SUPREME COURT OF THE UNITED STATES

No. 07–5439

RALPH BAZE AND THOMAS C. BOWLING, PETITIONERS *v.* JOHN D. REES, COMMISSIONER, KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April 16, 2008]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

Although I agree that petitioners have failed to establish that Kentucky's lethal injection protocol violates the Eighth Amendment, I write separately because I cannot subscribe to the plurality opinion's formulation of the governing standard. As I understand it, that opinion would hold that a method of execution violates the Eighth Amendment if it poses a substantial risk of severe pain that could be significantly reduced by adopting readily available alternative procedures. *Ante*, at 13. This standard—along with petitioners' proposed "unnecessary risk" standard and the dissent's "untoward risk" standard, *post*, at 2—finds no support in the original understanding of the Cruel and Unusual Punishments Clause or in our previous method-of-execution cases; casts constitutional doubt on long-accepted methods of execution; and injects the Court into matters it has no institutional capacity to resolve. Because, in my view, a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain, I concur only in the judgment.

I

The Eighth Amendment's prohibition on the "inflict[ion]" of "cruel and unusual punishments" must be understood in light of the historical practices that led the Framers to include it in the Bill of Rights. JUSTICE STEVENS' ruminations notwithstanding, see *ante*, at 8–18 (opinion concurring in judgment), it is clear that the Eighth Amendment does not prohibit the death penalty. That is evident both from the ubiquity of the death penalty in the founding era, see S. Banner, The Death Penalty: An American History 23 (2002) (hereinafter Banner) (noting that, in the late 18th century, the death penalty was "the standard penalty for all serious crimes"), and from the Constitution's express provision for capital punishment, see, *e.g.*, Amdt. 5 (requiring an indictment or presentment of a grand jury to hold a person for "a capital, or otherwise infamous crime," and prohibiting deprivation of "life" without due process of law).

That the Constitution permits capital punishment in principle does not, of course, mean that all methods of execution are constitutional. In English and early colonial practice, the death penalty was not a uniform punishment, but rather a range of punishments, some of which the Framers likely regarded as cruel and unusual. Death by hanging was the most common mode of execution both before and after 1791, and there is no doubt that it remained a permissible punishment after enactment of the Eighth Amendment. "An ordinary death by hanging was not, however, the harshest penalty at the disposal of the seventeenth- and eighteenth-century state." Banner 70. In addition to hanging, which was intended to, and often did, result in a quick and painless death, "[o]fficials also wielded a set of tools capable of *intensifying* a death sentence," that is, "ways of producing a punishment worse than death." *Id.*, at 54.

One such "tool" was burning at the stake. Because

burning, unlike hanging, was always painful and destroyed the body, it was considered "a form of supercapital punishment, worse than death itself." *Id.,* at 71. Reserved for offenders whose crimes were thought to pose an especially grave threat to the social order—such as slaves who killed their masters and women who killed their husbands—burning a person alive was so dreadful a punishment that sheriffs sometimes hanged the offender first "as an act of charity." *Id*., at 72.

Other methods of intensifying a death sentence included "gibbeting," or hanging the condemned in an iron cage so that his body would decompose in public view, see *id*., at 72–74, and "public dissection," a punishment Blackstone associated with murder, 4 W. Blackstone, Commentaries 376 (1769) (hereinafter Blackstone). But none of these was the worst fate a criminal could meet. That was reserved for the most dangerous and reprobate offenders—traitors. "The punishment of high treason," Blackstone wrote, was "very solemn and terrible," *id*., at 92, and involved "embowelling alive, beheading, and quartering," *id*., at 376. Thus, the following death sentence could be pronounced on seven men convicted of high treason in England:

> "'That you and each of you, be taken to the place from whence you came, and from thence be drawn on a hurdle to the place of execution, where you shall be hanged by the necks, not till you are dead; that you be severally taken down, while yet alive, and your bowels be taken out and burnt before your faces—that your heads be then cut off, and your bodies cut in four quarters, to be at the King's disposal. And God Almighty have mercy on your souls.'" G. Scott, History of Capital Punishment 179 (1950).*

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*As gruesome as these methods of execution were, they were not the

The principal object of these aggravated forms of capital punishment was to terrorize the criminal, and thereby more effectively deter the crime. Their defining characteristic was that they were purposely designed to inflict pain and suffering beyond that necessary to cause death. As Blackstone put it, "in very atrocious crimes, other circumstances of terror, pain, or disgrace [were] superadded." 4 Blackstone 376. These "superadded" circumstances "were carefully handed out to apply terror where it was thought to be most needed," and were designed "to ensure that death would be slow and painful, and thus all the more frightening to contemplate." Banner 70.

