

“VENN” AND THE ART OF SHARED GOVERNANCE*

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ONE of the most complicated issues in higher education administration is the issue of shared governance. Fundamentally the university *is* the faculty,¹ in the sense that the “business” of the university—educating students, engaging in unique research and creative activity—only happens with an engaged faculty. Based on the faculty’s expertise in teaching and research/creative activity, therefore, there are certain issues that are within the faculty’s authority to decide.² But the faculty generally speaking, does not want to spend the bulk of its time dealing with the behind-the-scenes details of running a university: making sure that bills get paid, budgets get managed, facilities get maintained, reports get filled out, and supporters of the university get nurtured.³ Faculty members are willing, however, to spend significant portions of their time on committees related to issues of central concern to the faculty as a whole, such as faculty appointments, curriculum issues, and admissions policy.

* © Nancy B. Rapoport 2003. All rights reserved. My apologies to ROBERT M. PERSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE: AN INQUIRY INTO VALUES* (Bantam Books 1984), for the jazz riff on his title.

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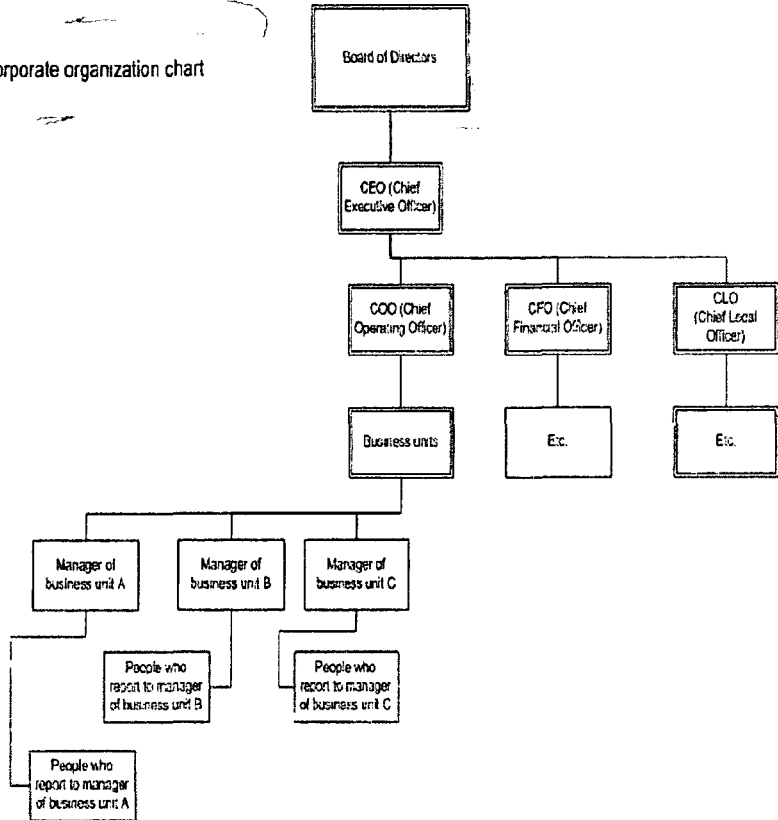
1. There is a competing argument that the university “is” the students. Certainly, students are the most important constituency, and their needs must be taken into account. But the business of a university goes beyond teaching students. The university must both educate students and discover new information through research; because the faculty is charged with both aspects of the university’s missions, the faculty is at the heart of the university. The service function—and outreach to the community in general—is also important to the university; again, though, the faculty is primarily in charge of this obligation as well.

2. Bad decisions on these issues—e.g., discrimination in hiring or promotion and tenure decisions; course content that is so clearly beyond the pale that the students aren’t getting the course described in the course catalog—will trigger administrative intervention.

3. Generally speaking, faculty members generally do not have: (1) the type of expertise, or (2) the broader, university-wide view necessary to make informed decisions on these other matters. For these types of matters, the faculty is but one of many stakeholders.

I've found that shared governance is hard to explain to non-academics.⁴ Managers in the "real world" tend to envision a reporting structure that looks like this:

Typical corporate organization chart

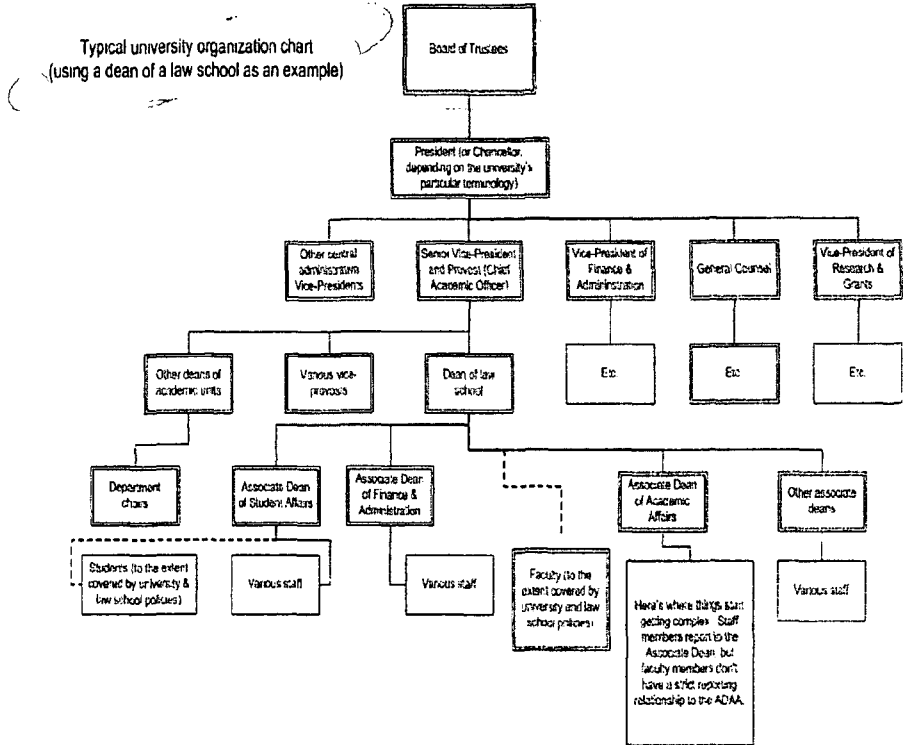


4. William L. Waugh Jr., *Issues in University Governance: More "Professional" and Less Academic*, 585 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 92 (Paul Rich & David Merchant spec. eds., 2003).

