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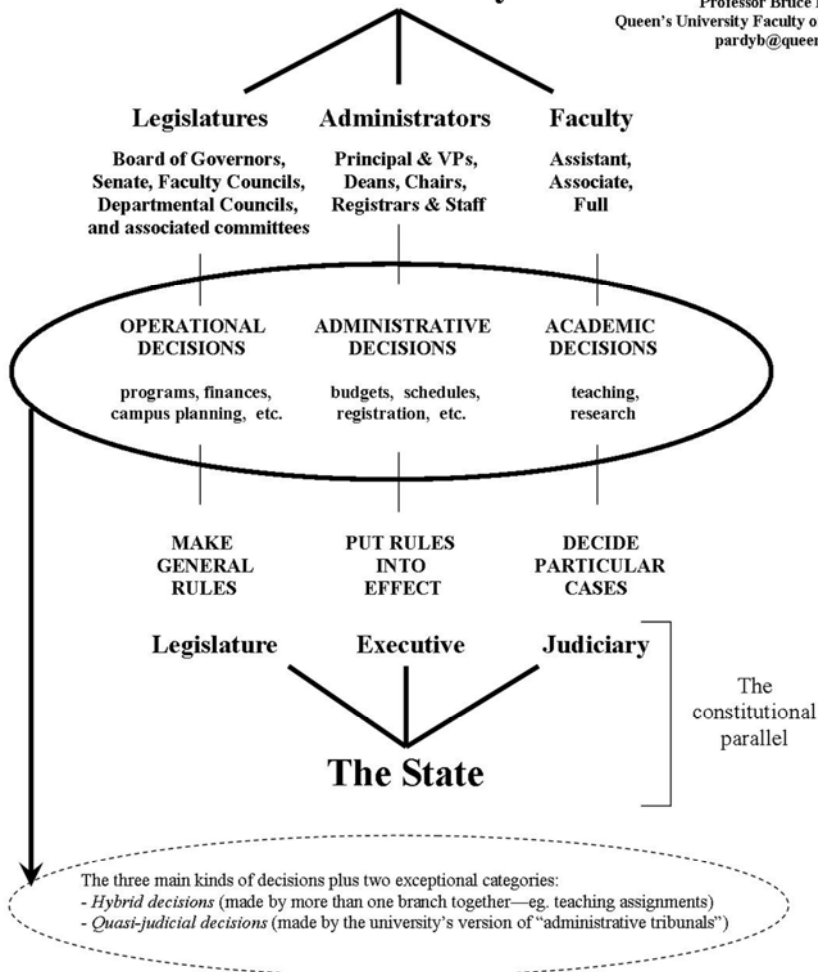


# SEPARATION OF POWERS WITHIN THE IVORY TOWER

*An Organizing Principle for University Governance*

## The University

Professor Bruce Pardy  
Queen's University Faculty of Law  
pardyb@queensu.ca





## SEPERATION OF POWERS WITHIN THE IVORY TOWER

### AN ORGANIZING PRINCIPLE FOR UNIVERSITY GOVERNANCE

Bruce Pardy<sup>1</sup>

#### POSTSCRIPT

#### 1. Within the University, Who Decides What?

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 the university's 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 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

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<sup>1</sup> Associate Professor, Faculty of Law, Queen's University, Kingston, Ontario. Comments are welcome at [pardyb@queensu.ca](mailto:pardyb@queensu.ca).

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.

## 2. Herding Cats

University governance involves unique challenges. The university is "one of the most complex of human institutions,"<sup>2</sup> in which relationships are characterized by "principles of tribal behavior."<sup>3</sup> The task of governing the university is often described as one of attempting to reconcile internal contradictions,<sup>4</sup> or requiring a perilous balancing act between irreconcilable interests.<sup>5</sup> The university is thought to be a place of inevitable conflict between faculty and administration, and between faculty and faculty, where governing is akin to herding cats.<sup>6</sup>

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<sup>2</sup> J. DOUGLAS BROWN, *THE LIBERAL UNIVERSITY: AN INSTITUTIONAL ANALYSIS* 3 (1969).