Although the Eighth Amendment was not the subject of extensive discussion during the debates on the Bill of Rights, there is good reason to believe that the Framers viewed such enhancements to the death penalty as falling within the prohibition of the Cruel and Unusual Punishments Clause. By the late 18th century, the more violent modes of execution had "dwindled away," *id.,* at 76, and would for that reason have been "unusual" in the sense that they were no longer "regularly or customarily employed," *Harmelin* v. *Michigan*, 501 U. S. 957, 976 (1991) (opinion of SCALIA, J.); see also *Weems* v. *United States*, 217 U. S. 349, 395 (1910) (White, J., dissenting) (noting that, "prior to the formation of the Constitution, the necessity for the protection afforded by the cruel and unusual

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worst punishments the Framers would have been acquainted with. After surveying the various "superadd[itions]" to the death penalty in English law, as well as lesser punishments such as "mutilation or dismembering, by cutting off the hand or ears" and stigmatizing the offender "by slitting the nostrils, or branding in the hand or cheek," Blackstone was able to congratulate his countrymen on their refinement, in contrast to the barbarism on the Continent: "Disgusting as this catalogue may seem, it will afford pleasure to an English reader, and do honor to the English law, to compare it with that shocking apparatus of death and torment to be met with in the criminal codes of almost every other nation in Europe." 4 Blackstone 377.

punishment guarantee of the English bill of rights had ceased to be a matter of concern, because as a rule the cruel bodily punishments of former times were no longer imposed"). Embellishments upon the death penalty designed to inflict pain for pain's sake also would have fallen comfortably within the ordinary meaning of the word "cruel." See 1 S. Johnson, A Dictionary of the English Language 459 (1773) (defining "cruel" to mean "[p]leased with hurting others; inhuman; hard-hearted; void of pity; wanting compassion; savage; barbarous; unrelenting"); 1 N. Webster, An American Dictionary of the English Language 52 (1828) (defining "cruel" as "[d]isposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness").

Moreover, the evidence we do have from the debates on the Constitution confirms that the Eighth Amendment was intended to disable Congress from imposing torturous punishments. It was the absence of such a restriction on Congress' power in the Constitution as drafted in Philadelphia in 1787 that led one delegate at the Massachusetts ratifying convention to complain that Congress was "nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline." 2 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 111 (2d ed. 1891). Similarly, during the ratification debate in Virginia, Patrick Henry objected to the lack of a Bill of Rights, in part because there was nothing to prevent Congress from inflicting "tortures, or cruel and barbarous punishment[s]." 3 *id.,* at 447–448.

Early commentators on the Constitution likewise interpreted the Cruel and Unusual Punishments Clause as referring to torturous punishments. One commentator

viewed the Eighth Amendment as prohibiting "horrid modes of torture":

> "The prohibition of cruel and unusual punishments, marks the improved spirit of the age, which would not tolerate the use of the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for the gratification of fiendish passion." J. Bayard, A Brief Exposition of the Constitution of the United States 154 (2d ed. 1840).

Similarly, another commentator found "sufficient reasons" for the Eighth Amendment in the "barbarous and cruel punishments" inflicted in less enlightened countries:

> "Under the [Eighth] amendment the infliction of cruel and unusual punishments, is also prohibited. The various barbarous and cruel punishments inflicted under the laws of some other countries, and which profess not to be behind the most enlightened nations on earth in civilization and refinement, furnish sufficient reasons for this express prohibition. Breaking on the wheel, flaying alive, rending asunder with horses, various species of horrible tortures inflicted in the inquisition, maiming, mutilating and scourging to death, are wholly alien to the spirit of our humane general constitution." B. Oliver, The Rights of An American Citizen 186 (1832) (reprint 1970).

So barbaric were the punishments prohibited by the Eighth Amendment that Joseph Story thought the provision "wholly unnecessary in a free government, since it is scarcely possible, that any department of such a government should authorize, or justify such atrocious conduct." 3 J. Story, Commentaries on the Constitution of the United States 750 (1833).

