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# Francis Bacon and the Natural Law Tradition;Note

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## FRANCIS BACON AND THE NATURAL LAW TRADITION

Francis Bacon's compendious writings represent a massive attempt at an organic restatement of human knowledge and its sources. Like most such attempts Bacon's great "Instauration" leaves considerable gaps; large areas of relevant inquiry are at best only very lightly sketched in: yet usually in these areas Bacon gives some fairly suggestive indication of the line of development that one might expect his work to take. Studying Spedding's great edition of Bacon,<sup>1</sup> however, one is struck by the absence in his extant writings and speeches of many very specific indications of an active interest in natural law. This absence might anyhow seem conspicuous in the age of Suarez, Grotius, and Vittoria, an age in which the concept of natural law was being enthusiastically reviewed and restated, but it is all the more surprising when we consider how typically "Baconian" the topic is. For not only was Bacon throughout his lifetime preoccupied with law in the juridical sense, but a preoccupation with the existence of ascertainable natural laws in a cosmological sense lay at the basis of his whole philosophy.<sup>2</sup> One might have expected a special exertion on Bacon's part to relate these two areas of inquiry, yet recognitions in his work of potential links between his natural philosophy and legal theory are rare and fragmentary.

Indeed, Bacon, in so many areas such a mine of suggestive theories, places himself squarely in the English legal tradition by largely avoiding abstractions about the nature of law. In the *Novum Organum* (1608-20), where we find his most lucid account of the inductive approach to Nature, he remarks that the system of "negation and exclusion" that he advocates in the field of natural philosophy could be enlarged to include all the other fields of learning.<sup>3</sup> The result of this process in law would be a series of Maxims. The Maxims of law would correspond to the inductively derived Axioms of natural philosophy. Little is heard of these Maxims, however, although in earlier years Bacon had written some preliminary notes for a treatise *De Regulis Juris* (c. 1597) which appeared in print in 1630 as *Maxims of the Law*.<sup>4</sup> If we look at these earlier Maxims we are immediately aware that here too Bacon is reluctant to generalize about the philosophical basis of law. Several of the Maxims approach some generalized concept of justice, but the nearest we come to any organized theoretical statement is in the preface, where he comments that the Maxims are "gathered and extracted out of the harmony and congruity of cases"; by them "no small light will be given . . . to sound into the true conceit of law by depth of reason."<sup>5</sup> But is this reference to the "depth of reason" anything more than the traditional

1. JAMES SPEDDING, R. L. ELLIS, D. D. HEATH (ed.), *WORKS OF FRANCIS BACON*, 14 volumes (London, 1857-74). Referred to henceforth as SPEDDING.

2. Paul H. Kocher, *Francis Bacon on the Science of Jurisprudence*, 18 *JOURNAL OF THE HISTORY OF IDEAS* 3-26 (1957) interestingly relates Bacon's common law habit of induction to his philosophical practice.

3. 4 SPEDDING 112.

4. 7 SPEDDING 313-387.

5. 7 SPEDDING 320, 319.

obesance to "reason" made by the practitioner of the common law? "Common reason is common law," Bacon told his fellow benchers at Gray's Inn in 1600. The context was a discussion of "the nature of uses," and Bacon is therefore involved with defining the status of equity. He is careful, even as he assimilates reason and conscience, to assert, or rather insist, quoting Fitzherbert, that common law "hath a kind of rule and survey over the chancery." The whole passage must be quoted:

. . . use is no more but a general trust, when a man will trust the conscience of another better than his own estate and possession; which is an accident or event of human society which hath been and will be in all laws, and therefore was at the common law which is common reason. For as Fitzherbert saith in the 14 Henry VIII 4, common reason is common law, and not conscience; but common reason doth define that uses should be remedied in conscience and not in courts of law, and ordered by rules in conscience and not by strait cases of law; for the common law hath a kind of a rule and survey over the chancery, to determine what belongs to the chancery. And therefore we may truly conclude that the force and strength that an use had or hath in conscience is by common law; and the force that it had or hath by common law is only by statutes.<sup>6</sup>

