# FOOL'S GOLD? A LIBERTARIAN ANALYSIS OF VANDRUNEN'S ACCOUNT OF STATE LEGITIMACY

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*Abstract:* This article engages the theoretical and biblical accounts of state legitimacy given by David VanDrunen in his book, *Politics after Christendom*. It argues that VanDrunen's theoretical account of legitimacy is at odds with his understanding of law and rights and in tension with many of his economic and theological observations. Furthermore, it argues that his biblical account of legitimacy fails to meet the rigorous standard he lays down for justifying coercion and violence.

*Keywords:* State legitimacy, Libertarianism, Noahic Covenant, Natural Rights

## I. INTRODUCTION

David VanDrunen's book, *Politics after Christendom*, is a mine of political, theological, and economic insight – a mine that provides many riches for those seeking to advocate for liberty. The work delves deep into the Noahic Covenant to develop a political-theological vision (chapters 1-6), and then brings forth the treasures in the form of application to the most pertinent loci of political theology (chapters 7-12). And yet, not all of the treasures produced by this mine are of the same quality, in particular, the arguments for state legitimacy turn out to be, upon closer examination, fool's gold – attractive at first glance, but of little value.

VanDrunen gives two accounts of the legitimacy of the state: the first is a biblical account in chapter 1, and the second is a theoretical account in

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chapter 11. Most of this article will be taken up expounding and critiquing his theoretical account, but at the end I will address his biblical account as well.

To begin, VanDrunen ought to be commended for showing an awareness of significant libertarian writers and engaging with their ideas. Among the sources cited in his work are *Anarchy, State, and Utopia* by Robert Nozick, *Anarchy and Legal Order* by Gary Chartier, *The Machinery of Freedom* by David Friedman, *Anarchism/Minarchism* ed. by Roderick Long and Tibor Machan,[2] and *The Routledge Handbook of Anarchy and Anarchism* ed. by Gary Chartier and Shad Van Schoelandt. One might lament that such names as Rothbard, Hoppe, and Huemer et al are missing from this list, but VanDrunen still demonstrates an unusual awareness and interaction with libertarian sources for a Reformed theologian.[3]

In addition, VanDrunen is to be commended for offering an account of state legitimacy. Too often theologians assume the legitimacy of the state rather than argue for it, but not so with VanDrunen. At the beginning

[2] Roderick Long is incorrectly listed as Rodney Long in VanDrunen's book.

[3] For example, in *Rethinking Christ and Culture*, Craig Carter does not interact with any of the classic libertarian texts and, moreover, uses "anarchy" in the sense Tolkien lamented ("whiskered men throwing bombs"), saying things such as, "The essence of all government is tyranny, but tyranny is preferable to anarchy most of the time for most people because chaos and random violence make daily life so miserable." (Craig A. Carter, *Rethinking Christ and Culture: A Post-Christendom Perspective* (Grand Rapids: Brazos Press, 2007), p. 187.) In *The Two Kingdoms*, Bradford Littlejohn does not cite a single libertarian author and does not engage with libertarian ideas except in passing comments. (W. Bradford Littlejohn, *The Two Kingdoms: A Guide for the Perplexed* (Lincoln, NE.: Davenant Trust., 2017)). In *Awaiting the King*, James K. A. Smith does not engage any anarchist writers and only mentions libertarianism in passing. (James K. A. Smith, *Awaiting the King: Reforming Public Theology*, Cultural Liturgies (Grand Rapids, Michigan: Baker Academic, 2017)). Similarly, in *The Case for Christian Nationalism*, Stephen Wolfe does not engage any anarchist or libertarian author; his only mention of libertarianism is to misconstrue it as denying pre-political and unchosen bonds. (Stephen Wolfe, *The Case for Christian Nationalism* (Moscow, Idaho: Canon Press, 2022), p. 465). Finally, *Political Church* by Jonathan Leeman contains no engagement with anarchist or libertarian authors. (Jonathan Leeman, *Political Church: The Local Assembly as Embassy of Christ's Rule*, Studies in Christian Doctrine and Scripture (Downers Grove, Ill.: IVP Academic, 2016)).

of his theoretical argument for state legitimacy, he lays out two basic assumptions, which libertarians can applaud,

> 1) "The use or threat of physical coercion against fellow human beings is illegitimate unless justified."
>
> 2) "All actions of government are either overtly coercive or operate at some level under threat of coercion."[4]

From these he concludes that "The burden of proof for state activity should lie with the government, not the governed."[5]

*Summary*

In this article, I will contend that VanDrunen has not presented a case that meets his own robust standards and is, in fact, inconsistent with his own analysis of law and natural rights and in tension with many of his theological and economic insights. He argues that the state is justified by the customary legal order, but also that the customary legal order is based on justice and consent, both of which inconsistent with the state. Furthermore, he argues that the state's role is to protect negative natural rights, but fails to adequately show how the state does so without itself violating those rights. Finally, he recognizes the danger of politicization, the advantage of market solutions to problems, and the problem of human sinfulness, but fails to recognize the tension in which these stand to the state – a centralized, geographical monopoly on the legalized use of violence.

We will see, VanDrunen's argument is closely tied to his analysis of law, justice, and rights, which are all framed by the covenant God made with Noah. So in order to understand his argument, we must start there.

[4] David VanDrunen, *Politics after Christendom: Political Theology in a Fractured World* (Grand Rapids, Michigan: Zondervan Academic, 2020), p. 324.

[5] Ibid, p. 325.

## II. NOAHIC BACKGROUND OF VANDRUNEN'S ARGUMENT

The Noahic Covenant shapes VanDrunen's entire work. In the introduction, VanDrunen states, "While this book gives attention to many of the biblical covenants, it makes special use of the covenant with Noah (Gen 8:21–9:17). The Noahic covenant, I argue, is foundational for understanding the revelation of God's will in the natural law, the character of Christians' pilgrimage in the present age, and the nature of God's common rule."[6] The Noahic covenant is universal, encompassing all of creation; preservative, restraining but not resolving the presence of evil in the world; and temporary, put in place until the second coming of Christ.[7] In other words, the Noahic covenant deals with all of creation, including both believers and unbelievers, and is not intended to provide salvation but merely preserve the post-diluvian world as the stage upon which God would display His redemptive acts.

