nature of his legal imagination and aphoristic theory.

In his influential *Forms of Nationhood*, Richard Helgerson argued that Bacon’s fascination with rules, maxims, and aphorisms was shaped by his political agenda, namely, a desire to protect and enlarge James I’s prerogative powers. During his reign, James faced a number of public challenges to his authority.³ For Helgerson, Bacon’s aphoristic theory was determined by a monarchocentric and absolutist politics:

But form was not the only thing Bacon derived from his Roman model. He also drew on that model for a conception of authority and its appropriate expression. From first to last, Bacon

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1. Francis Bacon, *Maxims of the Law*, in *The Works of Francis Bacon*, James Spedding, Robert Leslie Ellis, and Douglas Denon Heath (eds.), vol. 7 (London: Longman, 1859), pp. 309–87. Until the publication of the complete *Oxford Francis Bacon (OFB)*, James Spedding’s edition remains the standard. Citations from *The Works of Francis Bacon* and *The Works of Francis Bacon [. . .] The Letters and the Life* will appear as *SEH* followed by volume and page number. For an overview of Bacon’s role in early modern English law reform, see Barbara J. Shapiro, “Sir Francis Bacon and the Mid-Seventeenth Century Movement for Law Reform,” *The American Journal of Legal History* 24 (1980), pp. 331–62; for a discussion of English law reform in general, see Donald Veall, *The Popular Movement for Law Reform 1640–1660* (Oxford: Oxford University Press, 1970). See also Virginia Lee Strain, *Legal Reform in English Renaissance Literature* (Edinburgh: Edinburgh University Press, 2018).
 2. I use “maxim,” “rule,” and “aphorism” interchangeably following Bacon’s habit. In the Preface of *Maxims*, Bacon comments, “I judged it a matter undue and preposterous to prove *rules* and *maxims*” (*SEH* 7: 322, my emphasis). He further observes that “ancient wisdom and science was wont to be delivered in that form; as may be seen by the *parables* of Solomon, and by the *aphorisms* of Hippocrates, and the moral verses of Theognis and Phocylides; but chiefly the precedent of the civil law, which hath taken the same course with their *rules*,” and from these ancient examples he derives the basis for his enterprise to “delive[r] [. . .] knowledge in distinct and disjointed *aphorisms*” (*SEH* 7: 321, my emphasis). From these statements, I conclude that Bacon did not attempt to divide forms into precise taxonomies. On the difficulty of distinguishing between small or short forms, see the introduction by John Gross (ed.), *The Oxford Book of Aphorisms* (Oxford: Oxford University Press, 2003). For a discussion of legal maxims, rules, and Bacon’s contributions, see Peter Stein, *Regulae Juris: From Juristic Rules to Legal Maxims* (Edinburgh: University of Edinburgh Press, 1966), pp. 156–8, 160, 171–7.
 3. The political and legal struggles between King James and Sir Edward Coke have been richly analyzed in modern scholarship. In addition to Helgerson, below, see Allen D. Boyer, *Sir Edward Coke and the Elizabethan Age* (Stanford, CA: Stanford University Press, 2003) and Louis A. Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge: Cambridge University Press, 1977).

imagined the writing (or rewriting) of the law as belonging essentially to the monarch. The formal order he seeks derives from monarchic authority . . . Without a royal author the law could not be written. No other source of authority was imaginable.⁴

In other words, Bacon's pursuit of the "Roman model" – the codification of laws – cannot be detached from his devotion to the "royal author" (King James). While there is much to learn from Helgerson's analysis, not least his exceedingly original practice of historical formalism, his explication of Bacon's politics and aphoristic theory too neatly sidesteps evidence that suggests a shift in Bacon's outlook.⁵ My analysis builds on the foundation laid by Helgerson even as it revises some of his conclusions in order to support a revisionist reading of Bacon as one whose politics, like his aphoristic theory, accommodated a collaborative spirit with respect to the creation of knowledge and the assertion of interpretive authority. The scholarly theory of a less monarchocentric Bacon has been around for some time. For example, Markku Peltonen argues that Bacon's political philosophy skewed toward a theory of justified resistance, an essential argument in seventeenth-century republican ideology: "his general argument – that the common law decided the extent of royal authority – was in many respects closer to the antiabsolutists' than absolutists' arguments . . . Bacon was, in other words, subscribing to resistance theory."⁶ Analyzing Bacon's output from a different perspective, Henry S.

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4. Richard Helgerson, *Forms of Nationhood: The Elizabethan Writing of England* (Chicago, IL: University of Chicago Press, 1992), p. 75. Helgerson is remembered for his historical formalism (sometimes referred to as new formalism), which examines how "literary forms reflect or respond to contemporary political conditions" (Caroline Levine, *Forms: Whole, Rhythm, Hierarchy, Network* (Princeton, NJ: Princeton University Press, 2015), p. 5). Doing such work requires committing detailed attention to a text's material form and typographical or visual presentation while situating the text in a specific moment in time. For an instructive summary of historical formalism as it is practiced in early modern literary studies, see Michelle M. Dowd, *The Dynamics of Inheritance on the Shakespearean Stage* (Cambridge: Cambridge University Press, 2015), p. 12. In addition to the present article, recent engagements with Helgerson's work include Henry S. Turner, *The Corporate Commonwealth: Pluralism and Political Fictions in England, 1516–1651* (Chicago, IL: University of Chicago Press, 2016), p. xiii; Elizabeth Scott-Baumann and Ben Burton (eds.), *The Work of Form: Poetics and Materiality in Early Modern Culture* (Oxford: Oxford University Press, 2014), p. ix; Allison K. Deutermann and András Kiséry (eds.), *Formal Matters: Reading the Materials of English Renaissance Literature* (Manchester: Manchester University Press, 2013), p. 5. For an additional discussion of Helgerson's ideas, see Christopher Warren, *Literature and the Law of Nations, 1580–1680* (Oxford: Oxford University Press, 2015), p. 10, p. 13.
 5. "Bacon's views on this topic remained remarkably consistent . . . I have felt free to draw on various passages in summarizing his views without regard for chronology" (Helgerson, *Forms of Nationhood*, p. 315 n.15). I find this erasure of chronology to be misleading. If one begins with the premise that Bacon's early legal writings agree with his later ones, one is less likely to discern differences between them.
 6. Markku Peltonen, "Bacon's Political Philosophy," in *The Cambridge Companion to Francis Bacon*, Markku Peltonen (ed.) (Cambridge: Cambridge University Press, 1996), pp. 289–90. This essay was published shortly after Helgerson's book.

Turner argues that Bacon's works demonstrate an intellectual engagement with early modern legal and political notions of the corporation; Bacon's vision of "political ontology of sovereignty always also coexists with another, more pluralist and 'collective' model that permeates all levels of his system."⁷ The thesis I pursue here supports and extends both of these efforts to explore the "pluralist" impulse in Bacon's literary and legal-political imagination.

This article argues that Bacon's aphoristic theory revolved around a very English legal concept – the use – that accommodated a collaborative form of co-authorship in making legal knowledge. In the Preface of *The Maxims of the Law* (hereafter referred to as *Maxims*), his Latin and English treatise composed sometime in 1596/7, Bacon invites his readers to explore his "distinct and disjointed aphorisms" and "to make use of that which is so delivered to more several purposes and applications" (*SEH* 7: 321).⁸ Traditionally, critics have interpreted this as Bacon's invitation to readers to be playful with the aphorisms – "you do with these as you see fit," in other words. It has been argued, for example, that "[Bacon] uses aphoristic presentation" in order "to spur the reader on to similar enterprises of his own."⁹ What goes unremarked is the conditional nature of Bacon's language, one underscored by legal syntax and terminology. The word that appears repeatedly in *Maxims* (in both the Preface and the body of the text) is "use." This word is freighted with legal meaning. The use was a form of conveyance in which a grantor (also known as the feoffor to uses) conveyed the land to a trustee (feoffee to uses) "to the use" of a beneficiary (cestui que use).¹⁰ Uses were ubiquitous in early modern England and Bacon was especially well informed on the history and nature of the use.¹¹

7. Henry S. Turner, "Francis Bacon's Common Notion," *Journal for Early Modern Cultural Studies* 13(3) (2013), p. 26. See also the chapter on Bacon in Turner, *The Corporate Commonwealth*.