It should be remembered that colleges and universities are not the same as businesses, and the same economic assumptions do not apply. For example, strategic planning involves (or should involve) broad involvement of internal and external constituencies. However, the planning process is essentially top down in that senior executives guide the development of the mission and vision statements, the identification of strategic issues, and most important, the choice of participants. Many people may participate and there may be relatively open communication. But faculty become[s] just another stakeholder group, along with students, staff, alumni, and local dignitaries. They may find themselves fighting for a niche in a new mission because that niche will determine their resource allocations for the coming years. Organizational change has become an administrative responsibility rather than a faculty responsibility.

Id. (citations omitted).

They don't expect something that looks like this:



The dotted lines are confusing, to say the least.⁵ What authority do deans (or—for those units that are organized by departments—department chairs) have over faculty members?

We'll leave two issues for another time: (1) student governance issues; and, (2) shared governance as it relates to units that have departments. (On the latter point, suffice it to say that—when there are multiple departments in a unit—the primary shared governance interaction is between the faculty members of the department and the department chair. When there are departments, the dean interacts more often with the department chairs than with the entire faculty.) The issue of where the faculty fits into a shared governance model is complicated enough, and I haven't even begun to figure out where I'd place some of the other important governing bodies—such as the university senates—in the flowchart.

5. This flowchart is by no means complete, of course; I just wanted to introduce the concept of the ambiguous authority of deans vis-à-vis the faculty.

I spend a fair amount of time explaining that deans almost invariably have the authority to manage staff, budgets,⁶ and fund-raising, but that decanal power with respect to everything else—from vision-setting to facilities allocation—can run the gamut (from strongly dean-governed units to strongly faculty-governed units), depending on the particular school.⁷ Every school has a different tradition as to which parts of “shared” governance really are shared, and which parts are within either the faculty’s jurisdiction or the administration’s jurisdiction.⁸

What doesn’t vary is the reaction of non-academics to the concept of shared governance. For people used to top-down command of employees by employers,

6. Budgets and academic programs are inextricably linked:

Higher education in the United States is clearly undergoing profound change. Issues of access, program quality, cost to students and their families, and cost to taxpayers are challenging universities and colleges to reexamine their products (or services). Public institutions are experiencing decreasing state support, and as a result, they are increasing tuition to make up the difference or face serious deterioration of program quality. The costs of education are not rising so much as public subsidies are decreasing, with students and their families picking up the tab. In many cases, raising special fees only reduces the state subsidy. Moreover, tuition discount or scholarship programs are increasing the number of students—further straining college and university resources....

In this environment, university presidents are under increasing pressure to meet performance standards, usually measured by the number of students enrolled and the credit hours generated, but increasingly measured by evidence of reputation and endowment growth (or occasionally by the success of the sports teams)....

There is also a cultural divide that encourages politicians and business leaders to intervene in academic affairs. Roger W. Bowen, [former] president of the State University of New York at New Paltz, has criticized the interference of political leaders and their lack of tolerance for faculty, including faculty-administrator, opposition. Bowen concluded that the academic world, which values free-thinking, intellectual risk taking and challenges to authority and the rules, conflicts with the political world, which prefers “certainty, order, and rules.” Political leaders do not like their authority to be challenged, and that is precisely what leaders face in academic institutions....

Waugh, *supra* note 4, at 87-88 (citations omitted). *See also id.* at 92 (“The language of higher education is increasingly punctuated with references to cost and revenue centers, customer-driven programs, and other terminology more common to the business world. While the profit motive is certainly appropriate in private for-profit institutions, profit or value is defined quite differently in academic institutions.”).

7. Remember, deans are the quintessential middle-managers in universities. They’re charged with promoting the good of their academic units *and* with furthering the goals of the university as a whole. On bad days, that means that deans are between a rock and a hard place, making neither the academic unit nor the university happy. On good days, deans can further the goals of the academic unit *and* the university.

8. One of my colleagues has pointed out that an academic unit’s culture is closely tied to how deans are selected for that unit. In provost-driven selection processes, the faculty has significant input, but the provost has the ultimate decision-making authority for hiring (and firing) the dean. In faculty-driven selection processes, the faculty’s vote regarding the choice of a dean candidate is key, and the provost reviews the selection primarily for procedural fairness. I would presume that in a faculty-driven process, a vote of no confidence in the dean would be dispositive; in a provost-driven process, such a vote would be informative but not dispositive. Each process says something about how that particular culture views shared governance and the role of administrators within that governance model. I’m more familiar with the provost-driven model. Both times that I’ve been selected as dean, the provost made the final decision after getting input from the faculty.

the idea that the faculty *shares* power with the administration is a novel concept.⁹ Most of the time, the two facts that give them the most pause are that (1) deans can't hire new faculty members without express faculty consent;¹⁰ and (2) deans can't push through curricular changes without express faculty consent.¹¹ After all, we seem to be the CEOs of our academic units, so why don't we have the authority to act like "normal" CEOs?¹²

9. Henry Rosovsky, former Dean of the Faculty of Arts and Sciences at Harvard University, puts it best:

Another critical virtue of academic life—I am thinking of tenured professors at, say, America's top fifty to one hundred institutions—is the absence of a boss. A boss is someone who can tell you what to do, and requires you to do it—an impairment of freedom. As a dean—i.e., as an administrator—my boss was the president. I served at his pleasure; he could and did give me orders. But as a professor, I recognized no master save peer pressure, no threat except, perhaps, an unlikely charge of moral turpitude. No profession guarantees its practitioners such a combination of independence and security as university research and teaching.