VanDrunen notes that the Noahic covenant lays out a modest ethic for the human race. Mankind is commissioned to "be fruitful and multiply and fill the earth" (Gen. 9:1, ESV), permitted to eat plants and animals (though not animals with their life-blood, Gen. 9:2-4), and to enact retributive justice against murderers (Gen. 9:6).[8] He argues that at least three sets of institutions are necessary for the carrying out of the Noahic commission, namely, familial, enterprise, and judicial institutions.

My focus in this article is on VanDrunen's treatment of judicial institutions and central to his discussion of those institutions is Genesis 9:6, "Whoever sheds the blood of man, by man shall his blood be shed, for God made man in his own image" (ESV). VanDrunen argues that this verse authorizes humans to engage in "retributive justice for intrahuman

[6] VanDrunen, *Politics after Christendom*, p. 20-21.
[7] Ibid, p. 63-64.
[8] Ibid, p. 80-81.

violence."[9] Essentially, this verse is the basis for the development of judicial institutions necessary for the carrying out of the Noahic commission. Concerning these institutions, he says, "These judicial institutions need not be arms of the state, since private organizations can provide security, mediation, arbitration, and related services. But the need for such institutions presents a context in which civil government, arguably, becomes a morally plausible idea."[10] When I reference the Noahic covenant throughout the rest of this article, it is this aspect that I have primarily in view.

## III. VANDRUNEN'S DEFINITION OF A STATE

Throughout his work VanDrunen uses the terms "government," "civil government," and "the state" synonymously.[11] He never gives a formal definition of what he means by "civil government" or "state," but he describes the function of the state in such a way as to come close. He says, "Government is not voluntary. It asserts jurisdiction over all people within its geographical bounds and exercises physical coercion against those who resist it."[12] This is in keeping with his statement earlier in the book that, "*Everything* civil government does is grounded in at least the threat of coercion."[13]

VanDrunen gets more specific when he contrasts the state with familial and enterprise institutions. He says,

> Government institutions are not natural in the sense that familial institutions are, and they are not voluntary in the sense that enterprise associations are. Governments claim jurisdiction over every person within their

[9] Ibid, p. 64.
[10] Ibid, p. 84.
[11] Ibid, p. 25-29.
[12] Ibid, p. 323.
[13] Ibid, p. 46-47, emphasis original.

> territories, do not allow these people to opt out, and back up their policies and taxation codes with threat of physical coercion.[14]

So, according to VanDrunen, the state is an involuntary, geographically-bound institution that operates on the basis of coercion or the threat thereof in everything it does, especially towards those who resist it. Moreover, the state does not permit anyone within its claimed jurisdiction to opt out.

The only thing he takes exception to from the modern conception of the state is its monopoly status – though it is not clear whether he does because he believes the state *does* not possess that monopoly or *ought* not to possess that monopoly. VanDrunen states, that because of the nature and role of the law in legitimizing a government (more on this in the next section), "There is a problem with the contemporary notions that the state properly holds a monopoly on coercive power and that its authority preempts all others."[15]

Already there is a tension here, as it is unclear how an involuntary institution that does not allow anyone within its claimed jurisdiction to opt out is not a monopoly. It may be true that the monopoly is not always exercised, but it is claimed. It seems that VanDrunen wants to deny that the state is a monopoly, yet his description of the state tacitly admits that it functions as a monopoly. If one takes VanDrunen at his word that the state he is justifying is not a monopolistic state, then his arguments are reduced to mere theorizing and have no relevance to the legitimacy of modern monopoly states.

## IV. VANDRUNEN'S ARGUMENT FOR STATE LEGITIMACY

VanDrunen lays out his argument for state legitimacy very succinctly. He says,

[14] Ibid, p. 330.

[15] Ibid, p. 328. VanDrunen cites Max Weber and Hobbes as the originators of this idea.

> The basic argument is not complicated. If legal authority emerging through the customary order is legitimate, then other forms of authority it authorizes are also *prima facie* legitimate. And among other forms of authority the law may authorize, and which it seems likely to authorize, is civil government. That is to say, where the customary legal order recognizes certain bodies and offices of government, approves of certain means of staffing those offices, and defers to certain kinds of government action for enacting and defending just rules for the good of the community, these various provisions are legitimate.[16]

One can formalize VanDrunen's argument thusly:

P1: The customary legal order is legitimate.

P2: The customary legal order may legitimately authorize other authorities.

P3: The customary legal order has legitimately authorized the state.

∴ The state is legitimate.

This formalization is a bit stronger than VanDrunen's initial wording since he says only that the customary legal order "may" and "is likely to" authorize the state, however, VanDrunen does contend that the customary legal order has authorized the state, as we shall see.

*Law and the Customary Legal Order*

It is clear from the argument above that VanDrunen's argument for the legitimacy of the state relies heavily on his analysis of law in the preceding chapter (chapter 10). In that chapter, VanDrunen argues for a polycentric account of law as the customary legal order. Unlike how he treats the state, he gives very clear definitions of laws and customs. His definitions are as follows:

> Law: norms of conduct considered obligatory in a community.[17]

[16] Ibid, p. 328.
[17] Ibid, p. 290.

