

**EIGHTH AMENDMENT CHALLENGES TO DEATH PENALTY
PROTOCOLS: HOW *BAZE V. REES* WILL ENGENDER FUTURE
COLLATERAL ATTACKS ON THE DEATH PENALTY**

*Jenna Zerylnick**

I. INTRODUCTION

Throughout history, “reasonable people of good faith” consistently disagreed about the morality of capital punishment.¹ In 1976 *Gregg v. Georgia* settled the debate—capital punishment is constitutional.² In *Gregg*, the Court reasoned that the Framers of the Constitution accepted capital punishment and the Court held for nearly two centuries that capital punishment for the crime of murder is not a per se violation of the Eighth Amendment.³ It follows that there must be a means of carrying an execution out,⁴ but “for many [people] who oppose it, no method of execution would ever be acceptable.”⁵ The Eighth Amendment of the United States Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁶ Courts struggle to define what constitutes “cruel and unusual punishment” in relation to the death penalty, when considering this amendment. Constitutional interpretation, modern case law, and progressive medicine led to confusion about what standard courts should use to determine whether a state’s execution procedure violates the Eighth Amendment.

In *Baze v. Rees*, two death row inmates—both convicted of double murder—alleged Kentucky’s lethal injection protocol violated the Eighth Amendment, based on the proposed standard that it “cre-

* Jenna Zerylnick, Florida Coastal School of Law, Expected date of J.D. May 2010; B.S. University of Georgia

¹ *Baze v. Rees*, 128 S. Ct. 1520, 1537 (2008) (plurality opinion).

² *Id.* at 1529 (citing *Gregg v. Georgia*, 428 U.S. 153, 177 (1976) (plurality opinion)).

³ *Gregg v. Georgia*, 428 U.S. 153, 169, 177-78 (1976) (plurality opinion).

⁴ *Id.*

⁵ *Id.* at 1537.

⁶ U.S. CONST. amend. VIII.

ate[d] an unnecessary risk of causing pain.”⁷ The United States Supreme Court Justices, in a plurality with five concurring opinions and one dissenting opinion, attempted to define a judicial standard to determine whether an execution protocol violates the Eighth Amendment.⁸ The Justices proposed drastically different standards: ranging from opining that the Eighth Amendment merely prohibits “horrid modes of torture,”⁹ to advocating that it restrains procedures creating an “unto-ward, readily avoidable risk of inflicting severe and unnecessary pain.”¹⁰ The opinion does not clarify a bright-line rule on the issue.¹¹ Ultimately, the plurality reached the correct conclusion: Kentucky’s procedure is consistent with the Eighth Amendment.¹² However, by applying a vague standard to interpret the Eighth Amendment, the decision leaves the door open to future litigation over similar issues.¹³

Part II of this note provides a brief legal history of capital punishment in the United States and includes the factual and procedural background of *Baze*. Part III discusses the plurality opinion and analyzes the effect that *Baze* has on the future of capital punishment litigation.

II. BACKGROUND

A. *The Evolution of the Death Penalty*

At the time of this opinion’s issuance, thirty-six states and the federal government imposed capital punishment for certain crimes.¹⁴ Over time, these states and the federal government adopted more humane execution methods.¹⁵ Until the midpoint of the nineteenth century, hanging was the primary method of execution in the United States.¹⁶ Then in 1888, in an effort to find “the most humane and prac-

⁷ *Baze*, 128 S. Ct. at 1529 (internal quotation marks omitted).

⁸ *See id.* at 1522-70.

⁹ *Id.* at 1558 (Thomas, J., concurring) (internal quotation marks omitted).

¹⁰ *Id.* at 1572 (Ginsburg, J., dissenting).

¹¹ *Id.* at 1562 (Thomas, J., concurring).

¹² *See id.* at 1538 (plurality opinion).

¹³ *Id.*

¹⁴ *Id.* at 1525.

