

## **Separation of Powers: The Prime Directive of University Governance**

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### **Abstract**

*Governance of the modern university is properly based upon a separation of powers among its faculty, administrators, and legislative bodies. This separation of powers is the university's central organizing idea, and its version of an unwritten constitutional principle. The university's historical origins, theoretical purposes, and modern mythology are consistent with the pivotal role of a separation of powers principle in its government. Yet this principle is not widely recognized or understood, perhaps because it is so basic as to be overlooked, or because it has heretofore been expressed in terms that obscure its true nature. When consistently applied, it enables the parties within the institution to play complementary rather than conflicting roles. When the principle is breached or ignored, university government is liable to be arbitrary and confused, and in conflict with the institution's conceptual foundations. In extreme situations, problematic administration, contentious politics, and excessive bureaucracy result. The principle proposed in this article divides responsibilities in the following manner: University legislative bodies have authority over operational and program matters. Administrative officers have jurisdiction over administrative matters. Individual professors have authority over academic matters in their courses and in their scholarship. When these decision-makers are inside their own particular areas of authority, the university achieves its purpose by insisting that they be left alone. Separating powers within the university is important not merely because it allows the university to achieve its goals and to be consistent with its mission. Rather, in a sense, separation of powers is itself the mission of the university: to provide an environment with time and space for the free inquiry of new and controversial ideas.*

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## **Part 1 – Introduction**

Governance of the modern university is properly based upon a separation of powers among its faculty, administrators, and legislative bodies. This separation of powers is the university's central organizing idea, and its version of an unwritten constitutional principle.

The concept of separation of powers within the university is both ancient and novel. It is ancient in the sense that it reflects the way that the university has operated for hundreds of years, and reflects well-established theories and understandings about how the university works and what it is for. It is novel and evolutionary in the sense that those theories and understandings have yet to crystallize into one coherent governing principle. Much about the university's historical origins, theoretical purposes, and modern mythology is consistent with the pivotal role of a separation of powers principle in its government. Yet this principle is not widely recognized or understood, perhaps because it is so basic as to be overlooked, or because it has heretofore been expressed in terms that obscure its true nature. Separation of powers makes the university's operation consistent with its mandate as a quasi-public institution dedicated to the free inquiry of new and controversial ideas. When consistently applied, it enables the parties within the institution to play complementary rather than conflicting roles in the pursuit of that mandate. When the principle is breached or ignored, university government is liable to be arbitrary and confused, and in conflict with the institution's conceptual foundations. In extreme situations, problematic administration, contentious politics, and excessive bureaucracy result.

The subject of this analysis is internal university government. It does not address external governance of the university, the extent of university autonomy, or its relationship with federal, provincial or state governments. Instead, it looks inward to the three decision-

making centres within the university – faculty members, administrators, and “legislative” bodies - and the central principle that defines the relationship among them.<sup>1</sup> The university has historically enjoyed a significant degree of deference and autonomy in its treatment by governments and courts,<sup>2</sup> but this deference is accompanied by scarce indication of where authority should lie on various matters. Within the university, who decides what?

## **Part 2 – University Governance: Herding Cats**

University governance involves unique challenges. The university is “one of the most complex of human institutions,”<sup>3</sup> in which relationships are characterized by “principles of tribal behaviour.”<sup>4</sup> The task of governing the university is often described as one of attempting to reconcile internal contradictions,<sup>5</sup> or requiring a perilous balancing act between irreconcilable interests.<sup>6</sup> The university is thought to be a place of inevitable conflict between faculty and administration,<sup>7</sup> and between faculty and faculty, where governing is akin to herding cats.<sup>8</sup>

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<sup>1</sup> “Academic freedom must not be confused with institutional autonomy. Post-secondary institutions are autonomous to the extent that they can set policies independent of outside influence. That very autonomy can protect academic freedom from a hostile external environment, but it can also facilitate an internal assault on academic freedom. To undermine or suppress academic freedom is a serious abuse of institutional autonomy.” Canadian Association of University Teachers, *Policy Statement on Academic Freedom*, November 2005 < <http://www.caut.ca/en/policies/academicfreedom.asp>>.

<sup>2</sup> David Mullan, *The Universities and Principles of Remedies of Public Law* 25 ADMIN. L.R. 212 (1987); GREGORY M. DICKINSON, *ACADEMIC AUTONOMY AND LEGAL PRESCRIPTION: AN INVESTIGATION OF THE INTRUSION OF LAW INTO DECISION-MAKING WITHIN UNIVERSITIES* (Ph.D. Thesis, Department of Education, University of Toronto, 1988) at 553-554. But see *Freeman-Maloy v Marsden* [2006] S.C.C.A. No. 201, where the Supreme Court of Canada refused leave to appeal a decision of the Ontario Court of Appeal allowing a university student to sue the president of his university for misfeasance in public office; and *Shank v. Daniels* (2002), 57 O.R. (3d) 559 (Ont. S.C.), where the court applied a standard of correctness to a dean’s decision on the guilt of a student on an allegation of an academic offence.

<sup>3</sup> J. DOUGLAS BROWN, *THE LIBERAL UNIVERSITY: AN INSTITUTIONAL ANALYSIS* (New York: McGraw-Hill Book Company, 1969) at 3.

<sup>4</sup> HAZARD ADAMS, *THE ACADEMIC TRIBES* (New York: Liveright, 1976) at vii.

<sup>5</sup> Hazard Adams identifies two antinomies of the university. “Antinomy the first: The faculty is the university; the faculty are employees of the university; Antinomy the second: The administration is the master of the faculty; the administration is the servant of the faculty.” *Id.*, at 15-16.

<sup>6</sup> NORMA M. GOONEN AND RACHEL S. BLECHMAN, *HIGHER EDUCATION ADMINISTRATION: A GUIDE TO LEGAL, ETHICAL, AND PRACTICAL ISSUES* (Westport: Greenwood Press, 1999) at 1.