8. Douglas Denon Heath (Spedding's co-editor and the principal editor of volume 7 which contains his legal and political writings) proposes that *Maxims* was "written by about 1597" (*SEH* 7: 303). After Bacon's death, *Maxims* was published as part of *The elements of the common laws of England, Branched into a double tract* (London, 1630). The first "tract" is *Maxims* and the second is *The use of the common law*, which the printer attributed to Bacon. Scholars now believe *The Use* to have been written by another. For a discussion of the influence of Bacon's maxims on Anglo-American jurisprudence and for an alternative translation of the maxims, see John C. Hogan and Mortimer D. Schwartz, "On Bacon's 'Rules and Maximes' of the Common Law," *Law Library Journal* 76 (1983), pp. 48–77; John C. Hogan and Mortimer D. Schwartz, "A Translation of Bacon's Maxims of the Common Law," *Law Library Journal* 77 (May 1984), pp. 707–18.

9. Lisa Jardine, *Francis Bacon: Discovery and the Art of Discourse* (Cambridge: Cambridge University Press, 1974), p. 177.

10. I will use the modern terms (grantor, trustee, and grantee or beneficiary) unless the context calls for the original ones. Initially, Church courts adjudicated disputes pertaining to the use; later, it was the Chancery. After the passing of the Statute of Uses (to be discussed below), the common law courts took over the adjudication of uses. On the role of the Church courts, see R.H. Helmholz, "The Early Enforcement of Uses," *Columbia Law Review* 79 (1979), pp. 1503–13.

11. On Bacon's familiarity with the use, see section II.

By connecting Bacon's aphoristic theory to the use (law), this article sets the stage for a reconsideration of Bacon's definition of legal authority. In *Maxims*, the figure of the "royal author" is largely absent. Instead, Bacon invites several groups of readers to tend to the *corpus* of legal knowledge. He asks his readers to participate in a grand philanthropic enterprise of law reform: make the law more clear and available to ordinary English subjects.¹² This invitation, however, carries certain expectations. Like a grantor who takes great care in the selection of his trustees, Bacon only extends the invitation to "sensible men" "learned" in the law (*SEH* 7: 321, 323). These "learned" readers, the trustees of legal knowledge, are expected to adhere to the author's own "clear and perspicuous exposition" (*SEH* 7: 323). Thus, Bacon simultaneously brings readers into his project and sets conditions on their participation. Later in life, Bacon's interest in sharing legal authority waned. His late work, *An Example of a Treatise on Universal Justice or the Fountains of Equity, by Aphorisms* (hereafter abbreviated as *A Treatise*) reveals an absolutist slant that aligns with the monarchocentric reading of Bacon.¹³ In *A Treatise*, a hierarchal model limits the cultivation of legal knowledge and the exercise of legal interpretation to juriconsults. The shift could be interpreted in several ways. It could suggest that Bacon did not find the kind of "learned" readers he had envisioned and, following his public disgrace in 1621, he lost the desire to nurture such readers. Perhaps, related to the first possibility, the change could reflect an aversion toward continued debate with rivals like Sir Edward Coke over issues related to the royal prerogative. Or the shift could indicate that Bacon from the very first distrusted his readers. Once untethered from public office and the trappings of an active, political life, the seed of distrust could have bloomed into an unapologetically absolutist outlook. Whatever the cause (personal, psychological, legal, or political) it is clear that in the final phase of his career, he envisioned experts taking over the stewardship of the law.

12. The people's happiness concerned Bacon as much as the thought of pleasing his sovereign. As he states in *De dignitate et augmentis scientiarum*, "[t]he end and scope which laws should have in view, and to which they should direct their decrees and sanctions, is no other than the happiness of the citizens" (aph. 5, *SEH* 5: 89). The idea of doing something good to benefit the people, acting with *philanthropia* (love for mankind), is a recurring theme in Bacon's works. In his biography of Henry VII, for instance, Bacon praises that Tudor king for creating "deep" laws to advance the "happiness" of the people (*The History of the Reign of King Henry VII and Selected Works*, Brian Vickers (ed.) (Cambridge: Cambridge University Press, 1998), p. 64). Furthermore, in his essay on "Goodnesse" (1597, 1625), Bacon writes "I take *Goodnesse* in this Sense, the affecting of the Weale of Men, which is that the Grecians call *Philanthropia* . . . This of all Vertues . . . is the greatest; being the Character of the Deitie: And without it, Man is a Busie, Mischievous, Wretched Thing; No better then a Kinde of Vermine" (*The Essayes or Counsels, Civill and Morall*, Michael Kiernan (ed.), vol. 15, *OFB* (Oxford: Clarendon, 2000), p. 39). For an additional discussion of Bacon's philanthropy and how it relates to Christian charity, see Masao Watanabe, "Francis Bacon: Philanthropy and the Instauration of Learning," *Annals of Science* 49(2) (1992), pp. 163–73.

13. *A Treatise's* Latin title is *Exemplum tractatus de justitia universali, sive de fontibus iuris, in uno titulo, per aphorismos*. It forms chapter three of book eight of *De dignitate et augmentis*. See *SEH* 5: 88–110.

I. “Uses” of *Maxims*

Composed in 1596/7, *Maxims* circulated in manuscript before it was printed in 1630. Twenty-five rules and their attached commentary are framed by a dedicatory epistle to Queen Elizabeth and a Preface to the general reader. The Preface contains a detailed statement about the power of maxims, what Rosalie Colie calls “small forms.”¹⁴ Much of the scholarly attention has been focused on the following passage:

Whereas I could have digested these rules into a certain method or order, which, I know, would have been more admired, as that which would have made every particular rule, through his coherence and relation unto other rules, seem more cunning and more deep; yet I have avoided so to do, because this delivering of knowledge in distinct and disjointed aphorisms doth leave the wit of man more free to turn and toss, and to *make use of* that which is so delivered to more several purposes and applications. (*SEH* 7: 321, my emphasis)¹⁵

Interpretations of this passage emphasize the boldness of Bacon’s vision. For example, Lisa Jardine focuses on the originality of Bacon’s language of discovery. Whereas dichotomies – stemming from the dichotomous “method” invented by Peter Ramus¹⁶ – exemplify a “magisterial style” that “impose[s] . . . conclusions on the reader,” Bacon’s aphoristic style sets “the reader . . . at liberty to test its applicability in a variety of fields, and to explore not only its immediate consequences, but all its possible ramifications.”¹⁷

14. On “small forms,” see Rosalie L. Colie, *The Resources of Kind: Genre-Theory in the Renaissance*, Barbara K. Lewalski (ed.) (Berkeley, CA: University of California Press, 1973), p. 33.

15. This passage has been cited in Brian Vickers, *Francis Bacon and Renaissance Prose* (Cambridge: Cambridge University Press, 1968), p. 67; Jardine, *Francis Bacon*, p. 178; Alvin Snider, “Francis Bacon and the Authority of Aphorism,” *Prose Studies* 11(2) (1988), p. 59; Reid Barbour, “The Power of the Broken: Sir Thomas Browne’s *Religio Medici* and Aphoristic Writing,” *Huntington Library Quarterly* 79(4) (2016), p. 596. Scholars typically link the passage to another of Bacon’s reflections on aphorisms in *The Advancement of Learning* (1605): “*Aphorismes*, except they should bee ridiculous, cannot bee made but of the pyth and heart of Sciences: for discourse of illustration is cut off, Recitalles of Examples are cut off: Discourse of Connexion, and order is cut off; Descriptions of Practize are cutte off; So there remayneth nothinge to fill the *Aphorismes*, but some good quantitie of Observation: And therefore no man can suffice, nor in reason will attempt, to write *Aphorismes*, but hee that is sound and grounded . . . *Aphorismes*, representing a knowledge broken, doe invite men to enquire further; whereas *Methodes* carrying the shewe of a Totall, doe secure men; as if they were at furthest” (*The Advancement of Learning*, Michael Kiernan (ed.), vol. 4, *OFB* (Oxford: Oxford University Press, 2000), p. 124).

16. Bacon repeatedly criticized the Ramist method which had become popular among European intellectuals. According to Ramus, the discovery of knowledge lay in the division of general principles into two parts, and the splitting of these parts into additional parts and so on. For a helpful explanation, see Walter J. Ong, *Ramus, Method, and the Decline of Dialogue: From the Art of Discourse to the Art of Reason* (Chicago, IL: University of Chicago Press, 1958), p. 245.

17. Jardine, *Francis Bacon*, pp. 176–7. Jardine’s and Vickers’ reading of Bacon’s aphoristic theory left a deep impression on subsequent criticism. James Stephens writes that Bacon’s “aphorism

Similarly, Brian Vickers underscores the power of Bacon's aphorisms to generate "flexibility and freedom from system," wherein "system" again refers to the Ramist method.¹⁸ Both Jardine and Vickers (in spite of their scholarly differences) conclude that Bacon's aphorisms disrupt received knowledge because of their formal design. Bacon's endorsement of the reader's co-authoring capacity cements his reputation as a great experimentalist, a modern thinker breaking with tradition.