HENRY ROSOVSKY, *THE UNIVERSITY: AN OWNER'S MANUAL* 163-64 (1990). Any dean (or person who might want to someday become a dean) should read Rosovsky's chapter on "A Dean's Day." *Id.* at 37. It's the most accurate description of an "average" day I've read. For the best "live action" description of a dean's day, no one can beat the training at the ABA New Deans' School (a/k/a the Velvet Boot Camp), aptly entitled *A Day in the Life*.

10. ROSOVSKY, *supra* note 9, at 273.

[P]residential authority in the academic realm should be thought of as judicial rather than executive. The president is not given power in order to select who, in his opinion, is the best scholar of a certain subject. It is his task to monitor procedures, to adjudicate differences among experts—in brief, to develop a clear policy or to take a specific action based on the many voices of those with deep knowledge. The principle that those with knowledge should have a greater say is not, I believe, subverted by presidential authority.

Id.

11. A colleague (and friend) of mine at another university has pointed out that I may be describing the ideal world here, rather than the actual world, in which some deans use their carrots and sticks to force the hands of their faculty colleagues even in terms of faculty hiring and curricular matters. And it's no secret that deans *will* make their preferences known, either publicly or privately, and that we can use our budget authority to support some programs over others.

That ability to discriminate among programs is part of our job. Supporting every program equally doesn't move an academic unit forward nearly as quickly as does giving the few excellent programs continuing support; and yet, it's also true that supporting only the best programs runs the risk of serious weakness in the rest of the academic unit. We have to make tough (and unpopular) calls.

My only advice is the advice that Tom Read gave me at the American Bar Association's New Deans' School in 1998. Tom gave us two rules: (1) don't take things personally, because they rarely are meant personally and (2) don't ever retaliate. Rule #1 is sometimes difficult; rule #2 is (surprisingly) not at all difficult. If you have the best interest of your school at heart, it's easy to overlook the fact that you don't like a person or a program, if the person or program is doing good things and deserves funding.

12. See Frank T. Read, *The Unique Role of the Law School Dean in American Legal Education*, 51 J. LEGAL EDUC. 389, 390 (2001) ("[T]he supposedly high-and-mighty dean ... has slowly devolved from the classic stereotype of a benign autocrat to, in too many cases, little more than an embattled, dispirited juggler trying to accommodate increasingly fractious constituencies.").

It s a Question of Jurisdiction

Because I'm law-trained, I tend to think of shared governance in terms of jurisdiction.¹³ The faculty best understands the core missions of teaching and research/creative activity¹⁴—hence, shared governance traditionally gives the faculty the authority to control issues of admissions, faculty hiring, and curricular change,

13. I'm not alone in using this terminology. See, e.g., Ad Hoc Committee on Faculty Governance, *Report on Faculty Governance*, 42 J. LEGAL EDUC. 299 (1992). Here's one of the proposals that the Report suggested:

It does not seem possible to describe with any real precision the current division of decisional responsibilities between the Dean and the Faculty. In a loose sense, however, it seems fair to say that it is understood that the Dean should decide administrative and managerial issues, while the Faculty makes all important policy decisions.

Id. at 299. The Report is delightfully tongue-in-cheek and worth reading. Even though it's a parody of real proposals, it does capture the traditional view of shared governance.

14. For the remainder of this article, I'm going to leave out the "creative activity" part of this formula, not because "creative activity" is unimportant, but because I have more familiarity with "research" in the law school sense. I know that creative activity is important for, e.g., the fine arts. The faculty of the fine arts is in a better position to judge the creative activity in their fields than am I.

Final judgments on educational questions are best left in the hands of those with professional qualifications: academics who have experienced a lengthy period of apprenticeship and have given evidence of performing high-quality work, in teaching and research, as judged by their peers on the basis of broad evidence. This applies particularly to faculty control of curriculum. The chances of having courses taught well—with verve and imagination—are greatly diminished when content and structure are imposed by "outsiders" without debate and discussion.

ROSOVSKY, *supra* note 9, at 270. See also Waugh, *supra* note 4, at 95 ("Administration is those processes that are related to the allocation of resources, including planning, human resource management, and particularly financial management. Governance is those processes related to the technology of the university, including the academic programs, faculty, and scholarship. Preserving the distinction, so that the dog wags the tail, rather than the reverse, is essential for maintaining healthy academic institutions.").

Tom Read, Dean Emeritus of South Texas College of Law (as well Dean Emeritus of the University of Tulsa, Indiana University-Indianapolis, the University of Florida, and the University of California-Hastings) explains:

Furthermore, the modern law teacher, reflecting different generational experiences, demands participation in all basic academic governance decisions. The lines between what have traditionally been thought to be decanal powers and what have been thought to be faculty academic powers have blurred. Faculty, more and more, want to be consulted about everything. Faculty appointment committees dominate the hiring structure. Faculty promotion and tenure committees dominate the promotion and tenure structure. Faculty curriculum committees organize and control the curriculum. Faculties set standards, and more and more faculties want executive committees or advisory committees to the dean on what have traditionally been decanal powers—control over the purse, control over the faculty's course assignments, and so on.

