not a complete victory for them. Market participants likely will (and should) remain conscious of the continued susceptibility of a significant portion of the municipal debt market to a constitutional challenge because an upheaval in the private activities bond market would have far-reaching and detrimental economic consequences in an already volatile market environment.

B. Criminal Law and Procedure

1. Eighth Amendment — Death Penalty — Lethal Injection Drug Protocol. — In a widely reported speech at the 2006 Georgetown University Law Center graduation, Chief Justice Roberts called for "broader consensus" on the Court, with a focus on achieving more unanimous or nearly unanimous decisions.[1] Last Term, in *Baze v. Rees*,[2] the Court affirmed the constitutionality of the three-drug protocol used in lethal injections in the United States, holding that a state's refusal to adopt an alternative method of execution violates the Eighth Amendment only if the method "effectively address[es] a 'substantial risk of serious harm[]' [— that is, it is] feasible, readily implemented, and [would] in fact significantly reduce a substantial risk of severe pain."[3] The decision's 7–2 vote led commentators to write that *Baze* was a sign of the Court's moving toward greater consensus.[4] However, the Justices' conflicting rationales and the multiple opinions both showed that Chief Justice Roberts did not achieve his desired "broader consensus" and indicated why he likely will not be able to do so on other controversial issues. Moreover, the opinions demonstrated why such consensus is not actually desirable. The additional opinions provided guidance both to future litigants about where the Justices stand on the constitutionality of capital punishment and to states about how they can avoid future litigation over methods of execution.

The petitioners had each been tried and convicted of unrelated murders in the Commonwealth of Kentucky and sentenced to death.[5] In 2004, both men brought an action in Kentucky's Franklin Circuit Court seeking a declaratory and injunctive judgment that the Commonwealth's lethal injection protocol constituted cruel and unusual punishment and was therefore unconstitutional "under the Eighth Amendment to the United States Constitution and Section 17 of the

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[1] Chief Justice John Roberts, Address at the Georgetown University Law Center Commencement (May 21, 2006).

[2] 128 S. Ct. 1520 (2008).

[3] *Id.* at 1532 (plurality opinion) (quoting Farmer v. Brennan, 511 U.S. 825, 842 (1994)).

[4] *See, e.g.*, Linda Greenhouse, *On Court That Defied Labeling, Kennedy Made the Boldest Mark*, N.Y. TIMES, June 29, 2008, at 1.

[5] Baze v. Commonwealth, 965 S.W.2d 817, 819 (Ky. 1997); Bowling v. Commonwealth, 873 S.W.2d 175, 179 (Ky. 1994).

Kentucky Constitution."[6] In Kentucky, as in most other states, the lethal injection protocol consists of injections of three separate drugs: sodium thiopental, which renders the condemned person unconscious; pancuronium bromide, which causes paralysis and stops respiration; and potassium chloride, which causes cardiac arrest.[7] After a bench trial, the court found the protocol violated neither constitution.[8] The Kentucky Supreme Court affirmed.[9] The court noted both that it had previously held that lethal injection was constitutional and that other courts had routinely found that lethal injection violated neither the federal Constitution nor applicable state constitutions.[10]

In a series of opinions, the U.S. Supreme Court affirmed.[11] Writing for a plurality, Chief Justice Roberts[12] found the petitioners had demonstrated neither that the Commonwealth's failure to adopt an untested alternative nor that potential pain from maladministration of Kentucky's lethal injection protocol violated the Eighth Amendment.[13] The petitioners had suggested that a method should be considered unconstitutional if it created an "'unnecessary risk' of pain,"[14] but Chief Justice Roberts found that using this standard would risk turning "courts into boards of inquiry," with endless rounds of litigation promoting new, marginally better methods.[15] Instead, he adopted a standard that would require states to implement an alternative execution procedure if an inmate showed that it "effectively address[ed] a 'substantial risk of serious harm[,]'"[16] meaning that the alternative was "feasible, [could be] readily implemented, and [would] in fact significantly reduce a substantial risk of severe pain."[17]

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[6] Baze v. Rees, No. 04-CI-01094, slip op. at 3, 2005 WL 5797977 (Ky. Cir. Ct. July 8, 2005) (Findings of Fact and Conclusions of Law).

