Deporting the Addicted: Arguments for the Repeal of Section 237(A)(2)(B)(II) of the Immigration and Nationality Act

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Introduction

Imagine the following three scenarios. Jacques, a French national, came to the United States as a lawful permanent resident four years ago to marry his wife, a United States citizen. They are expecting their first child in six months. They have lived continuously in Philadelphia where they intend to build a life and raise their child. Jacques remains in the United States as a lawful permanent resident and has elected not to pursue citizenship, as he is proud of his French heritage and wishes to maintain status as a French citizen. Within the past two years, Jacques has unfortunately experimented with and become addicted to amphetamines. In an effort to cure this problem, Jacques and his wife decided to seek help at a local drug clinic.

Carlos, a thirty-year-old Mexican citizen, entered the United States illegally fifteen years ago with his mother. They have remained in the San Diego area since then. Carlos earns a living in a shoe factory and is his mother’s sole provider. He leads a relatively unremarkable life and has never been in trouble with the law. Over the past five years, Carlos has gradually become dependent on alcohol, specifically hard alcohol such as vodka. As the dependence became more severe, it began to interfere in Carlos’s life. To regain control, he began attending Alcoholics Anonymous meetings at a local church. A month ago, the shoe factory laid him off, and, on his way home to break the unfortunate news to his mother, he stopped off at a neighborhood bar and had a few drinks. While walking home, he stumbled a couple of times, and, when approached by a police officer, he slurred his words. The officer arrested Carlos for public drunkenness. Carlos and his attorney have decided that at his arraignment next week, Carlos should plead guilty and ask the judge for leniency due to his addiction.1

Madeline, an Italian citizen, came to the United States as a child seventy years ago. As a lawful permanent resident, she lives in Buffalo where she raised her seven children and saw her many grandchildren and great-grandchildren grow up. Madeline, whose husband died ten years ago, lives a simple life, supplemented only by her social security checks and her late husband's meager pension. Five years ago, a doctor diagnosed Madeline with liver cancer. In an effort to provide Madeline comfort in her last years, her doctor prescribed morphine to dull the pain. Madeline's cancer is now in remission, but she has since become severely addicted to the pain killers. The addiction is destroying her relationship with her dozens of grandchildren and great-grandchildren. As a family, they decide to have her committed to a drug rehabilitation clinic so that she will be able to enjoy her final years drug-free.

Section 237(a)(2)(B)(ii) of the Immigration and Nationality Act ("INA") states that any alien who is a drug abuser or addict is deportable. In each of the above scenarios, the non-citizen in question risks deportation under this provision if the Immigration and Naturalization Service ("INS") somehow learns of the alien's addiction. Section 237(a) lists all of the current deportation grounds, but subsection (a)(2)(B)(ii) in particular brushes up against several constitutional boundaries.

This Note argues for the repeal of section 237(a)(2)(B)(ii) based on several arguments challenging the constitutionality of this provision. Part I of the Note examines the history of the immigration acts and the development of the congressional power to deport. Part II examines possible constitutional violations of section 237(a)(2)(B)(ii) including violations of the Eighth Amendment prohibition against cruel and unusual punishment, the Fourteenth Amendment Equal Protection Clause and the Fifth Amendment procedural and substantive due process protections. Finally, Part III argues that section 237(a)(2)(B)(ii) is unconstitutionally vague because it draws no dis-
tinctions as to what particular types of drugs, nor what degree of addiction or abuse, would warrant deportation. 8

I. DEVELOPMENT OF THE PLENARY POWER DOCTRINE AND THE EVOLUTION OF CONGRESS'S RIGHT TO DEPORT

Since the late 1800s, the United States Supreme Court has recognized that Congress has the complete power, as an incident of sovereignty, to exclude foreigners. 9 This plenary power was and continues to be the basis for all immigration legislation as it relates to restricting the types of individuals who are allowed to cross the United States border and regulating the types of individuals who are allowed to stay. 10

In 1888, in *Chae Chan Ping v. United States* ("Chinese Exclusion Case"), the United States Supreme Court held that the power of exclusion of foreigners is an incident of sovereignty and thus Congress has the plenary power to pass legislation that excludes foreigners from the United States. 11 Chae Chan Ping was a Chinese laborer who entered the United States in 1875 and lived in San Francisco until 1887. 12 In 1887, he left for a visit to China, and upon his return, the INS denied him admission pursuant to an 1888 act that prohibited the return of all Chinese laborers who had left the United States. 13 The Court rejected Chae Chan Ping's various constitutional challenges to the Act of 1888, reasoning that the congressional power to restrict immigration was an important element of maintaining sovereignty. 14

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8 See 8 U.S.C. § 237(a)(2)(B)(ii); see also infra notes 273-91 and accompanying text.
9 See, e.g., Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889); Massieu v. Reno, 915 F. Supp. 681, 698 (D.N.J. 1996) (reiterating that legislative power over admission of aliens is absolute).
10 See, e.g., Harisiades v. Shaughnessy, 342 U.S. 580, 586-87 (1952) (holding that an alien's status in this country is a matter of Congressional permission and tolerance, and an alien has no constitutional right to remain in the United States); United States v. Oboh, 92 F.3d 1082, 1087 (11th Cir. 1996), cert. denied, 117 S.Ct. 1257 (1997) (same).
11 130 U.S. at 609.
12 See id. at 582.
13 See id. In 1882, Congress passed an act which suspended the immigration of Chinese laborers for ten years. See Act of May 6, 1882, ch. 126, 22 Stat. 58 ("Act of 1882"); Thomas Alexander Aleinikoff et al., Immigration Process and Policy 4 (3d ed. 1995). Because it was not Congress's intent for the Act of 1882 to affect Chinese laborers who were already in the United States, the statute established a procedure for the issuance of "certificates of identity" so that if a Chinese laborer chose to leave for a visit, he could re-enter. Act of 1882 § 4; see Aleinikoff, supra. Prior to his departure, Chae Chan Ping complied with the Act of 1882 and obtained a certificate of identity, believing that such certificate would entitle him to re-enter the United States without a problem. See Chae Chan Ping, 130 U.S. at 582. Congress passed another act in 1888, however, that prohibited the return of all Chinese laborers who had left the United States regardless of whether or not they obtained their certificates pursuant to the Act of 1882. See Act of Sept. 13, 1888, ch. 1015, 25 Stat. 476 ("Act of 1888"); Aleinikoff, supra.
14 Chae Chan Ping, 130 U.S. at 608, 609. Chae Chan Ping argued that the Act of 1888 was
stated that not only does the government have the right to regulate immigration, but the government has the duty to do so in order to protect the country's independence. The Court concluded that a sovereign nation has the inherent right and the plenary power to exclude foreigners and that such a right cannot be granted away or restrained. The Supreme Court thus held that Congress's refusal to allow Chae Chan Ping reentry into the United States was a valid exercise of legislative power.

It was in this Chinese Exclusion Case that the Supreme Court first discussed the plenary power doctrine, which essentially placed unfettered authority with respect to immigration laws and restrictions in the hands of the federal government. The plenary power doctrine finds its roots in the concept of absolute and inherent sovereignty, though there is no one particular provision in the Constitution from which it can find support.

Four years later, in 1892, in Nishimura Ekiu v. United States, the United States Supreme Court upheld the Immigration Act of 1891 (“Act of 1891”), which codified existing exclusion laws and provided for exclusive inspection of aliens by the federal government. When petitioner, Nishimura Ekiu, arrived at the United States border in 1891, unconstitutional for several reasons. See id. at 584–89. First, he argued that the Act of 1888 contravened the Burlingame Treaty of 1868 which recognized that an alien has an “inherent and inalienable right ... to change his home and allegiance” as well as the “mutual advantage of free migration and emigration of [American and Chinese] citizens.” Id. at 585. Second, he claimed that the INS detained him without due process, and thus in violation of the Fifth Amendment. See id. at 584. Third, he argued that he had a vested right to return to the United States because he had previously lived there as a peaceable resident. See id. at 586–88. Fourth, Chae Chan Ping argued that the Act of 1888 violated the ex post facto prohibition in the Constitution because it was applied retroactively. See id. at 589. The Court rejected all of Chae Chan Ping's arguments. Id. at 603, 609.

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an inspector refused to allow her to enter pursuant to an 1882 act that required exclusion of an alien if the inspector believed that the alien would likely become a public charge.\(^{21}\) The main issue in this case was the validity and effect of the inspector's actions, and Nishimura argued that the inspector did not have the authority to order exclusion because the Secretary of the Treasury (rather than the Superintendent of Immigration) had appointed him.\(^{22}\) The Court rejected Nishimura's argument on the grounds that the Act of 1891 specifically delegated to the Secretary of the Treasury the power to appoint immigration inspectors.\(^{23}\) The Court, in an often cited passage, reiterated its reliance on the plenary power doctrine as a means of settling immigration issues:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.\(^{24}\)

The Court concluded that pursuant to the plenary power to regulate immigration, Congress had the authority to pass legislation that delegated authority to the Secretary of the Treasury and, therefore, the Act of 1891 was constitutional and valid.\(^{25}\) The Court thus affirmed the Secretary's decision to exclude Nishimura.\(^{26}\)

The aliens in the *Chinese Exclusion Case* and *Nishimura* were seeking entry into the United States, and thus the issue in their cases was whether the exclusion from entry was proper.\(^{27}\) Exclusion, however, was not the only means available to Congress in regulating immigration.\(^{28}\)

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\(^{21}\) See Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214 ("Act of Aug. 1882"); *Nishimura*, 142 U.S. at 652, 661. The Act of Aug. 1882 provided that the Secretary of the Treasury had the duty to examine the immigrants who are seeking entry, and "if on such examination there shall be found among such passengers any convict, lunatic, idiot or any person unable to take care of himself or herself without becoming a public charge, ... such persons shall not be permitted to land." Act of Aug. 1882 § 2; see *Nishimura*, 142 U.S. at 662.

\(^{22}\) See *Nishimura*, 142 U.S. at 662-63.

