Shoul v. DOT, Bureau of Driver Licensing

Supreme Court of Pennsylvania

December 6, 2016, Argued; November 22, 2017, Decided

No. 64 MAP 2015

Reporter
643 Pa. 302 *; 173 A.3d 669 **; 2017 Pa. LEXIS 3192 ***

LAWRENCE S. SHOUL, Appellee v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, BUREAU OF DRIVER LICENSING, Appellant

Subsequent History: Rehearing denied by *Shoul v. DOT, Bureau of Driver Licensing, 2018 Pa. LEXIS 2000 (Pa., Jan. 31, 2018)*

Prior History: [***1] Appeal from the Order of the Adams County Court of Common Pleas, Civil Division, dated February 24, 2015, exited February 26, 2015, at No. 2014-S-721.

Counsel: For Shoul, Lawrence S., Appellee: Attorney: Darkes, Barbara Ann, McNees Wallace & Nurick LLC, Harrisburg, PA.

For Bureau of Driver Licensing, Appellant: Bricknell, Philip Murray, PA Department of Transportation, Office of Chief Counsel, Vehicle & Traffic Law Division, Harrisburg, PA.

For Bureau of Driver Licensing, Appellant: Edwards, Terrance M., PA Department of Transportation, Office of Chief Counsel, Vehicle & Traffic Law Division, Harrisburg, PA.

For Pro Bono Coordinator, Participants: Fine, David R., K&L Gates, LLP, Harrisburg, PA.

Judges: JUSTICE TODD. SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ. Chief Justice Saylor and Justice Donohue join the opinion in full. Justice Wecht joins Parts I, II(B), and III of the opinion and files a concurring opinion. Justice Dougherty joins Parts I and II(B) of the opinion and files a concurring and dissenting opinion in which Justice Baer joins. Justice Mundy joins Parts I and II(A) of the opinion and files a concurring and dissenting opinion.

Opinion by: TODD

Opinion

[**672] [*307] **JUSTICE TODD**

In this appeal, we review the trial court's determination that *75 Pa.C.S. § 1611(e)*, providing that holders of commercial [*308] driver's licenses who are convicted of certain drug crimes while using motor vehicles are disqualified from holding such licenses for life, violates Pennsylvania's constitutional right to due process and the federal and Pennsylvania constitutional prohibitions on cruel and unusual punishment. After careful review, we reverse in part, vacate in part, and remand to the trial court for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

By way of statutory background, [***2] *75 Pa.C.S. § 1611(e)* derives from Title XII of the Anti-Drug Abuse Act of 1986 — titled the *Commercial Motor Vehicle Safety Act* — as later amended by the Motor Carrier Safety Improvement Act of 1999.[1] These federal enactments, *inter alia*, established a statutory disqualification scheme whereby holders of commercial driver's licenses ("CDLs") who engaged in certain crimes while using motor vehicles were disqualified from holding CDLs for specified periods of time, and also required states to adopt many of its provisions to continue receiving federal highway funding.[2] In response, the General Assembly enacted the Uniform Commercial Driver's License Act,[3] the purpose of which is "to implement the Commercial Motor Vehicle Safety

---

[1] *See* Pub. L. No. 99-570, 100 Stat. 3207 (1986), *as amended by* Pub. L. No. 106-159, 113 Stat. 1748 (1999), *codified at 49 U.S.C. §§ 31301 et seq.*

[2] *See 49 U.S.C. §§ 31310(g)*, *31314*; *49 C.F.R. §§ 383.51*, *384.401*.

[3] Act of May 30, 1990, P.L. 173, No. 42, *as amended by* Act of 2005, P.L. 100, No. 37, *codified at 75 Pa.C.S. §§ 1601 et seq.*

Act . . . and reduce or prevent commercial motor vehicle accidents, fatalities and injuries by," *inter alia*, "[d]isqualifying commercial drivers who have committed certain serious traffic violations or other [**673] specified offenses." *75 Pa.C.S. § 1602*. In particular, the General Assembly adopted *75 Pa.C.S. § 1611*, which requires Appellee, the Pennsylvania Department of Transportation ("PennDOT"), to manage Pennsylvania's parallel disqualification scheme. *Section 1611* provides as follows, in pertinent part:

> ***§ 1611*. Disqualification**
>
> [*309] **(a) First** [***3] **violation of certain offenses**.—Upon receipt of a report of conviction, [PennDOT] shall, in addition to any other penalties imposed under this title, disqualify any person from driving a commercial motor vehicle . . . for a period of one year for the first violation of:
>
> > (1) [*75 Pa.C.S. §] 3802* (relating to driving under influence of alcohol or a controlled substance . . . where the person was a commercial driver at the time the violation occurred;
> > * * *
> >
> > (7) any offense wherein the person caused the death of a person as a result of a motor vehicle accident through the negligent operation of a commercial motor vehicle, including, but not limited to, a violation of *18 Pa.C.S. § 2504* (relating to involuntary manslaughter) or a violation of [*75 Pa.C.S. §] 3732* (relating to homicide by vehicle).
> > * * *
>
> **(c) Two violations of certain offenses**.—. . . [PennDOT] shall disqualify for life any person convicted of two or more violations of any of the offenses specified in *subsection (a)* . . . arising from two or more separate and distinct incidents.
> * * *
>
> **(d) Mitigation of disqualification for life**.—[PennDOT] may issue regulations establishing guidelines, including conditions, under which a disqualification for life under *subsection (c)* may be reduced to a period of not less than ten [***4] years, if such reductions are permitted by Federal regulations.
>
> **(e) Disqualification for controlled substance offenses**.—[PennDOT] shall disqualify any person from driving a commercial motor vehicle for life who is convicted of using a motor vehicle in the commission of any felony involving the manufacture, distribution or dispensing of a controlled substance or possession with intent to manufacture, distribute or dispense a controlled substance where either:
>
> > [*310] (1) the person was a [CDL] holder at the time of the commission of the felony; or
> > (2) the motor vehicle used in the commission of the felony was a commercial motor vehicle.
>
> There shall be no exceptions or reductions to this disqualification for life.
> * * *
>
> **(g) Disqualification for serious traffic offenses**.—[PennDOT] shall disqualify any person from driving a commercial motor vehicle for a period of 60 days if convicted of two serious traffic violations . . . arising from separate and distinct incidents occurring within a three-year period. A violation will only be considered a serious traffic violation for purposes of this subsection where:
>
> > (1) the person was a [CDL] holder at the time of the violation, and conviction of the violation [***5] results in a revocation, cancellation or suspension of the person's operating privileges for non[-]commercial motor vehicles; or
> > (2) the person was operating a commercial motor vehicle at the time of the violation.

[**674] *Id. § 1611*. It is the lifetime disqualification under *subsection (e)* that is the focus of this case.

Against this statutory backdrop, the factual and procedural history of this matter is relatively straightforward. In 2013, a Pennsylvania State Police informant asked Appellee Lawrence S. Shoul, who held a CDL, to retrieve marijuana from one of Appellee's co-workers and deliver it to the informant. Appellee obliged, using a motor vehicle to do so, whereupon he was arrested and charged with two counts of felony manufacture, delivery, or possession with intent to deliver a controlled substance, *35 P.S. § 780-113(a)(30)*, and ultimately convicted of the same.[4] Thereafter, PennDOT notified Appellee that, pursuant to

[4] The record before us does not indicate the amount of marijuana, whether Appellee delivered the marijuana using a personal or commercial motor vehicle, or Appellee's sentence.

Section 1611(e), he was disqualified from holding a CDL for life. Appellee appealed his disqualification to the trial [*311] court, asserting, as pertinent herein, that *Section 1611(e)*: (1) violated his federal and Pennsylvania constitutional rights to substantive due process because it was not [***6] rationally related to promoting highway safety; and (2) violated the federal and Pennsylvania constitutional prohibitions on cruel and unusual punishment because, although it was formally a civil sanction, it was functionally a criminal punishment and was so irrational and disproportionate to his conduct as to be cruel and unusual. In response, PennDOT argued that *Section 1611(e)* was rationally related to promoting highway safety, as well as deterring drug trafficking and complying with certain federal highway funding requirements; and that it is both formally and functionally a civil sanction.

The trial court found that *Section 1611(e)* violated Pennsylvania's constitutional right to substantive due process and the federal and Pennsylvania constitutional prohibitions on cruel and unusual punishment. Specifically, concerning Appellee's claim that *Section 1611(e)* violated his right to substantive due process, the court did not address the federal constitutional issue, but agreed with Appellee that, as a Pennsylvania constitutional matter, statutes affecting one's right to hold a CDL must bear a rational relationship to a legitimate governmental objective, and that *Section 1611(e)* is not rationally related to promoting highway safety, reasoning [***7] that Appellee's conduct posed no danger thereto:

> [T]here is no suggestion that during the underlying incident [Appellee] was . . . under the influence of . . . marijuana or that he posed any safety hazard at all. No rational argument can be made that a CDL holder unlawfully delivering a controlled substance is likely to create a commercial vehicle highway safety hazard. It is more likely that a CDL holder unlawfully delivering marijuana will drive safely so as not to call law enforcement attention to himself.

Trial Ct. Op., 2/24/15, at 10-11 (footnote omitted). The court also opined that *Section 1611(e)* was not rationally related to highway safety because it was uniquely harsh when compared to some of *Section 1611*'s other disqualification provisions [*312] involving conduct it viewed as more dangerous to highway safety:

> [A] CDL holder who is operating a commercial vehicle while under the influence of marijuana is only subject to a one year disqualification. Similarly, a CDL holder who causes the death of another as a result of criminally negligent operation of a motor vehicle is likewise disqualified for one year. Only where a CDL holder has two or more of these [**675] convictions is he subject to a lifetime disqualification, [***8] and then he may seek reduction of that sanction to 10 years. Furthermore, a CDL holder convicted of two serious traffic violations only receives a 60-day disqualification. What appears clear is that the lifetime disqualification at issue is only tangentially related to highway safety if other factors are present, which do not appear in this case.

