BEATING A DEAD CORPSE

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SOVEREIGNTY, RIP. By *Don Herzog*. New Haven: Yale University Press. 2020. Pp. xiii, 299. $40.

INTRODUCTION

About two-thirds of the way through *Sovereignty, RIP*, Don Herzog[1] recounts one of the more macabre moments of the Stuart Restoration. Three leaders of the revolt against Charles I who had the good sense to pass away during the Commonwealth had their bodies exhumed and hanged for nine hours. They were then decapitated, and their heads were displayed on poles above Westminster Hall (p. 181). This symbolic violence against regicidal corpses—supplementing, of course, the actual violence against those regicides still living when Charles II returned to English soil—was a dramatic reassertion of Stuart sovereignty and a powerful rebuke to the argument that a monarch could be haled before a tribunal and made to answer for his misgovernance.

Herzog uses this incident to illustrate one of the three components of what he terms the "classic theory of sovereignty," which "holds that every political community must have a locus of authority that is unlimited, undivided, and unaccountable to any higher authority" (p. xi). The treatment of the regicides is presented as an illustration of the "unaccountable" prong: for those who had dared to call a sovereign to account, there could be no peaceful repose, even in death. But one might also discern in the incident a metaphor for Herzog's project as a whole: a dead conception of sovereignty is repeatedly exhumed, exhibited, and brutalized for all to see.

Herzog's title suggests an awareness that sovereignty is already dead and that he comes merely to bury it. But the text itself is a polemic against sovereignty, written in a tone of breathless urgency that suggests live stakes. For Herzog, one must either renounce the core attributes of the classic conception of sovereignty, in which case one is left with an empty slogan, or one must embrace them, in which case one is left with a pernicious political system. But Herzog *also* does an excellent job of demonstrating that we—at least, we in twenty-first century liberal-ish democracies—don't really buy into any of the elements of the classical conception of sovereignty. In the end, then, the reader is left wondering just what the stakes of Herzog's project are.

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I. GENEALOGY?

There seems to be something of a mismatch between Herzog's method and the larger point he wishes to make in *Sovereignty, RIP*. The method is admirably inductive and practice-grounded. As Herzog puts it at the outset, "Not metaphysics, not ontology, but what a wide range of actors have said and done and fought over occupy me. . . . Nor am I interested solely in discourse or concepts or ideas. I'm interested in actual practices because I think that's the best way to grasp the stakes of theory" (pp. x–xi). In short, Herzog wishes to examine the historical practice of sovereignty in order to understand something about the theory. This seems to me an eminently worthwhile project.

One way such a project might work is through a genealogical account of a concept, aimed at demonstrating its contingency by bringing to light the particular historical conditions under which it arose.[2] Indeed, passages in Foucault's brilliant essay on Nietzschean genealogy share powerful similarities with Herzog's description, quoted above, of his own method: "[T]he genealogist refuses to extend his faith in metaphysics, . . . he listens to history," writes Foucault.[3] And what does history teach the genealogist? First and foremost, "how to laugh at the solemnities of the origin."[4] Genealogical accounts of a concept are "capable of undoing every infatuation,"[5] both in their focus on contingency[6] and in their insistence that "[h]umanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination."[7] Genealogical stories may not be happy ones, but they do provide critical tools for analyzing the status quo and for resisting Whiggish teleologies.

There is much in Herzog's book that partakes of this genealogical impulse. He tells a vivid and compelling story about a conception of sovereignty arising out of the sixteenth- and seventeenth-century European wars of religion (chapter 1). Nor does he shy from emphasizing the embodied domination that gave rise to the classic theory of sovereignty: "[L]et's gaze unflinchingly at 'this horror of blood and massacre,' at some unspeakable tales of life—no, death—on the ground" (pp. 2–3; footnote omitted). The tales turn out not to be unspeakable after all, as the reader is treated to vignettes from the gory exploits of the Duke of Alba in the Netherlands, the Count of Tilly and Albrecht von

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2. Canonical examples include MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977), and FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY (Keith Ansell-Pearson ed., Carol Diethe trans., Cambridge Univ. Press 3d ed. 2017) (1887).