[7] *Id.* at 8–9. At least thirty states use the exact combination of drugs used in Kentucky. *Baze*, 128 S. Ct. at 1527 (plurality opinion).

[8] *Baze*, No. 04-CI-01094, slip op. at 13. Specifically, the plaintiffs had challenged, *inter alia*, the protocol's use of pancuronium bromide and potassium chloride, Kentucky's alleged failure to ensure that a sufficient dose of sodium thiopental was administered, the insertion of a needle into the neck of the person to be executed, the amount of time allowed to insert an intravenous line to deliver the drugs, the lack of monitoring for "anesthesia awareness," and the insufficiency of equipment available for resuscitation if a stay were granted. *Id.* at 4. The court did rule that Kentucky could no longer inject the lethal drugs into the condemned prisoners' necks. *Id.* at 13.

[9] Baze v. Rees, 217 S.W.3d 207, 213 (Ky. 2006).

[10] *Id.* at 212.

[11] *Baze*, 128 S. Ct. at 1526 (plurality opinion).

[12] Chief Justice Roberts was joined by Justices Kennedy and Alito.

[13] *Baze*, 128 S. Ct. at 1526 (plurality opinion).

[14] *Id.* at 1529 (quoting Brief for Petitioners at 38, *Baze*, 128 S. Ct. 1520 (2008) (No. 07-5439), 2007 WL 3307732).

[15] *Id.* at 1531.

[16] *Id.* at 1532 (quoting Farmer v. Brennan, 511 U.S. 825, 842 (1994)).

[17] *Id.*

Applying this standard to the case at bar, and noting that the large number of states that use the same lethal injection protocol as Kentucky was probative, the Chief Justice concluded that the petitioners had not shown that there was a substantial risk that inmates would receive an insufficient dose of sodium thiopental, nor were states required to implement the "untested alternative procedures" the petitioners favored.[18] In light of the large number of safeguards taken by Kentucky,[19] Chief Justice Roberts wrote that the additional measures sought by the petitioners and Justice Ginsburg's dissent were not necessary.[20] Finally, he noted that "a lethal injection protocol substantially similar to the protocol [in the case at bar] would not create a risk that meets [the] standard" he had previously laid out.[21]

Justice Alito concurred. Noting that he did not believe, contrary to Justice Thomas, that the plurality's opinion would lead to endless litigation,[22] Justice Alito contended that, since the Court assumes lethal injection is constitutional, it must not impose "procedural requirements that cannot practicably be satisfied" on either the federal government or the states.[23] To show that a proposed modification would significantly reduce a substantial risk of severe pain, he argued, a prisoner would have to "point to a well-established scientific consensus."[24] He criticized the "untoward" risk standard proposed by Justice Ginsburg's dissent as one that "would open the gates for a flood of litigation."[25]

Justices Stevens, Scalia, Thomas, and Breyer each filed an opinion concurring in the judgment. Justice Stevens wrote that preserving the dignity of executions by eliminating muscle movements was a "woefully inadequate justification" for use of pancuronium bromide, one significantly outweighed by the risk that the drug hides the condemned prisoner's pain as he is executed.[26] He noted that most state legislatures had not directly mandated the use of the drug, and that those that had done so had merely adopted the protocol because it was used by the other states.[27] Justice Stevens argued that retribution, the most prominent rationale in favor of capital punishment, may have to be reexamined in light of trends away from painful methods of execution.[28] Justice Stevens declared that he himself believed that the death pen-

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[18] *Id.* at 1533.
[19] *Id.* at 1533–34.
[20] *Id.* at 1536–37.
[21] *Id.* at 1537.
[22] *Id.* at 1538 (Alito, J., concurring).
[23] *Id.* at 1539.
[24] *Id.* at 1540.
[25] *Id.* at 1542.
[26] *Id.* at 1544 (Stevens, J., concurring in the judgment).
[27] *Id.* at 1544–45.
[28] *Id.* at 1547–48.

alty was not constitutional.[29] However, constrained by precedent, Justice Stevens found that Kentucky's method of lethal injection met the tests proposed both by the plurality and by Justice Ginsburg in her dissent and therefore concurred in the judgment.[30]