¹⁵ *Id.*

¹⁶ *Id.* at 1526 (quoting *Campbell v. Wood*, 511 U.S. 1119, 1119 (1994) (Blackmun, J., dissenting from denial of certiorari)) (internal quotation marks omitted).

tical method known to modern science of carrying into effect the sentence of death,”¹⁷ the State of New York became the first to authorize the use of electrocution to carry out the death sentence.¹⁸ By 1915 eleven other states followed and electrocution became the prevailing form of execution for almost a century.¹⁹ In addition to electrocution, states also used alternative execution methods, “including hanging, firing squad, and lethal gas” during this period.²⁰

A legal moratorium on executions began in 1968 due to allegations that discretionary capital statutes were unconstitutional because of their arbitrary nature.²¹ In 1972 the Supreme Court, in *Furman v. Georgia*, held that discretionary capital statutes resulted in arbitrary sentencing, thereby violating the Eighth Amendment.²² Four years later, in *Gregg*, the Court held Georgia’s new statutory reforms to be constitutional and reinstated the death penalty.²³ After a nine-year hiatus, state legislatures reacted to constituents calling for the reconsideration of electrocution as a means of assuring a humane death.²⁴ In 1977, after consulting with the head of the anesthesiology department at the University of Oklahoma College of Medicine, legislators in Oklahoma in-

¹⁷ *Id.* (quoting *Glass v. Louisiana*, 471 U.S. 1080, 1082 (1985) (Brennan, J., dissenting from denial of certiorari)) (internal quotation marks omitted).

¹⁸ *Id.* (quoting *Glass*, 471 U.S. at 1082).

¹⁹ *Id.*

²⁰ *Id.* (citing Brief for the Fordham University School of Law, Louis Stein Center for Law & Ethics as Amicus Curiae in Support of Petitioners at 5-9, *Baze*, 128 S. Ct. 1520 (No. 07-5439), 2007 WL 3407041).

²¹ Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment’s Differing Impacts Among States*, 104 MICH. L. REV. 203, 208 (2005).

²² See *Furman v. Georgia*, 408 U.S. 238, 256-57 (1972) (Douglas, J., concurring) (“[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.”).

²³ See *Gregg v. Georgia*, 428 U.S. 153, 206-07 (plurality opinion) (“The new Georgia sentencing procedures, by contrast, focus the jury’s attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. . . . No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines.”).

²⁴ *Baze*, 128 S. Ct. at 1526 (plurality opinion) (citing STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY 192-93, 296-97* (2002)).

troduced the first bill proposing lethal injection as the state's method of execution.²⁵ Thirty-six states now use lethal injection "as the exclusive or primary means of implementing the death penalty, making it by far the most prevalent method of execution in the United States."²⁶ In 2008 the Supreme Court answered an Eighth Amendment challenge to Kentucky's lethal injection protocol, holding that Kentucky's protocol is constitutional.

B. Baze v. Rees

The jury convicted Ralph Baze and Thomas Bowling of capital murder and subsequently sentenced them to death.²⁷ "After exhausting their state and federal collateral remedies, Baze and Bowling sued three state officials . . . seeking to have Kentucky's lethal injection protocol declared unconstitutional."²⁸ The petitioners conceded that if the executioner administers the lethal injection protocol properly, it results in a humane death.²⁹ They alleged the protocol is an unconstitutional "cruel and unusual punishment" because of the possibility that the executioner might not correctly follow the procedure, resulting in significant pain.³⁰ The petitioners also proposed "an alternative protocol, one that they concede[d] ha[d] not been adopted by any State and ha[d] never been tried."³¹

After a seven-day bench trial, during which approximately twenty witnesses testified, "including numerous experts, the [trial] court upheld [Kentucky's] protocol, finding there to be minimal risk of various claims of improper administration of the protocol."³² "On appeal, the Kentucky Supreme Court stated that a method of execution violates the Eighth Amendment when it creates a substantial risk of wanton and

²⁵ Brief for Petitioners at 4, *Baze*, 128 S. Ct. 823 (No. 07-5439), 2007 WL 3307732; Brief for the Fordham University School of Law, *supra* note 20, at 16-23.