Read, *supra* note 12, at 391.

subject to the administration's veto power relating to issues of process and budget.¹⁵ Those issues that relate to keeping the place running (budget, facilities), thriving (fundraising, keeping various internal and external constituencies¹⁶ relatively happy), and on the good side of the law are within the jurisdiction of the administration.¹⁷

Of course, there's concurrent jurisdiction on many issues,¹⁸ which means that there are serious difficulties at the margins in terms of classifying which group has jurisdiction over which precise issues. Moreover, using "faculty" and "administration"¹⁹ as distinct groups tends to set up a "we-they" distinction that can lead to serious misunderstandings and lack of respect on both sides.²⁰ And yet the discussion has to start somewhere, so why not with jurisdiction?²¹

15. Budget, of course, affects these core issues, dictating everything from the ability to hire a new faculty member to determining the break-even point (admittedly, an art rather than a science) of expanding or reducing the size of an entering class.

16. These constituencies include, but aren't limited to, Regents/Trustees, legislatures and the executive branch, alumni, and other friends of the university.

17. See ROSOVSKY, *supra* note 9, at 266 ("Some areas of governance and policy are properly deemed beyond faculty jurisdiction, usually for reasons of lack of specialized competence or conflict of interest.")

18. For an interesting take on shared governance, see Susan J. Becker, *Thanks, But I'm Just Looking: Or Why I Don't Want to Be a Dean*, 49 J. LEGAL EDUC. 595, 598-99 (1999).

19. Remember, a lot of us who are administrators started out as academics, and we still perform the core faculty duties of research and teaching. (I think that we have the service function well covered, too.) The hard part is doing everything well at once.

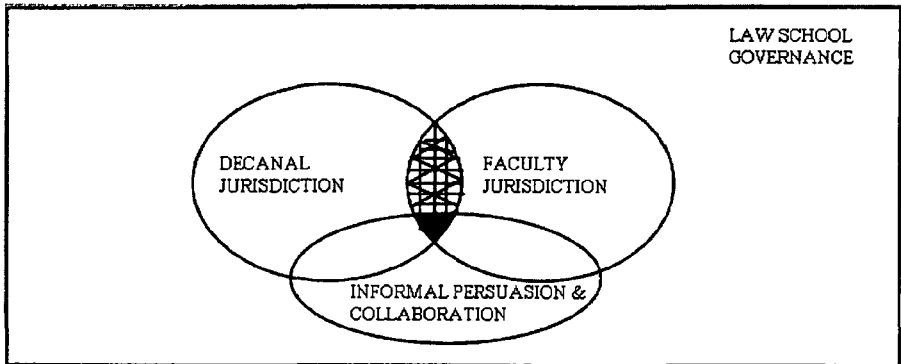
The major tension in the modern deanship is between the role of a resource provider and that of academic leader. The qualities that produce success in one area are not necessarily the qualities that propel success in another. A good resource provider may not be a good academic leader and vice versa. A truly successful dean has to be talented in both areas. If you drop the resource ball you will fail, even if the faculty that hired you told you they wanted you to be an academic leader. Or, if you drop the academic leader role with the faculty, despite the fact you bring in buckets of money, you will fail, even though you may have been hired by an administration that told you they wanted a fundraiser. The modern American dean must do both and must do both well. It is a challenge. And overriding it all is the need to be the visionary leader who can convince all the constituencies of the need to move in the same direction at the same time. The dirty little secret for most law deans is that 95 percent of the dean's problems are not "what we ought to do" but rather "how do we keep all of those divergent souls moving generally in the same direction toward common goals?"

Read, *supra* note 12, at 395-96. The other dirty little secret is that we can't play all of our various roles equally well, all of the time. Often, our scholarship and teaching suffer from too little time devoted to them. Sometimes, our decanal roles suffer because we need to devote at least some time to research and teaching if we are still to think of ourselves as faculty members as well as deans.

20. Cf. Nancy B. Rapoport, *Going from "Us" to "Them" in Sixty Seconds*, 31 U. TOL. L. REV. 703 (2000).

21. I am particularly grateful to my colleague Lonny Hoffman for setting me up with a well-chosen excerpt from Hart and Wechsler to help articulate my governance philosophy. See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 444-55 (1996) (discussing federal subject matter concepts and the concepts of exclusive and concurrent jurisdiction between federal and state courts).

One way to describe the intersection of faculty-administrative jurisdiction is visually with the use of a Venn diagram.²² The idea of using a Venn diagram to describe the intersection of two related fields isn't new; even the use of a Venn diagram to describe the intersection of ethics and morality isn't new.²³ If we try it with law school governance (often called "faculty governance" or "shared governance"), here's one of the possibilities:



What I like most about this Venn diagram is that it's less structured than the "typical university governance flowchart" that I've drawn.²⁴ The Venn diagram is more fluid than a traditional organizational chart, and it highlights that actual jurisdiction is often tempered by informal persuasion of (and collaboration among) various decisionmakers.

The hard part isn't making the drawing. The hard part is figuring out which things go in which circles in the drawing.²⁵ Let's use a single academic unit—a law school—for this discussion.

Exclusive Faculty Jurisdiction

From my perspective, deans can propose curricular changes to the faculty, but the faculty is wholly within its rights to reject those changes. Deans may still teach—after all, most deans are also members of the faculty—but deans don't have the same day-to-day familiarity with the curriculum as do those faculty members teaching full course loads.²⁶ The dean may try to persuade the faculty regarding

22. For more information on Venn diagrams generally, see <http://www.venndiagram.com> (last updated Apr. 5, 1999); <http://stat-www.berkeley.edu/users/stark/Java/Venn.htm> (last generated Sept. 19, 2003).