II

Consistent with the original understanding of the Cruel

and Unusual Punishments Clause, this Court's cases have repeatedly taken the view that the Framers intended to prohibit torturous modes of punishment akin to those that formed the historical backdrop of the Eighth Amendment. See, *e.g.*, *Estelle* v. *Gamble*, 429 U. S. 97, 102 (1976) ("[T]he primary concern of the drafters was to proscribe 'torture[s]' and other 'barbar[ous]' methods of punishment"); *Weems*, 217 U. S., at 390 (White, J., dissenting) ("[I]t may not be doubted, and indeed is not questioned by any one, that the cruel punishments against which the bill of rights provided were the atrocious, sanguinary and inhuman punishments which had been inflicted in the past upon the persons of criminals"). That view has permeated our method-of-execution cases. Thrice the Court has considered a challenge to a modern method of execution, and thrice it has rejected the challenge, each time emphasizing that the Eighth Amendment is aimed at methods of execution purposely designed to inflict pain.

In the first case, *Wilkerson* v. *Utah*, 99 U. S. 130 (1879), the Court rejected the contention that death by firing squad was cruel and unusual. In so doing, it reviewed the various modes of execution catalogued by Blackstone, repeating his observation that "in very atrocious crimes other circumstances of terror, pain, or disgrace were sometimes superadded." *Id.*, at 135. The Court found it "safe to affirm that punishments of torture, such as those mentioned by [Blackstone], and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment]." *Id.*, at 136. The unanimous Court had no difficulty concluding that death by firing squad did not "fal[l] within that category." *Ibid.*

Similarly, when the Court in *In re Kemmler*, 136 U. S. 436, 446 (1890), unanimously rejected a challenge to electrocution, it interpreted the Eighth Amendment to prohibit punishments that "were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on

the wheel, or the like":

> "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 there something inhuman and barbarous, something more than the mere extinguishment of life." *Id.*, at 447.

Finally, in *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459 (1947), the Court rejected the petitioner's contention that the Eighth Amendment prohibited Louisiana from subjecting him to a second attempt at electrocution, the first attempt having failed when "[t]he executioner threw the switch but, presumably because of some mechanical difficulty, death did not result." *Id.*, at 460 (plurality opinion). Characterizing the abortive attempt as "an accident, with no suggestion of malevolence," *id.*, at 463, the plurality opinion concluded that "the fact that petitioner ha[d] already been subjected to a current of electricity [did] not make his subsequent execution any more cruel in the constitutional sense than any other execution":

> "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution." *Id.*, at 464.

III

In light of this consistent understanding of the Cruel and Unusual Punishments Clause as forbidding purposely

torturous punishments, it is not surprising that even an ardent abolitionist was constrained to acknowledge in 1977 that "[a]n unbroken line of interpreters has held that it was the original understanding and intent of the framers of the Eighth Amendment . . . to proscribe as 'cruel and unusual' *only* such modes of execution as compound the simple infliction of death with added cruelties or indignities." H. Bedau, The Courts, the Constitution, and Capital Punishment 35. What is surprising is the plurality's willingness to discard this unbroken line of authority in favor of a standard that finds no support in the original understanding of the Eighth Amendment or in our method-of-execution cases and that, disclaimers notwithstanding, "threaten[s] to transform courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology." *Ante*, at 12.

We have never suggested that a method of execution is "cruel and unusual" within the meaning of the Eighth Amendment simply because it involves a risk of pain—whether "substantial," "unnecessary," or "untoward"—that could be reduced by adopting alternative procedures. And for good reason. It strains credulity to suggest that the defining characteristic of burning at the stake, disemboweling, drawing and quartering, beheading, and the like was that they involved risks of pain that could be eliminated by using alternative methods of execution. Quite plainly, what defined these punishments was that they were *designed* to inflict torture as a way of enhancing a death sentence; they were *intended* to produce a penalty worse than death, to accomplish something "more than the mere extinguishment of life." *Kemmler, supra*, at 447. The evil the Eighth Amendment targets is intentional infliction of gratuitous pain, and that is the standard our method-of-execution cases have explicitly or implicitly

invoked.

Thus, the Court did not find it necessary in *Wilkerson* to conduct a comparative analysis of death by firing squad as opposed to hanging or some other method of execution. Nor did the Court inquire into the precise procedures used to execute an individual by firing squad in order to determine whether they involved risks of pain that could be alleviated by adopting different procedures. It was enough that death by firing squad was well established in military practice, 99 U. S., at 134–135, and plainly did not fall within the "same line of unnecessary cruelty" as the punishments described by Blackstone, *id.*, at 136.