<sup>7</sup> “The faculty member ... observes the administrator co-operate with people he believes are insidious fools at best and, apparently taken in by them, opt for the clearly pragmatic solution. In such situations – again I

The perspective of this article is that these characteristics are accurate but not inevitable. Instead, they are symptoms that arise when the university's first principle is not clearly understood or applied. The university is indeed a complex institution, but it need not be complicated. Effective university governance is eminently possible if it is done on the basis of clear principles that reflect the university's historical evolution and purpose rather than on murky management strategies and ad-hoc muddling through. University governance is difficult not because academic personalities are idiosyncratic (although often they are), or because goals of administration and faculty conflict (although sometimes they do), but because university government is often poorly conceived by those who design it and participate in it.

Universities have two core functions: teaching and research. They contain a wide variety of people with different perspectives, objectives, and convictions, all of whom should be able to feel at home within the institution. The university exists to make deep specialization possible.<sup>9</sup> Governing such a place requires the articulation of a clear and simple principle that explains who decides what. The simple principle I propose divides responsibilities in the following manner: In the university, legislative bodies have authority over operational and program matters; administrative officers have jurisdiction over administrative matters; and individual professors have authority over academic matters in their courses and in their scholarship.

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see no escaping them – the faculty observes the symbol of the institution tarnished even as it reveals its human dimensions, while the administrator is tempted toward misanthropy as he copes endlessly with problems of personality and character in a faculty proudly exercising its independence.” Adams, *supra* note 4, at 8.

<sup>8</sup> Nancy B. Rapoport, *Of Cat-Herders, Conductors, Tour-Guides and Fearless Leaders* 33 UNIVERSITY OF TOLEDO LAW REVIEW 161 at 161-163 (2001); Mark G. Edelstein, *Academic Governance: The Art of Herding Cats* in JAMES MARTIN AND JAMES E. SAMUELS, EDs., *FIRST AMONG EQUALS: THE ROLE OF THE CHIEF ACADEMIC OFFICER* (Baltimore: The Johns Hopkins University Press, 1977) 58; Thomas H. Hammond, *Herding Cats in University Hierarchies: Formal Structure and Policy Choice in American Research Universities* in RONALD G. EHRENBERG, ED., *GOVERNING ACADEMIA* (Ithaca: Cornell University Press, 2004) 91.

<sup>9</sup> “The structures of the university emerged to solve several problems: how to nurse deeply specialized scholars, how to protect them from each other and the outside world, and how to pool the results of their distributed inquiries. ... The history of the university gives us an idea of what the university is for. The university is home to structures that nurse and protect and connect deeply specialized scholars.” Suzanne Lohmann, *Darwinian Medicine for the University* in EHRENBERG, *id.*, 72 and 78.

This article is not an appeal for a legalistic approach to university governance. Indeed, it is exactly the reverse. The appropriate response to organizational complexity is principled simplicity.<sup>10</sup> A system of internal governance based upon a separation of powers avoids ad-hoc administration and the frequent legalistic wrangling that accompanies it. Good governance requires each branch to stick to its knitting. In the absence of clear and simple ground rules, any particular matter can become a cause for conflict. Resentment and confusion are the likely results should one branch attempt to control matters within the bailiwick of another. When administrators interfere with research agendas, when departmental and faculty councils make rules to control professors in the classroom, when professors meddle in administrative matters without responsibility, governance issues become obstacles to the university's two main purposes.

Many modern universities have extraordinarily complicated and muddled systems of internal governance. They employ a multitude of internal bodies – boards, committees, panels, and so on - with unclear and overlapping mandates, on which administrators and faculty members spend inordinate amounts of time. A plethora of rules and policies exist on every conceivable subject,<sup>11</sup> yet it is still deemed necessary to hold meetings. People are occupied with directing matters that are not always within their sphere of expertise, contributing to a conflicted environment in which teaching and research are not genuinely the top priorities. The burdens of administration, internal politics, institutional promotion and the struggle for resources often crowd out more worthwhile activities. The university claims to operate on academic collegiality, yet many campuses brim with conflict, sometimes open but more frequently bubbling just below the surface.<sup>12</sup>

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<sup>10</sup> See RICHARD EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (Cambridge: Harvard University Press, 1995) 21-49.

<sup>11</sup> “[U]niversities often have complex and legalistic [rules and procedures which exceed what the law would require.]” DICKINSON, *supra* note 2, at ii.

<sup>12</sup> “I have always maintained that academic politics was the bloodiest, the most ruthless and the most vicious politics that I have ever experienced. It makes Parliament look like a piece of cake in comparison.” Svend Robinson, *The Collision of Rights* 44 U.N.B.L.J. 61 at 61 (1995). A version of this observation, sometimes attributed to Henry Kissinger, is worth noting: “University politics is so vicious precisely because there is so little at stake.”

Such characteristics of university life are not inevitable, but are facilitated by the failure to observe a separation of powers. Managing the university can indeed be like herding cats. The analogy is apt – not because cats unreasonably resist herding, but because cats are not ‘meant’ to be herded. Like the different branches within the university, they are characteristically independent. Taking separation of powers seriously means not attempting to control people who act within their sphere of autonomy.

### **Part 3 – Separation of Powers**

#### **(a) The separation of powers principle**

The rationales for separating powers are to prevent concentrations of power, and to allow independent sources of authority and expertise to fulfill disparate tasks without interference of one from the other. The concept of a separation of powers in government comes from constitutional jurisprudence. Monahan describes its origins:

The doctrine of the “separation of powers” was developed in the seventeenth and eighteenth centuries by the English philosopher John Locke and by the French jurist Charles-Louis Montesquieu. Both Locke and Montesquieu believed that there should be a clear separation between the executive, legislative, and judicial branches of government. They reasoned that such separation was necessary to prevent tyranny, as Locke stated: “[i]t may be too great a temptation to humane frailty, apt to grasp at Power, for the same Persons who have the power of making laws, to have also in their hands the power to execute them.”<sup>13</sup>

In Canada the separation of powers between legislative and executive branches is weaker than it is in the United States.<sup>14</sup> In the U.S., there is a strict division between Congress (the legislative branch), the office of the President (the executive branch), and the judiciary. In the Canadian parliamentary system, like its model in the U.K., the leaders of the Government head the executive branch and control the Government side of the

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<sup>13</sup> PATRICK MONAHAN, CONSTITUTIONAL LAW, 2nd ed. (Toronto: Irwin Law, 2002) 67.

