PENN STATE
LAW REVIEW

Where Presumption Overshoots: The Foundation and Effects of *Pennsylvania Department of Transportation v. Clayton*

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I. INTRODUCTION

At the core of a just and well-ordered society lies a dedicated assurance of the right to due process of law. Due process is "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."[1] However, as Justice Frankfurter famously declared, "'Due process' is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society."[2]

The principle of due process creates a tension between the authority of the legislature and that of the courts. On the one hand, due process "is a restraint on the legislative . . . powers of government and cannot be construed as to leave congress free to make any 'due process of law,' by its mere will."[3] On the other hand, "it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree."[4]

Since the era of *Lochner v. New York*,[5] perhaps no due process doctrine illuminates this tension greater than the irrebuttable presumption doctrine ("IPD"). Developed in the early 1970s, the doctrine states:

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1. Bank of Columbia v. Okely, 17 U.S. *4 Wheat.) 235, 244 (1819).
2. Griffin v. Illinois, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring).
3. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856).
4. Otis v. Parker, 187 U.S. 606, 608 (1903).
5. Lochner v. New York, 198 U.S. 45 (1905). This case has become synonymous with unjustified judiciary incursion into the realm of the legislature. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963).

> It is forbidden by the Due Process Clause to [deprive an individual of life, liberty, or property] on the basis of a permanent and irrebuttable presumption . . . when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination."[6]

In practice, IPD invalidates state action that purports to speak in terms of determinate criteria, but does not allow for the admission or consideration of evidence plainly relevant to those criteria.[7]

This Comment will focus on the implications of one such application of IPD: the Pennsylvania judiciary's review of drivers license recalls due to the temporary physical incompetency of the licensee ("the license recall program"). The Pennsylvania Department of Transportation ("the Department"), pursuant to a legislative grant of rulemaking authority,[8] promulgates a set of medical incidents, the occurrence of which renders an individual incompetent to drive for a predetermined period of time.[9] Applying IPD in *Pennsylvania Department of Transportation v. Clayton*, the Supreme Court of Pennsylvania ruled that such regulations violate due process by denying the licensee an opportunity to present evidence that he or she is competent to drive, notwithstanding the disqualifying medical condition.[10]

The *Clayton* court's application of IPD is noteworthy for two reasons. First, it is uncommon for contemporary courts to apply IPD at all. Beginning in the later half of the 1970s, the federal courts began to call the doctrine into question.[11] The Circuit Courts of Appeals have almost uniformly abandoned IPD as an independent analysis, treating such issues as essentially equal protection claims.[12] As a result, IPD

6. Vlandis v. Kline, 412 U.S. 441, 452 (1973).
7. *See* Weinberger v. Salfi, 422 U.S. 749, 772 (1975).
8. 75 PA. CONS. STAT. ANN. § 1517 (West 2010).
9. 67 PA. CODE §§ 82.1-83.6 (2010).
10. Pa. Dep't of Transp. v. Clayton, 684 A.2d 1060, 1065 (Pa. 1996).
11. *See, e.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 23-24 (1976) (refusing to apply IPD where a presumption arises merely out of the statutory language used but does not affect the substance or purpose of purely economic legislation); *Salfi*, 422 U.S. at 772 (noting that unrestricted use of IPD risks turning the doctrine into a "virtual engine of destruction for countless legislative judgments").
12. *See* Malmed v. Thornburgh, 621 F.2d 565, 576 (3d Cir. 1980); Trafelet v. Thompson, 594 F.2d 623, 629-30 (7th Cir. 1979); Martin v. Harrah Indep. Sch. Dist., 579 F.2d 1192, 1197-99 (10th Cir. 1978), *rev'd on other grounds*, 440 U.S. 194 (1979); Fairfax Hosp. Ass'n v. Califano, 585 F.2d 602, 608-10 (4th Cir. 1978); Johnson v. Lefkowitz, 566 F.2d 866, 869 (2d Cir. 1977); West v. Brown, 558 F.2d 757, 760 (5th Cir. 1977).

analysis, though based in federal law, has virtually disappeared from federal jurisprudence.[13]

Second, the use of IPD by the Pennsylvania courts could have significant implications for numerous regulatory schemas in the Commonwealth. Without a thorough understanding of the scope and limits of IPD, any legislative classification could fall prey to a finding that it impermissibly presumes class membership from a set of distinguishing characteristics. Thus IPD could become "a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments."[14]

The purpose of this Comment is to explore the nature and scope of IPD in reference to its present use by the Pennsylvania courts. Its goal is to carve out an area of applicability that allows the doctrine to protect individuals from arbitrary or unwarranted deprivations of protected rights without disrupting the separation of powers between the legislature and the judiciary. This task will proceed through three separate, but interrelated, inquiries.

First, it will be necessary to examine IPD generally as a constitutional doctrine. This inquiry will focus on the federal case law developed during IPD's brief but fruitful period of use by the Supreme Court of the United States. Close examination will yield three important conclusions: IPD cannot be entirely merged with the equal protection analysis as they present divergent standards; IPD only proscribes presumptions of one natural fact based on the presence of another, not legal constructs defined by certain determinate criteria; and, therefore, IPD functions effectively only as a doctrine of procedural due process.

Second, this understanding of IPD will allow for a thorough examination of the Supreme Court of Pennsylvania's application of IPD in *Clayton*. The upshot of such an examination is the conclusion that the medical license recall program does indeed create an impermissible irrebuttable presumption. The fact that a person has a certain medical condition does not necessarily mean that the person presents an unacceptable risk behind the wheel. However, the conclusion must be tempered by an understanding that the ultimate conclusion of incompetency to drive is not presumed from a given level of risk, but rather defined by that risk.

Finally, this Comment will explore the pertinent issue presently unresolved: what standard should the courts use in determining whether a

13. *See* RONALD D. ROTUNDA and JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.6 (3d ed. 1999).

14. *Salfi*, 422 U.S. at 772.

petitioner has rebutted a legislative presumption?[15] Three considerations will guide this inquiry: (1) the scope of IPD is naturally limited to those cases where a presumption is used because an objective measure of the determinate criteria is unavailable;[16] the scope of judicial review is limited to whether the presumption has been rebutted in accordance with the determinate criteria set forth in the regulations;[17] and the only evidence relevant to this determination is that which bears on whether the determinate criteria are met, not that which calls into question the appropriateness of the criteria.[18] In the context of license recalls, these considerations lead to the conclusion that a licensee must present evidence sufficient to show that he or she presents less risk than would ordinarily be associated with persons suffering from a given condition.

Although this Comment is meant to elucidate IPD generally, Pennsylvania's license recall program remains the primary focusing issue. Therefore, before beginning the analysis, it will be necessary to provide a brief synopsis of the governing law and legal issues.

II. BACKGROUND

Pennsylvania license recalls are governed by the interaction statutes, administrative regulations, and judicial review. Thus a brief overview of each is provided to come to an understanding of the present tension between the legislative and regulatory provisions on the one hand, and the constitutional restraints imposed by the judiciary on the other.

A. *Statutory Framework*

The Pennsylvania Vehicle Code[19] provides that "the Department shall recall the operating privilege of any person whose incompetency has been established under the provisions of this chapter."[20] The Vehicle Code establishes a Medical Advisory Board ("MAB") to advise the Department in establishing and promulgating regulations establishing physical and mental criteria relating to competency standards.[21] Specifically, the MAB is charged with defining disorders characterized

15. This issue has largely gone unaddressed by the courts, as the Department has primarily focused its efforts arguing that IPD is not the appropriate standard by which to evaluate its regulations. *See* Peachey v. Pa. Dep't of Transp., 979 A.2d 951, 957 (Pa. Commw. Ct. 2009) (Leadbetter, J., concurring).