The same was true in *Kemmler*. One searches the opinion in vain for a comparative analysis of electrocution versus other methods of execution. The Court observed that the New York Legislature had adopted electrocution in order to replace hanging with "'the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases.'" 136 U. S., at 444. But there is no suggestion that the Court thought it necessary to sift through the "voluminous mass of evidence . . . taken [in the courts below] as to the effect of electricity as an agent of death," *id.*, at 442, in order to confirm that electrocution in fact involved less substantial risks of pain or lingering death than hanging. The court below had rejected the challenge because the "act was passed in the effort to devise a more humane method of reaching the result," and "courts were bound to presume that the legislature was possessed of the facts upon which it took action." *Id.*, at 447. Treating the lower court's decision "as involving an adjudication that the statute was not repugnant to the Federal Constitution," *ibid.*, the Court found that conclusion "so plainly right," *ibid.*, that it had "no hesitation" in denying the writ of error, *id.*, at 449.

Likewise in *Resweber*, the Court was confronted in dramatic fashion with the reality that the electric chair

involved risks of error or malfunction that could result in excruciating pain. See 329 U. S., at 480, n. 2 (Burton, J., dissenting) (quoting affidavits from the petitioner's brief recounting that during the unsuccessful first attempt at electrocution, the petitioner's "'lips puffed out and his body squirmed and tensed and he jumped so that the chair rocked on the floor'"). But absent "malevolence" or a "purpose to inflict unnecessary pain," the Court concluded that the Constitution did not prohibit Louisiana from subjecting the petitioner to those very risks a second time in order to carry out his death sentence. *Id.*, at 463, 464 (plurality opinion); *id.*, at 471 (Frankfurter, J., concurring); see also *Furman* v. *Georgia*, 408 U. S. 238, 326–327 (1972) (Marshall, J., concurring) (describing *Resweber* as holding "that the legislature adopted electrocution for a humane purpose, and that its will should not be thwarted because, in its desire to reduce pain and suffering in most cases, it may have inadvertently increased suffering in one particular case"). No one suggested that Louisiana was required to implement additional safeguards or alternative procedures in order to reduce the risk of a second malfunction. And it was the *dissenters* in *Resweber* who insisted that the absence of an intent to inflict pain was irrelevant. 329 U. S., at 477 (Burton, J., dissenting) ("The intent of the executioner cannot lessen the torture or excuse the result").

IV

Aside from lacking support in history or precedent, the various risk-based standards proposed in this case suffer from other flaws, not the least of which is that they cast substantial doubt on every method of execution other than lethal injection. It may well be that other methods of execution such as hanging, the firing squad, electrocution, and lethal gas involve risks of pain that could be eliminated by switching to lethal injection. Indeed, they have

been attacked as unconstitutional for that very reason. See, *e.g.*, *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 654, 656–657 (1992) (STEVENS, J., dissenting) (arguing that lethal gas violates the Eighth Amendment because of "the availability of more humane and less violent methods of execution," namely, lethal injection); *Glass* v. *Louisiana*, 471 U. S. 1080, 1093 (1985) (Brennan, J., dissenting from denial of certiorari) (arguing that electrocution violates the Eighth Amendment because it poses risks of pain that could be alleviated by "other currently available means of execution," such as lethal injection); *Campbell* v. *Wood*, 18 F. 3d 662, 715 (CA9 1994) (Reinhardt, J., concurring and dissenting) (arguing that hanging violates the Eighth Amendment because it involves risks of pain and mutilation not presented by lethal injection). But the notion that the Eighth Amendment permits only one mode of execution, or that it requires an anesthetized death, cannot be squared with the history of the Constitution.

