

American
CONSTITUTIONALISM
&
Federal American Constitution



The Congress Includes 2 Chambers

English model, is divided into two chambers

The House of Representatives



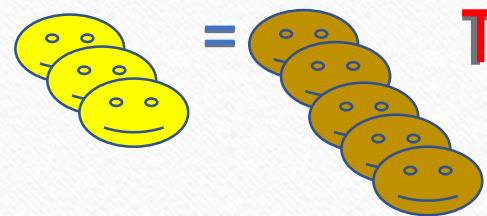
The optimal number of representatives for democracy at the beginning: PROPORTIONAL TO THE CITIZENS

problem

Apparently insoluble struggle between small & large States

The vote: only

- ☐ for male citizens
- ☐ and male slaves but

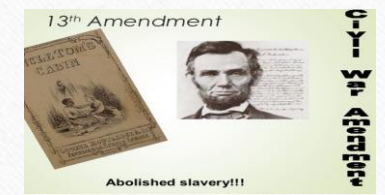


Three fifth

The Connecticut Compromise

- ☐ The female citizens (1919)

Passed on Senate on April 8, 1864 and on House on January 31, 1865 Approved on February 1, 1865



Passed on Congress on June 4, 1919 Ratified on August 18, 1919



Capitol hill



The Congress Includes 2 Chambers

English model, is divided into two chambers.



The Senate

The upper chamber of the Congress is the Senate.

Each state is represented in the Senate on an equal footing, regardless of its population, by two representatives.

problem

Apparently insoluble struggle between small & large States

The two senators are appointed or elected according to the constitutional provisions of each state; the term limit for senators is six years, but the Assembly is renewed every two years for one third of its members.

The Congress Includes 2 Chambers



English model, is divided into two chambers

*The House of
Representatives*



The Senate

In the legislative business, the Senate has a power completely equal to that of the House of Representatives: a bill must be approved by both Houses in order to be sent to the President for the signature.

In case of contrasts between the two Houses, a committee composed of members of the two Houses, with the duty of finding a shared text, can be appointed. But if the agreement is not achieved, the bill cannot end the legislative business.

The Congress Includes 2 Chambers



English model, is divided into two chambers



The Senate

Senate not only shares with the House of Representatives the legislative power, but also carries out several functions mainly related to checking the executive power.

other functions that only the Senate carries out

Constitution assigns to the Senate the power to approve – with a two thirds majority – the international treaties signed by the President; furthermore, the Senate is entrusted with the power to approve the appointments of federal officials made by the President (so called power of “advice and consent”). In the

Founding Fathers’ view, the Senate was the place where all the states, represented on equal footing, could lead the nation’s politics and check presidential initiatives.

Capitol hill

The Congress Includes 2 Chambers

English model, is divided into two chambers



The Senate

Senate not only shares with the House of Representatives the legislative power, but also carries out several functions mainly related to checking the executive power.

RELATIONSHIP BETWEEN SENATE AND PRESIDENT

The President is not only the Chief of the State, but also the leader of the executive branch, and therefore is entrusted with the power to appoint the officials of the Federal Government (under the advice and consent of the Senate), and to lead the federal administration.



The Congress Includes 2 Chambers

English model, is divided into two chambers

*The House of
Representatives*



RELATIONSHIP BETWEEN HOUSE AND PRESIDENT

According to the Constitution, the President of the **United States** is elected for a term of four years, together with a Vice President, poised to substitute for him in the case of an early interruption of the presidential term.



The election of The President

- Indirect election (Presidential electors)
- Direct election

RELATIONSHIP BETWEEN HOUSE AND PRESIDENT



Presidential election is an indirect one: citizens enjoying the right to vote elect a restricted number of electors (presidential electors), who gather in an electoral college, whose only duty is to elect the President and the Vice President.

the mandate of presidential electors turned into a mandatory duty to vote according on the popular vote

In case none of the candidates achieves the absolute majority of the votes cast by the presidential electors, the House of Representatives would elect the President (12th Amendment). This last circumstance happened once in the Early Republic, in 1824.