16. *See* Byers v. Pa. Dep't of Transp., 735 A.2d 168, 171 (Pa. Commw. Ct. 1999).

17. *See* Dare v. Pa. Dep't of Transp., 682 A.2d 413, 416 (Pa. Commw. Ct. 1996).

18. *See Byers*, 735 A.2d at 172.

19. 75 PA. CONS. STAT. ANN. §§ 101-9901 (West 2011).

20. *Id.* § 1519(c).

21. *Id.* § 1517(b).

by losses of consciousness.[22] By statute, all physicians are required to report diagnoses of disorders specified by the MAB to the Department.[23]

The MAB is composed of 13 members appointed by the Secretary of Transportation: five representatives of state agencies and eight medical professionals.[24] Once the MAB defines a disorder affecting the ability of a person to drive safely, the Department will promulgate these findings as regulatory criteria establishing competency to drive.[25]

Following a recall under section 1519 of the Vehicle Code, a licensee is entitled to de novo review by the court of common pleas for the licensee's county of residence.[26]

B. Regulatory Framework

The Department has promulgated regulations in title 67, chapter 83 of the Pennsylvania Code establishing physical and mental criteria determinative of a person's ability to drive safely.[27] These criteria can be divided into two categories: general disqualifications (which automatically disqualify a person from driving) and disqualifications contingent on healthcare providers' recommendations.[28]

The first set of disqualifications appears in section 83.3, setting forth minimum visual standards.[29] Persons having a visual acuity of less than 20/100 combined vision with corrective lenses, a combined field of vision less than 120º, or a need for telescopic lenses to achieve a visual acuity greater than 20/100 are generally disqualified to drive.[30] Persons having a visual acuity less than 20/70 with corrective lenses may be disqualified contingent on the opinion of an ophthalmologist or optometrist.[31]

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22. *Id.* § 1518(a).
23. *Id.* § 1518(b).
24. *Id.* § 1517(a). Specifically, the MAB is to consist of a representative from the Departments of Transportation, Justice, and Health, the State Police, and the Governor's Council on Drug and Alcohol Abuse. The medical professionals appointed are to include a neurologist, a doctor of cardiovascular disease, a doctor of internal medicine, a general practitioner, an ophthalmologist, a psychiatrist, an orthopedic surgeon, and an optometrist. *Id.*
25. *See* 67 PA. CODE §§ 83.1-83.5; *infra* Part II.B.
26. 75 PA. CONS. STAT. ANN. § 1550(a), (c) (establishing right of appeal and de novo review respectively); 42 PA. CONS. STAT. ANN. § 933(a)(1)(ii) (West 2008) (vesting jurisdiction for such appeals in the Court of Common Pleas and providing that the venue shall be the licensee's county of residence).
27. 67 PA. CODE § 83.1-83.5.
28. *Compare id.* § 83.3-5(a) (establishing criteria that necessarily lead to a disqualification), *with id.* § 83.5(b) (establishing criteria that lead to a disqualification only at a provider's recommendation).
29. *Id.* § 83.3.
30. *Id.* § 83.3(d)-(g).
31. *Id.* § 83.3(c)(1).

The second set of disqualifications appears in section 83.4, setting forth disqualifying seizure disorders. A person suffering from a seizure disorder is, subject to certain conditions, generally disqualified from driving for six months after the occurrence of a seizure.[32] Therefore, a licensee who is subject to a recall under this provision could have his driving privileges restored in six months if he remains seizure free.

The final set of disqualifications appears in section 83.5, and sets forth miscellaneous disqualifying conditions that may affect the ability of a person to drive safely. Miscellaneous disqualifying conditions include hypoglycemic reactions caused by diabetes, loss of consciousness caused by cardiovascular disease or cerebral vascular insufficiency, and periodic losses of consciousness of unknown cause.[33] Conditions which are disqualifying only upon a healthcare provider's recommendation may include any condition which, in the provider's opinion, may impair the licensee's ability drive safely.[34]

C. *Judicial Review of Section 83.4: The* Clayton *Case*

On September 5, 1986, David A. Clayton suffered a grand mal epileptic seizure.[35] His treating physician, Dr. H.J. Silvas, submitted a convulsive disorder form to the department as required by section 1518(b) of the Vehicle Code.[36] Dr. Silvas noted on the form that Clayton was being treated with Dilantin and, in the doctor's opinion, was physically competent to continue driving.[37] The Department determined that, notwithstanding Dr. Silvas' opinion, Clayton was incompetent to drive pursuant to section 83.4 and recalled his license on November 28, 1986.[38]

On de novo appeal, the Court of Common Pleas of Washington County found that the provisions of section 83.4 were unreasonable and violative of procedural due process.[39] The court found that the provision

32. *Id.* § 83.4(a). The original regulation, at issue in *Clayton*, disqualified a licensee for one year following a seizure. *See* 21 Pa. Bull. 1813 (Apr. 19, 1991). The shortened time period does not seem to have any impact on the application of the *Clayton* doctrine. *See infra* Part III.C.

33. 67 PA. CODE § 83.5(a). These conditions disqualify a person from driving for a period ranging from six months to one year depending on the specific condition.

34. *Id.* § 83.5(b) (listing many conditions explicitly, but also providing a catch-all to allow for a medical professional's discretion).

35. Pa. Dep't of Transp. v. Clayton, 684 A.2d 1060, 1060 (Pa. 1996).

36. *Id.*

37. *Id.* at 1061.

38. *Id.*

39. *Id.* at 1061-62.

violates procedural due process by creating an irrebuttable presumption that a person suffering from epilepsy is not competent to drive.[40]

The Commonwealth Court ultimately affirmed the trial court's order.[41] Relying on *Michael H. v. Gerald D.*,[42] the court reasoned that the creation of an irrebuttable presumption that persons suffering from epilepsy were incompetent to drive violates the licensee's procedural due process rights.[43] Classifying the due process violation as procedural, the court thereby rejected the Department's assertion that the regulations were supported by a sufficient rational basis.[44] Therefore, the court held, although the regulations were not facially invalid under substantive due process, the licensee must be afforded an opportunity to present evidence rebutting the presumption of his incompetence to drive.[45]

The Supreme Court of Pennsylvania affirmed the order of the Commonwealth Court, but held that the creation of an irrebuttable presumption violated both procedural *and* substantive due process rights.[46] Balancing the Department's interest in maintaining highway safety against the individual's liberty and property interests in retaining his license, the court concluded that the former was not sufficient to deprive the latter without a meaningful hearing.[47] Such a hearing cannot be considered meaningful unless "the licensee be permitted to present objections, not to the conclusion that he had suffered an epileptic seizure, but rather to the presumption of incompetency to drive."[48]

D. Subsequent Developments to the Clayton Doctrine

For roughly thirteen years following the *Clayton* ruling, the doctrine espoused therein remained dormant. This dormancy is likely the result of an amendment to section 1519 of the Vehicle Code. While the Supreme Court considered *Clayton*, the General Assembly approved a bill limiting judicial review of medical license recalls to "whether the

40. *Id.* at 1062.
41. Pa. Dep't of Transp. v. Brown, 630 A.2d 927 (Pa. Commw. Ct. 1993), *aff'd sub nom.* Pa. Dep't of Transp. v. Clayton, 684 A.2d 1060 (Pa. 1996).
42. Michael H. v. Gerald D., 491 U.S. 110 (1989).
43. *Brown*, 630 A.2d at 927.
44. *Id.* at 930.
45. *Id.* at 931.
46. Pa. Dep't of Transp. v. Clayton, 684 A.2d 1060, 1064 (Pa. 1996) (reasoning that the presumption "is the substance of the statute or regulation at issue, which presumption necessarily implicates process given its conclusion").
47. *Id.* at 1065.
48. *Id.*

person is competent to drive in accordance with the provisions of the regulations promulgated under section 1517."[49]