3. MICHEL FOUCAULT, *Nietzsche, Genealogy, History*, *in* THE FOUCAULT READER 76, 78 (Paul Rabinow ed., Pantheon Books 1984).

4. *Id.* at 79.

5. *Id.*

6. *Id.* at 80–82.

7. *Id.* at 85.

Wallenstein in Pomerania, and more (pp. 3–11). For Herzog, the Reformation—or, more precisely, "the collision between the success of Protestantism and that older commitment to the unity of Christendom" (p. 12)—pushed Europe into decades of conflagration, and the classic theory of sovereignty was the attempt to find a solution (p. 16).

It is therefore not a coincidence that sovereignty becomes an obsession of early modern European political writers, and Herzog gives us a brief tour through Bodin, Hobbes, Grotius, Pufendorf, Burlamaqui, Locke, Blackstone, et many, many al. (pp. 16–41). The profusion of citations is compelling (even if the individual exegeses are a little thin): the classical conception of sovereignty was an idea, Herzog shows, that came to be in widespread circulation in the decades after, and very plausibly as a reaction against, the horrors of the wars of religion. So, too, Herzog gestures toward the Foucauldian point that innovations in political theory merely redirect domination rather than displace it:

> Sovereignty might provide an apt explanation of what's wrong with Catholic Spain sending the Armada against Protestant England, or for that matter with Pope Pius V's 1570 bull branding Queen Elizabeth a heretic and instructing English subjects and nobles alike not to obey her on pain of excommunication. Both meddle in what intuitively seem like the internal affairs of other countries, and again the theory of sovereignty gives those national boundaries new significance. . . . But sovereign authority over religion, coupled with . . . [the notion] that social order requires religious unity, immediately turns dissident subjects into incipient traitors. (pp. 36–37; footnotes omitted)

Thus, at the same time that sovereignty serves as a tool for suppressing international war by purporting to make the "internal" affairs of one state the business of that state alone, it equally serves to justify internal persecution by turning political (including religious) heterodoxy into an attack on the very foundations of the political system. The locus of domination shifts, but the quantum remains the same: the penalties meted out to the Gunpowder Plotters are hard to distinguish from the depredations of the Duke of Alba. Moreover, at least sometimes, there's a resistance-repression dialectic at play: "State repression redoubled resistance; resistance redoubled state repression."[8]

So far, Herzog's account has all the ingredients for a genealogical argument. The classical conception of sovereignty is not some universal truth but rather arose under and in response to particular historical circumstances. It was "a contingent bid to deal with the problems of early modern Europe, especially religious civil war" (p. 90). It suited the needs of many powerful actors in those circumstances, and it is accordingly not surprising that many of them promoted a strong form of it. But that shouldn't lead us to think that it represents some sort of moral truth: it reformulated domination; it didn't abolish

8. P. 37; *cf.* STAR WARS: EPISODE IV; A NEW HOPE (Lucasfilm 1977) (Princess Leia: "The more you tighten your grip, Tarkin, the more star systems will slip through your fingers." Grand Moff Tarkin: "Not after we demonstrate the power of this station.").

it. If we twenty-first-century Americans still adhered to the classical conception of sovereignty, then this would be the beginning of a long-overdue reevaluation. By tracing its history and highlighting its contingency, Herzog would have made plain that our political ordering could be other than as it is.

II. POSTMORTEM?

But Herzog's project comes a bit too late: contingency has already done its work, and the classical conception of sovereignty is no more. The best source to demonstrate this? *Sovereignty, RIP*, by Don Herzog. After giving his account of sovereignty's origins, Herzog moves on to chapters examining each of the core aspects of the classical conception: sovereignty's illimitability (chapter 2), indivisibility (chapter 3), and unaccountability (chapter 4). In each case, Herzog both discusses historical moments and theoretical texts meant to illustrate the aspect of sovereignty under discussion and also makes plain that we moderns (and indeed plenty of our forbearers as well) have fundamentally rejected that principle. But, by doing so, he reveals that the classical conception of sovereignty has long been jettisoned.