\(^{23}\) Id. at 663.

\(^{24}\) Id. at 659.

\(^{25}\) Id. at 659, 664.

\(^{26}\) Id. at 664.

\(^{27}\) *Nishimura*, 142 U.S. at 652; *Choe Chan Ping*, 130 U.S. at 581-82.

\(^{28}\) See ALEINIKOFF, supra note 13, at 511-12.
Congress also had the power to pass legislation regarding the ability to deport aliens who were already within the United States borders.29

In 1888, Congress enacted the first permanent deportation statutes.30 One of these statutes required the removal, at any time after entry, of all persons of Chinese descent who were found inside the United States in violation of the law.31 The other statute required the removal by administrative process, within one year after entry, of all aliens who had landed in violation of the 1885 and 1887 contract labor laws prohibiting the importation or migration of aliens who had pre-existing contracts to work in the United States.32 Congress amended the deportation laws in 1892 to state that all Chinese laborers in the United States were required to obtain a certificate of residence from the Collector of Internal Revenue, and, according to the regulations promulgated pursuant to this amendment, the Collector would only issue a certificate on the "affidavit of at least one credible white witness."33 The Act of 1892 provided that the government could arrest and deport any alien who failed to acquire this certificate within the requisite time period.34

29 See id. Deportation refers to the removal of a non-citizen who is within the United States borders, and exclusion refers to the non-admittance of a non-citizen who is waiting at the border. See id. at 20–21. Traditionally, the amount of due process the INS affords to an alien depends on which proceeding the INS has commenced against the alien. See id. at 512. In deportation proceedings, the alien has generally had more due process rights, both procedural and substantive, and these rights are based in part on the notion that once someone is within the border, he or she has a "stake" or a vested interest. See, e.g., Kaoru Yamataya v. Fisher, 189 U.S. 86, 101 (1903) (holding that an alien who has entered the country is entitled to due process under the Fifth Amendment and cannot be deported without an opportunity for a hearing); Caballero v. Caplinger, 914 F. Supp. 1374, 1376 (E.D. La. 1996) (holding that aliens in deportation proceedings are entitled to constitutional protections of due process). Conversely, an alien in exclusion proceedings has significantly less due process rights. See, e.g., Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) (stating that an alien at the border stands on a different footing than an alien who is already within the border); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress, it is due process as far as an alien is concerned.") In the recently enacted IIRIRA, the distinction between deportation and exclusion proceedings has been eradicated. IIRIRA § 301, Pub. L. No. 104–208, Div. C., 110 Stat. 3009 (1996) (to be codified 8 U.S.C. § 1229). It is unclear what effect abolishing this distinction will have on the particular rights afforded to an alien in a given proceeding. The proceeding for either category is now termed "Removal Proceedings." See id. § 304.


31 See Act of Sept. 1888; Maslow, supra note 30, at 312.


33 Act of May 5, 1892, ch. 60 § 6, 27 Stat. 25 ("Act of 1892"); see ALEINIKOFF, supra note 13, at 21.

34 Act of 1892; see ALEINIKOFF, supra note 13, at 21.
In 1893, in *Fong Yue Ting v. United States*, the United States Supreme Court upheld the constitutionality of the Act of 1892 and ruled that Congress had the absolute right, pursuant to the plenary power doctrine and the notion of inherent sovereignty, to pass deportation legislation. The INS arrested Fong Yue Ting, a Chinese laborer, for failure to produce a certificate of residence as required by the Act of 1892. An immigration judge subsequently ordered Fong Yue Ting's deportation because he could not establish his residency through the testimony of at least one credible white witness. The Court rejected Fong Yue Ting's claims that he was deprived of life, liberty and property without due process of law. The Court stated that the right to deport immigrants who have not been naturalized or taken any steps toward becoming citizens is as absolute and unqualified as the right to exclude. The Court relied on the plenary power doctrine to uphold the constitutionality of the Act of 1892 and held that the power to exclude aliens as well as the power to expel them is an inherent power incident to sovereignty. The Court thus upheld Fong Yue Ting's deportation order.

In 1907, Congress expanded the immigration law to provide for the deportation of aliens engaged in prostitution and aliens who had become public charges due to conditions that existed prior to their entry into the United States. In 1917, Congress again extended the deportation grounds to include all those who became public charges from pre-entry causes and those who were sentenced to jail for two or

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35 Act of 1892; 149 U.S. 698, 711 (1893).
36 See *Fong Yue Ting*, 149 U.S. at 702.
37 See id. at 704.
38 Id. at 730. In his dissent, Justice Brewer argued that the act is unconstitutional because it imposes punishment without due process of law. Id. at 733 (Brewer, J., dissenting). He said, "[d]eposition is punishment. It involves first an arrest, a deprivation of liberty; and, second, a removal from home, from family, from business, from property." Id. at 740 (Brewer, J., dissenting). Justice Field, in his dissent, also was unwilling to accept that deportation is not punishment. Id. at 759 (Field, J., dissenting). He said that "if a banishment of the sort described be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied." Id. at 759 (Field, J., dissenting).
39 Id. at 707. The Court commented on the fact that the Chinese immigrants had taken no steps toward becoming citizens; yet, until 1943, the law prohibited them from naturalizing. See Act of May 6, 1882, ch. 126, § 14, 22 Stat. 58, 61 (persons of Chinese origin specifically barred from naturalization), repealed by Act of Dec. 17, 1943, ch. 344, § 1, 57 Stat. 601; *Fong Yue Ting*, 149 U.S. at 724; *Scaperlanda*, supra note 18, at 980 n.56.
40 See *Fong Yue Ting*, 149 U.S. at 707.
41 Id. at 732.
42 Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 899-900; see Maslow, supra note 30, at 313.
more crimes involving "moral turpitude." This act and subsequent amendments remained in effect until 1952.

In 1952, Congress passed the McCarran-Walter Act which required the deportation of eighteen general classes of aliens. In this act, Congress outlined the procedures involved in deporting aliens and also defined the limited discretion of the Attorney General in deportation proceedings. The McCarran-Walter Act provided, for the first time, for deportation of aliens addicted to narcotics. The act did not distinguish between those aliens who had cured their addiction and those who had not. Similarly, the act required deportation even if the alien never engaged in criminal activity with respect to his addiction or was a useful member of the community. Critics of this provision in the McCarran-Walter Act feared that it was an unfair provision, and they argued for its repeal. Although ultimately overridden, President Franklin D. Roosevelt vetoed the provision and stated that narcotics addiction is a lamentable disease and should not be treated as a crime. 

Despite the criticism, the McCarran-Walter Act, at least with respect to the provision regarding narcotics addiction as a ground for

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43 Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 889; see Maslow, supra note 30, at 313. Adequate consideration to the meaning of the term "moral turpitude" is beyond the scope of this Note. In fact, the leading treatise on immigration law states that "attempts to arrive at a workable definition of moral turpitude never have yielded entire satisfaction.... This term defies precise definition, since its limits are charted by human experience." ALEINIKOFF, supra note 13, at 544 (quoting CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE, § 71.05[1][d][i] (1994)). BLACK'S LAW DICTIONARY provides the most common definition of moral turpitude: "the act of baseness, vileness or the depravity in private and social duties which man owes to his fellow man," but even this definition gives little indication of how the courts have struggled to categorize a particular crime as one involving moral turpitude. BLACK'S LAW DICTIONARY 698 (6th ed. 1991); see ALEINIKOFF, supra note 13, at 544. For examples of how the courts have interpreted "moral turpitude," see Jordan v. DeGeorge, 341 U.S. 223, 229 (1951) (holding that crime involves moral turpitude); see also McCarran-Walter Act § 241; Maslow, supra note 30, at 339. The McCarran-Walter Act provided for the deportation of any alien who "is, or hereafter at anytime after entry has been, a narcotic drug addict." McCarran-Walter Act § 241.

44 See Maslow, supra note 30, at 313.

45 McCarran-Walter Act § 241, 8 U.S.C. § 1251 (1952); see Maslow, supra note 30, at 314.

46 See McCarran-Walter Act § 242; Maslow, supra note 30, at 317.

47 McCarran-Walter Act § 241; Maslow, supra note 30, at 339. The McCarran-Walter Act provided for the deportation of any alien who "is, or hereafter at anytime after entry has been, a narcotic drug addict." McCarran-Walter Act § 241.

48 See McCarran-Walter Act § 241; Maslow, supra note 30, at 339.

49 See McCarran-Walter Act § 241; Maslow, supra note 30, at 339.

50 See Maslow, supra note 30, at 339.

51 See id.
deportation, remained intact until 1990. The Immigration Act of 1990 amended the grounds of deportation by consolidating the eighteen categories of deportable aliens into five broader classes. This statute also amended the language of the drug addiction provision of the McCarran-Walter Act by dropping the term “narcotic.” This change reflected Congress’s recognition that certain drugs, like cocaine, are not narcotics but are nevertheless addictive, and that abuse of drugs, even absent addiction, can have a harmful impact on and pose a danger to society.

