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## II. ENUMERATED AND INCIDENTAL POWERS IN EIGHTEENTH CENTURY LAW

The Constitution is, of course, a document of enumerated powers. The federal government enjoys only those powers listed or incidental to those on the list.<sup>7</sup> Enumerated powers can also be called express or principal powers. Under eighteenth century law, if a power was incidental to an enumerated power, then it was conveyed by implication; there was no need to set it forth expressly.<sup>8</sup> An incidental power often was labeled as “needful” or “necessary” for exercise of the principal, express, or enumerated power.<sup>9</sup> The Constitution itself employs both “needful” and “necessary” as synonyms for incidence.<sup>10</sup>

The Constitution does not explicitly grant eminent domain authority within state boundaries. Thus, the federal government may exercise it only if it is incidental (or ancillary) to one or more express powers. It is not sufficient, as the *Kohl* court maintained, that eminent domain be “inseparable from sovereignty.”<sup>11</sup> Nor is it sufficient that the Fifth Amendment’s Takings Clause<sup>12</sup> qualifies its exercise, for the Clause might be merely qualifying its exercise within federal territories and enclaves.

The founding-era doctrine of principal and incidental powers was a branch of the larger jurisprudence of principal and incidental interests. Contemporaneous legal sources provide rules for determining whether an unmentioned power is incidental to an enumerated, or principal, one. The most fundamental rule was that a power was incidental if the bargain or understanding of the parties—which founding-era lawyers called the “intent of the makers”<sup>13</sup>—was that it be so. When the “intent of the makers” was not known, a reviewing court adopted a default rule. The approach for deriving the default rule may be described as follows. First, the interpreter asked if the claimed incidental power was of lesser value than the enumerated one. If it was not, it could not be incidental. But if it was of lesser value, then the interpreter asked whether the claimed incidental power was tied to the enumerated power either (1) by custom, or (2) by absolute or reasonable necessity. Reasonable necessity meant that the person trying to

exercise the principal power would suffer “great prejudice” in that exercise if the putatively incidental power were denied to him.<sup>14</sup>

For example, suppose Abigail granted to Brianna an enumerated power to mine coal from Abigail’s land, but the grant failed to mention that Brianna had the right to use the surface for that purpose. Brianna might well claim that the right to use the surface was incidental or ancillary to the right to mine.<sup>15</sup> A court assessing Brianna’s claim first would determine whether her claimed right to use the surface was less “worthy”—of lesser value—than the right to mine.<sup>16</sup> If so, then the court would ask if such a right of entry was customary. If it was, then it was incidental. If it was not, then the court would ask if Brianna would suffer “great prejudice” (not mere inconvenience) without it. If so, then the right was incidental, but if Brianna would not suffer “great prejudice,” it was not. However—and this is critical—a court would not consider custom or prejudice unless the “worthiness” test was satisfied. A power was never incidental to its putative principal unless it was of lesser value than the principal.

In *McCulloch v. Maryland*, Chief Justice John Marshall followed this basic analysis. Before reaching the question of whether incorporating a national bank was “necessary,” he asked whether it was of lesser importance than the principal powers (which he called “great powers”) to which it might be incidental. In other words, he asked if the claimed power was so valuable that it would have been enumerated if the ratifiers had understood the Constitution to grant it.<sup>17</sup> He concluded that authority to incorporate a national bank was of lesser value than the principal powers to which it might have been incidental. Only then did he proceed to his famous discussion of the word “necessary.”<sup>18</sup>

Chief Justice John Roberts followed the same rules nearly two centuries later when deciding whether the authority to require people to purchase insurance policies was incidental to any of the Constitution’s express grants. Justice Roberts concluded that requiring people to purchase insurance was a “great power” of the kind the Constitution would have enumerated had it been granted, and that it therefore could not be incidental.<sup>19</sup>

## III. WAS EMINENT DOMAIN A PRINCIPAL POWER?

### A. Initial Questions

Professor William Baude has pointed out that the *Kohl* Court did not follow the procedure for determining whether

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7 *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819).

