I. Constitutions

A constitution is usually a written document that sets forth the powers, and limitations thereof, of a government. It represents an agreement between a government and the people of a nation or a state in which the people consent to a form of government and the extent of the sovereign powers of that government. Sovereignty in government means the absolute right to govern, and the powers by which a sovereign entity governs are granted by the constitution. The federal government and state governments are sovereign, but usually municipal and county governments are not (in North Carolina, they have no power except that given to them by the state).

The federal Constitution is the highest source of U.S. laws, and no other law can override it. The federal Constitution divides the powers between the federal and state governments, granting some to the federal government only (called “exclusive” powers), granting some to both federal and state governments (“concurrent” powers) and refusing some other powers to both federal and state governments (“denied” powers). Any power not mentioned by the federal constitution in one of these three categories is implicitly a power of the states. The federal government is, therefore, said to be a government of limited powers. North Carolina state government is limited only by restrictions placed on it by the N.C. constitution and by the explicit and implicit limits established by the U.S. constitution.

Federalism is a system of government where power is divided between the federal government and a group of states with powers granted to the central government for the benefit of all states. The Supremacy Clause (Article VI of the U.S. constitution) established the ranking of federal and state laws. There are some areas where the federal government and state governments have concurrent authority, which means that they can act independently in making laws on the same subject. However, the doctrine of preemption states that a federal law takes precedence over a conflicting state law.

The first article of the U.S. constitution defines the functions and powers of the legislative branch of government. It contains the Commerce Clause, which grants an express power to the federal government to regulate foreign and interstate commerce and commerce with the Indian Tribes. This clause has been expanded to cover many situations and is the basis for much federal law. It is often called the elastic clause as Congress has stretched it to provide authority for laws covering many subjects based upon actual or potential impacts on interstate commerce. The Contract Clause of the same article prohibits states from unreasonably impairing private contracts. This is an example of a denied power.

There have only been twenty-seven amendments to the U.S. constitution. The first ten amendments are called the Bill of Rights. The Fourth Amendment protects the privacy of citizens by prohibiting unreasonable searches and seizures (essentially those without judicially issued warrants). Originally the Fourth Amendment applied only to the federal government; however, the Supreme Court, through the Fourteenth Amendment has applied it to the states. The Supreme Court has held that the use of warrantless high technology surveillance (such as infrared scanning) of a home violates the Fourth Amendment.
The concept of due process basically means that a citizen can expect to be treated fairly by the government. The Fifth Amendment prohibits the federal government from denying any person “life, liberty or property without due process of law.” The Fourteenth Amendment puts this same restriction on state governments.

The Fifth Amendment also contains a Takings Clause that prohibits the federal government from taking private property for public use unless the owner is fairly compensated for it. The Fifth Amendment, as with most of the first ten amendments, has been applied to the states through the Fourteenth Amendment.

The Fourteenth Amendment contains the Equal Protection Clause that says that states must treat similarly situated people in the same manner.

II. Treaty Making Power

The second article of the U.S. Constitution defines the functions and powers of the executive branch. Section 2 of this article defines the powers of the President, one of which is to make treaties with foreign countries with the consent of two-thirds of the Senate. Also, under Article I, Section 10, states cannot make treaties with foreign nations. States are also prohibited from making agreements with other states unless Congress specifically consents for them to do so. Such agreements, approved by congress, are called interstate compacts.

III. Legislative Power

The legislative power is the power to enact statutes (laws). The U.S. Constitution grants that power to Congress, subject to veto by the President. A presidential veto can be overridden by a two-thirds vote of both houses of Congress. In North Carolina, the power to enact statutes is vested in the General Assembly, and the Governor has a limited veto power.

IV. Judicial Power

Article Three of the federal constitution vests the power to hear and decide cases in the U.S. Supreme Court and any lower courts established by Congress. Presently, the lower (“inferior”) courts include the U.S. Court of Appeals, the U.S. District Courts and seven special federal courts that only hear certain kinds of cases. Federal courts may be called upon to rule on the constitutionality of federal or state laws. Federal judges are appointed by the President, with the consent of the Senate.

The N.C. constitution vests the power to decide cases in the N.C. Supreme Court and the lower courts, which are the Court of Appeals, the Superior Courts and the District Courts. State judges are elected by the voters of North Carolina.