²⁶ *Baze*, 128 S. Ct. at 1526-27 (plurality opinion).

²⁷ *Id.* at 1528-29.

²⁸ *Id.* at 1529.

²⁹ *Id.* at 1526.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1529.

unnecessary infliction of pain, torture or lingering death.”³³ Applying this standard, the Kentucky Supreme Court affirmed the trial court’s holding and the United States Supreme Court granted certiorari “to determine whether Kentucky’s lethal injection protocol satisfies the Eighth Amendment.”³⁴

III. ANALYSIS

A. *The Plurality Fails to Clarify the Applicable Standard*

The plurality correctly held that Kentucky’s procedure is consistent with the Eighth Amendment.³⁵ However, the plurality missed a valuable opportunity to clarify the standard used to determine whether an execution procedure violates the Eighth Amendment. The standard applied by the plurality is both vague and unclear.³⁶ This “vague and malleable standard” leaves the door open to future litigation regarding the constitutionality of a state’s death penalty procedure, possibly resulting in a “*de facto* ban on capital punishment.”³⁷

The plurality discussed how the Court should interpret the Eighth Amendment in relation to execution procedures by noting, “[t]his Court has never invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.”³⁸ Explaining this fact, the plurality reasoned it is difficult to define the extent of the constitutional prohibition on cruel and unusual punishments.³⁹ For example, in 1879 the Court rejected the argument

³³ *Id.* (quoting *Baze v. Rees*, 217 S.W.3d 207, 209 (Ky. 2006)) (internal quotation marks omitted).

³⁴ *Id.*

³⁵ *See id.* at 1538.

³⁶ *See id.* at 1562 (Thomas, J., concurring).

³⁷ *Id.* at 1542 (Alito, J., concurring) (stating that adopting vague standards to determine whether a protocol violates the Eighth Amendment will lead to litigation gridlock).

³⁸ *Id.* at 1530 (plurality opinion).

³⁹ *Id.* (quoting *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1879)) (noting the difficulty in “defin[ing] with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted”).

that death by firing squad constituted cruel and unusual punishment.⁴⁰ Rather than undertaking to define the standard, the Court simply reasoned that it is safe to assume that the Constitution prohibits tortuous punishment and punishment involving unnecessary cruelty.⁴¹ Therefore, it is well settled that punishments which deliberately inflict pain, only “superadd[ing] pain to the death sentence,” are prohibited by the Eighth Amendment.⁴² Though narrow, case law expanded this standard in the past century; yet, the exact parameters of the standard remain unclear.⁴³ As the plurality noted, “[s]ome risk of pain is inherent in any method of execution—no matter how humane It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.”⁴⁴

Recent case law extended the meaning of the Eighth Amendment beyond only prohibiting intentionally torturous procedures and recognized that subjecting individuals to a risk of future harm can qualify as cruel and unusual punishment.⁴⁵ The purpose of this extension is to ensure that even if a procedure is not intended to add pain to death, the court will prohibit the procedure if it carries with it a substantial chance of needless suffering.⁴⁶ In *Baze*, the petitioners “contend[ed] that the Eighth Amendment prohibits procedures that create an unnecessary risk of pain.”⁴⁷ The plurality rejected the petitioners’ proposed standard, and instead stated that for a procedure to violate the Eighth Amendment, “the conditions presenting the risk must be *sure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently *imminent* dangers.”⁴⁸

⁴⁰ *Id.* (citing *Wilkerson*, 99 U.S. at 134-35) (“[W]e upheld a sentence to death by firing squad imposed by a territorial court, rejecting the argument that such a sentence constituted cruel and unusual punishment.”).

⁴¹ *Id.* (quoting *Wilkerson*, 99 U.S. at 136) (internal quotation marks omitted).

⁴² *Id.* (internal quotation marks omitted).

⁴³ *See generally id.* (discussing several possible proposed standards).

⁴⁴ *Id.*

⁴⁵ *Id.* at 1530.

⁴⁶ *See id.* at 1530-31 (explaining the principles that dictate the determination of whether a punishment is cruel and unusual, absent intentional torture).

