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Past the Pillars of Hercules: Francis Bacon and the Science of Rulemaking

Daniel R. Coquillette

Boston College Law School, daniel.coquillette@bc.edu

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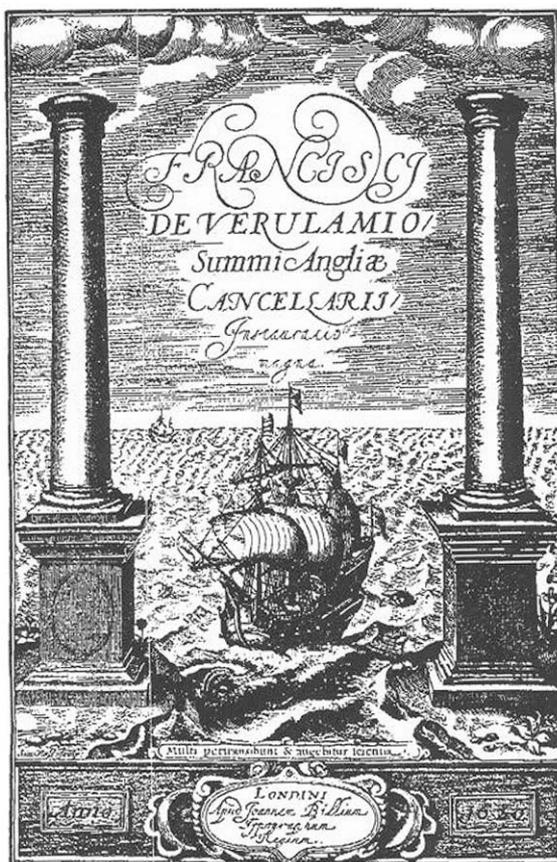
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PAST THE PILLARS OF HERCULES: FRANCIS BACON AND THE SCIENCE OF RULEMAKING*

Daniel R. Coquillette**



Title page of Bacon's *Novum Organum* (1620)

* “[S]ailing past the Pillars of Hercules and ignoring the ancient warnings ‘non ultra!’” DANIEL R. COQUILLETTE, FRANCIS BACON 258 (William Twining & Neil MacCormick eds., 1992). The above frontispiece of Francis Bacon’s *NOVUM ORGANUM* (1620) (from GIBSON, *infra* note 1, at 87) shows the Pillars of Hercules and a small, brave ship passing beyond them. See also FRANCIS BACON, *SYLVA SYLVARUM*, frontispiece (1626); R. W. GIBSON, FRANCIS BACON: A BIBLIOGRAPHY OF HIS WORKS AND OF BACONIANA TO THE YEAR 1750 87, 147, 157 (1950). This Article obviously reflects the private views of the author, not of the Committee on Rules of Practice and Procedure or the Judicial Conference of the United States. Special thanks are due to Charles Riordan, the invaluable editorial assistant to the Monan Chair.

** Reporter, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, 1985 to present; J. Donald Monan, S. J. University Professor, Boston College; Charles Warren Visiting Professor of American Legal History, Harvard Law School.

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INTRODUCTION: EDWARD H. COOPER AND THE DEBAUCHED BUT INTELLECTUAL COURT OF JAMES I

In honoring a distinguished person such as Edward H. Cooper, it is customary to make comparisons with famous figures of the past (e.g., “How Bill Clinton reminds me of George Washington”). Francis Bacon (1561–1626), disinherited at birth, rose in the debauched court of James I to be Vice Regent and Lord Chancellor, the second

most powerful man in England.¹ Despite cruelly betraying his best supporter, the Earl of Essex in 1601 (who was executed), and having a number of scandals involving stable boys and debt, Bacon flourished. He became a major advocate for Stuart divine-right authoritarianism, thus earning the hatred of Chief Justice Coke and the common-law bar. Impeached by Parliament in 1621 for bribery, Bacon confessed to receiving huge bribes as Lord Chancellor, but argued that he decided the cases fairly, despite, in his words, being guilty of “corruption.”² Stripped of his offices, he retired in disgrace to his country estate, where he wrote his great *De Augmentis Scientiarum* (1623), his prophetic *New Atlantis* (1624), and, some think, all of Shakespeare and even *Don Quixote*.³

The parallels between Bacon’s career and that of Edward H. Cooper are, of course, obvious. Bacon was one of the great legal minds of his day. Unlike the common-law judges who formed the law by deciding cases, Bacon expressed his greatness in writing brilliant juristic treatises and, as Lord Chancellor, drafting one of the first modern rule systems, the *Ordinances in Chancery* (1617–1620).⁴ Indeed, my thesis is that Bacon invented modern, scientific rulemaking by fusing his new theories of inductive, empirical research with the traditions of equitable pleading and is, in fact, the intellectual forbearer of the likes of Charles Clark, Benjamin Kaplan, and Edward Cooper.

My intention is to establish this thesis by examining Bacon’s *Ordinances* and his seminal *A Proposition to His Majesty Touching the*

1. See DANIEL R. COQUILLETTE, FRANCIS BACON 4–126 (William Twining & Neil MacCormick eds., 1992). For particularly readable biographies of Francis Bacon, see CATHARINE DRINKER BOWEN, FRANCIS BACON: THE TEMPER OF A MAN (1963) (Bacon’s early years are detailed at 23–42); DAPHNE DU MAURIER, THE WINDING STAIR: FRANCIS BACON, HIS RISE AND FALL (1976). For the moral tone of the Court of James I, see DAPHNE DU MAURIER, GOLDEN LADS: A STUDY OF ANTHONY BACON, FRANCIS AND THEIR FRIENDS (1975). A good recent account is LISA JARDINE & ALAN STEWART, HOSTAGE TO FORTUNE: THE TROUBLED LIFE OF FRANCIS BACON (1999).

2. For the original documentation of the charges and Bacon’s confessions, see XIV THE WORKS OF FRANCIS BACON 209–78 (James Spedding, Robert Leslie Ellis & Douglas Denton Heath eds., 1874) [hereinafter Spedding (all volumes)]. This great edition of Bacon’s works remains the most widely cited by scholars, although a new project by Oxford University Press, THE OXFORD FRANCIS BACON, is underway. See FRANCIS BACON, THE ADVANCEMENT OF LEARNING i, vii–viii (Michael Kiernan ed., 2000). On the bribery, see COQUILLETTE, *supra* note 1, at 222 & 263–64 nn.13 & 14; JARDINE & STEWART, *supra* note 1, at 448–69.

3. See COQUILLETTE, *supra* note 1, at 223–62. As to Bacon, Shakespeare, and Cervantes, see NIEVES MATHEWS, FRANCIS BACON: THE HISTORY OF A CHARACTER ASSASSINATION 384–93 (1996); N.B. COCKBURN, THE BACON-SHAKESPEARE QUESTION: THE BACONIAN THEORY MADE SANE (1998). Sir Edwin Dunning Lawrence believed that “every significant piece of Elizabethan or Jacobean literature emanated from Bacon’s pen.” K. E. Attar, *Sir Edwin Dunning-Lawrence: A Baconian and His Books*, 5 LIBRARIAN 294, 311 (2004).

4. Spedding vol. VII, *supra* note 2, at 347–72.

Compiling and Amendment of the Laws of England (1616).⁵ These show Bacon's great debt to Roman jurisprudence and Renaissance critical thinking but also show the unique contribution Bacon has made to modern progressive jurisprudence. This is particularly true as to the forming of law by prospective rules, rather than retroactive case law, and the testing and amendment of such rules in light of Bacon's revolutionary theories of inductive scientific reasoning and empirical observation.

Bacon's innovations earned him contempt and ferocious critical opposition, both during his life and up to the present day. I will conclude by noting three particular sources of this opposition that remain relevant to scientific, progressive rulemaking. As Mark Twain was thought to have said, "History doesn't repeat itself, but it rhymes."⁶

I. THE HISTORICAL SOURCE OF CIVIL PROCEDURE

The significance of Bacon's revolutionary approach to law making can only be appreciated in its historical context. This context has three fundamental aspects. First, there is the great ideological contribution of Roman law to Western jurisprudence and its ongoing importance as a continuing foil to a second great tradition: the literally insular, but extraordinarily important, evolution of an incremental English "common law." In turn, that evolution of English common law is nowhere more powerfully illustrated than by the development of common-law pleading and the causes of action. Finally, the emergence of equity jurisprudence, born of the religious tradition of the Church and a new Renaissance humanism—both indebted to Roman legal science—set the stage for Bacon's bold innovations.

5. Spedding vol. XIII, *supra* note 2, at 61–71.

6. Eugene Volokh, *History Doesn't Repeat Itself, But It Rhymes*, THE VOLOKH CONSPIRACY (Feb. 18, 2005, 1:51 PM), <http://volokh.com/posts/1108756279.shtml>. It seems that although this quote has been attributed to Mark Twain, no one has been able to find the original published source (as far as I can tell). The UCLA Law School research library was once asked to track down the source, and could not definitively attribute the quote to Twain.

A. The Great “Rivers” of Western Legal Ideology

Roman legal science underlies all of modern rulemaking. Indeed, the words “rule,”⁷ “civil,”⁸ and “legislation”⁹ are all of Roman origin. Preserved by the great legal projects of the Emperor Justinian and rediscovered in the twelfth century at the dawn of Europe’s great universities, such as Bologna, Paris, and Oxford, it still provides the cornerstone of Continental jurisprudence.¹⁰ The Church, traditionally centered in Rome and the guardian in the darkest days of Latin literacy, early applied Roman law concepts to contemporary administrative problems, and its lead was gradually followed throughout Europe.¹¹

What made England unique was not that it was free of Roman law influence—the Roman tradition was strong in its universities and in its canon law—but rather that its insular character gave rise to a counter force. The second “river” of legal culture was invented by conquerors to address specific problems they faced in administering, to them, a foreign and often hostile population.¹² Short of trained judges and always concerned about challenges to the legitimacy of their rule, the Normans and Norman Angevin descendants hit on the idea of leaving the traditional Anglo-Saxon local courts—the *folc-moots*—intact, and establishing a consistent, national system of law that was restricted to just those matters of particular concern to the central government: namely, serious crimes (i.e., “felonies” not “misdemeanors”), land disputes involving “free tenure” (i.e., not the local copyhold of the serfs on the manors, or “unfree tenure”), and certain important civil actions, all of which could have financial consequences to the government.¹³ This national legal system, “common” to all of the counties and shires, soon was termed the “common law.”

7. From “*regulare*.” “*Regula*” refers to a straight stick. See THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 1055 (R.E. Allen ed., 8th ed. 1990).

8. From “*civilis*.” “*Civis*” refers to a citizen. *Id.* at 206.

9. From “*lex legis*,” the Roman term for specific, enacted, and usually written law. *Id.* at 76–77; see also CASSELL’S LATIN DICTIONARY 316 (J. R. V. Marchant & Joseph F. Charles eds., rev. ed. 1953); THE INSTITUTES OF GAIVS 1.2–.3 (F. de Zulueta ed. & trans., 1946).

10. See DANIEL R. COQUILLETTE, THE ANGLO-AMERICAN LEGAL HERITAGE 1–10 (2d ed. 2004); see generally FRANCIS DE ZULUETA & PETER STEIN, THE TEACHING OF ROMAN LAW IN ENGLAND AROUND 1200 (1990) (describing early Roman law teaching in the English universities).

11. See generally W. W. BUCKLAND & ARNOLD D. McNAIR, ROMAN LAW AND COMMON LAW (2d ed. 1974); R. H. HELMHOLZ, CANON LAW AND THE LAW OF ENGLAND (1987) (describing the impact of Roman law on the evolution of canon law).

12. See COQUILLETTE, *supra* note 10, at 55–63.

13. *Id.* at 58–59. See also J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 14–62 (3d ed. 1990); R. C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW (1973).

In developing this system, the Norman Angevins had three great ideas. The first was leveraging scarce judicial resources by judges “riding circuit.” The original central courts—the King’s Bench, the Common Pleas, and the Excheques—had specific jurisdiction and eventually met regularly at Westminster Hall in London, built by the Norman William Rufus in 1099 and still standing.¹⁴ But between regular sessions in London, the small band of trained judges would “ride circuit” as “justices in eyre” and hold “assize courts” in the county towns, bringing common-law justice out to the people and thus stretching judicial manpower.¹⁵

To this “assize” idea, the Norman Angevins added a second: jury trial. What better way to save judicial labor and to ensure popular support for judicial order than to “coopt” the local population in the process itself! The Norman Angevins had developed juries in Normandy as a tool of administration, putting local citizens under oath (hence “juror,” from the Latin *jurare*, to swear) to answer questions about taxable assets and other issues.¹⁶ The “grand jury” (i.e., “big,” usually twenty-one) continued this notion of presentment, reporting on crimes in the county to the visiting judge, while the “petit jury” (usually twelve) early replaced ordeal as a mode of proof for crime. Indeed, we still use these Norman French terms for juries, as well as other “law” French terms such as “attorney,” “voir dire,” “felony,” “misdemeanor,” and “oyez” in modern jury trials.¹⁷

Finally, in attempting to limit access to the centralized, common-law courts, the Norman Angevins developed a formulary system of causes of action, which remain the ancestor of modern common-law pleading. This was not done by a statute or central decree, but by the evolving practice of the courts over many years.¹⁸ In the end, this “river” of incremental, evolutionary, court-made procedural law, so different in both jurisprudence and philosophy from the Roman *Codex*, would flow with the British Empire to lands as far from that Atlantic island as India, Australia, Nigeria, Kenya, New Zealand, Hong Kong, Barbados, Canada, and yes, the United States,

14. See DAVID M. WALKER, *THE OXFORD COMPANION TO LAW* 1297 (1980).

15. See S.F.C. MILSOM, *HISTORICAL FOUNDATION OF THE COMMON LAW* 25–36 (2d ed. 1981); COQUILLETTE, *supra* note 10, at 154–55.