"Common reason is common law" — this is seemingly in the spirit of Christopher St. Germain, the sixteenth century English expositor of natural law. Yet one can profitably compare Bacon's statement with a typical passage from St. Germain's *Doctor and Student* (1523). The latter is also discussing equity, and as he assesses the relationship between law and conscience he insists, as Bacon does not, upon the traditional links between the law of man, natural law, and divine law:

Where conscience shall be ruled by the law is not, as me seemeth, to be understood only of the law of reason and the law of God, but also of the law of man, that is not contrary to the law of reason, nor the law of God, but is superadded unto them for the better ordering of the commonwealth: for such a law of man is always to be set as a rule in conscience, so that it is not lawful for a man to frame it on the one side or the other: for such a law of man hath not only the strength of man's law, but also the law of reason, or of the law of God, whereof it is derived. For lawes made by man, which have received of God power to make lawes, be made by God. And therefore conscience must be ordered by that law, as it must be upon the law of God, and upon the law of reason.<sup>7</sup>

Behind St. Germain's rather tortuous repetitiveness lies the firm assertion that, as he states elsewhere, "the first ground of the Law of England is the Law of Reason" (and the Law of Reason is of course synonymous for St. Germain with the Law of Nature).<sup>8</sup> St. Germain was well known as a legal theorist amongst English lawyers in the sixteenth century, as the numerous reprints of *Doctor and*

6. *Reading on the Statute of Uses*, 7 SPEDDING 415.

7. CHRISTOPHER ST. GERMAIN, *DOCTOR AND STUDENT, OR DIALOGUE BETWEEN A DOCTOR IN DIVINITY AND A STUDENT IN THE LAWS OF ENGLAND* bk. I, ch. 19 (London, 1721).

8. *Ibid.*, bk. I, ch. 2.

*Student* show. In 1627, a hundred years after the publication of *Doctor and Student*, Sir Henry Finch's *Law, or a Discourse Thereof* devotes several preliminary chapters to a discussion of the "Law of Reason or the Law of Nature," and this kind of writing "indicates the atmosphere in which lawyers were educated in the seventeenth century."<sup>9</sup> But Bacon hardly seems to have absorbed this atmosphere.

In later years, it is true, in his *Arguments at Law* (1613) he made an eloquent statement of the relationship of law to nature:

. . . the reasons of municipal laws severed from the grounds of nature, manners, and policy are like wall flowers which, though they grow high upon the crests of states, yet they have no deep roots.<sup>10</sup>

Occasional flourishes of this kind, which have little to do with natural law in the traditional sense, appear here and there throughout Bacon's works. In his *Brief Discourse Touching the Happy Union of the Kingdoms of England and Scotland* (1603) — of which more later — he talks of political science as a "Persian Magic," the "observation of the contemplations of nature and an application thereof unto a sense politic: taking the fundamental laws of nature, and the branches and passages of them, as an original or first model, whence to take and describe a copy and imitation for government."<sup>11</sup> This sounds promising, but as we progress and Bacon tells us that there is "a great affinity between the rules of nature and the true rules of policy" it becomes clear that Bacon's subject here is not law but practical politics, and in his concern to urge caution and gradualness he is using the processes of nature (e.g., earthquakes contrasted with more gradual natural changes) as an elegant analogy of the political process. In the *Advancement of Learning* (1605) he throws away a hint that seems to forecast the history of natural law theory in positivist hands when he mentions a "true coincidence" between commutative and distributive justice and "truth and geometric proportion"; but we look in vain for a Baconian restatement of natural law principles, or indeed for any systematic integration of legal theory into his philosophy. In this sense one can read Bacon's legal writings as a tale of lost opportunities. An appendix to his great *De Augmentis Scientiarum*, for example, offers a series of aphorisms entitled *Tractatus de Justitia Universali sive de Fontibus Juris*,<sup>12</sup> yet the material is disappointing: after a general statement about the nature of legal rights (which, Spedding remarks, is more than anything else Hobbesian in its nonrecognition of the principle that moral ideas lie at the root of civil rights) Bacon confines his discussion to the severely practical question of the need for certainty in the law — *Legis tantum interest ut certa*.<sup>13</sup> We look for something larger. Beyond the Axioms of natural science