<sup>14</sup> PETER HOGG, CONSTITUTIONAL LAW OF CANADA (Toronto: Thomson Carswell, 2005) at 272.

legislature. In their legislative role, they introduce bills and influence the way members of their own party will vote. In their executive role, they direct a vast array of agencies and bureaucrats who put the law into effect. Thus, a small group of individuals play dominant roles in two branches at the same time. In this sense, division between executive and legislature reflects a weak version of the separation of powers principle. Nevertheless, separation between the two branches does exist – they are not one branch, but two, each with distinct functions and limitations that distinguish it from the other. When they wear the hat of the executive branch, the prime minister and Cabinet have no power to act other than in the manner that the law authorizes;<sup>15</sup> their power is limited by the law that the legislature has passed. When they wear their legislators' hat, their power depends on support from members of the House of Commons and Senate, and therefore exists in proportion to their ability to rally approval for particular bills.

In the case of the judicial branch, separation of powers is much more distinct.<sup>16</sup> In Canada, the judiciary has constitutional status as a separate and independent branch of government.<sup>17</sup> Monahan explains the rationale:

An independent judiciary is necessary in any society committed to the rule of law. The rule of law requires, among other things, that government must be conducted according to law, including the law of the constitution. Because the government will often be a party to litigation, it has long been recognized that judges can only uphold the rule of law if they are independent of the government and other agencies of the state. Only an independent judiciary can render decisions that might be unfavourable to a sitting government or that might limit the powers of the state. Therefore, the independence of the judiciary is essential to the effective performance of the judicial function and the maintenance of the rule of law.<sup>18</sup>

### **(b) The branches of authority in the university**

The case for a separation of powers in the university is not based upon an exact replication of the separation of powers at the level of government in either Canada or the

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<sup>15</sup> *Roncarelli v Duplessis* [1959] S.C.R. 121.

<sup>16</sup> HOGG, *supra* note 14, at 208-209.

<sup>17</sup> *Constitution Act, 1867*, ss. 96-100; MONAHAN, *supra* note 13, at 82.

<sup>18</sup> MONAHAN, *id.*, at 86.

United States, but upon the principle itself. The application of the principle at the level of national or provincial government provides a helpful model, but the university has unique characteristics to which the principle must be thoughtfully applied.

Like government, the university has three main branches of authority. They are not the same branches as in government, nor are their roles identical, but there are some similarities in role and function. The university's executive branch consists of its administrators: president and vice-presidents, deans and associate deans, registrars, and administrative staff; the university's professors constitute its faculty branch; and it has a legislative branch that consists of its program and policy-making bodies:<sup>19</sup> boards of governors, senate, university council, faculty boards, departmental boards, and associated committees. (Because it is not the purpose of this piece to dissect the particular jurisdictional powers of these various bodies within the legislative branch, but to treat those bodies as one branch of three, I will collectively refer to them as "legislative bodies" without attempting to distinguish one from another. The way in which powers are distributed between these bodies is important,<sup>20</sup> but is not the focus here.)

At the highest level of abstraction, the job of the government's legislative branch is to make general rules, expressed in statutes. The role of the executive is to put the general rules into effect, while the mandate of the judicial branch is to apply the general rules to decide particular cases. In the university, legislative bodies make decisions about the university's operations - finances, programs, institutional planning, and so on. The administration carries out those decisions and plans, making the day-to-day decisions necessary to put them into place. Professors determine particular cases: in teaching, they

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<sup>19</sup> Canadian universities typically have two or three main legislative bodies, one called the Board of Governors or Board of Trustees or some variation thereof, a second sometimes called a Senate or University Council, and occasionally a third body with a limited mandate such as appointing the university's chancellor. Divided between the first two bodies are the main program and operational powers of the university, with the Board of Governors often responsible for financial and corporate affairs and the Senate for program and personnel matters. Faculty boards or councils and their associated committees exercise delegated authority from the main university bodies, much like municipalities exercise delegated powers from provincial governments.

<sup>20</sup> For example, see *Kulchyski v. Trent University* [2001] O.J. 3237 (Ont. C.A.), leave to appeal denied [2001] S.C.C.A. No. 516; Daniel A. Nelson, *Judicial Review in the Community of Scholars: A Short History of Kulchyski v. Trent University* 13 EDUC. & L.J. 367 (2004).



make decisions regarding the courses that they are assigned; and in scholarship, they conduct research and publish findings and opinions.

Within the university, as in the Canadian government, individuals may have a role in more than one branch. On the university's legislative bodies sit administrators and faculty, as well as community members and students. The university president is an administrator, but typically has a leading role on the senate and board of governors, and thus has a significant opportunity to influence the actions of both bodies. Nevertheless, the president's executive power is limited by the decisions made by these legislatures. Professors also play a double role.<sup>21</sup> They are autonomous decision-makers with respect to academic matters in their teaching and research, and sit on a variety of legislative bodies, including some on which professors constitute the majority of members such as faculty and departmental councils. Administrators and students representatives usually make up the remainder.

### **(c) Decisions in the university and who makes them**

Within the university, there are three main categories of decisions to be made:

1. operational decisions;
2. administrative decisions; and
3. academic decisions.

