

In sovereignty's shadow: The limitations of decentralisation under Federalism and multilevel approaches to governance

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Abstract

The focus of this paper is to outline how the foundational approach of decentralisation inherent in federalist and multilevel governance (MLG) systems is incompatible with the indivisible nature of sovereign authority. Via an examination of the structural elements of these systems, their strengths and weaknesses, and an evaluation of the concept of sovereignty, this paper posits that the requirement for an identifiable central sovereign power in governance remains immovable, despite attempts to diffuse this power across multiple actors and governing levels. It further posits that attempts to divide this sovereign power ultimately destroy it, creating governing crises by delegitimising and undermining governmental authority across all levels. An evaluation of the evidence presented supports this contention and raises numerous questions that bear further consideration.

Keywords: constitution, decentralisation, federalism, multilevel governance, sovereignty

Introduction

Although the *multilevel governance* (MLG) concept emerged in the context of European Union (EU) integration, the theories and approaches embedded within it have expanded to influence existing frameworks of governance, such as federalism. The role of local government in policy implementation has been ascendant under the United States' (US) system of federalism; as populations have grown, federal and state laws, regulations, and public policy initiatives have also proliferated (Higgins, Young & Levy, 2009, pp. 500-503). Whilst the unique constitutional legal structure of US federalism and the two main approaches of MLG differ, their foundational construct of *decentralisation* belies a shared concern: that decentralisation of power and the creation of multiple levels of government cause, rather than resolve, crises of governance, undermining the original purposes of both MLG and federalism. It is the core contention of this paper that because sovereign authority must be present for governing actors to be considered legitimate, and hence, for governance to be successful, this sovereignty cannot be ultimately divided without that power essentially being destroyed.

This paper deals with matters *seriatim*. The first section provides background and context to the relevance of the MLG concept for the purposes of this paper, then assesses the strengths and weaknesses of the concept's two traditional approaches to governance, *top-down* and *bottom-up*. The second section reviews literature necessary to understand how the concept of sovereignty has historically evolved, yet how its original principles continue to form the foundations of modern governance systems

such as federalism. The third section delves into the structural components of the US' system of federalism, provides a short history of its formation, and appraises how its proponents sought to address the inherent tensions in their attempts to divide sovereign power amongst multiple levels of governments. This section also identifies and draws comparisons between the parallel weaknesses of federalism and the two MLG approaches and shows how these decentralised governance approaches are tested by the limitations of the principles of sovereignty. The final section employs the case study of local governments in the US and examines their unique status in a federal system that does not constitutionally recognise them as sovereign actors. The conclusion then summarises how the evidence presented attests to this paper's contention.

Multilevel Governance: a malleable concept

The concept of *multilevel governance* has manifested itself across abundant iterations, in the theoretical, academic and implementation spaces, though foundationally, MLG attempts to build frameworks around how multifarious actors participate in governance and share the duties of executing public policy. To parse out its complex elements, the MLG concept attempts to arrange numerous politically independent actors – public and private – governing at different levels of territorial ambit, while in ongoing deliberation and negotiation with each-other, *sans* any exclusive political authority or hierarchy (Bache & Flinders, 2004, pp. 34-37). According to Marks, MLG assumes the paradigm of *multi-level* and *governance* as separate components, with the former invoking the vertical cooperation of actors operating at different territorial levels (supranational, national, regional, local), and the latter covering the necessary horizontal interdependence of governmental and non-governmental actors participating in policy-making (Marks, 1993, p. 392). Mende suggests that “*Multilevel governance (MLG) is fundamentally marked by the participation of private actors... They gain the legitimacy and power to regulate both themselves and others*” (Mende, 2021, p.171). While cohesion policy amongst EU states was the original focus of MLG, the literature surrounding it has expanded beyond this aim and is cognizable as a versatile approach with which to understand the complex interactions between numerous governing levels, and the deliberative policy-making dynamics throughout various political systems globally (Bache & Flinders 2004). What the increased malleability of conceptual MLG definitions have failed to reckon is that these approaches veer from the practical realities of the immovable particularities embedded in certain governance systems (Mende, 2021, pp. 172-176). While some have prescribed MLG as an “*imperative rather than a theoretical option*” (Dupré, 2020, p. 803) when addressing the modern complexities of public policy-making, there is little consensus on just what such an imperative constitutes (Schakel, Hooghe & Marks, 2014, pp. 269-271, 277-278).

