

Zombie Sovereignty: Dead Idea, Eternal Life?

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Don Herzog, [Sovereignty, RIP](#) (2020).

[Don Herzog](#)'s new book exhorts its readers to face up to tough facts about the doctrine, purpose, and practice of sovereignty—and the irrelevance of that concept to legal argument. For anyone whose calling is to teach and develop the primary constitutional precepts aimed at taming state power—limiting it, dividing it, and making it accountable—Herzog's book is a hair-raiser of a read, especially in light of the last four years of headlines. It is also a good text for anyone interested in political theory or constitutional doctrine.

In simple terms, sovereignty posits unitary, total command as a requirement to give us order. There must be one unaccountable source of law and of rules. Devised as a means of stopping bloody religious wars in Europe, and perhaps useful today where internal wars rage among sects, the idea has seen its time pass in liberal democracies. Sovereignty as an idea is no longer a means to resolve religious hatred without gore, but a problem of remnants here to make trouble. Unlike Mark Twain's misreported departure, sovereignty's death has been grossly underreported. Pronouncements of its obsolescence by the likes of St. George Tucker, Harold Laski, John Dewey, Hannah Arendt, and H.L. A. Hart (Pp. 265-68) have not had the clout to head off furtive moments of reliance on the classic theory. (P. xii.)

Although he wants, as have others done, to pronounce last rites over the idea, Herzog finds that sovereignty has a certain zombie-like persistence. His achievement is to demonstrate its vacuous, even nonsensical nature as an idea while demonstrating its pernicious continuing appeal. In his preface, he shows that any use of the term that omits the dangerous or vacuous parts leaves us with a capacious label that can describe anyone or anything at all. For me, that's the scary part. The term is useless in argument or analysis, but like the undead, it persists.

Herzog helpfully draws the reader's attention to the commitments—abstract in theory, terrifying in application—necessary to effectuate the big idea. Sovereignty as an idea with considerable staying power is simple enough, and, in these days of American carnage, it is an idea with a degree of popular appeal. First, sovereignty means we need control, and lots of it. Though who "we" are may not be always clear, Herzog proceeds to lay out the nature of the presumed need that we have. If you want social order, and we know many do, you need "a political actor (whether corporate or individual) whose authority is unlimited, undivided, and unaccountable."

Expositors of sovereignty in the life of nations have adopted and advanced similar ideas and offered nominees to fill the role. Charles I of England considered the person of the king to be well suited to the job. Parliament differed, and applied new ideas about limits, sharing, and accountability. The English Civil War provided an early draft for Herzog of the discussions that might arise between practitioners of unlimited authority and adherents of something roughly constitutional in conception. Charles lost the debate—and the English Civil War—and died a martyr king. The Restoration (bringing in Charles II and countless paramours) continued the debate. While arguments raged, the importance to sovereignty of a well-provisioned army asserted itself once more.

Among the merits of the book are a nice account, in Herzog's inimitably striking prose, of Charles's efforts to effectuate his vision and the sad ending for Charles to the enterprise. One gains an appreciation of the phrase "heads will roll," coming and going. Herzog treats us to a vivid description of the expressions of sovereignty inflicted by Charles II upon the restoration of the Stuart vision of sovereignty, in preference to the Cromwellian version that found a taste for military rule. Torture seemed well suited to making clear once more the prerogative of the monarchy, along

with a son's thirst for revenge. It also is a good demonstration of raw power.

Therein lies a bit of a puzzle about the book: why worry about the term, if raw power is all one needs? The irrelevance of the concept of sovereignty is made vivid in Herzog's imaginary summary of the back and forth about ultimate, unlimited power between Charles and his prosecutors in his trial in the Rump Parliament. "A cartoonist could have drawn them sticking out their tongues at one another. 'We are satisfied with our own Authority,' said the lord president. 'You have shown no lawful authority to satisfy any reasonable man,' shot back the king." In this example of a school-yard standoff between the King and "the people," Herzog shows that sovereignty can do no work. He then shows with examples from claims by Presidents to immunity that they don't quite have it either. Who has the guillotine has power, but is that a debate?

I pause here to note that Herzog spends most of his time in the territory of nation states and international law, what a nation can do to its citizens and claim immunity from restraint or redress, and whom it can torture. One reader, Jack Goldsmith, [has argued](#), in effect, that Herzog does a fine job in that domain of demolishing the idea of sovereignty, but that the demolition seems not entirely needed. The bad things Herzog sees sovereignty as doing are accomplished quite nicely using other legal doctrines and applying the logic of power, which goes where it wishes. Goldsmith doubts that the doctrine does any additional harm, really, in legal cases or in what power does. Goldsmith is all ideas. Herzog likes examples that show us fruitless argument and inevitable power moving under sovereignty's banner. He also explains that if the banners of sovereign rule, by a king or "the people," can be finally furled and put away, we have ourselves, told to us in his story of "the efforts of actual people to solve actual problems."