The federal and state courts base their opinions on written laws, such as the Constitution, statutes, and regulations, if applicable, and on the common law. Common law is created by the reasoning from prior judicial decisions. The principle of *stare decisis* means that a court must follow its own prior decision when the facts are the same as in the prior case. Therefore, court decisions form precedents that must be followed within a particular court system. Courts may consider, but do not have to follow, the
precedents of a different court system. Where there is a conflict, statutory law overrides common law.

V. Executive Power

In the federal government, the President is the elected official who is responsible for enforcing the federal law. He is commander-in-chief of the armed forces, he appoints Cabinet members (subject to Senate confirmation) to advise him, he can grant reprieves and pardons to federal criminals, he can make treaties with foreign countries with the consent of two-thirds of the Senate, he makes diplomatic and judicial appointments, and he can issue executive orders. The Governor of the North Carolina can also issue executive orders. An executive order interprets or implements some provision of the constitution, a statute, or a treaty.

VI. Administrative Agencies

An administrative agency is a unit of the government (but not a court or legislative body) that is created by Congress (or the General Assembly) to make rules and render decisions in particular areas of public interest. Administrative agencies are usually formed by an act of the legislature called an enabling statute to assist the President or the Governor in enforcing the applicable law. An enabling statute sets up the agency and the guidelines to be followed by the agency in performing its duties. Administrative agencies can also be created by an executive order of the President or the Governor, but this is less common.

The duties of an administrative agency include rule making, adjudication of individual cases and administrative activities. In other words, one agency may perform many of the functions of the three branches of the federal government. The procedures for rule making and adjudication are governed by the Administrative Procedure Act (APA).

The rules promulgated by an administrative agency have the same effect as a law, and to insure that the rules are appropriate, the APA provides procedures for the way the agency gathers information from the public beforehand. One of the types of rule making is called “informal.” Here, the steps are: (1) a review of the Proposed Rule is made by the Office of Management and Budget (OMB), (2) after at least 30 days, notice of the Proposed Rule is published in the Federal Register, (3) written comments are received and evaluated, (4) a review of the draft Final Rule is made by the OMB, and (5) the Final Rule is published in the Federal Register.

The “formal” type of rule making, which is less favored because it is expensive and time consuming, involves these steps: (1) a review of the Proposed Rule by the OMB, (2) notice of the Proposed Rule is published in the Federal Register, (3) public hearings are held, with sworn witnesses and opportunity for cross-examinations, (4) a review of the draft Final Rule is made by the OMB, and (5) the Final Rule is published in the Federal Register.

The most common type of rule making is called “hybrid” because it combines the formal and informal types. The steps followed in this type are: (1) a review of the Proposed Rule by the OMB, (2) a notice of the Proposed Rule is published in the Federal Register.
Register, (3) written comments are received and informal public hearings with oral testimony are held, (4) a review of the draft Final Rule is made by the OMB, and (5) the Final Rule is published in the Federal Register.

A fourth type of rule making is called “exempt” and it is not favored by the courts. It allows no public comment. This type is only used in special circumstances, such as where rules are made by a military service or national security agency (where speed and secrecy are needed), or in cases of emergency, or for interpretive rules or general policy statements. For emergency rules, public comment is taken after the rule becomes law. The agency may then later revise the emergency rule and issue a final rule.

Judicial review is the process by which an agency’s actions are overseen by a court. The purpose is to ensure that the agency is operating within its authority. The court only interferes with the agency’s authority if it finds that the delegation of authority is unconstitutionally vague, a constitutional standard was violated, the action was beyond the scope of its statutory authority, or the proper procedure was not followed.

A delegation is unconstitutionally vague if Congress failed to include adequate guidelines in the enabling statute that serves as authority for the regulation. A regulation that is beyond the scope of statutory authority is one which exceeds that which Congress authorized. Failure to follow proper procedure as set forth in the APA and other statutes is the most common reason that federal courts cite when setting aside regulations. If the court finds that the agency failed to follow proper procedure it will not reach the merits of the regulation.

Agency adjudication takes place when an agency issues an order for something other than rule making. For example, the agency may decide whether a person is entitled to a particular benefit or it may issue a license. The adjudication process can be either formal or informal, and adjudication is actually a judicial function. Its purpose is to resolve disputes between agencies and individuals and companies affected by its actions. Results of agency adjudication are subject to judicial review; however, agency decisions are often difficult to reverse because courts usually give agency decisions a great degree of deference.