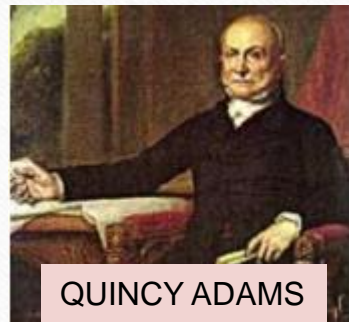
so called «corrupt bargain»

White House

White House

Capitol hill

The election of The President



QUINCY ADAMS

This election is notable for being the only time since the passage of the **Twelfth Amendment** in which the presidential election was decided by the House of Representatives, as **no candidate received a majority** of the electoral vote.

This presidential election was also the only one in which the candidate receiving the most electoral votes did not become president (**because a majority, not just a plurality, is required to win**).

It is also often said to be the first election in which the president did not win the popular vote, although the popular vote was not measured nationwide.

- Indirect election
- Direct election



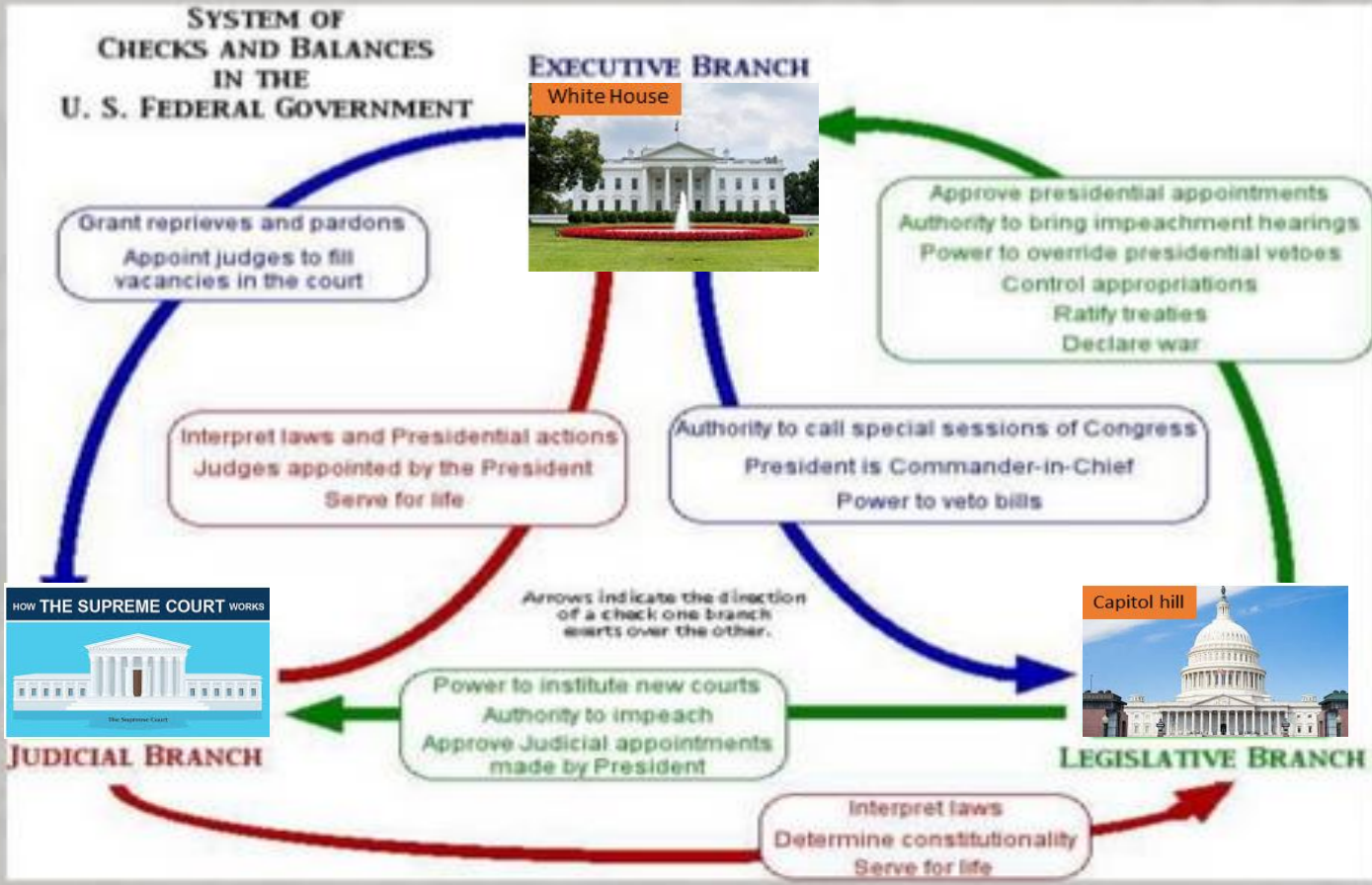
1824 Presidential Election

1824 Election Results

Candidate	Party	Electoral Votes	Popular Votes
Andrew Jackson	Democratic-Republican	99	153,544
✓ John Quincy Adams	Democratic-Republican	84	108,740
William H. Crawford	Democratic-Republican	41	40,856
Henry Clay	Democratic-Republican	37	47,531

Checks and balances

What are the Checks and Balances?



A chain of control

Checks and balances

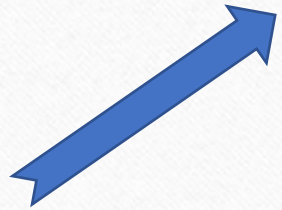


Congress v. President

Impeachment

Impeachment. Origins and constitutional regulation

- PRESIDENT
- VICE PRESIDENT
- HIGHER OFFICIALS



In England at the beginning

As for the first, born in England during the age of limited monarchy, impeachment was a trial carried out by the chambers of Parliament for crimes committed by the ministers of the Crown. Throughout English history, however, impeachment lost its role, substituted by the emergence of the relation of confidence between Parliament and ministers, and the political responsibility of the ministers for their actions.