There is another possibility. Bacon's repeated signaling of "use" recalls the common law culture of the use. What if instead of asking his readers to arrive at their own conclusions, Bacon is suggesting that they "make use of" the aphorisms on his terms – just as a grantor might ask trustees to follow his instructions when they engage in the "use" of the property? After discussing the "profitable" nature of his collected "rules and grounds," which he promises will shed "no small light" on the science of the law, he states that "[n]either will the use hereof be only in deciding doubts . . . but further in gracing of argument; in correcting unprofitable subtlety, and reducing the same to a more sound and substantial sense of law" (*SEH* 7: 319–20). This phrase "the use hereof" echoes the syntax of a use clause, which states that such and such property shall be made to "the use of" designated beneficiaries.¹⁹ The parallelism, I argue, is not accidental but deliberate; it is designed to coax the reader into a transaction wherein they promise to carry out the author's wishes to ameliorate the field of law in exchange for the "use" of the maxims. To grasp Bacon's negotiation of shared authority with respect to the labor of interpretation, it is vital that one understands the historical circumstances (not to mention the controversy) surrounding the device of the use. Bacon lived during an "age of the fantastic conveyance" in which countless landowners invented ways to claim wide "powers of disposition" over their estates.²⁰ As the section below makes clear, Bacon was as well versed in the metaphorical possibilities of the legal use as any lawyer of his generation.

. . . functions first as a vehicle for the discovery and communication of truth or possibility in its barest form" (*Francis Bacon and the Style of Science* (Chicago, IL: University of Chicago Press, 1975), p. 101). Alvin Snider argues that Bacon's aphorism "subordinates formal description to cognitive instrumentality, and calls for the avoidance of closure, or 'knowledge broken,' to challenge an engrossment of learning by method-wielding codifiers" ("Francis Bacon," p. 64). Wendy Olmsted compares Bacon's analysis of aphorisms to Cicero's topics which "simulate inquiry and the growth of knowledge" (*Rhetoric: An Historical Introduction* (Malden, MA: Blackwell, 2006), p. 70). Finally, tracing a long tradition of "discontinuous writing," Ben Grant links Baconian aphorisms to Italo Calvino's radical experimental writing in *Invisible Cities* (*The Aphorism and Other Short Forms* (Abingdon: Routledge, 2016), p. 4, p. 15).

18. Vickers, *Francis Bacon*, p. 67.

19. As explained by Theodore F.T. Plucknett, "[t]he English word 'use' . . . is in fact derived not from the Latin *usus* but from *opus*, the phrase being *A. tenet ad opus B.*—*A.* holds for the benefit [use] of *B.*" (*A Concise History of the Common Law*, 5th edn. (Boston, MA: Little, Brown, 1956), p. 576).

20. A.W.B. Simpson, *An Introduction to the History of the Land Law*, 2nd edn. (Oxford: Oxford University Press, 1986), p. 198.

II. The Device of the Use

It has been said that the medieval and early modern use is the “ancestor” of today’s trust.²¹ The following definition by R.H. Helmholz lays out the nature of the device and the parties involved in the transaction:

The holder of the freehold land – the feoffor – would convey land during his lifetime to feoffees to uses. They in turn held it for the benefit of the feoffor, or sometimes of a third party – the cestui que use – under instructions to convey the land to persons to be named in the feoffor’s will.²²

To explain the rise of the use in England, historians often cite the example of medieval crusaders who, upon leaving for the Holy Land, conveyed “their lands to a friend upon various conditions.”²³ The use was advantageous to the landowner in that it allowed him to devise his property according to his will and liking.²⁴ “Medieval common law made little provision for the settlement of landed property, and none for the device of real estate by will” and common law only recognized “the ancient rights of dower and primogeniture.”²⁵ Thus, the use gave landowners the option of “full testamentary freedom over his freehold lands,” enabling them to carry out a variety of land transfers.²⁶ Examples of the use may be found in the Domesday Book,²⁷ but it was during the medieval period that the use acquired “immense popularity.”²⁸ By the end of the fifteenth century, the use had become so well established as to be “almost universal.”²⁹

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21. Helmholz, “The Early Enforcement of Uses,” p. 1503. For an additional comment on the relationship between the use and the modern trust, see Plucknett, *A Concise History*, p. 598.
 22. Helmholz, “The Early Enforcement of Uses,” p. 1503. In Law French, cestui que use refers to the beneficiary; it derives from the phrase “‘cestui a que use le feoffment fuit fait’” (Simpson, *An Introduction*, pp. 173–4).
 23. Plucknett, *A Concise History*, p. 577.
 24. The use “permitted the owner of lands in his lifetime to make various designations of their profits, as prudence, or justice, or family convenience, might from time to time require” (William Blackstone, *Commentaries on the Laws of England: Book II of the Rights of Things*, Simon Stern (ed.) (Oxford: Oxford University Press, 2016), p. 224).
 25. E.W. Ives, “The Genesis of the Statute of Uses,” *The English Historical Review* 82 (1967), pp. 673–4.
 26. John H. Langbein, Renée Lettow Lerner, and Bruce P. Smith (eds.), *History of the Common Law: The Development of Anglo-American Legal Institutions* (New York: Aspen, 2009), p. 305.
 27. Simpson, *An Introduction*, p. 173.
 28. Ives, “The Genesis of the Statute of Uses,” p. 673.
 29. Blackstone, *2 Commentaries*, p. 224. On the popularity and ubiquity of uses, Blackstone observes, “the greatest part of the land of England was conveyed to uses; the property or possession of the soil being vested in one man, and the use, or profits thereof, in another” (*2 Commentaries*, p. 92, original emphasis). Plucknett emphasizes the late fifteenth century as a milestone: “by the end of the *fifteenth century* a fair body of law had been settled which gave a definite form to the use” (*A Concise History*, p. 580, my emphasis). In contrast, Ives believes that the use became established during the reign of Richard II (1367–1400), “so common did it become that by the end of the *fourteenth century* – probably even from the early years of Richard II’s reign – the court of Chancery had to step in to protect and control the device” (“The Genesis of the Statute of Uses,” p. 674, my emphasis).

Although popular among landowners, the use proved vexing to the English crown. By engaging in the use, landowners escaped feudal incidents, which were essentially “succession tax[es].”³⁰ E.W. Ives crisply summarizes the royal antipathy toward the use: “[i]n all this the principal sufferer was the Crown. Royal feudal rights were based upon the traditional concept of seisin, but the use made nonsense of tradition . . . the income which the Crown received from its feudal incidents suffered severely.”³¹ Royal attempts at restricting the use occurred in the fourteenth century, but it was not until the reign of Henry VIII that legislation was finally passed to limit the use. In 1536, bowing to royal pressure, parliament passed the Statute of Uses whose full title was “An Act concerning Uses and Wills” (27 Hen. VIII. c. 10). The preamble of the Statute lists all the injuries stemming from uses:

. . . sundry imaginations, subtle inventions, and practices have been used, whereby the Hereditaments of this Realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secrete uses intents and trusts . . . for the most part made by such persons as be visited with sickness, in their extreme agonies and pains or at such time as they have had scantily any good memory or remembrance; At which times they being provoked by greedy, covetous persons lying in a wait about them do many times dispose indiscreetly and unadvisedly their lands and inheritances . . . The King’s Highness hath lost the profits and advantages of the Lands of persons attained, and of the Lands craftily put in Feoffment to the uses of Aliens born, and also the profits of waste . . .³²

It is quite a list of abuses. The Statute was decisive; it effectively “executed” the use by “transfer[ing] the use into possession . . . making *cestuy que use*” – that is, the beneficiary – “complete owner of the lands and tenements, as well at law as in equity.”³³ But Henry neglected to anticipate the resistance of his subjects. Across the realm, landowners opposed the Statute and in the end it had to be rolled back and replaced by the Statute of Wills.³⁴

30. Langbein, Lerner, and Smith, *History of the Common Law*, p. 305. Additionally, Helmholz explains that “the ‘use’ enabled landowners to treat the land as their own but to avoid the restrictions of wardship and marriage, the demands of creditors, and the Statute of Mortmain could all be avoided” (“The Early Enforcement of Uses,” p. 503 n.2).

31. Ives, “The Genesis of the Statute of Uses,” p. 674. Ives clarifies that “[s]eisin was not vested in a self-perpetuating group of trustees while the control and enjoyment of the property belonged to a beneficiary who was invulnerable to the claims of any feudal overlord.”