The EU's economic initiatives for greater inclusivity of regional bodies in the decision-making and implementation of policies underscores the pre-eminence of the traditional *top-down* governance approach within the MLG framework. The top-down approach delineates governance responsibilities between actors while emphasising the rule of law and promoting stability in environments where frequent policy changes can result in uncertainty for citizens. Conversely, the *bottom-up* MLG approach allows for greater decentralisation of authority to empower actors best placed to implement the policy and lead on governance, while creating a mindset of inclusivity and community (Hooghe & Marks, 2010, pp. 18-22). Despite their purported differences, these MLG

approaches elucidate similar limitations and inefficiencies in practice, such as: the slow transfer of ideas through hierarchical systems, bureaucratic and administrative roadblocks to addressing complex and urgent issues, resource competition between governing actors, distrust between governing levels and citizens, or amongst the governing levels themselves (Scharpf 2012, pp. 67, 70, 74); inherent power imbalances between governing actors leading to usurpation of authority by those with increased capacity to lead (Scharpf 2012, p. 67); actors governing with coterminous authority over the same policy space may lead to a lack of transparency and accountability while fostering corruption (Benz 2010, pp. 221-223); difficulty distinguishing the jurisdictional authority of governing actors, thus bringing into question their legitimacy (Bauer & Börzel, 2010, pp. 256, 259-260).

Ultimately, these factors have the potential to undermine the purposes of MLG, as its conceptual versatility begets evident complications that are inapposite to its intentions, rendering it a hinderance unto itself (Benz 2010, pp. 215-217). Thus, the focus on the enterprise of governance is no longer as a means to an end, but as the end itself. Concerningly, these factors raise the prospect of an unrealised threat: Does MLG actually weaken the idea of structural governance and vitiate the legitimacy of representative governments? This countervailing exposition, that MLG may be setting up governments or governing systems to fail, is propounded in the sections examining sovereignty, its function in the US federal system, and how its principles complicate the existence of local governments outside the constitutional delineations of power.

The sovereignty ambushade: decentralisation's Achilles heel

“Sovereignty is an entire thing – to divide, is – to destroy it” (Calhoun, 1992, p.105). This succinct understanding of the concept eloquently portrays the underlying cause of the perpetual power struggles that ensue once multiple actors are given authority over the same policy space. It is argued here that the aforementioned issues concomitant with the traditional MLG approaches stem from a basal issue, that of dividing sovereignty - an inherently indivisible power - between multiple governance levels. As this paper contends, sovereign power must be present for governing actors to be viewed as legitimate, and hence, for governance to be successful. Analogous to the concept of MLG, sovereignty is one of the most debated, challenged, and continuously evolving concepts, both in its theoretical interpretation and legal application (Wendt & Duvall, 2008, p. 607). A short review of the relevant aspects of and theories surrounding sovereignty is required to establish its ineluctable character at the centre of the governance systems under examination.

The conceptual development of sovereignty accompanied the advent of the territorial state in the sixteenth century, which conferred credence to a centralised power to make and enforce law over a stipulated territory (Morgenthau, 1948, pp. 341-342). Sovereignty, as a traditional legal principle, refers to an absolute or supreme repository of power that is innately indivisible and unrestricted (Naidu, 2002, p. 34). Relevant to this discussion are the models of Westphalian sovereignty – the principle of external recognition and non-interference between states – and domestic sovereignty – the internal organisation of authority within a state – (Krasner, 1999, p. 9). Karp notes that the process of obtaining and holding sovereignty has proven itself fraught with paradoxes, inconsistencies and infringements. Yet, the enduring significance of its principles and purpose have continued to influence the modern international state system, particularly through the recognition of the sovereign state as the archetype of

a legitimate political entity (Karp, 2008, pp. 323-324). Acquiring sovereign legitimacy has historically spanned many permutations, predominantly with claims of a right to authority stemming from the divine or dynastic – some of the earliest iterations of *top-down* rule. The later notions of sovereign power emanating from *the will of the people*, or similar *bottom-up* approaches to power and governance were originally considered irrelevant, and unnecessary in the establishment of the sovereign state (MacFarlane & Sabanadze, 2013, pp. 612-614) Thus, the top-down approach to sovereignty was the norm, with rulers often inheriting their sovereign supremacy and exercising dominion over their populations and territory to ensure the survival of their state, rather than to provide efficient governance for their internal subjects. This norm would eventually be challenged by enlightenment philosophers such as Locke and Rousseau, who argued that sovereignty could only be derived from the people and with their consent to be governed (MacFarlane & Sabanadze, 2013, p. 614). These developments illuminate a core entanglement of the involuted nature in the bottom-up approach to sovereign governance: Who exactly are *the people*?