⁴⁷ *Id.* at 1529 (internal quotation marks omitted).

⁴⁸ *Id.* at 1530-31 (emphasis added) (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993)) (internal quotation marks omitted).

This standard is problematic for multiple reasons. First, its malleable language provides prisoners, like those in *Baze*, with the opportunity to claim a state's procedures are unconstitutional simply by employing experts who propose improvements to a protocol or who can point to empirical data in support of their ideas.⁴⁹ Second, its vague language opens the door to litigation requiring courts to engage in a medical debate—a debate courts are not qualified to participate in.⁵⁰ Throughout the opinion, the plurality clarified the standard to an extent, yet its implementation is likely to be problematic in future cases.⁵¹

The plurality effectively explained one significant aspect of the standard: “a condemned prisoner cannot successfully challenge a State’s method of execution merely by showing a slightly or marginally safer alternative.”⁵² In support of this standard, allowing inmates to challenge an execution protocol by merely offering the testimony of a few experts or studies would cause courts to embark on a slippery slope of unwarranted Eighth Amendment challenges.⁵³ The constitutionality of capital punishment procedure is not an appropriate issue for courts to rely on arbitrary expert testimony.⁵⁴ Justice Samuel Alito observed that “public policy on the death penalty, an issue that stirs deep emotions,

⁴⁹ See *id.* at 1540 (Alito, J., concurring) (“Moreover, an inmate should be required to do more than simply offer the testimony of a few experts or a few studies.”).

⁵⁰ See *id.* at 1562 (Thomas, J., concurring) (“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.”).

⁵¹ See *id.* (“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.”).

⁵² *Id.* at 1531 (plurality opinion).

⁵³ See *id.* (“Permitting an Eighth Amendment violation to be established on such a showing would threaten 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. Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures—a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of death.”).

⁵⁴ See *id.* at 1554 (Scalia, J., concurring) (explaining why courts are not the appropriate forum to make such a factual determination).

cannot be dictated by the testimony of an expert or two or by judicial findings of fact based on such testimony.”⁵⁵ Justice Alito expanded on the plurality’s standard by suggesting that “an inmate challenging a method of execution should point to a well-established scientific consensus” to challenge a state’s method, rather than merely providing a few expert witnesses who suggest a modification.⁵⁶ Also significant is Justice Alito’s observation that “evidence regarding alleged defects in [execution] protocols . . . is [often] haphazard and unreliable,”⁵⁷ particularly due to ethical restrictions prohibiting many medical professionals from participating in executions.⁵⁸ Justice Antonin Scalia stated: “[i]t is simply not our place to choose one set of responsible empirical studies over another in interpreting the Constitution.”⁵⁹

B. Courts Should Not Act as Medical Boards of Inquiry

In addition to the reasons discussed above, the plurality gives only a cursory mention to the most significant reason why prisoners cannot challenge a state’s method of execution by showing a slightly safer alternative: because it is not the role of the courts to act as medical boards of inquiry.⁶⁰ “Permitting an Eighth Amendment violation to be established on such a showing would threaten 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.”⁶¹ Courts should not act as medical boards of inquiry because this approach finds no support in case law and would “intrude on the role of state legislatures in implementing their execution procedures,” by engaging the courts in “scientific controversies beyond their expertise,” and inefficiently using judicial economy.⁶²

⁵⁵ *Id.* at 1541-42 (Alito, J., concurring).

⁵⁶ *Id.* at 1540.

⁵⁷ *Id.*

⁵⁸ *See id.* at 1539-40 (citing various medical authorities, including the American Medical Association, that dictate that medical professionals are not to participate in executions because they are “member[s] of a profession dedicated to preserving life”).

⁵⁹ *Id.* at 1554 (Scalia, J., concurring).

⁶⁰ *See id.* at 1531 (plurality opinion) (explaining why it is imprudent to allow a marginally safer alternative challenge to prevail).

