of a maturing society."[48] The proper approach to an interpretation of this provision has been one of the major points of difference among the Justices in the capital punishment cases.[49]

Application and Scope

"Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as [drawing and quartering, embowelling alive, beheading, public dissecting, and burning alive], and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution."[50]

In upholding capital punishment inflicted by a firing squad, the Court not only looked to traditional practices but examined the history of executions in the territory concerned, the military practice, and contemporaneous writings on the death penalty.[51] Relying on the Fourteenth Amendment's Due Process Clause rather than the Eighth Amendment, the Court next approved electrocution as a permissible method of administering punishment.[52] Many years later, a divided Court, assuming the Eighth Amendment's applicability to the states, held that a second electrocution following a mechanical failure at the first that had injured but not killed the condemned man did not violate the proscription.[53]

In *Baze v. Rees*,[54] a Court plurality upheld capital punishment by a three-drug lethal injection protocol, despite the risk that the protocol will not be properly followed and that severe pain will re-

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[48] Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion). This oft-quoted passage was later repeated, with the Court adding that cruel and unusual punishment "is judged not by the standards that prevailed in 1685 . . . or when the Bill of Rights was adopted, but rather by those that currently prevail." Atkins v. Virginia, 536 U.S. 304, 311–12 (2002).

[49] *See* Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

[50] Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878).

[51] Hanging was the other method of execution commonly used at the time, and implicitly approved by the Court.

[52] *In re* Kemmler, 136 U.S. 436 (1890) ("Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies something inhuman and barbarous, something more than the mere extinguishment of life," id. at 447).

[53] Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947). Justice Frankfurter tested the issue by due process standards. Id. at 470 (concurring). Years earlier the Court, although recognizing that the Eighth Amendment was then inapplicable to the states, opined in dictum that a fine and a brief imprisonment for illegal sale of alcohol was not cruel and unusual punishment. Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475 (1867).

[54] 128 S. Ct. 1520 (2008).