In 2008, however, Gary L. Peachey successfully appealed the recall of his license, relying on the *Clayton* Doctrine to introduce medical testimony that he was competent to drive irrespective of his epileptic condition.[50] On subsequent appeal by the Department, the Commonwealth Court affirmed the lower court order, "discerning no meaningful distinction between the circumstances here and those presented in *Clayton*."[51] Specifically, the court affirmed the admissibility of opinion testimony by the licensee's treating physician that Peachey "looks fine, he's a responsible guy and I think he can probably drive safely."[52] In a separate opinion, Judge Leadbetter questioned whether this evidence was sufficient to overcome the regulatory presumption.[53] That issue, however, was not raised for appeal and she therefore concurred in the opinion of the court.[54]

The *Peachey* decision opened the gates for medical license recall appeals under the *Clayton* Doctrine. Shortly thereafter the Commonwealth Court affirmed two trial court orders restoring driving privileges to persons suffering from conditions other than epilepsy. In *Dewey v. Pennsylvania Department of Transportation*,[55] the court held that section 83.5(a)(1) of the regulations, relating to diabetes and hypoglycemia, is substantively identical to those relating to epilepsy and, therefore, was subject to *Clayton*.[56] Only three months later, the court extended this reasoning to section 83.5(a)(2), relating to cardiovascular disease, in *Golovach v. Pennsylvania Department of Transportation*.[57]

Through these cases, all of the Department's general disqualification provisions have become subject to the *Clayton* Doctrine, with the exception of the minimum vision requirements. However, none of the subsequent cases significantly expanded on or refined the analysis in *Clayton*, and the Department continues to aver that its regulations do not create an invalid irrebuttable presumption.[58] There is, as a result, a

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49. An Act Amending Title 75 (Vehicles) of the Pennsylvania Consolidated Statutes, 1996 Pa. Laws 118, § 1 (codified as amended at 75 PA. CON. STAT. ANN. § 1519(c) (1996)).
50. Peachey v. Pa. Dep't of Transp., No. 2008-4692 (Pa. C.P. Centre Co. 2008).
51. Peachey v. Pa. Dep't of Transp., 979 A.2d 951, 957 (Pa. Commw. Ct. 2009).
52. *Id.* at 954.
53. *Id.* at 957 (Leadbetter, J., concurring).
54. *Id.*
55. Dewey v. Pa. Dep't of Transp., 997 A.2d 416, 419 (Pa. Commw. Ct. 2010).
56. *Id.* at 419.
57. Golovach v. Pa. Dep't of Transp., 4 A.3d 759, 762 (Pa. Commw. Ct. 2010).
58. *See id.* at 5-6; Interview with Andrew Cline, Deputy Chief Counsel, Pennsylvania Department of Transportation, in Lemoyne, Pa. (Nov. 6, 2010).

degree of uncertainty concerning the scope of *Clayton* generally, and the state of the license recall program specifically.

III. ANALYSIS

A. *Foundation and Development of IPD*

The Supreme Court of the United States has held that "a permanent and irrebuttable presumption" is forbidden by the Due Process Clause of the Fourteenth Amendment[59] "when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination."[60] This doctrine, divided into its constitutive elements, asks three separate questions: (1) Is the legislative presumption permanent and irrebuttable?; (2) Does the presumption necessarily imply the conclusion reached?; and (3) Does the legislative authority imposing the presumption have a reasonable alternative means to reach the conclusion?[61]

Despite the relatively bright-line substance of the IPD test, classifying the constitutional rights protected by IPD presents a particularly vexing problem. Courts have invoked the doctrine to invalidate legislation that attributes to a class certain characteristics that are not universally or necessarily true.[62] Thus, IPD tends to take on the features of an equal protection analysis. However, the doctrine rests analytically on due process rights. Even still, it is not clear from the case law whether IPD is primarily rooted in substantive or procedural due process.

Examining IPD through its foundation in the Supreme Court of the United States is helpful to elucidate the doctrine's scope and purpose. The importance of classifying the rights protected is what standard of analysis courts should use to determine the validity of a legislative act. If IPD is rooted in equal protection or substantive due process rights, it may conflict with the well-established rational basis standard.[63] Indeed confusion between IPD and rational basis has led some courts to simply

59. U.S. CONST. amend. XIV, § 1.

60. Vlandis v. Kline, 412 U.S. 441, 452 (1973).

61. Hereinafter these questions will be referred to as Steps One, Two, and Three respectively in the IPD analysis.

62. *See generally* Malmed v. Thornburgh, 621 F.2d 565, 573-76 (3d Cir. 1980) (reviewing the decisions from the United States Supreme Court that found a violation of IPD).

63. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 653 (1974) (Powell, J., concurring).

disregard IPD in favor of rational basis analysis in all cases.[64] However, a close look at IPD may show this reaction to be overbroad in its application.

1. IPD and the Rational Basis Test

The relationship between Steps Two and Three of the IPD analysis places it in a precarious position with respect to the rational basis test. The rational basis test states, "if a law neither burdens a fundamental right nor targets a suspect class, [courts] will uphold the legislative classification so long as it bears a rational relation to some legitimate end."[65] Under this analysis, legislative acts made in furtherance of a legitimate end carry the presumption of rationality even where the determinate criteria are imperfectly designed to reach the desired goal.[66]

There may be substantial overlap between legislative acts that give rise to IPD analysis and those that give rise to rational basis analysis under equal protection and substantive due process challenges. For example, a state may seek to deny preferential tuition rates to non-residents at its state universities.[67] In that case, a determinative class is created: a class of non-residents categorically and universally excluded from preferential tuition rates. This provision, on its own, seems undeniably to rest on a sufficient rational basis.[68] However, suppose the state, in pursuance of this legitimate measure, defines non-residents to include all persons with a primary address outside of the state at the time of his or her application for admission.[69] In this case, a proxy classification is established: a class of persons with addresses outside of the state serves as a proxy for the class of non-residents which is excluded from preferential tuition rates.

It is not immediately clear what standard should be applied to the proxy criteria. Under the rational basis test, the proxy classification need only be rationally related to the legislative purpose. Under IPD, the proxy class must universally belong to the determinative class. In *Vlandis*, the Court bypassed the issue, finding the proxy criteria was both an impermissible irrebuttable presumption and irrationally related to the

64. *See* Malmed v. Thornburgh, 621 F.2d 565, 576 (3d Cir. 1980); Trafelet v. Thompson, 594 F.2d 623, 629-30 (7th Cir. 1979); Johnson v. Lefkowitz, 566 F.2d 866, 869 (2d Cir. 1977).

65. Romer v. Evans, 517 U.S. 620, 631 (1996).

66. Heller v. Doe *ex rel.* Doe, 509 U.S. 312, 321 (1993).

67. *See* Vlandis v. Kline, 412 U.S. 441, 442 (1973).

68. *Id.* at 445. The denial of preferential tuition rates to non-residents is a rational method of insuring that state-subsidized education is provided only to those persons who have, or will, significantly contribute to the state's tax revenues.

69. *Id.* at 442-43.

legislative purpose.[70] However, where IPD analysis yields a different result from rational basis analysis, it is necessary to distinguish which cases give rise to each analysis.

Vlandis already presents the first possible solution: simply sidestep the problem altogether. Both courts and commentators have noted that the IPD analysis utilized by the Supreme Court is often merely shorthand for finding a lack of rational basis supporting the legislative act.[71] For example, in *Cleveland Board of Education v. LaFleur*[72] the Court held that a provision requiring pregnant teachers to take leaves of absence five months before their expected date of delivery in order to ensure that all teachers were physically capable has "no rational relationship to the valid state interest" and "contain[s] an irrebuttable presumption of physical incapacity."[73] Examples such as *Vlandis* and *LaFleur* may imply that IPD only functions as a tool for determining the rational basis of a legislative act. It does not create a separate standard.[74] If the difference between the standards is merely formal, IPD analysis can simply be incorporated into rational basis analysis.