Id. at 11 (quotation marks and citations omitted). Finally, relying on then-Justice, later-Chief Justice Castille's rationale in his concurring opinion in *Nixon v. Commonwealth, 576 Pa. 385, 839 A.2d 277 (Pa. 2003)*,[5] the court opined that *Section 1611(e)* was not rationally related to the promotion of highway safety because it failed to account for offenders' potential for rehabilitation:

> To paraphrase Justice Castille in *Nixon*, there may be offenses which are so severe that any reasonable person would agree that a lifetime ban from having a CDL is rational and required. But it is difficult to find a rational [*313] basis for automatically concluding that unlawfully delivering marijuana creates such a safety issue that an individual, otherwise qualified to safely operate a commercial vehicle, should forever be denied employment in this field.

Trial Ct. Op., 2/24/15, at 11 (citations and footnotes omitted).

---

[5] In *Nixon*, this court addressed a statute precluding certain former offenders, including those convicted of, *inter alia*, theft, from working in elder care facilities, but excepting offenders who had already been working on those facilities for at least one year at the time of the statute's enactment. *Nixon, 839 A.2d at 289-90*. Although this Court invalidated the statute on a different basis, Justice Castille authored a Concurring Opinion wherein he indicated his view that a statute precluding offenders convicted of certain, relatively minor, offenses from working in such facilities was not rationally related to protecting clients because it failed to account for their potential for rehabilitation. *See id. at 291-92* (Castille, J., concurring) ("[I]t is difficult to discern a rational basis for automatically deeming an ancient conviction for theft . . . or for simple possession of a controlled substance . . . as eternally and retroactively prohibiting otherwise qualified care workers from continued employment in these facilities.").

Turning [***9] to Appellee's claim that *Section 1611(e)* violated the federal and Pennsylvania constitutional prohibition on cruel and unusual punishment, the trial court noted that formally civil sanctions may nevertheless be functional criminal punishments according to the framework set forth in the United States Supreme Court's decision in *Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)*. Applying that framework, the trial court found that *Section 1611(e)* was, in fact, functionally a criminal punishment and constituted cruel and unusual punishment.

PennDOT appealed directly to this Court,[6] raising three issues for our review:

> I. Did the trial court fail to properly recognize legitimate legislative interests underlying the lifetime disqualification of [Appellee's CDL] for use of a motor vehicle in a felony violation of the Drug Act other than the reduction and prevention of commercial motor vehicle accidents?
>
> II. Is the lifetime disqualification of a [CDL] under *Section 1611(e)* for conviction of a major Drug Act violation rationally related to highway safety, [**676] drug trafficking deterrence, and the continued receipt of federal highway funding?
>
> III. Is the lifetime disqualification imposed under *Section 1611(e)* a civil collateral consequence of conviction for a major drug trafficking violation rather than a criminal [***10] penalty?

PennDOT's Brief at 3.

[*314] **II. ANALYSIS**[7]

A. Substantive Due Process

In PennDOT's first two issues, it challenges the trial court's determination that *Section 1611(e)* violates Appellee's right to substantive due process under the Pennsylvania Constitution. Before addressing the arguments of the parties, we begin with a discussion of due process principles. While the claim before us is grounded in the state constitution, because our cases have found guidance from the similar federal right, we offer a brief explication of that right. The *Fourteenth Amendment to the United States Constitution* provides that no state may "deprive any person of life, liberty, or property, without due process of law." *U.S. Const., amend. XIV*. The United States Supreme Court has held that this prohibition contains not only a procedural component protecting persons against arbitrary and unjust proceedings, *see, e.g., Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)* (noting that the fundamental requirement of procedural due process is notice and an opportunity to be heard), but also a substantive component protecting persons against arbitrary and unjustified laws, *see, e.g., Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)* (holding that substantive due process protected ethnically diverse spouses from statute forbidding ethnically diverse marriages); *Williamson v. Lee Optical Co., 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955)* (holding that substantive due process [***11] did not protect unlicensed eye care professionals against statute requiring licensure for preparation and sale of eyeglasses). The state counterpart is *Article I, Section 1 of the Pennsylvania Constitution*, which provides that "[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own [*315] happiness." *Pa. Const., art. I, § 1*. This Court has held that this guarantee likewise protects persons against arbitrary and unjust laws. Claims that a statute violates either the federal or state right to substantive due process are subject to the following "means-end review":

> [C]ourts must weigh the rights infringed upon by the law against the interest sought to be achieved by it, and also scrutinize the relationship between the law (the means) and that interest (the end). Where laws infringe upon certain rights considered fundamental, such as the right to privacy, the right to marry, and the right to procreate, courts apply a strict scrutiny test. Under that test, a law may only be deemed constitutional if it is narrowly tailored to

---

[6] *See* *42 Pa.C.S. § 722(7)* (providing exclusive jurisdiction to this Court in "appeals from final orders of the courts of common pleas" in "[m]atters where the court of common pleas has held invalid as repugnant to the Constitution . . . of the United States, or to the Constitution of this Commonwealth . . . any statute of . . . this Commonwealth").

[7] Because each of PennDOT's issues implicates ***Section 1611(e)***'s constitutionality, a pure question of law, our standard of review is *de novo* and our scope of review is plenary. *Robinson Twp., Washington Cnty. v. Commonwealth, 623 Pa. 564, 83 A.3d 901, 943 (Pa. 2013)*.

> a compelling state interest.
>
> Alternatively, where [***12] laws restrict . . . other rights . . . which are undeniably important, but not fundamental, . . . courts apply a rational basis test.

[**677] *Nixon, 839 A.2d at 286-87 & n.15* (collecting federal and state cases).

Thus, while statutes abridging fundamental rights are subject to strict scrutiny and are constitutional only where they are narrowly tailored to a compelling governmental interest, statutes limiting other rights are subject to a rational basis test. Notably, the federal rational basis test differs significantly from our own in terms of the degree of deference it affords to legislative judgment. The high Court has described its rational basis test, albeit in the context of a claim that a statute violated the *Fourteenth Amendment's Equal Protection Clause*, as broadly deferential:

> We many times have said . . . that rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. . . . [A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the *Equal Protection Clause* if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, [***13] a legislature that creates [*316] these categories need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. A statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do [***14] not require, rough accommodations—illogical, it may be, and unscientific.

Heller v. Doe, 509 U.S. 312, 319-21, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (citations, brackets, and quotation marks omitted).

This Court, by contrast, applies what we have deemed a "more restrictive" test. *Nixon, 839 A.2d at 287 n.15*. Specifically,

> a law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained. Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. The question whether any particular statutory provision is so related to the public good and so reasonable in the means it prescribes as to justify the exercise of the police power, is one for the [*317] judgment, in the first instance, of the law-making branch of the government, but its final determination is for the courts.

Gambone v. Commonwealth, 375 Pa. 547, 101 A.2d 634, 636-37 (Pa. 1954) (citation and [**678] footnotes omitted); *see also Nixon, 839 A.2d at 287-88 & n.15* (distinguishing the federal test from the state test). Thus, under our state charter, we must assess whether the challenged law has "a real and substantial [***15] relation" to the public interests it seeks to advance, and is neither patently oppressive nor unnecessary to these ends. Nevertheless, we bear in mind that, although whether a law is rationally related to a legitimate public policy is a question for the courts, the wisdom of a public policy is one for the legislature, and the General Assembly's enactments are entitled to a strong presumption of constitutionality rebuttable only by a demonstration that they clearly, plainly, and palpably violate constitutional requirements. *Id. at 285-86*.[8]

---

[8] The concurrence views *Gambone*'s formulation of the rational basis test as a remnant of the oft-derided "*Lochner* era" of federal substantive due process jurisprudence and inconsistent with modern jurisprudential understanding of legislative capacity and authority. Critically, however, the

Herein, PennDOT argues that the trial court erred in determining that *Section 1611(e)* was not rationally related to promoting highway safety and, in any event, in failing to recognize that it is rationally related to legitimate governmental objectives: deterring drug crime and complying with federal highway funding requirements. Specifically, PennDOT posits that *Section 1611(e)* is rationally related to promoting highway safety because it protects motorists from "operators of large [commercial motor vehicles who] exercise poor judgment and risky behavior by committing major drug offenses using motor vehicles." PennDOT's Brief at 16. PennDOT rejects the trial court's [***16] determination that a driver delivering marijuana is likely to drive cautiously as "strain[ing] credulity and miss[ing] the point": that "[t]he lifetime ban is imposed because the drug trafficking . . . while using a vehicle reflects extreme bad judgment and risky behavior and the possibility [*318] of further bad [judgment] and risky behavior when behind the wheel of a forty-ton, 100 foot long truck." *Id.* at 19. PennDOT further assails the trial court's reliance on the reasoning underlying Chief Justice Castille's concurrence in *Nixon*, asserting that whether dangerous conduct is predictive of future dangerous conduct is a question for the legislature, and further suggesting that *Nixon* is inapposite because *Section 1611(e)* is not retroactive and involves the privilege of a CDL. PennDOT also rejects the trial court's view of *Section 1611(e)*'s severity as undermining its rational connection to highway safety, arguing that variations among *Section 1611*'s disqualification provisions "only show that the program was well thought through . . . with varying sanctions based on the offense," and that the proper severity of any particular sanction is a legislative question. *Id.* at 20.

In the alternative, PennDOT offers that *Section 1611(e)* is rationally related to protecting [***17] against drug trafficking and drug use by deterring the same. To that end, PennDOT relies heavily on this Court's decision in *Plowman v. Dept. of Trans., Bureau of Driver Licensing, 535 Pa. 314, 635 A.2d 124 (Pa. 1993)* (upholding statute imposing 90-day to 2-year driver's license suspension for possession of a controlled substance as protecting against the proliferation of drug use by deterring the same).

Finally, PennDOT submits that *Section 1611(e)* is rationally related to the legitimate government objective of continuing to obtain full federal highway funding, estimating [**679] that, absent its enactment, the state would lose approximately $56.7 million in such funding in the first year and $113.4 million in subsequent years, and noting that those funds empower PennDOT to carry out its governmental duties. *See* PennDOT's Brief at 18.