> Customary order: the patterns of conduct to which members of a political community ordinarily adhere.[18]
>
> Customary legal order: those aspects of the customary order that members of the community regard as legally binding.[19]

The reader will at once notice the similarity between the definitions of *law* and *customary legal order*. This is intentional as VanDrunen argues that these are identical – the law is the customary legal order.[20]

For VanDrunen, the law or customary legal order arises from the bottom up, from innumerable interactions between individuals, families, and businesses. He argues against legal positivism – a monocentric view that holds that the state is the only source of law – and instead adopts a polycentric account of law, namely, an account that denies that the state is the only – or even most important – source of law.[21] Instead, law is produced by any institutions or associations that shape the customary norms of behavior in a society, including businesses, churches, labor unions, universities, etc.[22] He draws on the work of Hayek and others concerning spontaneous order and argues that the law "is constituted by the patterns of conduct resident in the overlapping real-life relationships among millions of individuals and associations. It is the product of the spontaneous coordination of the tiny bits of relevant knowledge possessed by all the participants of complex modern societies."[23]

According to VanDrunen, this way of producing law fits within the broader Christian and Noahic understanding of each individual as made in the image of God and of equal worth. Therefore, it is of utmost importance that the law be produced organically and consensually, rather than imposed by violence. Concerning familial, economic, and judicial institutions, he writes, "Since all people are of equal worth and dignity,

[18] Ibid, p. 300.
[19] Ibid, p. 300.
[20] Ibid, p. 301.
[21] Ibid, p. 295.
[22] Ibid, p. 297.
[23] Ibid, p. 312.

these authority structures ought to develop organically and consensually rather than by some people coercively imposing their will upon others."[24]

Significantly, VanDrunen locates the consensual nature of the customary legal order as foundational to its justice. He writes, "Polycentrists often emphasize that while legislation makes law by imposing the will of one upon the many, that is, by coercion, the customary order makes law by consent."[25] This means that, for VanDrunen, cases of injustice in a society, even if widespread and systemic, are not approved by the customary legal order. He says, "Someone might note that most horrific customs do not enjoy the genuine consent of all parties involved, and thus do not fit the idea of 'customary legal order' as I defined it. That is true."[26] In his section concerning civil resistance in the following chapter, VanDrunen makes the point explicitly, saying, "Chapter 10 argued that the customary legal order is the law, but essential to that argument was that the customary legal order coordinates a community's life by free, mutual, and consensual interaction," and "unjust law hinders the task that law ought to promote, and thus the human community has no authorization to develop unjust laws."[27]

Because the state derives its legitimacy and authority from the legitimacy and authority of the law, it is necessarily a restricted state. VanDrunen puts it this way, "Government agencies and officials have legitimate authority only within the bounds granted by the law (that is, the customary legal order), and the law has authority only within the bounds of the natural law (which is the law of God)."[28]

### *Natural Law, Justice, and Natural Rights*

This raises the question as to the character and extent of natural law, which VanDrunen addresses in chapter 9 of *Politics after Christendom*. His

[24] Ibid, p. 292.
[25] Ibid, p. 316.
[26] Ibid, p. 317.
[27] Ibid, p. 354.
[28] Ibid, p. 352.

basic thesis is that "Justice should be the foundation of law and government authority."[29] Having already laid out his argument for government and conception of law as customary legal order, it remains to show how he grounds this in a conception of justice and natural rights.

VanDrunen argues that the Noahic Covenant (remember Genesis 9:6) speaks of *rectifying justice*, that is, justice that seeks to right wrongs.[30] This justice does not fit neatly into the modern debates over constitutive or foundational justice, nor the debates about justice as rights vs. justice as right-order.[31] According to VanDrunen, the Noahic picture of rectifying justice involves retribution and compensation, while allowing room for forbearance in some cases when the broader purposes of the Noahic covenant are taken into account.[32]

This vision of Noahic justice, VanDrunen argues, implies the existence of negative natural human rights.[33] Natural human rights are "just claims that all individuals properly assert in every cultural context, simply by being human, and that laws and governments ought to respect as a matter of justice."[34] As *natural* rights, these rights are universal, equal, and reciprocal – in other words, they apply to all human beings in the same way[35]

[29] Ibid, p. 249.

[30] Ibid, p. 251.

[31] Those who adopt a view of justice as foundational argue that it lays out the general rules and principles upon which a society is built. Those who adopt a view of justice as constitutive contend that justice is what reflects and protects virtue in a society. The distinction between justice as rights vs. justice as right-order comes from Nicholas Wolterstorff. The former position holds that justice is grounded in inherent rights, the latter that it is found only in a rightly ordered society, Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton, N.J.: Princeton University Press, 2010).

[32] VanDrunen, *Politics after Christendom*, p. 258-268.

[33] Ibid, p. 270-289.

[34] Ibid, p. 270. VanDrunen does make a special exception for children having positive rights claims against their parents.

[35] Ibid, p. 271.

– and all human beings possess them by virtue of their creation in the image of God. As *negative* rights, they entail no positive obligation upon others but merely assert their right not to be harmed in certain ways.[36]

VanDrunen contends that positive natural rights would be neither universal nor reciprocal, usually depend on some level of technological progression, and cannot exist in harmony with each other; therefore, the concept of positive rights is incoherent: "I conclude that no conception of positive rights *both useful and coherent* can be implied from the Noahic covenant."[37]

For VanDrunen, negative rights are grounded in the Noahic Covenant, which establishes the general moral order for the postdiluvian, fallen world. This grounding is principally found in the *lex talionis* principle in Genesis 9:6, which points toward a vision of negative natural rights and rectifying justice. VanDrunen states, "Noahic justice makes sense of the world as we know it and accords with the natural law."[38]

He ends the chapter by discussing the Noahic covenant and judicial institutions and, though he recognizes that the Noahic covenant gives no explicit instruction as to the *kind* of judicial institutions that might legitimately arise and recognizes the validity and sometime-superiority of private judicial institutions, he still makes room for the state – albeit a severely restricted one.[39] In his own words, "Whatever other authority civil government may have, its core responsibility is to enforce the Noahic justice contemplated in previous pages.…To say that a government enforces

[36] As an example of the distinction between negative and positive rights, consider the right to marry. A *negative* right to marry affirms that an individual has the right to pursue marriage and that no other individuals have the right to prevent him from doing so (provided he does not violate any other negative rights in his pursuit). His negative right imposes no extra duties upon anyone. A *positive* right to marry affirms that he has a right to pursue marriage *and that someone has the duty of marrying him*.

[37] VanDrunen, *Politics after Christendom*, p. 275, emphasis original. See discussion in 275-280.