16. COQUILLETTE, *supra* note 10, at 160–62. See BAKER, *supra* note 13, at 84–90; OXFORD DICTIONARY, *supra* note 7, at 642 (defining *juror*); see also JOHN P. DAWSON, *A HISTORY OF LAY JUDGES* 118–29 (1960).

17. See EARL JOWITT, *THE DICTIONARY OF ENGLISH LAW* 176, 793, 1178, 1285, 1843 (Clifford Walsh ed., 1959) (providing French roots for “attorney,” “felony,” “voir dire,” and “oyez”).

18. See generally F. W. MAITLAND, *EQUITY AND THE FORMS OF ACTION AT COMMON LAW* (A. H. Chaytor & W. J. Whittaker eds., 1910) (explaining the evolution of writs and providing examples of them); BAKER, *supra* note 13, at 63–83, 612–27 (same).

creating an historical and ideological rival to that other great cultural river, the law of Rome.¹⁹

B. The Evolution of Common-Law Pleading

Common-law pleading linked process, substantive rights, and mode of proof in one system of forms, the so-called “writ” system.²⁰ The common-law courts were a restricted-entry system, and the ticket was a judicial writ. These were purchased in blank from that center of literacy in the Kingdom, the office of the Lord Chancellor or Chancery, in London. The Chancery kept a set of appropriate forms, later reproduced as the “Register of Writs.” The appropriate names of the parties could then be inserted, much like complaints and subpoena forms used today. But—and here was the key point—only the writ that correctly described the cause of action presented by the facts of the plaintiff’s case would do, and the parameters of the causes of action described by the writs were originally very narrow.²¹ Many wrongs suffered by potential plaintiffs were not described by writs in the Register and thus lay outside the acceptable common-law causes of action. Remedies for these wrongs were only available in the Church courts, the feudal courts, the traditional local courts, or not at all.

Access to that other great Norman invention, jury trial, was one of the great attractions of this “common law” pleading system, as was the fact that common law courts were “courts of record,” and kept good central accounts. But not all causes of action were entitled to jury trial. In fact, all of the earlier causes of action, described in a family of writs forms known by their first word as “*Praecipe*” writs, were triable instead by “primitive” modes of proof, namely oath helping (known by its Latin name as “compurgation”) and trial by battle.²² These modes gained their legitimacy by involving God directly in the process, not unlike ordeals in criminal cases. Oath helping involved a contest of original oaths as sacred objects, backed by supporting oaths, all of which would have to be perfect in form. Of course, God would cause an oath helper giving a false sacred oath to slip up. This mode of “primitive” proof was required

19. In the immortal words of Maitland, it was this formulary system that formed “the strongest bulwark against Romanism.” See 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 585 (2d ed., 1898).

20. See COQUILLETTE, *supra* note 10, at 149–52; 87 SELDEN SOCIETY, *EARLY REGISTERS OF WRITS* xi–xii (E. de Hass & G. D. G. Hall eds., 1970).

21. COQUILLETTE, *supra* note 10, at 152–53.

22. *Id.* at 152–53, 158–59.

in the causes of action contained in the Writs of Right (property ownership), Covenant (documents under seal), Trover, Detinue, and other *Praecipe* writs. The idea was the same for the Writ of Right Tenant in Capite, the cause of action for land title disputes at the top of the feudal system, but these were tried by “battle” (i.e., hired champions that whacked at each other with padded weapons until God caused the one representing the party at fault to give up).²³

Why were these early causes of action linked to a mode of proof other than jury trial? Probably because jury trial as a source of civil, rather than criminal, judgment was still evolving. But by the reign of Henry II, a new set of remedies, the *Questus Est Nobis* writs, were introduced. Often referred to as the “Possessory Writs,” they were designed to restore those in occupations of land to possession if “disseised,” or dispossessed by force—clearly an effort to reduce “self help” in anticipation of seeking a judicial remedy.²⁴ But unlike the *Praecipe* writs, the *Questus Est Nobis* writs were to be tried by jury.

One prevalent feature of both the ancient *Praecipe* writs, with their “irrational” modes of proof, and the *Questus Est Nobis* writs is that the issue decided had to be reduced to a “yes” or “no” answer. God either causes a slip in the oath helping or not, and the “Possessory Writs” continued in that tradition. Either a person had been thrown off land during a brief period (i.e., “since the King returned from France”) or not. This required that each trial involve just one issue that was properly framed as a cause of action set forth in the correct writ. All of common law pleading began by narrowing legal disputes to this one issue that could then be resolved by a simple decision of “yes” or “no.” Inherent in this process was a very narrow set of remedies. All the *Questus Est Nobis* writs simply restored the prevailing party to possession (i.e., no damages, simply restitution).²⁵ This was also true of most of the *Praecipe* writs, including Trover, Debt Detinue, and Writ of Right. The remedy was simply to return the unjust enrichment. In Covenant, an exception, the only remedy was specific performance of the covenant. Once the narrow terms of the covenant writ were met (i.e., a document under seal signed by the party to be charged) the only defense permitted was “*non est factum*,” meaning “not my deed—not my signature.” The only issue to be decided, by wager of law, was therefore “yes” or “no”—it was the defendant’s deed or it was not.²⁶

23. See *id.* at 159; WALKER, *supra* note 14, at 119. For a classic, see G. NEILSON, TRIAL BY COMBAT (1890) (providing an account of judicial dueling).

24. COUILLETTE, *supra* note 10, at 153–55.

25. See *id.* at 154–55.

26. *Id.* 152–55, 169–70; see also BAKER, *supra* note 13, at 440–44.

In the last stage of the evolution of common-law pleading, the introduction of “*Ostensurus Quare*” or Trespass Writs, the system evolved beyond “yes” or “no” answers, and allowed the jury to give damages. Trespass was a cause of action that was triable in the King’s Bench, rather than the Common Pleas, because it was more like a crime than the usual civil actions.²⁷ The original requirements were an act done *vis et armis* (“with force of arms”) *contra pacem nostrum* (“against the King’s peace”). The original trespass action contemplated a physical assault, and it was obviously impossible to put the victims back in as good shape by restitution, particularly given pain and suffering and physical injury. You hit someone with a baseball bat, and you cannot “restore” the victim’s prior condition. In trespass actions, juries could do more than answer “yes” and “no”; they could give damages.

There is not enough space here to describe the eventual expansion of trespass actions, largely by legal fiction, to eventually cover everything from Ejectment to Action on the Case in Assumpsit (a contract remedy which could be so far removed from a violent attack as to involve simple nonfeasance).²⁸ The reason was clearly the desire by plaintiffs to avoid irrational modes of proof and to gain damages, not just restitution. The old rule for using the older writs, when appropriate, was finally revoked in *Slade’s Case* in 1602, which also permitted trespass action in both the King’s Bench and the Common Pleas, conferring the benefits of more business on both.²⁹ From then on, the *Ostensurus Quare* writs reigned supreme, with jury-trial modes of proof and damage remedies as their primary feature. Trespass became the “mother writ” of modern common-law causes of action.

But the gradual evolution of the causes of action and their accompanying writs gave a “mindset” to common-law pleading that proved durable. First, the law was almost entirely judge made through incremental case law. Even radical reforms, such as that of *Slade’s Case*, were done through legitimizing legal fictions—in that case, the *Indebitatus* fiction.³⁰ Secondly, a cause of action was never

27. COQUILLETTE, *supra* note 10, at 155–57, 171–72; see also VAN CAENEGEM, *supra* note 13, at 29–54.

28. See, e.g., A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 3–196 (1975) (explaining the conceptual history of the action of assumpsit). Also see the lucid, if outdated, account in T.F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 353–78 (5th ed. 1956).

29. See *Slade’s Case*, 4 Coke’s Reports 92(b) (1602), in COQUILLETTE, *supra* note 10, at 261–63.

30. See *id.* at 250–52. On the *Indebitatus* fiction, see WALKER, *supra* note 14, at 607. In Maitland’s words, these “forms of action” were “living things” that grew in the context of regular, adjudicated cases:

just procedural. Each cause of action stood for a substantive right, a carefully defined remedy, and a particular mode of proof. A division between “procedure” and “substantive law” would be incomprehensible to our common-law ancestors.³¹ Finally, the common-law system was restrictive. It was carefully designed to remedy only certain wrongs—wrong of particular interest to the Norman Angevin Crown. The older causes of action also required narrowing all issues to a “yes” or “no” answer. Even after the evolution of the *Questus Est Nobis* trespass writs gave juries the power to award damages in a wider range of cases, it was in the best interest of the common-law judiciary, particularly in circuits far from London, to keep matters as simple as possible for the trier of fact. This avoided the appearance that cases were resolved by judicial discretion, as opposed to the routine, predictable, and narrow application of the formulary writs.³² Growing from the insecurity of an occupying Norman elite, both jury trial and formulary pleading removed responsibility from the professional judge and devolved it into the hands of the lay people of the region, as juries, and also into a system of fixed forms, each with its own requirements, mode of proof, and remedies, that—in theory at least—made life as easy as possible for the jury, as predictable as possible for the parties, and as legitimate as possible in the eyes of a suspicious public.

C. The Extraordinary Contribution of Equitable Pleading and the Subrin Thesis

Common-law courts were never intended to be the *exclusive* source of all legal remedies. They were only to be the exclusive source of legal remedies for those causes of action of interest to the Crown and that also met the narrow requirements of the writs and

Our forms of action are not mere rubrics nor dead categories; they are not the outcome of a classificatory process that has been applied to pre-existing materials. They are institutes of the law; they are—we say it without scruple—living things. Each of them lives its own life, has its own adventures, enjoys a longer or shorter day of vigour, usefulness and popularity, and then sinks perhaps into a decrepit and friendless old age. A few are still-born, some are sterile, others live to see their children and children’s children in high places. The struggle for life is keen among them and only the fittest survive.

POLLOCK & MAITLAND, *supra* note 19, at 588.

31. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 914–18 (1987).

32. In Subrin’s words, “[i]n the Middle Ages discretion is entirely excluded; all is to be fixed by iron rules.” *Id.* at 918. This is largely, although not entirely, true. For a discussion of common law action without writs, “plaints,” and “Querelos,” see COQUILLETTE, *supra* note 10, at 158, 175–76.

common-law pleading. “Supplemental” local courts, descended from the Anglo-Saxon *folc-moots*, continued for centuries. So did feudal courts and Church courts, with their formidable ecclesiastical remedy of excommunication, retain control of much of what today is regarded as the business of a probate court.³³ But the growing power of a centralized royal Executive, particularly during the Renaissance and the reigns of the mighty Tudor monarchs, saw the development of a new style of supplemental jurisdiction, the Conciliar Courts, of which the oldest, and the most powerful, was the Court of the Lord Chancellor, or the Chancery.³⁴

The medieval King was always regarded as the source of “complete justice,” and his spiritual advisor, the Lord Chancellor, was his natural designee to meet this responsibility. This function was completely separate from the Lord Chancellor’s role as head of a secretariat, and thus from the supply of common-law writs.³⁵ Access to the Chancellor’s court was limited in one very important way: no case with a legal remedy (i.e., a remedy in the common-law courts as a cause of action) could be entertained.³⁶ In theory, therefore, there could be no competition between the Chancery and the common law. The Chancery could only fill the common law’s gaps.

During the sixteenth century, under strong Tudor monarchs, other “conciliar” courts grew in influence. Like the Chancery, these were based on a powerful member of the King’s Privy Council, such as the Lord High Admiral (The High Court of Admiralty), the Lord President of the Privy Seal (The Court of Requests), the Lord High Constable of Earl Marshal (The Court of the Constable and Marshal), and the entire Privy Council sitting as an extraordinary criminal court (The Star Chamber).³⁷ Each of these courts supplemented the common-law courts in a particular way. For example, the Admiralty heard cases arising in foreign trade and on the high seas, the Requests heard cases between poor people, the Constable and Marshal heard military cases, and the Star Chamber heard cases that threatened national security and were not triable in the ordinary courts—a concept relevant to today’s terrorist problems. In theory, none competed directly with the common-law courts as,

33. See *id.* at 183–84; see also BAKER, *supra* note 13, at 26–33; Charles Donahue, Jr., *Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-Examined After 75 Years in the Light of Some Records from the Church Courts*, 72 MICH. L. REV. 647, 658–59 (1974).

