

CONSTITUTIONAL STRUCTURE, JUDICIAL DISCRETION,
AND THE EIGHTH AMENDMENT

Bradford R. Clark

ABSTRACT

The Supreme Court recently resolved a longstanding split in its Eighth Amendment jurisprudence when it declared that the cruel and unusual punishments clause delegates to federal courts broad discretion to exercise “independent judgment” to evaluate the propriety of punishments authorized by state law. The Court claimed authority to displace a punishment—however widely employed—based on the Court’s own assessment of the penological effectiveness of the punishment and the moral culpability of the particular class of offenders. Notably, the Court did not, and has not in the modern era, attempted to justify its approach in terms of either the text or the history of the Eighth Amendment. Drawing on the broader lessons of the constitutional structure, this paper argues that the Court’s assumption of broad discretion to displace state law contradicts the implications of constitutionally prescribed lawmaking procedures, the political safeguards of federalism, and the Supremacy Clause. In this regard, the Court’s current approach to the Eighth Amendment ignores the lessons of prominent historical episodes in which federal courts first embraced, and then abandoned as unconstitutional, similar assumptions of broad judicial discretion—most notably, the early controversy surrounding federal common law crimes and the later embrace of so-called general common law under the Swift doctrine. Absent clear evidence that a particular constitutional text, such as the Eighth Amendment, authorizes this degree of judicial discretion, the constitutional structure—as illuminated by these past instances of discretion and retreat—counsels against it.