Congress v. President

The House of Representatives



The Senate

Checks and balances



Impeachment

Impeachment. Origins and constitutional regulation

- PRESIDENT
- VICE PRESIDENT
- HIGHER OFFICIALS



In America

Framers of the American Constitution decided to confirm the possibility of **impeachment** of President, Vice President and other high officials of the Federal Government, also for its consistency with their ideal of **ethic responsibility** of those who are in charge of public functions.

Checks and balances

The Senate



The House of Representatives

Congress v. President

Impeachment

DEBATE
What kind of behaviour can lead to an impeachment?

- PRESIDENT
- VICE PRESIDENT
- HIGHER OFFICIALS

- Crimes
- Maladministration



⊕ those who would have liked to provide a limited area of impeachable crimes, granting an ample discretionary power to the President and the executive branch

⊕ those who would have wanted to allow impeachment not only for crimes, but also for maladministration, creating a sort of congressional check upon the political and administrative action of the President.

The 2nd solution was approved



Checks and balances

The Senate

The House of Representatives



Congress v. President

Impeachment

Impeachment. Origins and constitutional regulation

DEBATE

What kind of behaviour can lead to an impeachment?

⊕ The delegates in Philadelphia decided to acknowledge an impeachment on «**treason, bribery, and other high crimes and misdemeanors**». While treason and bribery are typical crimes, misdemeanors are a kind of activity not exactly defined, and open to several constructions.



- PRESIDENT
- VICE PRESIDENT
- HIGHER OFFICIALS

- Crimes
- Maladministration

What Institution can propose and vote on an impeachment?