8 Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in GARY LAWSON, GEOFFREY MILLER, ROBERT G. NATELSON & GUY SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 60 (Cambridge Univ. Press 2010).

9 *Id.* at 70.

10 U.S. CONST. art. I, § 8, cl. 17 (“needful Buildings”) & cl. 18 (“necessary and proper”). See also *Latin*, *supra* note 6 at section III.C. (“[I]n eighteenth century legal documents, “necessary” was a common way of conveying incidence[.]”).

11 *Kohl*, 91 U.S. at 371-72.

12 U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”).

13 Robert G. Natelson, *The Founders’ Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239, 1251-52 (2007).

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14 *Legal Origins*, *supra* note 8, at 60-67.

15 *Id.* at 65.

16 *E.g.*, GILES JACOB, *A NEW LAW-DICTIONARY* (10th ed. 1782) (unpaginated) (“defining incident”).

17 *McCulloch*, 17 U.S. at 407-08.

18 *Id.* at 408ff.

19 *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 559 (2012) (The Necessary and Proper Clause “does not license the exercise of any great substantive and independent power[s] beyond those specifically enumerated.”) (internal quotation marks omitted).

A year before the Supreme Court’s *Sebelius* decision, this argument as applied to the Affordable Care Act was anticipated in Robert G. Natelson & David B. Kopel, “Health Laws of Every Description”: *John Marshall’s Ruling on a Federal Health Care Law*, 12 ENGAGE 49, 51 (2011).

an interest is incidental when it upheld the exercise of eminent domain within state boundaries. Specifically, the Court never addressed the question of whether eminent domain is too important to be an incident.<sup>20</sup> That question is the subject of the remainder of this essay.

Of course, if eminent domain is not a principal power, there are several principal powers to which it could be incidental. At least in some circumstances, it might be reasonably necessary for construction of offices for housing government functions. In pursuing activities under the navigation component of the Commerce Clause, Congress might need to condemn land to build lighthouses and otherwise improve harbors.<sup>21</sup> But the most obvious role for eminent domain is in furtherance of congressional authority “to establish . . . post Roads.”<sup>22</sup> (In the Constitution, a “post Road” is an intercity or interstate highway punctuated by rest stops; “to establish” a post road means to undertake all actions necessary to bring it into operation.)<sup>23</sup>

When the Constitution was adopted, eminent domain was a customary, and often reasonably necessary, component of road construction and improvement. Statutes empowering boards of trustees to undertake road construction and improvement routinely included grants of condemnation authority.<sup>24</sup> However, the enumeration of condemnation power in a statute granting authority to a commission does not suggest it must be enumerated in a Constitution; one expects a statute to itemize more than a constitution.<sup>25</sup>

To understand the Founders’ view of what was and wasn’t a principal power, one must examine the law of the time. Commentators who fail to do that—who apply their reasoning ability to only a few historical scraps—may become puzzled. They may then conclude the concept of principal (or “great”) powers is tautological, incoherent, or otherwise meaningless.<sup>26</sup> But you cannot answer constitutional questions by applying your reasoning ability, be it ever so formidable, to mere historical scraps.

20 William Baude, *Re-thinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738 (2013) Professor Baude concluded, although on thin founding-era evidence, that eminent domain was a great power. *Id.* at 1755-61. The focus of his article was on later evidence.

21 During the founding era, regulation of navigation and construction of related improvements was considered part of “regulating commerce.” Robert G. Natelson, *The Legal Meaning of “Commerce” In the Commerce Clause*, 80 ST. JOHN’S L. REV. 789, 809-10 (2006); cf. *Gibbon v. Odgen*, 22 U.S. (9 Wheat.) 1 (1824) (holding that navigation was understood by the founding generation to be part of commerce).

22 U.S. CONST. art. I, § 8, cl. 7.

23 Robert G. Natelson, *Founding-Era Socialism: The Original Meaning of the Constitution’s Postal Clause*, 7 BRIT. J. AM. LEGAL STUDIES 1, 57 (2018).