The core hypothesis exploring this question is the idea of *popular sovereignty*. This theory formed around the notion that representative governments are created with the consent and participation of the citizenry - the sovereign people - to protect and preserve their liberties and rights (Glanville, 2010, p. 240). Benjamin Franklin articulated this principle, stating, “*In free governments, the rulers are the servants and the people their superiors and sovereigns*” (Franklin, 1787). In contrast to the traditional dictum of top-down state sovereignty, popular sovereignty refocused sovereignty as a bottom-up mechanism that transfers legitimacy and authority to a state’s governing actor/s on behalf of the interests of its citizens, rather than those of the governing class (Naidu, 2002, p. 34).

The rise of the popular sovereignty concept, however, has embedded within it its own problems: specifically, the contradictions inherent in the indivisibility principle of sovereign power. Historically, popular sovereignty has prevailed at various points: The French Revolution ushered in the nationalist path outlined by Rousseau’s idea of a general will of the people; as Wight suggests, “*the rights of men gave way to the rights of nations*” (Wight, 1977, p. 160). In contrast, Locke’s dimension of individual rights as the basis for popular sovereignty became an underlying factor in the American Revolution, where ideas of historical and cultural commonalities were eschewed in favour of the principles of unalienable rights, liberties, and equal treatment before the law (Glanville, 2010, pp. 240-242). Thus, the legitimacy of the US government emanated from the limited powers consented to it by the states and their people; first to the Confederation Congress under the Articles of Confederation, then to the Federal Government under the US Constitution (Laqueur & Rubin, 1979, p. 107). It is important to recognise that the unique nature of US federalism, a system of governance dividing power between the extant several states and a centralised federal government, elicited yet another iteration in the conceptual evolution of sovereignty: *dual sovereignty*.

This structuring of dual sovereignty under the US federalism is analysed in depth in the next section. However, it is imperative to conclude this review of sovereignty’s conceptual history by examining how the attempts to divide its power eviscerate and dismantle the principle’s core purpose: to identify who holds supreme authority. By its very definition, sovereign power cannot be held by more than one actor without

creating tension and competition over said power; stated bluntly, multiple actors cannot all be supreme.

Legal and political theorist Carl Schmitt has contributed pertinently on this topic, holding the views that a sovereign and its power cannot ultimately be divided (Schmitt, 1985, pp. 8-9), and that the purpose of a constitution is to strengthen the state by granting it powers that ensure order and stability (Schmitt, 1985, xvii-xxvi). These views stand in contrast to proponents of federalist theory and to many of the English common law and European Enlightenment thinkers that influenced the framers of the US Constitution, which led them to focus on how a constitution could balance individual liberties with governmental powers to maintain a functioning state (Schechter, Bernstein & Lutz, 1990, p. 4).

Schmitt has proposed his own paradigm of sovereign power: “*Sovereign is he who decides on the exception*” (Schmitt, 1985, p. 5). Schmitt defines the state of exception as the right of the sovereign to abrogate the rule of law on behalf of what it perceives to be the public interest (Schmitt, 1985, pp. 5-10). The word *exception* here justifies the use of extra-legal measures taken by the sovereign in defence of the public interest, which Schmitt equates with the defence of the state itself (Schmitt 1985, p. 6). Schmitt’s paradigm disposes of the aforementioned iterations of sovereignty, arguing that in practice, “*sovereignty is the highest power, not a derived power*” (Schmitt, 1985, p. 6). The argument here is that regardless of any legally defined power structures or constitutionally recognised legitimacy, in a crisis situation, the sovereign determines the threat and acts accordingly to preserve the state. Furthermore, Schmitt’s theory rejects the popular sovereignty approach where the idea of a sovereign people has been conflated with the sovereign executive, as the people have no ability to execute a necessary exception to the law (Schmitt, 1985, pp. 6-7). Essentially, the ability to determine and control the exception is precisely the question of sovereignty itself.