23. See, e.g., Stewart J. Schwab, *Limited-Domain Positivism as an Empirical Proposition*, 82 CORNELL L. REV. 1111, 1113 (1997).

24. See note 5 and accompanying text.

25. See ROSOVSKY, *supra* note 9, at 271 ("Let me stress again that the faculty does not wield unqualified power. Most educational decisions taken by a faculty are reviewed by academic deans, presidents, and trustees . . .").

26. Deans often come and go (or return to the faculty), but most tenured faculty members will

curricular issues; such persuasion behind the scenes is fine, as long as the dean accepts the faculty's determination on curricular issues.²⁷

Other issues wholly in the "faculty jurisdiction" Venn circle would include an individual faculty member's decision on course content²⁸ and teaching methods,²⁹ subject only to legal and policy constraints.³⁰ The individual faculty member also has jurisdiction over her own research agenda. Deans can facilitate teaching and research, but teaching and research relate to core university functions; therefore, faculty members need to have the first say on these issues.³¹

Exclusive Decanal Jurisdiction

Similarly, we can put certain issues clearly within the administrative circle.³² Deans can—and should—get advice from faculty staff, and students on budget issues, but it's the dean's neck on the line if the school doesn't make its budget. The budget function is the most typical CEO function in the dean's job description. It's also the dean's neck on the line if the admissions policy violates state or federal law, if privacy regulations are breached, or if harassment is tolerated. As I occasionally remind people, because I get to be the first named defendant on lawsuits, I like to

stay at their academic institution for their entire careers. The curricular trend *du jour* shouldn't override the entire faculty's analysis of the appropriate curriculum for a particular institution. Deans are, however, useful for prodding the faculty into engaging in such an analysis.

27. Two points here: obviously, the faculty is likely to take the dean's proposals seriously, because deans and faculty have to rely on each other so much for so many things; therefore, I don't want to underestimate the dean's behind-the-scenes power in this example. *See supra* note 11. I also don't want to rule out the dean's ability to bring up curricular revisions again, after a few years have passed, particularly if the composition of the faculty has changed in the meantime.

28. *But see supra* note 2 and accompanying text.

29. *See id.*

30. Who gets to teach which course at which time is a matter of negotiation between the faculty member and the administration (typically, the Associate Dean for Academic Affairs). *See supra* note 2 and accompanying text.

31. If you're reading this essay wondering if my take on shared governance reflects issues of gender, at least in part, let me point you to Herma Hill Kay's wonderful article on women law deans. Herma Hill Kay, *Women Law School Deans: A Different Breed, or Just One of the Boys?* 14 *YALE J.L. & FEMINISM* 219 (2002). *See also* ROBERT BIRNBAUM, *HOW ACADEMIC LEADERSHIP WORKS: UNDERSTANDING SUCCESS AND FAILURE IN THE COLLEGE PRESIDENCY* 37 (1992) ("Effective and ineffective academic leaders come in all sizes, shapes, colors, genders, levels of experience, and personalities."); *id.* at 44-46. The only negative thing that I have to say about Dean Kay's article is that it minimizes her own key role in legal education and her renowned mentoring of other deans.

I firmly believe that effective leadership depends on context. A good leader at one institution is not necessarily a good leader at all other institutions, *see id.* at 37, although experience at one institution certainly helps to inform decisions at other institutions.

32. Don't forget that deans are middle managers, so we get some of our marching orders from the central administration. *See, e.g.,* VAN CLEVE MORRIS, *DEANING: MIDDLE MANAGEMENT IN ACADEME* 119-20 (1981). As Morris points out, "[A] discontinuity of expectation exists between the faculty, who live[s] in a kind of do-your-own-thing world, and the academic vice-president, who lives in a superior-to-subordinate accountability world. The dean, with one foot in each, is a bridge that is expected to join these two worlds." *Id.* at 120.

increase our odds on winning those lawsuits by making sure that we keep our noses clean.³³

The allocation and use of facilities is also administrative in nature,³⁴ as are issues of how information technology is to be used and how the library is to be run. Just as the faculty is likely to care a great deal what the dean thinks about issues squarely within the faculty's jurisdiction,³⁵ the dean is also likely to care greatly what the faculty (and staff, students, alumni, etc.) thinks about issues within the jurisdiction of the administration.³⁶

Concurrent Jurisdiction

What of those issues in which the administration has veto power but no affirmative power to propose? I'm thinking specifically of faculty hiring, where the faculty must vote a candidate an offer before the dean has authority to make the offer.³⁷ The dean can choose not to make the offer notwithstanding the faculty's support of the candidate (although the dean probably should discuss with the faculty her reasons before the faculty votes on the candidate, and a wise dean should think long and hard before rejecting a faculty vote to hire a particular candidate).³⁸ Veto-power issues belong in the intersection of "faculty jurisdiction" and "administrative jurisdiction."³⁹

Another issue that belongs in that intersection is the overall direction that the law school will take (commonly known as "vision"). No vision propounded by the dean and unsupported by the faculty will work.⁴⁰ The faculty knows that deans come and

33. OK, I've talked about necks and noses. I think I can keep clear of any other body part references in the remainder of this essay.

34. Some of my faculty colleagues at various institutions may disagree with me on this one, but the job of deciding who teaches where, who should get which offices, and what to do when new space is either scarce or becomes available is more efficiently allocated to the administration rather than left to a majority-rule faculty vote.