9. J. W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 34 (Oxford, 1955).

10. 7 SPEDDING 524.

11. 10 SPEDDING 90. Persian princes were reputed to be taught "policy" and magic simultaneously. Bacon, understanding "magic" to mean knowledge of the processes of nature, approved of the system.

12. 1 SPEDDING 803-27.

13. See A. LEVI, *IL PENSIERO DI F. BACON CONSIDERATO IN RELAZIONE CON LA FILOSOFIA DELLA NATURA DEL RINASCIMENTO E COL RAZIONALISMO CARTESIANO* 307-8 (Turin, 1925).

stand the final truths, he tells us, the *philosophia prima*; behind the Maxims of law, the *legum leges*, should stand some conception of natural law, but Bacon remains silent about it.<sup>14</sup>

If we turn from Bacon the philosopher to Bacon the practicing lawyer, however, we find him appealing to the principles of natural law at crucial moments in one of the most celebrated legal struggles in which he was involved. This was the prolonged discussion which developed around the establishment of the United Kingdom of England and Scotland, in the first decade of the seventeenth century. Bacon played a central role in resolving the technical problems that this great constitutional occasion produced. The social, economic, and political issues involved became crystallized in a legal debate which with remarkable consistency appeared to make its terms of reference the principles of natural law.<sup>15</sup>

The reasons for this recourse were threefold. First, the Union of the two countries was an unprecedented event; although much scholarly energy was expended in attempts to find one, there was no real legal precedent to which appeal could be made. In such circumstances it was inevitable that Fortescue's words would be recalled: "*Nous sommes ore en cas siccome les canonistes e civillians face quant un nouvel cas arrivent de que ils n'ont nul ley devant; donques il resorter a ley de nature.*" Secondly, an important element of the problem was the meeting and conflict of two systems of law, and it was traditionally in such situations (as in the case of the Law Merchant) that the principles of natural law, an assertion of transcendent, supranational qualities in the nature of law, were expected to come into play. Thirdly, and most immediately significant, fundamental questions of the nature of legal authority were raised when naturalization became a central issue.

When King James VI of Scotland acceded to the English throne in 1603 the Proclamation by which he assumed the style of King James I of Great Britain implied certain changes in the status of Scots citizens. If the Scots were not subject to English law, it would not be fair for them to be endowed with English privileges and liberties; the Proclamation therefore implied a general naturalization for the Scots. Official public acceptance of the Union of the two countries was something that James had set his heart on, and in 1606 he had an Instrument of Union laid before Parliament, presented by the Lord Chancellor, Ellesmere, in order that Lords and Commons might publicly ratify the implications of his Proclamation. But it soon became apparent that Parliament was unhappy with some aspects of the Instrument. The various practical proposals relating to commerce and public affairs were accepted in one or other of the Houses, but those parts of the Schedule that dealt with naturalization had a rough passage through the Commons. Early objections centered upon the effect in England of a sudden descent of lean and hungry Scotsmen, and speakers envisaged with dismay a "surcharge of people upon this realm of England." But

14. If Bacon had ever completed his *Advertisement Touching a Holy War* (left unfinished in 1622) he might have been obliged to enter into a more profound discussion of natural law by way of international law.