24 *Id.* at 59.

25 Cf. *McCulloch*, 17 U.S. at 407 (“A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.”).

26 E.g., David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 578 & 613 (2017) (claiming that the “Great Powers theory” is an “analytical failure” and the great powers argument “a mere tautology”).

The Constitution was written in a legal, political, economic, and social context, and that context is key to constitutional interpretation.

### B. Eighteenth Century Law Books

Fortunately, to determine whether eminent domain was a principal power, we need not examine every law book current during the eighteenth century.<sup>27</sup> We can limit ourselves to books that classified the law by topic and ranked the topics by importance, and focus on those known to have been popular on this side of the Atlantic. Professor Herbert A. Johnson’s survey of founding-era law libraries provides a useful measure of popularity: How many of the 22 eighteenth century American law libraries he surveyed possessed each work?<sup>28</sup>

Digests or “abridgments” organized law by “titles” and further broke down titles into divisions and sub-divisions. For an abridgment to gain popularity among lawyers, its organizational scheme had to reflect the way lawyers thought. Abridgments covered both statutory and case law, but we turn first to statutory digests because eminent domain was authorized by statute and because the new federal government would legislate that way.

Giles Jacob’s *The Statute Law Commonplac’d* was one of the two most popular statutory digests in eighteenth century America.<sup>29</sup> Many items on Jacob’s list of titles<sup>30</sup> corresponded to powers and other concepts enunciated in the Constitution: Admiralty, Ambassadors, Appeals, Bail (also appearing in the Eighth Amendment), Bankrupts, Coin, Customs (e.g., import and export duties), Debt, Excise, Felony, Habeas Corpus, Highways, Militia, Piracy, Post-office, Seamen, Soldiers, Taxes, and Weights and Measures. Other titles represented subdivisions of broader constitutional subjects; for example, Fairs and Markets, Lighthouse, Merchants and Merchandize, and Trade were all aspects of the “Power . . . to regulate Commerce . . . .”<sup>31</sup> Still other titles—most in fact—were subjects the Constitution reserved to the states: Baron and Feme (husband and wife), Devises, Gaming, Guardians, Murder, Rape, Universities, and others. During the ratification debates, many items in this last group were identified as reserved to the states by the Constitution’s advocates.<sup>32</sup> The coincidence of Jacob’s titles with topics mentioned in the Constitution and (if represented as reserved to the states) in the constitutional debates is striking. Although we have no direct evidence of this, it is easy to imagine the framers using Jacob’s

27 John Worrell, *Bibliotheca Legum Angliae* (1786), available at [https://i2i.org/wp-content/uploads/2015/01/Constitution\\_Worrall-ocr.pdf](https://i2i.org/wp-content/uploads/2015/01/Constitution_Worrall-ocr.pdf) (a catalogue of English law books in use at the time, over 260 pages long).

28 HERBERT A. JOHNSON, IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES 1700–1799 (1978).

29 GILES JACOB: THE STATUTE LAW COMMONPLAC’D, OR A GENERAL TABLE TO THE STATUTES (1739). Professor Johnson found it in five of 22 libraries surveyed, tied with Wingate’s statutory abridgment. JOHNSON, *supra* note 28, at 59.

30 JACOB, STATUTE LAW, *supra* note 29 (unpaginated section following p. 409).

31 U.S. CONST. art. I, § 8, cl. 3.

32 *The Founders Interpret*, *supra* note 3.

index as a checklist, marking off some items for the new federal government and designating the rest as reserved to the states.

Partly because most of Jacob's entries were subjects the Constitution reserved to the states, the Constitution enumerated far fewer principal powers than there were titles in Jacob's digest. Moreover, as shown by the division of commerce into several different titles, much of Jacob's scheme was at a lower level of generality than that of the Constitution. So a title in Jacob's digest is no guarantee that the founding generation considered the subject to be concerned with a principal power. Yet if a subject was not important enough to merit a title even in Jacob's work, this is surely evidence that the subject was not a principal one.