⁶¹ *Id.*

⁶² *Id.*

Allowing courts to decide what execution method a state should use would be an intrusion on the role of state legislatures.⁶³ The Supreme Court ruled that the Constitution does not prohibit capital punishment, “and that the States may enact laws specifying that sanction.”⁶⁴ “[T]he power of a State to pass laws means little if the State cannot enforce them.”⁶⁵ Not only is it beyond courts’ constitutionally allocated power to determine what execution protocols states should use, but it is unnecessary because by moving towards more humane execution procedures “the States have fulfilled [their role] with an earnest desire to provide for a progressively more humane manner of death.”⁶⁶

Courts should not act as medical boards of inquiry to determine best practices for executions because it “require[s] courts to resolve medical and scientific controversies that are largely beyond judicial ken.”⁶⁷ Judicial proceedings, decided by judges lacking medical expertise, are not an effective forum for determining what execution protocols states should use.⁶⁸ Justice Clarence Thomas stated:

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 scientific, 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.⁶⁹

⁶³ *Id.* at 1531-32 (quoting *Bell v. Wolfish*, 441 U.S. 520, 562 (1979)) (“The wide range of ‘judgment calls’ that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.”).

⁶⁴ *Id.* at 1537.

⁶⁵ *Id.* (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)).

⁶⁶ *Id.* at 1531.

⁶⁷ *Id.* at 1562 (Thomas, J., concurring).

⁶⁸ *See id.* (“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.”).

⁶⁹ *Id.*

Another reason courts cannot function effectively as medical boards of inquiry is because the state-of-the-art in medicine is constantly changing.⁷⁰ Justice John Paul Stevens provided an example of how one state addressed this problem. In 2005 Department of Corrections (DOC) officials in New Jersey decided to revise the state's lethal injection protocol.⁷¹ "At a public hearing on the proposed amendment [to the protocol, a] DOC Supervisor . . . told attendees that the drugs to be used in the lethal injection protocol [remained] undetermined" because: "[w]e understand that the state-of-the-art is changing daily so to say we are going to use something today when something may be more humane becomes known later wouldn't make sense for us."⁷² With the state-of-the-art in medicine constantly changing, courts and state corrections departments cannot efficiently adapt to this change.

Another constraint on progress is that the American Medical Association's *Code of Medical Ethics* restricts physicians from even helping to design more humane protocols.⁷³ Due to these limitations, state legislatures should create specialized committees made up of individuals with scientific expertise, whose task is to proactively research and discover more humane methods of execution. Delegating responsibility for the determination of the best execution procedures to individuals with expertise in the subject would be more efficient. Further, it would result in better protocols than continuing to give the opinions of unqualified courts such great deference.

The final significant reason why courts should not determine best medical practices is because allowing them to do so would "lead to litigation gridlock" and essentially "produce a *de facto* ban on capital punishment."⁷⁴ Allowing prisoners to challenge execution protocols by offering marginally safer alternatives allows prisoners to delay or halt

⁷⁰ See *id.* at 1546 (Stevens, J., concurring) (referencing a Department of Corrections hearing on proposed amendments to New Jersey's lethal injection protocol).

⁷¹ *Id.*

⁷² *Id.* (quoting Tr. of Public Hearing on Proposed Amendments to the New Jersey Lethal Injection Protocol 36 (Feb. 4, 2005)) (internal quotation marks omitted).

⁷³ See *id.* at 1539 (Alito, J., concurring) (quoting Harris, *Will Medics' Qualms Kill the Death Penalty?*, 441 NATURE 8, 8-9 (2006)) ("The head of ethics at the AMA has reportedly opined that '[e]ven helping to design a more humane protocol would disregard the AMA code.'").

