
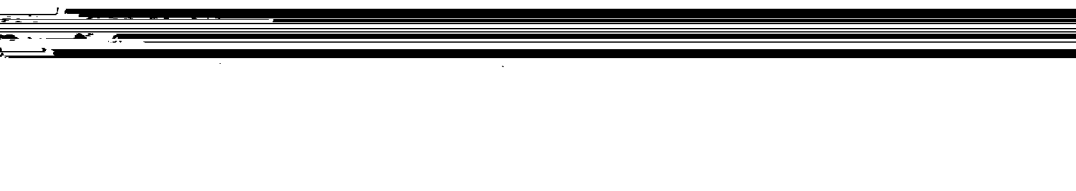


a preoccupation with the necessity and propriety of drawing up publicly promulgated lists of protected rights, which entailed a debate about what rights should be added to the list, and what was properly left off, as well as about whether the list was intended to be comprehensive, each of these episodes raised very different legal, political, and institutional problems. Only by undertaking a comparative assessment of these diverse confrontations with the enumeration problem can we properly situate our own enumeration problem. This is a prerequisite to assessing the prospects for unenumerated rights in the American political future.

At the time of the Founding, the problem of enumeration was a problem of the sort characteristic of any constitutional founding: ~~what to put in and what to leave out, or, put otherwise, what to list~~



and what not to list. A founding problem is a regime problem in its most elemental sense. While there is much dispute, imprecision, and inconsistency in discussions of just how we identify political and legal



consult with judges of other countries who are called upon to serve similar domestic duties.⁵⁴ If judges internalize this attitude, we will find them in coming years increasingly willing to cite enumerations wherever they may find them. Whether they then use these to announce new rights or to interpret domestic rights in a particular way is neither here nor there. This phenomenon, if it comes to pass, may very well constitute our next enumeration problem. If it does, we will