Jacob's digest included no title for eminent domain or for its contemporaneous synonyms—compulsory acquisition, compulsory powers, condemnation, expropriation, or taking.<sup>33</sup> Buried well beneath the title "Highways" was a short reference to a statute permitting justices of the peace to condemn land for widening a highway so long as "no House, Garden, &c. be pulled down or taken away" and "Satisfaction" is paid.<sup>34</sup> The subordinate location implied that eminent domain was an incident to the principal power of constructing and improving highways.

Edmund Wingate's statutory digest<sup>35</sup> appeared in as many American libraries as that of Giles Jacob.<sup>36</sup> A review of his volume yields similar results, except that the section on "High-Ways" included no reference to compulsory purchase of lands.<sup>37</sup>

Because the latest available edition of Wingate's volume was published in 1708, well before the founding era, I also examined a later statutory digest: Thomas Walter Williams' *Digest of Statute Law*, published the same year the Constitution was written.<sup>38</sup> Many of Williams' titles corresponded to constitutional categories.<sup>39</sup> As in the Jacob abridgment, commerce was divided among several titles<sup>40</sup> and eminent domain was absent. Under "Highways and Turnpikes" was a reference to purchasing land

when highways needed to be widened or "turned."<sup>41</sup> If this reference included purchasing from an unwilling owner (as in Jacob's book), then it strengthens the inference that eminent domain was considered incidental to the power to construct, relocate, and widen roads.

More comprehensive digests covered case law and some statutory matter. Probably the best of these—and one of the most popular and certainly the most current—was the five volume 1786 edition of Matthew Bacon's *A New Abridgment of the Law*.<sup>42</sup> Many of Bacon's titles also corresponded to concepts in the Constitution, although he omitted any treatment of taxation.<sup>43</sup> As in Jacob's work, some titles represented units of larger constitutional categories,<sup>44</sup> and there were dozens of titles that did not correspond to constitutional categories. Nothing in Bacon's organizational scheme—neither a title nor a division—addressed eminent domain or its synonyms. There was, under "Highways," a reference to compulsory purchase of land for highway widening, similar to that in Jacob's digest.<sup>45</sup> The remaining three of the four most popular general abridgments were those by Knightly D'Anvers, Charles Viner, and John Lilly.<sup>46</sup> None of these featured a title devoted to eminent domain.

We next turn to treatises that focused on real property. Professor Johnson's library survey suggests that the two most popular real property treatises were John Lilly's *Practical Conveyancer*<sup>47</sup> and Orlando Bridgman's *Conveyances*.<sup>48</sup> In third

33 Cf. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 554 (1972) (listing some of these synonyms).

34 JACOB, STATUTE LAW, *supra* note 29, at 223:

Justices of Peace at their Quarter-Sessions may order the enlarging Highways, not exceeding eight Yards in Breadth, so as no House, Garden, &c. be pulled down or taken away and making Satisfaction to the Owner of the Ground; for which they may order Assessments.

35 EDMUND WINGATE, AN EXACT ABRIDGMENT OF ALL THE STATUTES IN USE AND FORCE FROM THE BEGINNING OF MAGNA CARTA (2d ed. 1708).

36 JOHNSON, *supra* note 28, at 59.

37 WINGATE, *supra* note 35, at 298-303.

38 T.W. WILLIAMS, A COMPENDIOUS DIGEST OF STATUTE LAW (1787).

39 *Id.* The table of titles is unpaginated, and begins following page 669. The titles with direct constitutional connections are Admiralty, Ambassadors, Bail, Bankrupt, Debt and Debtors, Excise and Customs, Habeas Corpus, Highways and Turnpikes, Militia, Money, Naturalization, Piracy, Post Office, Seamen, Solders, Taxes, and War.

40 *Id.* They included Bills of Exchange, Bills of Lading, Fairs and Markets, and Merchants.