Checks and balances

The Senate

The House of Representatives



Debate on the Veto

those who wanted a strong executive saw in veto power a check upon vicious legislation

those who wanted a strong prevalence of Congress did not accept a veto power of the executive branch: after independence, the state constitutions rejected this power due to its systematic abuse against the acts passed by the assemblies

Presidential Power

Congress v. President

Capitol hill

White House



Checks and balances

The Senate

The House of Representatives



□ Debate on the Veto

Absolute veto power was rejected

A compromise

a qualified veto power was recognized: if the President were to veto a bill passed by Congress, Congress could override the presidential veto with a two thirds majority in both Houses. In such a case, the President would be compelled to sign the bill.



□ Presidential Power

The presidential veto on the bills passed by Congress.

Congress v. President



Supreme Court and Constitution



During the Philadelphia Convention, the organizing of judicial power of the Union received little consideration

Nonetheless, in art. 3, the Constitution directly regulates the jurisdiction of the federal judiciary branch and the establishment of a Federal Supreme Court.

Remembering
the past



the Founding Fathers believed that federal courts
✦ should be subject to the rules of Common law.



Beginning with the colonial legal order, American legal thought was linked to the idea of Common law as a superior law. The courts of the colonial legal orders tried to apply Common law principles as limits to the laws passed by English Parliament and colonial assemblies, as well as to the orders enacted by the governors.



After independence, judicial review of legislation was immediately adopted by the courts of the states' legal orders. Here, the states' declarations of rights provided the provisions to be applied as norms superior to the laws passed by the legislative bodies.

Supreme Court and Constitution



✕ In Philadelphia, state delegates did not openly discuss the power of the federal courts to carry out such judicial review of legislation, but it was commonly adopted by the courts of all the states, and it was commonly acknowledged by American legal thought that it is the province of the judicial branch to declare null and void a law that does not abide the constitution.

✕ For all of those reasons, the organizing of the federal courts was not regulated in the Constitution but reserved for a successive federal statute to be approved.

Supreme Court and Constitution



6 Judges to 9 Judges
Decisions are taken by majority
With attached the dissenting opinion

A **dissenting opinion** presents the reasons for which one of the judges taking part in the deliberations voted against the final decision reached by the **majority**. It therefore serves to explain why she/he did not agree with the conclusions expressed in the judgment.

Supreme Court and Constitution



Separation power of federal Government and States

The supremacy value of federal law upon State's law

supremacy clause. Art. 6 states that «this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding».

Supreme Court and Constitution



Separation power of federal Government and States

The supremacy value of federal law upon State's law

SUPREME CLAUSE

Means

- ❑ a form of codification laws
- ❑ Get an hierarchical source of laws

Supreme Court and Constitution

The American balance between statutory law and Common law



The origin of SUPREME CLAUSE

Against Common Law from England

In the United States of America, protests against the Common law tradition began to appear immediately after the Revolution and independence from the mother country.

Against Laws from England

One of the main criticisms that the revolutionary generation launched against the mother country regarded the excessive role assumed by the Parliament of Westminster and the alteration of the sound principles of the Common law system, considered to be guarantees of liberties against tyranny.

Which Criticisms?

criticism

against the old judges of Common law, a kind of a judiciary aristocracy speaking a technical language not shared by the common people.

The new parliaments elected by the American people claimed wide and unlimited power to make new laws, and did not accept the burdens imposed by a source of law, such as the case law coming from the English courts, not linked with the will of the people.

Supreme Court and Constitution

*The American balance
between statutory law
and Common law*



The origin of SUPREME CLAUSE

New American Common Law
And Equity

And so

New American Laws
(Federal and States laws)

Codifications of law began to appear in many states,
following the sample of the Civil Code of Louisiana.