Schmitt further states, the sovereign “stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety” (Schmitt, 1985, p. 7). Paradoxically, Schmitt argues the irrelevance of where and how sovereign legitimacy is derived, while simultaneously asserting that only the state sovereign has legitimacy to violate its own legality (Schmitt, 1985, pp. 6-7, 9, 17, 23). This issue of legitimacy is vital for a sovereign government to retain its internal recognition as the actor with the right of governance and use of force, or it risks the breakdown of governance and the state itself.

The US’ system of federalism challenges Schmitt’s core theoretical assumptions that sovereignty is indivisible, and that only the state has the legitimacy to violate its own legality because:

First, there are two levels of statehood in the US (state and national); both could theoretically claim the right of exception to the law and violate each other’s legal boundaries.

Second, both the state and federal governments derive their sovereign powers from *the people* (the popular sovereign), a fundamental aspect of the US’ sovereign legitimacy that Schmitt’s paradigm deems irrelevant (Lev, 2017, p. 195).

Third, unlike Schmitt’s paradigm which supposes an entire public interest, federalism does not assume the general will of a whole people, rather, acknowledging that some interests of the people may be divided (Schmitt, 1999, pp. 196-203). Thus, federalism

attempts to account for some of the flaws inherent in popular sovereignty by dividing the governing process between the state and federal governments, each with prescribed powers enshrined in laws (Lev, 2017, pp. 198-199).

In practice, Schmitt's theoretical assumptions expose the vulnerabilities of federalism's principles, whilst underscoring how the weaknesses of MLG correlate directly to the sovereignty stipulation, as the indivisible nature of the concept nullifies claims that governance can be decentralised. Furthermore, the issue of divided sovereignty is central to the contention of this paper, that deploying multiple governance levels can weaken the stability of governments and invalidate their legitimacy. Such assumptions become evident through the following examination of US federalism's system of dual sovereignty.

Decentralising power: the Federalism test

Federalism could be considered an inceptive model of MLG; a structural governance system defined as the arrangement of multiple sovereign entities governing over the same political space (Karmis & Norman, 2005, p. 3). The sui generis nature of the federal system extant in the US relies on the delineated powers constitutionally enumerated between the Federal (national) Government, the several state governments and the sovereign people (Karmis & Norman, 2005, p. 6). Through this division, the Framers of the Constitution sought to establish a unified national government of limited powers, while maintaining a distinct realm of autonomy in which state governments could exercise a greater general power, in keeping with a core founding principle of the *US Declaration of Independence* to ensure governmental representation remained close to its citizens (Wood, 1998, pp. 128-129).

Notably, the concept of *local government* beyond the several states occupies an ambiguous constitutional locus, as the document observes silence on its establishment, proffering no guidance on any relationship between local and state governments, or the national and local governments (US Const., 1787). Despite the US Constitution's lawful legitimisation of all governing actors, local governments appear to draw their legitimacy and legal bounds via the sole determination of each state government, rather than any federal legal realm (Bowman & Kearney, 2012, p. 529). Significantly, any concern regarding the establishment of local governments was also absent in the US' antecedent *Articles of Confederation* (Art. of Confed., 1777). One possible constitutional inference affirming local governmental jurisdiction could be drawn from the Constitution's Tenth Amendment, which states, "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people*" (US Const., 1787, amend. 10), suggesting that the Framers understood local government powers to be wholly within the remit of the several states.

The purpose of establishing a constitutional federal governing system in the US was to address the functional problems that arose under the preceding Articles of Confederation. Such issues caused ongoing discord amongst the states, including disputes over wartime debts, interstate trade, taxation, and the push to form a national military (Chadwick 2004, pp. 481-482; Stahr, 2005, pp. 182, 186; Puls, 2008, pp. 174, 176- 177). The little power granted to the only central governing body under the Articles – The Confederation Congress – was insufficient to arbitrate disputes between the states, and the body lacked enforcement abilities as all resolutions required self-

compliance by the quarrelling states themselves (Morris, 1987, pp. 245-266). With the survival of the newly formed confederation under threat of self-dissolution or perpetual conflict, some considered the absence of a durable central government to be the principal affliction. Thus, the impetus for expanding a centralised government resonated with some, while distrust and fear remained that a return to centralisation of power—would again separate government from the people it represented, undermining the new-found liberties and principles that the Revolutionary War had been fought to secure (Chadwick, 2004, pp. 468-471).