35. See *supra* note 27.

36. Phoebe Haddon brings to mind another jurisdictional issue. At the schools I know well, deans serve at the pleasure of the provost (or the president, if the dean reports directly to the president). Does the provost or president have to consult with the faculty before firing the dean? See generally Phoebe A. Haddon, *Academic Freedom and Governance: A Call for Increased Dialogue and Diversity*, 66 TEX. L. REV. 1561 (1988). The technical answer is no. But a provost or president who fires a popular dean will face backlash. Sometimes that backlash is worth it; sometimes, it's not. See Valerie Strauss, *Georgetown Decides To Retain Law Dean; Facing Revolt, President Changes Mind*, WASH. POST, Apr. 18, 1998, at A1.

37. There may be institutions in which the dean has more affirmative power, but I'm not aware of any examples.

38. There's a fine line here. Not liking the candidate is probably not a sufficient reason to disregard the faculty's vote; the candidate's effect on salary compression or the fact that the positive vote on the candidate was very close might be better reasons. Rejecting the faculty's first choice of a qualified candidate is not often a smart move.

39. See MORRIS, *supra* note 32, at 125 (describing which issues are within exclusive faculty jurisdiction and which ones aren't). See also *supra* note 14 and accompanying text.

40. Cf. BIRNBAUM, *supra* note 31, at 25-26 ("[T]he real purposes of articulating a vision are to give constituents confidence in the leader's competence and convince them that the leader has listened to them and been influenced by them.... A shared vision tells constituents, not necessarily that the institution will be different, but that it will be better.")

go.⁴¹ Often, though, deans are good at weighing all of the different objectives of the law school and proposing ideas to the faculty that can help the law school to improve, and even to thrive. Deans have the advantage of listening to many constituencies over time.⁴² We can isolate themes, and we can determine whether there's funding to support the execution of those themes. Moreover, because we are also faculty members, we can use our knowledge of faculty concerns to test our hypotheses about whether the themes are realistic. A shared vision is a wonderful example of shared governance at its best.⁴³

Deciding Who Has Jurisdiction

What should determine who has jurisdiction over a particular issue? There are two factors: (1) which group has the most relevant expertise and (2) whether there's a need for uniformity. Just as state courts, under our system of dual sovereignty, exercise their concurrent jurisdiction with the federal courts to decide questions of federal law all the time, the presumption should be that, for the core functions of the university, the faculty should be allowed to experiment. For the non-core functions, such as budget and facilities policy, the expertise lies with the administration, and the need for uniformity is clearer.⁴⁴ For matters in which the faculty and the

41. Some folks on the faculty love to remind deans of this fact. I've checked with my colleague deans; this "I can wait you out" comment is true all over the country, in a variety of academic units. My colleague law school deans should take some comfort in that knowledge.

42. See Read, *supra* note 12, at 395 ("Despite shared governance everywhere, any dean who is not a visionary will not survive. The dean must be the focal point for articulating the vision of the school in order to coax most of the constituencies into moving in the same direction most of the time.").

43. A lot of work in governance uses a committee structure. The faculty tends to take committee work more seriously if the administration recognizes hard work on a committee, providing both intangible rewards (lots of praise) and tangible ones (release time, raises based in part on service). One of my frustrations is that unless I find out whether committee members worked hard and were productive, it's difficult to figure out who should get rewarded for this very important service role. Another frustration is that the same faculty members are tapped repeatedly for important committees because they have, in the past, worked hard on committees. The "reward" for doing work well tends to be more work. This type of reward is unfair to the faculty member who has worked hard on many important committees. Entrusting important work to people who have, in the past, not worked hard in their assigned committees can harm the institution by causing it to stagnate. I'd be interested in hearing what solutions there are for this particular problem, which isn't at all unique to academia.

44. Individual variation *among academic units* on budget and facilities issues is a different concept, and—since I'm writing from a dean's perspective and not from the perspective of the central administration—certainly worth considering. (I'm all in favor of recognizing that different academic units have different needs and traditions.) Susan Becker puts it best:

My law school, as one of seven colleges of an urban university, is caught in a classic Catch-22. University leaders exhort the law school to create its own unique identity, which can be leveraged into greater academic recognition as well as development dollars. But the law school is not allowed to color outside any of the university's lines. Indeed, a common response by university officials to any law school proposal is "If we let you do X, then the other colleges will want to do X." So we are constantly striving to distinguish ourselves by moving in lockstep with everyone else. I am the only one seeing the irony here?

Becker, *supra* note 18, at 599. The idea that the administration should control budgets and facilities

administration each have expertise to bring to the table (and the concept of "vision" comes to mind here), a more equally shared jurisdiction makes sense.⁴⁵

Timing and Tie-Breakers

The most striking difference between a faculty member's role in governance and an administrator's role involves the issue of timing. Much of the faculty's exclusive jurisdiction involves matters that take a great deal of time to sort out.⁴⁶ With a few exceptions, there is sufficient time to sort things out. Faculty hiring tends to follow the same pattern year after year: determination of needs, culling through possibilities, interviewing, voting offers to particular candidates. The faculty can discuss admissions policy in the fall, with most applications coming in right after Thanksgiving. Curricular changes rarely need emergency action.

One of the frustrations that administrators have is that we *want* to have time to mull over decisions, but often there's neither sufficient time nor sufficient information before we have to make a decision. Many decisions aren't earth-shaking and don't need a lot of time for mulling over, but the big picture questions—how should we spend our limited resources? how can we get more buy-in for some of our ideas?—often have real-time deadlines that curtail our ability to engage in much introspection.

In issues of concurrent jurisdiction, the mindset of faculty members, trained to research and examine issues from a variety of perspectives, is very different from the mindset of deans, who want to keep things running.⁴⁷ Here's an example from

(rather than deciding those issues by faculty vote) is based on the fact that the administration does have more expertise in these areas, and experimentation in these areas is likely to decrease the functioning of the university or individual academic unit.