The administrative duties of an agency include advising, conducting research, issuing permits, managing property, and administering contracts and grants. This function is similar to the executive branch.

An agency’s power is limited by the statute or executive order by which it is created. Also, as there are checks and balances among the three branches of government, there are also protections set up regarding administrative agencies. Each branch of the government can exercise control to a certain extent. For the executive branch, the President appoints the agency head, the OMB recommends the budget each year and also has a regulatory review process, and the agency is subject to executive orders. The legislative branch has oversight of the agency’s actions, has the power to terminate or amend the enabling statute, has the power to control the agency’s budget, and the Senate must consent to agency nominations. The judicial branch has the power of judicial review over all agencies.

There are generally four types of administrative agencies: (1) executive (the agency head serves at the pleasure of the President) and (2) independent (the head is appointed by the President, but serves for a fixed term). The Environmental Protection Agency (EPA) is an independent agency but is unusual in that it was created by executive
order and its head serves at the pleasure of the President. The remaining two categories of agency are judicial and congressional. These serve the judiciary and Congress, respectively. The Library of Congress is an example of a congressional agency whose primary function is to provide information to the Congress. It also serves the very important secondary function of supporting research by the public through its repository, archival and research functions. The Copyright Office, located organizationally within the Library of Congress, is unusual in that it is a congressional agency whose primary mission is to serve the public by registering copyrights.

Some examples of federal administrative agencies are the EPA, the Department of the Interior (including the Bureau of Land Management, the U.S. Fish and Wildlife Service, and the National Park Service), the Department of Agriculture (including the Forest Service, the Natural Resources Conservation Service, and the Farm Service Agency), the Department of Labor (including the Occupational Safety and Health Administration and the Mine Safety and Health Administration), and the Department of Defense. Some examples of independent agencies are the Consumer Products Safety Commission and the Food and Drug Administration.

VII. County and Municipal Governments

In North Carolina, county and municipal governments have only the power that is granted to them under the state constitution. They are generally authorized to issue ordinances, such as zoning or nuisance regulations. Health departments whose jurisdictions may include one or more counties are authorized to issue rules. Ordinances and rules are both forms of local law.

VIII. How to Find Laws

The statutes passed by Congress can be found in several places. The United States Code and the United States Code Annotated (with explanations) both have the federal statutes arranged by subject matter (“codified”). This makes it easier to locate the most current law in a particular area. The U.S. Statutes at Large contain the texts of laws chronologically rather than by subject matter (therefore, not codified). The chronological listings of North Carolina laws are called the Session Laws, and the codified laws are called the General Statutes of North Carolina. County and municipal governments individually decide how to publish their laws. It may be necessary to contact local officials to obtain copies.

Executive orders of the President are recorded chronologically in the Federal Register (not codified). They are published annually by subject matter in Title 3 of the Code of Federal Regulations. Executive orders of the Governor are found in the North Carolina Register (not codified).

Case law, which comes from the judicial branch, is contained in various reporters, depending upon the specific court. Decisions regarding specific issues of the three levels of federal courts (Supreme Court, Court of Appeals and District Court) are published in chronological order. For example, decisions of the U.S. Supreme Court are found in U.S. Reports and U.S. Supreme Court Reports. Opinions of the U.S. Court of Appeals are
published in the Federal Reporter and West’s Federal Reporter. Federal District Court opinions are located in the Federal Supplement and West’s Federal Supplement. North Carolina Supreme Court cases are found in North Carolina Reports and appellate cases in North Carolina Court of Appeals Reports. For the state court system, only decisions of the Court of Appeals and the Supreme Court are published, not those of trial courts. As in the federal reporters, state court decisions are also published in chronological order.

Newly proposed federal regulations and adopted versions of new regulations are found in the Federal Register that is published daily. Once a regulation is adopted by a federal administrative agency, it is published in the Code of Federal Regulations, which is arranged by agency and subject matter. For state administrative agencies, the North Carolina Register includes newly proposed regulations and adopted versions of new regulations. It is published bi-monthly and items are listed in chronological order. The North Carolina Administrative Code is a compilation of adopted regulations organized by applicable department.

Please reference the D.H. Hill Library website, prepared for this course, on legal research. <http://www.lib.ncsu.edu/courses/are306> Reference librarians are available to answer questions that you may have about legal research.