32. Great Britain, *The Statutes of the Realm*, vol. 3 (London, 1817), p. 539. I have modernized the text, adding commas and expanding contractions. Simpson calls the “long preamble . . . a diatribe against the supposed evils attendant upon the creation of uses” and concludes, “[i]t is quite clear, however, that this is mere propaganda, and that the realities of the matter are that Henry VIII was by 1529 becoming short of money, and resolved to meet his need by turning to the feudal revenues which were his as supreme lord, but whose collection was frustrated by the prevalence of uses” (*An Introduction*, p. 186).

33. Blackstone, *2 Commentaries*, p. 227. For a further detailed discussion of the “execution” of the use, see Simpson, *An Introduction*, p. 185.

34. The Statute of Uses proved to be unpopular among landowners and has been connected to the Pilgrimage of Grace. For an analysis of how the Statute angered Henry’s subjects to rebellion, the king’s pyrrhic victory, and the expansion of common lawyers’ jurisdiction in the decades that followed, see Plucknett, *A Concise History*, pp. 586–7.

One of Bacon's most enduring legal works – still cited today – is his *Reading . . . upon the Statute of Uses* (hereafter *Reading*) based on his lectures at Gray's Inn. In spite of the self-effacing introduction,³⁵ the *Reading* is a tour de force of legal learning. The depth of Bacon's knowledge is not surprising considering his experience; he had acted as co-counsel (with Coke) on the case *Dillon v. Freine* (1595).³⁶ In his *Reading*, Bacon affirms the common law courts' jurisdiction over the adjudication of use-related suits: "we may truly conclude, that the force and strength that an use had or hath in conscience is by common law" (*SEH* 7: 415). He also reflects on the advantage of the use for the cestui que use. Previously, the cestui que use who found himself cheated by unscrupulous feoffees lacked remedy "in law."³⁷ "The king had remedy in law for his pernancy³⁸ of the profits, but *cestui que use* had none . . . an use be nothing in law to yield remedy by course of law, yet it is somewhat in reputation of law and in conscience" (*SEH* 7: 399–400).

Bacon's balanced analysis of the use constituted a tacit rejection of the general opprobrium associated with the use. For example, mirroring the harsh language of the preamble of the Statute of Uses, Coke argues that "[t]here were two Inventors of Uses, Fear, and Fraud; Fear in times of Troubles and civil Wars to save their Inheritances without forfeiture; and Fraud to defeat due Debts, lawful Actions, Wards, Escheats, Mortmains, &c."³⁹ In contrast, Bacon offers a sanguine, even philosophical, perspective on the origins of the use:

Mr. Coke, in his Reading, doth say well, they were produced sometimes for fear, and many times for fraud; but I hold that neither of these causes were so much the reasons of uses as another reason in the beginning, which was, that the lands by the common law of England were not testamentary or devisable; and, of late years, since the statute, the ease of the conveyance, for sparing of repurchases and execution of estates; and now, last of all, an excess of will in men's minds, affecting to have assurances of their estates and possessions to be revocable in their own times, and too irrevocable after their own times. (*SEH* 7: 409)

Coke had located the origins of the use in men's deviousness to cheat the Crown of revenues and in their desperate attempt to secure their lands during politically volatile times. But Bacon, skirting Coke's pessimistic reading of human nature, explains the rise of the use as an inevitable response by landowners to the restrictiveness of the common law

35. "I could not be ignorant either of the difficulty of the matter . . . or much less of my own unableness, which I had continual sense and feeling of" (*SEH* 7: 396).

36. Also known as *Chudleigh's Case*, the question came down to "whether the common-law rules on property transfers applied to transfers made by use" (Boyer, *Sir Edward Coke*, p. 121).

37. The initial lack of common law jurisdiction over uses may be traced to the use's origin in civil law. Blackstone explains, "the notion [of the use] was transplanted into England from the civil law, about the close of the reign of Edward III, by means of the foreign ecclesiastics" (2 *Commentaries*, p. 223).

38. "Pernancy, *n.*," a legal term, signifies "the taking or receiving of something; taking into possession; receipt of a tithe, rent, etc.," *OED Online* (Oxford: Oxford University Press, 2018), <http://www.oed.com>, accessed Aug. 4, 2018.

39. Edward Coke, *The Reports* (London, 1680), p. 39.

concerning tenure (“lands by the common law . . . were not testamentary or devisable”). Indeed, Bacon’s ultimate point is a psychological one. The use emerged as an inevitable outcome of landowners’ desire “to have assurances of their estates and possessions to be revocable in their own times, and too irrevocable after their own times” (*SEH* 7: 409).⁴⁰ Bacon checks his moral judgment at the door and explores, instead, the use’s deeper history, jurisdictional limits, and exceptions.

Beyond the issues of jurisdiction and historical origins, Bacon reveals an interest in the place of conscience in uses. In a discussion of the use’s various “properties,” Bacon quotes Justice Fenner on the role of “private” and “general” conscience in use transactions:

Uses, saith he [Fenner], are created by confidence; preserved by privity (which is nothing else but a continuance of the confidence without interruption); and ordered and guided by conscience, either by the private conscience of the feoffee, or the general conscience of the realm, which is Chancery. (*SEH* 7: 401)

Whereas another might have expressed alarm at the use’s dependence on conscience, Bacon simply observes this to be a fact. Uses are built on trust: the “private conscience” of individuals and Chancery, the court representing the “general conscience of the realm.”⁴¹ Warming to this theme, Bacon writes that “an use is a trust reposed by any person in the terre-tenant, that he may suffer him to take the profits, and that he will perform his intent . . . Use is an ownership in trust” (*SEH* 7: 400–1). When someone “reposes” his trust “in the terre-tenant,” that device is the use.⁴² The use could, in theory, benefit all the parties involved in the transaction. The grantor (feoffor) could devise his land, the trustee (feoffee) could oblige the wishes of the grantor and turn a profit in the process, and the grantee or beneficiary (cestui que use) could be assured of an inheritance.

How people could abuse the use did not interest Bacon. Yet legal records contain many examples of broken promises and lost profits. The feoffor’s reliance on the feoffee’s conscience produced a system of inherent instability and laid the foundation for a culture of suspicion.⁴³ In the records, we find examples of petty and grand fraud; indeed, *Dillon v. Freine* was controversial precisely because it seemed to manipulate the spirit of the law. In theory, the grantor’s wishes could be upset if, for example, the “terre-tenant”

40. Bacon’s psychological explanation for the origins of the use has endured the test of time. Blackstone, for one, was persuaded by Bacon’s insight, remarking “partly the caprice of mankind; who (as lord Bacon observes) have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards” (*2 Commentaries*, p. 228).

41. Perhaps even at this early moment, Bacon anticipated working in Chancery. Bacon sat in Chancery in 1617. Following his appointment to the position of Lord Chancellor in January 1618, he oversaw much of the business in that court. See Markku Peltonen, 2007, “Bacon, Francis, Viscount St Alban (1561–1626), lord chancellor, politician, and philosopher,” *Oxford Dictionary of National Biography*, <http://www.oxforddnb.com>, accessed Nov. 4, 2018.

42. “Terre-tenant” refers to “one who has the actual possession of land; the occupant of land” (“Terre-tenant, *n.*,” *OED Online*). This was pointed out to me by one of the journal’s readers.

43. I am grateful to one of the journal’s readers for this point.

sold a portion of the estate to finance his own debt rather than allowing the land to pass to the stated beneficiary. Something like that happened in a Canterbury case from 1375. The feoffees of John Roger did not hold the land for the use of Roger's widow Margery but "alienat[ed] half the land" to Hugh Pryor. In court, the feoffees claimed that Pryor had pressured them and they had acquiesced out of fear, but the judge "held that the alleged fear had been 'empty and insufficient to move a constant man,' and that the feoffees must suffer the canonical penalties for failing to carry out their duty."⁴⁴ Bacon knew of such examples of fraudulent conveyance – from personal observation, experience, and his prodigious reading of legal history. Yet he consistently downplayed the use's pessimistic outcomes in his *Reading*. Likewise, in *Maxims*, Bacon kept the better part of his suspicion at bay and cultivated an outlook of trust.

Understanding these aspects of the development of the use and Bacon's reading of it allows for a revision of Bacon's definition of legal authority. The use is predicated on trust, goodwill, and conscience. Authority is never absolute; it is a negotiation premised on mutually beneficial exchanges. Power is shared and the grantor occupies one of three vertices of the trust-triangle. The multiple evocations (seven in the Preface by my count) of the word "use," his exhortations to the reader to "make use of" and to seek "profit" (*SEH* 7: 323) in the maxims, the thematic unity of the 25 rules and their accompanying commentary (many of them pertaining to the use), all suggest a link between his aphoristic theory and the use.