34. See COQUILLETTE, *supra* note 10, at 185–88.

35. *Id.* at 151–52, 185; BAKER, *supra* note 13, at 64–66, 114–20.

36. *Id.* at 185. See generally BAKER, *supra* note 13, at 112–34 (describing the Courts of Chancery and Equity).

37. COQUILLETTE, *supra* note 10, at 205–09.

by definition, absence of a common-law remedy was a *sine qua non* of their jurisdiction.

For our purposes, the most important thing about these courts is that they used a different procedure from common-law pleading. First, none had jury trials, and thus were free of the need to state issues clearly and simply for lay triers of fact. Second, rather than looking to common-law causes of action and writs to initiate proceedings, the courts used far simpler “bills” that recited the facts and the remedies sought.³⁸ Finally, trial process was very different, based far more on production of documents and affidavits and far less on in-court testimony—something one would expect where the triers of fact were experienced specialist judges rather than juries.

This process, used in all these courts, was what we today would call “equitable” process, or “equity,” although the heart of equity jurisprudence remained the Chancery. The most fundamental difference between common-law pleading and equity, besides the absence of the jury, was the greater discretion of the judge and the relative simplicity of the “bills” and pleading practice, at least in the earlier centuries.³⁹

The difference was reinforced by ideological tension between the practitioners. The common-law barristers who practiced in the common-law courts were trained in the Inns of Court in London—private guilds with no university connections.⁴⁰ Indeed, no “common law” was taught in any English university until Blackstone’s lectures at Oxford in 1753. But under the sponsorship of the Tudors, a rival professional group emerged, the Doctors of Civil Law of Doctors’ Commons, London. Members of this group all had university doctorates earned in Roman and civil law, and had a monopoly on proceedings in the Requests and the Admiralty.⁴¹ Common-law lawyers and the civilian Doctors could both appear in Chancery proceedings.

38. For examples of equitable “bills,” see *id.* at 202–04; see also C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 298–307, 321, 329 (1949).

39. See CARLETON KEMP ALLEN, LAW IN THE MAKING 383–425 (7th ed. 1964); IX WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 335–53 (3d ed. 1945); Subrin, *supra* note 31, at 918–21.

40. See BAKER, *supra* note 13, at 177–99; ALAN HARDING, A SOCIAL HISTORY OF ENGLISH LAW 167–93 (1960). See generally WILFRID R. PREST, THE INNS OF COURT UNDER ELIZABETH I AND THE EARLY STUARTS, 1550-1640 1–46 (1972) (explaining the social history of the English bar).

41. See DANIEL R. COUILLETTE, THE CIVILIAN WRITERS OF DOCTORS’ COMMONS, LONDON 22–32 (1988). See generally BRIAN P. LEVACK, THE CIVIL LAWYERS IN ENGLAND, 1603–1641 (1973) (illustrating the life of civil lawyers in early seventeenth-century England); G. D. SQUIBB, DOCTORS’ COMMONS (1977) (providing a history of society and its members).

Not surprisingly, the common lawyers were suspicious of the discretionary powers of the Lord Chancellor and resented competition from the Doctors, especially with regard to the latter's lucrative monopoly in the Admiralty.⁴² It was particularly troubling that no client had an absolute "right" to equitable relief in the Chancery. Subjective "equitable" factors—including the familiar "clean hands" doctrine and a traditional concern for the weak and vulnerable, together with the freedom of the equity judge (at least in theory) from prior precedents—caused suspicion and unease among this common law professional class. After all, the common lawyers made their living protecting the private interests of merchants and a landed squirearchy that sought, above all, predictability of outcome and security of property. This was a professional and ideological tension that would survive the English Civil War and last for centuries.⁴³ Indeed, as Stephen Subrin has brilliantly demonstrated, this tension persisted through the history of American procedural reform, from Joseph Story's *Commentaries on Equity Pleading* of 1834 to the Field Code of 1848, the Thorp Code of 1897, and, finally, the ultimate victory of the ideology of equitable pleading in the Enabling Act of 1934 and Charles Clark's "equity-prone view of procedure" that would dominate the 1938 Federal Rules of Civil Procedure.⁴⁴

II. RULEMAKING AS AN EMPIRICAL SCIENCE

The profound influence of traditional English equity and its ideology on modern American civil procedure, so brilliantly described by the likes of Subrin, Burbank, and Cooper, is clearly beyond the scope of this paper.⁴⁵ But the law of equitable pleading, which, borrowing Maitland's words, would so influence the "kingless commonwealth" beyond the seas, did not spring, fully formed, from the medieval practices of the Chancery or even those of the sixteenth century.⁴⁶ One great figure, an innovative genius of the first order, would make the conceptual breakthrough in law reform that would

42. See COQUILLETTE, *supra* note 41, at 97–148.

43. *Id.* at 149–97.

44. Subrin, *supra* note 31, at 963, 961–82.

45. See, for example, the classic Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Edward H. Cooper, Extraordinary Writ Practice in Criminal Cases: Analogies for the Military Courts, 98 F.R.D. 539 (1983); Edward H. Cooper, *Aggregation and Choice of Law*, 14 ROGER WILLIAMS U. L. REV. 12 (2009); Subrin, *supra* note 31.

46. Maitland was speaking of the common lawyers: "Those few men who were gathered at Westminster round Pateshull and Raleigh and Bracton were penning writs that would run in the name of kingless commonwealths on the other shore of the Atlantic Ocean; they were

equip equitable pleading for its rule as an ideological conqueror. Much admired, feared, and hated, this man was Francis Bacon (1561–1626).

Bacon's genius as the literal inventor of modern inductive social science, his extraordinary power as a writer, and his rise politically to be the second most powerful man in the England of his day, Vice Regent to James I, has historically overshadowed the fact that, first and foremost, he was a lawyer.⁴⁷ Born to a father who was the head of the Chancery Court, Lord Keeper Sir Nicholas Bacon (Elizabeth I did not ennoble her "Lord Chancellors"), and a mother, Lady Ann Bacon, the Calvinist sister-in-law of William Cecil (Lord Burghley, Lord Treasurer, and probably the richest man in England), Bacon would have appeared to be "to the manor born." In retrospect, that Bacon became Lord Chancellor himself, and head of the Chancery Court like his father, would seem to be an obvious outcome of his "wiring." Indeed, Queen Elizabeth herself had, reportedly, "'delighted to confer with him' as a boy" and called him "the young Lord Keeper."⁴⁸ A distinguished legal career seemed practically guaranteed.

But in fact, nothing could have been further from the truth. The youngest of eight children, six by a former marriage, Bacon was slighted by his father's will.⁴⁹ His early life was a constant struggle for education and preferment, and, despite appeals to his wealthy uncle, Lord Burghley, Bacon was very much on his own. Queen Elizabeth, a shrewd judge of character, distrusted him, and forced Bacon to betray his one true friend and supporter, the Earl of Essex. Bacon's testimony would lead to Essex's execution,⁵⁰ the first of many blots on Bacon's character.

But Bacon did manage, at age twelve, to matriculate at the great Trinity College, Cambridge, where he is today regarded as one of many outstanding graduates. He entered, at age fifteen, Gray's Inn

making right and wrong for us and for our children." FREDERIC POLLOCK & FREDERICK WILLIAM MAITLAND, 2 *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 705 (2d ed. 1968). In terms of "right and wrong," he could even more accurately be describing the Lord Chancellors and equity.

47. See COQUILLETTE, *supra* note 1, at 3–4.

48. *Id.* at 23–24; see BOWEN, *supra* note 1, at 30–31.

49. In Bacon's words, "For my father, though I think I had greatest part in his love of all his children, yet in his wisdom served me as last comer." *Id.* at 41.

50. See BOWEN, *supra* note 1, at 75–80; MATHEWS, *supra* note 3, at 30–59.

of the Inns of Court, to train as a common lawyer. His statue now dominates the Gray's Inn first square.⁵¹

Deliberately passed over by Elizabeth, Bacon and his natural brother, Anthony, conspired secretly with her heir, James VI of Scotland. On Elizabeth's death, Bacon and his brother quickly solicited James, now James I of England and preferment followed.⁵²

Bacon and Anthony were homosexuals, and were at ease in the predominantly gay court of James I.⁵³ But far more importantly, James was a genuine intellectual, perhaps the most intelligent English monarch of all time.⁵⁴ He quickly recognized that Bacon was a genius, first appointing him King's Counsel in 1604, and following many other positions to be discussed below, ultimately Lord Chancellor, in 1618. James I also ennobled Bacon as Baron Verulam in 1618, and then as Viscount St. Alban in 1621. Bacon's cynical marriage in 1606, at age forty-five, to fourteen-year-old heiress Alice Barnham ensured wealth.⁵⁵

Bacon was legally trained, apprenticed as a lawyer, and from 1608 until his elevation to Lord Keeper in 1617, was Treasurer of Gray's Inn, one of the four great legal guilds of London. His legal arguments, particularly against Edward Coke in the famous, law-altering *Chudleigh's Case* (1594) and *Slade's Case* (1602), and his legal readings, such as the famous "On the Statute of Uses" at Gray's Inn in 1600, were outstanding. Perhaps the greatest of his writings was the immortal essay *Of Judicature* of 1612.⁵⁶

But today, scientists from astrophysicists to cancer researchers are turning once again to the inductive scientific method Bacon

51. See [RT. HON. ARTHUR BALFOUR], *THE UNVEILING OF THE STATUTE OF FRANCIS BACON* (1912); COQUILLETTE, *supra* note 1, at 23–24; see also Daniel R. Coquillette, "The Purer Foundations": *Bacon and Legal Education*, in FRANCIS BACON AND THE REFIGURING OF EARLY MODERN THOUGHT 147–52 (Julie Robin Solomon & Catherine Gimelli Martin eds., 2005).

52. See BOWEN, *supra* note 1, at 97–101; COQUILLETTE, *supra* note 1, at 70.

53. See Alan Bray, *Homosexuality and the Signs of Male Friendship in Elizabethan England*, HISTORY WORKSHOP, no. 29, 1990, at 1, 14 (quoting Simonds D'Ewes' claim that Bacon was a known "sodomite"); Charles R. Forker, *Sexuality and Eroticism on the Renaissance Stage*, 7 S. CENT. REV., no. 4, 1990, at 1, 2 ("Francis Bacon, according to the gossipy John Aubrey, was a well-known pederast."). Francis Bacon's brother, Anthony, was formally accused of sodomy in France. *Id.* See generally DAPHNE DU MAURIER, *GOLDEN LADS: A STUDY OF ANTHONY BACON, FRANCIS AND THEIR FRIENDS* (1975) (discussing the sexual atmosphere of James I's court); COQUILLETTE, *supra* note 3, at 70 (describing when Bacon was knighted, along with 300 others, to mark the King's Coronation).

54. See generally *THE POLITICAL WORKS OF JAMES I* (1918) [hereinafter, JAMES, *POLITICAL WORKS*]; COQUILLETTE, *supra* note 12, at 328–31. Of course, here is a genuine example of where some of the work may be Bacon's. Thus, James I's "Charge to the Judiciary," see JAMES, *POLITICAL WORKS*, 326–27, 333–35, reads very close to Bacon's essay *Of Judicature*, in *ESSAYS OF FRANCIS BACON* (2d ed. 1613), and in Spedding vol. VI, *supra* note 2, at 582–87.

55. COQUILLETTE, *supra* note 1, at 90, 315–20; BOWEN, *supra* note 1, at 131–74.

56. *Id.* at 192–96.

pioneered and praise Bacon's invention of linguistics and empirical social science. Bacon's *New Atlantis* (1624) predicted submarines, airplanes, refrigerators, terrorism, and research universities, thus attracting thousands of fanatically devoted followers. Bacon's spectacular political advocacy of authoritarian Stuart divine right monarchy—later amplified by Bacon's secretary, Thomas Hobbes—has earned him the everlasting hatred of Whig historians and liberal political philosophers.⁵⁷ In light of all this, Bacon the lawyer just gets lost.

Nevertheless, Bacon was a lawyer first and foremost, and as Lord Chancellor, he was the powerful head of the foremost equity jurisdiction in England. Author of two of the greatest essays on law reform, *A Proposition to His Majesty Touching the Compiling and Amendment of the Laws of England* (1610) (hereinafter *A Proposition*) and *An Offer to the King of a Digest to Be Made of the Laws of England* (1621) (hereinafter *A Digest*),⁵⁸ it is this Bacon who provided what it took to transform the traditional equity jurisprudence into the force that touched Charles Clark and the Federal Rules of Civil Procedure.