Writing in response to Justice Stevens, Justice Scalia[31] first noted that, except for the Court's opinions in *Furman v. Georgia*,[32] there is "no legal authority for the proposition that the imposition of death as a criminal penalty is unconstitutional."[33] Instead, he argued that capital punishment is "explicitly sanctioned by the Constitution."[34] Justice Stevens, Justice Scalia argued, was promoting "rule by judicial fiat."[35]

Rejecting the tests of both the plurality opinion and the dissent, Justice Thomas[36] argued that a form of capital punishment "violates the Eighth Amendment only if it is deliberately designed to inflict pain."[37] Justice Thomas began with an examination of the history of capital punishment in the United States and the Court's previous decisions on various forms of execution, noting that the focus was on whether the punishments were torturous.[38] The plurality's and the dissent's proposed standards, in contrast, "cast substantial doubt" on every other form of capital punishment.[39] Moreover, Justice Thomas argued, standards like the one imposed by the plurality opinion lead to more litigation and involve courts in controversies beyond their abilities.[40] Because Kentucky's lethal injection protocol was not intended to inflict pain, Justice Thomas concluded that it was constitutional.[41]

Although Justice Breyer preferred Justice Ginsburg's formulation for how to review the constitutionality of a method of execution, he found that the petitioners' had not presented sufficient evidence that the lethal injection method to be used violated that standard.[42] He examined each piece of evidence presented in favor of the petitioners' case, finding problems with each in turn. A study in a British medical journal, which said there were surprisingly low levels of barbiturates in the bloodstreams of executed inmates, had been questioned by other

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[29] *Id.* at 1550–51.
[30] *Id.* at 1552.
[31] Justice Scalia was joined by Justice Thomas.
[32] 408 U.S. 238 (1972).
[33] *Baze*, 128 S. Ct. at 1552 (Scalia, J., concurring in the judgment).
[34] *Id.* at 1553.
[35] *Id.* at 1555.
[36] Justice Thomas was joined by Justice Scalia.
[37] *Baze*, 128 S. Ct. at 1556 (Thomas, J., concurring in the judgment).
[38] *Id.* at 1556–60.
[39] *Id.* at 1561.
[40] *Id.* at 1562.
[41] *Id.* at 1563.
[42] *Id.* at 1563–64 (Breyer, J., concurring in judgment).

authors.[43] Concerns raised in a law review article about "botched" executions should be prevented by Kentucky's use of better trained phlebotomists and execution observers.[44] Moreover, he said, doctors in the Netherlands recommend using pancuronium bromide for euthanasia, and medical ethics standards indicate that it would be difficult to find trained medical personnel to assist with executions.[45] The remedial methods supported by Justice Ginsburg, Justice Breyer wrote, would likely not make a significant difference.[46] Ultimately, while noting his overall concerns about the death penalty, Justice Breyer agreed that the method used in Kentucky was not proven unconstitutional.[47]

Justice Ginsburg dissented.[48] She advocated a lesser standard — that the petitioner need demonstrate only "an untoward, readily avoidable risk of inflicting severe and unnecessary pain"[49] — arguing that three factors should be considered: "the degree of risk, magnitude of pain, and availability of alternatives."[50] Unlike the plurality, which required at least a "substantial risk" of harm, Justice Ginsburg believed that if a convict demonstrated a high level of one factor, then he would not need to make as significant a showing on the other factors.[51] She noted that other states take various steps to test whether the inmate is unconscious before injecting the pancuronium bromide and potassium chloride, including calling the inmate's name, shaking the inmate, brushing his eyelashes, and putting substances with a strong odor near his nose to test for a reaction.[52] Justice Ginsburg argued that the Court should remand the case to consider whether Kentucky's failure to take such steps violates this standard.[53]

Last Term, commentators looked at the 7–2 split in *Baze* and similarly lopsided results in other cases and declared, both immediately after the case was decided[54] and later, when the Term as a whole looked

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[43] *Id.* at 1564–65.

[44] *Id.* at 1565 (citing Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63 (2002)).

[45] *Id.* at 1566.

[46] *Id.*

[47] *Id.* at 1566–67.

[48] Justice Ginsburg was joined by Justice Souter.

[49] *Baze*, 128 S. Ct. at 1567 (Ginsburg, J., dissenting).

[50] *Id.* at 1568.

[51] *Id.*

[52] *Id.* at 1570–71.