Appellee, by contrast, argues that the trial court correctly found that *Section 1611(e)* was not rationally related to any legitimate governmental objective. Regarding the promotion of highway safety, Appellee, largely tracking the trial court's analysis, posits that it is "undeniable that the commission of a single drug act violation does not directly implicate highway safety" and contends that, because *Section 1611(e)* sanctions [*319] other, more dangerous behavior less severely, it is unreasonable, [***18] unduly oppressive, and patently beyond the necessities of promoting highway safety. Appellee's Brief at 6. Regarding the deterrence of drug trafficking and drug use, Appellee claims that *Section 1611(e)*'s failure to provide a graduated system of sanctions, or method for reinstatement after disqualifications, based on drug crime makes it more likely to *promote* such crime than to deter it:

> From a purely logical perspective . . . the lack of a graduated punishment scheme violates the baseline principle of proportionality. A CDL holder who is predisposed to traffic in drugs, realizing that . . . he faces the same consequences whether he moves a full trunk or a full trailer may, in fact, be incentivized to opt for the more lucrative option of using his commercial motor vehicle to transport the drugs. Alternatively, a commercial driver whose CDL has been disqualified for life may decide that he should apply his training as a truck driver to further drug trafficking; *[Section] 1611(e)* no longer has any teeth with regard to such an individual.

Id. at 8 (footnote omitted).

Finally, Appellee concedes that *Section 1611(e)* is related to, and indeed necessary to, continuing to receive federal highway funding, but asserts that sanctioning such an objective [***19] as satisfying the requirements of substantive due process undermines state constitutional guarantees:

> This argument, were it valid and taken to its logical conclusion, would permit the General Assembly to disregard the Pennsylvania Constitution in any situation, to pass any law the federal government demanded, so long as it would lead to the

---

parties do not dispute the applicability of the *Gambone* test to Appellee's challenge to ***Section 1611(e)***. Accordingly, in our view, any reconsideration of *Gambone*, and, more recently, *Nixon*, must await a future case, with developed advocacy.

> Commonwealth's receipt of federal funding. This cannot be the law. The Commonwealth of Pennsylvania must be and is limited in its actions by the Pennsylvania Constitution. An interest in the receipt of federal funding cannot, by itself, save a law that is otherwise repugnant to the Pennsylvania Constitution.

Id. at 9.

As detailed above, the question of whether *Section 1611(e)* violates the right to substantive due process under the Pennsylvania [*320] Constitution implicates an evaluation of the law's *means* — i.e., its disqualification of Appellee's holding a CDL for life — against its *ends* — i.e., its policy goals of protecting highway safety, deterring drug crime, and complying with federal highway funding requirements. Where, as here, there is no claim that the law impacts a fundamental right, we need not consider whether *Section 1611(e)* is narrowly tailored to meet a compelling governmental [***20] interest; rather, we need only determine whether it is rationally related to its interest — that is, whether it has a real and substantial relation to the public interests it seeks to advance, and is neither patently oppressive nor unnecessary [**680] to these ends. *Gambone, 101 A.2d at 636-37*.

Preliminarily, we agree with the trial court that *Section 1611(e)* is not rationally related, at least as a matter of Pennsylvania constitutional jurisprudence, to the protection of highway safety. As the trial court reasoned, the mere delivery of a controlled substance does not, by itself, pose a direct or substantial risk to highway safety. Moreover, although PennDOT's creative argument that persons who deliver controlled substances are predisposed to poor judgment and risky behavior, which inferentially includes poor judgment and risky behavior that *does* pose a risk to highway safety, might be sufficient to satisfy the federal constitution's requirements, it is too abstract and attenuated to satisfy Pennsylvania's constitutional requirements that a law bear a "real and substantial relation to the objects sought to be attained." *Id. at 637*. Indeed, PennDOT's argument in this regard ultimately rests on the proposition that persons who engage in *any* poor [***21] judgment or risky behavior are of such risk to highway safety as they might reasonably be barred from driving, a proposition we do not accept.

Furthermore, we find merit in the trial court's view that *Section 1611(e)*'s severity, relative to *Section 1611*'s other sanctions for conduct plainly more dangerous to highway safety, undermines the notion that it is rationally related to that purpose: simply stated, a law which plainly goes too far allegedly in pursuit of some legitimate purpose may reflect [*321] arbitrariness or may betray other, unspoken purposes, a principle plainly contemplated by the *Gambone* test. *See id.* ("[A] law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case. . . . Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations."). As the trial court reasoned, *Section 1611(e)* stands out as the sole provision imposing a lifetime disqualification from holding a CDL that may never be lifted, while holders of CDLs who commit traffic violations, drive under the influence of alcohol and/or drugs, or even [***22] cause negligent homicides — all plainly more dangerous, injurious, or fatal to motorists — are subject to significantly shorter-term disqualifications; even repeat offenders subject to lifetime disqualification may seek exceptions and reductions in the length of their disqualifications. Thus, as the trial court opined, *Section 1611* quizzically sanctions perhaps the least risky conduct (relative to highway safety) it regulates with the greatest severity, suggesting it is either harsh for no reason, or for some ulterior reason.

We reject PennDOT's arguments to the contrary. First, although variation in a statute's sanctions relative to particular conduct might reasonably demonstrate thorough consideration, it is not *Section 1611*'s variation which calls its relationship to highway safety into question; rather, it is the apparent disjunct between *Section 1611*'s lifetime disqualification for conduct which is not, in and of itself, dangerous to highway safety and *Section 1611*'s less onerous sanctions for conduct that poses greater risks and, in some circumstances, actually injures (or even kills) motorists. Moreover, although PennDOT is correct that, whether a particular sanction is justified for particular conduct is a legislative question [***23] in the first instance, it is beyond peradventure that the legislature's determination is subject to judicial review for compliance with constitutional requirements, including the *Gambone* test. *Id.* ("The question [of] whether any particular statutory provision is so related to the [**681] public good and so reasonable in the means it prescribes [*322] as to justify the exercise of the police power, is one for the judgment, in the first instance, of the law-making branch of the government, but its final determination is for the courts.").

Furthermore, we likewise agree with the trial court that *Section 1611(e)*'s imposition of a *lifetime* disqualification undermines its rational relationship to promoting highway safety: as Chief Justice Castille explained in *Nixon*, a law which fails to account for persons' inherent potential for rehabilitation may well be "unreasonable," "unduly oppressive," or "patently beyond the necessities of" its regulatory aims. *Id.* Presently, *Section 1611(e)* operates on the principle that one's use of a motor vehicle to deliver a controlled substance not only poses such a risk to highway safety as to justify the disqualification of his right to hold a CDL, but also an irrefutable legislative determination that [***24] he will *always* pose such a risk to highway safety as to justify the same. We agree with the trial court and Appellee that this is an unreasonable conclusion.

However, we ultimately must agree with PennDOT that the trial court overlooked the fact that *Section 1611(e)* serves the legitimate governmental purpose of deterring drug activity. As PennDOT argues, this Court's decision in *Plowman* stands for the proposition that the suspension of a driver's license is rationally related, at least as a matter of federal constitutional jurisprudence,[9] to protecting against the conduct giving rise to the suspension — therein, possession of a controlled substance — by deterring it. *See* Plowman, 635 A.2d at 127 ("[T]he prospect of losing one's driver's license may deter a potential drug user from committing [a] drug offense. At least, that potential user may consider the loss of his/her license and its effect on employment and transportation prior to committing a drug offense."). We find this rationale persuasive as a matter of Pennsylvania constitutional jurisprudence as well. Plainly, just as the suspension of a driver's license for [*323] possession of a controlled substance might influence a would-be possessor of drugs not to possess them, [***25] *Section 1611(e)*'s lifetime disqualification from holding a CDL for delivery of a controlled substance while using a motor vehicle might influence a would-be drug trafficker not to traffic drugs or, at minimum, to do so without a vehicle. Appellee's argument to the contrary — that *Section 1611(e)*'s lack of a graduated system of sanctions actually incentivizes would-be drug traffickers to traffic larger quantities of drugs at a single time — is too clever by half: the question is not whether the statute bears a real and substantial relationship to persuading drug traffickers to minimize the amount of contraband they are carrying, but, rather, to persuading holders of CDLs to avoid drug trafficking altogether.[10] We find that the legislature was free to conclude that it might.[11]

[**682] Accordingly, we hold that *Section 1611(e)* does not violate Appellee's Pennsylvania constitutional right to substantive due process.

B. Cruel and Unusual Punishments

In PennDOT's final issue, it challenges the trial court's determination that *Section 1611(e)* violates the federal and Pennsylvania constitutional prohibitions on cruel and unusual punishments. The Eighth Amendment to the United States Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and [***26] unusual punishments inflicted." U.S. Const., amend. VIII.[12][13] Although [*324] the latter

---

[9] In *Plowman*, the parties agreed that the federal and Pennsylvania constitutional guarantees of substantive due process were coterminous. Notably, Plowman was decided before *Nixon*, which dispelled that notion. *See* Nixon, 839 A.2d at 287 n.15.

[10] Moreover, taking Appellee's argument to its natural end, a statute's failure to provide gradations (or gradations within those gradations) in its sanctions would similarly render it an irrational deterrent, essentially requiring that the legislature invent a vast spectrum of sanctions for an equally vast panoply of circumstances attendant prohibited conduct. We do not view the due process clause as imposing such a requirement.

[11] Because we find that ***Section 1611(e)*** is rationally related to the legitimate governmental interest of deterring drug trafficking, we need not consider whether its relationship to federal highway funding requirements is sufficient to satisfy the requirements of Pennsylvania's substantive due process doctrine.

[12] This prohibition applies to both the federal government and, via the Fourteenth Amendment's guarantee of due process, to state governments. *See* Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976); Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976); Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

[13] Similarly, Article I, Section 13 of the Pennsylvania Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Pa. Const., art. I, § 13. Because the parties proceed from the view that the Eighth Amendment and Article I, Section 13 are coextensive and present arguments predicated only on Eighth Amendment jurisprudence, we consider only the Eighth Amendment's prohibition on cruel and unusual

clause is limited, by its terms, to "punishments," the trial court and the parties differ as to that term's scope. Below, the trial court analyzed Appellee's claim under the *Mendoza-Martinez* factors, concluding that *Section 1611(e)* constitutes punishment, and, before us, PennDOT advocates the same approach. Appellee, by contrast, argues that the trial court's application of the factors was flawed, and, in the alternative, contends that *Section 1611(e)* is punishment pursuant to the high Court's decision in *Austin v. United States, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993)*, which held that the term extends to any sanction intended, at least in part, to punish or deter criminal conduct.

