

# Unit 1 : Lesson #5: Checks & Balances and Separation of Powers

- Madisonian Model
- Separation of Powers
- Checks & Balances
- Marbury v. Madison (1803)
- Amendment Process (Citizen's Powers)
- Formal Amendments
- Informal Amendments

# MADISONIAN MODEL

**Fear that majority and minority factions could threaten the government**

*Solution: Set up precautions that will prevent this from happening*



## ***SEPARATION OF POWERS***

*Separate the power between three branches of government*



## ***CHECKS AND BALANCES***

*Each branch can prevent the other branches from becoming omnipotent*



## ***FEDERALISM***

*Share the power between the national government and the state governments*

# WHAT WAS ONE OF MADISON'S THREE AUXILIARY PRECAUTIONS TO PREVENT TYRANNY?

## SEPARATION OF POWERS

- Allocation of constitutional authority to each of the three branches of the national government
- To Madison, tyranny was government that controlled all 3 branches of government = division of power among the legislative, executive, and judicial branches
- Colonial experiences, e.g. excessive power in state legislatures = need for strong executive
- Danger of one branch combining forces with another branch = checks and balances



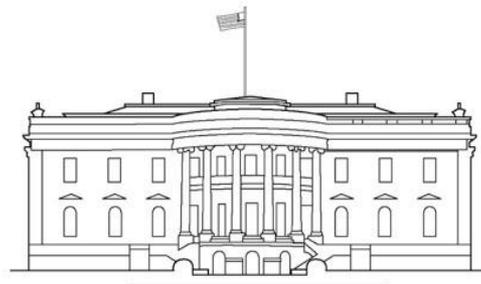
# SEPARATION OF POWERS

Definition - Constitutional division of powers among the legislative, executive, and judicial branches, with the legislative branch making law, the executive applying and enforcing the law, and the judiciary interpreting the law.

**Legislative Branch**  
**Congress**  
**Makes the Law**



**Executive Branch**  
**President**  
**Enforces the Law**



**Judicial Branch**  
**Supreme Court**  
**Interprets the Law**



House elected by the people in the district

Senate originally selected by state legislators

President elected by electoral college

Judges selected by president

Term is for 2 years

Term is for 6 years

Term is for 4 years

Term is for life

Direct democracy

Indirect democracy

Indirect democracy

Indirect democracy

# SEPARATION OF POWERS

## Powers of the branches of government



Legislative branch

Executive branch

Judicial branch

Pass laws	Veto legislation	Declare laws unconstitutional
Declare war	Command armed forces	Hear cases on federal law
Impeach president and judges	Grant pardons	Preside over impeachment trials
Approve presidential appointments	Appoint judges, ambassadors, department heads	Declare presidential acts unconstitutional
Ratify treaties	Conduct foreign affairs and negotiate treaties	
Levy taxes		
Establish number of Supreme Court justices		
Regulate Supreme Court's jurisdiction		

After the Revolutionary War, the writers of the Constitution knew that the best system of government would involve a separation of powers. They gave the new government three branches. Each one would have its own jobs and responsibilities. The Constitution describes the duties that each branch has and the duties of the people who carry out these duties.

**The legislative branch (Congress) makes laws for the nation. Congress is bicameral, it has two parts – the House of Representatives and the Senate.**

**The executive branch makes sure that the laws of the country are obeyed. The President is the head of the executive branch. He is also known as the Chief Executive of the country. The executive branch is very large because many people and groups are needed to help the President. (Vice President, Cabinet**

**The judicial branch answers questions about the meaning of laws and whether or not they follow the Constitution. The highest court in the judicial branch is called the Supreme Court. Nine judges, or justices, make decisions about laws and other court matters. The head of the Supreme Court is called the Chief Justice.**

# WHAT WAS ONE OF MADISON'S THREE AUXILIARY PRECAUTIONS TO PREVENT TYRANNY?

## CHECKS AND BALANCES

- **Background**
  - 18<sup>th</sup> century view of government as something to be restrained, and modern view of government as something to be used for the common good.
  - Fear of tyranny among Founders >> distrust of government = checks and balances as means of intentionally building **inefficiency** in order to prevent government abuse of power.
- Each branch has a role in the actions of others (veto, veto override, appointment and confirmation, treaty making and ratification, defense funding and Commander-In-Chief)
- Each branch is politically independent of the others