[53] *Id.* at 1572.

[54] *See* Linda Greenhouse, *In Latest Term, Majority Grows to More Than 5 of the Justices*, N.Y. TIMES, May 23, 2008, at A1; Edward Lazarus, *The Supreme Court's Term So Far: An Unusual Degree of Agreement, with Liberals Joining "Conservative" Rulings and Vice-Versa*, FINDLAW'S WRIT, June 6, 2008, http://writ.news.findlaw.com/lazarus/20080606.html.

significantly less collegial,[55] that the case represented hope for a more united Court. The case in fact demonstrated the exact opposite conclusion — that Chief Justice Roberts will face severe challenges in attempting to achieve "broader consensus" in future controversial cases.

Consensus is clearly important to Chief Justice Roberts. Immediately after taking up his post, the Chief Justice touched on the subject both in his speech at Georgetown[56] and in an interview with Professor Jeffrey Rosen.[57] The Court, he argued, should strive to achieve more "[u]nanimous, or nearly unanimous, decisions,"[58] since 5–4 decisions diminish the Court's "credibility and legitimacy."[59] Moreover, he contended, such consensus provides clearer guidance to the practicing bar and lower courts.[60] One way to achieve this is to rule on narrow grounds, since such opinions tend to gather the most support.[61] Another is to discourage the writing of concurrences and dissents, which would require a "commitment on the part of the Court to acting as a Court, rather than being more concerned about the consistency and coherency of an individual judicial record."[62]

While Chief Justice Roberts was praised for the high level of unity achieved in his first Term,[63] many analysts argued there had been a shift backwards in the 2006 Term.[64] At least in regard to the number of 5–4 decisions, one measure of the Court's unity, the last Term represented a significant improvement. In 2006–2007, 33% of the Court's decisions were decided by a vote of 5–4; in 2007–2008, only 17% of decisions included the same divide.[65]

Seizing on this difference, some commentators have described the Term as a sign that the Court is moving toward greater consensus, describing *Baze* as a particular example of this trend. This occurred both immediately after *Baze* was handed down, when admittedly the Court looked significantly more united than it had in previous years,[66]

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[55] *See, e.g.*, Greenhouse, *supra* note 4; Jeffrey Rosen, *Supreme Agreement*, TIME, July 14, 2008, at 36.

[56] Roberts, *supra* note 1.

[57] Jeffrey Rosen, *Roberts's Rules*, ATLANTIC, Jan.–Feb. 2007, at 104.

[58] *Id.* at 105.

[59] *Id.* (quoting Chief Justice Roberts).

[60] Roberts, *supra* note 1.

[61] *Id.*

[62] Rosen, *supra* note 57, at 106 (quoting Chief Justice Roberts) (internal quotation mark omitted).

[63] *See, e.g.*, John F. Basiak, Jr., *The Roberts Court and the Future of Substantive Due Process: The Demise of "Split-the-Difference" Jurisprudence?*, 28 WHITTIER L. REV. 861, 864–65 (2007).

[64] *See, e.g.*, Vikram Amar et al., *Roundtable Discussion, An Enigmatic Court? Examining the Roberts Court as It Begins Year Three*, 35 PEPP. L. REV. 547, 555 (2008) (statement of Prof. Kathleen Sullivan) (noting that "[l]ast Term, the Court was as polarized as it has ever been").

[65] *See* Rosen, *supra* note 55, at 36.

[66] When *Baze* was handed down, there had been only one 5–4 decision that Term. *See* Greenhouse, *supra* note 54.

and later, after the 5–4 outcomes in *Boumediene v. Bush*[67] and *District of Columbia v. Heller*[68] caused some initially optimistic writers to question their earlier assessments. To the *New York Times*'s long-time Supreme Court reporter, Linda Greenhouse, although the Term as a whole "left a complicated and, to some extent, blurred imprint," *Baze* was an example of the Court's "trying to find a modicum of middle ground."[69] Professor Rosen, describing the Term instead as "something of a group hug between the liberal and conservative Justices,"[70] similarly saw *Baze* as part of the Court's "bipartisan harmony."[71]