The tensions present in this microcosm of what would become modern US federalism were already present due to the imbalance between the states and the central level of government. At this time, the powers of the several states outweighed those delegated to the national congress. To address this power imbalance, the solution proposed would expand the scope of authority for the national government: *centralisation*. Essentially, to resolve one power imbalance, another was created (Maggs, 2017, pp. 416-417). As plans progressed to move from a loose confederation of states to a constitutional federal system of government, one in which the national government would hold supreme sovereign authority over certain jurisdictional prerogatives – a marked reversal from a system which largely reserved deference of decision-making power to the several states under the Articles –, arguments advanced on all sides as an innate recognition emerged that the issues of dividing sovereign power would continue to plague the US (Hamilton, 2001, pp. 70-75).

This early test for US federalism directly challenges a core precept at the intersection of the top-down and bottom-up MLG approaches: *decentralisation*. Decentralisation has been defined as “... *the transfer of authority, responsibility, and resources—through deconcentration, delegation, or devolution—from the center to lower levels of administration*” (Cheema & Rondinelli, 2007, p. 1). The intricate contextual framing required for this analysis is what makes the US such a unique case study. Whereas decentralisation in the original EU-context of MLG relays power from a central state government to the lower levels to achieve improved integration and governance, upon the framing of the US Constitution, the task was to convince the states to delegate their power upward to achieve similar aims. Thus, in theory, by relinquishing partial sovereignty, a greater body could act upon the common interests of all states and assuage much of the discord that threatened the confederation’s existence.

If US federalism is to be considered a form of MLG, then a paradigm shift of the two traditional approaches is required. If the several states are the progenitors of sovereignty, and the creation of a centralised government necessitates its division, such a situation naturally induces questions of sovereign supremacy. Despite the superficial similarities between US federalism and the top-down centralised MLG approach this does not hold up to scrutiny once the issue of sovereign supremacy is invoked, as the US Constitution does not designate this status to any definitive actor. Rather, it determines where the power to govern over certain policy spheres lies. Consequently, and to a point of perpetual contention, there is no agreement on which governing level in the US is at the *top* (US Const., 1787.) Likewise, nor does the bottom-up decentralisation approach of MLG aptly suit the uniqueness of US federalism.

If one were to consider a parallel paradigm that may better explain how these dual MLG approaches function under US federalism, it would show how the top-down approach masquerades as the bottom-up approach; that is to say, *centralisation*

manifesting as *decentralisation*. Given that power must emanate from a sole authority prior to any diffusion, and with the miasma of constitutional incertitude surrounding the question of sovereign supremacy, it is difficult to locate where actual authority resides over numerous issues as both the Federal and several state governments have historically claimed supreme authority over contentious policy areas (Gey, 2002, pp. 1608-1614). Thus, the question remains: In the US, who decentralises power, and who is the centre? This quandary returns to the contention of this paper, that blurring the centre of governing authority, the *sovereign*, may actually set up governments to fail.

Returning to the Framers' attempts to address the inherent sovereign tensions they foresaw in pursuing federalism, a key argument levelled against expanding centralised government presaged that competing jurisdictions of enforcement and oversight over the rights of the people and the powers of each governing level (state/federal) would emerge. Given that the Constitution could not delineate to which governmental level of jurisdiction every future issue would fall, nor incorporate every contingency that might necessitate government action, objections abounded from what came to be known as the *anti-federalists* over its ratification (Maier, 2010, pp. 36-38). Notable anti-federalist Patrick Henry explicitly raised the issue of how divided sovereignty between the antecedent states and the new national government would function under the framework of the proposed constitution, declaiming,

“Have they made a proposal of a compact between states? If they had, this would be a confederation. It is otherwise most clearly a consolidated government... and the sovereignty of the states will be relinquished: and cannot we plainly see that this is actually the case?” (Henry, 1788).

Such a germane recognition of the obduracy inherent in the sovereignty principle reflects the contentious origins of US federalism. The attempt to divide power originally held by the several states to a new central government, regardless of the efforts to build in a system of checks and balances shows the Framers willingness to abandon the original ideal of a compact of states, and to dilute the power the states held as supreme sovereigns within this compact (Hummel & Marina, 1981). It could be argued that the new constitution was an attempt to correct the original US ideal of decentralised power after only a short time under the Articles of Confederation, by reverting to what was familiar: centralised government. Hamilton affirms this in Federalist No. 15 when enumerating the deficiencies of decentralised governance as envisioned under the Articles, writing, “*Government implies the power of making laws. It is essential to the idea of a law, that it be attended with a sanction... If there be no penalty... the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation*” (Hamilton, 2001, p. 72).