The current version of the INA leaves the language with respect to the addiction provision relatively unchanged. Recent amendments to this version, however, render the consequences significantly more harsh in that the possibility for relief is greatly curtailed. The Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) removed the possibility of a waiver of deportation for deportation orders based on drug offenses. Prior to the passage of this law, the immigration statutes provided for discretionary relief of deportation. The AEDPA, however, eliminated waivers of deportation for any alien who is deportable under, inter alia, section 237(a) (2) (B) (ii). Under section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of

53 See INA § 602(a).
54 Compare id. (“Any alien who is, or at any time after entry has been, a drug abuser or addict is deportable.”) (emphasis added) with McCarran-Walter Act § 241 (“[a]ny alien in the United States shall, upon the order of the Attorney General, be deported who . . . is, or hereafter at any time after entry, has been, a narcotic drug addict . . . .”) (emphasis added).
58 Id. The phrase “drug offenses” in this context refers to criminal convictions as well as drug addiction. See id. Therefore, the AEDPA does not only remove a waiver possibility for those convicted of drug crimes, but it also removes the possibility for those who are merely addicts. See id.
59 See INA § 212(c). Although the language in this section appears to indicate that this relief is only available in exclusion proceedings, the Attorney General has ruled that section 212(c) relief is likewise available in deportation proceedings. See Francis v. INS, 552 F.2d 268, 273 (2d Cir. 1976) (holding that fundamental fairness dictates that section 212(c) should apply in both deportation and exclusion hearings); Dan Kesselbrenner, The “Anti-Terrorism” Law, IMMIGR. NEWS. (National Immigration Project, National Lawyers Guild, Inc., Boston, MA), June 1996, at 7.
60 AEDPA § 440(a); see INA § 237(a) (2) (B) (ii); Kesselbrenner, supra note 59, at 7.
1996 ("IIRIRA") there are still some situations where cancellation of removal is a possible remedy, but those situations are limited and left entirely to the Attorney General's discretion. In addition, the AEDPA severely restricts the opportunity for judicial review of a deportation order. Thus, even though the current version of the INA with respect to drug addiction has remained relatively unchanged, by removing many procedural protections, the AEDPA severely increased the potential harshness of INA section 237(a)(2)(B)(ii). Where there is no possibility of judicial review and where the only possibility of a waiver is in the Attorney General's discretion, this provision, if enforced, may have harsh effects never intended by the original drafters of this provision.

II. CONSTITUTIONAL VIOLATIONS OF SECTION 237

Although Congress has the plenary power to enact legislation to restrict immigration as well as the power to enact legislation pertaining to the rights of an alien to remain in the United States, such laws may nevertheless violate the Constitution. It is well settled that the judiciary applies deferential treatment to such legislation, but Congress must remain within the confines of the United States Constitution. Congress should thus repeal section 237(a)(2)(B)(ii), or in the alternative, the courts should declare that section unconstitutional because it violates several provisions in the Constitution.

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61 IIRIRA § 304.
62 AEDPA § 440(a). AEDPA § 440(a) amended 8 U.S.C. § 1105a(a) to read, in pertinent part, that any final order of deportation as a result of a criminal conviction (which includes deportation orders based on drug addiction under § 237(a)(2)(B)(ii)) shall not be subject to review by any court. AEDPA § 440(a); see Dululao v. INS, 90 F.3d 396, 399-400 (9th Cir. 1996) (upholding the constitutionality of denial of judicial review stating that there is no constitutional right to judicial review in deportation cases); Hincapie-Nieto v. INS, 92 F.3d 27, 29-30, 31 (2d Cir. 1996) (upholding the constitutionality of denial of judicial review, especially because habeas corpus relief was still available as a remedy).
63 INA § 237(a)(2)(B)(ii); AEDPA § 440(a).
64 See Massie v. Reno, 915 F. Supp. 681, 698 (D.N.J. 1996) ("[n]otwithstanding the political branches' near plenary power over aliens, this power is circumscribed by the constitutional constraints imposed on the exercise of all governmental authority.")
65 See, e.g., Fiallo v. Bell, 430 U.S. 787, 792 (1977) (stating that the Congress's power over the admission of aliens is absolute); Mbiya v. INS, 990 F. Supp. 609, 611 (N.D. Ga. 1996) (stating that although Congress's power to deport is plenary, it is nevertheless subject to judicial intervention under the paramount law of the Constitution); Chan v. Reno, 916 F. Supp. 1289, 1296 (S.D.N.Y. 1996) (stating that judicial review in immigration matters is narrowly circumscribed); Massie, 915 F. Supp. at 698 (D.N.J. 1996) (same).
66 INA § 237(a)(2)(B)(ii); see infra note 292 and accompanying text.
A. Violation of the Eighth Amendment

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment.\(^6^7\) Section 237(a)(2)(B)(ii) of the INA violates the Eighth Amendment's prohibition against cruel and unusual punishment because it unconstitutionally characterizes a person as an addict and imposes an extreme consequence due to such status.\(^6^8\) Although the Supreme Court has declared that deportation does not constitute punishment for purposes of the Eighth Amendment protection, this Note analogizes the characterization of "addict" in the immigration context to those situations in the criminal context where the Court has found that similar characterizations violate the Constitution.\(^6^9\)

In 1958, in *Trop v. Dulles*, the United States Supreme Court struck down a portion of the nationality law that stripped citizenship from those convicted of desertion from the military during a war.\(^7^0\) The petitioner, a native-born American, deserted the United States Army.\(^7^1\) In 1952, Trop applied for a passport, but was denied on the ground that under section 401(g) of the Nationality Act of 1940, he had lost his citizenship by reason of his conviction and dishonorable discharge for wartime desertion.\(^7^2\) The Court invalidated the expatriation provision in part because it violated the Eighth Amendment.\(^7^3\) The Court stated that the framers of the provision intended expatriation to constitute punishment.\(^7^4\) Moreover, the Court reasoned that because de-nationalization destroyed an individual's status in society, it constituted cruel and unusual punishment.\(^7^5\) The Court thus concluded that the Eighth Amendment forbids Congress to punish by taking away citizenship.\(^7^6\)

\(^6^7\) U.S. CONST. amend. VIII. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

\(^6^8\) See id.; INA § 237(a)(2)(B)(ii).

\(^6^9\) See, e.g., *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (invalidating as unconstitutional under the Eighth Amendment a statute criminalizing an involuntary status); *Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893) (stating that deportation is not punishment).

\(^7^0\) 356 U.S. 86, 101 (1958).

\(^7^1\) See id. at 87.


\(^7^3\) *Trop*, 356 U.S. at 101.

\(^7^4\) *Id.* at 97.

\(^7^5\) See id. at 101-02.

\(^7^6\) *Id.* at 103.
In 1962, in *Robinson v. California*, the United States Supreme Court held that a statute criminalizing narcotic addiction violated the Eighth Amendment. 77 The defendant was a narcotics addict, and the State charged the defendant with violating a statute that made it a misdemeanor punishable by imprisonment for any person to be addicted to narcotics. 78 A police officer arrested the defendant after observing scar tissue and discoloration on the defendant's arm, and based on his experiences, the officer determined that the defendant had used narcotics. 79 The Court acknowledged that a state has a right to regulate narcotic drug traffic, but implied that such regulation is limited to specific acts, such as use, purchase, sale or possession of narcotics and may not apply to the status of narcotics addiction. 80 The Court stated that narcotic addiction is an illness contracted innocently or involuntarily. 81 The Court concluded that a state law that imprisons a diseased individual as a criminal is an infliction of cruel and unusual punishment unless such addiction is accompanied by a volitional act. 82 Thus, the Court reversed Robinson's conviction on the grounds that the statute upon which he was convicted was unconstitutional under the Eighth Amendment. 83

In 1977, in *Ingraham v. Wright*, the United States Supreme Court ruled that the Eighth Amendment's prohibition against cruel and unusual punishment protected only those convicted of a crime. 84 Pupils in a junior high school alleged that they were denied their constitutional rights when their teachers used corporal punishment as a means of discipline. 85 In *Ingraham*, petitioners alleged several incidents of severe corporal punishment, including an instance where a teacher paddled one of the petitioners more than twenty times, resulting in a hematoma requiring medical attention. 86 The Court rejected petitioners' claim that the teachers' actions violated the Eighth Amendment's prohibition against cruel and unusual punishment. 87 The Court looked to the history of the Amendment, as well as to the Court's prior decisions that construed the proscription against cruel and unusual

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78 See id. at 660, 668.
79 See id. at 662.
80 See id. at 665-66.
81 Id. at 667.
82 Robinson, 370 U.S. at 667.
83 Id. at 666-67, 668.
85 See id. at 653, 655.
86 Id. at 657.
87 Id. at 664.
punishment to protect only those convicted of crimes. The Court stated that a schoolchild has little need for the protection of the Eighth Amendment and thus held that when public school teachers impose corporal punishment as a disciplinary tool, the Eighth Amendment does not apply.

In 1978, in *McJunkin v. Immigration and Naturalization Service*, the United States Court of Appeals for the Ninth Circuit held that section 241(a)(11) of the INA did not violate the Eighth Amendment. McJunkin, a citizen of Germany, lawfully entered the United States in 1956. Pursuant to the Narcotic Addict Rehabilitation Act ("NARA"), McJunkin voluntarily sought, and received pursuant to a hearing, an order of commitment to a drug rehabilitation clinic due to his narcotics addiction. The INS received the order of commitment, which characterized the alien as a drug addict, and the INS used this order to initiate deportation proceedings against the alien.

McJunkin first argued that the INS could not use a NARA order as evidence in a deportation proceeding. McJunkin relied on a provision in the NARA that provides that "[t]he results of any hearing, examination, test or procedure to determine narcotic addiction of any patient under this subchapter shall not be used against such patient in any criminal proceeding." The court rejected this argument on the ground that deportation proceedings constitute civil, not criminal, proceedings and thus this provision of the NARA did not apply.

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89 *Id.* In his dissent, Justice White disagreed with the majority’s limitation on the Eighth Amendment’s prohibitions. See *Id.* at 685 (White, J., dissenting). He looked to the express language of the Amendment and determined that there was no such limitation. See *Id.* (White, J., dissenting). He also relied on the fact that the Framers deliberately excluded the word “criminal” as evidence that the Amendment was designed to prohibit all inhumane or barbaric punishments regardless of whether the offense was civil or criminal in nature. See *Id.* (White, J., dissenting); see also *Whitney v. Albers*, 475 U.S. 312, 318–19 (1986) (reiterating that the Eighth Amendment prohibition against cruel and unusual punishment was only applicable in criminal adjudications).

90 *Ingraham*, 430 U.S. at 670, 671.

91 579 F.2d 533, 535 (9th Cir. 1978); see INA § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1976). Section 241 of the INA provided for the deportation of any alien who "is, or hereafter at any time after entry has been, a narcotic drug addict . . . ." INA § 241(a)(11).