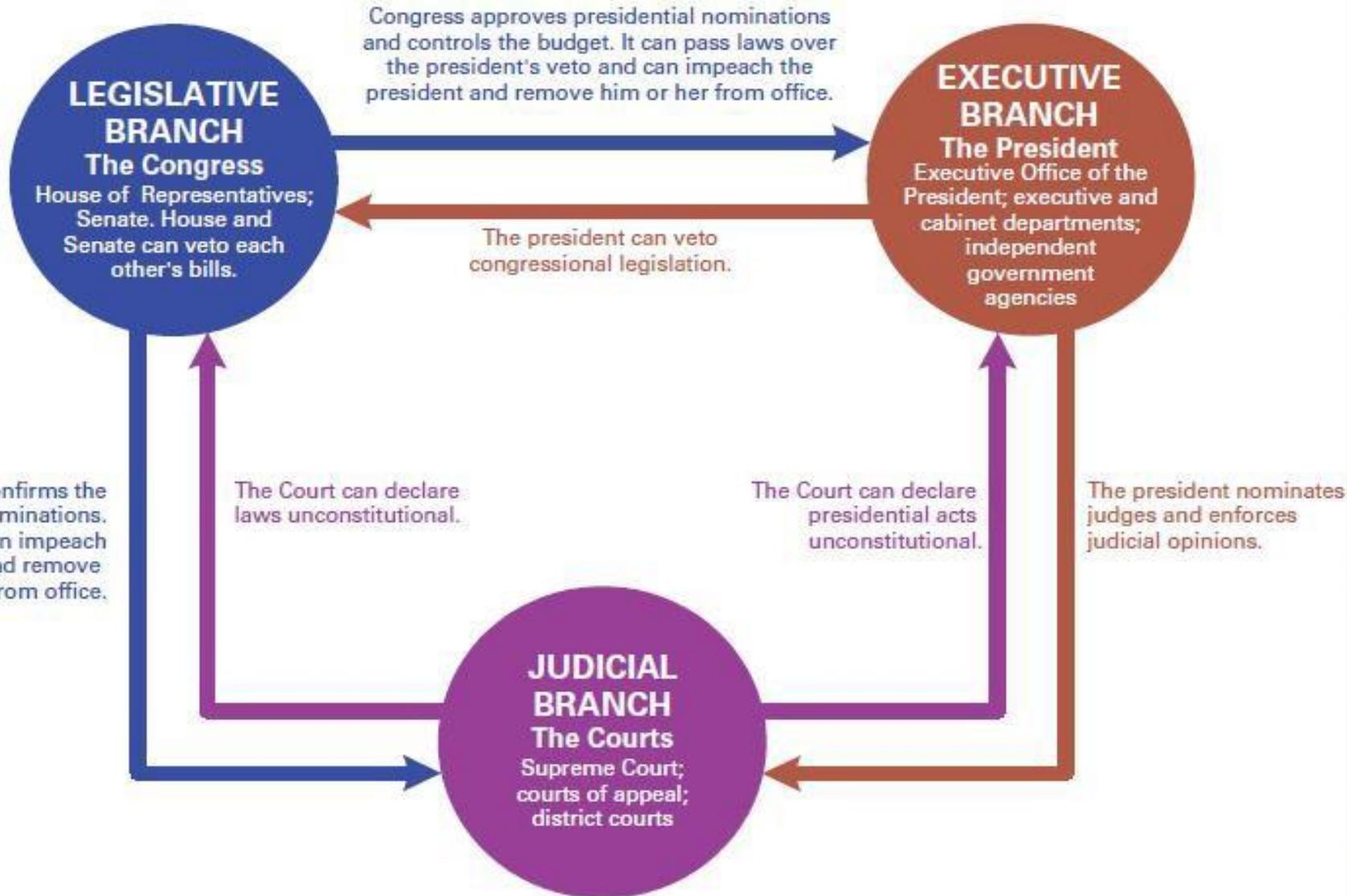
# WHAT WAS ONE OF MADISON'S THREE AUXILIARY PRECAUTIONS TO PREVENT TYRANNY?