41 *Id.* at 279.

42 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW (Dublin, 1786). This work appeared in ten of the 22 law libraries surveyed. JOHNSON, *supra* note 28, at 59. The abridgment by Knightly D'Anvers was more widely held (by thirteen libraries), but had not been updated since 1737, *id.* at 17-18, and as far as I can ascertain, was never completed. My assessment that Bacon's digest was probably the best in its category is based on my own experience with such works over the last thirteen years.

43 *Postal Clause*, *supra* note 23, at 60 n. 479.

44 For example, Carriers, Fairs and Markets, Merchant and Merchandize, Obligations, and portions of Prerogative were all subsets of the Constitution's "Power . . . to regulate Commerce . . ."

45 BACON, *supra* note 42 (unpaginated) (located on the 141st page of a PDF file in which the title page is the first page).

46 JOHNSON, *supra* note 28, at 59 sets forth the number of libraries for each of the following: KNIGHTLY D'ANVERS, A GENERAL ABRIDGMENT OF THE COMMON LAW (2d ed. 1725-37) (3 vols.) (held by 13 of 22 law libraries surveyed); CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY (1st ed. 1742-45) (24 vols.) (held by nine libraries); JOHN LILLY, THE PRACTICAL REGISTER, OR A GENERAL ABRIDGMENT OF THE LAW (2d ed. 1745) (two vols.) (held by eight libraries).

Lists of topics in the D'Anvers and Viner works appear in unpaginated sections at the beginning of each volume. In the two Lilly volumes, the unpaginated tables of titles appear after page 882 and 880 respectively, but before the supplemental material in each volume.

47 JOHN LILLY, THE PRACTICAL CONVEYANCER (3d ed., 1742) (2 vols.).

48 ORLANDO BRIDGMAN, CONVEYANCES: BEING SELECT PRECEDENTS OF DEEDS AND INSTRUMENTS (4th ed. 1710).

place was Edward Wood's *Complete Body of Conveyancing*.<sup>49</sup> Eminent domain and its synonyms did not appear among the subject titles or even in the text of any of these works. Bridgman's and Wood's treatises mentioned "condemnation," but only to signify forfeiture of ship cargos for legal violations and the condemnation of individuals for violating judicial writs and for other offenses.<sup>50</sup> Some other contemporaneous law books also mentioned "condemnation" in the sense of forfeiture for violating the law.<sup>51</sup>

Institutes or Commentaries were treatises surveying the entire scope of the law. The two most generally held in America were William Blackstone's *Commentaries* and Thomas Wood's *Institute of the Laws of England*.<sup>52</sup> Blackstone's *Commentaries* featured a short treatment of eminent domain, identifying it as a legislative prerogative and resorting to road construction as an example. Yet Blackstone (or his editor) did not think the concept worth an index entry.<sup>53</sup> Blackstone's book had an index entry for "taking," but it referred the reader to felonious and unlawful takings, not to eminent domain. Wood's *Institute* featured no relevant entry.<sup>54</sup> Newer than the institutes of Blackstone and Wood was *A Systematical View of the Laws of England*, by Richard Wooddeson, Blackstone's successor at Oxford.<sup>55</sup> The *Systematical View* did not mention eminent domain.

49 EDWARD WOOD, A COMPLETE BODY OF CONVEYANCING IN THEORY AND PRACTICE (3d ed., 1770) (3 vols.). Among 22 eighteenth century libraries Johnson surveyed, Lilly's and Bridgman's books were each held by five and Wood's treatise by three. JOHNSON, *supra* note 28, at 61.

50 BRIDGMAN, *supra* note 48, at 39, 231 & 310 (all referring to condemned persons); I WOOD, *supra* note 49, at 358 (referring to prize goods condemned by the admiralty), 416 (condemned persons), 770 & 811 (same).