III. Terms of Use

Bacon's authorial conditions concern the character of the reader and the manner of his reading. He hopes his treatise will find an audience of "sensible men" who possess the necessary wit and honor for law.⁴⁵ Just as he has pursued the study of the law in the Queen's service, so he desires that the rules will not be used solely for the reader's personal gain but for the common good. Additionally, supposing that the work finds its intended audience of "learned" readers, he asks that these readers follow his "clear and perspicuous exposition" (*SEH* 7: 323).

In the Preface, Bacon apologizes for writing his commentaries in Law French, the "language of our law" whose "harshness" obstructs the comprehension "civilians, statesmen, scholars, and other sensible men" (*SEH* 7: 321–2). This apology is unwarranted. The commentaries come to us in plain English. At some point in the writing process, Bacon changed his mind about the work's audience and expanded the invitees from "professed lawyers" (*SEH* 7: 322) to the different groups that Bacon cultivated in the course of his life: civil lawyers, legislators, and other "sensible men" (*SEH* 7: 321). The phrase "sensible men" denotes individuals who are capable of "having or showing good sense

44. Helmholz, "The Early Enforcement of Uses," p. 1505.

45. On the culture and rhetoric of civic magistracy at the Inns of Court, see Jessica Winston, *Lawyers at Play: Literature, Law, and Politics at the Early Modern Inns of Court, 1558–1581* (Oxford: Oxford University Press, 2016); Michelle O'Callaghan, *The English Wits: Literature and Sociability in Early Modern England* (Cambridge: Cambridge University Press, 2007).

and sound judgement; judicious, reasonable, practical, prudent” or, more generally, of “having senses.”⁴⁶ In yoking these various groups, from the specific (“student of law”) to the general (“sensible men”), Bacon conjures an “imagined community” – a virtual commonwealth – of service-oriented men.⁴⁷ This is a fantasy. In Bacon’s time, common and civil lawyers fought over jurisdictional authority, professional status, and aristocratic patronage. Common lawyers were famous for asserting their elite status – and group solidarity – through “professional and ideological investment in the common law,” including convivial “clubbing” and literary patronage.⁴⁸ Civil lawyers enjoyed their own associational habits.⁴⁹ Yet, exuding an ecumenical spirit, Bacon invites all these “men” to his project. His league of “learned” gentlemen exists in the imagination: in his own, primarily, but perhaps also in the mind of the sympathetic reader. Numerous readers, not merely legal specialists, are deemed capable of wresting meaning from the maxims.

Along with deploying intellectual “wit,” Bacon asks his reader to apply the wisdom contained in the treatise to improve the law for the public’s benefit. He reminds readers of the crisis of public confidence in the law, observing that the “profession is noted to be infected” with “abuses” (*SEH* 7: 319).⁵⁰ Let the good lawyer aspire not only to enrich himself (“to receive countenance and profit”) but also to make “amends” to the profession by being “a help and ornament thereunto [it] . . . to visit and strengthen the roots and

46. “Sensible, *adj.*, *n.*, and *adv.*,” *OED Online*. I am grateful to Rebecca Lemon for this point.

47. To quote Benedict Anderson, “all communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined. Communities are to be distinguished, not by their falsity/genuineness, but by the style in which they are imagined” (*Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. edn. (London: Verso, 2016), p. 6).

48. O’Callaghan, *The English Wits*, p. 4, p. 2.

49. “The main split within the lawyers’ ranks divided practitioners of common law . . . from those who professed the civil law (civil because derived and adapted from Justinian’s *Corpus Juris Civilis*, the great sixth-century codification of Roman law) . . . civilians were graduates of Oxford and Cambridge and sometimes held higher degrees from Continental universities. Those who carried their studies as far as the LLD were eligible to join Doctors’ Commons, a corporate society of London-based practitioners set up in the later fifteenth century to provide senior members of the profession with facilities similar to those which common lawyers had enjoyed, at their inns of court and chancery, since at least the mid-fourteenth century” (Wilfrid R. Prest, *The Rise of the Barristers: A Social History of the English Bar, 1590–1640* (Oxford: Clarendon, 1986), pp. 3–4). For additional studies of civilians, see Daniel R. Coquillette, *The Civilian Writers of Doctors’ Commons, London: Three Centuries of Juristic Innovation in Comparative, Commercial, and International Law* (Berlin: Duncker & Humblot, 1988); Brian P. Levack, *The Civil Lawyers in England, 1603–1641: A Political Study* (Oxford: Clarendon, 1973).

50. This is not the only time that Bacon recognizes popular complaints of judicial corruption. In his essay “Of Judicature,” Bacon states that the “unjust Judge . . . corrupteth the Fountaine” of justice (*OFB* 15: 166). For an in-depth discussion of how judges and legal administration were represented in popular and professional literature, see Penelope Geng, “On Judges and the Art of Judicature: Shakespeare’s *Henry IV, Part 2*,” *Studies in Philology* 114(1) (2017), pp. 97–123.

foundation of the science itself” (*SEH* 7: 319). By way of encouragement, Bacon reflects on his own labored study of the law:

Having therefore from the beginning come to the study of the laws of this realm with a mind and desire no less . . . that the same laws should be the better by my industry . . . I do not find that . . . I can . . . confer so profitable an addition unto that science, as by collecting the rules and grounds dispersed throughout the body of the same laws. (*SEH* 7: 319)

Along with this reflexive comment about his “industry,” a word whose Latin form (*industria*) implies “diligent activity,” Bacon casts himself in the role of the law student.⁵¹ (In truth, he was no longer a student, having been admitted to the bar in 1582.⁵²) This noble intellectual pursuit of knowledge for the sake of improving the legal profession and its “science” and securing the realm from deceit and “abuse” is a path that he has set for himself – and one that he challenges the reader to follow.

In addition to talking about the character of the fit reader, Bacon expounds at length about how the rules and maxims are to be applied, writing, “having chosen out of them such as I thought good, I have reduced them to a true application, limiting and defining their bounds, that they may not be run upon at large, but restrained to point of difference . . . their limits and exclusions duly assigned” (*SEH* 7: 320). “Limits and exclusions” refer to the commentaries that follow each rule. The final section of the Preface lays out his reasons:

. . . that they be not set down alone, like short dark oracles, which every man will be content still to allow to be true, but in the meantime they give little light or direction; but I have attended them, (a matter not practiced, no not in the civil law to any purpose, and for want whereof, indeed, the rules are but as proverbs, and many times plain fallacies,) with a clear and perspicuous exposition; breaking them into cases, and opening their sense and use and limiting them with distinctions, and sometimes showing the reasons above whereupon they depend, and the affinity they have with other rules. (*SEH* 7: 323)

That rules be followed by examples and illustrations – or “cases” – was important to Bacon. Years later, in a letter to James, he again emphasizes the necessity of commentaries, saying:

The naked rule or maxim doth not the effect. It must be made useful by good differences, ampliation, and limitations, warranted by good authorities; and this not by raising up of quotations and references, but by discourse and deducement in a just tractate. (*SEH* 13: 70)⁵³

Rules unaccompanied by “limitations” are apt to be misapplied by ignorant or malicious legal practitioners. Hence, Bacon cautions against the habit of rules “set down alone, like short dark oracles” and nearly two decades later he once more rejects the utility of the “naked rule.”

51. “Industry, *n.*,” *OED Online*.

52. Peltonen, “Bacon, Francis.”

53. “Ampliation, *n.*” means “enlarging, extending, amplification,” *OED Online*.

The first rule – “Regula 1. *In iure non remota causa, sed proxima spectatur*” (“in law, it is the immediate, not the remote, cause which is regarded”)⁵⁴ – and its accompanying commentary demonstrates just how a rule might be “limited.” As promised in the Preface, his commentaries offer brief descriptions of how a rule might shape everyday legal judgments:

It were infinite for the law to judge the causes of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree.

As if an annuity be granted *pro consilio impenso et impendendo*, and the grantee commit treason, whereby he is imprisoned, so that the grantor cannot have access unto him for his counsel; yet, nevertheless, the annuity is not determined by this *non-feasance*. Yet it was the grantee’s act and default to commit the treason, whereby the imprisonment grew: but the law looketh not so far, but excuseth him, because the not giving counsel was compulsory and not voluntary, in regard of the imprisonment.

So if a parson make a lease, and be deprived, or resign, the successor shall avoid the lease . . . (SEH 7: 327)

Dozens of scenarios are pursued – across eighteen paragraphs – and what emerges is a panoramic sense of the legal lives of ordinary subjects. Bacon’s imagined community here expands to include such everyday characters as “a parson,” “I. S. a stranger,” a hypothetical “I,” a “feoffee,” “my son,” “a wife,” “I. D.,” and others (SEH 7: 327–9).