15. A large documentation of parliamentary and legal procedures in this matter is available in 2 STATE TRIALS 559-696.

as these fears were quieted or dismissed by the Instrument's defenders, argument came more and more to settle upon the legal and constitutional issues at stake, notably the matter of the King's allegiance and the problem of whether it could be extended beyond the confines of his own territory. Parliamentary lawyers now took over the debate, a debate in which Bacon was to play an influential role.

He had participated actively and efficiently in expediting the King's wishes from the beginning. Thus in 1603 his *Brief Discourse*, already referred to, is a preparatory account of the background to the Union that also wisely counsels the King, *festina lente*; and in 1604 he was authorized to draw up a complete analysis of the problems involved in the Union for the use of the Commission that James had set up. This paper, entitled *Certain Articles or Considerations Touching the Union, etc.*, examines in some detail the difficulties likely to arise out of a "severalty" of Parliaments, Privy Counsels, Officers of the Crown, Nobility, Revenue, Commerce, Privilege, Taxes, Courts of Justice and the Law.<sup>16</sup> At this stage little is heard from Bacon about natural law, but when in 1606 he was made head of a Parliamentary Commission dealing with the problem of Union he prepared a Certificate entitled *Authorised to Treat of an Union For the Weal of Both Realms* recognizing that the Commission is facing the problem *in novo casu*.<sup>17</sup> No precedent is available, so "we thought ourselves so much the more bound to resort to the infallible and original grounds of nature and common reason. . . ."

This kind of language appears in most of Bacon's subsequent contributions to the debate. About the same time, for example, one of the secondary issues raised was the question of King James's "style," — what was his new title to be? Bacon drafted a *Proclamation Touching the King's Style*, in which he goes out of his way to stress the "natural" legal basis of the Union of the two kingdoms:

Which so happy fruit of the union of kingdoms is chiefly to be understood when such conjunction or augmentation is not wrought by conquest and violence, or by pact and submission, but by the law of nature and hereditary descent.<sup>18</sup>

Speaking of the new closeness of the two countries, he observes:

they are . . . incorporate under one head, it is the work of God and nature, whereunto the works of force and policy cannot attain.<sup>19</sup>

A few weeks later he makes a *Report of the First Days Conference Touching the Question whether the Scotchmen born since the King came to the Crown be Naturalized in England*. Here we find him arguing that "In doubtful cases in laws . . . there are inducements . . . which lead us to our opinion . . . fetched out of the law of reason, out of the law of nations, and out of the civil law."<sup>20</sup>

16. 10 SPEDDING 218-34.

17. *Id.* at 242.

18. *Id.* at 235.

19. *Id.* at 236.

20. *Id.* at 328.

When the growing discontent in Parliament culminated in a bitter debate in February, 1607, about "under what limitations" Scotsmen could be admitted to the privileges of naturalization, Bacon made a brilliant (and often amusing) speech in defense of "this work heroical," in the course of which he was able solemnly to relate the Union of England and Scotland to the Communion of Saints, where "we are all fellow-citizens, and naturalized of the heavenly Jerusalem."<sup>21</sup>

With Parliament uneasy about the proposals a Committee of Lords and Commons met several times to debate the issue, Bacon being the chief spokesman for the Commons. The eleven judicial members of the House of Lords, including the three chief justices (the Lord Chief Justice Popham; Coke, who was Chief Justice of the Common Pleas; and Thomas Flemming, Chief Baron) confirmed the opinions they had given in the House in supporting, with only one dissent, the scheme for naturalization. They recommended an act be passed to declare that, by common law, all *post nati* (that is, natives of either Kingdom born after "the King's happy coming to the Crown of England,") were automatically naturalized in both. Despite this weight of legal opinion, however, the Commons could not be brought to pass the declaratory act that James wanted. They evidently still felt suspicious of the whole affair; any gain seemed almost all on the side of the Scots, and there was little in it for themselves. In face of this uncertainty, a clear judicial decision became necessary. Opportunity was provided in the great *Post Nati* case, otherwise known as *Calvin's Case*. Here the plaintiff, Robert Calvin, a Scots *post natus*, sought to establish certain English legal rights. Although Bacon goes out of his way to deny that it was "feigned or framed," this proceeding clearly was a test case, brought to force the issue, and to establish precedent in the courts for the naturalization of Scotsmen.