51 *E.g.*, 2 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 2-197 (15th ed., 1755) (discussing enforcement of the excise laws, including condemnation) & 227-29 (condemnation of goods for violating bans on exports of certain tools and machinery); WILLIAMS, STATUTES, *supra* note 38, at 48, 147, 151, 155, 157 & 158 (condemnation of goods for violation of customs and excise laws). *cf.* 2 NICHOLAS COVERT, THE SCRIVENER'S GUIDE 745, 748 (4th ed. 1724) (containing a mortgage form by which the mortgagor covenants title against unspecified "condemnations.")

52 JOHNSON, *supra* note 28, at 59 (indicating that Blackstone's *Commentaries* appeared in ten of 22 libraries, and Wood's *Institute* in eight).

I have not relied on Edward Coke's *Institutes*, which were widely held but already well over a century old. For the record, however, eminent domain and its synonyms do not appear as a title in eighteenth century editions. EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (13th ed. 1788) (unpaginated table near the end of the volume); EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (unnumbered ed. 1797) (unpaginated tables near beginning and end of the volume); EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (unnumbered ed. 1797) (same); EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (unnumbered ed. 1797) (same).

53 1 WILLIAM BLACKSTONE, COMMENTARIES \*135; 4 *id.* (unpaginated index).

54 THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND (10th ed. 1783) (unpaginated table near the end of the volume).

55 RICHARD WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND (1792). This book was published soon after the Constitution was ratified, but its lectures date from 1777. Some earlier lectures were published in RICHARD WOODDESON, ELEMENTS OF JURISPRUDENCE (1783). The

Another group of sources was the law dictionaries. Most of these featured comprehensive entries rather than mere definitions; they were more akin to single volume encyclopedias than to modern law dictionaries. In America, the most popular law dictionary by far was *A New Law-Dictionary*, compiled (like the statutory digest mentioned earlier) by the prolific Giles Jacob.<sup>56</sup> Jacob's dictionary contained definitions and accompanying discussions of most of the leading nouns (or variations thereof) in the Constitution's enumeration of congressional powers.<sup>57</sup> The entries included Tax, Debt, Money, Creditor, Commerce, Naturalization, Bankrupt [*sic*], Coin, Counterfeits, Post, Pirates, Letters of marque, and Militia. There was no entry for eminent domain or any of its synonyms other than "taking";<sup>58</sup> the two entries for "taking" referred to felonious and unlawful taking, as in Blackstone's index. References to eminent domain were likewise absent in other contemporaneous law dictionaries.<sup>59</sup>

In sum, the classification schemes adopted by leading works of eighteenth century law inform us that, while eminent domain was recognized as a legal concept, it was not a prominent one. Rather, it was an incident to constructing and improving highways. Eminent domain did not rank with principal powers such as taxation, military affairs, commercial regulation, bankruptcy, the post office, and road construction.

#### C. Eighteenth Century Instruments Granting Authority

The Constitution was only one of many founding-era documents conveying legislative authority to governments and governmental agents. Indeed, to a considerable extent, the Constitution followed patterns previously established for such instruments.<sup>60</sup> The pre-constitutional instruments of this kind most relevant in America were (1) colonial charters by which the British Crown empowered colony organizers, (2) commissions by which the Crown empowered colonial governors, and

*Systematical View* appeared in four of the 22 libraries Johnson surveyed. JOHNSON, *supra* note 28, at 59.

56 The edition used here is GILES JACOB, A NEW LAW-DICTIONARY (10th ed. 1782). JOHNSON, *supra* note 28, at 61, states that Jacob's dictionary in one edition or another was in twelve of 22 surveyed law libraries. Next in popularity was John Cowell's *Interpreter*, held by six libraries, tied with a Law-French dictionary.