So, for example, chapter 2 (on the illimitability of sovereign power) opens with a discussion of the conflicts between the Stuart monarchs and their parliaments.[9] For Herzog, the notion that sovereign power cannot be limited is captured in the maxim "the king can do no wrong." Herzog cites Blackstone for this principle (p. 68), which makes sense: Blackstone was nothing if not legally conservative, so we should expect to see him articulating the basic principles of the classical conception of sovereignty, even in a late eighteenth-century context well removed from the conditions that gave rise to it.[10] But the story is a bit more complicated than Herzog lets on: almost a hundred and forty years before Blackstone penned his *Commentaries*, Coke wrote that "it is a maxime in Law, That the King can doe no wrong."[11] This is a bit more of a puzzle—after all, Coke was sympathetic to the Puritan cause; he was a leader of the parliamentary cause; and he strongly identified himself with limits on

9. Pp. 50–66. A subject near to my heart! *See, e.g.*, JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 4–5, 46–47, 80–90, 157–67, 207–10, 234–36, 268–75 (2017) [hereinafter CHAFETZ, CONGRESS'S CONSTITUTION]; Josh Chafetz, *"In the Time of a Woman, Which Sex Was Not Capable of Mature Deliberation": Late Tudor Parliamentary Relations and Their Early Stuart Discontents*, 25 YALE J.L. & HUMANS. 181 (2013); Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 367–88 (2010) [hereinafter Chafetz, *Impeachment and Assassination*]; Josh Chafetz, Opinion, *Trump's Second Impeachment Defends the Constitution. Senate Conviction Should Be Next.*, NBC NEWS: THINK (Jan. 14, 2021, 4:34 AM), https://www.nbcnews.com/think/opinion/trump-s-second-impeachment-makes-constitutional-sense-senate-conviction-must-ncna1254207 [perma.cc/9SPT-763U].

10. *See* Emily Kadens, *Justice Blackstone's Common Law Orthodoxy*, 103 NW. U. L. REV. 1553 (2009); *see also* Stephen B. Presser, *The Original Misunderstanding: The English, the Americans, and the Dialectic of Federalist Constitutional Jurisprudence*, 84 NW. U. L. REV. 106, 124 (1989) (referring to Blackstone's *Commentaries* as "the bible of English legal conservatism").

11. 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND, ch. 2, § 13(l) (London 1628).

Crown power.[12] Of course, this might just prove Herzog's point: so strong was the pull of the classical conception of sovereignty that *even Coke* adhered to it!

Alternatively, maybe the maxim works differently upon further examination. As Clayton Roberts noted, the maxim that the king could do no wrong sat alongside an equally venerable maxim that the king always acted through servants—or, to be more precise, that royal commands, to be effective, had to bear the Great Seal, the Privy Seal, and/or the Signet, which could only be applied by officials in the Chancery, the Exchequer, or the Secretary's Office, respectively.[13] This ensured that there was always some royal official *other than the king* who could be associated with some act of the Crown and held responsible for it.[14] We can now flip the script: *even Blackstone* (in a passage that Herzog does not cite) recognizes sharp limits to Crown power:

> That the king can do no wrong, is a necessary and fundamental principle of the English constitution: meaning only . . . that, in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the king; nor is he, but his ministers, accountable for it to the people: and, secondly, that the prerogative of the crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice. Whenever therefore it happens, that, by misinformation or inadvertence, the crown hath been induced to invade the private rights of any of it's [sic] subjects, though no action will lie against the sovereign, (for who shall command the king?) yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute: and, as it presumes that to *know of* any injury and to *redress* it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.[15]

Herzog is therefore simply mistaken to gloss Blackstone as saying: "[O]f course the king can do bad things, can inflict grievous harm on others; but none of that will count as an injury at law, so none of it is a wrong, strictly speaking" (p. 70). Instead, Blackstone recognizes that the Crown (which is to say, the king acting through his servants) can indeed "invade . . . private rights," and he takes pains to insist that royal courts be open to such claims against those servants "as of course."