After careful review, we agree with Appellee that *Austin* provides the appropriate framework and that *Section 1611(e)* constitutes punishment because it, at least in part, exacts retribution or deters crime. Admittedly, the high Court has long employed the *Mendoza-Martinez* framework in myriad areas of federal constitutional jurisprudence, arguably including *Eighth Amendment* jurisprudence, to determine whether a formally civil sanction is functionally punitive in nature. *See, e.g., Trop v. Dulles, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958)* (plurality) (considering claim that punishing military deserters with expatriation violated [***27] the *Eighth Amendment's* prohibition on cruel and unusual punishments and applying a purpose-based standard presaging the *Mendoza-Martinez* framework); *United States v. Ward, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980)* (considering claim that formally [*325] civil penalties imposed for spilling oil into navigable waters were functional criminal punishments, implicating the *Fifth Amendment's* privilege against self-incrimination and applying the *Mendoza-Martinez* framework); *Smith v. Doe, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003)* (considering claim that sexual offender registration requirements were [**683] functional criminal punishments implicating the federal constitutional *Ex Post Facto Clause* and applying the *Mendoza-Martinez* framework).

However, it is apparent that *Austin* retreated from that practice in the context of *Eighth Amendment* challenges. In *Austin*, the court considered a claim that a state civil forfeiture law violated the *Eighth Amendment's* prohibition on excessive fines, and the government argued that the statute's civil sanctions were not "punishment" according to the *Mendoza-Martinez* factors, and, thus, were outside the *Eighth Amendment's* scope. *Austin, 509 U.S. at 604-607*. The high Court first rejected the government's premise that *Mendoza-Martinez* defined that scope as inconsistent with the fact that the text and history of the *Eighth Amendment*, unlike that of other constitutional prohibitions, drew no distinction between civil and criminal "punishment": [***28]

> Some provisions of the *Bill of Rights* are expressly limited to criminal cases. The *Fifth Amendment's Self-Incrimination Clause*, for example, provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." The protections provided by the *Sixth Amendment* are explicitly confined to "criminal prosecutions." The text of the *Eighth Amendment* includes no similar limitation.
>
> Nor does the history of the *Eighth Amendment* require such a limitation. Justice [O'Connor] noted in [*Browning Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)*]: "Consideration of the *Eighth Amendment* immediately followed consideration of the *Fifth Amendment*. After deciding to confine the benefits of the *Self-Incrimination Clause* of the *Fifth Amendment* to criminal proceedings, the Framers turned their attention to the *Eighth Amendment*. There [*326] were no proposals to limit that Amendment to criminal proceedings." [The *Eighth Amendment's* predecessor,] Section 10 of the English Bill of Rights of 1689 is not expressly limited to criminal cases either. The original draft of § 10 as introduced in the House of Commons did contain such a restriction, but only with respect to the bail clause: "The requiring excessive Bail of Persons committed in criminal Cases, and imposing excessive Fines, and illegal Punishments, to be prevented." The absence of any similar restriction in the other two clauses suggests that they were not limited to criminal cases. In the final version, even the reference [***29] to criminal cases in the bail clause was omitted.

Id. at 607-609 (citations and quotation marks omitted). Moreover, the court intimated that such a distinction was inconsistent with the *Eighth Amendment's* purpose of "limit[ing] the government's power to punish":

---

punishments herein. *But see Commonwealth v. Baker, 621 Pa. 401, 78 A.3d 1044, 1056 (Pa. 2013) (Castille, C.J.*, concurring) (offering distinctions between the *Eighth Amendment* and *Article I, Section 13*); *Commonwealth v. Eisenberg, 626 Pa. 512, 98 A.3d 1268, 1282-83 (Pa. 2014)* (same).

> The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. Thus, the question is not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment.

Id. at 609-10 (citations and quotation marks omitted). In a footnote, the court sharpened the point, observing that the government's reliance on *Mendoza-Martinez* (and *Ward*) was "misplaced":

> The question in those cases was whether a nominally civil penalty should be reclassified as criminal and the safeguards that attend a criminal prosecution should be required. . . . In addressing the separate question whether punishment [**684] is being imposed, the Court has not employed the tests articulated in *Mendoza-Martinez* and *Ward.* Since in this case we deal only with [***30] the question whether the *Eighth Amendment's Excessive Fines Clause* applies, we need not address the application of those tests.

[*327] *Id. at 610 n.6* (some citations and quotation marks omitted). Finally, the Court explained the proper scope of *Eighth Amendment* "punishment" as including sanctions intended in any respect to exact retribution for, or to deter, conduct:

> We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the *Excessive Fines Clause*. We, however, must determine that it can only be explained as serving in part to punish. . . . [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

Id. at 610.

Thus, following *Austin*, although *Mendoza-Martinez* remains salient for determining whether a formally civil sanction is functionally a criminal punishment, implicating constitutional rights attendant criminal proceedings, it is inapplicable in determining whether a sanction is, for purposes of the *Eighth Amendment*, "punishment," which includes all civil or criminal sanctions that serve retributive or deterrent purposes to any degree.[14]

---

[14] In her Concurring and Dissenting Opinion, Justice Mundy notes that this formulation of the *Eighth Amendment's* scope in *Austin* derives from *Halper*, and that the Court in *Halper* adopted two contrary tests for determining if a civil sanction is punishment within the meaning of the federal constitutional prohibition on double jeopardy: (1) that only solely remedial sanctions are not punishment; and (2) that only solely deterrent sanctions are punishment. *See* Concurring and Dissenting Opinion (Mundy, J.), at 2-4. Justice Mundy contends that the high Court in *Hudson v. United States, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997)* — a double jeopardy case — retreated from the former test in favor of the latter, on the ground that the former test would designate virtually all civil sanctions as punishment. *See* Concurring and Dissenting Opinion (Mundy, J.), at 4-5. Justice Mundy urges that this Court should similarly retreat from the former test for purposes of determining whether a civil sanction is punishment within the meaning of the constitutional prohibition on cruel and unusual punishments, reiterating that a contrary holding would designate virtually all civil sanctions as punishment within the meaning of that constitutional prohibition. *Id.* at 5.

Respectfully, we view *Austin*'s pronouncement that civil sanctions intended at least in part to occasion deterrence or retribution are punishment for *Eighth Amendment* purposes as authoritative notwithstanding *Hudson [***31]* , and appropriately situated to that context in light of the differences, detailed in *Austin*, between double jeopardy and cruel and unusual punishment doctrine. *See Austin, 509 U.S. at 607-10*. Preliminarily, *Hudson* was a double jeopardy case, not an *Eighth Amendment* case, and thus, unsurprisingly, *Austin*'s pronouncement was not overruled in *Hudson*. Moreover, as the court explained in *Austin*, while the constitutional restrictions on double jeopardy apply only to "criminal" punishments — rendering *Hudson*'s focus on solely deterrent civil sanctions an arguably appropriate benchmark — the constitutional prohibition on cruel and unusual punishments applies to all punishments, justifying a focus on sanctions with any deterrent effect. Indeed, in *Hudson* and subsequent cases, the high Court has highlighted the distinction and contemplated that the scope of the civil sanctions implicating the prohibition on double jeopardy was narrower than that for the *Eighth Amendment* prohibition on cruel and unusual punishments. *See Hudson, 522 U.S. at 102* (opining that double jeopardy doctrine need not be so broad in light of the more expansive scope of other provisions, including the *Eighth Amendment*, citing *Austin*); *United States v. Ursery, 518 U.S. 267, 286, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1998)* (noting that *Austin* did not involve double jeopardy and that the court has never understood the scope of the *Eighth Amendment* as "parallel to, or even related to" the constitutional prohibition on double jeopardy); *United States v. Bajakajian, 524 U.S. 321,*

[*328] Applying *Austin*, it is clear that *Section 1611(e)* is punishment. Even assuming *arguendo* [**685] that *Section 1611(e)* is not [*329] intended to exact retribution against felony drug offenders, it is unquestionably meant to deter drug crime. Indeed, as noted *supra*, *Section 1611(e)* derives from the Commercial Motor Vehicle Safety Act of 1986, which was itself a constituent part of the Anti-Drug Abuse Act of 1986, P.L. No. 99-570, 100 Stat. 3207, legislation directed at curtailing drug cultivation, trafficking, and abuse, among other purposes. *See id.* Plainly, *Section 1611(e)* deters drug crime not only by preventing persons previously convicted of drug offenses (who are presumed to be likely to commit the same offenses again) from using commercial motor vehicles to engage in drug trafficking, but also, as detailed above, by attempting to influence holders of CDLs not to engage in drug crime in the first instance — *i.e.*, deterring them.[15]

[*330] Nevertheless, that determination does not answer the question of [**686] whether *Section 1611(e)* is a *cruel and unusual* punishment. A claim that a particular punishment is cruel and unusual is evaluated according to the tripartite test set forth in *Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983)*, which this Court has described as follows:

> The *Eighth Amendment* does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences which are grossly disproportionate to the crime. . . .
>
> . . . The [*Solem* test] examines: (i) the gravity of the offense and the harshness of the penalty; (ii) the

---

329 & n.4, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (rejecting the government's argument that an *in personam* forfeiture of cash was not a punishment because forfeiture also served remedial purposes, opining that, even if it did serve remedial purposes, "the forfeiture would still be punitive in part").

In addition, we note that *Austin* does not sweep all civil sanctions within its ambit, but, rather, only those intended, at least in part, to incentivize primary conduct. For example, although a driver's license suspension predicated on a motorist's driving under the influence of alcohol is plainly intended both to protect the community from a potentially inebriated motorist *and* to incentivize the motorist not to drive under the influence in the future, a driver's license suspension predicated on a motorist's inability to pass a vision exam is intended only to protect the community, not to incentivize the driver to have better vision. *Compare 75 Pa.C.S. §§ 3801-3804 with 67 Pa. Code § 83.3*. Contrariwise, we note that virtually all sanctions, including imprisonment, which are unquestionably punishment, have a remedial component in that they are ultimately intended to remove dangerous individuals from, or ameliorate the risk of danger to, society and to provide for the rehabilitation of offenders. The high Court has not embraced an interpretation of the *Eighth Amendment* that would permit punishments to be inflicted in a manner grossly disproportionate to the underlying offenses simply because they are also meant to achieve non-punitive, non-deterrent ends.