These terms and conditions suggest a certain authorial anxiety over the reception of the text. But that anxiety did not, ultimately, hold Bacon back from sending his work into the world, even knowing that the final interpretation of *Maxims*, like any text, would be up to the individual reader.⁵⁵ No grantor could guarantee that his trustees would fulfill his conditions – he could hope that they would reciprocate his trust, he could set legal conditions, but he could not ultimately fix the future. Occupying that very structural position, Bacon was powerless to limit the reader’s interpretation of his *Maxims* – or even the reproduction of the text – yet he still pursued an agenda of shared knowledge among a collective of users.

At this moment, it is helpful to briefly take stock of the materiality of the text. Both manuscript and printed copies of *Maxims* reveal a block-like presentation of the treatise,

54. Hogan and Schwartz, “A Translation,” p. 711. Hogan and Schwartz provide additional translations of the maxims including “in law it is not the ultimate but the immediate cause which falls under consideration” and “[t]he law looks more to the near than to the distant (or remote) cause.”

55. There is little evidence of how readers read Bacon’s *Maxims*. For example, the manuscript and early printed copies that I have examined contain few marginalia. I was able to examine three manuscript copies (British Library Harley MS 6688, 856, and 1783) and several printed copies (British Library RB 508.c.8, Huntington Library RB 43093, 601121, 601122, 624294, and 114920). Only the Huntington’s RB 43093 contains brief marginalia (see Sig. A3v, B2r, H4r, H4v, I4r, and K1r).

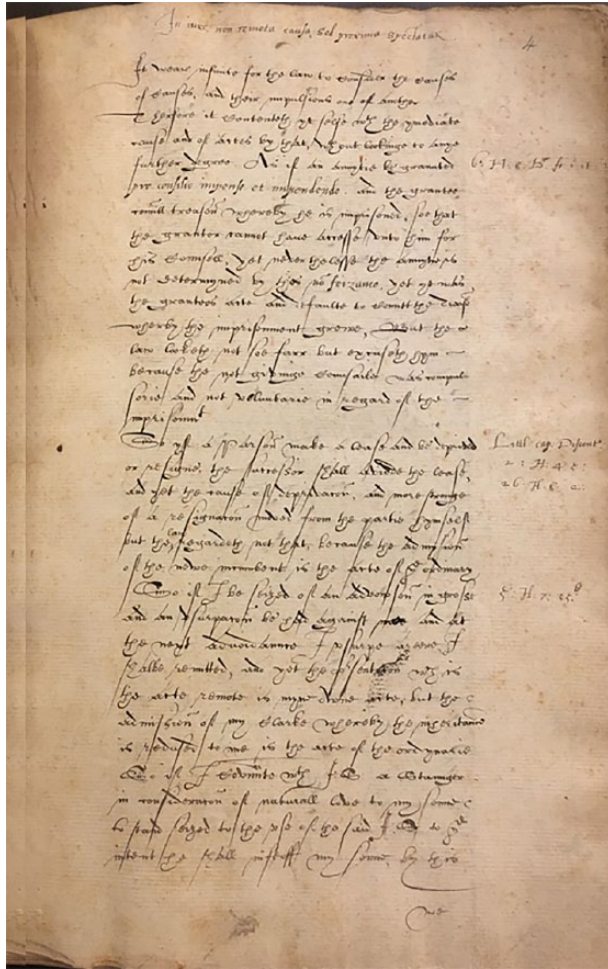


Fig. 1. A page from a manuscript copy of Bacon’s *Maxims*. © British Library Board, BL Harley MS 856, fo. 4r. Reproduced with permission from the British Library.

setting the text up for *bricolage*. In one of the manuscript copies, the rule is set off in an italic script and the commentary in secretary (Fig. 1). This form is reproduced in the printed version (Fig. 2). The rule is in italic type, the commentary in Roman, and each section textually enclosed by the solid frame of the paragraph. Furthermore, an ornate capital “I” – the same one that appears in Bacon’s opening address to Elizabeth (“I do here most humbly present . . .”) – begins the paragraph-length explication of rule 1.⁵⁶

56. The ornate capital was most likely the printer’s decision, perhaps modeled on a manuscript copy of *Maxims*. One of these contains fanciful capitals bearing a branch and leaf design (BL Harley MS 6688, fo. 8r).

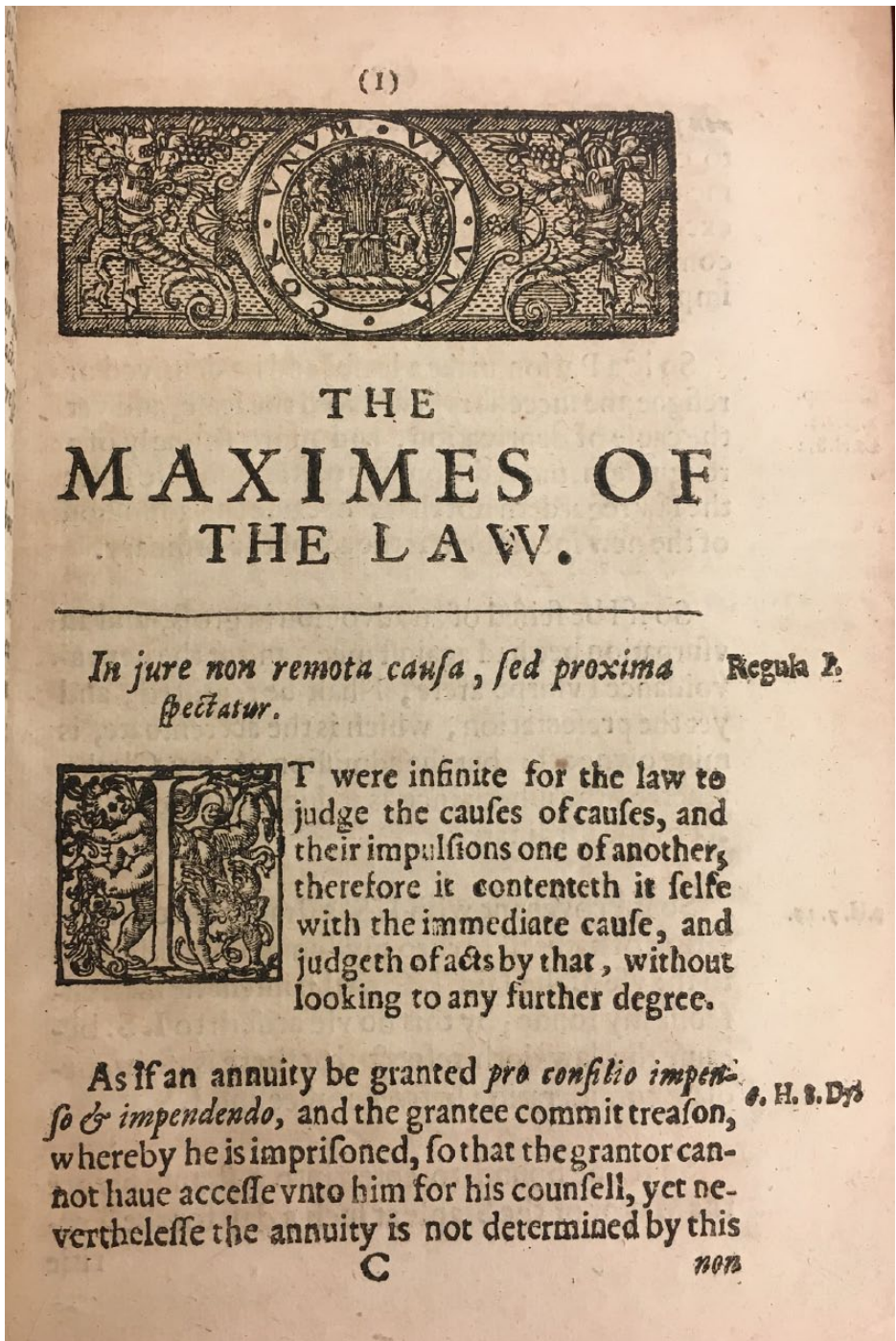


Fig. 2. A page from Bacon's *Maxims*. © The Huntington Library, HEHL RB 43093, Sig. C1r. Reproduced with permission from the Huntington Library.