IPD analysis, however, is not functionally equivalent to rational basis analysis. As discussed above, Step Two of the IPD analysis requires a necessary correlation between the proxy criteria and the determinate criteria beyond that which is required by rational basis analysis.[75] Further, Step Three allows the courts to invalidate legislative provisions if there is a better method of reaching the determination available.[76] This approach stands in stark contrast to the established principle that courts will not second-guess reasonable legislative schema simply because seemingly better alternatives exist. Therefore, at least in some cases, IPD analysis does yield a result that diverges from that which would be reached under the rational basis test.[77]

70. *Id.* at 449-50.

71. *See, e.g.*, Malmed v. Thornburgh, 621 F.2d 565, 575 (3d Cir. 1980); RONALD D. ROTUNDA and JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.6 (3d ed. 1999).

72. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

73. *Id.* at 643-44; *see also* U.S. Dep't of Agriculture v. Murry, 413 U.S. 508, 513-24 (holding that a determination of an individual's need for food stamps based on the income of that individual's non-minor children claimed as dependents created an irrebuttable presumption that was "not a rational measure of the need of the household").

74. *See Malmed*, 621 F.2d at 575 (holding that "a court using [IPD] must apply the rational basis test, or in appropriate cases, strict scrutiny. Otherwise, the court would be resorting to blatant 'Lochnerism'").

75. *See supra* text accompanying notes 60-61.

76. *See* Vlandis v. Kline, 412 U.S. 441, 453-54 (1973) (holding that Connecticut's method of determining residency for in-state university tuition rates fails IPD analysis where "the State can establish such reasonable criteria for in-state status as to make virtually certain" that all bona fide residents will qualify).

77. *Clayton* presents just such a case, as will be discussed *infra* Part III.B.

2. Legislative Conclusions of Natural Facts as the Distinguishing Feature of Impermissible Irrebuttable Presumptions.

Prior to the problematic expansion of IPD into traditional equal protection and substantive due process analysis, the doctrine emerged as a prohibition against legislating conclusions of fact. Courts largely credit *Bell v. Burson*[78] as having formally established IPD.[79] This case involved a Georgia statute providing that the driver's license of an uninsured motorist shall be suspended if the motorist is involved in an accident "unless or until the operator or owner has previously furnished security sufficient . . . to satisfy any judgments for damages or injuries resulting."[80] The appellant, an uninsured motorist, was involved in an accident and did not furnish the necessary security, but maintained that he was not at fault in the accident and, therefore, no security was necessary to satisfy judgments against him. At an adjudicative hearing, the Georgia Department of Public Safety refused to consider evidence that the appellant was not at fault and ordered the suspension of the appellant's license.[81] The Court held that appellant's due process rights had been violated by excluding from the hearing "consideration of an element essential to the decision."[82] The Court specifically did not invalidate Georgia's legislative scheme, but held only that an adjudication must determine that there is a reasonable possibility of judgment against the licensee before a suspension may be ordered.[83]

The legitimacy of compulsory insurance plans, noted by the Court in *Bell*,[84] creates a particularly vivid delineation between rational basis and IPD analyses. Under rational basis analysis, requiring all motorists to carry insurance or provide a surety is rationally related to the purpose of ensuring that judgment liabilities are satisfied. However, where, in order to suspend a license, the legislation makes the possibility of liability determinative of a requirement to provide a surety, it violates IPD by conclusively presuming a possibility of liability from

78. Bell v. Burson, 402 U.S. 535 (1971).

79. *See, e.g.*, *Vlandis*, 412 U.S. at 446-47 (noting that, while irrebuttable presumption have "long been disfavored," *Bell v. Burson* announced the standard controlling alleged due process violations); Pa. Dep't of Transp. v. Clayton, 684 A.2d 1060, 1063 (Pa. 1996) (noting that IPD emerged through a line of cases beginning with *Bell v. Burson*).

80. *Bell*, 402 U.S. at 536 n.1 (1971) (quoting GA. CODE ANN. § 92A-604 (1970)).

81. *Id.* at 538.

82. *Id.* at 542. The Court reasoned that the hearing was not meaningful as required by procedural due process if the determinative fact underlying a conclusion of liability—i.e., the fault of the motorist—was presumed prior to the inquiry.

83. *Id.* at 543.

84. *Id.* at 543 n.6 (noting that requiring all motorists to carry insurance or provide a surety would be constitutionally valid).

involvement in an accident.[85] The criteria of the proxy class (individuals involved in an accident) exclude the constitutional requirement of due process for the class members who do not belong to the determinate class (individuals who have a reasonable possibility of liability).

In cases such as *Bell*, the status of the determinate criteria as a question of fact fundamentally determines the legitimacy of the overall scheme. As the Court noted in *Michael H. v. Gerald D.*,[86] rational basis, not IPD, is controlling where the purported determinate criteria "is a legal construct, not a natural trait."[87] The Court's analysis on this point accords with McCormick's definition of a presumption as "a standardized practice, under which certain [proxy] facts are held to call for uniform treatment with respect to their effect as proof of other [determinate] facts."[88] On the other hand, where proof of one fact is, as matter of law, sufficient to dispose of an issue, the law is "not stating a presumption at all, but simply expressing the rule of law."[89] By excluding conclusive presumptions of natural facts, IPD hedges the border between presumptions and rules of law.

Confusion emerges, however, where courts fail to delineate between their analyses of a challenged rule of law and a challenged irrebuttable presumption of fact. As the Court notes in *Michael H.*, most IPD cases ultimately turned on the inadequacy of proxy criteria to rationally support the purported state interest rather than its insufficiency to prove the determinate criteria.[90] Properly placing IPD as a doctrine of procedural due process will significantly mitigate these confusions.

3. The Ability of Procedural Remedies to Cure Due Process Violations Under IPD Analysis.

The preceding analysis helps to clarify which presumptions violate due process, but it does not indicate an appropriate remedy where courts

85. *Id.* at 541.

86. Michael H. v. Gerald D., 491 U.S. 110 (1989).

87. *Id.* at 131. The Court here discussed two separate claims resting on IPD. The plurality decision is disjointed as to the treatment given to the claim brought by petitioner, Michael H., (with J. Stevens departing from the plurality), but a clear majority of the Court concurred in respect to the second claim brought by petitioner, Victoria. The section quoted here relates to the latter claim. Moreover, the dissenting opinions tend to diverge on the issue of whether the legitimacy of a paternal relationship is a natural trait and not whether the general principal quoted is sound.

88. KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 342 (6th ed. 2006).

89. *Id.*; *accord.* Watkins v. Prudential Ins. Co., 173 A. 644, 647 (Pa. 1934) ("Wherever from one fact another is conclusively presumed . . . the rule really provides that, where the first fact is shown to exists, the second fact's existence is wholly immaterial.").

90. *Michael H.*, 491 U.S. at 120-21.

find such violations. This issue will turn on the nature of the due process rights protected by IPD. The general principle of constitutional jurisprudence is that "a law repugnant to the constitution is void."[91] In procedural due process claims, however, the legislative action is not itself unconstitutional; what is unconstitutional is the inadequacy of procedure attending the action.[92] Therefore, while violations of substantive due process result in the invalidation of legislative acts,[93] procedural due process violations can remedied by the imposition of additional safeguards.[94]

In the context of IPD, the divergence between the remedies available in substantive and procedural due process claims is critical. If the creation of an irrebuttable presumption were found to violate an individual's substantive due process rights, then the presumption would itself be constitutionally invalid.[95] On the other hand, if an irrebuttable presumption is found to violate only procedural due process, the presumption might be allowed to remain intact by providing individuals with an opportunity for rebuttal.[96]

Substantive due process is violated where a state interest cannot, in any case, justify the deprivation of an individual interest.[97] Therefore, an irrebuttable presumption cannot, in itself, violate substantive due process. IPD analysis focuses on the relationship between the class to which a deprivation applies and the criteria used to establish that class.[98] The extent to which the deprivation could, or could not, benefit a state interest is a separate inquiry altogether.