## CHECKS AND BALANCES

- Power struggles among three branches (especially Congress and the president)
- A majority of the voters can win control over only part of the government at one time. **Staggering of terms within each branch** >> a majority of voters can gain control over one part of government at one time, e.g. midterm congressional elections can serve as a check of the executive.
- Independent national courts are provided
- Political independence within each branch: no branch is dependent upon the other two for election (exception: judges are appointed by President) and continuance in office (life terms for judges ameliorate presidential influence)



# CHECKS AND BALANCES



# Separation of Powers & Checks and Balances

## Separation of Powers

The separation of the powers of government among three branches— legislative, executive, and judicial—so that each branch has to cooperate with the others in order to accomplish policy making goals.

## Check & Balances

The Framers gave each branch the power to check, or stop, the actions of the other two branches in meaningful ways.



# **JUDICIAL REVIEW - *MARBURY V. MADISON* (1803)**

- Framers did not specifically provide for judicial review
- Court could not enforce an unconstitutional law (Section 13 of Judiciary Act)
- Chief Justice John Marshall reasoned that judges should interpret the Constitution, not the President or Congress
- Judicial review became established due to this case

## **EFFECTS:**

- Litigation sometimes trumps legislation as a way to make public policy
- Examples – Modern-day gun issues
  - *District of Columbia v. Heller* (2008) - Supreme Court held that a Constitutional right to gun ownership - irrespective of service in a state militia - did exist.
  - *McDonald v. Chicago* (2010) - The Second Amendment right to keep and bear arms for self-defense in one's home is fully applicable to the states through the Fourteenth Amendment.

# Formal & Informal Amendments



**If the Founding Fathers created a perfect Constitution, why did they allow us to change it?**

- **An amendment is a change or addition to the Constitution.**
- **When drafting the Constitution, the Framers detailed an amendment process in Article V that gave citizens avenues to change the Constitution.**

# WHY DO WE NEED AN AMENDMENT PROCESS?

- The Constitution of the United States was ratified in 1789, making it 230 years old, the oldest constitution in the modern world. It was created for our “posterity” (think Preamble).
- The Framers could not have foreseen the changes the United States would experience.
  - What can we do to update the Constitution to address these new issues?
  - Solution: citizens could add changes to the Constitution.
- Process for amending, or changing, the Constitution in Article V.
  - **Framers intended for the amendment process to be difficult**
  - Although the federal government could propose amendments, three-fourths of states have to ratify every amendment.

# CHANGING THE LETTER OF THE CONSTITUTION: FORMAL AMENDMENTS

**Formal Amendments are written changes that are added to the Constitution**

- **Constitution should not change as an expression of basic and timeless personal liberties, but should adapt to changing conditions (amendment process)**
- **Legacy of the Articles: Unanimous vote to amend = impractical = desire to make process easier, but not too easy**
- **Process of amending reflects federal system.**
- **First 10 = Bill of Rights = some rights are fundamental and should not be subject to majoritarian control. (Anti-Federalist Demand that the Bill of Rights be added)**

# PROPOSING AND RATIFYING FORMAL AMENDMENTS

- 1) Proposed by 2/3 vote of each house of Congress  
→→→ Ratified by 3/4 of the state legislatures – **used 26 times**
  
  - 2) Proposed by 2/3 vote of each house of Congress  
→→→ Ratified by special conventions in at least 3/4 of the states – **used once....do you know for which amendment?**
- A more directly democratic way. People elect delegates who state their positions on the proposed amendment. Citizens are in essence casting their votes on the amendment by voting for the appropriate delegates.