92 See *McJunkin*, 579 F.2d at 535.


94 See *McJunkin*, 579 F.2d at 535. The opinion is unclear as to how INS obtained the order of commitment entered by the district court. See *Id.*

95 See *Id.*

96 NARA § 309; see *McJunkin*, 579 F.2d at 535.

97 *McJunkin*, 579 F.2d at 535; see *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (holding
ceeding would defeat the reformative purpose of the NARA as it would ultimately discourage alien addicts from reaping the benefits of the NARA. In response, the court stated that it was Congress's task, not the courts', to change the words of the NARA to include deportation proceedings.

Secondly, McJunkin argued that the NARA hearing did not establish an addiction for purposes of deportation. The Ninth Circuit also rejected this argument, but declined to hold as a matter of law that a NARA order would automatically provide sufficient evidence in all deportation cases. The court recognized that in each of the proceedings, different standards of proof apply—deportation proceedings require proof by "clear, convincing and unequivocal language," and commitment under the NARA is not necessarily as demanding. The court thus held that an addiction established for NARA purposes should constitute no more than a prima facie case subject to the alien's rebuttal. In this particular case, however, the court considered the NARA commitment order sufficient to establish addiction for purposes of deportation.

McJunkin's third argument challenged the constitutionality of addiction as a ground for deportation. McJunkin argued that under Robinson, the provision of the INA that provided for deportation of an addicted alien was a violation of the Eighth Amendment. The Ninth Circuit rejected McJunkin's analogy to Robinson. The court based this rejection on the theory that deportation does not rise to the level of a criminal sanction. The court stated that under the Constitution, the freedom from criminal sanctions is unrelated to an alien's privilege to enter or remain in this country and thus, they are subject to different

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97 See McJunkin, 579 F.2d at 535.
98 Id.
99 See id.
100 Id.
101 Id. (quoting Woodby v. INS, 385 U.S. 276, 285-86 (1966)). The court, however, did not expressly state what the requisite standard of proof is in an NARA commitment hearing. See id. at 536 & n.1.
102 McJunkin, 579 F.2d at 536.
103 Id.
104 See id.
105 U.S. CONST. amend. VIII; see INA § 241(a) (11); McJunkin, 579 F.2d at 536. For a discussion of Robinson, see supra notes 77-83 and accompanying text.
106 See Robinson, 370 U.S. at 667; McJunkin, 579 F.2d at 536.
107 See McJunkin, 579 F.2d at 536; see also Harisiades, 342 U.S. at 594; Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893).
The Ninth Circuit further noted that Congress has the plenary power to impose conditions on an alien who wishes to remain in this country which they could not similarly impose on United States citizens. The court thus upheld McJunkin's deportation order as being a constitutional exercise of power.

In 1994, in *Pottinger v. Miami*, the United States District Court for the Southern District of Florida held that the city's practice of arresting homeless persons for performing life-sustaining activities such as sleeping, standing and congregating in public places violated the Eighth Amendment. In *Pottinger*, the plaintiffs were homeless men, women and children who argued that their status of being homeless was involuntary and beyond their immediate ability to change. They argued that the conduct for which they were arrested was inseparable from their status as homeless. Relying on *Robinson*, the court stated that criminalizing an involuntary status is unconstitutional under the Eighth Amendment. The plaintiffs in this case, the court stated, had no choice but to eat, sleep and engage in other life-sustaining activities in public. Thus, the court held, arresting them for such conduct was a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

Many states have attempted to criminalize a "status," such as addiction or homelessness, but the Supreme Court has declared such statutes unconstitutional violations of the Eighth Amendment guarantee against "cruel and unusual punishment." The Court struck down these statutes, reasoning that penalizing a person for an involuntary status violates the constitutional prohibition against cruel and unusual punishment. Examples of "status" characteristics include age, race, gender, national origin and illness.

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108 McJunkin, 579 F.2d at 536.
109 Id. at 536 (citing Brice v. Pickett, 515 F.2d 158 (9th Cir. 1975)).
110 Id.
111 810 F. Supp. 1551, 1559, 1565 (S.D. Fla. 1992); see also Joyce v. City and County of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994) (looking to various factors such as the involuntariness of the acquisition of that characteristic and the degree to which an individual has control over that characteristic in determining whether or not a characteristic was a "status").
112 810 F. Supp. at 1561.
113 See id.
114 Id. at 1561–62; see Robinson, 370 U.S. at 666.
115 Pottinger, 810 F. Supp. at 1565.
116 Id.
117 See U.S. Const. amend. VIII; see, e.g., Robinson, 370 U.S. at 666–67; Pottinger, 810 F. Supp. at 1562.
118 Robinson, 370 U.S. at 666–67; Pottinger, 810 F. Supp. at 1565.
119 See Joyce, 846 F. Supp. at 857.
Thus, although the Supreme Court's decisions clearly reflect a desire to separate criminal sanctions from deportation, the Supreme Court has also declared that statutes criminalizing a status are unconstitutional.\(^{120}\) McJunkin thus may have been more successful had he attacked this particular INS provision arguing not that the ultimate sanction of deportation was cruel and unusual, but rather that the categorization as an addict was cruel and unusual, and thus in violation of the Eighth Amendment.\(^{121}\) In Robinson, the Court did not base its holding on the notion that the actual punishment was cruel and unusual, but rather on the notion that criminalizing something out of a person's control was cruel and unusual.\(^{122}\) If the Supreme Court admonishes the criminalization of the status of addiction, then deporting an individual solely because of his or her addiction would also violate the Constitution.\(^{123}\) Thus, in McJunkin's case, the law is well settled that he cannot argue that deportation, as a resulting sanction, was cruel and unusual, but the law is significantly less settled with respect to the argument that the mere categorization of "addict" is in and of itself cruel and unusual punishment.\(^{124}\)

Even if the court were to accept that the Eighth Amendment prohibits such a categorization, this argument may nevertheless fail because the Supreme Court has interpreted the Eighth Amendment as applicable only to criminal matters.\(^{125}\) Though the Court may have in the past limited Eighth Amendment protections to only those situations involving a criminal matter, the express language of the Amendment contains no such restriction.\(^{126}\) The Court in Ingraham cites to the history of the Amendment for support of its holding that the

\(^{120}\) See Robinson, 370 U.S. at 666-67; McJunkin, 579 F.2d at 586; Pottinger, 810 F. Supp. at 1565; see also Harisiades, 342 U.S. at 594; Fong Yue Ting, 149 U.S. at 709.

\(^{121}\) See Robinson, 370 U.S. at 666; McJunkin, 579 F.2d at 586.

\(^{122}\) See Robinson, 370 U.S. at 667. The Court stated, "[t]o be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." Id.

\(^{123}\) See INA § 237(a)(2)(B)(ii), 8 U.S.C.A. § 1227(a)(2)(B)(ii) (West 1996); Robinson, 370 U.S. at 666. This Note does not challenge the constitutional validity, nor the public policy concerns, with respect to the grounds of deportation that deal with narcotic criminal offenses. This provision, however, does not distinguish between those who act upon their addiction in a criminal manner and those who are innocently afflicted. See INA § 237(2)(B)(i)–(ii) (criminal offenses as a ground for deportation).

\(^{124}\) See Robinson, 370 U.S. at 666-67; McJunkin, 579 F.2d at 586; Pottinger, 810 F. Supp. at 1565; see also Harisiades, 342 U.S. at 594; Fong Yue Ting, 149 U.S. at 709.

\(^{125}\) U.S. Const. amend. VIII; see Ingraham, 430 U.S. at 664.

\(^{126}\) See U.S. Const. amend. VIII; Ingraham, 430 U.S. at 664; see also Ingraham, 430 U.S. at 685 (White, J., dissenting).
Eighth Amendment protects only those convicted of a crime; however, the majority opinion is unconvincing.127 Justice White, in his dissenting opinion in Ingraham, is more persuasive than the majority.128 In arguing that the Eighth Amendment is not limited to criminal matters, Justice White relies on the fact that the Framers deliberately excluded the word “criminal” in the Amendment and regards such exclusion as strong evidence that the Amendment was designed to prohibit all inhumane or barbaric punishments.129

In addition, the popular definition of “punishment” extends well beyond criminal sanction, thus a plain language interpretation of the Eighth Amendment would similarly extend beyond criminal sanction.130 According to Webster’s Ninth New Collegiate Dictionary, for example, one definition of punishment is severe, rough or disastrous treatment.131 Categorizing someone as an addict for purposes of governmental action is arguably “severe, rough or disastrous treatment,” and thus under a plain language interpretation of the Eighth Amendment, this governmental action is subject to the Eighth Amendment limitations regardless of whether or not the categorization occurred in a criminal or civil setting.

Although it purports to keep alienage issues outside of Eighth Amendment protections, the United States Supreme Court has to some level acknowledged that the right to maintain residency in the United States is a constitutionally protected right.132 The observations in Trop, for example, seem inconsistent with the prevailing view that deportation does not constitute punishment.133 This inconsistency supports the argument that deportation does in fact rise to the level of punishment and therefore should enjoy the protections of the Eighth Amendment. Although the statute in Trop did impose a sanction for a crime, and thus fell squarely within Eighth Amendment protections, the Court nonetheless spoke to the harshness of denationalization, which is similar to deportation.134 Thus, if the Supreme Court was willing to hold that denationalization constitutes cruel and unusual

127 Ingraham, 430 U.S. at 664–66; see id. at 685 (White, J., dissenting).
128 Id. (White, J., dissenting).
129 See id. (White, J., dissenting).
130 U.S. CONST. amend. VIII; WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 955 (1988).
131 WEBSTER’S, supra note 130, at 955.
133 See id. at 101; see also Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (stating that “[deportation] is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.”); Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) (observing that deportation may be the equivalent of banishment or exile).
punishment because it destroys an individual's status in society, then deportation, which has similar consequences, must also constitute cruel and unusual punishment.\(^{135}\)

In addition, although the notion that deportation is civil, not criminal, finds support in the case law, many dissenters and scholars challenge this concept as a legal fiction.\(^{136}\) In arguing against the Alien and Sedition Acts, for example, James Madison expressed the belief that deportation constitutes punishment for Eighth Amendment purposes.\(^{137}\) More recently, as judges and lawyers give more consideration to immigration consequences when contemplating plea arrangements and imposing sentences, the line the courts had previously drawn dividing deportation from criminal sanction has blurred.\(^{138}\) Thus, section 237(a)(2)(B)(ii) of the INA may violate the Eighth Amendment in two different ways.\(^{139}\) First, given the recent trend in treating deportation as if it were a criminal punishment, deportation is, or should be, within the Eighth Amendment's protection against cruel and unusual punishment; thus, section 237(a)(2)(B)(ii) is invalid because it is cruel

\(^{135}\) See id. at 101.