Rather, IPD calls into question the appropriateness of the process used to determine whether the deprivation is justified in a given case. Procedural, unlike substantive, due process is not meant to forbid a deprivation, but to enable "persons to contest the basis upon which a

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91. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

92. Zinermon v. Burch, 494 U.S. 113, 125 (1990).

93. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (invalidating state statute that deprived individuals of the right to marry based on race as a violation of substantive due process).

94. *See* Goldberg v. Kelly, 397 U.S. 254, 268-71 (1970) (mandating certain procedural safeguards required in welfare benefit termination cases).

95. *See* Stanley v. Illinois, 405 U.S. 645, 658 (1972) (holding that presumptions of parental unfitness are invalid because all parents have a substantive right "to a hearing on their fitness before their children are removed from their custody").

96. *See* Pa. Dep't of Transp. v. Clayton, 684 A.2d 1060, 1067 (Pa. 1996) (Zappala, J., dissenting) ("If the flaw in the regulation is that the presumption is irrebuttable, it would seem that a rebuttable presumption would satisfy the majority's concern.").

97. *See* Youngberg v. Romeo, 457 U.S. 307, 320 (1982) (balancing the state's purported purpose against the individual rights deprived in furtherance of that purpose); *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that the deprivation of a right to marry violates substantive due process when done on an "unsupportable" basis).

98. *See supra* Part III.A.1.

State proposes to deprive them of protected interests."[99] Irrebuttable presumptions violate procedural due process by precluding members of a proxy class from presenting evidence tending to show that they do not belong in the determinate class.[100] The due process violations are remedied by simply providing such individuals the opportunity to present evidence rebutting the proposition.[101]

In sum, IPD is a doctrine of limited applicability. If state legislation deprives individuals of a protected interest based on certain factual criteria, the legislation itself may be challenged on equal protection or substantive due process grounds. Procedural due process does not challenge the provision directly but mandates that, where such deprivations are affected, individuals be given an opportunity for a meaningful hearing "appropriate to the nature of the case."[102] IPD establishes that such a hearing cannot be meaningful where a conclusive presumption eliminates consideration of the factual criteria determinative of the issue.[103]

B. *IPD and Determinations of Competency to Drive Under the Pennsylvania Vehicle Code.*

1. IPD Step One: Is the Presumption Permanent and Irrebuttable?

It is apparent that the Department's license recall regulations create an irrebuttable presumption of incompetency to drive, at least in respect to the general disqualifications. The Department will recall a license whenever "a physician provides clear information indicating that the person does not meet the medical regulations for safe driving."[104] Because such "clear information" is simply a confirmation that a condition exists, where a licensee suffers from one of the conditions listed in chapter 83 of the regulations, his or her license will be revoked without an opportunity to rebut the presumption that the condition necessarily implies incompetency.

In a sense, of course, the presumption is not permanent because driving privileges are restored when and if the licensee meets the minimum medical qualifications.[105] However, the permanence of the presumption, for IPD purposes, is properly measured by the finality of

99. Carey v. Piphus, 435 U.S. 247, 259-60 (1978).
100. Vlandis v. Kline, 412 U.S. 441, 452 (1973).
101. *See id.*; Bell v. Burson, 402 U.S. 535, 542 (1971)
102. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).
103. *See supra* note 100 and accompanying text.
104. 67 PA. CODE § 82.3 (1997).
105. *Id.* § 83.4.

the determination, not the length of the determination's effect.[106] The presumption is permanent because a licensee cannot refute a presumption of incompetency to drive at any point in which that incompetency has been determined under the regulatory criteria. It is the permanence of the presumption given the proxy criteria, not the permanence of the proxy criteria, that is at issue.[107]

The medical license recall regulations, therefore, create a permanent and irrebuttable presumption of incompetency to drive. Because all of the Department's general disqualifications create permanent irrebuttable presumptions, all of the regulations require further to IPD analysis.[108]

2. IPD Step One, Addendum: Does the Presumption Create an Under-Determined Conclusion of Fact?

The function of IPD is to preclude legislative decrees that certain facts exist where, in reality, they do not.[109] There is a certain common sense to this approach: as Abraham Lincoln pithily remarked, no governmental pronouncement calling a calf's tail a leg would result in a calf actually having five legs.[110] On the other hand, it is well within the purview of the legislature to construct legal rights and relationships conclusively evidenced by certain facts. Thus, for example, while the legitimacy of a parent-child relationship may be conclusively determined by the marital status of the parent because legitimacy is a legal construct, the natural father of an illegitimate child cannot be conclusively presumed to be unfit because parental fitness is a matter of factual behavior.[111]

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106. *See* Vlandis v. Kline 412 U.S. 441, 453 n.9 (1973) (noting that a presumption which may be refuted after a given period of time is not permanent, whereas a presumption that cannot be refuted during the period in which it is effective is permanent).

107. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 645-46 (1974) (focusing on the conclusiveness of a presumption that pregnant teachers were physically unable to continue working without regard for the fact that such a condition is naturally not permanent).

108. The minimum visual requirements, for example, are no less conclusive to a determination of incompetency than disorders tending to cause a loss of consciousness. *See* 67 PA. CODE § 82.1(a) (stating "drivers in this Commonwealth shall meet the minimum standards to be qualified to drive" which include physical, mental, and visual criteria under chapter 83).

109. *See Cleveland Bd. of Educ.*, 414 U.S. at 645 (noting that one's physical ability to work through pregnancy is "very much an individual matter" that cannot permissibly be determined with fixed criteria).

110. REMINISCENCES OF ABRAHAM LINCOLN BY DISTINGUISHED MEN OF HIS TIME 242 (Allen Thorndike Rice ed., Harper & Bros. Publishers 1909).

111. *Compare* Stanley v. Illinois, 405 U.S. 645, 654 (1972) (holding that the father of an illegitimate child cannot be presumed to be an unfit custodian), *with* Michael H. v.

The status of the term "competency" calls into the question the validity of the *Clayton* Doctrine. The laws of Pennsylvania recognize that competency is, in some circumstances, considered a legal construct.[112] At very least, the discretion to determine competency, prior to de novo judicial review, is fully within the authority granted to the Department.[113]

Competency, in the context of the Vehicle Code, however, is defined in reference to an unacceptable degree of risk.[114] In the end, the risk of being involved in an automobile collision as a result of a medical condition is the unstated, under-determined criteria presumed by regulations. The measure of this risk is, moreover, a fact that cannot be altered by legislative fiat.

The legislature maintains the authority to define the level of risk, which will be deemed to render a person incapable of driving safely.[115] Due process restrains such legislative determinations only to the extent that they are not rationally related to a legitimate government purpose.[116] Moreover, the rational basis test does not require the legislature to fix such determinations with mathematical certainty.[117] It follows, therefore, that the Department may exercise its legislative function to define the level of unacceptable risk in reference to specified medical conditions.[118]

Valid codification of the level of risk deemed unacceptable, however, does not absolve the state from its burden to prove that this level is present in an individual. In the context of medical conditions, the presence of the condition is not fully determinative of the risk even where the risk is defined in reference to the condition.[119] Not every

Gerald D., 491 U.S. 110, 129-30 (1989) (holding that the legal rights afforded to a legitimate father are retained irrespective of whether he is, or is not, the natural father).