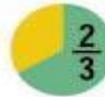
# PROPOSING AND RATIFYING FORMAL AMENDMENTS

- 3) Proposed by a national constitutional convention called by Congress at the request of 2/3 of the state legislatures →→→ Ratified by 3/4 of the state legislatures – **never used**
- 4) Proposed by a national constitutional convention called by Congress at the request of 2/3 of the state legislatures →→→ Ratified by special conventions in at least 3/4 of the states – **never used**
- **Constitutional Convention method never used because fear of “runaway” convention that might get out of hand and implement wholesale changes in the Constitution.**
    - Disturbing questions: Will convention stick to only the matter at hand? Will it take on other issues? Who gets to be delegates? How are they selected? How is representation among the states to be determined?
  - **Seven year period provided for ratification (generally: do you know of an exception?); Congress has the power to decide on a time period**

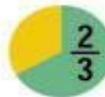
# HOW CAN THE CONSTITUTION BE AMENDED?

## Step 1 Amendment Is Proposed

Proposed by Congress by  
a  $\frac{2}{3}$  vote in both houses

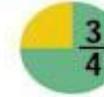


Proposed at a national convention  
called by Congress when  
requested by  $\frac{2}{3}$  (34) of  
the State legislatures

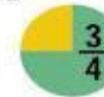


## Step 2 Amendment Is Ratified

Ratified by the State  
legislatures of  $\frac{3}{4}$  (38)  
of the States



Ratified by conventions held  
in  $\frac{3}{4}$  (38) of the States



# HOW CAN THE CONSTITUTION BE AMENDED?

## Amending the Constitution

### Proposed

Amendment is proposed by a two-thirds vote of each house of Congress.



Amendment is proposed by a national convention called by Congress at the request of two-thirds of the state legislatures.

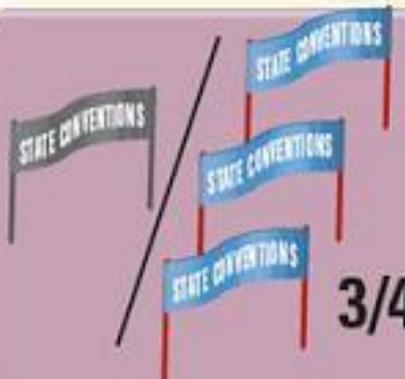


### Ratified

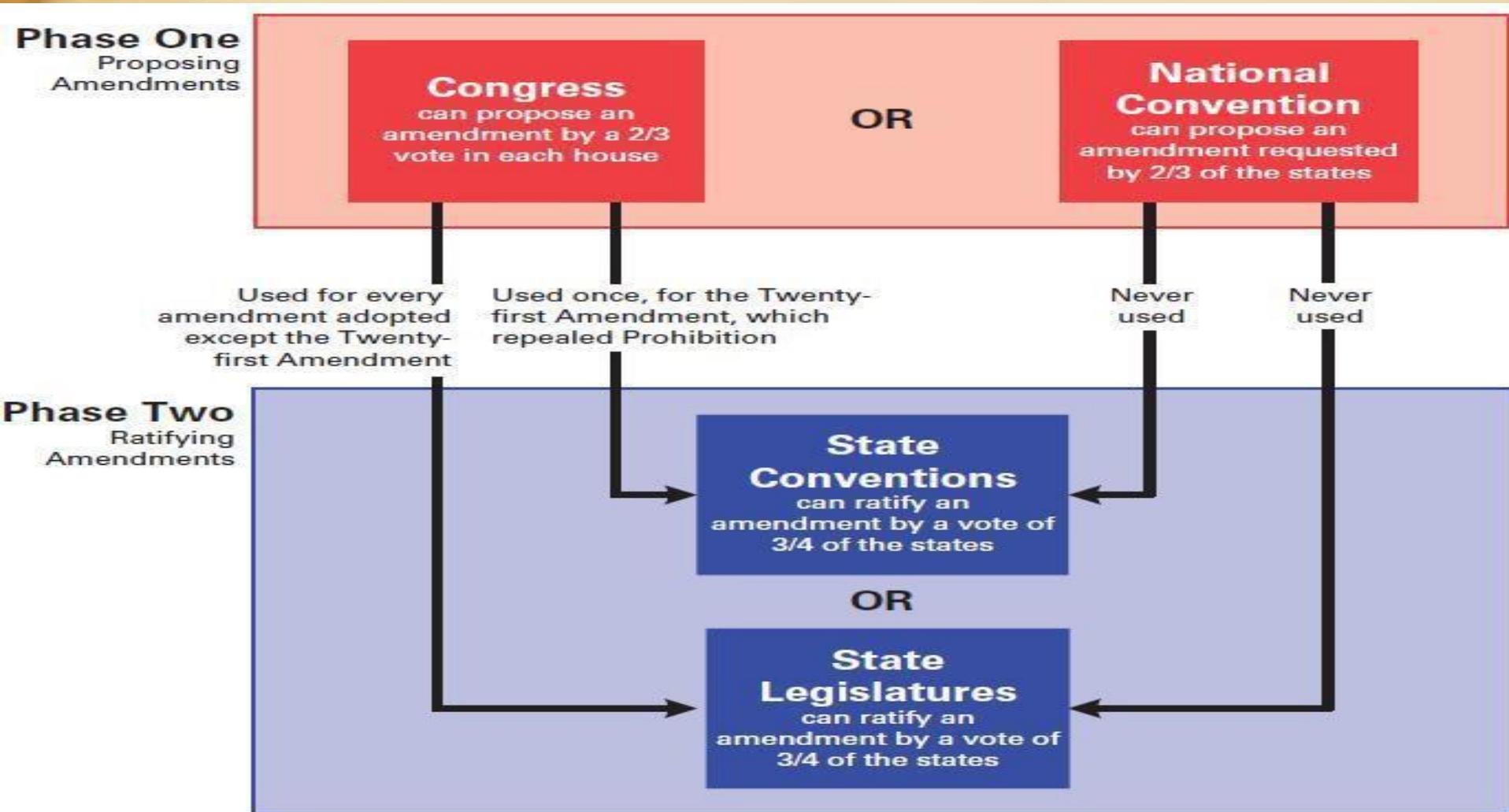
Amendment is ratified by three-fourths of the state legislatures.