⁷⁴ *Id.* at 1542.

capital punishment simply by securing experts who testify about an additional step a state *could* take to reduce the risk of pain from a given protocol.⁷⁵ The possibilities for altering the protocols are limitless. Therefore, allowing prisoners to make such challenges would essentially place a *de facto* ban on the death penalty.⁷⁶ The plurality correctly rejects attempts to lessen the burden required of prisoners seeking to challenge a protocol by denying the petitioners' proposed *unnecessary risk standard* and the dissent's *untoward risk proposal*,⁷⁷ instead upholding the *substantial risk of serious harm standard*.⁷⁸ Yet, by failing to clearly define what constitutes a substantial risk, the plurality leaves the door open to future litigation over similar issues.⁷⁹

After *Gregg*, "seemingly endless proceedings . . . characterized capital [punishment] litigation . . ." ⁸⁰ "In 1989, the Report of the Judicial Conference's Ad Hoc Committee on Federal Habeas Corpus in Capital Cases . . . noted the lengthy delays produced by collateral litigation in death penalty cases."⁸¹ It is important to recognize that litigation challenging the constitutionality of execution protocols is often utilized as a collateral attack on the death penalty itself.⁸² For some who oppose capital punishment, the only acceptable solution would be for the Court to abolish the death penalty as cruel and unusual in all circumstances.⁸³ Thus, an alternative employed by some opposed to the death penalty is

⁷⁵ See *id.* at 1537 (plurality opinion) (rejecting the validity of challenges seeking to show only an additional redundancy in protocols).

⁷⁶ See *id.* at 1542 (Alito, J., concurring) ("The Court should not produce a *de facto* ban on capital punishment by adopting method-of-execution rules that lead to litigation gridlock.").

⁷⁷ *Id.* at 1532 (plurality opinion).

⁷⁸ *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1970)) (internal quotation marks omitted).

⁷⁹ See *id.* at 1562 (Thomas, J., concurring) ("[T]oday's decision is sure to engender more litigation.").

⁸⁰ *Id.* at 1542 (Alito, J., concurring).

⁸¹ *Id.*

⁸² See *id.* (discussing the delays caused by extensive and repetitive litigation over execution protocols).

⁸³ See *id.* at 1562 (Thomas, J., concurring) ("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.").

to continuously challenge the constitutionality of states' execution procedures.⁸⁴ Courts must keep the issue of the constitutionality of execution methods separate from the controversy over the constitutionality of the death penalty itself.⁸⁵ Collateral attacks on the death penalty through litigation challenging execution procedures waste judicial resources and the indirect approach produces no clear guidelines.⁸⁶ Perhaps, as suggested by Justice Stevens, it is time for the Court and the Legislature to reevaluate the constitutionality of the death penalty itself.⁸⁷

IV. CONCLUSION

Ultimately the decision in *Baze* is likely to engender future litigation over similar issues.⁸⁸ The Supreme Court bypassed a valuable opportunity to clarify the standard used to determine whether a state's execution protocol violates the Eighth Amendment. The plurality's standard needs clarification because its vague language welcomes litigation challenging execution protocols.⁸⁹ The most significant reason courts should uphold an exacting standard for Eighth Amendment challenges to execution protocols is because the judicial system is not an effective forum for determining best medical practices.⁹⁰ *Baze* does not establish a bright-line rule on the issue, but instead leaves the door open to future collateral attacks on the death penalty.⁹¹

⁸⁴ *Id.*

⁸⁵ *See id.* at 1542 (Alito, J., concurring) ("The issue presented in this case—the constitutionality of a *method* of execution—should be kept separate from the controversial issue of the death penalty itself.").

⁸⁶ *See id.* (noting the purpose of the Antiterrorism and Effective Death Penalty Act of 1996 is to reduce delays in execution proceedings).

⁸⁷ *See id.* at 1548-49 (Stevens, J., concurring) ("The time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely arrived.").

⁸⁸ *See id.* at 1562 (Thomas, J., concurring) (disapproving the standard proffered by the plurality in *Baze*).

⁸⁹ *Id.* at 1542 (Alito, J., concurring).

⁹⁰ *See id.* at 1532 n.3 (plurality opinion) ("Justice Thomas agrees that courts have neither the authority nor the expertise to function as boards of inquiry determining best practices for executions . . .").

⁹¹ *See id.* at 1562 (Thomas, J., concurring) ("Needless to say, we have left the States with nothing resembling a bright-line rule.").