When analyzing whether the *Baze* case reflected a move toward consensus, it is first important to establish what consensus means. If it means only the ultimate vote count, as many of the media accounts following *Baze* seemed to believe, then Chief Justice Roberts has achieved his goal. A 7–2 decision, even based on divided rationales, perhaps relieves some of the attention commentators pay to the votes of individual Justices.[72] This type of consensus is perhaps a worthy goal. Even if the Justices cannot agree on why a particular decision is correct, the fact that they all agree on a particular outcome certainly gives the decision, and by extension the Court, additional legitimacy.[73]

However, it seems Chief Justice Roberts is seeking something else — having the Justices not only vote the same way, but also speak with the same voice. He has noted that the Justices "should all be worried, when they're writing separately, about the effect on the Court as an institution."[74] By this measure, *Baze* was a clear failure.

There was little evidence of "the Court acting as a Court" in this case. There were more opinions (seven) than actual splits in reasoning (four). Chief Justice Roberts can perhaps take some credit for having avoided a separate opinion by Justice Kennedy,[75] but Justice Alito, seen by some as a fellow seeker of greater consensus,[76] wrote his own

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[67] 128 S. Ct. 2229 (2008) (holding accused combatants held at Guantanamo Bay have a right of habeas corpus and that the Military Commissions Act unconstitutionally suspended the writ).

[68] 128 S. Ct. 2783 (2008) (holding that the Second Amendment confers an individual right to bear arms).

[69] Greenhouse, *supra* note 4.

[70] Rosen, *supra* note 55, at 36.

[71] *Id.* at 37.

[72] *Cf.* Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 942 (2003).

[73] *Cf.* Rosen, *supra* note 57, at 105 (quoting the Chief Justice as saying that the Court must "refocus on functioning as an institution, because if it doesn't it's going to lose its credibility and legitimacy as an institution" (internal quotation mark omitted)).

[74] *Id.*

[75] *Cf.* Amar, *supra* note 64, at 554 (statement of Prof. Rosen) (saying the Chief Justice signaled to him that Justice Kennedy would be his greatest opposition to achieving consensus).

[76] *See, e.g.*, Douglas W. Kmiec, *Overview of the Term: The Rule of Law & Roberts's Revolution of Restraint*, 34 PEPP. L. REV. 495, 496 (2007).

opinion despite fully joining the plurality. The standard employed by the plurality governs only under the *Marks v. United States*[77] rule, because Justices Scalia and Thomas concurred on broader grounds.

Even some proponents of greater consensus on the Court acknowledge that dissents may be unavoidable and, in some cases, desirable.[78] To advocates of consensus, it is likely the concurrences that are the larger problem. Even where the shifting of a few votes would not change the result, as in *Baze*, concurrences can be highly divisive. Although written in support of the majority or plurality opinion, a concurrence may still have a detrimental effect, muddying clear waters in the guise of clarification.[79] But seen as far worse are the opinions joining the Court's decision but belittling its reasoning.[80] Often more cutting in their attack on the plurality than the dissent, they cannot help but create a sense of discord, of nine individuals rather than a unified Court.

The greatest portent of the failure of Chief Roberts's goal of greater consensus are the concurrences by Justices Scalia and Thomas.[81] They did not disappoint here. Justice Thomas directly criticized the reasoning of both the plurality and the dissent, referring to them as "lacking support in history or precedent."[82] In doing so, he touched on many of the major themes that conservative critics of the Court often raise — the very themes the Chief Justice is hoping will receive diminished attention in a more cohesive Court: that the Court ignores history,[83] that Justices "evolve" the Constitution to find rights that suit them,[84] and

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[77] 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.))).

[78] *Cf.* Shugerman, *supra* note 72, at 942 ("Dissent can contribute to public debate, but one-vote majorities shift attention away from the decision and toward the divided vote."). It is far from clear that unanimity improves the public's impression of the Court as an institution, at least in the long term. For example, it is hard to imagine that the Court would be seen as more legitimate today if Justice Harlan had not written his ringing dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), instead silently joining the majority. *Id.* at 559 (Harlan, J., dissenting).

[79] *Cf.* Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777, 819 (1990) (noting that concurrences intended to limit or emphasize parts of unanimous opinions "eat away at the authority of a unanimous opinion by appending a guide to interpretation").

[80] *Cf. id.* (noting that opinions concurring only in the judgment of a unanimous opinion "deny the Court [the power of a unanimous opinion] entirely").