Despite the understanding that the Federal Government would only retain those powers explicitly enumerated to it under the Constitution, and the eventual incorporation of a Bill of Rights deemed necessary to assuage the Constitution's detractors and ensure its ratification, the sovereign dichotomy that persisted between the states and the Federal Government proved too intractable to overcome (Kaminski & Bernstein, 1990, pp. 425-428). With both sovereign levels of government competing for authority over the most politically controversial issues *du jour*, the relative parity of force retained by the states and that held by the Federal Government eventually led to the breakdown of governance, through the secession of several states, and thereupon, the US Civil War (Bestor, 1964, p. 327).

Far from an exemplar epitomising the ideal of MLG's decentralisation approach of enhanced and unified governance, US federalism affirmatively demonstrates the aforementioned weaknesses immanent in dividing sovereignty and governing power amongst multiple actors. Rather than stabilising crises of governance, allowing multiple governance levels to operate across the same space has demonstrated the tendency for said actors to utilise force and usurp authority in furtherance of an acute interest, irrespective of their legal bounds. Furthermore, the US federalism model supports the contention that MLG can be the cause of the destabilising governance imbalances it seeks to address. It also evinces the indivisible nature of sovereignty and the proposition that a supreme sovereign will always be sought in times of turmoil; in essence, it is impossible to remove sovereignty from the equation of governance.

Local government: Federalism's *Third Sovereign*

Just as scrutinising how US federalism emerged elucidates the flaws present in the dual top-down and bottom-up traditional MLG approaches, an evaluation of modern US governance in practice further showcases the complications of over-decentralisation, and how it inevitably leads to *re-centralisation*, or the usurpation of power and illegitimate force. As noted, a distinctive legal attribute of the US' federalist structure is that despite the many responsibilities ascribed to local governments, their delphic status as a legitimate governing level remains ancillary to the constitutional recognition granted to the state and federal governmental levels. Thus, the several US states have each adopted unique systems of local governance, often arranged into distinct categories, including *County Governments*, *Town or Township Governments*, *Municipal Governments*, and *Special-Purpose Local Governments*, each holding various jurisdictional powers and functions (Benton, 2022, pp. 82-87).

Two core frameworks serve to contextualise how the constitutionally unrecognised level of local government fits into US federalism model. The first framework is *Home Rule*. This concept holds that a constituent part of a US state has delegated authority from a constitution to exercise power, or that power is implicitly allowed unless specifically denied to it by the state. The idea behind Home Rule is that localities are free to self-govern and pass laws provided that these laws don't conflict with state or federal statutes and constitutions. The second framework is the *Dillon's Rule* doctrine. This doctrine interprets local governance not as a power-sharing system with state government but asserts that local governments have no inherent authority beyond what is granted to them by their states. This doctrine originated in a 1868 court case by Iowa state judge John Dillon, who argued that local governments are wholly the creation of the state legislatures, thus subject to their control, restriction, or complete dissolution (Bowman & Kearney, 2012, pp. 530-532). This theory was affirmed in 1907 by the US Supreme Court, which upheld the power of the State of Pennsylvania to consolidate the city of Allegheny into the city of Pittsburgh, against the wishes of Allegheny residents (Hansford, 2020). To clarify the distinction between the two frameworks, Home Rule allows for local governments to enact ordinances without a state legislature's permission, while Dillon's Rule allows for state legislatures to place any restrictions on their municipalities, provided legislatures don't exceed their own constitutional powers.

It is salient to adduce the critiques and questions emergent from these frameworks of local government under the US' system of constitutional federalism. Analogous to the tensions extant in the power-sharing arrangement between the US states and the

Federal Government, the overlooked power-struggles between state and local governments – which oft lead to Federal Government involvement – can have vaster detrimental effects on day-to-day governance, given how heavily local governments are relied upon to deliver key services, enforce laws, and carry out tasks which the State Government is unable to (Bowman & Kearney, 2012, p. 541). Consequently, although local governments remain key actors in carrying out these practical functions, their existence as distinct legal sovereigns and their relationship to both the state and the federal governments linger in constitutional no man’s land. This raises the first key question: Should local governments be legally and constitutionally defined as US federalism’s *third sovereign*, or would recognizing this new level of government create more legal confusion as the division of governing power becomes more fractured? For now, local governments remain subject to the whims of state legislatures and governors, who often make politically motivated decisions, and frequently pass statutes and ordinances against the interests of local governments for the purposes of political or personal retribution (Fechter, Douglas & Nguyen, 2023).