112. *See, e.g.*, Commonwealth v. Counterman, 719 A.2d 284, 295 (Pa. 1998) (holding that mental incompetency to present evidence does not follow from the fact that a witness is mentally ill); Wei v. State Civil Service Commission, 961 A.2d 254, 258-59 (Pa. Commw. Ct. 2008) (holding that competency to remain employed as a civil servant may be defined by agency vested with legislative authority to make that determination).

113. Turk v. Pa. Dep't of Transp., 983 A.2d 805, 819 (Pa. Commw. Ct. 2009).

114. *See* 75 PA. CON. STAT. ANN. § 1518(a) (West 2004) (authorizing the MAB to "define disorders . . . affecting the ability of a person to drive safely.").

115. *See* Commonwealth v. Mikulan, 470 A.2d 1339, 1433 (Pa. 1983) (noting that, in the context of driving under the influence laws, the legislature may "prohibit driving within a certain reasonable time after drinking any alcohol" just as legitimately as it may predicate the prohibition in reference to a specified blood alcohol content).

116. Commonwealth v. Duda, 923 A.2d 1138, 1150 (Pa. Commw. Ct. 2007).

117. *See* Heller v. Doe *ex rel.* Doe, 509 U.S. 312, 321 (1993).

118. That the Department's medical license recall regulations were promulgated under a valid delegation of legislative authority is outside the scope of this analysis and will be taken as a given.

119. *See generally* Ben A. Rich, *Prognostication in Clinical Medicine*, 23 J. LEGAL MED. 297 (2002).

person suffering from epilepsy, for example, presents the same risk of seizure in a given time period as a hypothetical, average person suffering from epilepsy.[120]

3. IPD Step Two: Is the Presumption Not Necessarily or Universally True?

Properly formulated, Step Two of the IPD analysis is whether the existence of a physiological symptom necessarily implies the existence of certain undesirable risk. *Davis v. Meese*[121] admirably addressed this thorny calculus in context of medical competency requirements. In assessing the validity of an FBI exclusion of insulin-dependent diabetics from certain positions, the court noted

> If a method of testing could be devised which reliably determined whether certain individual insulin-dependent diabetics presented no or very little reasonably probable risk of a severe hypoglycemic occurrence while on an assignment in a situation where such an occurrence could pose a serious risk of damage or harm to co-workers, the public or the individual, then the blanket exclusion of all insulin-dependent diabetics would be invalid. Unfortunately, such is not the case.[122]

Where medical opinion diverges, however, as to the risk associated with a certain condition, "only by assessing the relative merit and strength of the opinions can a proper determination be made."[123]

In the context of IPD analysis, the absence of such an assessment is precisely what is claimed as the due process deficiency. Where medical experts may disagree on the actual risk associated with a particular medical condition, deference is owed to the determinations of public health officials.[124] Where the risk is not uniform across the class of persons suffering from such a condition, however, a conclusive presumption of unacceptable risk is "neither necessarily nor universally true."[125]

120. *See*, *e.g.*, 2 DAN J. TENNENHOUSE, ATTORNEY'S MEDICAL DESKBOOK § 24:20.10.IV (4th ed. 2010); Kathryn Kramer, *Shifting and Seizing*, 22 J.L. & HEALTH 343, 347 (2009).

121. Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988). This case involved a claim under the Rehabilitation Act of 1973, 29 U.S.C. §§ 791-796 (1985). The court notes that IPD is inapplicable because no due process interests are implicated. *Davis*, 692 F. Supp. at 521. It is, therefore, used only as an example and its conclusions do not necessarily apply to due process claims.

122. *Davis*, 692 F. Supp. at 518.

123. *Id.* at 520.

124. Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 288 (1987).

125. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 646 (1974).

The terms of IPD Step Two, therefore, mandate that the license recall provisions promulgated by the Department establish criteria narrowly enough to establish a class of persons who each minimally present a level of risk that is deemed unacceptable. The *Clayton* court approaches but does not directly address this issue.[126] However, lower courts have found medical evidence sufficient to establish that persons suffering from the general exclusionary medical conditions "did not pose a significant risk"[127] or "could safely operate a motor vehicle"[128] based on factors not present in the relevant regulations.

Based on the foregoing considerations, it might be assumed arguendo that the risks associated with the exclusionary medical conditions are not necessarily or universally true. At least some persons suffering from exclusionary medical conditions present a risk of automobile accidents that are not appreciably higher than the general public.

4. IPD Step Three: Does the Department Have A Reasonable Alternative Means of Reaching the Conclusion?

Any given method can be considered reasonable to the extent that it is more likely than alternative methods to yield a correlation between the determination of incompetency and the actual risk associated with the individual. Courts do not insist that such alternative methods meet the level of universal or necessary truths.[129] Further, it is not necessary that the court determine the best possible alternative where it is clear that superior methods exist.[130]

Generally, the Department could reasonably utilize two alternative methods of ascertaining the competency of a driver afflicted with conditions tending to cause a loss of consciousness. The Department could more narrowly tailor the regulatory criteria to exclude only those persons who would present an unacceptable level of risk.[131]

126. Pa. Dep't of Transp. v. Clayton, 684 A.2d 1060, 1065 (Pa. 1996) ("Precluding unsafe drivers, even those who are potentially unsafe drivers, from driving on our highways is an important interest. But it is not an interest which outweighs a person's interest in retaining his or her license so as to justify the recall of that license without first affording the licensee the process to which he is due.").

127. Peachy v. Pa. Dep't of Transp., 979 A.2d 951, 954 (Pa. Commw. Ct. 2009).

128. Dewey v. Pa. Dep't of Transp., 997 A.2d 416, 419 (Pa. Commw. Ct. 2010).

129. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 650 (1974) (upholding "reasonable and narrow" criteria for establishing teacher fitness); *see also* Vlandis v. Kline, 412 U.S. 441, 453 (1973) (noting that the state may legitimately establish proxy criteria "that make virtually certain" the existence of the determinative criteria).

130. *See* Bell v. Burson, 402 U.S. 535, 542-43 (1971).

131. This is the approach attempted by the Department in the 2004 amendment to its medical recall regulations. *See* 34 Pa. Bull. 3718 (July 17, 2004).

Alternatively, the Department could evaluate such persons on a case-by-case basis based on the opinion of a treating physician.[132]

It suffices to say, at present, that the Department has alternative methods of determining incompetency to drive. Therefore, the medical recall criteria presented in the *Clayton* case indeed satisfy the elements of an impermissible irrebuttable presumption. The court was correct in holding that due process requires "that the licensee be permitted to present objections, not to the conclusion that he suffered an epileptic seizure, but to the presumption of incompetency to drive."[133] What remains are what evidence, if any, will be sufficient to overcome that presumption, and how far the *Clayton* doctrine extends.

C. Application of the Clayton *Doctrine*

Although Pennsylvania's license recall program creates an irrebuttable presumption by denying licensees the opportunity to present evidence of their competency to drive, the disqualifying conditions are not necessarily insufficient to find incompetency. *Clayton* holds merely that courts must consider evidence that a person suffering from such conditions is in fact competent.[134]

The dissent in *Clayton* criticizes the court for failing to establish a standard by which such evidence should be judged.[135] And indeed, subsequent courts have struggled with the weight to be given to the regulatory presumption of incompetency.[136]

The *Clayton* doctrine raises numerous concerns that courts must address. Courts must balance the interest of public safety against the interests of an individual in maintaining his or her driver's license. Medical license recalls are not esoteric issues of administrative bureaucracy, but rather affect all persons using Pennsylvania's highways. Although administrative efficiency does not outweigh a person's constitutionally protected interest in maintaining a driver's license,[137] if

132. This appears to be the approach recommended by the *Clayton* court. *See* Pa. Dep't of Transp. v. Clayton 684 A.2d 1060, 1065 n.7 (Pa. 1996).