57 Principally U.S. CONST. art. I, § 8, although other congressional powers are scattered throughout the document.

58 JACOB, DICTIONARY, *supra* note 56 (unpaginated).

59 JOHN COWELL, A LAW DICTIONARY, OR THE INTERPRETER OF WORDS AND TERMS (Improved, enlarged ed. 1727) (held by six libraries); WILLIAM RASTELL, LES TERMES DE LA LEY (unnumbered ed. 1742) (held by four); TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (1783) (held by three); THOMAS BLOUNT, A LAW DICTIONARY AND GLOSSARY (3d ed. 1717) (held by three). I also examined two dictionaries not on Professor Johnson's list, ANONYMOUS, THE STUDENT'S LAW-DICTIONARY (1740) and RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY (1792), with similar results.

60 Robert G. Natelson, *The Original Meaning of the Constitution's "Executive Vesting Clause"—Evidence from Eighteenth-Century Drafting Practice*, 31 WHITTIER L. REV. 1, 7-11 (2009).

(3) founding-era state constitutions, by which the people of each state created new governments and granted authority to them.

English law held that subsidiary legislative authority was within an executive's power to govern conquered and unorganized territories.<sup>61</sup> Thus, colonial charters enumerated and conveyed legislative powers to governors, usually to be exercised in conjunction with an elected assembly. Typically enumerated were the powers of taxation,<sup>62</sup> legislation,<sup>63</sup> facilitation and regulation of commerce,<sup>64</sup> land disposition,<sup>65</sup> and creation of courts<sup>66</sup>—all principal powers listed in the Constitution. In no colonial charter was eminent domain listed separately. Yet we know that colonial governments exercised eminent domain,<sup>67</sup> so it must have been implied from enumerated authority.

In 1688, the absolutist government of James II (1685-89) issued a commission to Edmund Andros as governor of the “Dominion of New England.”<sup>68</sup> The Dominion consolidated not only modern New England, but also New Jersey and New York. In addition to granting executive and judicial authority to the governor, the commission granted him an expansive list of legislative powers. These included the ability to make laws, impose taxes, appropriate funds, raise military forces, create courts, dispose of land, and provide for fairs, markets, ports, and similar instrumentalities of commerce.<sup>69</sup> Eminent domain was not enumerated. This cannot be because the parties were ignorant of the subject. Only five years earlier, eminent domain had been banned in New York by an instrument revoked when

the Dominion was created.<sup>70</sup> Thus, it is highly unlikely that the Crown intended to deny Andros authority to take land for improvements such as roads. That authority must have been implied in the enumerated grants. In the century after the British evicted James II and the colonists disposed of Andros, the commissions of colonial governors became highly standardized. They all enumerated legislative functions to be exercised in conjunction with an elective assembly. And they all left eminent domain to implication.<sup>71</sup>

Finally, between 1776 and May 29, 1790, when Rhode Island ratified the Constitution, all states except Connecticut and Rhode Island adopted new constitutions. The framers of these documents typically contemplated general purpose governments, so most state constitutions granted legislative authority in bulk rather than in enumerated detail.<sup>72</sup> A partial exception was the Massachusetts Constitution of 1780, drafted primarily by John Adams. It granted to the legislature (“general court”) authority

61 *Campbell v. Hall*, 98 Eng. Rep. 848 (K.B. 1774) (holding that the Crown may legislate for conquered territories until formally admitting English law and institutions into the territory, but not afterward). *Cf.* U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.”).

62 *E.g.*, MASS. CHARTER (1691) (“And alsoe to impose Fines mulcts Imprisonments and other Punishments And to impose and levy proportionable and reasonable Assessments Rates and Taxes”); Md. Charter, art. XVII (1632) (“Power . . . to assess and impose the said Taxes”).

63 *E.g.*, GA. CHARTER (1732) (“ . . . full power and authority to constitute, ordain and make, such and so many by-laws, constitutions, orders and ordinances”).

64 *E.g.*, PA. CHARTER (1681) (authorizing importation, creation of fairs, markets, and “Sea-ports, harbours, . . . and . . . other places, for discharge and unladeing of goods”).

65 *E.g.*, GA. CHARTER (1732) (granting power to colonial common council to convey land). *Cf.* U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . .”).