Where does the residual presence of a dead idea leave us? A couple of places. First, there is the social behavior connected to our continuing instinct to bow to power. President Charles Eliot of Harvard described its command over the human response to position well enough in the nineteenth century, without a needful mention of the idea of command over territory that Herzog describes as an element of the sovereign pretense. On becoming president, Eliot wrote: "Official station is a curious power. There is a lot of human nature in the saying *à tout seigneur tout honneur*, even when the seigneur is a mean or inadequate person, the station is still sacred."

Second, legal and other arguments are infected by both the idea and the behavior. Herzog gives us examples aplenty. He helps the reader link the debaters' standoff in the trial of Charles I in seventeenth-century England to the idea that captured the imagination of Southerners claiming their rights as sovereign states and Northerners claiming a larger domain of sovereign right.

Despite all the blood, as Herzog narrates in his wonderfully but grimly memorable way, the affection for sovereignty theory and practice has retained believers. Herzog explains how the belief in the United States persists in the face of contradictory commitments to constitutions such as ours here. Two ancillary commitments in sovereignty theory makes plain its appeal to rulers. They are that, as noticed by president Eliot, "sovereignty is immensely dignified," and that, as Southern theorists and enough Northerners to make a war maintained, "law is the command of the sovereign." While the masses crave law and order, any person or entity (monarch, university board of governors, Pope) is apt to be drawn to the gratifications of dignity as immense and to the possession of command made law. (Can anyone say pardon power?)

This thought broadens the appeal of the book from persons whose primary concern is political theory, international law, and constitutional law to common readers. Herzog, with a little help I borrow from Eliot, lays a marker for a broader reflection on the claims to dignity and command. "It's natural to read the classic theory of sovereignty as applying to monarchs. But I'll take the theory as leaving open, as Hobbes explicitly does, just who holds sovereignty: the king, king-in-Parliament, or whatever else." Herzog's primary big game is government. As noted, "Sovereignty, as I'm treating it, is supposed to be a feature of part or all of the government." "Whatever else" is the dangerously open term. Without needing the zombie itself as the big idea, the lingering life in these subcomponents may just be as pernicious as Herzog tells us it is.

As We the People have learned lately, the sovereignty feature at the executive level in the United States is enjoying a vogue, at the executive level. The principle of dignity, with immunity playing a supporting role, takes its expression in the expulsion of persons from various spots in government, e.g., the White House grounds (Col. Vindman), the F.B.I. (James Comey), and the embassy in Ukraine (Marie Yovanavitch).

To recognize that presidential immunity in the United States is not that of a sovereign, Herzog provides a guide to various parlor games that insulate the role somewhat, but not enough to make our president a sovereign. Simply explained, the man (yes, so far!) can be removed from office by a process having some connection to consent (albeit not quite the sovereignty of The People—nope, they are not sovereign either). But Herzog shows us some prosecutorial behavior that seems to demonstrate the staying power of sacred respect for the role: Nixon's final prosecutor, Leon Jaworski, in the end, after Nixon's resignation, had less fellow feeling for the jury of peers who sought to indict Nixon than he had remnants of deference to the man, however "mean or inadequate." He vetoed the will of the grand jury, which was to indict Nixon.

So even as Herzog explains that sovereignty is not part of the legal armor of the President, the bit of life in it seems to do more work than constitutional contradictions of sovereignty promise. The book then is a bit of a brain-teaser. Herzog demolishes the concept as an idea and demonstrates how it is stymied in doctrine and in human argumentation, where either power or a less grandiose idea will prevail. The winner is either force or a form of reason that is not a sovereignty claim. Why murder a zombie? I think for Herzog, it is to give us back to ourselves. Forget high flown discourse of "metaphysics or ontology," (P. xiii), first brought to us by Hobbes and embraced by thinkers who spelled out the need of subjection and, in the bargain, "awe of reverence" for a Royal Sovereign (Pp. 21-23) and come to earth where actual people solve actual problems.

Let Herzog show you why, as he devotes the book to scary stories of the harm sovereignty, dead or alive, has done and could do again. Since brain-teasers are worthwhile, and the book is a great read, providing little primers on history and bloodshed along with plenty of pedagogical oomph, it is a gift to readers. It is just the book for anyone in possession of broad interests or an immersion in nooks in scholarship of one kind or another, a love of learning, and a tolerance for gore.

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