

DON HERZOG CHESS RESPONSE

I would first like to take the opportunity to thank Professor Herzog for this fascinating paper, in which he tells us, in no uncertain terms, that the time has come to grow up, at least politically. He has issued a much-needed call to arms, to jettison the concept of ‘sovereignty’ from our political vocabulary, as we once packed away our childhood comfort blankets.

Why this appeal for political maturity? The concept of sovereignty, he suggests, is not only confused, but pernicious. It masquerades as a helpful tool for current politics, yet fails to address, or even to encompass within its conceptual framework, the real problems facing contemporary political society.

In this response, I will first outline the main points of Professor Herzog’s argument to this affect. I will then go on to indicate some areas where I believe further discussion would be productive.

Professor Herzog does not suggest that the concept of ‘sovereignty’ was always so useless as he believes it is today. In the sixteenth and seventeenth centuries, political theorists such as Bodin, Hobbes, Grotius, and others, elaborated a theory of sovereignty which entered general political and popular usage, and played an important role in the process of early modern state-building. This ‘classic’ theory of sovereignty, on Professor Herzog’s telling, described the necessary single locus of authority in a political community. This authority had three key attributes: it must be unlimited, undivided, and unaccountable. These three conditions were not always and invariably present in every configuration of the ‘classic’ theory, he admits, but formed the basis for a great deal of political rhetoric in the period, such as that used by James

I and Charles I of England. They saw sovereignty as inhering in the institution of the monarch, who was the highest authority in the land, and the originator of all law.

He goes on to describe how, although in initial disputes over the colonies in North America, the term ‘sovereignty’ was not widely used (therefore reminding us that it is not a *necessary* framework for political discussions of authority), it gained more and more salience in the years leading up the American Revolution. The debate was, in this case, whether sovereignty over the land should be seen as solely possessed by the British Parliament, or whether there should be some jurisdictional autonomy for the colonies. The importance of *indivisibility* to the concept in particular polarised the debate, by foreclosing any possibility of divided or delegated sovereignty.

The notion continued to play a starring role in the political history of the early Republic, and Professor Herzog goes on to show how it supplied the basic terminology for debates over the Constitution, and during the Civil War. Political actors contested where precisely sovereignty should be seen to lie — in the institutions of the *states'* governments, or in the *federal* government.

To this day, he suggests, the term litters our political conversations. This, despite the fact that the march of constitutionalism, federalism, and the rule of law, have chipped away, respectively, at the original unlimited, undivided, and unaccountable nature of sovereignty. We have never adequately reframed the concept, or reinterpreted it away from its original sense. We are thus saddled with the dead weight of an unchanged political theory of the nature of institutional authority, a theory that hails from the early modern period, and that is completely unserviceable

to contemporary debates. ‘Sovereignty’ no longer comes close to describing political reality, and therefore has outlived its usefulness.

Yet, and here I turn to the more critical aspect of my response, I would suggest that there are two different notions of sovereignty that ought to be carefully disentangled. One would be what I will call for ease of terminology ‘institutional sovereignty’. This is a concept regarding the *location* of power in a particular institution — whether this is King, Parliament, or the United States Federal Government — and the *nature* of this power: as undivided, unlimited, and unaccountable. This is the notion, I think, that Professor Herzog focuses on in his paper.

There is, however, another use of the term ‘sovereignty’. This is what I will refer to as ‘popular sovereignty’, and plays a different role in politics — that of *legitimating* governmental structures, rather than *describing* the power located in an institution. This alternative usage of sovereignty is still, I suggest, crucial to debates in contemporary political society, and therefore dangerous to dismiss out of hand.

Professor Herzog does touch briefly on the idea of ‘popular sovereignty’ at the opening of his paper, but does not pursue it. I would like to push him a little further on the subject. As a means of doing so, I will briefly invoke the current debates over Brexit, as an example used by Professor Herzog, and a political context I know well.

Currently, as I’m sure you are all aware of, there is a debate raging in the courts of the United Kingdom as to whether Article 50 — the mechanism by which the U.K. can trigger its exit from the E.U. — should legally be invoked by *Parliament*, or by the *Prime Minister*. In the recent submissions to the Supreme

Court, the applicants arguing on behalf of *parliamentary prerogative* state that ‘politically, the peoples of the United Kingdom are sovereign; but legally the way in which they express this sovereignty is through the structures of representative democracy’. The British people are therefore sovereign, and they invest this sovereignty in parliament. This does *not* mean that in doing so they give up their sovereignty. They simply *delegate* the powers that possession of sovereignty gives them, to a governing body. In this telling, sovereignty resides in the collected people, *not* in any particular institution.

The theory of ‘popular sovereignty’ has as long an intellectual pedigree as that of ‘institutional sovereignty’, as outlined by Professor Herzog. It stretches back at least as far as Calvinist resistance theories in the sixteenth century, and finds perhaps its most famous (or infamous) expression in Rousseau’s notion of the General Will. Indeed, arguably one of the key theoretical shifts during the Age of Revolutions was precisely in seeing sovereignty as *not* housed in the person of the king, or in any centralised political institution, but in the body of the people, who could bestow it on institution, but *reclaim* it if it was being improperly wielded.

The idea of popular sovereignty as the ultimate source of power in a state, and legitimating government, still has incredible current political salience. The rallying cry of so-called ‘Brexiters’ was ‘take back control’. The perception was that the E.U. parliament was not governing adequately, and therefore should be deprived of its power over the people of the U.K. Given their anti-establishment distaste for practically all Westminster politicians, this was not a call for a return of sovereignty from the E.U. to the U.K. government, as the locus of sovereignty in the U.K. It was

to return to the British people directly, who could then re-invest it where they wished. On how far British citizens have, or will, in reality regain any power by leaving the E.U., I will refrain from commenting — but that was, at least, the argument. Sovereignty was seen as ultimately inhering in the people, as the highest authority in the nation, not in an institution.

This concept of popular sovereignty has, moreover, more explanatory power than Professor Herzog credits it as having. He suggests, and here I'm quoting, that 'if someone is defending, say, the right of the state of Michigan not to answer to a lawsuit in federal court on the grounds of state sovereignty, it would be baffling to suggest that actually the people are sovereign'. I would argue that, in fact, it is not baffling at all. The people, being sovereign, are able to delegate their power to different bodies without dividing their own sovereignty — in this case, to both the state and the federal government. The question for the judge to figure out would be to whom, in the context of whatever question is at issue, the people had delegated their power. If it was to the federal government, they do have a right to take the lawsuit — if it was to the state, the federal government does not have that right.

I think that Professor Herzog is correct, and the Early Modern theory of centralised institutional sovereignty is like a childhood toy. Its time has come to be packed away at the back of the garage — although I would question how far it is actually dangerous, rather than simply useless as a concept. But in discarding this notion of sovereignty, we should not throw the baby out with the comfort blanket, and fail to recognise the formidable power that the concept of *popular* sovereignty wields in our contemporary political landscape. Thank you.