

Sources

Separation of powers has been a cornerstone to Montana's constitutional history from its nascent territorial formation to its modern 1972 form. In each constitution between then and now, separation of powers can be found in each source document, and in each the doctrine is evidently reformed and perfected until the 1889 constitution which the 1972 constitution took verbatim:

Organic Act of the Territory of Montana, May 26, 1864 (13 Stat. 85)

- § 2 vests executive power and authority in the governor;
- § 4 vests legislative power and authority in the governor and legislative assembly, consisting of a council (13 members) and house of reps (13 members);
- § 6 extends powers of legislature to be consistent with U.S. Const., placing limits on legislative powers; requires presentment of bills to executive for approval or veto
- § 9 vests judicial power in one Supreme Court, district courts, probate courts, and justices of the peace
- § 15 gives governor power to define judicial districts and assign judges until legislative assembly thereafter exerts power in its first or subsequent sessions to organize, alter, or modify judicial districts and assign judges

Montana Territory Organic Act, March 2, 1867

(a.k.a. An Act amendatory of "An Act to provide a temporary Government for the Territory of Montana," approved May 26, 1864; 14 Stat. 426)

- §§ 2, 3, 4 authorizes judiciary to hear and determine civil and criminal cases; limits on power; salaries; defines judicial districts and assign judges
- § 5 clarifies the governor's duties in regards to elections
- §§ 5, 6 revives the lapsed legislative functions of the Territory; authorizes the creation of legislative districts; the election of representatives to "both houses of the legislative assembly" and nullifies all prior laws of the Territory called legislative assembly of 1866"

Montana Constitution, 1884: Art III, § 1

"The powers of the government of this State are divided into three distinct departments: The Legislative, Executive and Judicial; and no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in the Constitution expressly directed or permitted."

Provisions enumerating department powers:

- Art. IV Legislative Department
- Art. V Executive Department
- Art. VI Judicial Department

Enabling Act of 1889 (25 Stat. 676)

The Enabling Act of 1889 omits any specific reference to separation of powers between branches of government but implications abound if only by reference to branches by name.

- § 3 authorizes vote for the legislative assembly
- § 4 commands the state to adopt the United States Constitution; authorizes the creation of state constitution as long as it is "republican in form"
- §§ 5, 21 refer to judicial and legislative districts
- § 12 provides for public lands to be granted to the state upon admission into the Union "for the purpose of erecting public buildings at the capital of said States for legislative, executive and judicial purposes." (Emp added).

Comparison to Article IV of the 1889 Montana Constitution

COMMENT: With little debate and no changes, this Article was adopted from Article III of the 1884 Constitution (Proceedings, p. 691). This section has never been amended, nor have any amendments been proposed to alter its 1889 wording. <cite>Mont. Const. Conv. Comm., "Comparison of the Montana Constitution with the Constitutions of Selected Other States," *Montana Constitutional Convention Occasional Papers: Report No. 5*, art. IV at 1 (1971-1972). </cite>

"Article four. Distribution of Powers, is the same as Colo." <cite>Mont. Const. Conv. Comm., Elbert F. Allen, "Sources of the Montana State Constitution," *Montana Constitutional Memorandums: Memorandum No. 4* at 3 (June 10, 1910). </cite>

Legislative Council Report on the Montana Constitution

Summary:

The constitutions of forty states explicitly refer to the three branches of government; ten state constitutions and the federal constitution have no specific provision for separation of powers. Of the six constitutions used for comparative purposes, only two (Michigan and New Jersey) have a similar provision. Although a power of government may be vested in more than one branch in modern times, this article clearly expresses the basic concept of separation of powers and removal might imply rejection of that concept. Substitution of the term "branches" for the term "departments" would be more accurate, but the Council concludes that this article is adequate at the present time. <cite>Mont. Const. Conv. Comm., "Legislative Council Report on the Montana Constitution," *Montana Constitutional Convention Occasional Papers: Report No. 6* at 17 (1971-1972). </cite>

Comparison to U.S. Constitution

Where the Montana Constitution specifically provides for the separation of powers, the U.S. Constitution only implies it through its enumerated powers to the legislature, executive and judiciary:

The doctrine of separation of powers is fundamental in our system. It arises, however, not from Art. III nor any single provision of the Constitution, but because "[b]ehind the words of the constitutional provisions are postulates which limit and control." <cite>*National Mut. Ins. Co. of Dist. of Col. v. Tidewater Transfer Co.*, 337 U.S. 582, 590-91 (1949) (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934)). </cite>

To wit:

- Art. I, § 1: All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

- Art. II., § 1, cl. 1: The executive Power shall be vested in a President of the United States of America.
- Art. III, § 1: The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Drafting

Little discussion was had over whether separation of powers ought to be revised in the 1971-1972 constitution convention (as noted in Comparison of Article IV of the Montana Constitution, *supra*). However, in *Montana's Constitutional Convention Study No. 12*, author Richard F. Bechtel writes:

"Montana's 1889 Constitution was written during a period in which legislatures were distrusted; as a result, it a other constitutions written during the same era are said to offer strong evidence of the belief that state officials cannot be trusted." <cite> Mont. Const. Conv. Comm., Richard F. Bechtel, "The Legislature," *Montana Constitutional Convention Studies* at 1 (1971-1972). </cite>

Such distrust in 1889 may or may not have existed in 1972, but given the constitutional convention's ready adoption of the 1889 text, such distrust lives on by its adoption.