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12. On Coke's Puritan sympathies, see ALLEN D. BOYER, SIR EDWARD COKE AND THE ELIZABETHAN AGE 24, 65 (2003). On his parliamentarism, see CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 9, at 207, 234–35. On his self-presentation as a limiter of monarchical power, see Prohibitions del Roy (1607) 77 Eng. Rep. 1342 (K.B.). Coke's own telling of his encounter with James was likely inflated, *see* JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBES, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM 31 (1992), but our concern here is less with his personal courage in speaking up to James's face and more with his public staking out of the view that the monarch's power is limited.

13. CLAYTON ROBERTS, THE GROWTH OF RESPONSIBLE GOVERNMENT IN STUART ENGLAND 5 (1966).

14. CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 9, at 80.

15. 3 WILLIAM BLACKSTONE, COMMENTARIES *254–55 (footnotes omitted).

Nor was this principle limited to invasions of private rights cognizable in the courts. In its conflicts with the Stuart Crown, the House of Commons repeatedly went after Crown servants, even as parliamentary ringleaders knew full well that the odious policies were those of the monarch. Thus, the House hounded the first Duke of Buckingham from the first year of Charles I's reign, in 1625, until the Duke was assassinated in 1628,[16] including impeaching the Duke in 1626.[17] Coke, nearing the end of his life, thundered on the House floor, "I think the Duke of *Buckingham* is the Cause of all our Miseries; . . . that Man is the Grievance of Grievances: Let us set down the Causes of all our Disasters, and all will reflect upon him."[18] After Buckingham's assassination, Thomas Wentworth (soon to be created Earl of Strafford) took his place as Charles's favorite. He and other royal officials were impeached in 1640.[19] Although Strafford was not convicted on the impeachment, both houses of Parliament passed a bill of attainder against him. Charles at first promised that he would not sign the bill, but when Parliament refused to grant him any funds until he did, he gave in. Strafford was executed in 1641.[20] One could spin out still more examples: Herzog gives us a royalist's view of the restored monarchy,[21] but he fails to note that Charles II's Lord Chancellor, the Earl of Clarendon, who had served Charles faithfully in exile, was driven back into exile by Parliament a mere seven years after the Restoration and would never again draw breath on English soil.[22] Indeed, the House continued going after the restored monarch's favorite servants: the second Duke of Buckingham (a petition for his removal was passed in 1674), the Earl of Danby (impeached in 1678 and imprisoned for five years in the Tower of London), Sir Edward Seymour (impeached in 1680), et cetera.[23]

This was very much a *Crown* that could do constitutionally cognizable wrong, even if the king in his personal body[24] could not, which in turn puts significant pressure on the idea of sovereignty as involving unlimited authority (and that, of course, is *before* we get to the two violent depositions of Stuart monarchs in less than half a century). Likewise, one could—and on a number of occasions in subsequent chapters, Herzog does—find instances of powerful

16. *See* CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 9, at 82–83; Chafetz, *Impeachment and Assassination*, *supra* note 9, at 369–76.

17. 3 H.L. JOUR. 619–26 (1626).

18. 1 JOHN RUSHWORTH, HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE, WEIGHTY MATTERS IN LAW, REMARKABLE PROCEEDINGS IN FIVE PARLIAMENTS. BEGINNING THE SIXTEENTH YEAR OF KING JAMES, ANNO 1618. AND ENDING THE FIFTH YEAR OF KING CHARLES, ANNO 1629, at 607 (London 1721).

19. 4 H.L. JOUR. 97 (1640).

20. CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 9, at 83–85.

21. P. 183 ("Ten years after the restoration, Charles II's birthday still produced effulgent tributes . . . .").

22. *See* CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 9, at 86–87.

23. *See id.* at 49–50, 86–88.