[81] Professor Rosen noted that when the Chief Justice referred to Justices' caring more about their intellectual consistency than the Court's reputation, he was most likely referring to Justices Scalia and Thomas. Rosen, *supra* note 57, at 112.

[82] *Baze*, 128 S. Ct. at 1561 (Thomas, J., concurring in the judgment).

[83] *Id.* at 1561–62 ("[T]he notion that the Eighth Amendment permits only one mode of execution . . . cannot be squared with the history of the Constitution.").

[84] *Id.* at 1562 ("It appears the Constitution is 'evolving' even faster than I suspected.").

that the Court fails to give lower courts bright-line rules to decide cases.[85] This critique inherently challenges the legitimacy of the Court.

Justice Scalia, far from fulfilling Chief Justice Roberts's hope that individual Justices will not be the focus of attention,[86] wrote purely in response to Justice Stevens.[87] One could argue that by criticizing Justice Stevens's reliance on his own experience,[88] Justice Scalia was arguing for the Chief Justice's position that the Justices should care more about the Court's legitimacy than their own agendas.[89] But even if one agrees that Justice Stevens was violating that principle, it is hard to see how writing an entire opinion focusing on it helps that cause.

The result in *Baze* likely foreshadows difficult times for the Chief Justice in building consensus in the future. Here, both Kentucky and the United States, as amicus curiae, urged the standard the plurality adopted — that of a "substantial risk." Justices Scalia and Thomas essentially acted on their own. In one other case this Term, the two Justices admitted that they could agree with the plurality's opinion, but did not do so, instead writing what they believed was a more ideologically pure concurrence.[90] As Chief Justice Roberts has acknowledged, a Chief Justice seeking greater consensus on the Court is still only one of nine.[91] It is difficult to see what more Chief Justice Roberts could have done in this case to bring Justices Thomas and Scalia on board.

Justice Stevens's concurrence demonstrated similar problems. He seemed to agree with much of the Chief Justice's opinion, twice referring to it as "thoughtful."[92] In fact, since he appeared to find both the plurality and dissent's arguments persuasive, Justice Stevens seemed like the ideal Justice to bridge the divide and write a consensus opinion laying out a standard with which a large majority of the Court could agree, if not whether that standard was met. However, Justice Stevens had his own argument to make — that the death penalty itself is unconstitutional. Perhaps the Chief Justice managed to prevent Jus-

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85 *Id.* ("[W]e have left the States with nothing resembling a bright-line rule.").

86 Rosen, *supra* note 57, at 113.

87 *Baze*, 128 S. Ct. at 1552 (Scalia, J., concurring in the judgment).

88 *Id.* at 1555.

89 Rosen, *supra* note 57, at 113.

90 *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1624 (2008) (Scalia, J., concurring in the judgment) (acknowledging that the plurality's reasoning was "true enough, but . . . [that he preferred] to decide these cases on [other] grounds"). Justice Scalia was joined by Justice Thomas; Justice Alito also joined the opinion.

91 *See* Rosen, *supra* note 57, at 105.

92 *Baze*, 128 S. Ct. at 1546, 1548 (Stevens, J., concurring in the judgment).

tice Stevens from dissenting on those grounds,[93] but Justice Stevens's opinion still drew attention to him as an individual.[94]

Justice Alito's concurrence also damaged the path toward Chief Justice Roberts's prized consensus. Taking a slightly harder edge than the plurality opinion in describing "how the holding should be implemented,"[95] Justice Alito's concurrence explained what does not need to be explained, raising concerns about why such analysis is not included in the plurality. If there is such a serious risk of "[m]isinterpretation"[96] of the standard, it is unclear why the plurality opinion did not simply make it clearer. By writing separately, Justice Alito also suggested disagreement, or at least possible disagreement, among the other Justices to sign on to the plurality opinion. Otherwise, why would the Chief Justice not merely assign Justice Alito the plurality opinion?