Each of the three branches of university government has the exclusive jurisdiction over one of these categories. Legislative bodies make operational decisions (such as program offerings, course offerings, the establishment of faculties and departments, degree requirements, sessional dates, transcript policies, fee levels, and campus planning). Administrators carry out steps to put policies into practice (such as hiring faculty and

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<sup>21</sup> Deans and associate deans often play all three roles simultaneously. They are administrators first and foremost, and sit on legislative bodies by virtue of their post, but many also continue to teach and conduct research. Although they are not formally considered to be members of faculty during the term of their administrative assignments, they attract the same exclusive jurisdiction over their own courses and research projects while they are engaged in those activities.

staff, publishing calendars, soliciting and registering students, collecting fees, recording marks, making budgets, paying salaries, soliciting donations, and organizing commencement ceremonies). Professors make academic decisions: in scholarship, decisions about methods, perspectives, and conclusions; and in teaching, decisions about content, delivery, and assessment within the courses they are assigned to teach.

Two exceptional categories of decisions also exist:

1. hybrid decisions; and
2. quasi-judicial decisions.

Hybrid decisions are collaborative decisions that are made by at least two of the branches together. For example, some decisions will be made by department heads and individual faculty members. Hybrid decisions are academic decisions that are not limited to a professor's own courses or research, and thus have wider implications than the professor's own academic activities. For example, annual course assignments are a hybrid decision; they are made by departmental administrators in collaboration with each professor. They are hybrid decisions because they are academic in nature – what will the professor teach – but they are not decisions that the individual professor can make alone because she is not in a position to ensure that an appropriate roster of courses is offered to fulfill degree requirements established by the university's legislative bodies. On the other hand, course assignments are not decisions that the administration should make without participation by professors because they have a direct effect upon professors' academic endeavours. To assign professors courses in which they have no expertise and no interest would conflict with the university's goal of deep specialization. On the other hand, it would not be appropriate for the professor to assign herself four narrowly focused seminar courses on her particular area of expertise if that would prevent the department from offering the range and scope of courses that students require for a balanced education in the discipline and sufficient credits for the degree. Thus, course assignments are one example of a hybrid decision that administrators and professors make together.

Quasi-judicial decisions are made by panels or committees specially appointed to hear and determine cases such as alleged student misconduct. These bodies are the university equivalent of “administrative tribunals”, which carry out their mandates to decide particular cases in accordance with the rules of natural justice and procedural fairness.

#### **(d) Incidents of Separation of Powers in the University**

##### **1. ACADEMIC FREEDOM**

Separation of powers means decision-making autonomy over designated areas. When the autonomy of faculty within the modern university is considered, the discussion is often framed as a question of academic freedom. Academic freedom is an expression of the independence of university faculty members in academic matters,<sup>22</sup> and is one feature of separation of powers in the university.

Academic freedom means independence to decide academic questions. The professor is hired not just for her knowledge, but also for her judgment. She has a right and responsibility to exercise her scholarly and pedagogical discretion independently – in scholarship, to develop methods, perspectives, and conclusions; and in teaching, to decide content, delivery, and assessment that are in the best educational interests of her students. Academic freedom is not a privilege, but a characteristic of a proper separation of powers within the university.

I am sure that everyone would agree that academic freedom is as important to what scholars do, as judicial independence is to what judges do. There are, of course, differences in purpose between the two; whereas judicial independence is one assurance of impartiality, academic freedom protects commitment to ideas and theories which may be unorthodox or unpopular. Whereas judicial independence exists in the interests of the legitimacy of administration of justice, academic freedom exists in the

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<sup>22</sup> For an example of an extended definition of academic freedom, see the Canadian Association of University Teachers’ *Policy Statement of Academic Freedom*, November 2005, at <<http://www.caut.ca/en/policies/academicfreedom.asp>>.

interest of advancing scholarly inquiry. Common to both of these defining ideas, however, is the widespread acknowledgement of their continuing value and, as a consequence, their continuing utility in developing a framework in which the merits of claims to one or the other can be assessed.<sup>23</sup>

The right to academic freedom has been incorporated into collective agreements and governing documents at universities across Canada, and although the realization of that right continues to be a matter of some difficulty, the concept is firmly established in Canadian university culture. Much in the same way that the constitutional status of judicial independence is a reflection of separation of powers in the state, academic freedom is a corollary of the principle of separation of powers within the university. Because academic freedom appears in the form of a contractual term in collective agreements, it is possible to erroneously perceive it as a right that university administrations are able to grant or surrender in the course of labour negotiations. University administration is not able to refuse academic freedom to its professors without laying claim to expertise that it does not have.

One of the premises of the university is that the source of academic expertise on any particular subject is the individual professor, not the administration or the university as a whole. The university has no academic expertise other than that held by its professors – not its professors as a group, but as individual owners of specialized knowledge. While faculty members are sorted into disciplines, and all faculty within the math department presumably know math, it is the individual professor who is deeply embedded in his or her specialized field of inquiry. Prescribing course content is something that no one but the teaching faculty member does or can do – partly because it would be a breach of academic freedom, and partly because it requires expertise that the professor, not the university administration, possesses.