[38] Ibid, p. 281.

[39] Ibid, p. 284-285.

Noahic justice is to say that Noahic justice stands over the government and provides a standard which it must honor."[40]

### *The Bounds of State Authority*

So, what are the specific bounds within which the state may legitimately operate? Returning to chapter 11, VanDrunen considers three headings: protectionism, perfectionism, and service-provision.

Concerning the first, he argues that enforcing rectifying justice is the core responsibility of the state, based on the commission in Genesis 9:6[41] which, though originally given to the entire human race, has been delegated to the state by the law. As such, VanDrunen sees that the coercion of the state is clearly justified in inflicting retribution on rights violators, securing just compensation to the victims, and working to prevent such violations from happening.[42] Under this heading of protectionism, VanDrunen locates the legitimate government activities of policing, administrating the courts, and providing national defense.[43]

Interestingly enough, VanDrunen notes that rights violations can be and often are handled privately. Indeed, he states, "Theoretically, all violations of natural rights could be rectified through such private associations,"[44] but rejects this as a possibility on pragmatic grounds.

Second, VanDrunen defines perfectionism as the idea that it is the state's role to improve the moral character of its citizens.[45] Though not dogmatic, he considers this idea to be an uncomfortable fit within the Noahic background for the state and society. He gives three reasons why this is the case: First, the Noahic covenant takes a sober view of human sin and the corrupting nature of power. Second, the Noahic covenant has narrow

[40] Ibid, p. 285-286.

[41] "Whoever sheds the blood of man, by man shall his blood be shed, for God made man in his own image." (ESV)

[42] VanDrunen, *Politics after Christendom*, p. 331.

[43] Ibid, p. 332.

[44] Ibid, p. 331, cf. p. 84.

[45] Ibid, p. 332-333.

purposes that do not include the sort of thick moral vision of perfectionism.[46] Third, the Noahic covenant authorizes pluralistic political communities which make room for significant moral and religious disagreement.[47]

Third and finally, VanDrunen takes up the issue of state service provision. He frames the question as whether providing services is the sort of thing that the law can properly authorize the state to undertake.[48] As with perfectionism, VanDrunen is cautious about affirming state provision of goods. He begins his discussion with two preliminary points, the first distinguishing between non-excludable public goods and private goods and the second reaffirming that natural rights are purely negative, so no one can have a natural right to roads, medical care, etc. Together, these point toward the types of goods that are potential candidates for state provision (non-excludable public goods) and the type of argument that must be made for them (a non-rights-based argument).[49]

Analyzing it through the framework of the Noahic Covenant, VanDrunen offers three considerations that shape how he answers the question of state service provision. First, all humans are sinners, including government officials, so there is a predisposition against the centralization of services. Second, the Noahic Covenant envisions a pluralistic society so any service provision should not exclude members of that society based on religion or worldview. Third, the Noahic Covenant commissions humans to engage in the economic and technological development that enables them to multiply and fill the earth, from which he concludes, "Goods that are necessary for a community to carry out its Noahic commission and that are truly nonexcludable seem to leave us no choice: if the state

[46] According to VanDrunen, "perfectionism refers to a governments quest to make the members of its community better people." Ibid, p. 332.

[47] Ibid, p. 333-334.

[48] Ibid, p. 341-342. This is significant since it implies that there are things the law cannot *properly* (VanDrunen's word) authorize the state to do and therefore one must make a judgment not only as to whether the law does, in fact, authorize any given thing but whether that authorization was proper.

[49] Ibid, p. 342.

alone can provide goods the community needs to fulfill God's calling, it must be proper for the law to authorize the state to do so."[50]

So, what type of services does VanDrunen envision the state as being authorized to provide? He gives no clear answer and goes so far as to say, "Genesis 8:21–9:17 obviously provides no direct authorization for anyone to provide services for the community with the backing of coercive force."[51] Therefore, any argument from the Noahic covenant must be done indirectly. VanDrunen does find such indirect support for certain types of nonexcludable public goods that do not infringe on the pluralistic character of society. He gives roads as a good example of a non-excludable public good that *could* be provided on the market (though he gives no rationale for its non-excludability). In the end, he directly affirms that the state is authorized to provide policing, and tentatively suggests that it may be authorized to some sort of welfare.[52]

## IV. PROBLEMS

With the rather lengthy summary of VanDrunen's argument completed, I will proceed to the critique. I hope that the summary has already highlighted some potential problems for the reader.

### *Contradiction between the Law and the State*

Given that VanDrunen's argument grounds the state's legitimacy on that the fact that it has been legitimately authorized by the customary legal order, I will begin by expounding his view of that order. To begin, his definition of the customary legal order is descriptive, not prescriptive – "those aspects of the customary order that members of the community regard as legally binding." This definition does not imply anything one way

[50] Ibid, p. 344.
[51] Ibid, p. 342.
[52] Ibid, p. 346-48.

or another about the *justice* of the customary legal order. It is merely a description of the legal opinions of a community. Therefore, it is entirely possible that the customary legal order may authorize injustice, as VanDrunen recognizes (more on this later). It is all too easy to imagine the vast majority of a community legally authorizing the oppression of a minority. For example, a society in which only 0.5% have red hair could have a settled customary legal order in which the hunting of red-haired persons for sport was legally authorized.

Consequently, it is not enough to simply recognize that the customary legal order has authorized the state. However, even granting that it has (and it is doubtful whether this should be granted, given the lack of evidence VanDrunen gives for it) it does not settle the question of the state's legitimacy, since one must answer the further question: Was the authorization of the customary legal order *just*? VanDrunen recognizes as much when he states, "Unjust law hinders the task that law ought to promote, and thus the human community has no authorization to develop unjust laws."[53] In other words, the one seeking to make this argument must give a moral defense of Premise 3 – which VanDrunen does not do.

On the contrary, VanDrunen implicitly gives evidence that the state authorization given by the customary legal order is itself illegitimate by emphasizing the consensual nature of the customary legal order. Remember that VanDrunen argued that the consensual nature of the law was essential to his argument and that those authorizations of the law which (like the example above) authorize injustice are by nature non-consensual (since the victims do not give their consent) and therefore illegitimate.