[15] In her Concurring and Dissenting Opinion, Justice Mundy notes that, in *Plowman, supra*, this Court previously determined that a driver's license suspension predicated on a drug offense is not a punishment for *Eighth Amendment* purposes. Concurring and Dissenting Opinion (Mundy, J.), at 1-2 (citing *Plowman, supra*). Respectfully, this Court's discussion of the issue was as follows, *in toto*:

> Finally, Appellee argues, as she successfully did before the trial court, that the mandatory suspension of one's driver's license as a civil sanction for a drug conviction constitutes "cruel and unusual punishment" under both the *Eighth Amendment to the United States Constitution* [***32] and *Article 1, Section 13 of the Pennsylvania Constitution.* The underpinning for her position is that the suspension of her license is a criminal penalty. Because we disagree with her characterization of the sanction imposed, we cannot accept her conclusion. (Although [the statute providing for the suspension] is included in the Crimes Code, that, in and of itself, does not make the penalty imposed a criminal punishment.) [The statute] is merely a civil consequence of a criminal violation. Furthermore, no discretion exists in its application as PennDOT is required to suspend a driver's license upon proper notification of a conviction. For these reasons, we hold that *Section 13(m)* of the Act does not violate either the *Eighth Amendment of the United States Constitution* or *Article 1, Section 13 of the Pennsylvania Constitution.*

Plowman, 635 A.2d at 127-28. Additionally, in a footnote, we remarked that, even if we were to find the suspension to be a criminal punishment, we would find that it was not grossly disproportionate to the underlying offense or arbitrarily inflicted for the purpose of causing pain and suffering. *Id. at 127 n.3*.

Thus, the court's substantive analysis of the issue was a mere two sentences long, did not support its determination that the license suspension was not punishment by resort to any legal authority, made no mention of *Austin* (or any other governing case), and was buttressed by an alternative holding that the sanction was not cruel and unusual. Accordingly, we are inclined to find *Plowman* of little precedential value on this point, particularly in light of *Austin*'s apparent reformulation of the principles attendant the scope of the constitutional prohibition on cruel and unusual punishments.

> sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. . . . [A] reviewing court is not obligated to reach the second and third prongs of the test unless a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.

Commonwealth v. Baker, 621 Pa. 401, 78 A.3d 1044, 1047 (Pa. 2013) (internal quotation marks omitted). Additionally, in *Commonwealth v. 1997 Chevrolet & Contents Seized from Young, 639 Pa. 239, 160 A.3d 153, 2017 WL 2291733 (Pa. 2017)*, this Court recently expounded further on the appropriate considerations attendant a determination of whether a sanction constituting *Eighth Amendment* "punishment" — [***33] there, civil forfeiture of instrumentalities of crime — is grossly disproportionate to the related crime. Specifically, noting that the United States Supreme Court has largely left it to lower courts to further develop the intricacies of the gross disproportionality inquiry, we catalogued myriad factors relevant to determining the harshness of a particular penalty — including, *inter alia*, the objective and subjective value of the property forfeited to the owner and [*331] third parties, such as whether forfeiture would deprive the property owner of his livelihood — as well as factors salient in determining the gravity of an offense — including, *inter alia*, the nature of the offense, the offender's sentence as compared to the maximum available sentence for the offense, the regularity of the defendant's criminal conduct, and any actual harm arising from the offense other than a "generalized harm to society." *Id. at 192, 2017 WL 2291733 at *27*.

Finally, the question of whether a particular punishment is appropriate to a particular crime "[b]elong[s] in the first instance to the legislature." *Bajakajian, 524 U.S. at 336* (citing *Solem, 463 U.S. at 290* ("Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining [***34] the types and limits of punishments for crimes.")). Consistent with that admonition, the high Court has offered the following summary of its "gross disproportionality" decisions:

> Under this approach, the Court has held unconstitutional a life without parole sentence for the defendant's seventh nonviolent felony, the crime of passing a worthless check. *Solem*[, *supra*]. In other [**687] cases, however, it has been difficult for the challenger to establish a lack of proportionality. A leading case is *Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)*, in which the offender was sentenced under state law to life without parole for possessing a large quantity of cocaine. A closely divided Court upheld the sentence. . . . Again closely divided, the Court rejected a challenge to a sentence of 25 years to life for the theft of a few golf clubs under California's so-called three-strikes recidivist sentencing scheme. *Ewing v. California, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003)*; see also *Lockyer v. Andrade, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)*. The Court has also upheld a sentence of life with the possibility of parole for a defendant's third nonviolent felony, the crime of obtaining money by false pretenses, *Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)*, and a sentence of 40 years for [*332] possession of marijuana with intent to distribute and distribution of marijuana, *Hutto v. Davis, 454 U.S. 370, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982)* (*per curiam*).

Florida v. Graham, 560 U.S. 48, 59-60, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

Turning to the instant case, we [***35] find that the record is insufficiently developed to determine whether *Section 1611(e)*'s application to Shoul was grossly disproportionate to his crime, particularly in light of our intervening decision in *1997 Chevrolet*. Notably, the evidentiary record contains little detail concerning the facts of Shoul's offense, the impact of the loss of his CDL, his sentence as compared to the maximum sentence he faced, or the actual harmful consequences resulting from his offense. Moreover, neither the trial court, nor Appellee in his brief, have offered meaningful analysis of the issue. Indeed, the trial court appeared to erroneously conclude that its threshold determination that *Section 1611(e)* was "punishment" within the meaning of the *Eighth Amendment* was dispositive of Appellee's claim, and, although it remarked in its analysis of Appellee's substantive due process claim that *Section 1611(e)* appeared excessive to the purpose of protecting highway safety and excessive in comparison to *Section 1611*'s other sanctions, it did not recite or apply the *Solem* test in any respect. Appellee, likewise terse, baldly argues in his appellate brief that *Section 1611(e)*'s "imposition of an eternal ban from practicing one's profession is grossly disproportionate to the severity of a single drug [***36] act violation," and offers no substantive reasoning in support of that

allegation. Appellee's Brief at 18-19.[16] Moreover, insofar as the proceedings below pre-dated *1997 Chevrolet*, neither the parties nor the lower court had the benefit of its guidance to develop a comprehensive exposition of the harshness of *Section 1611(e)*'s application to Shoul or the severity of his offense, or to weigh one against the other. In our view, in light of the bare record, and our [*333] refinement of the gross disproportionality standard in *1997 Chevrolet*, the appropriate course is to vacate the trial court's order and remand to that court for further proceedings on the question of whether *Section 1611(e)*'s sanction is grossly disproportionate to Shoul's offense.

III. CONCLUSION

Accordingly, we reverse the trial court's order insofar as it held that *Section 1611(e)* [**688] violates the Pennsylvania constitutional right to substantive due process, we vacate the trial court's order insofar as it held that *Section 1611(e)* violates the federal and state constitutional prohibitions on cruel and unusual punishment, and we remand to the trial court for further proceedings consistent with this opinion.

Jurisdiction relinquished.

Chief Justice Saylor and Justice Donohue join the opinion [***37] in full.

Justice Wecht joins Parts I, II(B), and III of the opinion and files a concurring opinion.

Justice Dougherty joins Parts I and II(B) of the opinion and files a concurring and dissenting opinion in which Justice Baer joins.

Justice Mundy joins Parts I and II(A) of the opinion and files a concurring and dissenting opinion.

Concur by: WECHT; DOUGHERTY; MUNDY

Concur

CONCURRING OPINION

JUSTICE WECHT

I join in full the learned Majority's analysis of Shoul's cruel and unusual punishment challenge. I concur in the result reached by the Majority in its rejection of Shoul's substantive due process challenge. However, I disagree respectfully with the Majority's analysis of substantive due process under the Constitution of the Commonwealth of Pennsylvania.

[*334] The Majority correctly employs a rational basis test in evaluating Shoul's due process claim, reaffirming that a commercial driver's license is a privilege and not a fundamental right. *Plowman v. Pa. Dep't of Transp., Bureau of Driver Licensing, 535 Pa. 314, 635 A.2d 124, 126 (Pa. 1993)* ("Since a driver's license is a privilege and not a fundamental right, legislation affecting it must be evaluated under a 'rational basis' analysis.").[1] Moreover, even if we accept Shoul's argument that the revocation of his commercial license impacts his right to choose his profession, [***38] "the right to practice a chosen profession is subject to the lawful exercise of the power of the State to protect the public health, safety, welfare, and morals by promulgating laws and regulations that reasonably regulate occupations." *Khan v. State Bd. of Auctioneer Exam'rs, 577 Pa. 166, 842 A.2d 936, 946 (Pa. 2004)*. Accordingly, the rational basis test undoubtedly applies.

---

[16] Appellee also contends that ***Section 1611(e)*** "runs contrary to public policy," in that it stigmatizes former offenders. Appellee's Brief at 19 (citing *Secretary of Revenue v. John's Vending Corp., 453 Pa. 488, 309 A.2d 358, 362 (Pa. 1973)*). Appellee's contention in this regard is outside the scope of the issues raised in this appeal.

[1] It is well-established that driving is merely a privilege subject to reasonable regulation by the state. *See Plowman v. Com., Dep't of Transp., Bureau of Driver Licensing, 535 Pa. 314, 635 A.2d 124, 126 (Pa. 1993)* ("Operating a motor vehicle upon a Commonwealth highway is not a property right but a 'privilege.' As such, the Commonwealth has the right to control and regulate its use. However, such regulation must be tempered by adherence to the precepts of due process of law.") (citations omitted); *Commonwealth v. Funk, 323 Pa. 390, 186 A. 65, 67-68 (Pa. 1936)* ("The permission to operate a motor vehicle upon the highways of the [C]ommonwealth is not embraced within the term civil rights . . . . Although the privilege may be a valuable one, it is no more than a permit granted by the state, its enjoyment depending upon compliance with the conditions prescribed by it, and subject always to such regulation and control as the state may see fit to impose."); *accord Hess v. Pawloski, 274 U.S. 352, 356, 47 S. Ct. 632, 71 L. Ed. 1091 (1927)* ("In the public interest the state may make and enforce regulations reasonabl[y] calculated to promote care on the part of all, residents and nonresidents alike, who use its highways.").