\(^{136}\) See, e.g., Trop, 356 U.S. at 98 (stating that the notion that deportation is not punishment "may be highly fictional"); Fong Yue Ting, 149 U.S. at 740 (Brewer, J., dissenting) (stating that deportation is punishment because it takes an individual away from home, family, friends, business and property and sends him or her across the ocean to a distant land); United States ex rel. Klonis v. Davis, 13 F.2d 630, 630 (2d Cir. 1926) (Judge Learned Hand stated that no matter how heinous a crime, deportation is basically exile, which was a dreadful punishment abandoned by the common consent of all civilized people).

\(^{137}\) ALENIKOFF, supra note 13, at 512–13 (citing 4 Elliot's Debates 555 (Phila., J.B. Lippincott & Co., 1881 ed.)). James Madison said:

If banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness,—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security, and personal liberty, than he can elsewhere hope for; ... —if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.

Id.

\(^{138}\) See, e.g., Maryellen Fullerton and Noah Kingstein, Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys, 23 AM. CRIM. L. REV. 425, 426 (1986) (interplay between law enforcement and deportation is evident where the INS assigns immigration investigators to work with state law enforcement in an effort to seek out aliens who are involved in criminal activity); Daniel M. Kowalski and Daniel C. Horne, Defending the NonCitizen, 24 U. Colo. L. Rev. 2177, 2180 (1995) (under a recent federal statute, prosecutors and defense counsel may add deportation to the plea bargaining/sentencing mix; under a different federal statute, a U.S. Attorney may request the federal criminal court to hold a "deportation hearing").

\(^{139}\) See U.S. CONST. amend. VIII; INA § 237(a)(2)(B)(ii).
and unusual to punish someone due to a disease.\textsuperscript{140} This argument is not likely to succeed, however, because the actual penalty, deportation, has traditionally been excluded from Eighth Amendment protection.\textsuperscript{141} Secondly, section 237(a)(2)(B)(ii) is unconstitutional under the Eighth Amendment because it categorizes an individual as an addict and imposes a sanction as a result of that status—such categorization violates the Eighth Amendment.\textsuperscript{142} This argument has a greater chance of success because it does not ask the courts to depart from precedent to declare that deportation is punishment for Eighth Amendment purposes, but rather, it argues that any statute that imposes some form of sanction for an involuntary status violates the Eighth Amendment.\textsuperscript{143}

B. Violation of the Fourteenth Amendment Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution mandates that no state may deny any person equal protection under the law.\textsuperscript{144} The law is well settled that the courts will uphold a legislative classification challenged on equal protection grounds if it bears a rational relation to some legitimate end.\textsuperscript{145} Where a statute targets a suspect class, however, the courts will subject the legislative classification to strict scrutiny analysis.\textsuperscript{146} A legislative classification will survive strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest.\textsuperscript{147} Because aliens

\textsuperscript{140} See U.S. Const. amend. VIII; INA § 237(a)(2)(B)(ii); see also Trop, 356 U.S. at 100 (stating that the basic concept underlying the Eighth Amendment is nothing less than dignity of man and that power to punish should be exercised within limits of civilized standards); Fullerton, supra note 138, at 426; Kowalski, supra note 138, at 2180.

\textsuperscript{141} See, e.g., Whitney v. Albers, 475 U.S. 312, 318-19 (1985) (holding that Eighth Amendment was only applicable in criminal adjudications); Ingraham, 430 U.S. at 664 (same).

\textsuperscript{142} U.S. Const. amend. VIII; INA § 237(a)(2)(B)(ii); see Robinson, 370 U.S. at 666-67; Pottinger, 810 F. Supp. at 1562.

\textsuperscript{143} See, e.g., Robinson, 370 U.S. at 666-67; Pottinger, 810 F. Supp. at 1562.

\textsuperscript{144} U.S. Const. amend. XIV. The Amendment provides in pertinent part: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." Id.

\textsuperscript{145} See, e.g., Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 464 (1981); Robinson v. Fauver, 922 F. Supp. 639, 644 (D.N.J. 1996) (holding that unless a law targets a suspect class, a legislative classification will be upheld on equal protection grounds so long as it bears a rational relation to some legitimate end).

\textsuperscript{146} See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) (holding that classifications involving suspect class are subject to strict scrutiny under equal protection); Artway v. Attorney General of N.J., 81 F.3d 1235, 1267 (3d Cir. 1996) (same); Yokley v. Belaski, 982 F.2d 423, 425 (10th Cir. 1992) (same).

\textsuperscript{147} See, e.g., Wygant v. Jackson Board of Educ., 476 U.S. 267, 273-74 (1986) (to pass strict
are members of a suspect class, classifications based on alienage must be narrowly tailored to serve a compelling governmental interest.\(^{148}\)

In 1886, in *Yick Wo v. Hopkins*, the United States Supreme Court held that the constitutional promise of equal protection of the laws applies to aliens as well as to citizens.\(^ {149}\) In *Yick Wo*, a San Francisco ordinance placed restrictions on the ability to establish a laundry within the city limits.\(^ {150}\) Yick Wo, a native of China and a legal resident of the United States, was arrested for violating this statute.\(^ {151}\) Yick Wo argued that this statute violated the Equal Protection Clause of the Fourteenth Amendment because the statute had the effect of discriminating against the Chinese because Chinese immigrants had established most of the laundry facilities.\(^ {152}\) The Court ruled that the Equal Protection Clause protected aliens as well as citizens.\(^ {153}\) Thus, the Court held that because this statute, though fair and impartial on its face, unjustly discriminated against the Chinese, it violated the Equal Protection Clause of the Fourteenth Amendment.\(^ {154}\)

In 1971, in *Graham v. Richardson*, the United States Supreme Court struck down Arizona and Pennsylvania statutes that disqualified aliens from receiving various forms of welfare assistance.\(^ {155}\) In *Graham*, the aliens sought welfare benefits under their respective state statutes, but the states denied them the benefits.\(^ {156}\) The Arizona statute required fifteen years residence for non-citizens to become eligible for benefits, and the Pennsylvania statute denied the benefits to all aliens, regardless of residency.\(^ {157}\) The Court acknowledged that aliens as a class are a prime example of a “discrete and insular” minority, and thus held that the statutes were subject to strict scrutiny analysis.\(^ {158}\) In order to pass strict scrutiny, legislation that involves a suspect class must be narrowly tailored to serve a compelling state interest.\(^ {159}\) The states justified the statutes on the ground that they preserved welfare benefits

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\(^{148}\) See *Cleburne*, 473 U.S. at 439 (same).  
\(^{149}\) *Yick Wo*, 118 U.S. at 356, 369 (1886).  
\(^{150}\) Id. at 357.  
\(^{151}\) See id. at 357, 358.  
\(^{152}\) See id. at 369, 374.  
\(^{153}\) Id.  
\(^{154}\) *Yick Wo*, 118 U.S. at 373–74.  
\(^{156}\) Id. at 366–68, 368–70.  
\(^{157}\) See id. at 367–68.  
\(^{158}\) Id. at 372 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938)).  
\(^{159}\) See, e.g., *Wygant*, 476 U.S. at 273–74; *Cleburne*, 473 U.S. at 439; *Graham*, 403 U.S. at 376.
for citizens. The Court applied a strict scrutiny analysis to the challenged statutes and concluded that the states' interest in preserving welfare benefits for their own citizens did not justify the denial of those same benefits to aliens.

In 1980, in *Minnesota v. Clover Leaf Creamery Co.*, the Supreme Court upheld a state statute banning plastic non-returnable milk containers on the grounds that such classification was rationally related to a legitimate state interest. The respondents argued that the classification between plastic and non-plastic non-returnable milk containers unfairly discriminated against them. The state identified several reasons for the ban and produced evidence to show how the ban on non-plastic non-returnable milk containers furthered its interests.

Both parties agreed that because the classification did not involve a suspect class, the appropriate standard of review of the Equal Protection claim was the "rational basis" test. The Court stated that where there was evidence before the legislature reasonably supporting the classification, the legislation must be upheld. Thus, the Court held that this legislative classification was rationally related to a state interest and upheld the statute.

