



Loper Bright, Chevron, and a Game of Texas Hold 'em

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From *Chevron* to *Loper Bright*

- Constitutional Structure and Separation of Powers
- Statutory Construction Doctrines, as opposed to canons
- *Chevron* in Context
- *Loper Bright*
- Litigating and Counseling in a post-*Chevron* World (*aka* Welcome to Texas).

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Constitutional Issues

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Separation of Powers

- **Federalist No. 47:** answering claim that the Constitution does not provide for a separation of powers with “symmetry and beauty”, Madison writes:

order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct. The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor, in the first place, to ascertain his meaning on this point. The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. . . On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other.

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Separation of Powers

- **Federalist No. 48:**

I shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained. It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.

The conclusion which I am warranted in drawing from these observations is, that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

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Texas Constitution

- **Tex. Const. art. II, § 1: SEPARATION OF POWERS OF GOVERNMENT AMONG THREE DEPARTMENTS.** The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.
- **Tex. Const. art. V, § 8: JURISDICTION OF DISTRICT COURTS.** District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to enforce their jurisdiction.

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First appeared as part of the conference materials for the
19th Annual Advanced Texas Administrative Law Seminar session
"Agency Deference, Federal and Texas Developments"