... there is a compelling rationale for the faculty's role in governance. It is only the faculty as a whole that has the necessary expertise to ensure the

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<sup>23</sup> Peter MacKinnon, *Administering and Protecting Academic Freedom* in LEN M. FINDLAY AND PAUL M. BIDWELL, *PURSuing ACADEMIC FREEDOM: "FREE AND FEARLESS"?* (Saskatoon: Puriich Publishing Ltd., 2001) 37.

quality of curriculum, instruction, and research. While it may seem at times that administrators could act much more efficiently if they were allowed to simply “manage” their institutions, the reality is that the most important aspects of colleges and universities cannot be “managed.” They involve far too much specialized knowledge. If the members of the faculty do not exert themselves to protect and enhance academic quality through their governance role, there is no way the administration can do so effectively.<sup>24</sup>

It is the question of expertise that places doubt upon the process of annual review that takes place in many Canadian universities. In this process, faculty members are expected to submit an annual report to their dean describing their research and teaching activities during the year. The dean assesses the performance of the professor and assigns a merit score. Unfortunately, unlike the tenure process (discussed below), this process of annual review is problematic because it calls upon administrators to apply expertise that they do not possess. In performing these evaluations, the dean has only two choices of criteria to apply to faculty performance: quality or quantity (or both). The dean is not equipped to evaluate the quality of a professor’s research or teaching. Evaluation of research would require that the dean actually read and then assess the value of the professor’s written work. Assuming that the dean did in fact read the publications of faculty members every year, which of course does not happen, there would then be the task of placing the work in the context of the subject matter and sub-discipline within which it is written. It would require the dean to have the same deep specialization that the professor has – otherwise the professor knows more about the subject than the dean does, and the dean is not in a position to tell the professor whether his material is any good. University administrators are often former academics. Such experience can be helpful for understanding the nature of the institution and the needs of the constituents that it serves. But academics who become administrators are not appointed to exercise academic judgments. They have not the expertise to supervise or evaluate the work of professors. Unless the dean coincidentally has specialized in the same subject matter as a particular professor, she is unable to perform an assessment of the quality of the work. And if she does,

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<sup>24</sup> Mark G. Edelstein, *Academic Governance: The Art of Herding Cats* in JAMES MARTIN, JAMES E. SAMELS & ASSOCIATES, *FIRST AMONG EQUALS: THE ROLE OF THE CHIEF ACADEMIC OFFICER* (Baltimore: The Johns Hopkins University Press, 1977) 58 at 60.

coincidentally, have such a background in one case, then she will not for the rest of the roster. Thus, it is not feasible to expect deans to evaluate the quality of the work produced by faculty members. The only assessable criterion available is quantity.

But the university is not a factory. It does not exist to churn out as many pieces of writing as possible.<sup>25</sup> Instead, its mandate is virtually the reverse: to seek out new, difficult, controversial, and innovative approaches to real and theoretical problems. Under this mandate, one important discovery is more valuable than multiple run-of-the-mill endeavours; one seminal theory is more worthwhile than ten books of description. An assessment process focused on a faculty member's level of production is contrary to the reason for the university's existence, and does not provide a valid measurement of the professor's accomplishments. It provides the appearance of holding faculty to the university's standards and making them "accountable". However, it is not possible for the university to have abstract "academic standards" to which to hold its professors, since it has no independent academic expertise. Counting words or articles or experiments has no relationship to whether the university is serving its purpose. Assessing a professor's performance requires the same mechanism as in the tenure process: peer review. Since formal peer review is too onerous and time-consuming to perform on a regular basis – unless that is the only activity in which one wishes the faculty to be engaged (in which case there will be nothing to review) – the process of annual review for faculty should be abandoned.

Leaving slack in the system makes state legislators nervous because they suspect that the slack will be exploited by lazy deadwood faculty, and they don't want the taxpayer to pay good salaries to faculty who are doing nothing but living the good life. But we must keep in mind that it is not the first goal of the university to avoid paying faculty for doing nothing. (Indeed, given the potentially debilitating morale problem of the university, there is something to be said for paying the nonproductive faculty well.) The first goal of the university is to enable deep specialization, and there is one thing history tells us, it is that deep

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<sup>25</sup> Although, as Northrope Frye has observed, graduate students are expected to produce a thesis, "a thing that no one particularly wants either to write or to read. Thus, students learn that it is more important to produce than to perfect, and more valuable to profess knowledge than to possess it." (DIVISIONS ON A GROUND: ESSAYS ON CANADIAN CULTURE (Toronto: House of Anansi Press, 1982), 103.)

specialization occurs when scholars are given a room of their own – unsupervised and unincentivized slack, for short.<sup>26</sup>

Separation of powers commands everyone inside the university to do what they would fervently like for themselves but find most difficult to do for others: *choose them well and leave them alone*. It works to the benefit of administrators as well as faculty. While faculty have the autonomy to make academic decisions, administrators have the exclusive jurisdiction to make administrative decisions. While faculty complaints about administrative interference in their teaching and research activities are well founded, so is administrative frustration with meddling from faculty over matters that are not academic in nature. A good example of this phenomenon is faculty interference with the hiring, management, and dismissal of administrative staff (not including research assistants of particular professors), which are responsibilities firmly within the bailiwick of the administration.

[Faculty] trace their role back to the collegium of medieval university, which they view as a true “community of scholars” functioning perfectly well with no administration whatsoever. From this Edenic perspective, administrators of today seem, at best, a necessary evil. The tendency among faculty members to believe that whatever authority they may have is only a shadow of the authority they should have is one of the things that makes governance such an inexhaustible topic of debate on many campuses. Most faculty don’t actually believe that administrators are merely an excrescence on the system, and most administrators don’t feel a corresponding contempt for the faculty’s intrusions into administration, but it doesn’t take much exposure to the kind of banter exchanged between faculty and administrators to realize that there is often something of those attitudes just below the surface of academic life. When discussions become heated, those attitudes are likely to break through.<sup>27</sup>

Separation of powers protects faculty and administrators alike from irresistible compulsions to interfere.

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<sup>26</sup> Lohmann, *supra* note 9, 1 at 89.

<sup>27</sup> Edelstein, *supra* note 8, at 59-60.