Theoretical discussion of the Union was now solidly tied to a case of the transfer of real property. The issue, as stated in Coke's long report, was as follows: "whether Robert Calvin the plaintiff (being born in Scotland since the Crown of England descended to His Majesty) be an alien born, and consequently disabled to bring any real or personal action for any lands within the realm of England."<sup>22</sup> The case was argued before the King's Bench, but the judges, recognizing the "weight and importance thereof," adjourned it to the Exchequer Chamber, where eventually all the judges of England were able to give their opinion on the question of law that was involved. Coke comments that it was "as elaborately, substantially and judicially argued by the Lord Chancellor and my brethren the Judges as I ever read or heard of any." Ellesmere gives it as his opinion that "the witte of man could not devise to say more touching this question than the judges have done." The opinion of Bacon given as Solicitor General was recognized to be "of exceeding great consequence." Each of these celebrated jurists made appeal to the principles of natural law, but with significantly different emphases.

Coke, being Coke, the great defender of English common law, is determined to expel any hints of the exotic from the legal argument: "In their arguments of this cause concerning an alien, [counsel] told no strange histories, cited

21. *Id.* at 314.

22. 7 Co. Rep. 1a, 2a, 77 Eng. Rep. 377, 379, 2 STATE TRIALS 609 (1609).

no foreign laws, produced no alien precedents . . . for that the laws of England are copious in this point." But he makes a strong appeal to natural law, insisting at the same time on the traditional basis of the concept. Quoting not only Bracton, Fortescue, and St. Germain ("*jura naturalia sunt immutabilia*") but also Scripture (in the case of the Cilician St. Paul's Roman citizenship), Aristotle, and "that philosophical poet, Virgil," he examines as one of the five heads under which the whole problem must be discussed, the following propositions:

first that the ligeance or faith of the subject is due unto the King by the law of nature: secondly, that the law of nature is part of the law of England: thirdly, that the law of nature was before any judicial or municipal law: fourthly, that the law of nature is immutable.

The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex aeterna*, the moral law, called also the law of nature.<sup>23</sup>

"That the ligeance . . . of the subject is due unto the King by the law of nature." It must now be said that apart from the practical and theoretical implications of *Calvin's Case* in particular and naturalization in general, matters to which Coke, Ellesmere, and Bacon all devote careful attention, at the heart of *Post Nati* lies the question of *ligeancia* — was allegiance due first to the law, to the Crown in the abstract, to the Kingdom, or to the King's person? (The question of course explains the absorbed interest in *Post Nati* shown by King, Parliament, and Courts.) The topic could only be fully dealt with in relation to its immediate political perspective, but we can note here that the *Post Nati* case was tried against a background of the determined bid for sovereignty over the law which at this date was being made by both King and Parliament, a bid which of its nature tended to contravene the traditional formulations of natural law.<sup>24</sup> Each of the three leading jurists, as he struggles with the special issues of *Calvin's Case*, has an overriding concern to define and assert in his own way the primacy of the King's right to allegiance over any legal definition of it.

Coke, intensely loyal but concerned to define the limits of sovereignty, relies heavily on a serious recourse to the principles of that natural law which, he says, "God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex aeterna*, the moral law. . . ." Moses, who was "the first reporter or writer of law," and Aristotle, "nature's secretary," introduce Coke's discussion of "magistracy" in the traditional natural law style.<sup>25</sup> Coke is clear, when he touches on the question of parliamentary sovereignty, that no provision of natural law can be altered by Parliament. When it comes to the relationship of natural law and Crown he seems unable to resolve his dilemma, though there is no doubt that his mind and heart are with the old tradition.