The spread of written statutory law and
codification reduced, therefore, the role of Common law

But

Codifications limited to a rule of procedure

- The rule of precedents
- To a specific set of subjects

Supreme Court and Constitution

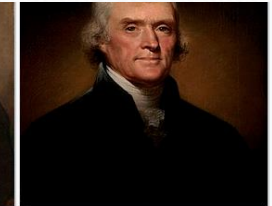


JUDICIAL REVIEW

- Judicial review is not found in the Constitution
- Articulated by the Court in *Marbury v. Madison*
- Judicial review allows courts to:
 - Determine the meaning of legislation
 - Invalidate statutes that are deemed unconstitutional



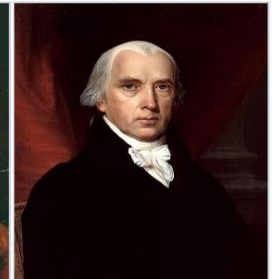
President John Adams, who appointed Marbury just before his presidential term ended.



Thomas Jefferson, who succeeded Adams as President and believed Marbury's undelivered commission was void.



William Marbury, whose commission Madison refused to deliver.



James Madison, Jefferson's Secretary of State, who withheld Marbury's commission.

Supreme Court and Constitution



More than **150** federal judges have been nominated to lifetime appointments by Trump.

Law cannot permit powers that Constitution doesn't include

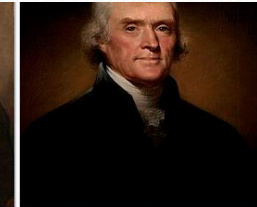
Marbury v. Madison (1803)

Suprem Court established the principle of judicial review in the United States, meaning that American courts have the **power to strike down laws, statutes**, and some government actions that violate the USA Constitution (as Judiciary Act of 1789 Section 13).

Marbury had been appointed a justice of the peace for the District of Columbia thanks President Adams' decree. Madison, secretary of State did not notify this decree, and the new Jefferson President was elected. Marbury asked to the Supreme Court a "writ of mandamus", an urgent statement. Constitution doesn't recognize this power. **But Section 13 of the Judiciary Act of 1789 provided that such writs might be issued.**



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Judiciary Act is an **Act** to Establish the **Judicial Courts** of the United States

Supreme Court and Constitution



Georgia
Institutional law
And the contract
between private men

Fletcher v. Peck (1810)



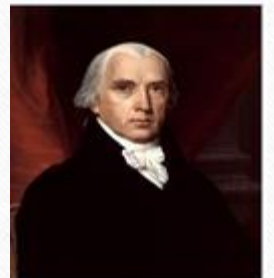
The legislature's repeal of the **law was unconstitutional** under Article I, Section 10, Clause 1 (the Contract Clause) of the United States Constitution. The majority concluded the sale between Fletcher and Peck was a binding contract, which under the Contract Clause cannot be invalidated even if it is illegally secured.

In 1795, the Georgia state legislature passed a land grant awarding territory to four companies. The following year, the legislature voided the law and declared all rights and claims under it to be invalid.

In 1800, John Peck acquired land that was part of the original legislative grant. He then sold the land to Robert Fletcher three years later, claiming that the land sales had been legitimate. Fletcher argued that since the original sale of the land had been declared invalid, Peck had no legal right to sell the land and thus committed a breach of contract.



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Supreme Court and Constitution



JURISDICTION on federal tax
Implied power
Definition of FEDERALISM

McCulloch v. Maryland (1819)

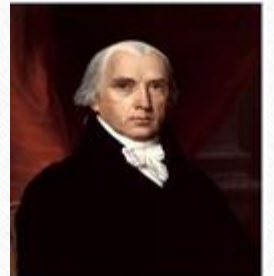
- Congress had the power to incorporate the bank and that Maryland could not tax instruments of the national government employed in the execution of constitutional powers.
- Pursuant to the **Necessary** and Proper Clause (Art. I, Section 8)
- Chief Justice Marshall noted that Congress **possessed powers not explicitly outlined in the U.S. Constitution**. Redefined “necessary” to mean “appropriate and legitimate,” covering all methods for furthering objectives **covered by the enumerated powers**.
- While the states retained the power of taxation, the Constitution and the laws made in pursuance thereof are supreme and cannot be controlled by the states.