24. *Cf.* ERNST H. KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY (1957).

actors in real time denying the indivisibility or unaccountability of sovereign authority. Indeed, in reading Herzog's account, one is left wondering whether the classical conception of sovereignty made it out of early modernity alive. On the illimitability of sovereignty: "[t]oday we take constitutional restraints on government power for granted" (p. 88), which makes the classical conception now seem "weirdly counterintuitive" (p. 91). On the indivisibility of sovereignty: "Publius . . . show[ed] that sovereignty not only could be divided, but had been, over and over again. . . . Madison's view, or something awfully close to it, is now the standard or official account of American constitutionalism" (p. 122), which "junk[s] one of the defining criteria of the classic concept of sovereignty" (p. 124). On the unaccountability of sovereignty, Herzog notes that even Richard Nixon's expansive executive-privilege claims—which were of course rejected as overbroad by Congress, courts, and American political culture—are "structurally different from the classic theory of sovereignty" (p. 195). Political actors today may still make rhetorical appeals to sovereignty, but "[h]appily, many of those appeals are prefatory, decorative, hortatory: they don't do any real work" (p. 264).

This then presents us with a puzzle. It doesn't appear that there's any work left for a genealogical account to do: sovereignty (or, at least, Herzog's classical conception of it) is already dead. Maybe Herzog's project should be understood as entirely backward-looking, then—as the sort of work that in a previous generation might have been more ponderously titled *The Rise and Fall of the Classical Conception of Sovereignty*. But this is clearly not Herzog's understanding of his own project. He tells us on both the first and last pages of the book that sovereignty today is "pernicious."[25] The dangers of the concept are the alpha and the omega of the book. He wants us to jettison sovereignty. But what is left to jettison?

III. ZOMBIE?

Maybe the problem is that even though we've rejected all three elements of the classical conception of sovereignty, it remains "a zombie concept, undead, stalking the world, terrifying people" (p. 291). Presumably, this would mean that it continues to shape our thinking about important issues, even though its theoretical underpinnings have been knocked out. That would indeed be worth noting and decrying. So where might it have this pernicious impact? As Herzog notes, the rise of liberal constitutionalism has brought with it the decisive rejection of unlimited and unaccountable government on the domestic level. After all, if the "liberal" part of liberal constitutionalism means anything, it's that state power is limited by claims sounding in the language of rights, and one pervasive strategy for making those limitations efficacious is by ensuring that powerholders have the ability to check one another—that is,

25. Pp. ix, 291. He also describes it as "a threat to social order—or at least to the sort of decent social order we want." P. 258.

to hold one another to account. Moreover, on the international stage, the current consensus is that "[s]tates have claims beyond their borders" and that they "don't have unique authority over whatever happens inside their borders" (p. 252). Indeed, the question of when, where, and why "humanitarian intervention" is justified has been central to discussions of international law and politics for decades.[26] There, too, the classical conception of sovereignty has lost its sway.

So where, then, do we find its pernicious influence? In the end, Herzog draws our attention to only two candidates: sovereign immunity (pp. 201–18) and diplomatic immunity (pp. 231–43). Note that, even if he were correct about both, the book's normative takeaway would be somewhat less ambitious than its framing suggests.[27] But even here, it's not at all clear that Herzog's classical conception of sovereignty is at play.

I share Herzog's disdain for state sovereign immunity, but the Supreme Court has repeatedly held that Congress can abrogate state sovereign immunity when it is legislating pursuant to any post-Eleventh Amendment constitutional grant of authority (which, as a practical matter, generally means pursuant to Section 5 of the Fourteenth Amendment).[28] What's more, state officials are subject to suits seeking injunctive relief.[29] This may not be terribly satisfying as a policy matter, especially in light of the current Court's generally miserly treatment of congressional power under the Reconstruction Amendments,[30] but neither is it an example of authority that is unlimited, indivisible, or unaccountable. Indeed, the availability of injunctive relief against state officials is an especially strong rejoinder to the claim that current sovereign-immunity doctrine rests on Herzog's classical conception. Federal courts can and routinely do order state officials to take (or refrain from taking) certain actions, and state officials who refuse to comply can be jailed for contempt.[31] This is nothing if not a recognition that state power is both limited and accountable.

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26. *Compare, e.g.*, SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE (2013) (advocating more active intervention to prevent genocide), *with* SAMUEL MOYN, HUMAN RIGHTS AND THE USES OF HISTORY 35–52 (2014) (taking a more skeptical approach to interventions meant to protect human rights).

27. The plot of *Lethal Weapon 2* notwithstanding, it's not clear that diplomatic immunity, for instance, is "stalking the world, terrifying people." P. 291.