## **2. ACADEMIC DIVERSITY AND COLLEGIALITY: THE RELATIONSHIP AMONG FACULTY MEMBERS**

A university is a community, but it is not a community of like-minded individuals. Professors with different educational perspectives and convictions should be able to work together within the university, in an environment of mutual respect and tolerance. The only value that the members of the community need hold in common is the belief in the necessity for such tolerance, for without it a free inquiry of ideas that challenge and question society's fundamental characteristics<sup>28</sup> is not possible. Academic diversity is easy to espouse but more difficult to deliver, for it calls upon faculty members to give colleagues space at the moment of strongest disagreement with matters of academic judgment. Academic tolerance is most important when it is most difficult. Collegiality does not mean congeniality;<sup>29</sup> nor does it mean that people must agree or reach consensus. Instead, it means that fundamental disagreement may exist amongst professors in an environment of acceptance and cooperative independence. Academic diversity means that students will be the beneficiaries of a wide range of views and approaches, and of a rich and diverse educational experience. If university government does not operate smoothly, efficiently, and without rancour in the presence of academic diversity, then it operates in conflict with the reason for the institution's existence. The university becomes at war with itself.

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<sup>28</sup> Michiel Horne cites the political theorist C.B. Macpherson as comparing the role of the university to that of "the medieval court jester or fool, the one person in a prince's entourage who was not a courtier, who was supposed to be outspoken and to say things that no one else would say," in the interest of diagnosing a sick society "at every level of its malfunctioning: ecological, physiological, economic, psychological, political, and above all ... moral." M. Horne, *Academic Freedom in Canada: Past, Present and Future* in LEN M. FINDLAY AND PAUL M. BIDWELL, *PURSUING ACADEMIC FREEDOM: "FREE AND FEARLESS"?* (Saskatoon: Puriich Publishing Ltd., 2001).

<sup>29</sup> For example, see the definition of collegiality offered by the Canadian Association of University Teachers, November 2005: "Collegiality refers to the participation of academic staff in academic governance structures. Collegiality does not mean congeniality or civility, it means the participation in the governance of the collegium. To be collegial, academic governance must: (a) allow for the expression of a diversity of views and opinions, (b) protect participants so that no individual is given inappropriate advantage (for example, due to power differentials) with respect to decisions, and (c) ensure inclusiveness so that all who should be participating are provided the opportunity to do so. Collegial governance depends on participants being given and delivering their share of the service workload." <<http://www.caut.ca/en/policies/collegiality.asp>>



One of the most serious threats to the separation of powers principle, and therefore to the academic freedom of faculty, can be the actions of fellow faculty. Universities are full of people, including faculty, who think they know best – about everything, including how others should do their jobs.<sup>30</sup> Faculty members have a significant role on the university's legislative bodies, particularly at the departmental and faculty level. Such participation is appropriate, but in the absence of a separation of powers doctrine, is a dangerous invitation for some faculty members to meddle in the academic decisions of others. Professors can become embedded in an administrative culture, seeing everywhere issues that require institutional attention,<sup>31</sup> or fervently believing that their misguided colleagues require constant supervision. Like fundamentalist zealots who demand the religious freedom to impose their beliefs on everybody else, individual academics who believe that their own conclusions, judgments, or beliefs about teaching and research are correct become eager to impose those judgments on others in their departments. In spite of their insistence upon academic freedom for themselves, some academics can be oddly rule-oriented and conformist in their expectations for those around them, intolerant of difference and suspicious of inventive ideas. They do not appreciate the difference between advocacy and coercion, or between collegiality and conformity. Lohmann attributes this trait in part to the deep specialization that the university has made possible:

Tenure is supposed to give individual scholars the freedom to think unthinkable thoughts, embark on high-risk-high-return research programs, stand up to “the powers that be,” and so on. It doesn't always work that way, or even most of the time. In the university, it is the tenured faculty, above all, who are the fundamental source of ossification. ... The problem is in part emotional, in other part cognitive, and it lies in the scholarly brain. First, the identity of a scholar, his connections and loyalties, are defined by his socialization in graduate school. Second, as a result of his graduate training, his brain is locked into seeing the world in a particular

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<sup>30</sup> I do not pretend to know why this is a frequently demonstrated characteristic of people who have made their careers in an institution dedicated to the free inquiry of new and controversial ideas. I merely observe that it is so.

<sup>31</sup> “There are always a few people in the faculty who will regard any single issue as a problem to be worked out simply for the sake of the adventure involved. Faculties are, after all, composed largely of people who like problems, perhaps even more than solutions, and even to the point of actively seeking them where they have not been recognized. Indeed, some of these individuals positively dislike solutions, preferring the deeper existential absurdity of the problem itself.” ADAMS, *supra* note 4, at 11.

way, and he is blind to new ideas and methods that slice the world in a different way.<sup>32</sup>

Thus, for separation of powers to be real, it must protect professors not just from administrators, but also from their fellow faculty in their roles as members of legislative bodies. Professors who wish to control the views and actions of their colleagues or believe that their faculty or department should develop a common academic or social mission miss the point: within the university, opinions on academic matters are *supposed* to differ. Collegial difference of opinion is a path to dialogue and discovery. It is consistent with a principled separation of powers that preserves academic independence. Coerced conformity is consistent with an environment of academic intolerance amongst peers who, if they considered the question broadly, might value precisely the reverse. Separation of powers protects faculty from other faculty in their role as university legislators.

### 3. TENURE

Judges require job security to carry out their role. Without it, they could be subject to pressure to act in accordance with the wishes of the legislative and executive branches. Their ability to make independent decisions depends upon the inability of other branches to interfere directly, by dictating the nature of decisions, or indirectly, by reward or punishment. The most severe form of punishment, of course, is dismissal. Therefore, judges require job security to be independent.

So too do professors. It is no coincidence that the faculty branch within the university is most like the judicial branch of government. The nature of the decisions is different, but the relationship with the other branches has distinct similarities. In order for professors to exercise their academic judgment independently, they must not be subject to the preferences of university administrators or policy bodies. They must be in a position to

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<sup>32</sup> Lohmann, *supra* note 9, at 78-79.

reject pressure from those sources without fear of suffering personal consequences, including job reprisals or dismissal.