In 1816, Congress chartered The Second Bank of the United States.

In 1818, the state of Maryland passed legislation to impose taxes on the bank. James W. McCulloch, the cashier of the Baltimore branch of the bank, refused to pay the tax. The state appeals court held that the Second Bank was unconstitutional because the Constitution did not provide a textual commitment for the federal government to charter a bank.



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Supreme Court and Constitution



THIS CASE helped to define the bases of FEDERALISM in USA CONSTITUTION

NO JURISDICTION
Damages
Losing properties
That's Federalism

Barron v. Baltimore (1833)

Barron was not entitled to damages for his property loss from the CITY on just compensation for a government taking.

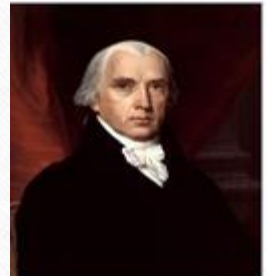
In a unanimous decision, the Court, **called** the intent of the framers and the development of the Bill of Rights (the first 10 amendments) as an **exclusive check on the federal government**

Does the Fifth Amendment, which prohibits taking private land for public use without just compensation, apply to the States as well as the Federal Government?

Baltimore **wharf** owner John Barron alleged that construction by the city had diverted water flow in the harbor area. He argued that sand accumulations in the harbor deprived Barron of deep waters, which reduced his profits. He sued the city to recover a portion of his financial losses. The trial court awarded him \$4,500 in damages, which the state appellate court struck down.



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Supreme Court and Constitution



The importance of Federalism and the judge's intrusion

Look the importance and the conditions of the “**judge's intrusion**”

The Development of Public Administration in the Liberal State

In the United States of America

At the federal level, it was not based on stable ministries, but rather on less structured agencies whose functions were related to the pursuit of a specific administrative task or the protection of a specific and temporary public interest. This also entailed a different relation between politics and administration: the entry of civil servants in office, as well as their removal, was based on the so-called “spoils system”, according to which the duration of the administrative office was inextricably linked to that of the political mandate

In the Anglo-American experience, therefore, the smaller size of public administration corresponded to its role and relationship with society: public administration did not achieve a special, protected, position in the legal order, as in Europe, and the review of its acts remained entrusted to the judicial branch. In other words, the Common law legal system helped to avoid the excess of state power over society that characterized European nations at the turn of the century.

Supreme Court and Constitution



The importance of Federalism and the judge's intrusion

Look the importance and the conditions of the “**judge’s intrusion**”

The Development of Public Administration in the Liberal State

Look the differences

In the United Kingdom the structure of public administration, though designed on the apical role played by the ministries as well, was historically characterized by a lighter bureaucratic apparatus. Moreover, in the English legal order, a considerable amount of administrative competences was traditionally left to the province of local government. Indeed, in spite of the lack of a systematic legal framework for the decentralization of competences in favor of substate entities, the large recourse to decentralized administrative offices for the implementation of administrative functions has represented a typical feature of the English administrative tradition.

In Europe a judicial review of the acts of the public administration developed only in the second half of the 19th century: a special judicial branch took shape, separate and independent from the ordinary judicial branch.

The judicial power from the ordinary one, and the inhibition of the ordinary courts to annul the acts of the public administration, exemplified the desire to set up the judicial review of the acts of the state taking into special account the public interests. Indeed, it must be underlined that these new administrative courts and councils were often composed of former advisors, ministers or high officials of the public administration itself, appointed directly by the government.