However, that test, as it has developed in Pennsylvania, is amorphous and subject to inconsistent application. The problem stems from this Court's continued reliance upon *Gambone v. Commonwealth, 375 Pa. 547, 101 A.2d 634 (Pa. 1954)*. The language from *Gambone* that is jurisprudentially problematic reads as follows:

> [**689] By a host of authorities, . . . Federal and State alike, it has been held that a law which purports to be an exercise of the [*335] police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained. Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. The question whether any particular statutory provision is so related to the public good and so reasonable [***39] in the means it prescribes as to justify the exercise of the police power, is one for the judgment, in the first instance, of the law-making branch of the government, but its final determination is for the courts.

Gambone, 101 A.2d at 636-37 (footnotes omitted).[2]

And so was planted the notion that we judges are to weigh the "reasonableness" of statutes. This was more than a little bit of *Lochner*-izing.[3] And yet, *Gambone* continues to receive uncritical citation, and so, the precedent creeps on.

[*336] True it is that *Gambone* was decided in 1954, a time when the constitutional standards for analyzing due process claims still were being formed. *See generally* David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, *83 Wash. U. L.Q. 1469 (2005)* (discussing the historical impact of *Lochner* on due process jurisprudence). *Lochner* and cases of its genre were decided in an era during which the Supreme Court of the United States, under the guise of protecting economic rights, actively struck down state laws because it disagreed with the economic theory or opinion [***40] of the legislatures that passed those statutes. *See Sorrell v. IMS Health Inc., 564 U.S. 552, 591-92, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011)* (Breyer, J., dissenting) ("[In the *Lochner*] era . . . judges scrutinized legislation for its interference with economic liberty. History shows that the power was much abused and resulted in the constitutionalization of economic theories preferred by individual jurists."); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 589, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) (Rehnquist, J.*, dissenting) ("[In the *Lochner* era,] it was common practice for [**690] this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies.").[4]

---

[2] In *Gambone*, this Court reviewed a state and federal due process challenge to a Pennsylvania statute that prohibited display of price signs in measuring in excess of twelve square inches at or adjacent to gasoline stations.

[3] *See Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905)*. The language of *Gambone* mirrors that of earlier United States Supreme Court decisions from what has been deemed the "*Lochner* era." *See, e.g.*, *Adair v. United States, 208 U.S. 161, 178, 28 S. Ct. 277, 52 L. Ed. 436, 5 Ohio L. Rep. 605 (1908)* ("[A]ny rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some *real or substantial relation* to or connection with the commerce regulated.") (emphasis added); *Chicago, B. & Q. Ry. Co. v. Illinois, 200 U.S. 561, 593, 26 S. Ct. 341, 50 L. Ed. 596 (1906)* ("If the means employed have no *real, substantial relation* to public objects which government may legally accomplish,—if they are arbitrary and unreasonable, *beyond the necessities of the case*,—the judiciary will disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action.") (emphasis added); *Mugler v. Kansas, 123 U.S. 623, 661, 8 S. Ct. 273, 31 L. Ed. 205 (1887)* ("If . . . a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has *no real or substantial relation* to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.") (emphasis added).

[4] During the "New Deal," the United States Supreme Court shifted toward its modern, deferential approach to substantive due process. The *Lochner* era's end is generally associated with the High Court's decision in *West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937)*, wherein the Court upheld a minimum wage law in a departure from earlier cases in which it had found such laws to violate due process by interfering with the freedom of contract. In *Parrish*, the Court stated as follows:

> Liberty under the Constitution is . . . necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.

It was not until the year following this Court's decision in *Gambone* that the United States Supreme Court finally interred *Lochner's* economic substantive due process doctrine. [*337] In *Williamson v. Lee Optical of Oklahoma Inc., 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955)*, the High Court observed that "[t]he day [***41] is gone when this Court uses the *Due Process Clause of the Fourteenth Amendment* to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Id. at 488*. The High Court explained that "[a] law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Id. at 487-88*. This is the rational basis test as it is commonly understood, at least at the federal level. *See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976)* ("[T]he burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."); *Richardson v. Belcher, 404 U.S. 78, 84, 92 S. Ct. 254, 30 L. Ed. 2d 231 (1971)* ("If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the *Due Process Clause of the Fifth Amendment*."); *Ferguson v. Skrupa, 372 U.S. 726, 731-32, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963)*; *Heffner v. Murphy, 745 F.3d 56, 79 (3d Cir. 2014)* (citing, *inter alia, United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980))* ("Under rational basis review, a statute withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature could rationally conclude was served by the statute. . . . A governmental [***42] interest that is asserted to defend against a substantive due process challenge need only be plausible to pass constitutional muster; we do not second-guess legislative choices or inquire into whether the stated motive actually motivated the legislation.") (internal citations and quotation marks omitted).

Oddly enough, as the federal courts evolved toward a "rational relationship" standard, this Court nonetheless has persisted [*338] in employing the language of *Gambone* to superintend legislation, sometimes striking laws and at other times upholding them. *Compare Nixon v. Commonwealth, 576 Pa. 385, 839 A.2d 277, 290 (Pa. 2003)* (holding [**691] that Act 13 did not have "real and substantial relationship" to Commonwealth's interest in protecting elderly individuals from victimization, and thus, Act 13 violated employees' due process right to pursue particular occupation) *and Pa. State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487, 494 (Pa. 1971)* (holding that statute making it unlawful for pharmacist to advertise prices of dangerous or narcotic drugs bore "no substantial relation" to objects sought to be obtained by its enactment) *with Khan, 842 A.2d at 947* ("As long as there is a basis for finding that the statute is rationally related to a legitimate state interest, the statute must be upheld."); *Laudenberger v. Port Auth. of Allegheny Cnty., 496 Pa. 52, 436 A.2d 147, 156-57 (Pa. 1981)* ("The touchstone of substantive due process . . . is [***43] whether the law in question is *rationally related* to a legitimate state goal") (emphasis added) *and Adler v. Montefiore Hosp. Ass'n of W. Pennsylvania, 453 Pa. 60, 311 A.2d 634, 642 (Pa. 1973)* ("As the reasonableness of the challenged policy is amply supported by the record, we find no Due Process violation.").

Although our decisions relying upon *Gambone* purport to apply the rational basis test, the plain language of *Gambone* departs significantly from the teachings of the modern federal cases. We confronted this discrepancy in *Nixon*. In the face of the Commonwealth's argument for a more deferential rational basis test, *i.e.*, "the rational basis test used in equal protection challenges and in due process challenges brought under the United States Constitution," *Nixon, 839 A.2d at 288 n.15*, we insisted that "[a]lthough the due process guarantees provided by the Pennsylvania Constitution are substantially coextensive with those provided by the *Fourteenth Amendment*, a more restrictive rational basis test is applied under [the Pennsylvania] Constitution." *Id.*

But why? *Nixon* based its reasoning on nothing other than *Pastor, 272 A.2d at 490-91* (observing that "Pennsylvania . . . has scrutinized regulatory legislation perhaps more closely than would the Supreme Court of the United States."), a 1971 [*339] opinion which was guided by *Gambone* and other earlier cases. [***44] Thus, *Nixon* merely circles back to the same *Lochner* deficiency. It is time to acknowledge that this less deferential test is imprudent. It is undoubtedly true that our judicial role empowers us (and, when called upon, requires us) to assess the constitutionality of laws passed by the legislature. But we are not authorized to judge the necessity or expediency of those laws. It is equally true of this Court as it is of the federal courts

---

Id. at 391-92 (quoting *Chicago, B. & Q. Ry. Co. v. McGuire, 219 U.S. 549, 565, 31 S. Ct. 259, 55 L. Ed. 328 (1911))*.

that we do not "sit as a superlegislature to weigh the wisdom of legislation, and we [should] emphatically refuse to go back to the time when courts used the Due Process Clause to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought." Ferguson, 372 U.S. at 731-32 (footnotes and internal quotation marks omitted). I am confident that, *Gambone* notwithstanding, most Pennsylvania jurists have long since forsaken *Lochner* and have long understood our duty to defer to the General Assembly when analyzing laws that impact ordinary rights and privileges.[5]

[**692] In point of fact, this Court has embraced a more deferential approach to due process in several decisions both before and since *Nixon*. *See* Driscoll v. Corbett, 620 Pa. 494, 69 A.3d 197, 215 (Pa. 2013) ("The mandatory retirement provision for judicial officers is subject to deferential, rational-basis review under both equal protection and due process, and it satisfies that [*340] standard."); Commonwealth v. Duda, 592 Pa. 164, 923 A.2d 1138, 1151 (Pa. 2007) ("[I]n evaluating [a Due Process challenge], we employ the rational basis test, under which a statutory classification will be upheld so long as it bears a reasonable relationship to accomplishing a legitimate state purpose. In undertaking this analysis, courts are free to hypothesize grounds the Legislature might have had for the classification.") (citation omitted); *Commonwealth v. Burnsworth, 543 Pa. 18, 669 A.2d 883, 889 (Pa. 1995)* ("To [perform the rational basis analysis], we have set forth a two[-]step approach. First, we must [***46] determine whether the challenged statute is designed to further a legitimate state interest or public value. If it is, we must then determine whether the statute is reasonably related to accomplishing the articulated state interest. Essentially, we must address whether the statute has some relationship to the interest which the legislature seeks to promote and whether that relationship is reasonable.") (citations omitted).[6]

Although we are of course the arbiters of constitutionality, we do no violence to that role when we defer prudentially to [*341] legislative policymaking. The *Gambone/Nixon* standard validates and encourages judicial overstepping, allowing courts to usurp the legislative role and to strike down laws merely because they are imperfect, unwise, or under-inclusive. Surely, some very large proportion of legislative work could fall within one or more of these categories. But republican democracy is a messy business. It is time to cease adherence [**693] to the outdated and overbroad language of *Gambone* in applying the rational basis test in Pennsylvania.