23. 7 Co. Rep. 1a, 12b, 77 Eng. Rep. 377, 391-2, 2 STATE TRIALS 629 (1609).

24. The constitutional history of this period has of course a vast bibliography, but the reader's attention is drawn to two recent studies, both of which pay considerable attention to the part played by natural law ideas: GEORGE L. MOSSÉ, *THE STRUGGLE FOR SOVEREIGNTY IN ENGLAND FROM THE REIGN OF QUEEN ELIZABETH TO THE PETITION OF RIGHT* (East Lansing, 1950), esp. pp. 139-74; J. W. GOUGH, *op. cit. supra* note 9, esp. the chapter on Edward Coke.

25. 7 Co. Rep. 1a, 12b, 13a, 77 Eng. Rep. 377, 392, 2 STATE TRIALS 629-33 (1609).



At the other extreme is Ellesmere. The *Post Nati* case is Ellesmere's only published opinion, done, he tells us,<sup>26</sup> in deference to the King's wishes: the Lord Chancellor's particular contribution to the plaintiff's case is a powerful assertion of the force in law of the King's Proclamations — "*rex est lex animata*," he quotes in his peroration, "*rex est lex loquans*." He had begun with a fine show of lip service to natural law: "the Common Law of England is grounded upon the law of God, and extends itself to the originall lawe of nature, and the universal lawe of Nations."<sup>27</sup> But his argument, made, he tells us, *coram Deo et angelis*, and supported by at least as rich a range of reference as Coke's, quickly moves away from theoretical preoccupations towards contemporary common law attitudes. The most interesting part of his argument is his discussion of Roman law (introduced by his citation of the *ius gentium*). But the opportunity to make his reference to natural law anything more than a pious gesture is simply ignored, notably at the point where it should logically have been at issue, when he discusses the function of Chancery as the great arbiter *in novo casu*, and law's responsibility in such situations to find the *dictumen rationis*. Ellesmere's argument concludes, predictably, that the case can be decided "by sentence of the most religious, learned and iudicious king that ever this kingdome or island had."<sup>28</sup>

Bacon's appeal to natural law is more sustained than Ellesmere's and if anything is more eloquent than Coke's. (Lawful monarchies, he announces, "are a shadow of the government of God himself over the world.") But there is less precision. Faced with the question of allegiance and sovereignty, he too invokes natural law: the submission of subjects to the hereditary monarch is based upon a truth "which afterwards by laws subsequent is perfected and made more formal, but it is grounded upon nature."<sup>29</sup>

Allegiance to the "natural liege sovereign" is "corroborated and confirmed by law, but is the work of the law of nature."<sup>30</sup> "As the common law is more worthy than statute law; so the law of nature is more worthy than them both," he continues, and later in the discussion he asks — and answers:

Is it not a common principle, that the law favoureth three things, life, liberty, and dower? And what is the reason of this favour? This, because our law is grounded upon the law of nature, and these three things do flow from the law of nature; preservation of life, natural; liberty, which every beast or bird seeketh and affecteth, natural; the society of man and wife, whereof dower is the reward, natural. It is well.<sup>31</sup>

Bacon, then, insistently returned to some concept of natural law in every aspect of his dealings with the problem of the Union. Yet one detects a sort of wariness in Bacon's approach, a concern to establish very firmly, even as he

26. 2 STATE TRIALS 659 fn.

27. *Id.* at 670.

28. *Id.* at 693. Ellesmere, great lawyer though he was, was notoriously subservient to James, and inimical to Coke. A well-known story is that when Queen Elizabeth made Ellesmere her Solicitor-General she said it was done "so that he might never oppose the Crown again." See DICTIONARY OF NATIONAL BIOGRAPHY.

29. 7 SPEDDING 644.

30. *Id.* at 647.