It is not a little ironic—and telling—that lethal injection, hailed just a few years ago as *the* humane alternative in light of which every other method of execution was deemed an unconstitutional relic of the past, is the subject of today's challenge. It appears the Constitution is "evolving" even faster than I suspected. And it is obvious that, for some who oppose capital punishment on policy grounds, the only acceptable end point of the evolution is for this Court, in an exercise of raw judicial power unsupported by the text or history of the Constitution, or even by a contemporary moral consensus, to strike down the death penalty as cruel and unusual in all circumstances. In the meantime, though, the next best option for those seeking to abolish the death penalty is to embroil the States in never-ending litigation concerning the adequacy of their execution procedures. But far from putting an end to abusive litigation in this area, and thereby vindicating

in some small measure the States' "significant interest in meting out a sentence of death in a timely fashion," *Nelson* v. *Campbell*, 541 U. S. 637, 644 (2004), today's decision is sure to engender more litigation. At what point does a risk become "substantial"? Which alternative procedures are "feasible" and "readily implemented"? When is a reduction in risk "significant"? What penological justifications are "legitimate"? Such are the questions the lower courts will have to grapple with in the wake of today's decision. Needless to say, we have left the States with nothing resembling a bright-line rule.

Which brings me to yet a further problem with comparative-risk standards: They require courts to resolve medical and scientific controversies that are largely beyond judicial ken. Little need be said here, other than to refer to the various opinions filed by my colleagues today. Under the competing risk standards advanced by the plurality opinion and the dissent, for example, the difference between a lethal injection procedure that satisfies the Eighth Amendment and one that does not may well come down to one's judgment with respect to something as hairsplitting as whether an eyelash stroke is necessary to ensure that the inmate is unconscious, or whether instead other measures have already provided sufficient assurance of unconsciousness. Compare *post*, at 6 (GINSBURG, J., dissenting) (criticizing Kentucky's protocol because "[n]o one calls the inmate's name, shakes him, brushes his eyelashes to test for a reflex, or applies a noxious stimulus to gauge his response"), with *ante*, at 22 (rejecting the dissent's criticisms because "an inmate cannot succeed on an Eighth Amendment claim simply by showing one more step the State could take as a failsafe for other, independently adequate measures"). We have neither the authority nor the expertise to micromanage the States' administration of the death penalty in this manner. There is simply no reason to believe that "unelected" judges without scien-

tific, medical, or penological training are any better suited to resolve the delicate issues surrounding the administration of the death penalty than are state administrative personnel specifically charged with the task. Cf. *ante*, at 5 (STEVENS, J., concurring in judgment) (criticizing the States' use of the three-drug protocol because "[i]n the majority of States that use the three-drug protocol, the drugs were selected by unelected Department of Correction officials with no specialized medical knowledge and without the benefit of expert assistance or guidance").

In short, I reject as both unprecedented and unworkable any standard that would require the courts to weigh the relative advantages and disadvantages of different methods of execution or of different procedures for implementing a given method of execution. To the extent that there is any comparative element to the inquiry, it should be limited to whether the challenged method inherently inflicts significantly more pain than traditional modes of execution such as hanging and the firing squad. See, *e.g.*, *Gray* v. *Lucas*, 463 U. S. 1237, 1239–1240 (1983) (Burger, C. J., concurring in denial of certiorari) (rejecting an Eighth Amendment challenge to lethal gas because the petitioner had not shown that "'the pain and terror resulting from death by cyanide gas is so different in degree or nature from that resulting from other traditional modes of execution as to implicate the eighth amendment right'" (quoting *Gray* v. *Lucas*, 710 F. 2d 1048, 1061 (CA5 1983))); *Hernandez* v. *State*, 43 Ariz. 424, 441, 32 P. 2d 18, 25 (1934) ("The fact that [lethal gas] is less painful and more humane than hanging is all that is required to refute completely the charge that it constitutes cruel and unusual punishment within the meaning of this expression as used in [the Eighth Amendment]").

V

Judged under the proper standard, this is an easy case.

It is undisputed that Kentucky adopted its lethal injection protocol in an effort to make capital punishment more humane, not to add elements of terror, pain, or disgrace to the death penalty. And it is undisputed that, if administered properly, Kentucky's lethal injection protocol will result in a swift and painless death. As the Sixth Circuit observed in rejecting a similar challenge to Tennessee's lethal injection protocol, we "do not have a situation where the State has any intent (or anything approaching intent) to inflict unnecessary pain; the complaint is that the State's *pain-avoidance procedure* may fail because the executioners may make a mistake in implementing it." *Workman* v. *Bredesen*, 486 F. 3d 896, 907 (2007). But "[t]he risk of negligence in implementing a death-penalty procedure . . . does not establish a cognizable Eighth Amendment claim." *Id*., at 907–908. Because Kentucky's lethal injection protocol is designed to eliminate pain rather than to inflict it, petitioners' challenge must fail. I accordingly concur in the Court's judgment affirming the decision below.