If, therefore, consent is essential to the law and dissent to a judgment or practice makes it not properly part of the law, then *ipso facto* the law's authorization of the state to which VanDrunen appeals as the grounds of its legitimacy is, in fact, illegitimate, since there exist those who deny the

[53] Ibid, p. 355.

validity of the state. The very existence of anarchists within a society nullifies his thesis. One might paraphrase VanDrunen's words against him and say that the state does not enjoy the genuine consent of all parties involved and thus does not fit within the customary legal order as he defines it.[54]

There is an inherent contradiction in VanDrunen's argument that cannot be overcome. Consent is essential to the customary legal order; coercion is essential to the state. Where coercion is present, consent cannot be, and vice versa. Therefore, according to his own analysis, the customary legal order *could not* legitimately authorize the state.

*Contradiction between Rights and the State*

Another contradiction in VanDrunen's argument comes from his understanding of rights.

At this point, it is apropos to recall VanDrunen's statement that, "Government agencies and officials have legitimate authority only within the bounds granted by the law (that is, the customary legal order), and the law has authority only within the bounds of the natural law (which is the law of God)."[55]

One may now formalize the argument against the state from VanDrunen's account of negative rights, natural law, and the customary legal order:

P1: The natural law establishes negative rights and prohibits their violation.

P2: The customary legal order has no authority to violate the natural law.

P3: The customary legal order cannot legitimately authorize violations of natural rights.

P4: The state by definition involves the violation of natural rights.

∴ The customary legal order cannot legitimately authorize the state.

[54] Ibid, p. 317.
[55] Ibid, p. 352.

Because I expect that VanDrunen would deny P4 I will give a brief justification for it. According to VanDrunen, the state is an involuntary, unnatural, coercive institution. In light of this, he acknowledges that the burden of proof lies on the one seeking to justify state action. He attempts to find justification in the customary legal order which justly operates according to the natural law and natural rights revealed in the Noahic Covenant. There is only one problem, the Noahic Covenant only authorizes the use of violence or coercion in order to defend one's rights or punish rights violators. The state, however, routinely violates the rights of the entire citizenry, does not give them the option of opting out, and is entirely dependent on this violation to continue to exist. We call this taxation.

VanDrunen summarizes this point well in a prior article:

> All government actions, even those authorized by the law, are either overtly coercive or operate under threat of coercion.[56]
>
> Political power may be wielded to defend against those who violate others' rights, and for this purpose only.[57]

It is hard to avoid the conclusion that any institution that is unnatural, involuntary, and initiates coercion against innocent parties necessarily involves a violation of others' rights and not a defense of them. Such an institution, therefore, cannot be said to be using its power, "for this purpose only."

*Tension between Service Provision and Theology and Economics*

The first two tensions between the nature of the state and the nature of the customary legal order and negative natural rights sufficiently dismantle VanDrunen's argument for state legitimacy. However, there exists yet another area of tension in VanDrunen's account of state legitimacy, namely, between his theological and economic insights on human nature and society on the one hand and the nature of the state on the other. As

[56] David VanDrunen, "The Protectionist Purpose of Law: A Moral Case from the Biblical Covenant with Noah," *Journal of the Society of Christian Ethics* 35, no. 2 (2015), p. 105.

[57] VanDrunen, "The Protectionist Purpose of Law," p. 108.

these insights are not central to his argument for the state in the way that law, justice, and rights were, they do not constitute a contradiction, but merely a tension in his argument. I will quote some key insights and briefly point out the tension between their existence and that of the state.

First, VanDrunen recognizes the danger of politicization, saying, "Whatever is politicized is made subject to the course of power of the majority, or even a clever and powerful minority… the rule of law demands keeping important activities away from the clutches of politics and the social divisiveness it fosters."[58] Given the truth of this statement, the implication is that services like rights/law enforcement and national defense – given their importance – should be kept away from the clutches of politics.

Second, he acknowledges the advantage that markets have over coercion in producing value and maximizing efficiency,

> [F]ree, noncoerced human interaction in the marketplace is especially effective in promoting industriousness, resourcefulness, and innovation for the general benefit of the human race and broader created order. If that is true, it indicates that providing important goods and services is best left to private means where possible. In real life, government agencies are notorious for their inefficiencies and failures…. Customer service at private companies is not always stellar, but when people in a market economy are displeased with their experience at a grocery store or restaurant, they can find another one. Removed from the discipline of the competitive market and the knowledge it provides about customer preferences, government-run services naturally sag in quality.[59]
>
> Given the industriousness and creativity fostered by free interaction in a market economy, private endeavors to help the poor are likely to be more robust, efficient, and innovative than programs run through a government bureaucracy.[60]

He goes on to give examples of poor government services including the DMV and the police. However, if government services will "naturally sag in quality" by nature of being removed from the free market and the

[58] VanDrunen, *Politics after Christendom*, p. 346-347.
[59] Ibid, p. 346.
[60] Ibid, p. 347.

forces of competition and loss, why ought a society let any services – let alone the most important, such as law enforcement – remain in its hands?[61]

Third, VanDrunen affirms the sinfulness of all human beings and the ever-present temptation to abuse power:

> Though God commissions magistrates to promote justice, they are among the grandest perpetrators of evil. Authority itself is a good. But civil governments in a fallen world are intractably sinful institutions. The power of the sword that enables them to keep some evil at bay also enables them to do evil on a more vicious scale than private parties.[62]

> All human beings are sinners, including government officials, who face special temptations that accompany power. For many government provided services this creates no special problem. For example, the reality of universal human depravity hardly determines whether a government agency or private company should pick up the garbage. But the fact that all are sinners should make us wary of concentrating a great deal of coercion backed power in any small group of hands. Thus, keeping service-provision dispersed among many private hands seems generally preferable to entrusting many services to government hands.[63]

Given this insight one wonders why VanDrunen does not take the next natural step and question whether it is in keeping with the sinfulness of man to entrust one group with the power of the sword, i.e., the power of initiating violence against others. This is especially odd since VanDrunen accepts the legitimacy and even the superiority (in many cases) of private judicial institutions, even private protection.[64] Indeed, he goes so far as to admit that, "Theoretically, all violations of natural rights could be rectified through such private associations."[65] Admittedly, VanDrunen goes on to present a series of difficult scenarios for private

[61] VanDrunen states that "there is no more quintessential government work than running a police department" (p. 346) and even acknowledges that the naturally sagging force applies to it as well, and yet does not then take the next logical step that policing is one of those "important goods and services…best left to private means." He seems also unaware that police departments are a modern invention and have *not* always been state-run.