Table 1. Summary of the contents of manuscript copies of *Maxims*.⁵⁸

CELM entry	Number of maxims
BcF 218	25
BcF 218.5	25
BcF 219	21
BcF 220	25
BcF 221	22
BcF 222	22
BcF 223	20
BcF 224	25
BcF 225	22
BcF 226	25
BcF 227	25
BcF 228	0

Together, the rules and their accompanying commentaries constitute what I term “modules.”⁵⁷ The intention behind such a “distinct and disjointed” presentation may have been to facilitate the reader’s intellectual engagement. It certainly encourages fragmentary reproduction. That condition is indeed borne out by the state of the extant manuscript copies of *Maxims* (Table 1). To date, 12 manuscript copies have been discovered. Some copies contain the complete treatise, i.e. Bacon’s dedicatory epistle to Queen Elizabeth, the Preface, and all 25 rules and commentaries, some only the preliminary material (i.e. none of the rules or commentary), and some only the rules and none of the preliminary material. Modern editors have not been able to fully determine the extent of Bacon’s involvement in the production of the manuscripts. The textual condition of *Maxims* is a reminder that all authors eventually lose control of their texts. Without exception, texts once entered into the public domain begin to enjoy a life of their own.

Presumably, Bacon anticipated that outcome. Having lectured on the use, Bacon was cognizant that the fulfillment of the grantor’s conditions is contingent upon the conscience of the trustee and, should private conscience fail, on judges who represent the “general conscience” of the realm. The existence of so many copies of *Maxims* indicates that he set aside his potential reservations. Publishing *Maxims* – in the sense of allowing it to circulate as a manuscript during his lifetime – was a risk worth taking. Perhaps that decision was based on philanthropic idealism or perhaps it was motivated by political ambition, a desire to dazzle his contemporaries with his legal perspicacity. One thing is certain: at that moment in his career, he wanted readers to “make use of” his aphorisms.

To summarize, I have argued that critics claim too much for Bacon when they compare him to a postmodern author who transfers authorial control to the reader. At the

57. In architecture, a modular design signifies “a unit of measurement in prefabricated construction . . . enabling ease of reproduction of repetitive standard components” (James Stevens, and Susan Wilson, “module,” in *The Oxford Dictionary of Architecture*, Oxford University Press, 2015, <http://www.oxfordreference.com>, accessed Dec. 20, 2018).

58. *CELM (Catalogue of English Literary Manuscripts)*, <http://www.celm-ms.org.uk/>, accessed Aug. 1, 2018. For more information on the manuscripts’ location and state, see http://www.celm-ms.org.uk/authors/baconfrancis.html#british-library-additional-4101_id414566

same time, the conclusion that Bacon's aphoristic theory is a vehicle for a politics of absolutism in which the law is written, ultimately, by a "royal author," also needs correction. *Maxims* reveals the extent to which Bacon could – and did – conceive a more collaborative and participatory form of legal knowledge-production. Arguably, then, the scheme that best captures the spirit of Bacon's aphoristic theory is the device of the use, a legal tool of medieval origin. Bacon's commentaries, his "ampliations" as he styled them, shows an author-grantor concerned with the potential of the "naked rule" to generate harmful "contradictions" in pleading. To prevent that from happening, Bacon sets his terms of use. He asks his readers to exercise their intellectual "wit" when reading the maxims – an action befitting "sensible men" – while adhering to the author's "clear and perspicuous exposition." Yet these conditions, like all such conditions, are tenuous for they depend on readers' goodwill. Complicating the "transaction" is the material form of the maxims and their rules. Presented in a visually exciting and modular form, *Maxims* invites just the kind of selective, gnomic, and "proverb[ial]" quotation that so troubled Bacon (*SEH* 7: 323).

IV. In Pursuit of Certainty

The emphasis on the reader's intellectual involvement in the project of the amendment of the law is less evident, if not wholly suppressed, in Bacon's late works which exhibit a deep suspicion toward non-expert legal interpretation. Indeed, Bacon retreats from the possibility of shared responsibility and advocates, instead, a tightly controlled, hierarchal model of authority. It is possible that this shift was the result of a career defined by political conflict and compromises. To put it more bluntly, Bacon backtracked and imposed stricter sanctions on who could be eligible to participate in the production of legal knowledge and in the wielding of legal authority. In *A Treatise* (1623), Bacon names the sovereign as the godhead of legal wisdom. In this work produced a few years before his death, maxims and rules exist not so much as the foundation for new knowledge, but as the repository for expert legal knowledge – knowledge that stems from the sovereign-legislator and is shaped by his wisest lawyers whom Bacon terms "jurisconsults." In this respect, *A Treatise* peddles a monarchocentric vision, one that is in keeping with Bacon's personal philosophy that a Lord Chancellor ought to conduct himself as the king's "instrument of monarchy, of immediate dependence on the King" (*SEH* 7: 651).

A Treatise begins with a series of imagined emergencies, from a lack of good court reporters to a dearth of legal textbooks. The staging of legal crises is an example of the kind of setting and re-setting of jurisdictional norms that Bradin Cormack calls the law's habit of "always looking back onto the scene of its own instability."⁵⁹ The act of diagnosing the deficiencies in law creates an opening for Bacon to imagine other possible futures. In the future that Bacon promotes, legal authority flows from the "fountain" of justice,

(search under "*Maxims of the Law*"). Note that BcF 228, Inner Temple Library Petyt MS 526, fos. 33r-5v, contains only the dedicatory epistle to Queen Elizabeth and the Preface.

59. Bradin Cormack, *A Power to Do Justice: Jurisdiction, English Literature, and the Rise of Common Law, 1509–1625* (Chicago, IL: University of Chicago Press, 2007), p. 30.

the sovereign-legislator, whose innate wisdom distinguishes him from (and sets him above) the bookish expertise of the lawyers.⁶⁰

The aspect of *A Treatise* that is most pertinent to the present discussion is the consideration of how maxims could be used to erase legal “obscurity” (aph. 52, *SEH* 5: 98).⁶¹ Obscurity in law gnawed at Bacon. In his letter to James written in 1621, Bacon complains that “the subject of the laws of England . . . ask much amendment for the form” (*SEH* 14: 363). Nothing, Bacon averred, was more important than certainty in law. “Certainty is so essential to law, that law cannot even be just without it” (aph. 8, *SEH* 5: 90). Such an elimination of confusion would ensure a more effective popular use of the law, making it possible for even lay people to navigate the courts. So insistent is Bacon on the need to “disclose the oracles and mysteries of laws” and the “many things [that] lie concealed in the laws” that at times he expresses a startling distrust of the very processes that constitute the legal experience: debate and interpretation, whether by magistrates or common petitioners or laypeople (aph. 88, *SEH* 5: 107). Bacon asserts that if the written law, delivered in aphorisms, could be made to achieve synchronicity with the principles of universal justice, then legal debates and judicial discretion would become obsolete – and that would be an ideal outcome. If one follows Bacon’s argument through to its logical end, one perceives that Bacon’s utopian future of universal justice comes at the expense of legal interpretation and debate, which is a distinctive feature of the adversarial nature of the law. In Bacon’s late jurisprudence, the removal of legal doubt takes precedence over all other concerns.

Bacon’s aphoristic theory in *A Treatise* reveals an urgent desire to secure legal knowledge once and for all. He writes, “laws which are found to be wordy and too prolix [should] be more compressed and abridged” (aph. 60, *SEH* 5: 100). He argues, “[b]ut if the laws by accumulation have grown so voluminous, or become so confused that it is expedient to remodel them entirely, and reduce them to a sound and manageable body, let it by all means be done” (aph. 59, *SEH* 5: 100). Furthermore, he explains that the “body” of law could be fashioned from “rules of law”:

A good and careful treatise on the different rules of law conduces as much as anything to the certainty thereof . . . The collection should consist not only of the common and well known

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60. In *De dignitate et augmentis*, Bacon compares James to a biblical law-giver, a “Moses or a David, that is, shepherds of their people” (*SEH* 5: 16).
61. Bacon states that “[o]bscurity of laws arises from four sources; either from an excessive accumulation of laws, especially if they be mixed with such as are obsolete; or from an ambiguity, or want of clearness and distinctness in the drawing of them; or from negligent and ill-ordered methods of interpreting law; or lastly, from a contradiction an inconsistency of judgments” (*SEH* 5: 98). There is, of course, more to the 97 aphorisms than Bacon’s discussion of law’s ideal textual form. *A Treatise* contains both standalone musings and others that are clearly part of a larger sequence. They touch on topics such as the causes behind the “loquacity and prolixity used in the drawing up of laws” (aph. 65) and the responsibility of “the enormous multitude of authors and doctors of laws” (aph. 78) who generate redundant legal commentary, thereby causing the laws to be “distracted” (*SEH* 5: 101, 104). He also considers the restructuring and reorganization of the legal system, including the creation of new superior courts (the “Centorian” and “Praetorian” courts) which would review the decisions of lower jurisdictions.

rules, but of others likewise more subtle and abstruse, which may be gathered from the harmony of laws and decided cases; such as are sometimes found in the best tables of contents; and are in fact the general dictates of reason, which run through the different matters of law, and act as its ballast. (aph. 82, *SEH* 5: 105–6)

To achieve a “manageable body” of laws, Bacon envisions transforming laws into legal rules (“*Regulis Juris*” in the original text) in order to achieve “certainty” of expression.