Setting aside all arguments that *Baze* did or did not represent consensus, it is far from clear that consensus is really a good thing. First, as Justice Frankfurter pointed out, consensus can conceal differences that should be expressed.[97] Consider if no concurrences had been filed in this case, if the seven Justices who voted for affirmance had joined the plurality opinion. Potential future litigants would be denied the knowledge that Justice Stevens believes the death penalty itself is unconstitutional, a view that some commentators argue may be held more broadly on the Court.[98] Similarly, proponents of fewer restrictions on execution methods would be denied the views of Justices Scalia and Thomas. In both cases, litigants would have less knowledge about where the Court as a whole actually stood on this issue, with the view of three Justices masquerading as the view of seven.

In addition, despite the wide divergence in rationales, the case did provide some guidance to the bar and lower courts. The wide majority vote provided some leeway in future cases. Even if Justice Breyer found his lesser standard met and Justice Stevens began dissenting in every case, the Chief Justice would still have a 5–4 majority. And at least the two main standards are not incompatible — it is difficult to imagine any method of execution that would be considered constitutional under Justice Ginsburg's test, but not under that of the plurality.

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[93] Justices Brennan and Marshall famously dissented in every death penalty case in their final years on the Court. Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1864 (2008).

[94] *See, e.g.*, Linda Greenhouse, *After a 32-Year Journey, Justice Stevens Renounces Capital Punishment*, N.Y. TIMES, Apr. 18, 2008, at A22.

[95] *Baze*, 128 S. Ct. at 1538 (Alito, J., concurring).

[96] *Id.* at 1542.

[97] Michael W. Schwartz, *Our Fractured Supreme Court*, POL'Y REV., Feb.–Mar. 2008 at 3, 8 (quoting DAVID M. O'BRIEN, STORM CENTER (1986)).

[98] *See* Cliff Sloan, *The Supreme Court Breakfast Table: A Skeptical New Mood About the Death Penalty?*, SLATE, June 25, 2008, http://www.slate.com/id/2193813/entry/2194300/.

Moreover, the clearest guidance on how to avoid future litigation, which both Justice Stevens[99] and Justice Thomas[100] argue is inevitable under the plurality's standard, came from Justice Stevens's concurrence and Justice Ginsburg's dissent. A state wishing to avoid potential future fights could follow Justice Stevens's suggestion to stop using pancuronium bromide and implement Justice Ginsburg's suggested "safeguards." While perhaps undercutting the import of the plurality opinion, Justice Stevens and Justice Ginsburg effectively fill in the law.

It may be true that the Chief Justice will yet find a way to promote more consensus opinions on the Court, but *Baze* suggests that his goal may not be desirable. Perhaps for the better, the Roberts Court remains a place where individual Justices express a diversity of opinions that can just as easily lead to a wide 7–2 split or a more narrow 5–4 divide.

2. Eighth Amendment — Death Penalty — Punishment for Child Rape. — The Eighth Amendment, "applicable to the States through the Fourteenth Amendment,"[1] provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[2] Excess, cruelty, and unusualness, however, do not have fixed definitions — they all are measured relative to expectations. To circumscribe the bounds of constitutionality, therefore, in the past century the Supreme Court has had to gauge such expectations by looking to "public opinion" and "evolving standards of decency," as well as its own independent judgment, to define what punishments are excessive, cruel, or unusual.[3] Last Term, in *Kennedy v. Louisiana*,[4] the Court applied these Eighth Amendment analyses and held unconstitutional a state statute that permitted the death penalty for the rape of a child that did not result in the child's death.[5] The opinion serves as a case study in the weaknesses of the Court's current "cruel and unusual" test, revealing the test's anachronisms and impracticalities. The Court should recognize these problems and exercise restraint in striking down laws under the Eighth Amendment by applying a presumption of constitutionality.

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99 *Baze*, 128 S. Ct. at 1542 (Stevens, J., concurring in the judgment).

100 *Id.*. at 1562 (Thomas, J., concurring in the judgment).

1 Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008), *modified on denial of reh'g*, No. 07-343, 2008 WL 4414670 (U.S. Oct. 1, 2008) (mem.)

2 U.S. CONST. amend. VIII. The Supreme Court has held that the amendment bans all excessive punishments, regardless of whether they are cruel or unusual. *See* Atkins v. Virginia, 536 U.S. 304, 311 n.7 (2002).

3 State v. Kennedy, 957 So. 2d 757, 779–80 (La. 2007) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958); Weems v. United States, 217 U.S. 349, 378 (1910)).

4 128 S. Ct. 2641.

5 *Id.* at 2646.