Tenure, and the process for granting it, in which committees solicit peer assessment of a candidate's scholarly work, are consistent with the separation of powers here described. While this process gives the final decision to university administrators, usually the president, upon the recommendation of the respective dean, that decision, and the dean's recommendation, are based upon the committee's recommendation, which is itself based upon the evaluation provided by the peer review process. Thus, neither the president nor the dean is asked to bring his or her own expertise to bear on the scholarly achievements of the candidate. Instead, they are asked to assess and weigh the assessments provided by those who have expertise. In this particular instance, the judge analogy applies to the president and dean rather than the professor. When a judge hears a case in which technical evidence is adduced, he hears expert evidence on the matters in contention, assesses their credibility, weighs their contribution, and comes to a conclusion. The judge does not bring her own expertise to the question, and indeed is expected to have none. The president and dean play a similar role. They are uninformed and non-expert decision-makers in the tenure decision, as they should be.

### **Part 3 – Application of the Separation of Powers Principle**

In this part, I will apply the separation of powers principle to a number of common issues within the university. Note that my purpose here is to illustrate the separation of powers among branches – legislators, administration, and faculty – rather than exhaustively identify a list of matters over which each has control.<sup>33</sup>

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<sup>33</sup> I will also refrain from attempting to describe which particular legislative body is responsible for what. The division of powers between legislative bodies varies from university to university. The question of which body has jurisdiction in any particular case can be a matter of importance and contention (see for example *Kulchyski v. Trent University* [2001] O.J. 3237 (Ont. C.A.), leave to appeal denied [2001] S.C.C.A. No. 516) but my objective in this article is not to address the division of powers within the legislative branch, but to illuminate the separation of powers between branches.

**Example (a): Course content**

Consider a hypothetical university course in developmental psychology. In order for such a course to exist, certain decisions must be made by the university's legislative bodies. First, the board of governors and/or senate must have approved the creation of a Faculty of Arts and Science (or the equivalent), and the establishment of a Department of Psychology (or equivalent) within it. The Faculty Council is likely the body with the jurisdiction to approve degree programs (or the mandate to recommend such decisions to the senate), and thus would be required to approve a program that encompasses courses in psychology. Let us assume there is a professor who wishes to teach a course in developmental psychology. Whether such a course will be offered is a decision for the local legislative bodies: the departmental council, or perhaps the faculty council, depending upon their particular division of powers. Thus, legislative bodies decide whether the course will be offered; its credit weight; whether it will be compulsory or optional; and other similar matters. These are operational decisions because they determine what role the course will play within the degree, how it relates to other courses, and so on.

Once the appropriate legislative bodies establish the existence of the course, two hybrid decisions must be made: which professor will teach the course, and in what term will it be taught? Administrators sign off on these decisions after reaching agreement with the relevant faculty members. Administrators also determine the final operational details, including the time slot, the classroom, and the students enrolled in the course. At this point, the professor assigned to teach the course assumes responsibility and control over content and pedagogy: materials, delivery, and assessment. The academic discretion in these matters is broad, but of course not absolute. For instance, the course must indeed be about developmental psychology, rather than contract law, calculus, or Spanish literature.

**Example (b): Grades**

As in other matters, some aspects of grades are properly within the mandate of one branch, and some are within the authority of another. Legislative bodies may determine the form in which achievement in a course will be recorded (Does the institution issue number grades or letter grades? If letter grades, which ones?) while the professor determines the relative academic merit of the students in the class (which students get which grade?). Thus, a council may determine whether grades will be letter grades or numerical marks, and may determine the number of each category of grade available to be awarded in each course (which is what a mandatory grade distribution does). A professor could not credibly argue the ability to award numerical marks at a school with letter grades; nor could he or she claim to be able to award more 'A' grades than the school makes available. However, the teacher, not the institution, determines the outcome of the particular course: How do the students rank? Only the professor can say that a particular student performed in the top quartile of the class. This is the professor's role, and no legislative body should be able to interfere with the exercise of academic judgment in this respect. Thus, the professor determines students' relative achievements, and legislatures determine the labels available to communicate those achievements.

Sometimes students attempt to appeal a grade to the dean, hoping the dean will decide that the mark was incorrect and ordering it to be changed. There is a fundamental error in the proposition. The correctness of a mark depends upon *content*, which is a matter exclusively within the responsibilities of the teacher. The dean has neither the expertise nor the jurisdiction to inquire into the substance of the student's exam or its evaluation by the professor. (Furthermore, since assessment is a relative matter, a student's proper grade depends upon how he has performed in relation to the rest of the class. Therefore, even if someone other than the teacher had the mandate to conduct a grade appeal, that person would need to assess the work of the entire class in order to replicate the evaluation performed by the professor.) Sometimes legislative bodies purport to establish limited appeal processes, but they are misconceived for similar reasons.

On the other hand, separation of powers does not provide decision-makers with unlimited powers. The ability to make academic decisions is the power to make decisions based on academic reasons. In exercising her academic judgment, a professor is obliged to operate with an absence of bias; to ignore irrelevant considerations; to apply an even hand across members of a class; and to be free from conflicts of interest. Consider two unhappy students with 'C' grades. The first believes the professor awarded him a 'C' because the professor was incorrect in her assessment of the student's work. The second believes the professor awarded him a 'C' because the student has red hair, and the professor continually remarked in class how students with red hair did poorly in her class. The first student has no case because the professor is the only person with the expertise, opportunity, and jurisdiction to assess the relative achievements and the substantive correctness of the student's work. However, the second student does have a case. The professor's assessment of the second student can be reviewed because the allegation is that the decision was not academic in nature, and should have been. The complaint does not challenge the professor's ability to decide matters within her area of expertise, but does exactly the reverse. The student's claim is not that the professor's judgment within her area of expertise was incorrect, but that the assessment did not in fact take place within that expertise as it should have. The professor has exclusive jurisdiction over academic decisions in her course, but a decision based upon the colour of a student's hair is not an academic decision. The review is not an appeal. It does not inquire into the substance of the exam. Instead, its purpose is to evaluate the way the decision was made, and to determine if the allegation of bias is established. The standard of proof upon the student for such an allegation is demanding. Allegations of procedural errors are easy to make, and the burden of proving them lies firmly upon the student.