<sup>3</sup> HAZARD ADAMS, *THE ACADEMIC TRIBES* vii (1976).

<sup>4</sup> *Id.* at 15-16.

<sup>5</sup> NORMA M. GOONEN & RACHEL S. BLECHMAN, *HIGHER EDUCATION ADMINISTRATION: A GUIDE TO LEGAL, ETHICAL, AND PRACTICAL ISSUES* 1 (1999).

<sup>6</sup> See Nancy B. Rapoport, *Of Cat-Herders, Conductors, Tour-Guides, and Fearless Leaders*, 33 U. TOL. L. REV. 161, 161-163 (2001) (discussing concept of herding cats). See also Mark G. Edelstein, *Academic Governance: The Art of Herding Cats*, in *FIRST AMONG EQUALS: THE ROLE OF THE CHIEF ACADEMIC OFFICER* 58 (James Martin & James E. Samuels eds., 1997); and Thomas H. Hammond, *Herding Cats in University Hierarchies: Formal Structure and Policy Choice in American Research Universities*, in *GOVERNING ACADEMIA* 91 (Ronald G. Ehrenberg ed., 2004).

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.

### 3. The Constitutional Parallel

The concept of separating powers within the university comes from constitutional jurisprudence. Separation of powers prevents concentration of power by dividing functions between three branches of the state.<sup>7</sup> It thus protects citizens from the tyranny that could result if the power to make laws was held in the same hands as the power to enforce them.<sup>8</sup> The case for a separation of powers in the university is not based upon an exact replication of the constitutional version in either Canada or the United States, but upon the principle itself. The application of the principle at the level of national or state government provides a helpful model, but the university has unique characteristics to which the principle must be thoughtfully applied.

### 4. Incidents of Separation of Powers in the University

#### (a) Academic freedom

Academic freedom means independence to decide academic questions. The professor is hired not just for her knowledge, but

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<sup>7</sup> PATRICK MONAHAN, CONSTITUTIONAL LAW 67 (2d ed. 2002).

<sup>8</sup> *Id.*

also for her judgment. She has a right and responsibility to exercise her scholarly and pedagogical discretion independently. One of the university's premises is that the source of academic expertise on particular subjects is the individual professor, not the administration or the university as a whole. Academic freedom is not a privilege, but a necessary feature of a proper separation of powers within the university.

(b) Academic diversity and collegiality

A university is a community, but not one of like-minded individuals. The only value that its members need to hold in common is the belief in the necessity for mutual respect and tolerance. Academic diversity calls upon faculty to give colleagues space at the moment of strongest disagreement with matters of academic judgment. Collegiality does not mean congeniality; nor does it mean that people must reach consensus. Instead, it means that fundamental disagreement may exist amongst professors in an environment of cooperative independence.

(c) Tenure

Like judges, professors require job security to carry out their role. Their ability to make independent decisions depends upon the inability of other branches to interfere with reward or punishment.<sup>9</sup> 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 reject pressure from those sources without fear of suffering personal consequences, including job reprisals or dismissal.

## 5. When a Clear Separation of Powers is Not Observed

A system of internal governance based upon a separation of powers avoids ad-hoc administration and the frequent legalistic wrangling that accompanies it. Many modern universities have extraordinarily complicated and muddled systems of internal

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<sup>9</sup> *Id.* at 86.

governance.<sup>10</sup> 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, 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.

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. When decision-makers are inside their own particular areas of authority, the university realizes its purpose by insisting that they be left alone.

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<sup>10</sup> A stroll through the website of any large university should reflect this conclusion, particularly when the rules, bodies and processes at all levels within the university - central, faculty, departmental - are added up. *See, e.g.*, Queen's University Homepage, <http://www.queensu.ca> (last visited Mar. 24, 2008).