31. *Id.* at 663-64.

invokes it, a clear distinction between the law of nature and "laws subsequent." The characteristics of the *Post Nati* case, as we have seen, virtually imposed a discussion in which at least a bow was made to natural law principles. But Bacon, who was eager to obtain a positive decision in the matter, seems sometimes merely to be manipulating the language of natural law for the purposes of forensic efficacy. Further, throughout his appeals to natural law, Bacon seems concerned to be nontechnical — "by the law of nature all men are naturalized one towards another; they were all made of one lump of earth, of one breath of God" — underlining, as it were, the distinctions to be borne in mind between this kind of law and the law of the courts and of statutes. In contrast with Coke, Bacon speaks of the natural law as a layman might; his illustrations are often drawn from physical nature itself (he will, he says, "visit and open the foundations and fountains of reason"), and his favorite image when he discusses the constitutional issue is that of the family. He uses the concept almost as a metaphor, an elegant figure of speech rather than an appeal to a formal principle. For Bacon the law of nature in *Post Nati* is still the law of the Persian Magic that he admired in his *Brief Discourse* and later in the *Advancement of Learning*:<sup>32</sup> policy must imitate nature.

Bacon resisted legal theorizing. He saw himself above all, and with justice, as a great practical lawyer. A long series of notes, memoranda, and reports demonstrate his passionate interest in the pressing business of "negations and exclusions," of tidying up English law in the most practical manner (see for example his *At the Taking of his Place in Chancery*, his *Proposition to his Majesty . . . Touching the Completing and Amending of the Laws of England*, or his *Amendment of the Law*). He wished

to purge out the multiplicity of laws, clear the uncertainty of them, repeal those that are most snaring, and press the execution of those that are wholesome and necessary. . . .<sup>33</sup>

In pursuit of these practical matters he remained determinedly inductive. He went as far along the road of theory as his *Maxims*, and suggested they were the equivalents of his *Axioms* of natural science. And on one occasion he was to add that "The *Maxims* are the foundations of the Law, and the full and perfect conclusions of reason";<sup>34</sup> but he must have consciously resisted the element of traditional formulation in natural law ideas as analogous to the sixteenth century Aristotelian formulations he attacked so vigorously in his philosophical writings. Such ideas were an intrusion of the fundamentally scholastic tradition of transcendent theory into what was for him an urgently practical affair.

Another reason for Bacon's unwillingness to associate himself with natural law doctrines, or unwillingness to undertake any systematic restatement of them must have been political. The age of Suarez was also the age of Hooker, and although in *Of The Laws of Ecclesiastical Polity* (1594-97) Hooker had tended to sheer away from defining sovereignty — already a delicate subject in Eliza-

32. 3 SPEDDING 261, 348.

33. 8 SPEDDING 339.

34. 7 SPEDDING 509.

bethan England — there is no doubt that he was largely in the Jerome-Albertus Magnus-Aquinas-Gerson-St. Germain line, and was identified with the scholastic doctrine of the primacy of law. The issue of the Royal Prerogative was a complex one, but it is enough to say here that *Bates' Case* in 1606 had already asserted the King's "over-riding absolute prerogative to deal with matters of State,"<sup>35</sup> and that Bacon had commented: "The King holdeth not his prerogatives of this kind mediately from the law, but immediately from God as he holdeth his crown."<sup>36</sup> His commitment to the defense of James' Royal Prerogative — for example, against the attacks of Coke (whose *Institutes* amply demonstrate that he had read his Bracton) — may well have made Bacon chary of too much reference to a natural law theory that could say, as Bracton, echoing Aquinas, said: "... *lex facit regum . . . non est enim rex ubi dominatur voluntas et non lex.*"<sup>37</sup> No doubt Bacon preferred the sound of the Bracton text quoted by Ellesmere in *Post Nati*: "*De chartis regis et factis regum, non debent, nec possunt iusticiari nec privatae personae disputare. . .*"<sup>38</sup>