28. *See, e.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636–39 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59, 65–66 (1996); Fitzpatrick v. Bitzer, 427 U.S. 445, 452–56 (1976).

29. *Ex parte* Young, 209 U.S. 123 (1908).

30. *See, e.g.*, Shelby County v. Holder, 570 U.S. 529 (2013); City of Boerne v. Flores, 521 U.S. 507 (1997).

31. *See, e.g.*, Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), https://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html [perma.cc/2NHG-JAUQ].

Diplomatic immunity is a likewise complicated case. Herzog describes it as "sweeping immunity from law across the board" (p. 237), but this is somewhat overstated. While the Vienna Convention on Diplomatic Relations provides diplomats and their household members absolute immunity from criminal punishment without the consent of the state they represent, their immunity from civil suit is limited by several exceptions.[32] Most notably, the immunity does not extend to activities "relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions."[33] And while one can—and Herzog does—find discussions around diplomatic immunity going back centuries that sound in the classical conception, one can also find far more functional justifications. The Vienna Convention itself nods to "the sovereign equality of States," but also notes that the "purpose of [diplomatic] privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States."[34] A State Department publication elaborates: "[A] failure of the authorities of the United States to fully respect the immunities of foreign diplomatic and consular personnel may complicate diplomatic relations between the United States and the other country concerned. It may also lead to harsher treatment of U.S. personnel abroad . . . ."[35]

Herzog asserts that this sort of argument "has the right form: retail, not wholesale. I doubt, though, that it justifies the same old sweeping immunities it's supposed to" (p. 240). But this ignores the fact that the Vienna Convention, by limiting diplomats' immunity from civil suit, did in fact alter the "old sweeping immunities" in ways that brought them more into line with their modern justifications. It made diplomatic immunity less about the sanctity of the ambassador as the personification of a foreign sovereign and more about protecting diplomatic functions: where diplomats are freelancing in the market, they no longer have civil immunity. And Herzog gives far too short shrift to the modern, functional justifications for what immunity remains: we may well think that there is nothing wrong with applying our laws against assault to other nations' diplomats; other nations may equally well think that there is nothing wrong with applying their laws against blasphemy to ours. A broad prophylactic rule may be best suited to facilitating valuable international diplomacy—a "retail" argument that does not sound in the classical conception of sovereignty.

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32. Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes art. 31, Apr. 18, 1961, 23 U.S.T. 3227.

33. *Id.* art. 31(1)(c).

34. *Id.* at 3230.

35. OFF. OF FOREIGN MISSIONS, U.S. DEP'T OF STATE, DIPLOMATIC AND CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES 5 (2018), https://www.state.gov/wp-content/uploads/2019/07/2018-DipConImm_v5_Web.pdf [perma.cc/344S-YS84].

CONCLUSION

It is of course the case that the *word* "sovereignty" is still very much with us. Herzog insists that this must mean that the classical conception is still with us too: "If you renounce all the criteria, you've got a vacuous or meaningless concept on your hands. (Imagine saying, 'This is a bachelor, but not an unmarried male.')" (p. xii). But here Herzog gives away the methodological game. "A bachelor is an unmarried male" is the textbook example of an analytic a priori truth, which is to say, a claim that is true by virtue of our understanding of the term itself; empirical evidence has no bearing on its truth.[36] But Herzog claims to abjure such ungrounded abstractions (which he dismisses as "metaphysics" or "ontology" (p. x)), focusing instead on "actual practices," or "what a wide range of actors have said and done and fought over" (pp. x–xi). Someone who is interested in the actual practice would need to focus on what work the word "sovereignty" is doing when it is used by actual people in actual politics today. And Herzog's own discussion shows that what people are doing with that word today has very little in common with the classical conception he describes.