In 1986, in *Wygant v. Jackson Board of Education*, the United States Supreme Court struck down an affirmative action plan because the plan was not sufficiently narrowly tailored and thus violated the Equal Protection Clause. The case arose when, in response to racial tension, the Jackson Board of Education ("the Board") considered adding a layoff provision ("Article XII") to the Collective Bargaining Agreement ("CBA") between the Board and the Jackson Education Union. The plan, as originally considered, was designed to protect minority employees. The Board initially failed to comply with Article XII but ultimately began to adhere to the provision, which resulted in the layoff of nonminority teachers. The displaced nonminority teachers brought suit arguing that Article XII violated the Equal Protection

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160 See *Graham*, 403 U.S. at 372.
161 Id. at 376.
163 See id. at 458 & n.1.
164 See id. at 465–70.
165 See id. at 461.
166 Id. at 464.
167 *Clover Leaf*, 449 U.S. at 470.
169 See id. at 270.
170 See id.
171 See id. at 271, 272.
Clause.\footnote{172} The Court first recognized that because the classification in Article XII was based on race—a suspect class—strict scrutiny was the appropriate level of review.\footnote{173} The Court identified the two prongs of this analysis.\footnote{174} First, any racial classification must be justified by a compelling government interest and, second, the means chosen to effectuate that goal must be narrowly tailored.\footnote{175} The Court concluded that while the Board’s interest in providing minority role models for its minority students was compelling, Article XII was not sufficiently narrowly tailored.\footnote{176} The Court thus held that the Board’s selection of layoffs as the means to accomplish even a valid purpose violated the Equal Protection Clause.\footnote{177}

INA section 237(a) (2) (B) (ii) creates two possible classifications.\footnote{178} First, the statute classifies an alien as either an addict or a non-addict.\footnote{179} Because diseased individuals do not constitute a suspect class, the standard of review for equal protection purposes is whether the classification is rationally related to a legitimate governmental purpose.\footnote{180} Arguably, Congress has recognized that the drug problem in this country is important enough to pass legislation that seeks to eradicate the problem.\footnote{181} This justification fails, however, when we take into account that this provision has the effect of deporting individual aliens who in actuality pose no threat to the safety of the nation.\footnote{182} A classification is “overinclusive” if it disadvantages some people who do not in fact threaten the government’s interest.\footnote{183} Although an overinclusive statute does not automatically render the statute unconstitutional under the Equal Protection Clause, it is certainly a factor a court should consider in making the rational basis determination.\footnote{184} A classification

\footnote{172} See id. at 272.
\footnote{173} Wygant, 476 U.S. at 273–74.
\footnote{174} Id. at 274.
\footnote{175} See id.
\footnote{176} Id. at 274, 283–84.
\footnote{177} Id. at 283–84.
\footnote{178} See INA § 237(a) (2) (B) (ii), 8 U.S.C.A § 1227(a) (2) (B) (ii) (West 1996).
\footnote{179} See id.
\footnote{180} See, e.g., Clover Leaf, 449 U.S. at 470; Gazette v. City of Pontiac, 41 F.3d 1061, 1067 (6th Cir. 1994) (status of being an alcoholic is not a suspect class for equal protection purposes); Pierce v. King, 918 F. Supp. 932, 942 (E.D.N.C. 1996) (disabled individuals do not constitute a suspect class).
\footnote{181} See INA § 237(a) (2) (B) (ii).
\footnote{182} See id.
\footnote{183} See Geoffrey R. Stone et al., Constitutional Law 568 (3d ed. 1996).
\footnote{184} See Stone, supra note 183, at 568. "It seems clear therefore that the permissibility of a legislative generalization must turn on the cost of the generalization as compared to the cost of a more individualized judgment." Id.
that may result in overinclusion tends to undercut the governmental claim that the classification serves legitimate political ends. Take Madeleine, for example. If she were to seek assistance under the NARA as McJunkin did, the INS could place her in deportation proceedings, subject only to the Attorney General’s discretion.\textsuperscript{185} Given that she has been in the United States for seventy years, it is highly unlikely that the Attorney General would deny a waiver request, but deportation nevertheless remains a possibility. If the INS did deport her, they would unlikely be able to demonstrate how a legitimate governmental end was achieved. Thus, in order to pass constitutional muster, the statute should take into consideration the potential overinclusiveness of a literal application of section 237(a) (2) (B) (ii).\textsuperscript{186}

Second, section 237(a) (2) (B) (ii) classifies individuals as addicted citizens versus addicted aliens.\textsuperscript{187} The courts subject legislation that involves a suspect class to strict scrutiny.\textsuperscript{188} Suspect classes are those identified by race, alienage or national origin.\textsuperscript{189} To survive strict scrutiny, legislation classifying a suspect class must be narrowly tailored to achieve a compelling governmental interest.\textsuperscript{190}

The plenary authority to regulate immigration extends to the classification of aliens as a basis for determining their eligibility to remain in the United States, thus, the courts have determined that these classifications are not entitled to strict scrutiny analysis.\textsuperscript{191} Courts apply rational basis review to deportation statutes that establish classifications.\textsuperscript{192} The equal protection argument unsuccessfully advanced against these deportation statutes, however, differs from the equal protection argument advanced in this Note against section 237(a) (2) (B) (ii).\textsuperscript{193} The argument here is not that Congress cannot classify someone as an alien and establish certain requirements to determine his or her eligibility to remain.\textsuperscript{194} Rather, the equal protection argument is that by nature of its sanction (deportation), section

\textsuperscript{185} See supra notes 1–2 and accompanying text.
\textsuperscript{186} See INA § 237(a) (2) (B) (ii).
\textsuperscript{187} See id.
\textsuperscript{188} See, e.g., Wygant, 476 U.S. at 274; Cleburne, 473 U.S. at 440; Quill, 80 F.3d at 726.
\textsuperscript{189} See Cleburne, 473 U.S. at 440; see also Quill, 80 F.3d at 726.
\textsuperscript{190} See, e.g., Wygant, 476 U.S. at 274; Cleburne, 473 U.S. at 440; Quill, 80 F.3d at 726.
\textsuperscript{191} See Fiallo v. Bell, 430 U.S. 787, 792 (1977); Giusto v. INS, 9 F.3d 8, 9 (2d Cir. 1993) (stating that because of Congress’s plenary power, statutes relating to immigration matters are subject only to rational basis review).
\textsuperscript{192} See Giusto, 9 F.3d at 10.
\textsuperscript{193} See INA § 237(a) (2) (B) (ii); Giusto, 9 F.3d at 9–10.
\textsuperscript{194} See Giusto, 9 F.3d at 10 (alien unsuccessfully argued that Congress could not classify aliens (for deportation purposes) on the basis of time served for a crime).
237(a)(2)(B)(ii) effectively discriminates against aliens who wish to seek treatment for their addiction.\textsuperscript{195} Thus, strict scrutiny should apply because this provision involves a suspect class in that it classifies an addict as either alien or non-alien.\textsuperscript{196}

Section 237(a)(2)(B)(ii) classifies between alien addicts and citizen addicts.\textsuperscript{197} This classification arguably disadvantages the suspect class, alien addicts, by effectively denying them the ability to seek treatment, either under the NARA or by means of other treatment options, such as Alcoholics Anonymous or drug rehabilitation centers. Alien addicts who are aware of section 237(a)(2)(B)(ii) may be reluctant to seek treatment for fear that the INS will learn of their addiction and subsequently deport them.\textsuperscript{198} Thus, because this provision discriminates against a suspect class, aliens, section 237(a)(2)(B)(ii) is subject to strict scrutiny.\textsuperscript{199} In order to survive strict scrutiny, this provision must be narrowly tailored to achieving a compelling governmental interest.\textsuperscript{200} The stated legislative purpose of this provision is to crack down on drug abuse.\textsuperscript{201} Although this undeniably constitutes a legitimate governmental interest, the issue is whether on balance it is a compelling enough interest to result in the extreme consequence of deportation. Even if this is a compelling governmental interest, the provision nevertheless fails a strict scrutiny analysis because the provision is not narrowly tailored.\textsuperscript{202} On the contrary, the provision makes no distinction between the type of addiction nor takes into consideration the factors surrounding the addiction.\textsuperscript{203} The classification sweeps too broadly in that many aliens who do not threaten the government’s interest may nevertheless qualify for deportation.\textsuperscript{204}

### C. Fifth Amendment Procedural Due Process Violations

Section 237(a)(2)(B)(ii) of the INA violates the Constitution because it deprives an alien of his or her procedural due process rights.

\textsuperscript{195} See INA § 237(a)(2)(B)(ii); Cleburne, 473 U.S. at 440; Quill, 80 F.3d at 726.

\textsuperscript{196} See INA § 237(a)(2)(B)(ii); see, e.g., Cleburne, 473 U.S. at 440; Quill, 80 F.3d at 726.

\textsuperscript{197} See INA § 237(a)(2)(B)(ii).

\textsuperscript{198} See id.

\textsuperscript{199} See id; see also Wygant, 476 U.S. at 274; Cleburne, 473 U.S. at 440; Quill, 80 F.3d at 726.

\textsuperscript{200} See Graham, 403 U.S. at 372; see also Wygant, 476 U.S. at 274; Cleburne, 473 U.S. at 439; Quill, 80 F.3d at 726.


\textsuperscript{202} See Graham, 403 U.S. at 372; see also Wygant, 476 U.S. at 274.


\textsuperscript{204} See INA § 237(a)(2)(B)(ii).
under the Fifth Amendment. Even though Congress has the absolute and inherent right to decide who may remain in this country, the Bill of Rights protects aliens in non-immigration contexts. Specifically, in criminal contexts aliens have the same rights as citizens. The Fifth Amendment guarantees that no person shall be deprived of liberty without due process of law, and to accomplish this goal, a criminal defendant has the right to present a defense. Deportation based on addiction could have the effect of inhibiting an alien's presentation of his or her defense in a criminal trial or could have an effect on the sentence ultimately imposed if an alien is convicted.

In 1972, in *Chambers v. Mississippi*, the United States Supreme Court held that the right to a fair opportunity to defend against the State's accusation is the essence of the due process rights of an accused. In *Chambers*, the petitioner was tried and convicted of murdering a police officer. As part of his defense, petitioner wished to cross-examine the individual whom the petitioner alleged to have committed the murder. The trial court denied him the opportunity to cross-examine on the basis of a state common law rule prohibiting a party from impeaching his or her own witness. The Supreme Court stated that the right of cross-examination is more than a desirable rule of trial procedure, but rather a component of the constitutional right of confrontation. Because this right is an essential and fundamental element of a fair trial, the Court held that the denial of this right violated due process. The Court thus reversed the defendant's conviction and held that the due process right of an accused in a criminal trial is protected by the right to a fair opportunity to defend against the State's accusations.

In 1977, in *United States v. Henricksen*, the United States Court of Appeals for the Fifth Circuit held that substantial government interfe-

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205 See U.S. CONST. amend. V; INA § 237(a)(2)(B)(ii). The Due Process Clause of the Fifth Amendment provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

206 See Aleinikoff, supra note 13, at 527; see also Wong Wing v. United States, 163 U.S. 228, 238 (1896) (affording Fifth and Sixth Amendment protections to aliens, but only with respect to criminal sanctions).