133. *Clayton*, 684 A.2d at 353.

134. *Id.*

135. *Id.* at 355 (Zappala, J., dissenting).

136. *Compare* Peachey v. Pa. Dep't of Transp., 979 A.2d 951, 957 (Pa. Commw. Ct. 2009) (Leadbetter, J., concurring) (noting that expert testimony that licensee is probably safe to drive is not sufficient where, but that the issue was not raised by the Department), *with* Golovach v. Pa. Dep't of Transp., 4 A.3d 759, 764 (Pa. Commw. Ct. 2010) (holding that physician's notation on the Department's reporting form that licensee was competent was sufficient to rebut presumption of incompetency even where licensee did not introduce any evidence at the hearing).

137. *See Clayton*, 684 A.2d at 1065, *accord.* Bell v. Burson, 402 U.S. 535, 540-41 (1971).

the system becomes unduly burdensome the Department may be unable to keep patently unsafe drivers off of the road.

Courts must navigate several difficult issues. As the *Clayton* doctrine matures, courts must address the scope of the doctrine, the limits of judicial review, and weight given to the now rebuttable presumptions promulgated by the Department.

1. Scope of the *Clayton* Doctrine

The potential for judicial abuse or incursion raises concerns in the application of the *Clayton* doctrine. At issue is the fact that virtually all regulatory schemes contain at least an implicit irrebuttable presumption: some set of factors is expressed that will lead an authority to conclude that an individual does or does not qualify for a certain benefit or burden. If the scope of *Clayton* is not in some ways limited, then the courts will be increasingly mandated to exercise a legislative function.[138]

The Commonwealth Court has applied the *Clayton* doctrine, without significant elaboration or alteration, only to medical license recalls pursuant to 67 PA. CODE §§ 83.4-83.5.[139] As *Dewey* notes, 67 PA. CODE § 83.5(a) is analytically identical to 67 PA. CODE § 83.4 in that a loss of consciousness may result from the specified conditions.[140]

However, the Commonwealth Court has declined to apply *Clayton* to license recalls pursuant to the vision requirements in 67 PA. CODE § 83.3, noting that such criteria were "objectively measurable and, unless proven otherwise, permanent."[141] Further, the Supreme Court of Pennsylvania has upheld a legislative presumption that a person with a blood alcohol level above the legal limit within two hours of driving was intoxicated while driving on the grounds that "there is no constitutional right to drink and then drive while the alcohol is still in one's system."[142]

Additionally, federal courts have recognized two exceptions to IPD. First, IPD is inapplicable where the legislature creates a benefit available only "upon compliance with an objective criterion."[143] In such cases the

138. Judge Aldisert presents this issue eloquently in *Malmed v. Thornburgh*, 621 F.2d 565, 575-77 (3d Cir. 1980).

139. *See* Peachey v. Pa. Dep't of Transp., 979 A.2d 951 (Pa. Commw. Ct. 2009) (holding that, like Clayton, § 83.4, relating to seizures, creates an irrebuttable presumption of incompetency); Dewey v. Pa. Dep't of Transp., 997 A.2d 416 (Pa. Commw. Ct. 2010) (holding that § 83.5(a)(1), relating to brittle diabetes or unstable hypoglycemia, creates an irrebuttable presumption of incompetency); Golovach v. Pa. Dep't of Transp., 4 A.3d 759 (Pa. Commw. Ct. 2010) (holding that §83.5(a)(2), relating to vascular diseases, creates an irrebuttable presumption of incompetency).

140. *Dewey*, 997 A.2d at 419.

141. Byers v. Pa. Dep't of Transp., 735 A.2d 168, 171 (Pa. Commw. Ct. 1999).

142. Commonwealth v. Duda, 923 A.2d 1138, 1150 (Pa. 2007).

143. Weinberger v. Salfi, 422 U.S. 749, 772 (1975).

petitioner has no protected right to such benefits until such criteria are met.[144] Second, IPD is inapplicable where the determinative criterion is "a legal construct, not a natural trait."[145] In such cases the legislature is empowered to define the construct in reference to any rationally related factors.[146]

Therefore, the *Clayton* doctrine does have a natural limitation that will not permit unchecked incursion into the legislative realm. As it pertains to the Department's regulations, most will not be subject to *Clayton*. The provision excluding amputees from operating any vehicles not specially designed,[147] for example, is based on objectively measureable and permanent criteria exempt from *Clayton*. Likewise, the provision requiring that licensees be at least 16 years of age[148] is an objective criterion required to initially receive the benefit of a license.

As it pertains to the license recall program, however, these exceptions are unlikely to benefit the Department. Following *Clayton*, the Department has attempted to narrow the disqualifying criteria in order to achieve a level of objectivity and certainty.[149] These amendments, however, have not altered the conclusion that a presumption of incompetency impermissibly follows from a set of symptoms.[150] Even if the Department were able to set forth with mathematical certainty the symptoms that would lead to a license recall, it would probably not be able to show that any individual suffering from such symptoms presents an objective risk of loss of consciousness while driving.[151] Such concerns must be addressed through the judiciary in the process of its review.

2. Scope of Judicial Review

The Pennsylvania General Assembly limited the scope of judicial review in medical license recall cases to "whether a person is competent

144. *Id.*
145. Michael H. v. Gerald D., 491 U.S. 110, 131 (1989).
146. *Id.*
147. 67 PA. CODE § 79.2 (1977).
148. 75 PA. CONS. STAT. ANN. § 1503(c) (West 2003).
149. *See* 34 Pa. Bull. 3718 (July 17, 2004).
150. *See* Peachey v. Pa Dep't of Transp., 979 A.2d 951, 956 (Pa. Commw. Ct. 2010) (noting that Clayton "did not focus on the licensee's physical condition but, rather, on his inability to prove competency to drive").
151. This should be contrasted with the vision requirements, 67 PA CODE § 83.3, which set, with a great degree of objective certainty, the ability of an individual to see clearly. While vision standards can be established so that all members of the disqualified class have, at least, the same incapacity to see at a given distance, it is unlikely that any criteria could be established ensuring that all persons who have epilepsy or diabetes present, at least, a certain level of risk.

to drive in accordance with the provisions of the regulations promulgated [by the Department] under section 1517."[152] The legislative history indicates that this provision intended to stem the large number of judicial orders restoring driving privileges to person deemed incompetent by the Department.[153]

However, this provision was adopted one month prior to the *Clayton* decision.[154] Following *Clayton*, the medical license recall program became subject to constitutional due process concerns, and any provision limiting the scope of judicial review on constitutional questions seems equally constitutionally suspect.[155] Although no court has yet addressed the issue directly, the cases following *Clayton* have treated the limitation on judicial review as having no effect on the *Clayton* doctrine.[156]

However, the scope of review limitation should not be dismissed so quickly. The only constitutional issue addressed by *Clayton* is whether the courts must consider evidence tending to rebut the presumption of incompetency.[157]

Bell v. Burson, which provides the *Clayton* court with its strongest support, holds that providing a forum for individuals to challenge the presumption may cure a violation of IPD.[158] Similarly, *Clayton* does no more than require courts to admit the evidence of a licensee tending to show that he or she is competent to drive.[159] Moreover, courts have recognized that the Department's disqualifying criteria continue to create a rebuttable presumption of incompetency.[160]

Based on these considerations, section 1519(c) of the Vehicle Code does limit judicial review notwithstanding the constitutional issue. First, courts must take the Department's disqualifying conditions as a starting point in any analysis of competency. The presence of such conditions