The job of perfecting the law, of amending, cutting, and combining, would be assigned to experts appointed by the sovereign. Only these specialists have the requisite understanding, judgment, and discernment to write such a “table of contents” derived from “general dictates of reason.” As Bacon puts it, the task “deserves to be entrusted to the ablest and wisest lawyers” (aph. 82, *SEH* 5: 105) or “*ingeniis, & prudentissimis jure consultis*” in the original text.⁶² The phrase “*jure consultis*” recalls the office of the Roman juriconsult. Marcia Colish explains that during the classical period (100 BCE to 350 CE), a distinction emerged between the *juris consultus* and the *rhetor* or advocate.⁶³ In this period, the juriconsult gained greater cultural and legal status than the advocate. His was a “gentleman’s avocation” in the sense that the juriconsult did not personally argue cases in court; rather, he gave counsel to advocates on points of law.⁶⁴ In the *Corpus Juris Civilis*, the juriconsult is described as a “public interpreter of the law”:

It was formerly provided that there should be public interpreters of the law, to whom the power of expounding of the law was given by the emperor, and who were called juriconsults. The unanimous decisions and opinions of these persons had such weight that it was settled by a constitution that the judge should not be at liberty to decide otherwise.⁶⁵

When Renaissance legal humanists undertook their philological study of Roman law, they revived the ancient division – and prejudice. During the so-called war of the faculties between humanists and scholastics in the fourteenth and fifteenth centuries, humanists nostalgically looked back to the days of the juriconsults, the “public interpreters of the law,” who combined philosophical learning with legal knowledge. Guillaume Budé, for example, complains that in his own time, “the study of law has degenerated from its original state. Today there are no longer juriconsults, or philosophers, but only lawyers’ (*jurisperiti*).”⁶⁶ The new generation of jurists (Budé, Alciato, Cujas, Doneau, Hotman, L’Hospital, and Bodin) was empowered by their “philological criticism” to accuse their predecessors (Bartolus, Giason del Mano, and Baldus) of mangling Justinian’s laws with

62. Francis Bacon, *Opera Francisci Baronis de Verulamio, Vice-Comitis Sancti Albani, Tomus primus: Qui continet De Dignitate & Augmentis Scientiarum. Libros IX* (London, 1623), Sig. Ooo4r.

63. Marcia L. Colish, *The Stoic Tradition from Antiquity to the Early Middle Ages*, vol. 1 (Leiden: Brill, 1985), p. 351.

64. Colish, 1: 350.

65. Justinian and Gaius, *The Institutes of Gaius and Justinian, The Twelve Tables, and the CXVIIIth and CXXVIIth Novels*, T. Lambert Mears (tr.) (London: Stevens, 1882), 1.2.§8.

66. Donald R. Kelley, “*Vera Philosophia*: The Philosophical Significance of Renaissance Jurisprudence,” *Journal of the History of Philosophy* 14(3) (1976), p. 268.

their glosses.⁶⁷ Budé's deprecation of the lawyers' lack of wisdom foreshadows Bacon's desire to revive the office of the jurisconsult.

A Treatise veers from *Maxims* in its interpellation of the reader or user. In *Maxims*, Bacon invites the reader to "make use of" the rules; he treats the reader as an intellectual equal, albeit one who is cast in the position of the trustee. In contrast, the tone and content of *A Treatise* is pointedly authoritarian; it adopts the absolutist language associated with King James. No longer writing in the fictive voice of a junior Innsman, Bacon argues with the confidence of a seasoned Roman jurisconsult. At times, *A Treatise* betrays impatience both with the people's interpretation of the law and judges' dissent from the rule of the sovereign. Indeed, the idea of judicial innovation is antithetical to good law: the "best law . . . leaves the least to the discretion of the judge" (aph. 46, *SEH* 5: 97). The "certain" form of the maxim would protect justice from the flawed interpretation of magistrates, lawyers, and the shifting tide of custom.⁶⁸ Rules would fasten wayward thoughts to legal certainties. In the future anticipated in *A Treatise*, the law would be so manifest – so self-evident – that it would not be subjected to needless debate or revision. Bacon's notion of justice emerges as a static, unchanging, and fixed entity.

A number of factors could have shaped Bacon's late aphoristic theory. Two years before *A Treatise*'s publication in *De dignitate et augmentis*, Bacon experienced a catastrophic reversal of political fortune. In March and April of 1621, he was tried for and convicted of bribery by the House of Lords.⁶⁹ It was a humiliating defeat for Bacon – all the more so for the man who inveighed against corruption in his essay "Of Judicature." In light of Bacon's personal circumstances, it could be surmised that *A Treatise* served a basic political function: as a gift to a royal patron in an attempt to mend a sorely tested relationship. James I had promoted him to the highest office and perhaps the king could lift him again.

The authorial desire to control interpretation is also present in *Maxims*. How else to account for the conditions he places on his readers? Yet the suspicion toward readers contended with an equally strong desire to impart his knowledge to various reading communities, not simply his fellow common law professionals. In *Maxims*, the spirit of openness and philanthropic love won the day.⁷⁰ The work was issued, circulating among readers until it was finally published in print for the common reader. A different kind of philanthropic vision guides *A Treatise*. The diverse community of readers has shrunk to

67. Linton C. Stevens, "The Contribution of French Jurists to the Humanism of the Renaissance," *Studies in the Renaissance* 1 (1954), p. 94. See also J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century: A Reissue with a Retrospect* (Cambridge: Cambridge University Press, 1987), pp. 9–10; Donald R. Kelley, "Civil Science in the Renaissance: Jurisprudence Italian Style," *The Historical Journal* 22(4) (1979), pp. 777–94.

68. Bacon was skeptical of custom: "let reason be esteemed prolific, and custom barren. Custom must not make cases. Whatever therefore is received contrary to the reason of a law, or even where its reason is obscure, must not be drawn into consequence" (aph. 11, *SEH* 5: 90).

69. For an extensive and richly contextualized account of Bacon's trial and the eventual judgment, see the last volume of *SEH* 14: 209–78; Lisa Jardine and Alan Stewart, *Hostage to Fortune: The Troubled Life of Francis Bacon 1561–1626* (London: Gollancz, 1998), p. 450.

70. On Bacon's notion of philanthropy, see n.12.

a privileged few. The labor of producing legal knowledge now depends on an elite team of jurisconsults.

V. Conclusion

In closing, a comparison of *Maxims* and *A Treatise* reveals an evolutionary trajectory in Bacon's jurisprudence and aphoristic theory. *Maxims*'s language recalls the culture of the use, particularly the way uses disrupt patrilineal order. As a model that coexisted – indeed, competed – with feudal inheritance, the use offered a way of thinking about ownership (and with that, authority) that was complex and dynamic. The relationship envisioned in *Maxims* between author and readers parallels what happens in the use. What readers “make” of the knowledge in *Maxims* will be determined, in part, by the reader's own “wit” and, Bacon hoped, by his commentaries. Readers are deputized as interpreters and makers of legal meaning, although they were expected to follow the guidelines established by the author.

Studying the meaning of “use” in Bacon raises questions about the metaphorical significance of the term in early modern culture. The use emerged out of necessity and lived experience. Its algebraic formula (*A. tenet ad opus B.*) captures a form of conditional association that feels modern.⁷¹ The use draws together different parties with the promise of collective stewardship. Grantors, trustees, and beneficiaries are not linked by blood or status (necessarily) but by the exchange of trust. To what degree does the popularity of the use serve as a reflection of the dynamic, shifting, and conditional nature of desire and duty that shaped the lives of Bacon and his contemporaries? How might we extend Bacon's use-inspired aphoristic theory to a reading of other evocations of “use”? For example, what does Shakespeare's poet seek from his “master-mistress” when he declares, “[b]ut since she [Nature] pricked thee out for women's pleasure, / Mine be thy love, and thy love's use their treasure”?⁷² What interpretive horizons would open up if we were to combine historical formalism with legal history?

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71. For Plucknett's explanation of this, see n.19.

72. William Shakespeare, “Sonnet 20,” *The New Oxford Shakespeare: The Complete Works*, Gary Taylor, John Jowett, Terri Bourus, and Gabriel Egan (eds.) (Oxford: Oxford University Press, 2016), p. 2827.

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