Supreme Court and Constitution



Look the importance and the conditions of the “**judge’s intrusion**”

The importance of Federalism and the judge’s intrusion

The Development of Public Administration in the Liberal State

The judicial review of the acts of the public administration

The introduction of the judicial review the acts of the public administration. represented a step forward in the path toward a liberal state, granting a wide set of judicial remedies to individuals against the state’s administration

Supreme Court and Constitution



Look the importance and the conditions
of the **“judge’s intrusions”**

The importance of
Federalism and the
judge’s intrusion

JUDICIAL REVIEW

- Judicial review allows parties to challenge:
 - Rulemaking actions
 - Adjudicatory decisions
 - Whether an agency has exceeded its statutory authority
 - Whether a guiding statute violates the Constitution
 - Whether an agency action violates due process considerations
 - Abuses of administrative discretion



What's the role of the Separate Powers on the *American Constitution*



Do you remember last lessons,
about the differences between
Flexible/Rigid Constitution, **chanceable/amendable** Constitution?



What's the **meaning** to modify *Federal American Constitution*



Is it possible? **NO**
It is only amendable

Congress
President
States
Citizens

What's the **meaning**
of **amending** the American Constitution



Do you remember last lessons?

Constitutionalism



New Idea –New Powers
New Conflicting Powers
New Order

modern Constitutionalism

modern Constitution

Values&rights

Congress
President
States
Citizens

Look

Preamble of American Constitution?

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

«We the People of USA...»

«More Perfect Union...»

Constitutionalism


Doctrin

New Idea –New Powers
New Conflicting Powers
New Order

modern Constitutionalism

modern Constitution

Values & rights

Congress
President
States
Citizens

Rigid American Constitution NOT *changeable* BUT *Amendable*

Two methods

An Amendment may **be proposed by**



■ **both**

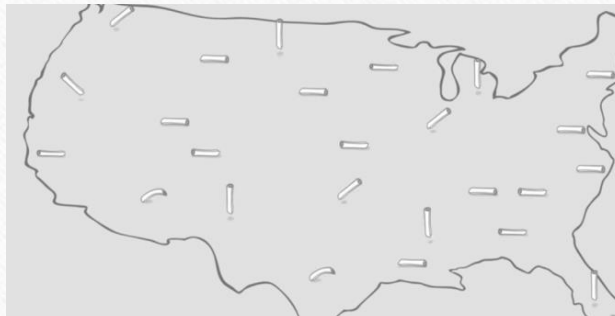
HOUSE **SENATE**

1^{rst}



■ **each States**

**Can vote An Amendament by
Own legislature**



2nd

No constitutional amendment has
ever come from state legislature.

Congress
President
States
Citizens

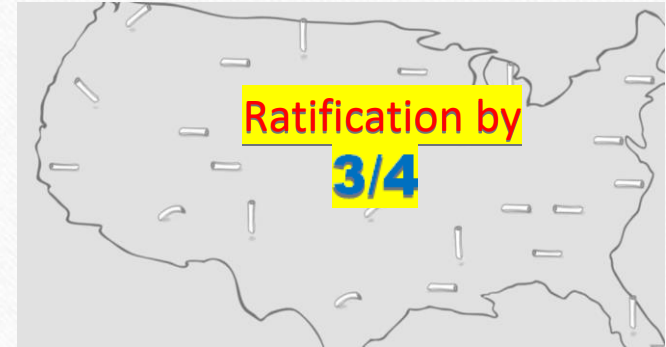
Rigid American Constitution NOT *changeable* BUT *Amendable*

Every Amendments have to put at the debate on both:

HOUSE $\frac{2}{3}$ SENATE $\frac{2}{3}$

CONFERENCE
COMMITTEE

NATIONAL
ARCHIVES



NATIONAL
ARCHIVES



Congress
President
States
Citizens

Rigid American Constitution
NOT *changeable* **BUT** *Amendable*

IMPORTANT ROLES of:

- HOUSE of Representatives**
- SENATE**
- STATES**
(in other terms **CITIZENS**)

BUT

- Any role is recognized to the President**