A. Francis Bacon's "New Tools": The Two Books . . . Of the Proficiency and Advancement of Learning, Divine and Humane (1605) and The Novum Organum (1620)—
A Progressive, Empirical Legal Philosophy

To understand Bacon's jurisprudential genius, one must begin with his revolutionary scientific thought. Long before his legal career took off under James I, Bacon published his first great treatise on inductive method, *The Two Books . . . Of the Proficiency and Advancement of Learning, Divine and Humane* (1605) (hereinafter *The Advancement of Learning*).⁵⁹ Overshadowed by one of the first acts of modern terrorism, the Gunpowder Plot of 1605 that nearly destroyed both Houses of Parliament—including Bacon as an M.P. and the King himself⁶⁰—the *Advancement of Learning* is considered a

57. *Id.* at 277–97. On Bacon's great scientific importance, see SEVENTEENTH-CENTURY RATIONALISM: BACON AND DESCARTES 15–18 (Norman F. Cantor & Peter L. Klein eds., 1969); I. BERNARD COHEN, *REVOLUTION IN SCIENCE* 147–51 (1985).

58. Spedding vol. XIII, *supra* note 2, at 61 (*A Proposition*); Spedding vol. XIV, *supra* note 4, at 357 (*A Digest*).

59. Spedding vol. III, *supra* note 2, at 253 (*The Advancement of Learning*). It was dedicated to James I. See COQUILLETTE, *supra* note 1, at 77–90.

60. See COQUILLETTE, *supra* note 1, at 77; WALKER, *supra* note 14, at 545.

masterpiece of modern English prose.⁶¹ More to the point, it rejected the traditional deductive, Aristotelian philosophy that dominated English university learning for centuries.

This was of direct relevance to English law. Bacon's thesis was that genuine learning was based on direct observation of nature, whether that be weather (Bacon invented modern meteorology), astronomy, biology, or human nature itself. In short, it started with observable facts and worked *upwards* to general propositions. In Bacon's later expansion of the *Advancement of Learning*, called *De Augmentis* (1623), barriers to accurate empirical study are explored with great genius: the "flaws" in the lens caused by the individual psyche (the "idols of the cave"); the prejudices of the ethnic community (the "idols of the tribe"); the barrier of linguistics and communication (the "idols of the marketplace"); and, most importantly, the artificial realities of religion, politics, and ideology (hence the "idols of the theater," drama being a compelling but artificial simplification of the real world).⁶²

Law, in the ideology of the medieval common law, evolved from "time out of mind," incorporating God's will and wisdom into national culture. Whether one was the author of *Bracton*, Sir Edward Coke, or Sir William Blackstone, to question such a manifestation of the folk culture of a nation on empirical grounds was like challenging the existence of God.⁶³ Law reform inevitably had to be incremental and, in most cases, shrouded by "legal fiction" (i.e., essential legal changes made in practice although denied in theory).⁶⁴

Bacon hated all fictions and all "top-down" legitimation of human learning, be it physics or legal rules. Why should a legal process be tested by anything but its actual success in practice, case

61. See THE OXFORD COMPANION TO ENGLISH LITERATURE 58 (Margaret Drabble ed., 5th rev. ed. 1995) (describing Bacon's prose as generally being "rich, ornate, and supple").

62. COQUILLETTE, *supra* note 1, at 228–34; Spedding vol. IV, *supra* note 2, at 53–54 (listing the four classes of idols); see also Walter H. O'Briant, *The Genesis, Definition, and Classification of Bacon's Idols*, 13 S. J. PHIL. 347, 348–57 (1975).

63. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67–68; EDWARD COKE, THE SECOND PART OF THE REPORTS OF SIR EDWARD COKE (1826) ("[T]he common law of England had been time out of mind before the Conquest and was not altered by the Conqueror."); COQUILLETTE, *supra* note 10, at 314.

64. In Maine's words, "[l]egal Fiction' . . . [signifies] any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified." HENRY SUMNER MAINE, ANCIENT LAW 24 (1864); see COQUILLETTE, *supra* note 10, at 305 ("The lawyers' pretenses are not consciously deceptive. The lawyers themselves, like the laymen, fail to recognize fully the essentially plastic and mutable character of law."); JEROME FRANK, LAW AND THE MODERN MIND 10 (1970); See also *id.* at 338–39. For a modern "critical" attack on Blackstone, see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 209–11, 381–82 (1979).

by case? More to the point, why should legal rules be “deduced” by judges in cases or controversies from a “fundamental” law or jurisprudence—a process inherently “after the fact”—thus denying the certainty that would permit citizens the ability to govern their conduct by clear prospective rules? In Bacon’s view, the first virtue of a just legal system was certainty, and that meant a prospective, not a retroactive, system.⁶⁵

Even more important, in Bacon’s inductive method, all rules—whether they purport to be rules of physics, linguistics, meteorology, or law—must continually be tested by empirical study. Validation by empirical research, in Bacon’s method, is the only true source of legitimacy. All other deduced tests of theory, whether from theology or mathematics, must give way to systematic observation, free of bias.⁶⁶

For nearly three hundred years, Bacon’s inductive scientific method was attacked by Newtonian formalists, mathematicians devoted to a purely abstract science, and those who saw the scientific method as driven by preordained hypotheses.⁶⁷ Only today, with the collapse of Newtonian physics, the radical discoveries of modern astrophysics—unpredicted by mathematical models—and the failure of “solutions”-driven research in cancer and other biomedical fields, have scientists rediscovered the value of starting with basic, “pure” research in physics, astronomy, biochemistry, and many other sciences, abandoning pre-determined hypotheses as an inherent source of bias—an “idol” blocking real understanding.⁶⁸

Bacon saw clearly that this inductive method was also key to real law reform. Rules must operate clearly and prospectively to achieve certain social ends. Their adoption should hardly guarantee their survival. Rather, they should be continuously tested, empirically, scientifically, and objectively, to determine if they achieve the ends for which they were designed. That scientific inductive process—and only that process—validates rules.⁶⁹

65. See FRANCIS BACON, OF THE ADVANCEMENT OF LEARNING 294–95 (1674) (Title I—*Of the First Dignity of Laws, That They Be Certain*). Aphorism VIII reads, “Certainty is so Essential to a Law, as without it a Law cannot be Just” *Id.* at 294 (emphasis in original). See also COQUILLETTE, *supra* note 10, at 334–35 (citing BACON, ADVANCEMENT OF LEARNING).

66. See Jerry Weinberger, *Francis Bacon and the Unity of Knowledge, Reason and Revelation*, in FRANCIS BACON AND THE REFIGURING OF EARLY MODERN THOUGHT 109–27 (Julie Robin Solomon & Catherine Gimelli Martin eds., 2005).

67. See I. BERNARD COHEN, REVOLUTION IN SCIENCE 147–51 (1985). Cohen notes further that “one of the conspicuous failures in Bacon’s concept of science is in not recognizing the important role of mathematics in scientific theory.” *Id.* at 145.

68. See *id.* at 159–60.

69. COQUILLETTE, *supra* note 1, at 277–92. He also “understood the futility of the process/substance distinction in law. It was fine to discuss a ‘rule’ in the abstract, but the important issue was how it *worked* in the concrete.” *Id.* at 277.

B. *Bacon's Progressive Legal Theory in Practice: A Proposition to His Majesty Touching the Compiling and Amendment of the Laws of England (1616–1617) and the Ordinances in Chancery (1617–1620)*

Bacon asserted his inductive, progressive legal philosophy in two ways: in specific proposals for law reform and in the actual adoption and enforcement of legal rules. The former approach culminated in *A Proposition*, written when Bacon was Attorney General and in a position to advocate directly to the King himself.⁷⁰ The latter approach resulted in the actual adoption and enforcement of judicial rules, the *Ordinances* of 1617–1620. These judicial rules were adopted by Bacon's authority after he was appointed Lord Keeper in 1617 and given control of the Chancery and its key equity jurisdiction.⁷¹

For Bacon, the initial opportunity for reform was James's accession to the Throne of England in 1603, unifying the Crowns of England and Scotland.⁷² This presented a theoretical opportunity to reform the laws of both kingdoms to prepare for a future unification and an obvious way to ingratiate himself with the King. Thus in 1603, just a year after James's accession, Bacon wrote *A Brief Discourse Touching the Happy Union of the Kingdoms of England and Scotland*, followed shortly by the more substantive *Certain Articles or Considerations Touching the Union of the Kingdoms*.⁷³ The law of Scotland was definitely more indebted to "civilian," Roman law influences. This gave Bacon the opportunity to argue, although in general terms, for a general law reform project which would move deductive common law "beliefs" toward a more instrumentalist, comparative, and scientific view of law.⁷⁴ In the short run, these proposals turned out to be hopelessly optimistic. The actual unification of the two Kingdoms did not occur until the Articles of Union in 1707, and the two legal systems have remained "very different" until this very day.⁷⁵

After Bacon was appointed Attorney General in 1613, his access to James's inner circle greatly increased, consolidated by his

70. See *id.* at 99–117.

71. See *id.* at 201–06.

72. The two kingdoms had separate laws and governments. It was James's great desire to see a complete unification, including the legal system. See 1 THE COMPACT EDITION OF THE DICTIONARY OF NATIONAL BIOGRAPHY 1062–63 (1976).

73. See COQUILLETTE, *supra* note 1, at 70–77. See Spedding vol. X, *supra* note 4, at 90, 218.

74. COQUILLETTE, *supra* note 1, at 74–75.

75. See WALKER, *supra* note 14 at 1108 (noting that Scottish law is "very different from that existing [today] in England and Wales").

appointment as Privy Counsellor in 1616. Between 1614 and 1615, Bacon proposed a major law reform project, addressed to the King as “A Memorial Touching the Reviews of Penal Laws and the Amendment of Common Law” (hereinafter, *The Memorial*). It proposed a Commission, consisting of “12 Lawyers and 12 Gentlemen of experience in the Country, for the review of penal laws and the repeal of such as are obsolete and snaring, and the supply where it shall be needful of laws more mild and fit for the time.”⁷⁶ The goal of this Commission would be “to prepare bills for the next Parliament.”⁷⁷

Although, as we shall see, Bacon was quick to use the judicial authority as Lord Chancellor to adopt procedural rules directly, he also was an experienced member of Parliament, having first been elected in 1581 at the age of only twenty for the seat of Bossing in Cornwall. He remained active in the House for the next thirty-seven years, until he was disqualified by being ennobled in 1618.⁷⁸ No one understood better than Bacon what was best left to the legislature.

But *The Memorial* also addressed matters “which Needeth No Parliament.” In particular, Bacon argued that the King, of his inherent authority, could “reform the body of their Laws,” by reviewing the reported cases of judicial decisions. “[I]t is hardly possible to confer upon this kingdom a greater benefit than if his Majesty should be pleased that these books also may be purged and reviewed, whereby they may be reduced to fewer volumes and clearer resolutions.”⁷⁹

No wonder the common law judges and lawyers feared this man. Here was revision and “reform” of reported judicial decisions by executive fiat. But Bacon had a point. The existing law reports were unofficial, unreliable, and of greatly varying quality. What is worse, some, like the immortal *Law Reports* of Sir Edward Coke, were written by the judge himself. Modern research has shown that Coke notoriously “revised” his *Reports* to reflect not what was actually done, but what he thought *should* have been done.⁸⁰ Not until 1865, when the Incorporated Council of Law Reporting for England and

76. Spedding vol. XII, *supra* note 2, at 84–85.

77. *Id.* at 85.

78. COQUILLETTE, *supra* note 1, at 311–19 (listing a chronology of Bacon’s career).

79. Spedding vol. XII, *supra* note 2, at 85.

80. See JOHN WILLIAM WALLACE, *THE REPORTERS* (4th ed. 1882), 165–96. Sir Edward Sugden observed of *Coke’s Reports*,

Let not our just admiration of Sir Edward Coke’s profound legal learning carry us too far. His system of turning every judgment into a string of general propositions and resolutions has certainly a very imposing appearance, but it is a system of all others the least calculated to transmit a faithful report . . . the bias of a man’s own sentiments may involuntarily lead him to pervert the opinions of others in order to support his own.

Wales was established, was there any official “quality control,” and even then there was no monopoly on reporting.⁸¹

Bacon saw all this clearly and, to his credit, made a radical proposal that would have greatly increased the legitimacy of the decided case law: a system of official reporters. In making his argument, Bacon ingeniously referred to a “tradition” that never existed: “[H]is Majesty may be pleased to restore the ancient use of Reporters, which in former times were persons of great learning, which did attend the Courts at Westminster, and did carefully and faithfully receive the Rules and Judicial Resolutions given in the King’s Courts, and had stipends of the Crown for the same.”⁸² Bacon then proposed six specific individuals and a stipend that could not “be less than 100£ per annum.”⁸³ He could not resist a closing slash at his rival, Chief Justice Coke:

It is true that this [reporting] hath been supplied somewhat of later times by the industry of voluntaries, as chiefly by the worthy endeavours of the Lord Dier and the Lord Coke. But great Judges are unfit persons to be reporters, for they have either too little leisure or too much authority, as may appear well by those two books, whereof that of my Lord Dier is but a kind of note book, and those of my Lord Cokes hold too much *de proprio*.⁸⁴

Had Bacon’s proposal for official reporters “of great learning” been adopted, the influence of the common law precedents could have been greatly strengthened. As it happened, this reform would have to wait for centuries, despite the accidental appearance of great “informal” Reporters, such as Sir James Burrow, who reported the King’s Bench from 1756–1772 (he made “an epoch in the history of reporting”). The first true official reporters were only appointed in 1865.⁸⁵ No wonder Bacon, as a legal scientist devoted to transparency and certainty, was skeptical of the reported precedent of his day.