Additional crucial legal questions also emerge from this constitutional ambiguity on the status of local governments:

First, do states actually have the legal power to delegate authority to a constitutionally unrecognised non-sovereign entity such as a local government? This is analogous to the ongoing legal claims that the US Congress has no constitutional power to delegate its own duties to the growing administrative branch of the Federal Government (Lawson, 1994). Although the purpose of the US Constitution is to enumerate the powers of the Federal Government rather than those of the state *governments*, as a governing framework retaining supremacy over the division of legal powers, it is a curiosity that states could have the power to create new governments, absent from any higher recognition.

Second, if local governments are purely a creation of state constitutions and legislatures, by what *mechanism* or jurisdiction are they to be subject to Federal Law? This paradox is particularly germane as local governments are often tasked with the enforcement and compliance of federal regulations (Benton 2022, pp. 96-98). Local governments are formed by citizens and all citizens are subject to federal law, thus those within local government are legally required to be compliant. Yet, the question of enforcement power remains; rather than the Federal Government being the legitimate entity enforcing its own laws, what constitutionally enumerated power gives the Federal Government the authority to devolve its responsibilities to the constitutionally absent “*insovereign*” of local government?

Third, would constitutional recognition of local governments upend the reasoning behind the Tenth *Amendment*, which guarantees that all non-delegated powers to the Federal Government belong to the states and the people (US Const., 1787, amend. 10)? Although constitutional recognition of local governments may reinforce their legal legitimacy, new constitutional clashes could emerge as local governments were clearly not envisioned as part of the original division of sovereign power intended under US federalism. For example, it is unclear how federal law could reckon or override the patchwork of state constitutions and laws that currently govern regions and localities, and whether the federal government would even have the power to intrude on what is already determined to be a state’s right in the constitution’s existing amendments.

Texas stands out as a quintessential exemplar illustrating these tensions of local governments' place within federalism, though such cases can be found across the US. There are over 350 Home Rule cities in Texas alone, with most other municipalities falling under Dillon's Rule (U.S. Census Bureau Texas, 2022). Although the framers of the Texas Constitution addressed local government, they did so in a haphazard manner; much of the focus was on the limitation of local taxation power, regulating property ownership, and limiting the creation of new municipal subdivisions (Texas Const. 1876). Two constitutional provisions elucidate this lack of attention to the legal remit of local governments:

Article IX Counties: *SECTION 1*. The Legislature shall have power to create counties for the convenience of the people, subject to the following provisions... (Texas Const. 1876, art. 9, sec. 1).

Article XI Municipal Corporations: *SECTION 1*. The several counties of this State are hereby recognized as legal subdivisions of the State. (Texas Const. 1876, art. 11, sec. 1).

Pursuant to the imprecision of these provisions, numerous ongoing cases out of Texas highlight the legal intersection between the three levels of government – federal, state, and local – and the lack of constitutional clarity on which level of government has final jurisdiction over which issues. For example, in May 2023, the Texas legislature passed a sweeping bill (HB2127) stripping municipalities of the right to enact regulations across a range of issues including payday lending laws, heat protections and water breaks for construction workers, and discrimination protections (Texas House Bill 2127 (2023)). In addition to the legal intersection of governance levels in this case, broader political considerations are also at play. The current make-up of the Texas state legislature is Republican Party controlled, and often attempts to pre-empt local laws from being enforced in predominantly Democrat Party run cities. Thus, because Democrats have so little power at the state level, they attempt to enforce their political agenda at the local level (Fechter, Douglas & Nguyen, 2023). Furthermore, many citizens living in these municipalities argue that local governments have actually gone too far with regulations and have asked the state to intervene against what they view as local ordinances harming their state-protected rights (Elbein, 2023). Another major area of concern regarding this bill is in the way it was written. The lack of jurisdictional clarity has meant that cities and municipalities are unsure which laws they still have the power to enforce, and local businesses remain uncertain about which contradictory laws they need to obey: state laws or local laws (Elbein, 2023). Ironically, in practice, this bill changes nothing by means of creating new laws, but simply provides for blanket authority to any Texas citizen to sue a municipality if they feel that its laws are stricter than the state's, so long as they can prove injury (Texas House Bill 2127 (2023)).