People today still talk about sovereignty, but—again, as Herzog compellingly demonstrates!—they do not believe in authority that is unlimited, indivisible, or unaccountable. In many cases, we might find that the word "sovereignty" is used as nothing more than high-toned window dressing[37]—in much the same way that judges claim to "respectfully dissent" even when their dissent is anything but respectful or that retail clerks tell you to "have a nice day" when it is clear they'd prefer you dead. This possibility is distasteful to Herzog, who dismisses it as reducing sovereignty to "an invidiously flabby concept" (p. 15). But to say that is to insist on abstract precision (Herzog's "metaphysics" or "ontology") over the messy reality of what people have said and done and fought over. In the world of "actual practices," people use words and concepts in flabby ways.[38]

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36. *See* IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS 16 (Gary Hatfield ed. & trans., Cambridge Univ. Press rev. ed. 2004) (1783). For a review of the current state of thinking—one that leans heavily on bachelors as unmarried males as an example—see Georges Rey, *The Analytic/Synthetic Distinction*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 12, 2017), https://plato.stanford.edu/entries/analytic-synthetic [perma.cc/8RGA-QQLH].

37. Indeed, the language of sovereignty might sometimes be used precisely to soften the blow of some action that is antithetical to the classical conception. Consider, for example, John Marshall's reference to Maryland as "a sovereign State" in the very first sentence of an opinion devoted to systematically dismantling that state's claim to tax a bank doing business within its borders. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 400 (1819).

38. Herzog seems to think that contemporary uses of "sovereignty" do nothing that "the concepts of *state*, *jurisdiction*, and *authority*" cannot do. P. 261. Perhaps this is correct—but, of course, one could write a treatise on the unsavory pasts of each of those concepts, as well. If contemporary uses of the word "sovereignty" are pernicious because they necessarily import something of the classical conception, then I don't see how turning to "state," "jurisdiction," or "authority" would present any less of a problem.

There are also some decidedly non-flabby uses of the word "sovereignty" in modern political discourse that nevertheless do not partake of Herzog's classical conception. For instance, Herzog on occasion recognizes that other actors "deploy[] the term *sovereignty*, but not in the sense I'm pursuing here"[39] or that some use of the term "has its place in a different debate."[40] But in bracketing these claims about sovereignty, Herzog misses the opportunity to engage with some of the most important and exciting work being done around the concept today. A deep account of sovereignty talk today would grapple, for instance, with Maggie Blackhawk's argument that Native American interests have best been protected through assertions of powers—assertions that generally sounded in claims of sovereignty—rather than assertions of rights.[41] It would take note of Elizabeth Reese's account of tribal governance as "where and how tribes have been quietly exercising and developing their vision of tribal sovereignty."[42] It would be less dismissive toward the generative possibilities of popular sovereignty—and it would find it worthwhile to ask why that particular *formulation* retains currency.[43] It might even ask about the vision of "community sovereignty without police" that was asserted by Black Lives Matter protesters in Seattle.[44]

But instead of engaging with actual contemporary political practices and discourses around sovereignty, Herzog analyzes a conception of sovereignty that (in his own telling!) almost no one today still adheres to and none of our political practices actually rest on. Nevertheless, he insists that continued use of the word indicates the live nature of the conception. This is a confusing project.

Instead, why not rejoice? The classical conception of sovereignty has been dead for some time. Our analyses of policies that were once justified wholesale by the concept of sovereignty are now justified at the retail level, if at all (p. 256). The word may have some currency in the context of certain live political controversies, but the classical conception is not shuffling about, zombie-like, wreaking havoc. Let it rest in peace.

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39. P. 231 n.188 (speaking of Vine Deloria's claims for Native American sovereignty).

40. P. 270 (discussing popular sovereignty).

41. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1845–76 (2019). Blackhawk argues that "Federal recognition of inherent tribal sovereignty and of each Native Nation's ability to self-govern should form a 'crown jewel' in our constitutional canon on par with *Brown*." *Id.* at 1796.

42. Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 584 (2021).

43. *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Elizabeth Anne Reese, *Or to the People: Popular Sovereignty and the Power to Choose a Government*, 39 CARDOZO L. REV. 2051 (2018).

44. *See* Hanna Wallis, *The Rich Legacy of Autonomous Zones in the Americas*, NATION (June 23, 2020), https://www.thenation.com/article/society/seattle-chaz-chop [perma.cc/2PNU-LFMN].