The culmination of Bacon’s efforts for a major project of law reform occurred in the period between June, 1616 and March, 1617,

Id. at 172. See generally V WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 423–93 (3d ed. 1945) [hereinafter HOLDSWORTH vol. V].

81. WALKER, *supra* note 14, at 730.

82. Spedding vol. XII, *supra* note 2, at 86.

83. *Id.*

84. *Id.*

85. WALLACE, *supra* note 80, at 446–47; BAKER, *supra* note 13, at 211. On the origins of the first official *Law Reports* in 1865 by the Incorporated Council of Law Reporting for England and Wales, see WALKER, *supra* note 14, at 730.

immediately before Bacon's appointment as Lord Keeper of the Seal, replacing Lord Chancellor Ellesmere as head of the Chancery Court. Addressed directly to the King himself, Bacon's "A Proposition" was a masterpiece, a complete program of fundamental law reform.⁸⁶

Bacon's starting proposition was simple. There was a lot that was good about the current state of English law, but it was far from perfect. On the one hand, worshipping the common-law status quo was absurd, but radical reform, without respect for what experience had established, was equally foolish. Here Bacon made a generous compliment to his arch-rival, common law conservative Chief Justice Coke.

Sir, I shall not fall into either of those two extremes concerning the laws of England; they commend themselves best to them that understand them; and your Majesty's Chief Justice [Coke] of your Bench hath in his writings magnified them not without cause. Certainly they are wise, they are just, and moderate laws; they give to God, they give to Caesar, they give to the subjects, that which appertaineth. It is true, they are as mixt as our language, compounded of British, Roman, Saxon, Danish, Norman customs. And as our language is so much the richer, so the laws are the more complete: neither doth this attribute less to them, than those that would have them to have stood out the same in all mutations; for no tree is so good first set, as by transplanting.⁸⁷

But the existing legal system urgently needed work:

But certain it is, that our laws, as they now stand, are subject to great uncertainties, and variety of opinion, delays, and evasions: whereof ensueth,

1. That the multiplicity and length of suits is great.
2. That the contentious person is armed, and the honest subject wearied and oppressed.
3. That the judge is more absolute; who, in doubtful cases, hath a greater stroke and liberty.
4. That the chancery courts are more filled, the remedy of law being often obscure and doubtful.

86. COQUILLETTE, *supra* note 1, at 99–117; Spedding vol. XIII, *supra* note 2, at 61–71.

87. Spedding vol. XIII, *supra* note 2, at 63.

5. That the ignorant lawyer shroudeth his ignorance of law in that doubts are so frequent and many.
6. That men's assurances of their lands and estates by patents, deeds, wills, are often subject to question, and hollow; and many the like inconveniences.⁸⁸

The answer? A wholesale analysis of the actual application of the English law, resulting in two great initiatives, one directed at the common law and the other at the statutory law, tested in both cases by actual application. In Bacon's immortal words, "Books must follow sciences, and not sciences books."⁸⁹

The common law initiative was to be divided in three parts. First, a legal history book, *De antiquitatibus juris*, would be written and a new registry of the legal records "in your Tower or elsewhere . . . searched perused and weighed."⁹⁰ These were to be used for "reverend precedents" but not as "binding authorities."⁹¹ Bacon's purpose was to distinguish between the history of the law and its active, present application—exactly what the Historical Appendices of *Moore's Federal Practice* and other major treatises have sought to achieve. Why? Because in Bacon's view, the constant reference of common law judges to a sanctified law dating to "time immemorial" was a fiction, masking in antiquarian terms what was, in fact, modern innovation. Separating legal history from present "binding precedent" was a first step to transparency.

The second part was to be the equivalent of the great *Digest of Roman Law*, containing all valid, authoritative precedents summarized and organized by topic. Erroneous cases, repetitious cases, and the "idle queries" of common law reporting would be "purged away," and those cases of "too great prolixity . . . drawn into a more compendious report."⁹² This precursor of today's American Law Institute Restatements would be a core of legal authority, consistent and available to all. Bacon added again a plea for professional, objective Reporters: "[I]t resteth but for your Majesty to appoint some grave and sound lawyers, with some honourable stipend, to be reporters."⁹³

88. *Id.* at 64. This list by Bacon sounds very much like the reasons for the 2010 Civil Litigation Review Conference at Duke, which was sponsored by the Civil Rules Advisory Committee of the Judicial Conference of the United States. See John G. Koeltl, *2010 Civil Litigation Review Conference*, 60 DUKE L.J. 537, 537 (2010).

89. Spedding vol. XIII, *supra* note 2, at 67.

90. *Id.* at 68.

91. *Id.*

92. *Id.* at 69.

93. *Id.*

Finally, Bacon would have three “auxiliary books”: (1) an authoritative law dictionary, *De verborum significationibus*, a precursor of Bryan Garner’s *Black’s Law Dictionary*;⁹⁴ (2) an official textbook for students, the *Institutions*, modeled on Justinian’s great Roman law text, “wherewith students begin”; and most importantly, (3) a book of judicial rules, *De regulis juris*.⁹⁵ This book of rules would directly challenge the judicial decisions of *Coke’s Reports* as a primary source of law, and Bacon was to write it himself:

For the treatise *De regulis juris*, I hold it of all other things the most important to the health, as I may term it, and good institutions of any laws: it is indeed like the ballast of a ship, to keep all upright and stable; but I have seen little in this kind, either in our law or other laws, that satisfieth me. The naked rule or maxim doth not the effect. It must be made useful by good differences, ampliations, 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. In this I have travelled myself, at the first more cursorily, since with more diligence, and will go on with it, if God and your Majesty will give me leave. And I do assure your Majesty, I am in good hope, that when Sir Edward Coke’s Reports and my Rules and Decisions shall come to posterity, there will be (whatsoever is now thought,) question who was the greater lawyer?⁹⁶

Alas, Bacon’s book of rules was never written.

The concluding part of Bacon’s great law reform project would be a great codification of all statutory law. It would have four goals:

1. The first, to discharge the books of those statutes whereas the case by alteration of time is vanished; as Lombard Jews, Gauls half-pence, *etc.* Those may nevertheless remain in the libraries for antiquities, but no reprinting of them. The like of statutes long since expired and clearly repealed; for if the repeal be doubtful, it must be so pro-pounded to the Parliament.
2. The next is, to repeal all statutes which are sleeping and not of use, but yet snaring and in force. In some of those it

94. BLACK’S LAW DICTIONARY (8th ed. 2004).

95. Spedding vol. XIII, *supra* note 2, at 70.

96. *Id.*

will perhaps be requisite to substitute some more reasonable law instead of them, agreeable to the time; in others a simple repeal may suffice.

3. The third, that the greivousness of the penalty in many statutes be mitigated, though the ordinance stand.
4. The last is, the reducing of concurrent statutes, heaped one upon another, to one clear and uniform law.⁹⁷

But, as Bacon pointed out, these changes would have to be made by Parliament, and all that the King could effectively do would be to call for “commissioners named by both houses; but not with a precedent power to conclude, but only to prepare and propound to Parliament.”⁹⁸ Thus, Bacon continued to respect the proper power of the legislature. Alas, this great proposal would also have to wait three centuries for even partial implementation, which occurred in the great nineteenth-century codification movements on both sides of the Atlantic.⁹⁹

But Bacon was not just a brilliant advocate and theorist of law reform. When he had both the power and the jurisdiction, he boldly implemented reform in practice. The power and jurisdiction came to him with his appointment as Lord Keeper of the Seal on March 3, 1617 and then as Lord Chancellor on January 4, 1618—moments of great pride to Bacon as he finally, against all odds, stepped into the shoes of his father. In the words of Bacon’s friend, the immortal poet Ben Johnson,

Son to the grave, wise
Keeper of the Seal,
Fame, and foundation
Of the English weal.
What then his father was,
P]that since is he¹⁰⁰

As Lord Chancellor, Bacon inherited both the civilian heritage of equitable procedure and great judicial discretionary power.

97. *Id.* at 71.

98. *Id.*

99. See COQUILLETTE, *supra* note 10, at 506–12; LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 403–11 (2d ed. 1985); ALAN HARDING, A SOCIAL HISTORY OF ENGLISH LAW 335–39 (1966); A.H. MANCHESTER, A MODERN LEGAL HISTORY OF ENGLAND AND WALES 1750–1930, at 13–20, 23–26, 38–49 (1980).

100. COQUILLETTE, *supra* note 1, at 191; see also BOWEN, *supra* note 1, at 172.

Equitable procedure had given rise to rules of Chancery procedure as early as the sixteenth century, brilliantly described by Paul Ward.¹⁰¹ But the early efforts, most importantly described by William Lambarde's Chancery notebooks, were primitive and disjointed compared to Bacon's pioneering effort, the *Ordinances in Chancery*.

The *Ordinances* were written between 1617 and 1620 as Bacon established control of the Chancery. They are known to us from a number of surviving manuscripts and were printed as early as 1642, but the revised edition of James Spedding, published in 1879, is regarded as definitive.¹⁰²

The *Ordinances* consist of 101 rules.¹⁰³ They have a very clear internal structure, which seems instantly familiar to modern proceduralists. In particular, Rules 1 to 5 set out how one could appeal a decree of the Chancery (i.e., "bills of review"). The fundamental principle is that "no bill of review shall be admitted . . . except the decree be first obeyed and performed" (Rule 3) unless the "act decreed to be done . . . extinguisheth the parties' right at common law" (Rule 4).¹⁰⁴

Rule 6 sets out the power of the legislature as a fundamental limitation on the equity jurisdiction:

No decrees shall be made, upon pretence of equity, against the express provision of an act of parliament: nevertheless if the construction of such act of parliament hath for a time gone one way in general opinion and reputation, and after by a later judgment hath been controlled, then relief may be given upon matter of equity for cases arising before the said judgment; because the subject was in no default.¹⁰⁵

101. See Paul L. Ward, *William Lambarde's Collection on Chancery*, 7 HARV. LIBR. BULL. 271, 280–86, 291–92 (1953). My special thanks to Karen Beck, colleague and curator extraordinaire, for this source.

102. See COUILLETTE, *supra* note 1, at 201–06; Spedding vol. VII, *supra* note 2, at 757–74 (containing the complete *Ordinances*). The *Ordinances* appeared in print as early as 1642, when they were printed in London for Mathew Walbanke and Lawrence Chapman. See FRANCIS BACON, *ORDINANCES MADE BY THE RIGHT HONOURABLE SIR FRANCIS BACON* (1642), reprinted in FRANCIS BACON, *LAW TRACTS* 279–98 [hereinafter *LAW TRACTS*] (2d ed. 1741). Again, my special thanks to Karen Beck.

103. See Spedding vol. VII, *supra* note 2, at 757. Spedding observed that "[i]n Harl. MSS. 1576—in which volume are also some Orders of Lord Ellesmere—there are fifteen additional rules, which from the place in which they occur would seem to be Bacon's." *Id.* Since Spedding omitted these and it remains uncertain that they were authored by Bacon, they are not discussed here.

104. *LAW TRACTS*, *supra* note 102, at 280.

105. Spedding vol. VII, *supra* note 2, at 760. The other great limitation on equity was that no equitable remedy could be available if there was a remedy at common law.

This is followed by remedies available in Chancery (Rules 7–10), a description of those bound and not bound by the remedies (Rules 11–12), the different ways in which causes may be dismissed after hearing (Rules 13–17), a prohibition against “double vexation” by suing “for the same cause at the common law and in chancery” (Rule 18), and the procedure for removal of causes by *certiorari* (Rule 19).¹⁰⁶

The Ordinances then focus on special forms of relief familiar to all students of equity: injunction (Rules 20–28), sequestration (Rules 29–30), enforcement of the decrees of other courts that “are by contumacy or other means interrupted” (Rules 31–32), and suits after judgment (Rules 33–34). Careful regard is given not to alter or undercut the judgments of the other royal courts. Thus, as Rule 34 stipulates,

Decrees upon suits brought after judgment shall contain no words to make void or weaken the judgment, but shall only correct the corrupt conscience of the party, and rule him to make restitution, or perform other acts, according to the equity of the cause.¹⁰⁷

The Ordinances then turn to their most fascinating subject: the direct regulation of the court officials—the “Registrars” and “Masters” and the attorneys appearing before them. Here we can see a microcosm of a busy legal community, subject to the usual risks of corruption, evasion, and inaccuracy. For example, the Chancery Registrars (spelt “registers” by Bacon) were charged with the drawing up of decrees but were quite capable of playing favorites both in the wording of the decrees and by delaying entry.¹⁰⁸ Rules 35 to 44 deal with various possible Registrar abuses, and Rules 37 and 38 address delays, inaccuracies, and private dealings by Registrars:

37. No order shall be explained upon any private petition, but in court as they are made, and the register is to set down the orders as they were pronounced by the court truly, at his peril, without troubling the lord chancellor, by any private attending of him, to explain his meaning; and if any explanation be desired, it is to be done by public motion, where the other party may be heard.

