

‘Legal Theory, Private Property, and the Reformation’

Noah Dauber

Noah Dauber received his Ph.D. in Government from Harvard University in 2006. Since then he has been a lecturer in the Committee on Degrees in Social Studies there. His research interests focus on late medieval and early modern history of political thought, the history of social science, the history of the state and political organization, and the history of social policy. He is revising his first book, *The Invention of Political Science* currently. He has recently published “Civil Authority and Aristotelian Argument in Philip Melanchthon’s *Commentary on Aristotle’s Politics*,” in *Politischer Aristotelismus: Untersuchungen zur Rezeption der aristotelischen Politik von der Antike bis zum 19. Jahrhundert*, eds. Christoph Horn und Ada Neschke-Hentschke (Verlag Schwabe, Basel/Stuttgart, 2008).

Introduction to the paper delivered on January 19, 2009: ‘Legal Theory, Private Property, and the Reformation’

Dauber’s seminar paper focuses on the role of positive and natural law in defining private property during the Reformation. The period immediately preceding the Reformation was one of great innovation in public and private law in Germany. It was the great age of the territorial ordinances (*Landesordnungen*) in which the princes of Germany set out their determinations on a variety of legal questions; of innovation in ingenious contracts which at once avoided the stigma of usury and provided credit; and of changes in land use and tenure. These changes were reflected in the faculties of theology of Germany in works of cases of conscience for confessors and even in commentaries on the Sentences of Peter Lombard, the standard textbook in the faculties of theology for centuries.

Gabriel Biel and Conrad Summenhart of the faculty of Theology in Tübingen were the most influential of the professors in Germany of the late fifteenth century. It was their ideas on politics and economics, originating in the work of Duns Scotus, which became definitive for the Reformation, and really, for an entire generation of theologians. Summenhart above all clarified and set the terms of debate. As Heiko Oberman has shown, his resistance to the canon lawyers on the subject of the tithes was thrilling for the young theologians of the day and some decades later explosive in the hands of the peasants. Dauber shows that Summenhart also took a revolutionary approach to private property, where he argued forcefully that the introduction of private property was due to civil authority and positive law, not natural law or divine law. This has been argued before, by Scotus and the Franciscans in the poverty debate, but Summenhart argued with a new determination and used the opportunity to criticize natural law as a kind of general thinking which when applied to the world after the Fall leads to conflicts of rights and desolation. Natural law did recommend private property after the Fall, but only in the most general way. It is authority which is necessary, Summenhart argued, to specify which goods belonged to which person particularly. And such particularity is necessary after the Fall, when human nature can no longer be relied upon.

Dauber then shows that the broad approach used by Summenhart was adopted by Philip Melanchthon in his *Commentary on Aristotle's Politics*. However, rather than arguing that private property necessarily required civil authority, Melanchthon preferred to take up the weak form of natural law that Summenhart left standing in the hopes of convincing the peasants and Anabaptists of the error of their ways. Dauber concludes that Summenhart's description of a legislative authority responsible for the disposition of private property prefigures the idea of the modern state in some respects and that the idea of natural law criticized by Summenhart and championed by Melanchthon became the modern natural law familiar from Grotius and Hobbes.

Reformation (and pre-Reformation) political thought is covered as much in the history of religious thought as in the history of political thought. The background for the paper, really, the world in which the paper is set, is to be found in Heiko Augustinus Oberman, *Masters of the reformation: the emergence of a new intellectual climate in Europe*, trans. Dennis Martin (Cambridge, 1981). This can be supplemented by the excellent chapter on the old and new laws in Heiko Oberman, *The harvest of medieval theology; Gabriel Biel and late medieval nominalism* (Cambridge, 1963). The political thought of the theologians who appear in the first part of the paper (principally Biel and Summenhart, but also Gerson, Ockham, and others who are only gestured at in the paper) are discussed in Annabel S Brett, *Liberty, right, and nature: individual rights in later scholastic thought* (Cambridge, 1997) and Brian Tierney, *The idea of natural rights : studies on natural rights, natural law, and church law, 1150-1625* (Atlanta, Ga., 1997) in the context of the discussion of natural rights, but both of their accounts touch on many other issues as well. For the Peasants' War, the political thought of the peasants, and the variation in political organization in early modern Germany see Peter Blickle, *From the communal reformation to the revolution of the common man*, trans. Beat Kümin (Leiden, 1998). Blickle has published on these themes in many different works, but *From the communal reformation* is relatively up-to-date and in English. A remarkable study of Melanchthon, Wilhelm Maurer, *Der junge Melanchthon zwischen Humanismus und Reformation* (Göttingen, 1967), though covering a wealth of issues, is also one of the most useful resources for Reformation political thought. Finally, on Melanchthon, my account owes much to Sachiko Kusukawa's "Vinculum concordiae: Lutheran method by Philip Melanchthon," in *Method and order in Renaissance philosophy of nature*, eds. Daniel A. Di Liscia, Eckhard Kessler, Charlotte Methuen (Aldershot, 1997), pp. 337-354.

The chief sources for the paper are:

Conrad Summenhart, *De Decimis*, in *Conradi Summenhart opera omnia*, ed. Helmut Feld, vol. 1 (Mainz, 2004).

Conrad Summenhart, *Septipertitu opus de contractibus pro foro conscientie atq; theologico* ([Hagenau], [1500]).

A translation of "The Twelve Articles" appears in *Luther's Works*, ed. Jaroslav Pelikan and Helmut T. Lehmann (St. Louis 1955-76), xlvii. 8-16. The original text is printed in *Flugschriften der Bauernkriegszeit*, ed. Adolf Laube and Hans Werner Seiffert (Berlin 1975), pp. 26-31.

Philip Melanchthon, *Commentarii in aliquot politicos libros Aristotelis*, in Philip Melanchthon, *Corpus Reformatorum Philippi Melanthonis opera quae supersunt omnia*, hg. v. Karl Gottlieb Bretschneider und Heinrich Ernst Bindseil (28 Bde., 1834-60; Reprint, New York, 1963)

Philip Melanchthon, *Eyn schrift...widder die artickel der Bawrschafft* (1525) in Melanchthon, *Werke in Auswahl*, hg. v. Robert Stupperich ([Gütersloh] : Bertelsmann, 1951)