

# The Two Theses of the Philosophy of Separating Powers: Who Exercises Power and How?

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## I Introduction

The device of placing legislative, executive and judicial power in separate bodies of political agents is commonly regarded as a practical means of checking abuse of political power. In this chapter, I explain why this thesis, useful as it is for inhibiting despotism, does not promote the rule of law and the liberty of citizens without further restraints concerning the manner of exercising power. The latter thesis, as I argue, figures prominently in the thinking of the philosophers who inspired modern constitutionalism. I conclude this chapter with a brief assessment of the Australian constitutional system measured against the two theses of the separation of powers doctrine.

The theory of the dispersal of powers has ancient roots. It was manifest in the systems of mixed government in the Athenian state, the Roman Republic and its medieval imitations in Florence and Venice, and in the Constitution of the United Kingdom until at least the *Parliament Acts* of 1911 and 1949. The aim of mixed government was to ensure the participation of the main elements of society – the people, the nobility and the royalty – in the making of laws. The implementation of laws was left to the royal executive and the royal courts. This was a two-fold separation of powers that was thought to serve the rule of law by subjecting royal power to the law of the land that could not be altered except by the consent of all three estates.

The three-fold separation of powers achieved through the independence of the courts from executive control did not occur in Western constitutional history until the English Revolution of 1688 and the *Act of Settlement 1701*. The Revolution was followed by a constitutional equilibrium that represented a three-fold separation of powers among the legislative, executive and judicial branches. This was the tripartite model that Baron de Montesquieu eulogised in his *De l'esprit des lois* (*The Spirit of the Laws*). It inspired the architecture of the American Constitution and many other presidential systems, while in the country of its birth it was gradually eclipsed by parliamentary sovereignty that fused executive and legislative power in a ministry responsible to the legislature.

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