106. *Id.* at 760–62.

107. *Id.* at 764.

108. See HOLDSWORTH vol. V, *supra* note 80, at 252–53.

38. No draught of any order shall be delivered by the register to either party, without keeping a copy by him; to the end that if the order be not entered, nevertheless the court may be informed what was formerly done, and not put to new trouble and hearing; and to the end also that knowledge of orders be not kept back too long from either party, but may presently appear at the office.¹⁰⁹

In particular, the Registrars were not to be influenced in drafting the decrees by counsel, even if “said counsel [be] never so great,” and should be certain the Lord Chancellor understood the significance of the orders when asked to sign them.¹¹⁰ Rules 40 and 41 state:

40. The registers, upon sending their draught unto the counsel of the parties, are not to respect the interlineations or alterations of the said counsel, be the said counsel never so great, farther than to put them in remembrance of that which was truly delivered in court, and so to conceive the order, upon their oath and duty, without any farther respect.

41. The registers are to be careful in the penning and drawing up of decrees, and specially in matters of difficulty and weight; and therefore when they present the same to the lord chancellor, they ought to give him understanding which are such decrees of weight, that they may be read and reviewed before his lordship sign them.¹¹¹

Similar rules govern references to Masters, for example in Rules 45 to 52.¹¹²

Of particular interest are the Rules governing sanctions. These routinely included the lawyers, as well as their clients. “Prolixity” was a particular concern. Thus, Rule 55 states:

55. If any bill, answer, replication, or rejoinder, shall be found of an immoderate length, both the party and the counsel under whose hand it passeth shall be fined.¹¹³

109. Spedding vol. VII, *supra* note 2, at 764–65.

110. *Id.* at 765.

111. *Id.* at 765.

112. *See id.* at 765–66.

113. *Id.* at 767.

Prior Lord Chancellors did not just fine those who failed to be concise. For example, take the fate of the unfortunate Richard Mylward, who filed a replication that “ ‘doth contain 6 score Sheets of paper [120 pages] and yet the matter which is pertinent and of substance contained therein might well have been contrived in 16 Sheets of paper.’ ”¹¹⁴ Lord Keeper Egerton ordered

that the Warden of the Fleet shall take the said Richard Mylward . . . and shall bring him into Westminster Hall, on Saturday next, about ten of the clock in the forenoon, and then and there shall cut a hole in the *myddest* of the same engrossed replication (which is delivered unto him for that purpose), and put the said Richard’s head through the same hole, and so let the same replication hang about his shoulders, with the written side outward; and then, the same so hanging, shall lead the same Richard, bare headed and bare faced, round about Westminster Hall, whilst the Courts are sitting, and shall shew him at the bar of every of the three Courts within the Hall, and shall then take him back again to the Fleet, and keep him prisoner, until he shall have paid 10 *l.* to Her Majesty for a fine, and 20 nobles to the defendant.¹¹⁵

Another offense was filing a pleading that was “libelous or slanderous,” particularly with regard to non-parties or “in derogation of the settled authority of any of His Majesty’s courts.”¹¹⁶ This included sanctions for the lawyers. Rule 56 directs:

56. If there be contained in any bill, answer, or other pleading, or any interrogatory, any matter libelous or slanderous against any that is not party to the suit, or against such as are parties to the suit upon matters impertinent, or in derogation of the settled authority of any of His Majesty’s courts; such bills, answers, pleadings, or interrogatories, shall be taken off the file and suppressed, and the parties severally punished by commitment or ignominy, as shall be thought fit, for the abuse of the court: and the counselors at law, who have set their hands, shall likewise receive reproof or punishment, if cause be.¹¹⁷

114. Ward, *supra* note 101, at 284–85 (setting out the original manuscript transcripts of Cecil Monro, a nineteenth-century Chancery Registrar and historian).

115. *Id.* at 285 (quoting Monro’s transcript).

116. Spedding vol. VII, *supra* note 2, at 767.

117. Sanctioning counsel for “derogation of the settled authority of any of His Majesty’s courts” is reflected today in ABA Model Rule 8.2(a): “A lawyer shall not make a statement

The Ordinances also controlled standard pleading matters, such as demurrers (Rules 57–60), answers (Rules 61–66), depositions and interrogatories (Rules 68–74), affidavits (Rules 75–76), petitions (Rules 80–83), special writs (Rules 84–92), and special commissions (Rules 93–97). The last offered the same potential for abuse as Registrars and Masters. Thus, Rules 96 and 97 direct:

96. No commission of bankrupt shall be granted but upon petition first exhibited to the lord chancellor, together with names presented, of which his lordship will take consideration, and always mingle some learned in the law with the rest; yet so as care be taken that the same parties be not too often used in commissions; and likewise care is to be taken that bond with good surety be entered into, in 200*l.* at least, to prove him a bankrupt.

97. No commission of delegates in any cause of weight shall be awarded, but upon petition preferred to the lord chancellor, who will name the commissioners himself, to the end they may be persons of convenient quality, having regard to the weight of the cause, and the dignity of the court from whence the appeal is.¹¹⁸

Finally, there are Rules of general court administration, which went from the very specific to the very general. These include the very specific Rule 67, which stipulates the exact number of lines in Chancery copies:

67. All copies in chancery shall contain fifteen lines in every sheet thereof, written orderly and unwastefully, unto which shall be subscribed the name of the principal clerk of the office where it is written, or his deputy, for whom he will answer, for which only subscription no fee at all shall be taken.¹¹⁹

that the lawyer knows to be false or with reckless disregard to its truth or falsity concerning the qualifications or integrity of a judge.” MODEL RULES OF PROF'L CONDUCT R. 8.2(a). Despite the First Amendment, such sanctions have been enforced. *See, e.g., In re Wilkins*, 782 N.E.2d 985 (Ind. 2003) (finding attorney in violation of Rule 8.2 despite any First Amendment protection of his remarks); *In re Hinds*, 90 N.J. 604 (1982) (holding that attorneys associated with an ongoing criminal trial making out-of-court statements about trial judges may be sanctioned). *But see In re Erdman*, 301 N.E.2d 426 (N.Y. 1973) (reversing disciplinary sanctions against a criminal defense attorney who made offensive statements out of court in a magazine).

118. Spedding vol. VII, *supra* note 2, at 773.

119. *Id.* at 768.

But there is also the very broad Rule 101, which contains general authority to make new rules whenever needed:

101. And because time and experience may discover some of these rules to be inconvenient, and some other to be fit to be added; therefore his lordship intendeth in any such case from time to time to publish any such revocations or additions.¹²⁰

Also included are rules that governed such diverse matters as who “shall be admitted to defend *in forma pauperis*” (Rule 98) and licenses to collect “for losses by fire or water,” which are carefully regulated by Rule 99. Insurance fraud was obviously a feature both of seventeenth-century and modern litigation.

Bacon’s *Ordinances* do not seem remarkable to us. They operated like modern rules of procedure and addressed many of the same problems—problems that have obviously been endemic to law practice and court operations throughout the ages. But that is exactly the point. These were truly modern rules of procedure, set in the context of the same equitable jurisdiction that was to have such a powerful influence on American rulemakers, three centuries later and an ocean away. Bacon’s philosophy of inductive, empirical observation of rules in practice, and his theories of law reform, took concrete form in his rulemaking. In modern parlance, Bacon did not just “talk the talk” of modern law reform and rulemaking. In the *Ordinances*, Bacon, as Lord Chancellor, “walked the walk.” It was exactly the sort of thing that would impress a Charles Clark, a Ben Kaplan, a Charles Wright, or an Edward Cooper.

III. “PAST THE PILLARS OF HERCULES”: HISTORICAL LINES OF ATTACK ON FRANCIS BACON AND THEIR SIGNIFICANCE TODAY

The title page of Bacon’s great *Novum Organum* (1620) bears a striking illustration: a small brave ship passing under the Pillars of Hercules, the traditional symbol of the end of the known world.¹²¹ It was a time of brave exploration of a New World. The opening words of Bacon’s utopia, the *New Atlantis*, were, “We sailed from Peru . . . for China and Japan, by the South Sea.”¹²² In 1620, the Pillars of Hercules were powerfully symbolic, but not just of exploration. Bacon’s scientific thought and his empirical theories of law

120. *Id.* at 774.

121. FRANCIS BACON, *NOVUM ORGANUM* (1620).

122. COQUILLETTE, *supra* note 1, at 258.

reform, which both went beyond the common-law tradition and the comfort level of his peers, defied the ancient warning of the Pillars, “*non ultra*” (“no further!”)

There is no space here to describe adequately the controversies of Bacon’s life—personal, professional, philosophical, and political.¹²³ But he earned enemies in all four categories, both while he lived and long after his death. I would like to focus solely on Bacon’s professional achievements, particularly in law reform and rulemaking, and on just three sources of controversy. These controversies have continued to the present day, and they are directly relevant to modern rulemaking. But the warning “*non ultra*” and the symbolism of the Pillars of Hercules have hardly disappeared, and many still believe Bacon’s methods and theories go too far. Here are three historic lines of attack on Bacon’s professional theories of law reform and his rulemaking.

A. *The Deductive, Formalist Attack: Edward Coke, William Blackstone, Christopher Columbus Langdell—Rulemaking as Intellectually and Morally Inferior to Case Law*

Any first-year law student who has been told by a professor that his or her answer to a legal question is “wrong” has been introduced to legal formalism. As perfected by great common lawyers, such as Bacon’s archenemy, Chief Justice Sir Edward Coke, the concept of legal learning as a science of “artificial intelligence” was initially deductive in its approach (i.e., there was an existing body of legal learning from which answer to most legal questions could be deduced).¹²⁴ Thus, the judge would consider a particular case or controversy and then apply the appropriate pre-existing legal rule to achieve the “correct” answer—an answer that, in theory at least, was independent from the political or economic forces of the day.

123. See *id.* at 275–97. For the master account of Baconian controversies, see generally MATHEWS, *supra* note 3.

124. See COUILLETTE, *supra* note 10, at 312–25; HOLDSWORTH vol. V, *supra* note 80, at 423–93. As Coke had the nerve to say directly to James I,

[T]hen the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that . . . His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the *artificial reason* and judgment of law . . . with which the King was greatly offended.

Id. at 339 (italics added); accord *Prohibitions del Roy*, in 12 COKE’S REP. 63 (1608).

Of course, law cannot evolve to meet changing social needs if this model is strictly applied, and great legal historians, such as Sir Henry Maine, early saw the use of “legal fictions” by judges as a way to preserve familiar forms but also to achieve necessary reform.¹²⁵ Unlike Maine’s other two modes of legal change, legislation and equity, legal fiction changed crucial outcomes while denying—at least formally—that the law itself had changed. The master of this approach was Coke himself in major cases such as *Slade’s Case* (1602).¹²⁶

Formalism has been closely associated with Anglo-American legal education, particularly professional university legal education, from the earliest times. Sir William Blackstone’s famous Vinerian lectures at Oxford in 1758 were the first to introduce the actual study of English common law of the courts within a university framework, and Blackstone’s resulting *Commentaries* (1765–1770) have become a formalist bible. Today, legal scholars such as E. P. Thompson, Douglas Hay of the Warwick School, and Duncan Kennedy have demonstrated that Blackstone’s *Commentaries* did not accurately represent the actual practice of law or the operation of eighteenth-century courts. But the four volumes of Blackstone, defining a “body” of common law, were on George Washington’s shelves, in Abraham Lincoln’s library as he rode the circuit in Illinois,¹²⁷ and were the cornerstones of the first law courses at the new Harvard Law School in 1817.¹²⁸

One feature of Coke and Blackstone’s formalism was the inherent superiority of case law. The judge deduces and applies the law in a case or controversy from the great pre-existing body of the law, and the case becomes both a source and the manifestation of this law. The purely instrumental aspect of legislation, which made no pretense to legitimacy other than the vote of the legislature, and the traditionally non-precedential principles of equity, which were

125. See MAINE, *supra* note 64, at 23–27.

126. See *Slade’s Case*, in 4 COKE’S REP. 92(b) (1602). See generally COQUILLETTE, ANGLO-AMERICAN LEGAL HERITAGE *supra* note 10, at 250–54, 261–63, 310–61 (discussing Coke’s legal career and approach to deciding cases).

127. See COQUILLETTE, *supra* note 10, at 438; Mark E. Steiner, *Abraham Lincoln and the Rules of Law Books*, 93 MARQ. L. REV. 1283, 1298–99 (2010).

128. COQUILLETTE, *supra* note 10, at 438. For Blackstone criticism, see, for example, Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205, 209–11 (1979). See generally DOUGLAS HAY ET AL., *ALBION’S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* 18–24 (1975); E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 269 (1975). On Blackstone’s fundamental importance in early American legal education, see ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD* 20–27 (1967); see also COQUILLETTE, *supra* note 10, at 437–39.

validated solely by achieving a just end in a particular situation, did not appeal to formalist curriculum.