---

[5] This view is, of course, not limited to Pennsylvania jurists. Interestingly, Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit—the son-in-law of *Gambone's* author, Chief Justice Horace Stern—once authored a draft opinion, never published because the case became moot, in which he also endorsed a deferential judicial approach:

> The contest on this, as on other issues where there is determined opposition, must be fought out through the democratic process, not by utilizing the courts as a way of overcoming [***45] the opposition[,] . . . clearing the decks, [and] thereby enabl[ing] legislators to evade their proper responsibilities. Judicial assumption of any such role, however popular at the moment with many high-minded people, would ultimately bring the courts into the deserved disfavor to which they came dangerously near in the 1920's and 1930's.

A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion*, 29 Harv. J.L. & Pub. Pol'y 1035, 1042 (2006) (alterations in original).

[6] The cases are legion. *See* Plowman, 635 A.2d at 127 ("As to the second prong of the rational basis test, we need not specifically conclude that the subject statute will be absolutely successful in accomplishing its objective. The legislation must bear a rational relationship to the interest that the legislature seeks to promote. In analyzing any statute under the 'rational basis test,' we must determine whether the legislation has some relationship to the identified state interest and whether that relationship is objectively reasonable. . . . To satisfy this prong, however, it is enough that we identify potential benefits to our citizens as a result of the promulgated legislation."); Commonwealth v. Mikulan, 504 Pa. 244, 470 A.2d 1339, 1342 (Pa. 1983) ("[I]t is beyond dispute that the General Assembly has a compelling interest in protecting the health and safety of the travelers upon our highways and roads against the ravage caused by drunken drivers, and that the means chosen to serve that interest . . . is rationally and reasonably related to achievement of that legitimate goal.") (emphasis omitted); Mikulan, 470 A.2d at 1348 (Zappala, J. concurring) ("[T]he statute in question has a rational relationship to a valid state objective. The requirements of due process have clearly been met to the extent that the legislature has acted in an area properly the subject of its police power, and has not done so arbitrarily."); Laudenberger, 436 A.2d at 157 (citing Rogin v. Bensalem, 616 F.2d 680 (3d Cir. 1980)) ("The touchstone of substantive due process, as with equal protection, is whether the law in question is rationally related to a legitimate state goal, or whether the state action arbitrarily works to deny an individual of life, liberty, or property.").

Justice Oliver Wendell Holmes, Jr. dissented in *Lochner*. As usual, Justice Holmes put it better than others could, then or now:

> This [***47] case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post [O]ffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The *14th Amendment* does not enact Mr. Herbert Spencer's Social Statics. [***48] The other day we sustained the Massachusetts vaccination law . . . . United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. Two years ago we upheld the prohibition of sales of stock on margins, or for future delivery, in the Constitution of California. The [*342] decision sustaining an eight-hour law for miners is still recent. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.
>
> General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far [***49] toward the end. Every opinion tends to become a law. I think that the word 'liberty,' in the *14th Amendment*, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

Lochner, 198 U.S. at 75-76 (Holmes, J., dissenting) (citations omitted).[7] More recently, Justice John Paul Stevens recalled his former colleague, Justice Thurgood Marshall, explaining the constitutional standard succinctly: "The Constitution does not prohibit legislatures [**694] from enacting stupid laws." *N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 209, 128 S. Ct. 791, 169 L. Ed. 2d 665 (2008)* (Stevens, J., concurring). They have done so before. They will do so again. They have that right, and they answer to the electorate for its exercise.

The more deferential standard has been recognized by venerated American jurists and wisely embraced at the federal [*343] level. I cannot endorse the Majority's adherence to the *Gambone* standard as interpreted by *Nixon*. I agree with the Majority's ultimate conclusion that *75 Pa.C.S. § 1611(e)* does not violate due process because it is rationally related to the legitimate state interest of deterring [***50] drug-trafficking. But, in my view, the Majority's analytical route to that result countenances undue encroachment upon legislative prerogative. While I recognize that *Gambone* and *Nixon* remain on the books, this Court should abandon those precedents and embrace the federal rule that Justice Holmes foreshadowed more than a century ago.

Dissent by: DOUGHERTY; MUNDY

Dissent

CONCURRING AND DISSENTING OPINION

---

[7] *See also* Letter from Oliver Wendell Holmes, Jr., to Harold J. Laski, (Mar. 4, 1920), *in Holmes-Laski Letters*, at 249 (Mark DeWolfe Howe ed., vol. 1) (1953) ("[I]f my fellow citizens want to go to Hell I will help them. It's my job.").

JUSTICE DOUGHERTY

I agree with the learned majority's application of the rational basis test as articulated by this Court in *Gambone v. Commonwealth, 375 Pa. 547, 101 A.2d 634 (Pa. 1954)*, and *Nixon v. Commonwealth, 576 Pa. 385, 839 A.2d 277 (Pa. 2003)*, and with its determination that, as a matter of Pennsylvania constitutional jurisprudence, lifetime disqualification from holding a commercial driver's license ("CDL") as set forth in *75 Pa.C.S. §1611(e)(1)* is not rationally related to promoting highway safety. I respectfully disagree, however, with the majority's determination lifetime disqualification ultimately conforms to Pennsylvania due process requirements because it is rationally related to deterring drug activity. I respectfully distance myself from the majority's reliance on *Plowman v. Dept. of Tran., Bureau of Driver Licensing, 535 Pa. 314, 635 A.2d 124 (Pa. 1993)*, to support its holding in this regard, and I distance myself from the view expressed in Justice Wecht's thoughtful concurring opinion — that the rational basis test [***51] in Pennsylvania grants deference to the legislature greater than that articulated by this Court in *Gambone, supra*, and *Nixon, supra.* Like the well-reasoned majority, I would defer that question to a future case in which the issue is precisely presented and addressed by the parties and the lower courts. Finally, I fully agree with the majority's determination lifetime disqualification under the statute is punishment, and with [*344] the decision to remand to the trial court the question of whether such irrevocable punishment in this case is grossly disproportionate to the offense, in light of this Court's recent decision in *Commonwealth v. 1997 Chevrolet & Contents Seized from Young, 639 Pa. 239, 160 A.3d 153 (Pa. 2017)*.

In my view, Pennsylvania jurisprudence currently requires a deeper due process analysis than merely considering whether there is any theoretical plausibility a statute is related to any legitimate state interest when that statute infringes on a person's right to work in his or her chosen profession. I believe the majority properly sets forth the appropriate test: "[U]nder our state charter, we must assess whether the challenged law has a 'real and substantial relation' to the public interest it seeks to advance, and is neither patently oppressive [***52] nor unnecessary to those ends." Majority *Slip Op. at 11*. As I see it, the lifetime disqualification aspect of *Section 1611(e)(1)* is patently oppressive and unnecessary to the deterrence ends the learned majority [**695] identifies as a legitimate governmental interest.

In *Plowman*, this Court considered the constitutionality of *Section 13(m) of the Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. §780-113(m)* (repealed), by which the possession of a small amount of marijuana in the home resulted in a driver's license suspension of anywhere from 90 days to two years depending on whether the offense committed was a first, second or third offense. The Court noted that operating a motor vehicle on Pennsylvania roadways is not a property right but a privilege, and thus the Commonwealth may regulate and control the activity; such regulations, however, must be tempered by adherence to the precepts of due process of law under a rational basis analysis. *Plowman, 635 A.2d at 126*. "The rational basis test mandates a two-step analysis[.]" *Id.* The Court must determine whether the statute 1) seeks to promote any legitimate state interest, and 2) is reasonably related to accomplishing that interest. *Id. at 127*. In other words, the analysis evaluates whether the legislation bears [***53] a rational relationship to any legitimate interest the legislature seeks to promote.

[*345] In discussing whether the license suspension sanction comported with the first prong of the due process analysis, this Court determined the legislature sought to protect the public interest against the proliferation of drug use, and supported its determination by reference to debate before the House of Representatives on the final reading of the bill, during which many members "professed their intent to send a strong message that neither possession nor use of illegal drugs will be tolerated in this Commonwealth." *Id.* The Court addressed the second prong of the test, *i.e.* whether suspension of driving privileges for possessing marijuana in the home was related to the interest the state sought to promote, as follows:

> In this particular instance, the maximum penalty for the criminal violation of possession of marijuana is 30 days of imprisonment and/or a $500 fine. It is doubtful that such a penalty would be imposed for a first-time offense. In fact, a first offense may merit nothing more than a small fine. As such, the prospect of losing one's driver's license may deter a potential drug user from committing [***54] that first drug offense. At least, that potential user may consider the loss of his/her license and its effect on employment and transportation prior to committing a drug offense. Both prongs of the rational basis test have been met.

Plowman, 635 A.2d at 127.

As the majority recognizes, *Plowman* was decided before *Nixon* dispelled the notion federal and Pennsylvania guarantees of due process are coterminous. *See* Majority Slip Op. at 17 n.9. Under the relaxed standard of *Plowman*, this Court determined the statute was rationally related to the legitimate state purpose of deterring drug activity because the maximum penalty for possessing marijuana was 30 days' imprisonment and/or a $500 fine, noting even that maximum penalty was unlikely to be imposed for a first offense. Thus, this Court concluded the statute's license suspension sanctions might provide a deterrent value which satisfied the second due process rational basis analysis prong.

Clearly, the penalties for the two counts of possession with intent to deliver a controlled substance (PWID) of which [*346] appellee was convicted by guilty plea carry much greater potential sentences of incarceration and fines than the maximum penalties [**696] at issue in *Plowman*.[1] In my view, [***55] the deterrent value of adding an irrevocable lifetime CDL disqualification for anyone holding a CDL who uses a motor vehicle to commit PWID is unnecessary to the end of deterring drug activity, even under the relaxed due process analysis employed by the *Plowman* Court. Accordingly, I dissent from the majority's holding and rationale with respect to its determination of this issue. I join Sections I and II(B) of the Majority Opinion.

Justice Baer joins this concurring and dissenting opinion.