[62] Ibid, p. 31.

[63] Ibid, p. 343.

[64] Ibid, p. 285, cf. 183.

[65] Ibid, p. 331.

judicial institutions to handle, but by framing them as rhetorical questions he gives the impression that they are insurmountable without demonstrating such. And, given his own presuppositions for establishing state authority,[66] the acknowledgment that there is a theoretically possible way of accomplishing what he holds to be the core responsibility of the state by private – and therefore non-monopolistic, non-coercive, consensual means – is an admission that no justification for the state can succeed unless it robustly and definitively disproves this theoretical possibility.

These three areas (politicization, market advantage, and sinfulness) do not constitute definitive refutations of VanDrunen's argument for state legitimacy, but they do reveal tensions – significant tensions – within his work which, if one accepts what he says elsewhere on these topics, greatly weaken his account of state legitimacy.

*Summary*

I have shown that VanDrunen's account of state legitimacy is at odds with his account of both law and natural rights; therefore, relying as it does on those twin pillars, it is unsuccessful. Furthermore, it is in significant tension with theological and economic insights elsewhere in his work.

## VI. ASSESSING VANDRUNEN'S BIBLICAL ARGUMENTS FOR THE STATE

Having dealt with his theoretical argument for the state, I now turn briefly to VanDrunen's biblical arguments given in chapter 1. VanDrunen

[66] VanDrunen lays out his presuppositions on p. 324-325: 1) The use or threat of physical coercion against fellow human beings is illegitimate and less justified. 2) All actions of government are either overtly coercive or operate at some level under threat of coercion. Conclusion: The burden of proof for state activity should lie with the government, not the governed.

gives three brief New Testament arguments and three brief Old Testament arguments for state legitimacy.[67]

One should also remember the standards VanDrunen himself lays down:

> 1) "The use or threat of physical coercion against fellow human beings is illegitimate and less justified."
>
> 2) "All actions of government are either overtly coercive or operate at some level under threat of coercion."[68]

With those principles in mind, in order for his biblical arguments to succeed they must demonstrate the legitimacy of the state's use of coercion, and not merely be consistent with it. I contend that VanDrunen's arguments, though consistent with the legitimacy of the state, fail to demonstrate that legitimacy.

### *New Testament Arguments*

New Testament argument 1: The New Testament explicitly acknowledges the legitimacy of the state in Romans 13, 1 Peter 2, and 1 Timothy 2.

Response: VanDrunen gives no exegesis of these texts and does not interact with contrary interpretations that do not view them as affirming political legitimacy.[69] For example, it is entirely plausible that in Romans 13 and 1 Peter 2, Paul and Peter are merely instructing Christians on their duties towards the state viewed as a *de facto* holder of power and not as a morally legitimate institution. Moreover, in 1 Timothy 2 Paul merely instructs Christians to pray for "kings and all who are in high positions" (ESV), yet inferring legitimacy from a command to prayer is tenuous at best, especially since the point of that prayer is that Christians might live lives substantially free from state interference.

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[67] Ibid, p. 26-29.

[68] Ibid, p. 324.

[69] Among scholars sympathetic to this view are John Howard Yoder and C. E. B. Cranfield.

New Testament Argument 2: The book of Acts indirectly affirms state legitimacy by recounting how Paul submitted to state officials and appealed to Caesar, and by presenting various state officials in a positive light.

Response: Paul's commission was as the apostle to the Gentiles (Acts 9:15; Rom. 11:33, 15:16) and so it is entirely plausible that he made prudential judgments as to what would hinder and advance his commission. Getting bogged down in a political debate about state legitimacy in which, undoubtedly, he would be charged with sedition would not have furthered his missionary commission. However, because of how he handled himself, the Roman tribune in Jerusalem could say, "I found that he was being accused about questions of their law, but charged with nothing deserving death or imprisonment" (Acts 23:29, ESV), and Agrippa and Festus could agree that "This man is doing nothing to deserve death or imprisonment" (Acts 26:31, ESV). Indeed, Paul even characterizes his appeal to Caesar as a prudential move to escape the Jews who sought to kill him (Acts 28:18-19). Furthermore, Paul writes in 2 Corinthians how he evaded the arrest warrant of Aretas, the king of Damascus (2 Cor. 11:32-33 cf. Acts 9:23-25). Therefore, it appears that Paul's overriding concern was preaching the gospel to the nations, and he interacted with state officials prudentially in order to further that goal.

New Testament argument 3: The New Testament recounts the conversion of a number of state officials (Zacchaeus, Cornelius, Sergius Paulus), none of which are compelled to then leave their posts, therefore affirming the legitimacy of their positions in the state.