The ultimate manifestation of American academic legal formalism was, of course, Christopher Columbus Langdell and his famous “case method,” first introduced by Langdell’s famous *Cases on Contracts* (1870), the very first casebook. Although by 1870, codification movements in both Europe and America had already been gathering momentum, and commercial and contract law was an obvious focus for such codes, no legislation intruded into most law school classrooms.¹²⁹ The extent of Langdell’s deductive formalism has been exaggerated, particularly by twentieth-century “realist” critics, but his emphasis on the inherent superiority of case law has dominated the legal education of generations of American lawyers, right to this very day.

This had a clear impact on the attitude of academia and students to Baconian rulemaking. If the deduction of legal principles from a pre-existing common law to cases or controversies is the correct role of the judge, and if the evolution of common-law rules—usually by legal fiction—is the most legitimate and wise mode of law reforms, the prospective enunciation of rules by judges in the abstract is flawed in two ways. First, to the extent the judges are not deciding cases based on a pre-existing common law, they are usurping the role of the legislature. Second, to the extent that judicial rulemaking changes and “reforms” existing procedural case laws, it is inherently a flawed, less “wise” process, that will inevitably have to be revisited by courts in actual cases.

An excellent example is a leading Massachusetts case involving a judicially promulgated rule, Mass. Rule of Professional Conduct 4.2.¹³⁰ The Comment to the Rule, approved by the Court and promulgated by the Supreme Judicial Court of Massachusetts at the same time as the Rule, made it explicit that an adversary lawyer must not contact a corporate official on the other side who is in a position to legally bind the corporation without the approval of the corporation’s lawyer. In a famous case involving the Corporation of

129. Ironically, Langdell was one of the first American law professors to actually assign procedural rules as a text, using the New York Code of Procedure in 1875–76. But his introductory text, James B. Ames’s *A Selection of Cases on Pleading at Common Law* (1875), was entirely case-oriented and contained no reported rules. Langdell also emphasized the importance of procedural forms, evolved through case law. See Bruce A. Kimball & Pedro Reyes, *The “First Modern Civil Procedure Course” as Taught by C. C. Langdell, 1870–78*, 47 AM. J. LEGAL HIST. 257, 261, 267–69 (2005). See also the masterful study of Langdell and case method in BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C. C. LANGDELL, 1826–1906*, at 130–65 (2009).

130. This, of course, is a court-promulgated rule of ethics, not of procedure, but the point is the same. See MASS. RULES OF PROF’L CONDUCT R. 4.2 (2011).

Harvard University, *Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard College*,¹³¹ the Supreme Judicial Court held that the Comment was erroneous and that only the “control group” of Harvard University was covered.¹³² Such cases obviously undercut the prospective advantages of judicial rulemaking for guidance to the bar. But “taught law is tough law,”¹³³ and the inherent superiority of case law has been instilled, consciously or unconsciously, in generations of Anglo-American lawyers and, with that, a distrust of prospective rulemaking driven by progressive, inductive, Baconian methods.

*B. The Attack of the Legal Realists: Rule “Skepticism” from Oliver Wendell Holmes, Jr. to the Critical Legal Studies Movement—
Rulemaking as a Futile Exercise*

Both Oliver Wendell Holmes, Jr. and Christopher Columbus Langdell believed that radical reform was needed in American legal education after the Civil War.¹³⁴ Langdell’s answer was a case-based approach that, like Coke, treated law as an “artificial science” with rigorous central principles—an approach that spread like wildfire throughout America’s law schools. Holmes, on the other hand, saw law very differently.

Literally facing Langdell and his disciple James Barr Ames at the Lowell Institute Lectures in November, 1880, Holmes challenged the fundamental “gospel of Savigny,” that the common law was fixed and immutable. In Holmes’s immortal words, later repeated in his *Common Law* (1881):

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their

131. 764 N.E.2d 825 (Mass. 2002); see also DANIEL R. COQUILLETTE, *REAL ETHICS FOR REAL LAWYERS* 317–18 (2d ed. 2012).

132. There was an emphatic dissent. See *Messing*, 764 N.E.2d at 836–40 (Cordy, J., concurring in part and dissenting in part). According to Justice Cordy, “[i]n this context it is painful to see the court now claim that, when it adopted the commentary, it did not intend its consequence.” *Id.* at 838.

133. See FREDERIC WILLIAM MAITLAND, *ENGLISH LAW IN THE RENAISSANCE* 18 (1901).

134. Holmes had strongly criticized Harvard Law School in an entry written with Arthur C. Sedgwick in the *American Law Review* (October, 1870), which observed that the School was “almost a disgrace to the Commonwealth We say ‘almost a disgrace’ because, undoubtedly, some of its courses & lectures have been good, and no law school of which this can be said is hopelessly bad.” SUTHERLAND, *supra* note 134, at 140.

fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.¹³⁵

Holmes continued:

What has been said will explain the failure of all theories which consider the law only from its formal side, whether they attempt to deduce the *corpus* from a *a priori* postulates, or fall into the humbler error of supposing the science of the law to reside in the *elegantia juris*, or logical cohesion of part with part. The truth is that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.¹³⁶

From these great lines evolved the famous “legal realist” school of jurisprudence that dominated Columbia Law School in the 1930s, drove the great jurisprudence of Louis Brandeis and Jerome Frank, and inspired the Critical Legal Studies Movement at Harvard and Stanford in the 1980s.¹³⁷

You might think that, since Holmes and the legal realists were critical of legal formalism, they might be more hospitable than the formalists to progressive rulemaking. But you would be wrong. To grossly oversimplify, at the heart of legal realism was skepticism about the “purity” or “neutrality” of any legal rule, if what was meant was that the rule was free from political or economic bias. Indeed, the very notion of a “level playing field” would appear to legal realists as a worthy goal in the abstract, but wishful thinking in practice. Rationalist, codified rules were a myth if one truly believed that they could be applied in a predictable, scientific manner, particularly over time. In Holmes’s words,

[h]owever much we may codify the law into a series of seemingly self-sufficient propositions, these propositions will be but a phase in a continuous growth. To understand their scope

135. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1st ed. 1881); see also COQUILLETTE, *supra* note 10, at 558.

136. HOLMES, *supra* note 137, at 36.

137. See generally the excellent accounts of Laura Kalman in LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960* (1986); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 13–22, 57–58, 82–84 (1996).

fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is.¹³⁸

As Commager put it, “legal realism” was “a new way of thinking about law and of applying it. It was a shift from absolutes to relatives, from doctrines to practices, from passive—and therefore pessimistic—determinism to creative—and therefore optimistic—freedom.”¹³⁹ But a shift from “absolutes to relatives” and from “doctrines to practices” again favors the evolutionary freedom of case law, this time an intellectually honest case law, that acknowledges that the judiciary is a vehicle for political, ideological, and even economic change—the case law of a Lord Mansfield, a Justice Brandeis, or a Warren Court. It is easy to see why both Holmes and Brandeis opposed the adoption of the Rules Enabling Act, Brandeis being “‘unreservedly against the measure.’”¹⁴⁰ Its promise of neutral, transparent, and prospective rules that could be relied on as constants over time was intellectually suspect and, as a practical matter, futile. Enacting and empirically testing such rules, if this

138. HOLMES, *supra* note 135, at 37. One of the more interesting exchanges between Holmes and Langdell and Langdell’s loyal disciple, James Barr Ames, occurs in the context of essays they prepared on the history of equity and equity pleading. See 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (Ernst Freund, William E. Mikell & John H. Wigmore eds., 1908) (published by the Association of American Law Schools) [hereinafter 2 SELECT ESSAYS]. Holmes had previously argued that the substantive law of equity did not necessarily embody “superior ethical standards” compared with the common law. OLIVER WENDELL HOLMES, JR., EARLY ENGLISH EQUITY (1885), *reprinted in* 2 SELECT ESSAYS, *supra*, at 707. Ames blasted back, “The acceptance of these conclusions would be difficult for any one who has studied his equity under the guidance of Professor Langdell.” JAMES BARR AMES, THE ORIGINS OF USES AND TRUSTS (1908), *reprinted in* 2 SELECT ESSAYS, *supra*, at 738. Langdell’s contribution to the volume SIR FREDERICK POLLOCK ET AL., THE DEVELOPMENT OF EQUITY PLEADING FROM CANON LAW PROCEDURE (1877), *reprinted in* 2 SELECT ESSAYS, *supra*, at 753, 775, emphasized the active judicial control of equity as an advantage over common law:

In one system, therefore, the court is active, assuming the supervision and control of the proceedings in an action from beginning to end; in the other, it is passive, leaving the respective attorneys to conduct their proceedings in their own way.

Id. at 775. This, of course, is consistent with Subrin’s thesis that the philosophy of modern federal rulemaking evolved from the procedure of equity. Subrin, *supra* note 31, at 929–73.

139. HENRY STEELE COMMAGER, THE AMERICAN MIND 378, 374–81 (1950).

140. Burbank, *supra* note 45, at 1083 n.296 (quoting Letter from Hon. Louis D. Brandeis to Hon. Thomas J. Walsh (May 14, 1926)); see also EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 26–33, 135–36 (2000). For a full discussion, see Burbank, *supra* note 45, at 1083 n.296; see also Subrin, *supra* note 31, at 958 n.284 (citing the responses to Senator Thomas W. Shelton’s 1926 letter to the federal judges seeking their views on a uniform federal rule approach) (“The responses from U.S. Supreme Court Justices were also mixed (Sutherland and Stone clearly for the Enabling Act; Brandeis and Holmes clearly against).”). See generally Burbank, *supra* note 45, at 1069–83.

was the route chosen, should be a function of Congress, which was openly political. Applying rules in practice, in cases and controversies, was best done by judges, who could allow the rules to evolve in “continuous growth.” On this, both the formalists and realists could agree, although for different reasons.

While there are still “old-fashioned” formalists on today’s law school faculties, the center of academic thought has shifted to the heirs of Holmes, Brandeis, Frank, and the legal realists. Like Holmes and Brandeis themselves, today’s legal realists, whether they call themselves followers of “critical legal studies” or not, see law reform as an inherently political process, whether done through legislation or courts. No wonder the idea of non-partisan, “objective” rules committees, whose prospective rulemaking is based on empirical, “scientific” research, and whose goals are a more just and efficient legal process for all federal litigants, is often met with skepticism in American academia today.¹⁴¹

C. The Political “Whig” Attack: Thomas Babington Macaulay, “Civil Prudence” and the Modern Populist—Rulemaking as Dangerous to Democracy

Legal formalists and legal realists have both questioned the core assumptions of Baconian rulemaking and the tradition of equity from which it springs. But there is a third group whose opposition to Bacon and his thought has been the most persistent, historically, and the most vehement. Representatives from the great Whig political traditions have not only opposed Baconianism; they have feared it.¹⁴²

Bacon made no attempt to hide his lack of faith in democracy, if by that one meant a system that assumed an egalitarian society. Long before the triumphs of modern technology, Bacon maintained that men were not created equal in their intelligence and

141. See, e.g., Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 288 (2009) (outlining view that the rulemaking process is ideologically skewed); Paul J. Stancil, *Close Enough for Government Work: The Committee Rulemaking Game*, 96 VA. L. REV. 69, 72–73, 99–100 (2010). There is a useful list of “rules critics” in Arthur Miller’s Duke Conference Address. See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 13 n.43 (2010). My special thanks to Andrea L. Kuperman, Chief Counsel to the Rules Committees and true colleague and friend, for her tireless assistance.

142. COQUILLETTE, *supra* note 10, at 313; see MATHEWS, *supra* note 3, at 337–68.

their understanding of the natural world.¹⁴³ Further, Bacon had little faith in individualism. Even highly talented individuals could be so deceived by their personal “idols” that they could be highly dangerous in the absence of a coercive, all-knowing government.¹⁴⁴ In the *Novum Organum*, Bacon called the individual human mind an “enchanted glass” whose inherent flaws distorted the clear reflection of the truth like a bewitched mirror.¹⁴⁵ Leveraged by the power of modern technology, such individuals could be capable of great destructive power—a very close prediction by Bacon of modern terrorism. The solution, fully developed in Bacon’s deeply disturbing utopia, the *New Atlantis* (1624), was to vest power in a strong, central government, whose leaders were chosen based on elitist principles of merit and intelligence and operated as a collective to control individual deviation.¹⁴⁶ Over time, public safety would increasingly demand that the rest of society be closely governed—and closely watched by an ever-present system of security and surveillance.

Whig historians from the seventeenth century onward saw Bacon’s thought as absolutely dangerous to populist democracy. This sentiment culminated in Thomas Babington Macaulay’s great attack on Bacon in his “Lord Bacon,” reprinted in *Critical and Historical Essays* of 1866.¹⁴⁷ Macaulay pulled no punches. Had Bacon kept

143. For an understanding of Bacon’s view of the social structure, see FRANCIS BACON, *NEW ATLANTIS* (1624) (describing Bacon’s utopia called Bensalem); Spedding vol. III, *supra* note 2, at 121 (preface to *NEW ATLANTIS*); see also COQUILLETTE, *supra* note 1, at 256–62 (discussing *NEW ATLANTIS*). Bacon’s fictional utopia was ruled by an elite secret order, the “Order” or the “Society” or the “Fathers” of Salomon’s House, to which all state officers were inherently subordinate. COQUILLETTE, *supra* note 1, at 258–59; *accord* Spedding vol. III, *supra* note 2, at 154–55.