207 See Wong Wing, 163 U.S. at 238.


209 410 U.S. at 294.

210 Id. at 285.

211 See id. at 291–92.

212 See id. at 295.

213 Id.

214 Chambers, 410 U.S. at 302.

215 Id. at 294.
ence with a defense witness's free and unhampered choice to testify violates due process.\textsuperscript{216} The prosecution charged the defendant with various drug offenses.\textsuperscript{217} The defendant, as part of her defense, wished to call a codefendant to testify because the codefendant's testimony would have tended to exonerate the defendant.\textsuperscript{218} As part of his plea, however, the codefendant had to agree not to testify.\textsuperscript{219} Because the codefendant's plea agreement adversely affected the defendant's defense, the court reasoned that the government should not have imposed that requirement on the codefendant.\textsuperscript{220} Thus, the court held that a due process violation occurs when the government substantially interferes with a defendant's right to present her defense.\textsuperscript{221}

In 1978, in \textit{United States v. Paige}, the United States District Court for the Eastern District of Pennsylvania held that the defendant would be severely prejudiced if he were deterred from testifying by the fear that he would be convicted on the basis of a prior crime.\textsuperscript{222} In \textit{Paige}, the defendant was charged with knowing receipt and concealment of stolen securities.\textsuperscript{223} The prosecution wished to produce evidence of defendant's prior criminal record and the defendant objected on the grounds of prejudice.\textsuperscript{224} The court stated that if the defendant chose to take the stand, he may not be able to adequately explain his prior criminal history to the jury's satisfaction, and thus the jury may infer guilt of the present crime.\textsuperscript{225} The court stated that such an inference unfairly shifts the burden of proof to the defendant.\textsuperscript{226} The court concluded that if the defendant is deterred from testifying for fear that the inadequate explanation of the prior crime would ultimately convict him, then the defendant is unfairly prejudiced.\textsuperscript{227} The court thus excluded the evidence of the defendant's prior conviction.\textsuperscript{228}

\textsuperscript{216} 564 F.2d 197, 198 (5th Cir. 1977); see also United States v. Goodwin, 625 F.2d 693, 703 (5th Cir. 1980) (holding that threats against witnesses constituted substantial government interference with a defense witness's free and unhampered choice to testify and thus violated due process).

\textsuperscript{217} See Henricksen, 564 F.2d at 198.

\textsuperscript{218} See id.

\textsuperscript{219} See id.

\textsuperscript{220} See id.

\textsuperscript{221} Id.


\textsuperscript{223} Id. at 100.

\textsuperscript{224} See id.

\textsuperscript{225} Id.

\textsuperscript{226} Id.

\textsuperscript{227} Paige, 464 F. Supp. at 100.

\textsuperscript{228} Id.
In 1996, in *United States v. Workman*, the United States Court of Appeals for the Second Circuit held that post-arrest rehabilitation may justify downward departures in sentences under appropriate circumstances. In *Workman*, the defendant was convicted of various charges relating to narcotics trafficking and conspiracy. The trial judge departed from the United States Sentencing Guidelines ("Guidelines") and relaxed the sentence based on the defendant's rehabilitation, and the Government appealed such departure. The Second Circuit affirmed the departure stating that the trial judge acted fully within his authority in granting a downward departure for rehabilitation.

Section 237(a) (2) (B) (ii) constructively interferes with the defendant's free and unhampered choice to testify. A defendant charged with public drunkenness, for example, may wish to testify that he or she has an addiction. He or she may believe that such testimony, though it does not by itself relieve him or her of criminal responsibility, could elicit sympathy from the fact-finder, and this sympathy could help in an acquittal. An alien defendant who is aware of section 237(a) (2) (B) (ii) may choose not to testify about his or her addiction for fear of deportation. Thus, section 237(a) (2) (B) (ii) is unconstitutional under the Fifth Amendment because it interferes with a defendant's free and unhampered choice to testify.

Under the Guidelines, a defendant in a prosecution for a federal crime is sometimes entitled to a downward departure in sentencing. Though not specifically mentioned as a ground for departure, many courts reduce a sentence based on either a defendant's rehabilitation effort or his or her acceptance of responsibility. In the cases where
courts consider drug rehabilitation efforts when departing from the Guidelines, the courts are not acknowledging that alcohol or drug use excused or justified the offense, but rather acknowledging that the rehabilitation effort can serve merely as a factor to consider in determining the appropriate sentence.\textsuperscript{238}

Although some courts have not accepted drug addiction and efforts at rehabilitation as grounds for downward departure, there nevertheless remains the possibility that a court may so choose, and therefore, section 237(a)(2)(B)(ii) infringes on the defendant's right to present a defense.\textsuperscript{239} If courts may depart from the Guidelines when a defendant either accepts responsibility or attempts to undergo rehabilitation, section 237(a)(2)(B)(ii) could deprive an alien of his or her due process rights during a criminal proceeding.\textsuperscript{240} An alien, such as Carlos in the scenario set out above, may be reluctant to admit his or her addiction for fear of deportation pursuant to section 237(a)(2)(B)(ii).\textsuperscript{241} If the alien feels constrained in presenting his or her defense, one could construe that as a due process violation.\textsuperscript{242}

D. Fifth Amendment Substantive Due Process Violations

Section 237(a)(2)(B)(ii) violates substantive due process under the Fifth Amendment because it deprives an alien of his or her liberty interest of participating in drug and alcohol rehabilitation.\textsuperscript{243} Substantive due process prevents a state from depriving an individual of his or her liberty or property interests without due process of law.\textsuperscript{244} An individual has a liberty interest in remaining healthy and taking meas-

\textsuperscript{1992}; see, e.g., Williams, 37 F.3d at 86; Maddalena, 899 F.2d at 818. But see Pharr, 916 F.2d at 132.

\textsuperscript{238} See, e.g., Williams, 37 F.3d at 86; Maddalena, 899 F.2d at 818; Seymour, supra note 237, at 840.

\textsuperscript{239} INA § 237(a)(2)(B)(ii); see, e.g., Workman, 80 F.3d at 701; Williams, 37 F.3d at 86; Deigert, 916 F.2d at 919 n.2; Pharr, 916 F.2d at 130; Maddalena, 899 F.2d at 818; Seymour, supra note 237, at 840.

\textsuperscript{240} See INA § 237(a)(2)(B)(ii).

\textsuperscript{241} See U.S. CONST. amend. V; INA § 237(a)(2)(B)(ii). This challenge assumes that the particular offense that the alien is charged with is not in and of itself a ground for deportation. See INA § 237(2)(a). In Carlos' case, for example, public drunkenness would not be a deportable offense, unless a particular court construes such a statute to be a crime of "moral turpitude." See id. Even in that case, the statute allows for exceptions to deportation in those instances. See id.

\textsuperscript{242} See Paige, 464 F. Supp. at 100.


\textsuperscript{244} U.S. CONST. amend. V.
ures to ensure one's own health and safety.\textsuperscript{245} A legal alien enjoys the same constitutional and statutory protections that are afforded to citizens.\textsuperscript{246}

In 1985, in 	extit{Baldi v. City of Philadelphia}, the United States District Court for the Eastern District of Pennsylvania held that the Constitution guarantees the right to be free from undue state interference or hindrance in promptly obtaining or attempting to obtain available medical treatment when it is needed.\textsuperscript{247} In 	extit{Baldi}, a friend was transporting the decedent, plaintiff's husband, to the hospital and the police stopped the vehicle for a traffic violation.\textsuperscript{248} Plaintiff alleged that the state violated the decedent's civil rights because the police action deprived the decedent of life or liberty without due process of law.\textsuperscript{249} The court did not accept plaintiff's argument that there is a general constitutional right to receive medical treatment absent state custody.\textsuperscript{250} The court did, however, state that the liberty interests of the Due Process Clause encompass the right to promptly seek available medical care without undue state interference or hindrance irrespective of the state's custody or control over an individual.\textsuperscript{251}

In 1990, in 	extit{Colon v. Schneider}, the United States Court of Appeals for the Seventh Circuit held that in order to demonstrate a constitutionally protected liberty interest, an individual must establish that he or she has a legitimate claim of entitlement to it.\textsuperscript{252} In 	extit{Colon}, the petitioner, an inmate, brought an action alleging that a corrections officer violated his liberty interest when the officer used mace against the petitioner.\textsuperscript{253} Petitioner relied on a Wisconsin statute that governed the use of mace in disciplining inmates.\textsuperscript{254} In determining the existence of a liberty interest, the court examined whether petitioner had a legitimate claim of entitlement to be free from the use of mace.\textsuperscript{255}


\textsuperscript{246} \textit{See} Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that aliens are persons guaranteed due process of law by the Fifth and Fourteenth Amendments); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (same).

\textsuperscript{247} 609 F. Supp. at 167.

\textsuperscript{248} \textit{Id.} at 165.

\textsuperscript{249} \textit{See id.}

\textsuperscript{250} \textit{Id.} at 166.

\textsuperscript{251} \textit{Id.} at 167.

\textsuperscript{252} 899 F.2d 660, 666 (7th Cir. 1990).

\textsuperscript{253} \textit{See id.}

\textsuperscript{254} \textit{See id.} at 667. The statute prohibited the use of mace for refusal to obey an order except in an emergency. \textit{See} Wis. Admin. Code \textsection{} HSS 306.08(5) (b); \textit{Colon}, 899 F.2d at 663.

\textsuperscript{255} \textit{Colon}, 899 F.2d at 666-67.
In order for a state regulation to create a constitutionally protected liberty interest, the regulations must employ mandatory language. The court concluded that although the Wisconsin statute limited the permissible use of mace, it did not contain mandatory language, and thus held that the statute did not create a constitutionally protected liberty interest.