**Example (c): Methods of student assessment**

Some aspects of student assessment are within the legislative function of university, faculty, or departmental councils: sessional dates, exam periods, exam scheduling, exam location, proctoring, and so on. These matters properly belong to legislative bodies because they do not involve *the pedagogy of the particular course*. When it comes to

pedagogy, the proper decision-maker is the professor. Thus, within the professor's bailiwick are decisions about the nature of the assessment: final exam or research paper? Take-home exam or in-house exam? Class participation grades? Oral presentation? How does assessment relate to course content? These are questions for the professor, not the legislative branch.

Like so many other academic and pedagogical matters, legitimate arguments can be found for and against particular forms of student assessment. Separation of powers means that professors sitting on councils and committees cannot impose their views about such matters upon their colleagues. Separation of powers means that students are not to be protected from a wide variety of academic approaches – because academic diversity provides a rich education for the student, and protects the academic independence of the professor.

#### **Example (d): Calendars and syllabi**

Students are parties to two “quasi-contractual” relationships. The first is between the university and the student, as expressed in the contents of the university calendar. The second is between professor and student, as expressed in the course syllabus. The university calendar, which is published by the administration in accordance with policies set by legislative bodies, should include matters that are within the jurisdiction of administrators and legislative bodies to decide; the course syllabus, prepared by the professor, should include matters within the bailiwick of the professor. Thus, calendars should not describe particular topics to be covered in particular courses, unless the professor confirms the accuracy of the description. The course syllabus should not represent that half the students in the class are eligible for ‘A’ grade marks if the faculty council has passed a mandatory grade distribution that stipulates otherwise. In each case, the author of the document makes promises that it does not have the ability to deliver because the promises lie within another branch's jurisdiction, and therefore makes misrepresentations to the students enrolled in those courses.

**Example (d): Speech codes**

Academic freedom is freedom from interference from other branches of authority within the university, not freedom from the law of the land. In carrying out their duties, faculty members are subject to the same national and provincial laws as every other citizen. Thus, laws of general application that govern the use of language, such as the laws of defamation and prohibitions against hate speech, apply to a faculty member's teaching and research. It is not the role of the university's other branches to supervise faculty member's activities, including the language that they use in teaching and research.<sup>34</sup> One of the university's purposes is to enable the pursuit of ideas that challenge deeply held cultural values. For the university to impose more censorship than exists in society at large would make no sense.<sup>35</sup>

**Example (e): Research agendas**

The independence of faculty members to determine their own research agendas is the quintessential consequence of separation of powers. Administrators have neither the expertise nor the jurisdiction to participate in research decisions of professors. Academic units do not exist to develop collectively coherent research outputs; whether the scholarship of a department's faculty members are evenly distributed across a discipline does not much matter. Independence in research agendas is necessary to facilitate deep specialization, to enable the pursuit of controversial theories, and to give traction to intuitive insights and foolish mistakes that are capable of producing both revolutionary discoveries and scholarly dead-ends. The proper role of the executive branch of the

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<sup>34</sup> But see J. Macfarlane, *Beyond the Right to Offend: Academic Freedom, Rights and Responsibilities in the Canadian University Classroom*, (1999) DAL. L.J. 80, who argues in favour of university supervision of faculty speech and curbed academic freedoms in teaching and research in order to prevent offence to members of particular groups. The test she advocates would require faculty to justify their choice of language by addressing "whether the impugned speech is core or peripheral to the academic concept or goal being addressed, and so calls for an explanation of *why* the expression of conduct were required in order to fulfil the search for truth, or a pressing academic objective." (at 120, emphasis in original.)

<sup>35</sup> "[U]niversities should acknowledge that they and their members are obliged to obey the law of the land – no less, but no more. ... Universities have no business attempting to police the acts of their members. That is the job of the state. When universities seek to do so, they compromise their fundamental purpose. ... universities must abandon the conceit that they are, or should be, multi-purpose social service agencies." Robert Martin, *Speech Codes in Action* 44 U.N.B.L.J. 135 (1995) at 142.



university in research activities is to provide resources – time, space, and money – and then to marvel or cringe at what comes out.

### **Part 5 - Conclusion**

Applying a separation of powers principle does not mean that people should not work together in a constructive and cooperative environment. Clear jurisdictions make good colleagues, and allow the university to pursue the goals it was meant to achieve. There is much resistance to observing a separation of powers because it requires highly intelligent people to refrain from interfering when they are certain that they are right. But doing so is essential to the well-being of the university because there are profound differences of opinion on every conceivable subject and conviction in the correctness of one's own approach is widely displayed. In the university, collegiality does not mean conformity, and advocacy does not legitimately end in coercion.

Complicated government in the university is unnecessary. One reason for the excess of process on university campuses is the absence of a clear, logical, and understandable framework for their governance. When each problem is a new problem, a new struggle is required every time. But when a few basic principles are understood, and a system of governance established that incorporates those principles, university governance can become clear, simple, and unobtrusive.

Separation of powers within the university is important not merely because it allows the university to achieve its goals and to be consistent with its mission. Rather, in a sense, separation of powers *is* the mission of the university: to provide time and space for the free inquiry of new and controversial ideas. The validity of those ideas is not the main criterion upon which to assess the university's accomplishments. Instead, it is the system of governance itself that sets the university apart from other institutions, both private and public. Without separation of powers, the university lacks the characteristics that constitute the reason for its existence. The university's prime directive is *hands off*:

university legislative bodies have authority over operational and program matters; administrative officers have jurisdiction over administrative matters; and individual professors have authority over academic questions in their courses and in their scholarship. When decision-makers are inside their own particular areas of authority, the university realizes its purpose by insisting that they be left alone.