144. See COQUILLETTE, *supra* note 1, at 227–34; Spedding vol. IV, *supra* note 2, at 53–54. Bacon’s secretary, Thomas Hobbes, would later take this suspicion of individualism as against the collective wisdom to its final classic expression in his *LEVIATHAN* (1651). COQUILLETTE, *supra* note 1, at 237–43 (noting the likely influence of Bacon’s *Aphorisms* on political thinking of his secretary, Thomas Hobbes, who had custody of the *Aphorisms*); see also BERTRAND RUSSELL, *HISTORY OF WESTERN PHILOSOPHY* 535–41 (1961) (describing Hobbes’s suspicion of individualism in *LEVIATHAN*).

145. In Bacon’s words, “For the mind of man is far from the nature of a clear and equal glass, wherein the beams of things should reflect according to their true incidence; nay, it is rather like an enchanted glass, full of superstition and imposture, if it be not delivered and reduced.” COQUILLETTE, *supra* note 1, at 227 (quoting Spedding vol. III, *supra* note 2, at 394–95).

146. Spedding vol. III, *supra* note 2, at 151–54; see COQUILLETTE, *supra* note 1, at 260–61 (footnote omitted) (“Bacon invented the expression ‘knowledge is power.’ In Bensalem, knowledge was all-powerful. But there was also something deeply disquieting about Bensalem and Salomon’s House. . . . [I]t was a society which, to a modern liberal, would be oppressive, sexist, hegemonic, hierarchical, intolerant and, in the last analysis, based on a system of secrets.”).

147. THOMAS BABINGTON MACAULAY, *LORD BACON*, reprinted in THOMAS BABINGTON MACAULAY, *CRITICAL AND HISTORICAL ESSAYS* 341, 341–408 (1860).

out of politics, and left his elitist tendencies as theory only, all might have been better. But he did not. In Macaulay's words,

[o]ur opinion of the moral character of this great man has already been sufficiently explained. Had his life been passed in literary retirement, he would, in all probability, have deserved to be considered, not only as a great philosopher, but as a worthy and good-natured member of society. But neither his principles nor his spirit were such as could be trusted, when strong temptations were to be resisted, and serious dangers to be braved.¹⁴⁸

In short, Bacon was politically dangerous. Macaulay argued further, "If we admit the justice of Bacon's answer, we admit it with regret, similar to that which Dante felt when he heard the facts of those illustrious heathens that were doomed to the first circle of Hell."¹⁴⁹

And it was not just Bacon's elitist tendencies or his commitment to authoritarian politics that alarmed Macaulay and his Whig followers. Bacon's philosophy was not idealistic, at least when it came to individualism. Bacon believed all individuals to be flawed, and individual freedom was a low, if not dangerous, priority. Rather, his goal was pragmatic, step-by-step progress. Again, as Macaulay put it, "[t]wo words form the key of the Baconian doctrine, Utility and Progress."¹⁵⁰ And "[t]o make men perfect was no part of Bacon's plan. His humble aim was to make imperfect men comfortable."¹⁵¹ These were words of faint praise from an idealistic Whig. Macaulay concluded:

We should not then have seen the same man at one time far in the van, and at another time far in the rear of his generation. We should not then be forced to own that he who first treated legislation as a science was among the last Englishmen who used the rack, that he who first summoned philosophers to the great work of interpreting nature was among the last Englishmen who sold justice.¹⁵²

Today, we live in an America where elected judges are the overwhelming norm in the states, and life-appointed federal judges

148. *Id.* at 388.

149. *Id.* at 391.

150. *Id.* at 389.

151. *Id.* at 397.

152. *Id.* at 414.

have been a target of both parties in the recent presidential primaries.¹⁵³ The powerful discretion of a Lord Chancellor would be regarded as anti-democratic, and Bacon's record for corruption would be seen as symptomatic of unelected and thus unaccountable power. Bacon's arguments that the elite should govern—the thesis of his utopia, the *New Atlantis*—and that legal rules should be made by elite experts, “scientific” and immune from the bias of democratic politics, can be as suspect in America today as in the England of Coke and Macaulay.

So what does one “do” about these historical lines of attack on progressive Baconian theories of law reform and rulemaking, particularly in light of the realities of modern American academia and democratic politics? To begin, nothing about the Rules Enabling Act or the Rules Committees will satisfy these critics. Langdellian formalists, forged for a century in the “Socratic” classrooms of America's elite law schools, are not about to abandon their faith in the intellectual and even moral superiority of case law—although first-year curriculum reform at Harvard and other major law schools is beginning to change the paradigm.¹⁵⁴ Nor will the “legal realist” descendants of Holmes and Brandeis lose their “rule skepticism.” And perhaps most importantly, populist, democratic politics in today's America, left or right, whether styled “Tea Party” or “Social Justice,” will never accept the inherent meritocracy of elite expertise embodied in the philosophy of Congress's historic delegation of power in the Rules Enabling Act.¹⁵⁵

153. See, e.g., *GOP Candidates Would Cut Federal Judges' Power*, WASH. POST (Oct. 23, 2011), http://www.washingtonpost.com/politics/gop-candidates-would-cut-federal-judges-power/2011/10/23/gIQA5u4Z9L_story.html; Erwin Chemerinsky, *GOP Candidates: Bashing Judges, Threatening Democracy*, L.A. TIMES, Dec. 20, 2011, at A21. As to the overwhelming role of elected judges in most state courts, see Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary* 12–13 (John M. Olin Law & Econ., Working Paper No. 357, 2007). My special thanks to Charles Riordan, my most invaluable editorial assistant, for his assistance on this point. While this theme was commonly found in the Republican 2012 primaries, concern over the composition of the federal judiciary is found in both parties. See Neil A. Lewis, *Deal Ends Impasse over Judicial Nominees*, N.Y. TIMES (May 19, 2004), <http://www.nytimes.com/2004/05/19/us/deal-ends-impasse-over-judicial-nominees.html?ref=charleswsrpickering>; Jeffrey Toobin, *Advice and Dissent*, THE NEW YORKER, May 26, 2003, at 42–48.

154. See generally Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597–608 (2007) (proposing major changes in the first-year curriculum toward legislative and regulatory sources as opposed to case-law studies only—changes now actually being implemented at Harvard Law School).

155. See Judicial Improvements and Access to Justice Act of 1988, Pub. L. 100-702, Title IV, § 401(a), 102 Stat. 4642, 4649 (codified at 28 U.S.C. § 2074 (b) (2006)) (indicating Congress's special reservation of power with regard to the Federal Rules of Evidence owing to congressional rejection of the original proposed Article V of these rules); Judith A. McMorro & Daniel R. Coquillette, *Federal Law of Attorney Conduct* (2010); see also Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655–1660–66 (1995).

But wise rulemakers can mitigate these inherent, historic hostilities. It is here where Edward Cooper becomes the true disciple of the better side of Bacon's legal philosophy. Let us start with Langdellian legal formalism. Intelligent deference to the evolution of case law, rather than rushing in with rule "fixes," has marked Cooper's distinguished career both as scholar and Reporter. As Rick Marcus's article in this volume, *Shoes That Did Not Drop*, demonstrates, Cooper's achievements have been based at least as much in wise deference as in reforming action.¹⁵⁶ As for the "legal realism" so influential in today's law schools, and its inherent cynicism and "rule skepticism" about any "objective" and "nonpartisan" lawmaking, the answer has to be the same as Bacon's (i.e., a relentless effort to develop good empirical research as free from political and economic bias as possible and devoted to testing rules against social benefits that are widely, if not universally, shared). Where rulemaking can be thus demonstrated as effective in achieving the basic goals of Rule 1 of the Federal Rules of Civil Procedure, "the just, speedy, and inexpensive determination of every action and proceeding," even "rule skepticism" can be mollified, if not convinced.¹⁵⁷

Finally, and perhaps most importantly, today's rulemakers must not repeat Bacon's mistakes in defying democratic politics. Ultimately, the Rules Committees were created by Congress and exist at Congress's discretion.¹⁵⁸ How do we retain Congress's confidence? Congress's 1988 "Sunshine" Amendments to the Rules Enabling Act tell us how.¹⁵⁹ Transparency of process, continued communication with the key Congressional committees and staffers, and, ultimately, deference to strongly felt Congressional concerns, are

156. See Richard L. Marcus, *Shoes That Did Not Drop*, 46 U. MICH. J.L. REFORM 637 (2012). See also the Hon. Mark Kravitz's thoughtful treatment of the same subject in *To Revise, or Not to Revise: That Is the Question*, 87 DENV. U. L. REV. 213 (2010). Judge Kravitz looks to the wisdom of the past:

Professor Robert Cover wrote that Professor Moore "always envisioned the Federal Rules as a tool which embodies a practical philosophy of procedure, one which liberates the courts to achieve substantive ends." I like to think that is what the Civil Rules Committee continues to do to this day—to provide judges the procedures necessary to "liberate" them to decide individual cases on their substantive merits with competence and integrity.

Id. at 225 (footnote omitted).

157. See the discussion of the history and philosophy of Federal Rule of Civil Procedure 1 in Daniel R. Coquillette, *Scope and Purpose of the Federal Rules of Civil Procedure as Defined in Rule I*, in 1 DANIEL R. COQUILLETTE ET AL., *MOORE'S FEDERAL PRACTICE* chap. 1, 1-1-1-56 (3d ed. 2008).

158. See sources cited *supra* note 155.

159. The Advisory Committees are, by mandate of Congress, "sunshine" committees. See Bankruptcy Reform Act of 1994, Pub. L. 103-394, Title I, § 104(e), 108 Stat. 4110 (codified as

required if the Rules Enabling Act is to survive another century. That is not to say that the Rules Committees must not stick up for what is best for the legal system—they owe an allegiance to the Article III federal system as well. Nor should they fail to remind Congress, in short-term controversies, of the long-term wisdom of Congress itself in establishing the Rules Enabling Act. But absolute transparency and cautious deference, the hallmark of Edward Cooper’s career as Reporter, are an answer, indeed the only answer, of federal rulemakers to the voices of populist democracy in today’s America.

CONCLUSION

When Francis Bacon spoke of “reporters,” it was in the context of his far-reaching and genuinely radical proposal to introduce professional and expert reporters to record the decisions of the courts—something unheard of at the time.¹⁶⁰ But in describing the desired qualities of such reporters, Bacon used language that resonates deeply with today’s Federal Rules Committees, institutions with which he would have deeply identified. His vision of progressive lawmaking, tested by empirical science, called for professionals of exceptional intelligence and integrity—ironically, a standard he only met in the first part. He called for “grave and sound lawyers, with some honorable stipend, to be reporters,”¹⁶¹ persons of “great learning” who would “carefully and faithfully receive the Rules and Judicial Resolutions given in the King’s Courts”¹⁶² and who would assist in “bearing up [the laws’] authority in the eyes of our people, and give life and vigor to our said laws and the execution of them.”¹⁶³ Edward Cooper is exactly the kind of “reporter” Bacon had in mind. Bacon said:

I hold every man a debtor to his profession, from the which as men of course doe seeke to receive countenance and profit, so ought they of duty to endeavour themselves by ways of amends, to be a help and ornament thereunto; this is performed in

amended at 28 U.S.C. § 2073 (2006)); DANIEL R. COQUILLETTE ET AL., *MOORE’S FEDERAL PRACTICE* 801–27 (3d ed. 2001); McCabe, *supra* note 155, at 1656–68; McMorroW & COQUILLETTE, *supra* note 155.

160. Francis Bacon, *ORDINATIO QUA CONSTITUUNTUR LEZ REPORTERS A LEGE*, reprinted in Spedding vol. XIII *supra* note 2, at 264–66; COQUILLETTE, *supra* note 1, at 210, 214 n.54.

161. Spedding vol. XIII, *supra* note 2, at 69 (“Propositions to His Majesty”).

162. *Id.* at 86 (“A Memorial Touching the Review of Penal Laws and the Amendment of the Common Law”).

163. *Id.* at 265 (“*Ordinatio qua Constituuntur Lez Reporters de Legge*”).

some degree by the honest and liberal practice of a profession . . . but much more . . . if a man bee able to visite and strengthen the roots and foundation of the science itself; thereby not only gracing it in reputation and dignity, but also amplifying it in perfection and substance.¹⁶⁴

“An ornament” to his profession, who “visits and strengthens the roots of the science itself,” thereby “gracing it in reputation” and applying it “in perfection and substance”—a perfect description, by Francis Bacon, of Edward Cooper.

164. FRANCIS BACON, A COLLECTION OF SOME PRINCIPAL RULES AND MAXIMS OF THE COMMON LAWE OF ENGLAND B2 (1639).