Section 2 of the Narcotic Addict Rehabilitation Act ("NARA") represents congressional intent to commit for treatment, rather than criminally punish, certain persons charged or convicted of narcotics violations who are narcotics addicts and who are likely to be rehabilitated through treatment. In enacting NARA, Congress intended that certain persons addicted to narcotic drugs who are not charged with a criminal offense should be afforded the opportunity to be committed for treatment. Under section 2, a person who believes himself or herself to be a narcotic addict may petition for voluntary treatment, and, similarly, a person who believes that a relative may be a narcotics addict may petition for treatment on behalf of the relative.

An act of Congress that has the effect of establishing a statutory right constitutes a liberty interest for purposes of substantive due process rights. The Fifth Amendment protects individuals against arbitrary governmental deprivations of life, liberty or property. In demonstrating a constitutionally protected liberty interest, an individual must establish that he or she has a legitimate claim of entitlement to such interest. A state or federal regulation creates a constitutionally protected liberty interest when the regulation employs language of a mandatory character.

Voluntary civil confinement as provided by the NARA establishes a constitutionally protected liberty interest because the statute uses mandatory language. The statute states,

[after considering such [voluntary petition for civil commitment], the United States attorney shall, if he determines that

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256 See id. at 667; see also Hewitt v. Helms, 459 U.S. 460, 471-72 (1990) (holding that mandatory language in a state regulation creates a constitutionally protected liberty interest).
257 Colon, 899 F.2d at 669.
259 See id.
260 See id.
261 See, e.g., Hewitt, 459 U.S. at 471-72; Colon, 899 F.2d at 667.
262 U.S. CONST. amend. V.
263 See, e.g., Hewitt, 459 U.S. at 471-72; Colon, 899 F.2d at 667.
264 See, e.g., Hewitt, 459 U.S. at 471-72; Colon, 899 F.2d at 667.
265 See, e.g., NARA § 302; Hewitt, 459 U.S. at 471-72; Colon, 899 F.2d at 667.
the person named in such petition is a narcotic addict, . . . file a petition with the United States district court to commit such person to a hospital of the Service for treatment . . . .

Because the NARA establishes a constitutionally protected liberty interest, the mere existence of section 237(a)(2)(B)(ii) effectively deprives an individual of that liberty interest. An alien addict who is aware of the consequences of section 237(a)(2)(B)(ii) may choose not to avail himself or herself of this constitutionally protected liberty interest, and thus section 237(a)(2)(B)(ii) violates substantive due process.

Thus, if a statute interferes with or hinders an individual in obtaining medical treatment, which section 237(a)(2)(B)(ii) arguably does, then the statute unconstitutionally violates substantive due process rights. Section 237(a)(2)(B)(ii) contemplates undue interference or hindrance for purposes of a substantive due process violation. Aliens enjoy the same protections that Congress affords to citizens in all situations except in the deportation context. Thus, they are equally entitled to enjoy the protections and the benefit of rehabilitation as enunciated in the NARA. Unfortunately, an alien who is aware of section 237(a)(2)(B)(ii) will choose not to participate in the NARA's benefits and this constitutes a constructive deprivation of a legitimate liberty interest.

III. VOID FOR VAGUENESS

Congress should repeal section 237(a)(2)(B)(ii) because it is unconstitutionally vague and does not provide any standards by which a person of reasonable intelligence would be able to understand what type of conduct is prohibited.

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266 NARA § 302 (emphasis added).
267 See INA § 237(a)(2)(B)(ii); NARA § 3412.
268 See INA § 237(a)(2)(B)(ii); Baldi, 609 F. Supp. at 167; see also McJunkin v. INS, 579 F.2d 553, 555 (9th Cir. 1978) (alien deported after trying to obtain, under the NARA, needed medical treatment for his addiction).
269 See INA § 237(a)(2)(B)(ii); see also Baldi, 609 F. Supp. at 167.
270 See, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259, 270-71 (1990) (holding that aliens are entitled to constitutional protections when they have come within the United States and have developed substantial connections with this country); United States v. Gomez, 797 F.2d 417, 419 (7th Cir. 1986) (aliens are guaranteed due process and equal protection under the Fifth and Fourteenth Amendments).
271 See, e.g., NARA § 302; Verdugo-Urquidez, 494 U.S. at 270-71; Gomez, 797 F.2d at 419.
272 See INA § 237(a)(2)(b)(ii); see also McJunkin, 579 F.2d at 535.
In 1988, in *Maynard v. Cartwright*, the United States Supreme Court held that objections to vagueness under the Due Process Clause rest on lack of notice, and hence, may be overcome in any specific case in which reasonable persons would know their conduct is at risk.\(^{274}\) In *Maynard*, the defendant was tried and convicted of murdering his former employers.\(^{275}\) The jury imposed the death penalty after concluding that a statutory aggravating circumstance existed—the murder was "especially heinous, atrocious or cruel."\(^{276}\) The Supreme Court accepted the defendant’s argument that the statute defining the relevant aggravating circumstance was unconstitutionally vague because it did not provide the jury with precise standards with which to determine a sentence.\(^{277}\) The Court held that the language of the statute did not provide the jury with sufficient guidance and thus was unconstitutionally vague and a violation of due process.\(^{278}\)

In 1996, in *Upton v. SEC*, the United States Court of Appeals for the Second Circuit held that due process requires that laws give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited.\(^{279}\) In *Upton*, the Securities and Exchange Commission ("SEC") censured the petitioner for failing reasonably to supervise a subordinate employee who aided and abetted in a violation of an SEC rule.\(^{280}\) Petitioner argued that he did not have sufficient notice of the rule upon which the SEC relied.\(^{281}\) The court acknowledged that the SEC is entitled to broadly construe its own rules, and may determine specific applications on a case-by-case basis.\(^{282}\) The court stated, however, that the SEC is not entitled to substantial deference when doing so would penalize an individual who has not received fair notice of a regulatory violation.\(^{283}\) Thus, the court vacated the SEC’s censure order holding that due process requires that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited.\(^{284}\)

\(^{274}\) 486 U.S. at 361.
\(^{275}\) *Id.* at 358.
\(^{276}\) *Id.* at 359.
\(^{277}\) *Id.* at 359, 361, 363–64.
\(^{278}\) *Id.* at 359, 361, 364.
\(^{279}\) 75 F.3d at 98.
\(^{280}\) *Id.* at 93.
\(^{281}\) *Id.* at 97–98.
\(^{282}\) *Id.* at 97.
\(^{283}\) *Id.* at 98.
\(^{284}\) *Upton*, 75 F.3d at 98; *see* Smith v. Avino, 91 F.3d 105, 108 (11th Cir. 1996) (holding that in order to pass constitutional muster, a statute must give person of ordinary intelligence a
Section 237(a) (2) (B) (ii) only contains language providing that the INS may deport an alien drug addict or abuser.\textsuperscript{285} It allows for deportation if such a condition existed at any time after entry.\textsuperscript{286} According to the plain language of the provision, an individual whose addiction to narcotics results in dangerous propensities may find himself or herself in deportation proceedings.\textsuperscript{287} Likewise, an individual who is a recovering alcoholic who attends Alcoholic Anonymous meetings regularly may find himself or herself in deportation proceedings.\textsuperscript{288} Even more shocking, an individual who smokes two packs of cigarettes a day and is admittedly addicted to nicotine may, under the plain language of the provision, find himself or herself in deportation proceedings.\textsuperscript{289} Section 237(a) (2) (B) (ii) is unconstitutionally vague because it does not give a person of ordinary intelligence a reasonable opportunity to know what behavior is prohibited and it does not provide explicit standards for those who apply it.\textsuperscript{290} With respect to section 237(a) (2) (B) (ii), an alien would unlikely realize that by undergoing medical treatment for cancer (where the possibility of becoming dependent on pain killers is significant), the alien is putting himself or herself at risk of deportation.\textsuperscript{291} Likewise, an alien who enters the United States, unaware that he or she is predisposed to alcoholism, would unlikely realize that the act of taking one drink, and thus triggering her disease, would result in deportation.

CONCLUSION

Congress should repeal section 237(a) (2) (B) (ii) because it violates several different provisions of the United States Constitution.\textsuperscript{292} It violates the Eighth Amendment's prohibition against cruel and unusual punishment in that it categorizes an individual as an addict, and the Supreme Court has ruled that such a categorization is unconstitutional. This provision violates an alien's equal protection rights because it either classifies an individual based on his or her addiction, in which

\textsuperscript{285} See INA § 237(a) (2) (B) (ii), 8 U.S.C.A. § 1227(a) (2) (B) (ii) (West 1996).

\textsuperscript{286} See id.

\textsuperscript{287} See id.

\textsuperscript{288} See id.

\textsuperscript{289} See id.

\textsuperscript{290} See, e.g., Maynard, 486 U.S. at 361; Upton, 75 F.3d at 98.

\textsuperscript{291} See INA § 237(a) (2) (b) (ii).

\textsuperscript{292} See id.
case the legislation is overinclusive and thus not rationally related to a legitimate state interest; or in the alternative, it classifies an individual based on alienage, in which case the legislation fails strict scrutiny review because it is not narrowly tailored to serve a compelling governmental interest. Section 237(a)(2)(B)(ii) violates procedural due process under the Fifth Amendment because it could have the effect of hindering or infringing upon an individual's right to a fair criminal trial. Similarly, it violates substantive due process under the Fifth Amendment in that it interferes with an individual's liberty interest in obtaining medical treatment. Finally, INA section 237(a)(2)(B)(ii) is unconstitutionally vague because the language of the provision fails to provide standards by which a person of reasonable intelligence would be able to understand what type of conduct the statute prohibits.

Although not entirely immune from constitutional challenges, it is well settled that the judiciary applies deferential treatment to immigration statutes. Congress may have exceptionally broad authority to promulgate laws governing the expulsion of aliens, but Congress must nevertheless remain within the confines of the United States Constitution. Thus, if the courts are unwilling, or unable, to strike down this provision, then it is the responsibility of Congress to recognize the constitutional infirmities of section 237(a)(2)(B)(ii).

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