66 *E.g.*, GA. CHARTER (1732) (“to erect and constitute judicatories and courts of record, or other courts”).

67 *Stoebuck*, *supra* note 33, at 561 n.28 (citing colonial laws authorizing condemnation for roads).

68 *Commission to Sir Edmund Andros as governor of the Dominion of New England*, in ENGLISH HISTORICAL DOCUMENTS: AMERICAN COLONIAL DOCUMENTS TO 1776, 239 (Merrill Jensen ed. 1955).

69 *Id.*

70 *The New York Charter of Liberties and Privileges* (Oct. 30, 1683), in ENGLISH HISTORICAL DOCUMENTS, *supra* note 68, at 228, 230 (denying authority to dispose of land without the owner's consent).

71 ANTHONY STOKES, A VIEW OF THE CONSTITUTION OF THE BRITISH COLONIES 150-64 (1783) (reproducing form commission), available at <http://books.google.com/books?id=VmNzusdnHlcC&printsec=frontcover&dq=anthony+stokes#PPP7,M1>.

The legislative authority granted was very broad:

And you the said A. B. by and with the consent of our said Council and Assembly, or the major part of them respectively, shall have full power and authority to make, constitute, and ordain laws, statutes, and ordinances, for the public peace, welfare, and good government of our said province.

*Id.* at 155.

Governors also arguably enjoyed legislative powers, without need for assembly consent, to “constitute” as well as appoint judges, *id.* at 158; to dispose of lands, *id.* at 162; and to establish fairs, markets, and harbors. *Id.* at 163.

*See also* ENGLISH HISTORICAL DOCUMENTS, *supra* note 68, at 195 (editor's note) (observing that “By the eighteenth century, the commissions of royal governors had arrived at a standard pattern,” and setting forth as an example the commission of New York governor George Clinton, issued Jul. 3, 1741).

72 *E.g.*, DEL. CONST., art. 5 (1776) (granting to the legislature “all other powers necessary for the legislature of a free and independent State”); GA. CONST. (1777), art. VII (granting to the legislature “power to make such laws and regulations as may be conducive to the good order and well-being of the State”). Other constitutions without detailed enumerations of legislative powers include Md. CONST. (1776), N.C. CONST. (1776), N.H. CONST. (1784), Part II (enumerating separately from a general legislative grant only the power to constitute courts); N.J. CONST. art II (granting indefinite legislative authority); N.Y. CONST. (1777), art. II (stating a general legislative grant); PA. CONST. (1776), § 2 (granting “supreme legislative power”) & § 9 (granting to the legislature, in addition to authority to regulate its own proceedings, “all other powers necessary for the legislature of a free state or commonwealth”); S.C. CONST. (1776), art. VII (general grant of legislative authority to “the president and commander-in-chief, the general assembly and legislative council”); S.C. CONST. (1778), art. II (vesting legislative authority in a general assembly); VA. CONST. (1776) (creating a legislature without a specific grant of authority).

to erect a judiciary, to tax, and to otherwise legislate.<sup>73</sup> Eminent domain was not set forth explicitly. But it must have been implied from the principal grants, because another portion of the same document limited its exercise.<sup>74</sup>

In view of this uniform drafting history, it was perfectly reasonable for the framers to decide that eminent domain need not be enumerated, and that the Constitution would grant it by implication.

#### IV. CONCLUSION

The constitutional theory of principal and incidental powers was part of the jurisprudential context within which the Constitution was adopted. It is also, with the assistance of eighteenth century legal sources, quite practical to apply. Eighteenth century law recognized eminent domain as a legislative power, but not as a principal one. It was merely incidental to others, such as the authority to “establish . . . post Roads.” The Constitution did, therefore, grant by implication eminent domain authority to the federal government in the exercise of its enumerated powers.

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73 MASS. CONST. (1780), Part II, ch. I, § 1, arts III & IV.

74 *Id.*, Part I, Art. X (requiring personal or legislative consent and reasonable compensation when eminent domain was exercised).