45. For example, the faculty and the administration could work together on a shared vision, and then the faculty could vote on the proposed vision, with the administration then adopting it (assuming no clear disagreements about the vision). If the faculty proposes its vision alone, then the administration needs its own input and the discretion to adopt it or not; likewise, if the administration proposes its own vision, then the faculty needs its own input and similar discretion to adopt it or not. Neither the faculty nor the administration should put the other in the position of going along with a vision that truly isn't shared by both. The dialogue itself is important. *Cf.* Haddon, *supra* note 36, at 1569-72.

46. *Id.* at 1575.

For academic inquiry in discussion and research to flourish, teachers must reside in a free and autonomous center in which they can pursue ideas through robust discourse inside the classroom and uninhibited exploration of views outside. The absence of a more scientific formula for academic freedom should lead faculty to insist on an open environment that minimizes institutional control over the ability to present and pursue ideas.

Id.

47. Becker, *supra* note 18, at 598-99

Faculty governance leaves law school administrators with two equally odious choices when determining whether a particular matter requires consultation with faculty. One option is to make a decision, and then endure the wailing and gnashing of teeth by faculty who claim the administration has trespassed on their sacred ground. The other option is to ask for faculty input in the first instance, thereby guaranteeing a minimum of six months' delay in reaching a final

my own experience at the University of Houston Law Center. The mindset difference hit me square between the eyes after Tropical Storm Allison, which put over twelve feet of water in the bottom floors of our law school in fewer than twelve hours on June 9 2001. It wiped out roughly 175,000 volumes of books in our library, as well as ruining several offices, along with the research and materials left in those offices. Those of us who were at the law school in the summer of 2001 had to make quick decisions to get the school up and running in time for fall 2001. When the rest of the faculty and the students came back that August, they questioned several of our decisions, wanting more time to examine all of the options. The time that we took to review one of those decisions—facilities allocation after the storm—was necessary from an emotional point of view, but it put us at risk for losing FEMA funds to repair some of the damage.⁴⁸ I treated our recovery effort as one under my exclusive decanal jurisdiction, which came as a surprise to some of my faculty colleagues who thought that the recovery effort should have been subject to concurrent jurisdiction.

If timing is one tricky issue for jurisdiction, ties on matters of policy are another.⁴⁹ I'm intentionally skirting the issue of what happens in a stalemate for those matters that are in the intersection of the two jurisdictions.⁵⁰ Certainly groups external to the

resolution. This second option is inevitably accompanied by a faculty critique that the administration isn't moving the law school forward quickly enough.

Id. See also Read, *supra* note 12, at 390 ("True to the human condition, those constituencies who share power generally accept no responsibility for the result, but they frequently want to dictate or control the decision-making process.").

48. If I had to do it all over again, I would still have wanted us to move quickly during the summer, see *infra* note 54, but I would have provided the faculty, students, and staff with more periodic updates during the summer (and more pictures) to be more sensitive to their visceral (grieving) reaction following their return to campus.

49. MORRIS, *supra* note 32, at 129

Perhaps, however, the surest test of a dean comes when a vice-president who is otherwise supportive nevertheless hands down a policy directive with which the faculty is in strong disagreement. The situation may be further exacerbated if this directive has been decided upon with little or no consultation with the dean or the faculty. As noted earlier the vice-president takes the measure of a dean, in part, by how quickly and how effectively he or she can deliver the vote, that is, convert the demurring faculty as a group to the policy position being enunciated and directed by the vice-president. Here we have a paradigm case of a major confrontation not merely between the dean's two constituencies, but more importantly between two worlds of action where the rationale for the final decision is drawn from two different political logics. In this brokerage capacity a dean's administrative skills are finally counted up.

Id.

50. Professor Lonny Hoffman has pointed out:

In theory, for federal jurisdiction purposes, express preemption makes for an easy case. (If Congress expressly preempts all state law, that ends the discussion; but just as express preemption cases will often involve thorny questions of statutory interpretation, so too may there be grey areas in faculty governance, as set forth in university by-laws or common law understandings of the scope of faculty v. decanal authority.) For a cite about express preemption cases being not so simple, see *Geier v. American Honda Motor Co. Inc.*, 529 U.S. 861 (2000).

university setting don't see the university "as" the faculty; most such groups tend to identify the "university" as the President alone: a fiction on two levels.⁵¹ Internally, every constituent group views itself as "the" university (or a part of "the" university). Because the internal view and the external view are so radically different from each other, any rule that purports to operate as a tie-breaker is going to be unsatisfactory.⁵²

The Venn diagram is a rough, inelegant way of looking at shared governance. There are other ways. Henry Rosovsky's book, *THE UNIVERSITY: AN OWNER'S MANUAL*,⁵³ has a more robust description of all parts of university life. Dean Rosovsky enunciates seven governance principles:

- "Not everything is improved by making it more democratic."⁵⁴
- "There are basic differences between the rights of citizenship in a nation and the rights that are attained by joining a voluntary organization."⁵⁵
- "Rights and responsibilities in universities should reflect the length of commitment to the institution."⁵⁶
- "In a university, those with knowledge are entitled to a greater say."⁵⁷
- "In universities, the quality of decisions is improved by consciously preventing conflicts of interest."⁵⁸
- "University governance should improve the capacity for teaching and research."⁵⁹
- "To function well, a hierarchical system of governance requires explicit mechanism of consultation and accountability."⁶⁰

Taken together, these seven principles help to flesh out which issues fit into the "shared governance" circle, which ones fit into the "decanal governance" circle, and which ones more appropriately belong in the intersection of the two. In terms of governance, Rosovsky's sixth and seventh principles are particularly helpful.

Email from Lonny Hoffman, Assistant Professor of Law, University of Houston Law Center, to author (July 29, 2003) (copy on file with author). Now you know why I love having such great colleagues here. Not only will they read drafts, but they'll give great substantive comments—and citations.