152. 75 PA. CONS. STAT. ANN. § 1519(c) (West 2004).
153. *See* LEGIS. JOURNAL, 180th Gen. Assemb., No. 30 at 1943 (Pa. 1996).
154. This provision was signed into law as Act No. 118 of 1996 on Oct. 7, 1996. *Clayton* was decided on Nov. 1 of that year.
155. *See* Johnson v. Robinson, 415 U.S. 316, 365 (1974) (noting that a provision barring courts from deciding the constitutionality of a legislative scheme would itself become constitutionally suspect).
156. *See supra* Part III.C.1.
157. Pa. Dep't of Transp. v. Clayton, 684 A.2d 1060, 1065 (Pa. 1996).
158. Bell v. Burson, 402 U.S. 535, 542 (1971).
159. *Clayton*, 684 A.2d at 1065.
160. *See* Turk v. Pa. Dep't of Transp., 983 A.2d 805, 813 (Pa. Commw. Ct. 2009) (holding, "absent any medical evidence to the contrary, the medical report alone is sufficient to establish a prima facie case and support a finding that the licensee suffers from a medical condition that interferes with her ability to drive"); *see also* Byler v. Pa. Dep't of Transp., 883 A.2d 724, 728 (Pa. Commw. 2005).

shifts the burden of production to licensee.[161] Second, the court must determine whether the licensee is competent to drive in accordance with the provisions of the Department's regulations—that is, whether the licensee presents a level of risk the regulations deem unacceptable.[162] The courts must then evaluate the strength of a licensee's evidence in light of these two restraints, neither of which implicate the constitutional concerns raised in *Clayton*.

3. The Nature of Evidence Relevant to Rebut a Presumption of Incompetency to Drive

The primary concern raised by the Commonwealth Court's application of *Clayton* is the relative ease with which the Department's regulations are cast aside in favor of a finding of competency.[163] In *Peachey*, the licensee was able to retain his license based on the testimony of his treating physician that "it would probably be safe, it's always a judgment call with these things, but I think he probably could drive at this point."[164] In *Dewey,* the licensee was able to retain his license based on the unsworn report of his treating physician.[165] Finally, in *Golovach*, the licensee was able to retain his license without introducing any evidence.[166]

The first two of these cases could, theoretically, have been resolved in the Department's favor by attempting to exclude the licensees' evidence under the terms of the Pennsylvania Rules of Evidence. First, Pennsylvania requires that expert testimony be expressed with reasonable certainty.[167] Second, medical diagnoses and opinions are specifically excluded from the business records exception to the hearsay rule.[168] Thus, unsworn reports or equivocal testimony by physicians that purport to establish competency could likely be excluded.

161. *See Byler*, 983 A.2d at 814.

162. The level of risk being the determinative criteria of competency to drive, it is within the legislative authority of the Department to establish. *See supra* Part III.B.2.

163. This raises separation of powers concerns in that the judiciary is exercising a legislative function, as well as public welfare concerns in that unsafe drivers may be able to retain their licenses.

164. Peachey v. Dep't of Transp., 979 A.2d 951, 954 (Pa. Commw. Ct. 2009).

165. Dewey v. Pa. Dep't of Transp., 997 A.2d 416, 417 (Pa. Commw. Ct. 2010).

166. Golovach v. Pa. Dep't of Transp., 4 A.3d 759, 762 n.5 (Pa. Commw. Ct. 2010).

167. *See* McMahon v. Young, 276 A.2d 534 (Pa. 1971) (interpreting PA. R. EVID. 702).

168. *See* Phillips v. Gerhart, 801 A.2d 568, 575 (Pa. Super 1995) (interpreting PA. R. EVID. 803(6) and noting that the court has "long held" that medical opinions contained in reports do not fall within the hearsay exception for records of regularly conducted activities).

These methods, however, do not ameliorate the trend of denying the presumptive weight of the medical license recall regulations expressed in *Golovach*. In that case, the Department received a physician's report that the licensee had suffered a syncopal attack but "had a pacemaker implanted . . . and he now has no medical contra-indications to resume driving."[169] Under 67 PA. CODE § 83.5(a)(2), the licensee is plainly within the disqualifying criteria. Although the licensee presented no evidence at trial, the court affirmed the reinstatement of his license.[170]

Given the current trend decreasing the weight applied to the medical recall regulations, it is all the more pertinent that courts recognize the nature of the presumption to be rebutted. The Department has established the amount of risk presented by an individual that renders him or her incompetent to drive; it is the amount of risk normally associated with the disqualifying conditions. Because not all persons with a given condition present a risk equal to that normally associated with the condition, the regulations create a presumption of incompetency.

This presumption can be rebutted only through evidence showing that the licensee presents less risk than other similarly afflicted persons. It is not for the individual physician to determine whether a person is safe to drive, but only to determine whether a person is safer than is required. If this were not so, licensees could offer evidence that, for example, an intoxicated person is safe to drive based on the opinion of single doctor. Such decisions are legislative and not left to individual opinion.

The courts must recognize that the irrebuttable presumption is between the disqualifying conditions and the established acceptable level of risk. Evidence that is not material to the refutation of this presumption is irrelevant.

IV. CONCLUSION

Concerns about the dangers inherent to a broad application of IPD are proper. Wherever legislative classifications are used to differentiate individuals for disparate treatment, courts may conclude that the legislation impermissibly presumes that all such individuals must be treated disparately in order to achieve the purported state interest. In insisting on a necessary connection between premise and conclusion, IPD presents a standard at odds with the accepted rational basis test.[171]

169. *Golovach*, 4 A.3d at 760-61.
170. *Id.* at 762.
171. *See supra* Part III.A.1.

Thus IPD could become "a virtual engine of destruction"[172] for such classifications previously found valid under rational basis analysis.

IPD, however, serves a valuable purpose within its limited scope. Where a legislative act classifies individuals based on certain factual criteria, the state cannot presume, rather than prove, the existence of those facts.[173] Such a presumption violates procedural due process by depriving those individuals of a meaningful opportunity to be heard.[174]

This is precisely, albeit obscurely, what the Pennsylvania license recall program has done. The program defines a class of individuals who are subject to a deprivation of their license to drive: those whose chances of a serious medical event create an unacceptable risk of losing control of an automobile.[175] However, since such a risk is incapable of precise and objectively measurable definition, the Department has defined unacceptable risk in reference to that posed by an individual with a given medical history. The Department then, and only at this point, creates an irrebuttable presumption that all persons with such medical histories present an unacceptable risk while driving.

Courts must exercise care in determining what evidence must be considered under IPD in license recall and similar cases. IPD does not give a licensee the right to present evidence showing that the amount of risk deemed unacceptable is not the appropriate measure of safety—this standard may only be challenged under the rational basis test.[176] Rather, IPD insists that licensee's be given the opportunity to show that they do not present the risks typically associated with such a medical history, despite having such a medical history.

The nature of the license recall program does not allow for an elegant solution, but rather insists on working within a circular logic: defining the risk by the condition then presuming risk from the condition. This is not a defect in law, but rather the stubborn persistence of nature to defy clear categorical thought.

We may know empirically that certain conditions lead inexorably to greater risks. We may calculate, through statistical abstractions, the exact level of that risk among a large population. When we codify this general risk as a precept of law, "we draw an uncertain and wavering line, but draw it we must as best we can."[177]

172. Weinberger v. Salfi, 422 U.S. 749, 772 (1975).
173. *See supra* Part III.A.2.
174. *See supra* Part III.A.3.
175. *See supra* Part III.B.2.
176. *See supra* Part III.C.3.
177. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting).

We may reasonably presume that the attributes of the class apply to its members. Yet, if we allow such postulates to harden into conviction, presumption overshoots veracity, and fallacy rules over wisdom.