This jurisdictional conflict continues to make its way through the courts, with both sides arguing that the state's constitution supports their arguments. The state argues that a plain reading of their Constitution gives supremacy to state laws over local regulations, while localities argue that constitutional Home Rule cities have sovereign power to enforce whatever local regulations they choose, provided they don't violate existing state statutes (Lee, 2023). The federal legal element is woven through here, as municipalities argue that many of their ordinances strengthen what is already in federal law – such as mandating water breaks for workers – and given that federal law

cannot be nullified by state law, the state therefore cannot prevent municipalities from enforcing ordinances that align with federal law (*The City of Houston v. The State of Texas* 2023). Further complicating matters, conflicting court precedents exist over whether a political subdivision has standing to sue its parent state in the first instance. Various federal circuit court rulings have allowed such suits under the *Supremacy Clause* of the US Constitution if it's suggested that state governments have violated federal law in overriding local ordinances. Whereas other rulings have stated that there is no constitutional provision allowing a subdivision to sue their state and that these political subdivisions lack any standing to bring their cases to federal courts (Lawrence, 2002, pp. 94, 100-105). These latter rulings attest to the earlier question raised: If local governments aren't recognised as sovereign entities with standing in federal courts, how can they be subject to federal laws, or permitted to enforce laws on behalf of the state or federal governments? Further, can a sovereign government delegate governmental responsibilities to a non-sovereign entity, without breaching its legal legitimacy?

Despite persisting arguments grounded in notions of popular sovereignty that claim an innate right of the people to form local governments, such arguments cannot be reconciled with the constitutional model of federalism which, while affirming that all government power stems from the people and the states, clearly delineates the legal authority of only two levels of government, state and federal (DeHart & Oakerson, 2022). As is evident by the Home Rule and Dillon's Rule frameworks, and despite the outstanding questions raised regarding the legal standing and legitimacy of local governments, the several states are, at this time, the centre-points of sovereign authority that can regulate or override local governments at will. In essence, something cannot retain an innate right to exist if that right is contingent on another's preference to abolish it. It is axiomatic that the congruence of dividing sovereign power between federal and state governments has been replicated at the micro-level between local and state governments, while also replicating the attendant obstacle of that immovable object inherent in governing authority: sovereign supremacy. As the Texas case elucidates, far from resulting in anodyne governance, what multiplying levels of government plainly results in is attenuated government authority, as citizens remain confused by which level of government retains the ultimate legal legitimacy and authority to enforce what are otherwise contradictory laws. This strengthens the critiques of MLG that this paper has presented and supports its contention, that when attempting to divide the indivisible concept of sovereignty, inevitably, governance and governments break down; when everyone is in charge, no one is in charge.

Conclusion

In summary, whilst MLG proponents have not advocated for their approaches under any pretence of devising perfected systems of governance, it is clear that even with MLG's malleable conceptual parameters and nebulous scope, certain governance imperatives, such as the principles of sovereignty, have remained the same across most governing systems, including that of federalism. Regardless of the number of levels of decentralisation or the attempts to diffuse power, sovereignty, that is, supreme authority, cannot be removed from the equation of governance, as the term *decentralisation* itself compels the devolution of power from a central source. If, as Bodin writes, "*the law is nothing but the command of a sovereign making use of his power*" (Bodin, 1992, p. 38), then the citizenry must be able to identify the sovereign's authority to regard both the law and the policies made under it as legitimate. As the

case of federalism has shown, imposing a system of dual sovereignty diminishes the authority of both the federal and state levels of government to assume supremacy and protect any sovereign imperative. Although the US' system of federalism is often lauded as one that can best represent its citizens – highlighting why on the surface it appears to align with the goals of the MLG approaches – it is evident that inherent in this system of divided power and multitudinous sovereignties governments can end up undermining themselves, creating the very issues that they sought to prevent or resolve. As has been shown, courts cannot be relied upon to settle questions of governing authority or sovereign supremacy in the absence of clearly defined laws or due to contradictory constitutional provisions that remain open to judicial interpretation. Despite federalism's intended goal of better governance through the diffusion of power, without clearly defined laws specifying the remit of each governmental level, this diffusion can exacerbate crises and politically fracture polities, leading, in the worst case, to the complete absence and dissolution of governance and governments at all levels. The evidence presented here is hence crucial in supporting the contention of this paper, that sovereign power cannot be divided without that power essentially being destroyed.

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