Response: This is a more complicated issue than can be completely dealt with here, but a few observations make the case for state legitimacy at least unclear. In the first place, the practical effect of these men leaving their office would have (in all likelihood) been the increase of evil. Zacchaeus would have likely been replaced with the next highest bidder for the tax collectorship without any of his newfound scruples about collecting more than required. Similarly, Cornelius and Sergius Paulus probably

would have been replaced with men who had no Christian convictions about justice and oppression. It is at least plausible that Christian ethics would permit someone to be a part of an unjust, fallen world system if by doing so they could mitigate the injustice. Under VanDrunen's account of strictly limited state authority, much of what the state does is illegitimate and therefore much of the tax money the state collects is illegitimately taken. VanDrunen explicitly acknowledges that roads can be privately provided, does that mean that Christians must foreswear using government roads? Or that Christians cannot work on the construction and maintenance of those roads? I think not. Similarly, Christians can hold public office if by doing so they can mitigate the evil that the state would otherwise perpetrate.[70]

Furthermore, at least with regard to Sergius Paulus and Cornelius, they performed roles (law administration and enforcement) that are not illegitimate in and of themselves. In a free society, law can and should be both administered and enforced. So, even in a perfectly libertarian society, there would be some individuals filling roles like that of Sergius Paulus and Cornelius, albeit removed from the context of a geographical monopoly on the legalized initiation of coercion.

The case is somewhat harder with Zacchaeus as he is a chief tax collector, a position which would not exist in a free society on account of there being no taxation. First, Scripture says nothing either way about Zacchaeus remaining a tax collector. It may be that declaration about giving half of his possessions to the poor and refunding those he has defrauded is an indication that he was resigning from his position. But even if he did, I am not off the hook, because of Luke 3:12-13. In this text, tax collectors approach John the Baptist and ask, "Teacher, what shall we do?" to which he replies, "Collect no more than what you have been ordered to" (NASB). John does not simply say, "Resign and find another profession," rather he

[70] A more detailed discussion can be found in Nick Watts, *Taxation Is Slavery: The Biblical Case for Libertarian Politics* (Gold Coast, Australia: Self-Published, 2020), p. 136-147.

commands them to only collect the bare minimum, what they are *commanded* to collect – which would have been less than could be expected from any other tax collector. This account supports my hypothesis that Christians may serve in the state, even in positions that would not exist in a free society, if they may restrain state evil.

### *Old Testament Arguments*

Old Testament argument 1: God's people made covenants with foreign kings, therefore recognizing their legitimacy.

Response: I admit that this observation is consistent with the legitimacy of the state but deny that it provides explicit evidence of the same. In the first place, it is doubtful that many of the "kings" of the ancient Near East were states in the sense in which VanDrunen is using the word. One scholar notes that in as late as the early monarchical period of Israel, "Kingdoms were ultimately just the highest level of such a household-based social organization, so that it constituted one great household made up of smaller household-based kinship units."[71] One can see this played out in the narrative of Genesis 14 which chronicles the wars between various kings during Abraham's time and in which Abraham is said to defeat the four kings of Elam, Goiim, Shinar, and Ellasar with a mere 318 trained men from his household. Even granting that Abraham took them by surprise at night and that he may have had assistance from three other households (Gen. 14:24) the fact that he was able to defeat them (with no indication that his victory was a result of direct divine intervention) indicates that their force was not composed of five large armies one would expect from latter biblical kings. Rather, the more likely case is that these "kings" were not commanders of nation-states and able to command armies in the tens of thousands, and though Abraham and his allies were undoubtedly the underdogs the match was much more even than it seems.

[71] Zachary Thomas, "Polycentrism and the Terminology of Polity in Early Israel," *Bible Lands E-Review*, S2 2019.

The issue gets more complex after the rise of the Israelite monarchy when Solomon makes a covenant with Hiram, king of Tyre (1 Kings 5:12). By this time, Solomon and Hiram were much more like rulers of a state. So, what can account for the treaty made between Solomon and Hiram? Does it acknowledge state legitimacy? One way of answering the question is to ask another, what would it have looked like if Hiram's rule was not morally legitimate? I contend that not much would have been different. The land surrounding Israel was filled with morally bankrupt, pagan rulers throughout most of its history. Yet Israel never saw it as their commission to leave the Promised Land and subdue those nations. In other words, the commission of Israel was not to "make the world safe for theocracy." Solomon's task in particular was to build the temple in Jerusalem; Hiram, according to the biblical accounts, was a reasonable, relatively just ruler; it makes perfect sense then that Solomon would engage in peaceful trade with Hiram and Tyre rather than aggressive foreign wars.

Old Testament argument 2: Old Testament saints held high political office (e.g., Joseph, Daniel, Esther, Mordecai, and Nehemiah) in pagan states, therefore indirectly affirming the legitimacy of these pagan states.

Response: Much of what I said in response to New Testament argument 3 applies here as well. Each of these persons was in a position in which they could restrain evil by their position and would have had every expectation that in their absence the position would have been filled by an unbeliever.

Moreover, none of the characters VanDrunen mentions seems to have actively sought out their position. Joseph was in prison before he was appointed. Daniel was taken as a captive by a pagan empire. Nehemiah, Esther, and Mordacai were living as exiles in a pagan empire and, at least in the case of Esther and Mordacai, under a king who could be very vindictive if crossed. Moreover, there is a plausible case to be made that Esther and Mordecai were morally ambiguous characters used by the secret providence of God and that not all of their actions are presented as exemplary.

In other words, none of these examples gives a clear and unambiguous affirmation of state legitimacy. They may be consistent with it, but I contend that they are also consistent with the libertarian analysis of the state.

Old Testament argument 3: Jeremiah 27 and 29 portray Nebuchadnezzar as appointed by God as His servant and instruct God's people to live normal lives and seek the good of the cities in which they are taken, thus indirectly affirming the legitimacy of Nebuchadnezzar and the Babylonian empire.

Response: Upon closer examination, these texts do not recognize the moral legitimacy of Nebuchadnezzar's conquest or empire and therefore cannot be used to argue for state legitimacy in general.