A famous gloss on Bracton's *De Legibus et Consuetudinibus Angliae* runs *In Anglia minus curator de iure naturalia quam in aliqua regione de mundo*.<sup>39</sup> The comment is largely and cogently questioned today. Apart from the evidence of the currency of books like the sixteenth century *Doctor and Student* and Henry Finch's seventeenth century *Discourse*, with their heavy accent on natural law, twentieth century scholarship has noted the natural law elements in the common law doctrine of "reasonableness,"<sup>40</sup> and in equity's appeal to conscience.<sup>41</sup>

35. See W. S. HOLDSWORTH, 6 *A HISTORY OF THE LAWS OF ENGLAND* 21 (London, 1924).

36. *Id.* at 22, fn. 1.

37. ("Law makes the king — for there is no king where will rules, not law.") H. BRACTON, *DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE* bk. 1, ch. 8, sec. 5, p. 38 (London, 1878).

38. ("Royal charters and acts neither should, nor can, be litigated nor disputed by private persons.") 2 *STATE TRIALS* 693. Ellesmere was no doubt adapting Bracton's "*Nemo quidem de factis suis praesumat disputare, multo fortius contra factum suum venire.*" ["No one indeed presumes to dispute his acts, *a fortiori* to proceed against his act."] *Op. cit. supra* note 37, at 40.

39. ("In England there is less concern for natural law than in any other part of the world.") See Richard O'Sullivan, *Natural Law and the Common Law*, 21 *PROCEEDINGS OF THE GROTIUS SOCIETY* 117-38 (1945).

40. See Frederick Pollock's *History of the Law of Nature*, in his *ESSAYS IN THE LAW* (London, 1922); A. P. d'ENTRÈVES, *NATURAL LAW* (London, 1951); Richard O'Sullivan, *op. cit. supra* note 39, at 117-38.

41. Since Paul Vinogradoff's seminal article on St. Germain — *Reason and Conscience in Sixteenth-Century Jurisprudence*, 24 *LAW QUARTERLY REVIEW* 373-84 (1908) — there has been some valuable comment on the ways in which in the sixteenth century and earlier, natural law principles, notably the emphasis on reason and conscience, entered English law in canon law form by way of the Chancellors. Luigi de Luca has emphasized the role of canonical forms in equity, and has related St. Germain's thought to Italian sources — *Aequitas Canonica ed Equity Inglese alla Luce del Pensiero di C. Saint Germain*, 3 *EPHEMERIDES IURIS CANONICI* 46-66 (1947). Helmut Coing has investigated further the manner in which the *denunciatio evangelica*, a canon law procedure which enforced the duties of "reason and conscience" as defined by natural law and divine law, provided the substantial rules and procedure for the working of equity — *English Equity and the Denunciatio Evangelica of the Canon Law*, 71 *LAW QUARTERLY REVIEW* 223-41 (1955). See also E. Wohlhaupter, *Der Einfluss naturrechtlicher und kanonistischer Gedanken auf die Entwicklung der englischen Equity*, 2 *ACTA CONGRESSUS IURIDICI INTERNATIONALIS ROMAE* 439-61 (1935).

There can be little doubt that natural law principles were still alive and meaningful in Elizabethan and Jacobean England. But equally certainly they were at odds with the policy of the age, of which Francis Bacon was a determined champion.

An ironic or tragic footnote to these comments is provided in the last reference to the topic that we know him to have made. In the *Memorandum* that he drew up in preparation for an audience with his sovereign shortly after the ruinous charges of corruption had been made against him, he seems to draw particular attention to a conflict between natural law and the King's will in this circumspect plea:

Now for any further speech, I would humbly pray his Majesty that whatsoever the Law of Nature shall teach me to speak for my own preservation, Your Majesty will understand it to be in such sort as I do nevertheless depend wholly upon your will and pleasure. . . .<sup>42</sup>

BERNARD McCABE

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42. 14 SPEDDING 237.