51. Not only does a President (or Chancellor, depending on a particular university's terminology) have to report to the Trustees or Regents (one fallacy), but also the very fact of shared governance means that there are certain issues that the President can't affect. The same problem is true at the decanal level: deans have to report to Provosts, and deans don't have jurisdiction over every issue facing the college.

52. A true tie-breaker means that it's time to change leadership, because the ability to lead by persuading has broken down. I know that this statement is going to come back to haunt me later, but I believe it, so I'm going to say it.

53. ROSOVSKY, *supra* note 9

54. *Id.* at 262 (emphasis omitted).

55. *Id.* at 265 (emphasis omitted).

56. *Id.* at 267 (emphasis omitted).

57. *Id.* at 269 (emphasis omitted).

58. *Id.* at 273 (emphasis omitted).

59. *Id.* at 276 (emphasis omitted).

60. *Id.* at 277 (emphasis omitted).

[O]ne has to make certain that faculty time is used as productively as possible [on teaching and research]. Given the university's main mission, the entire enterprise has to be organized so as to allow members of the instructional staff maximum opportunity to do their work, and to minimize, insofar as possible, even officially encouraged diversions, primarily excessive administrative responsibilities.

... The desire to participate is great, but self-governance comes only at a high price: it requires much time, knowledge, commitment, and [a] lot of what the Germans call *Sitzfleisch*. In some university activities—examples might be promotions, chairing departments, curricular requirements—faculty participation is essential and well worth the cost. No other group can be an adequate substitute.

All too often, however, the benefits of such faculty participation are illusory. Faculty members typically complain of administrative burdens and of lack of time in libraries or laboratories. Yet they sit on innumerable committees without complaint, spending hours in fruitless and inconsequential debates. Perhaps the total number of hours used in this fashion is not all that large, but the cumulative effects are considerable. Any researcher knows that uninterrupted time is the most precious of all gifts, and that is what administration and governance all too casually destroys.⁶¹

To offset the need to involve faculty members in the types of committees that don't call for faculty expertise and that steal precious time from the faculty's teaching and research missions, Rosovsky uses his seventh principle to encourage consultation and accountability.⁶² Using my Venn diagram motif, then, the group with jurisdiction over a particular matter should consult with the other group before making a final decision and should be accountable (both to the other group and to any higher-ups, such as provosts, presidents, and ultimately regents/trustees) for its decisions. Concurrent jurisdiction—that intersection in the Venn diagram—should involve that same consultation and accountability as well.

That's the theory, at least. To put that theory in practice, though, requires real prioritizing of time. Even when one group has jurisdiction, sometimes the effort that the group would take to make a particular decision is not the best use of the group's time. A law dean has jurisdiction over physical space in the law school, but she shouldn't necessarily take the time to decide office moves, unless there's some serious procedural irregularity or equity issue involved.⁶³ The faculty has jurisdiction on curricular issues, but having a faculty committee to schedule classes would be a colossal misallocation of faculty time. So the circles in my Venn diagram are "softer" than they first appear.⁶⁴

61. *Id.* at 276-77

62. *Id.* at 277-82.

63. I delegate a lot of space allocation decision to our Faculty Facilities Committee, for two reasons. First, the time that I would spend on making those decisions (rather than reviewing them, once they are suggested) is time spent away from other decanal duties, including fund-raising and setting overall priorities. Second, I have no spatial-visualization skills *at all*. Space allocation issues are very important, but I'm of better use to the law school by providing oversight, rather than proposing changes.

64. Many thanks to Larry Temkin for making this point (and the point in the next paragraph) much more eloquently than I could. Email from Larry Temkin to author (Sept. 3, 2003) (copy on file with author).

“Softness” in the circles implies a meeting of the minds about why the group without jurisdiction is, nonetheless, taking the lead on making certain decisions, lest—over time—a culture develops that *assumes* jurisdiction where only expediency was meant.⁶⁵ The risk of *under*-delegation is that the dean (or the faculty) spends too much time making decisions that, in the long run, aren’t crucial to the role of the dean (or the faculty), thereby neglecting those decisions that are much more crucial in the long term.⁶⁶ The risk of *over*-delegation, which is always tempting for extremely busy people (especially those with an active schedule or a demanding research agenda, requiring a lot of “quiet time”), is that the person to whom decision-making has been delegated may not have the long-term perspective necessary to make the best decision. There’s a fine line between doing the *right* thing, considering both short-term and long-term needs of the institution, and doing the *convenient* thing.

Does the Venn diagram motif really add anything to the understanding of shared governance? I believe that it does, at least to the extent that it describes a world in which shared governance is represented by authority that is occasionally clearly shared and occasionally clearly separate. When an institution uses the phrase “faculty governance” to refer to “shared governance,” there’s the (incorrect) implication that the faculty calls *all* the shots, not just the shots related to the university’s core missions.

What the Venn diagram fails to convey, though, is how nuanced the shared governance really is—that, even when jurisdiction falls squarely in the bailiwick of either the “faculty” or the “administration”—there is a lot of informal give-and-take necessary in order to ensure wise decisions.⁶⁷ In that sense, academia isn’t so different from any other well-run enterprise. In the best of worlds, those charged with making the hard decisions recognize their limitations as well as their need for advice. It’s a Zen thing.

65. See, e.g., *supra* notes 47-48 and accompanying text.

66. New Dean School also taught me that, for 90% of the decision that deans should make, all that matters is that *any* decision gets made, not what that decision is: for the remaining 10% of decisions, the decision itself is important. The trick, of course, is in figuring out which decisions fall within the 10% category.

67 See *supra* notes 63-66 and accompanying text.