Jeremiah speaks of Nebuchadnezzar three times as God's servant (25:9, 27:6, 43:10), but in each of these the emphasis is on Nebuchadnezzar as God's instrument in accomplishing His purposes and the title does not convey moral approbation.[72] In chapter 25, Jeremiah warns Judah about the coming conquest by Babylon as a result of their sin. In verse 9 he says,

> Behold, I will send for all the tribes of the north, declares the LORD, and for Nebuchadnezzar the king of Babylon, *my servant*, and I will bring them against this land and its inhabitants, and against all these surrounding nations. I will devote them to destruction, and make them a horror, a hissing, and an everlasting desolation. (ESV, emphasis added)

Clearly, Jeremiah views Nebuchadnezzar as God's servant appointed to bring judgment upon Judah. This does not, however, constitute a moral approbation of Nebuchadnezzar or his conquest. Just a few verses later, Jeremiah directs his audience to look seventy years forward to when Babylon will itself receive judgment, Jeremiah 25:12-14 says,

> Then after seventy years are completed, I will punish the king of Babylon and that nation, the land of the Chaldeans, for their iniquity, declares the LORD, making the land an everlasting waste. I will bring upon that land

[72] Klaas A D Smelik, "My Servant Nebuchadnezzar: The Use of the Epithet 'my Servant' for the Babylonian King Nebuchadenezzar in the Book of Jeremiah," *Vetus Testamentum* 64, no. 1 (2014): 109–34, https://doi.org/10.1163/15685330-12301142.

> all the words that I have uttered against it, everything written in this book, which Jeremiah prophesied against all the nations. For many nations and great kings shall make slaves even of them, and I will recompense them according to their deeds and the work of their hands. (ESV)

Concerning these verses, J. Dearman says, "That Nebuchadnezzar and Babylon are the Lord's servants in the historical process does not make them immune from his standards of justice."[73] God's just judgement against Babylon put vividly in the succeeding section in which Jeremiah is told to take the cup of Yahweh's wrath and pass it around to all the nations, beginning with Jerusalem and Judah and ending with the king of Babylon (25:17-26).

One can see this same pattern in Jeremiah 27, Nebuchadnezzar, the king of Babylon is called God's servant (27:6) by whom God will punish the nations (27:1-11) who will then be punished by God in the same manner (27:7, 22).

Significantly, the book of Jeremiah ends with an extended oracle of judgment against Nebuchadnezzar and Babylon (50:1-51:64), citing the very conquest of Judah and Jerusalem – the very act which Jeremiah says they acted as the servants of God – as the primary offense for which they are judged (50:11, 17-18, 28, 29, 33; 51:11, 24, 34-35, 49). Indeed, it is striking how in Jeremiah 27, God explicitly refers to Nebuchadnezzar as God's servant and prophesies that he will not return the vessels taken from the temple and even the ones he had left will be taken into Babylon (27:16-22), and yet then in the oracle of judgment upon Babylon states that the judgment is "vengeance for his temple" (50:28, 51:11, ESV).

This is consistent with the prophetic witness concerning Babylon in Habakkuk as well. In Habakkuk 1:12, the prophet speaks of the evil Babylonians (called Chaldeans, cf. Habakkuk 1:5-11) who were to defeat the kingdom of Judah and take them into captivity and exile, Habakkuk says

[73] J. Andrew Dearman, *Jeremiah and Lamentations*, The NIV Application Commentary Series (Zondervan, 2002), p. 232.

this, "O LORD, you have ordained them as a judgment, and you, O Rock, have established them for reproof" (ESV).[74]

However, far from drawing the conclusion of moral legitimacy because Babylon was God's ordained instrument of judgment, Habakkuk recognizes that even in their actions as God's instrument of judgment, it was acting as an evil nation – Habakkuk's whole first chapter is a complaint to God about Babylon's wickedness and evil.[75] Consider verses 15-17, personifying Babylon (or perhaps speaking of its king) as a fisherman, Habakkuk says,

> He brings all of them up with a hook; he drags them out with his net; he gathers them in his dragnet; so he rejoices and is glad. Therefore he sacrifices to his net and makes offerings to his dragnet; for by them he lives in luxury, and his food is rich. Is he then to keep on emptying his net and mercilessly killing nations forever? (ESV)

James Bruckner writes concerning these verses, "Habakkuk stands with his contemporaries Jeremiah and Isaiah, who declare quite unpatriotically that the national enemy will discipline God's people. They do not declare the Babylonians 'good.' To the contrary, God's judgment will fall later harder on the enemy (Hab. 2:16-20)."[76]

Therefore, the Old Testament prophets can simultaneously recognize wicked, pagan kings and empires as servants ordained by God's decree and at the same time evil agents who deserve judgment for the carrying out of that decree.

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[74] The Greek word underlying "ordained" is none other than a form of τασσω (LXX: τέταχας), the root used many times in Romans 13 (thus providing a plausible Old Testament background for a descriptive ordination in that text).

[75] Julie Moller, "The Vision in Habakkuk: Identifying Its Content in the Light of the Framework Set Forth in Hab. 1" (phd, University of Gloucestershire, 2004), https://eprints.glos.ac.uk/3120/.

[76] James K. Bruckner, *Jonah, Nahum, Habakkuk, Zephaniah*, NIV Application Commentary (Zondervan, 2004), p. 216. For another example of a wicked nation being used by God to punish Israel and then being punished by God for those very acts, see Isaiah's prophecies concerning Assyria in Isaiah 9:8-10:34.

## VII. CONCLUSION

VanDrunen's book, *Politics after Christendom*, is filled with biblical and philosophical insights from which libertarians can learn. It is, as I have said, a trove of such treasures. Much of his analysis of natural law, rights, and the customary legal order is perfectly consistent with libertarianism. Furthermore, VanDrunen has the insight and courage to recognize and openly argue that state legitimacy cannot be assumed and that the burden of proof rests on the one claiming to offer an account of it. I commend him highly for all these things.

But VanDrunen's actual arguments for state legitimacy are fool's gold. They may convince an unsuspecting prospector for a little while, but closer examination reveals their insufficiencies. VanDrunen's theoretical argument for state legitimacy is at odds with his account of natural law, rights, and law and in tension with many of his theological and economic insights into the nature of man and the nature of economic activity. Therefore, because I largely agree with his analysis of these things, I reject his argument for state legitimacy.

In assessing his biblical argument for state legitimacy, I find that though certain texts may be consistent with state legitimacy, nevertheless none of the arguments he puts forward necessitate it nor do they meet the burden of proof which VanDrunen correctly places on the one seeking to justify violence and coercion.