CONCURRING AND DISSENTING OPINION

JUSTICE MUNDY

I agree with the Majority to the extent it concludes that *75 Pa.C.S. § 1611(e)* does not violate Appellee's substantive due process rights under the Pennsylvania Constitution. As the Majority explains, *Section 1611(e)* has a "real and substantial relation" to the deterrence of drug trafficking. *See* Majority Op. at 17-18. I therefore join parts I and II(A) of the Majority Opinion. However, I cannot agree that *Section 1611(e)*'s revocation of driving privileges imposes punishment within the meaning of the *Eighth Amendment*. Therefore, I respectfully dissent from the Majority's decision to vacate and remand in part.

The *Eighth Amendment* states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments [***56] inflicted." *U.S. CONST. amend. VIII*. I begin by noting that this Court has already concluded that suspension or revocation of one's driver's license is not a criminal sanction. Indeed, in *Plowman v. Commonwealth Department of Transportation, 535 Pa. 314, 635 A.2d 124 (Pa. 1993)*, this Court concluded that mandatory suspension of a driver's license because of a drug conviction is not criminal punishment [*347] for the purposes of the *Eighth Amendment*. *Plowman, 635 A.2d at 127-28*. The Majority does not attempt to reconcile its decision with *Plowman*.[1]

Putting aside this Court's analysis in *Plowman*, the Majority's conclusion is still problematic. Some traditional examples of punishment include imprisonment, a criminal fine, criminal forfeiture, and civil *in rem* forfeiture, which all impose significant restrictions on the class of persons against whom they are imposed. Imprisonment, parole, and probation fundamentally restrict a person's liberty and movement. Further, everyone generally has a right to own property and not to have the government restrict his or her personal liberty. In *Austin v. United States, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993)*, upon which the Majority heavily relies, the Court characterized the concept of a fine as the government "extracting payments" from its citizens, and therefore deemed it punishment. *Austin, 509 U.S. at 610*. However, it is quite another matter for a state to grant a *privilege* to a person and [***57] revoke the same. *See Plowman, 635 A.2d at 126* (stating, "[o]perating a motor vehicle upon a Commonwealth highway is not a property right but a privilege.") (internal quotation marks and citation omitted). Therefore, the relevant inquiry is whether the revocation of a privilege otherwise granted by the government [**697] is itself punishment within the meaning of the *Eighth Amendment*, even if the revocation has some deterrent purpose.

The Majority concludes that *Austin* provides the appropriate framework for determining whether *Section*

---

[1] Appellee was convicted of PWID (marijuana) which carries a maximum sentence of five years and/or a $15,000 fine for a first offense. *35 P.S. §780-113(f)(2)*.

[1] This Court also expressed the view that, even if it deemed a license suspension predicated on a criminal conviction to be punishment, it would not find it unconstitutional because it was "not arbitrarily imposed for the purpose of inflicting pain and suffering." *Plowman, 635 A.2d at 127 n.3*.

1611(e) constitutes punishment within the meaning of the Eighth Amendment.[2] In *Austin*, the Supreme Court considered whether the federal civil *in rem* forfeiture scheme constituted a punishment for the purposes of the Excessive Fines Clause. The [*348] Court concluded it did, noting that "[t]he Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as *punishment* for some offense." Austin, 509 U.S. at 610 (internal quotation marks and citation omitted; emphasis in original). After discussing the history of forfeiture, the Court concluded that certain hallmarks of the federal forfeiture scheme revealed that Congress intended to utilize civil *in rem* forfeiture to punish. Id. at 619. The Supreme Court noted that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, [***58] but [*349] rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* (quoting United States v. Halper, 490 U.S. 435, 448, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989)).

This broadly-worded pronouncement in *Austin* comes from *Halper*. Halper was convicted of 65 counts of Medicare fraud. Halper, 490 U.S. at 437. After the criminal proceedings concluded, the government brought a separate civil action seeking a $130,000.00 civil penalty against Halper under the False Claims Act, which mandated a $2,000.00 penalty per violation. Id. at 448. Ultimately, the Court concluded that the imposition of this civil penalty could be a second and subsequent "punishment," in violation of the Double Jeopardy Clause. Id. at 449. The Court stated the rule as "[w]here a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment." *Id.*

The Court's analysis in *Halper* as to whether the civil penalty [***59] was "punishment" appeared to take contradictory positions insofar as the Court articulated two tests. The first was the test that appears in *Austin*, "a civil sanction that *cannot fairly be said solely to serve a remedial purpose*, but rather can only be explained as also serving either retributive or deterrent purposes, *is punishment*, as we have come to understand the term." Id. at 448 (emphases added). However, the second test from *Halper* states that, "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only as a deterrent or retribution*." Id. at 448-49 (emphasis added). The Supreme Court of Minnesota highlighted the contradiction in the following terms.

> The two "tests" quoted above are strikingly dissimilar. The first is a "solely remedial" test. Applied literally, it would appear to invalidate on double jeopardy grounds any remedial civil sanction also "serving either retributive or deterrent [**698] purposes," no matter how minor. The second is a "solely deterrent/retributive" test. Applied literally, it would appear to uphold on double jeopardy grounds any [***60] civil sanction which "may fairly be characterized as remedial."

State v. Hanson, 543 N.W.2d 84, 87 (Minn. 1996).

The Supreme Court abrogated *Halper* in Hudson v. United States, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). The Court confronted its problematic language in *Halper*, noting that the "solely remedial" test, which is found in *Austin*, had proved to be unworkable because "all civil penalties have some deterrent effect." Hudson, 522 U.S. at 102. Echoing the Minnesota Supreme Court's concerns, the Court observed "[i]f a sanction must be 'solely' remedial (*i.e.*, entirely nondeterrent) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause." *Id.* Therefore, it appears that the Court has retreated from its "solely remedial" test in determining whether a sanction constitutes punishment. Critically, *Hudson* did not discuss or retreat from *Halper*'s "solely deterrent" test.[3]

---

[2] *Plowman* was decided on December 14, 1993, approximately five and one-half months after *Austin* was decided on June 28, 1993.

[3] The Majority concludes that *Hudson* is of no consequence in this case because *Halper* and *Hudson* are Double Jeopardy Clause cases, whereas *Austin* is an Eighth Amendment case. Majority Op. at 22 n.14. However, the Majority appears to acknowledge that the test applied in *Austin* derived from *Halper*'s Double Jeopardy Clause test that the Court has since backed away from in *Hudson*. I recognize that it is not clear whether the Court has abrogated *Halper*'s test for all constitutional provisions given that civil in rem forfeiture is materially different from revocation of a privilege.

[*350] In addition, by taking *Halper*'s "solely remedial" test literally, as the Majority does, it is difficult to envision a civil consequence that does not serve as deterrence in some regard, and hence is not punishment. As *Hudson* recognized, *every* civil consequence imposed by the government is intended to have at least [***61] some deterrent purpose. *Id.* Indeed, the objective of government-imposed penalties is to advance the betterment of society as a whole and shape citizens' behavior in a way that promotes good citizenship and deters crime. Consequently, applying *Austin*'s solely remedial test as the Majority does, anything may be deemed punishment if it deters some behavior.

In my view, the test we should apply is *Halper*'s actual holding, i.e., the "solely [**699] deterrent" test that remains viable [*351] after *Hudson*.[4] *Section 1611(e)*'s consequence, while having deterrent effects, is not *solely* deterrent. *Section 1611(e)* protects the public from those who violate the conditions of having a commercial driver's license and promotes the general welfare by removing a participant in the drug trade from the Commonwealth's roads and highways. In my view, this is sufficient to show that *Section 1611(e)*'s consequence is not "solely deterrent" so as to constitute punishment, especially in light of the fact that it is the revocation of a privilege, not a fundamental or constitutional right.[5]

Based on the foregoing, I conclude the trial court erred when it held that Appellee's substantive due process rights and right to be free from [***62] cruel and unusual punishment were violated. Accordingly, I would reverse the trial court's order in its entirety. I respectfully dissent.

End of Document

Nevertheless, I conclude the test is not applicable.

The Majority cites *United States v. Ursery, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1998)*, in which the Court held that civil *in rem* forfeiture was not punishment for purposes of the *Double Jeopardy Clause*. However, in its analysis, the *Ursery* Court explicitly noted that "[t]he holding of *Austin* was limited to *the Excessive Fines Clause of the Eighth Amendment*[.]" *Ursery, 518 U.S. at 287* (emphasis added). As noted above, *Austin* characterized a fine as an "extraction" or "payment" to the sovereign as punishment for an offense. *Austin, 509 U.S at 609-10, 622*. In forfeiture proceedings, such as in *Austin*, the government obviously intends to "extract" property of some sort from a citizen. Therefore, *Austin* applied *Halper*'s "solely remedial" test to determine whether that payment to the government was punitive and hence a "fine" for the purposes of the *Excessive Fines Clause*. *Austin*'s use of the "solely remedial" test is therefore understandable, since "a fine that serves purely remedial purposes cannot be considered 'excessive' in any event." *Id. at 622 n.14*.

However, the revocation of a privilege is not a "payment" of property to the government. In this case, the Majority expands the scope of the "solely remedial" test beyond the *Excessive Fines Clause*. Under the Majority's view, *Halper*'s "solely remedial" test would apply to any negative consequence imposed by law, including revocation of a privilege. Therefore, even though the Supreme Court has not yet reconciled *Halper, Austin*, and *Hudson*, I cannot agree with the Majority's expansion of *Austin* beyond its legal foundation.

[4] This is consistent with *Halper*'s statement that its holding was intended to be "a rule for the rare case[.]" *Halper, 490 U.S. at 449*.

[5] My conclusion is consistent with the conclusion reached by many other states on this issue. *See, e.g., State v. Hickam, 235 Conn. 614, 668 A.2d 1321, 1328 (Conn. 1995)*, *overruled on other grounds, State v. Crawford, 257 Conn. 769, 778 A.2d 947 (Conn. 2001)*; *State v. Savard, 659 A.2d 1265, 1267-68 (Me. 1995)*; *Hanson, 543 N.W.2d at 88-89*; *State v. Mayo, 915 S.W.2d 758, 761-63 (Mo. 1996)*.