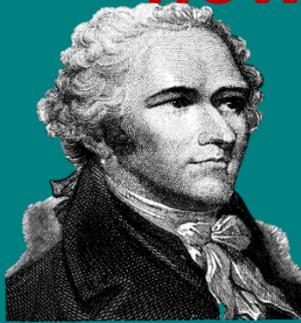
Amendment is ratified by three-fourths of the state conventions.



# HOW CAN THE CONSTITUTION BE AMENDED?



# HOW MANY AMENDMENTS HAVE BEEN PROPOSED? HOW MANY HAVE BEEN PASSED?



## Problem #1:

No single party has ever controlled two-thirds of the House or Senate. With different ideological goals, getting two-thirds of Congress to agree on a change to the Constitution is nearly impossible without some level of cooperation.



## Problem #2:

Every amendment must receive support from three-fourths of state conventions or state legislatures. It's incredibly difficult to get that many states to agree on a permanent change to the Constitution.

# INFORMAL AMENDMENTS

- **What?**

- DEFINITION - Changes to the Constitution that do not involve actually changing the wording of the Constitution
- Alters the meaning of the words already in the Constitution

- **Why?**

- “Constitution belongs to the living, not the dead” (Jefferson)
  - gets new blood over time (laws, amendments)
- Jefferson believed each generation might need a new Constitution.
- This hasn’t occurred because of the informal changes that have allowed the Constitution to adapt to changing times (especially with Congress’ use of implied powers)



# INFORMAL AMENDMENTS

## 2. PRESIDENTIAL ACTIONS

- Executive privilege/executive orders (latter has the force of law)
- Executive agreements with other countries
- Right to send armed forces into hostilities
- Right to propose legislation to Congress and work to secure its passage



# INFORMAL AMENDMENTS

## 3. JUDICIAL ACTIONS

- The judiciary has been the most influential in interpreting the Constitution
- Article III defines the power of the judiciary very broadly, but does not specifically mention judicial review
- Supreme Court has changed constitutional interpretations to reflect new social economic conditions (*Brown v. Board*, *Texas v. Johnson*)



# INFORMAL AMENDMENTS

## 4. CUSTOM AND USAGE

- Has democratized our Constitution (presidential and vice presidential TV debates)
- Examples - Cabinet, parties, committee system in Congress, senatorial courtesy, legislative veto, presidential nominating conventions

