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CONSTITUTIONAL LAW—SUPERVISING
CONSUMPTION: THE ARGUMENT FOR SUPERVISED
INJECTION FACILITIES AS A VALID EXERCISE OF STATES’
POLICE POWER

*Jennifer H. Diggles**

From medically assisted treatment to syringe exchange programs, the harm reduction movement has emerged as an evidence-based practice in response to the growing opioid epidemic. The supervised injection facility is a harm reduction measure that has proven effective in reducing overdose deaths and the spread of infectious diseases. Various countries around the world have initiated these programs and realized the benefits, and several states in the U.S. have proposed legislation to allow for such facilities as part of a broader approach to the opioid problem. Potential implementation of these facilities, however, is challenged on the basis that they would violate federal law, specifically 18 U.S.C. § 856—the “crack-house” statute. The threat of federal enforcement effectually prevents the passage of state legislation and stifles the positive impact supervised injection facilities have on preventing overdose deaths. However, an analysis of the legislative evidence combined with the concept that such an intervention is consistent with the Supreme Court’s commerce power jurisprudence, provides an alternate view of the federalism argument. Through appropriate state legislative action, it is possible to reconcile current criminal justice policies with the need for new and progressive harm reduction strategies in order to advance the fight against the opioid epidemic.

INTRODUCTION

Former Governor of Pennsylvania, Ed Rendell, got the federal government’s attention after announcing the non-profit organization Safehouse intended to open a supervised injection facility in

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Philadelphia.¹ In the face of threatened federal prosecution due to the purported illegality of such a facility under federal law, Rendell retorted, “Come and arrest me first.”² Philadelphia—like so many other cities, towns, neighborhoods, and communities across America—is ravaged by the opioid epidemic.³ City leaders and community organizations joined forces to implement a lifesaving supervised injection facility as part of a progressive harm reduction approach to rising numbers of opioid overdose deaths.⁴

The current “War on Drugs” approach, involving the pervasive criminalization of substance use and abuse, widespread incarceration, and unrealistic expectations of immediate cessation and abstinence, is an ineffective means of addressing this growing emergency.⁵ An alternative approach to tackling opioid addiction has emerged over the last forty years, and many of its interventions have proven efficacious.⁶ The supervised injection facility (SIF) is one such measure. The SIF, an evidence-based harm reduction measure that has been shown to positively impact rates of opioid overdose deaths, has been stifled by the assertion that such interventions are illegal under the Federal Controlled Substances Act (CSA).⁷ The reality of the opioid crisis requires a paradigm shift in

1. *All Things Considered, Philadelphia Plans to Open Medically-Supervised Injection Facility*, NPR (Oct. 8, 2018), <https://www.npr.org/2018/10/08/655635894/philadelphia-plans-to-open-medically-supervised-injection-facility> [<https://perma.cc/C8QQ-DKXB>] (quoting Ed Rendell, former Governor of Pennsylvania). Mr. Rendell is on the Board of Directors for Safehouse, a non-profit organization planning to provide overdose prevention services. *Id.* This interview was in response to the announcement of plans to move forward with the facility despite threats of prosecution from the federal government. *Id.*

2. *Id.*

3. In 2017, Philadelphia experienced a 34% increase in overdose deaths from the previous year—a total of 1,217 deaths. *Frequently Asked Questions*, SAFEHOUSE, <https://www.safehousephilly.org/about/faqs#footnote19> [<https://perma.cc/H8A2-JJFB>].

4. Safehouse refers to the service as “overdose prevention,” part of a broader package of services available to users struggling with addiction. *See id.*

5. *See generally* Ernest Drucker, *U.S. Drug Policy: Public Health Versus Prohibition*, in REDUCTION OF DRUG-RELATED HARM 71, 71–73 (E.C. Buning et al. eds., 1992). *See* Suchitra Rajagopalan, *It’s an Overdose Crisis, Not an Opioid Crisis*, DRUG POLICY ALLIANCE (June 14, 2018), <http://www.drugpolicy.org/blog/its-overdose-crisis-not-opioid-crisis>, [<https://perma.cc/AHJ3-NHQ5>], for a discussion on the impact of the “War on Drugs” as well as a call for recognition that the overdose crisis in the United States is not singularly related to opioids.

6. *See infra* Part I.

7. *See* Scott Burris et al., *Federalism, Policy Learning, and Local Innovation in Public Health: The Case of the Supervised Injection Facility*, 53 ST. LOUIS U. L.J. 1089, 1095–96 (2009); Andrew Lelling, United States Attorney, Dist. Of Mass., Statement from United States Attorney Andrew Lelling Regarding Proposed Injection Sites (Jul. 19, 2018) [hereinafter

our legal approach to drug policy and opioid addiction that is more inclusive of harm reduction strategies.

Part I of this Note briefly examines the extent of the opioid crisis and explores the emergence, evolution, and efficacy of the harm reduction approach to substance abuse treatment. Part II lays the foundation of statutory and common law principles implicated when evaluating the legality of SIFs. Using that foundation, Part III applies those principles to the SIF and argues the SIF is beyond the scope of Congress's commerce power. Part IV discusses the federal preemption doctrine, conducts an analysis of potential state laws authorizing SIFs, and asserts future state laws authorizing SIFs would survive a preemption challenge. This Note concludes that implementation of SIFs as harm reduction interventions under state law would be a valid exercise of states' police power.

I. THE EMERGENCE OF THE HARM REDUCTION APPROACH AND THE EFFICACY OF ITS METHODS

Crisis. Epidemic. Public health emergency. These terms have something in common: they are all used to describe the opioid situation in the United States.⁸ Between 1999 and 2017 over 700,000 people died from opioid overdose.⁹ In 2017 alone, there were 47,600 opioid overdose deaths.¹⁰ For many, if not most, prescription pain medication acts as the primary entry point into opioid abuse or addiction.¹¹ Once the

Regarding Proposed Injection Sites], <https://www.justice.gov/usao-ma/pr/statement-us-attorney-andrew-elling-regarding-proposed-injection-sites> [https://perma.cc/NR4W-5RXC].

8. *About the Epidemic*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Sept. 4, 2019), <https://www.hhs.gov/opioids/about-the-epidemic/index.html> [https://perma.cc/QN35-SCVX]; *Determination That a Public Health Emergency Exists*, PUB. HEALTH EMERGENCY (Oct. 26, 2017), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/opioids.aspx> [https://perma.cc/V2UU-ZRKR].

9. *Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/epidemic/index.html> [https://perma.cc/9P56-LT7R].

10. *Drug Overdose Deaths*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/data/statedeaths.html> [https://perma.cc/X957-GYDT].

11. *About the Epidemic*, *supra* note 8. "Abuse" refers to substance use that results in adverse consequences for the user while "addiction"—or dependence—refers to the user's inability to control his consumption despite serious negative consequences. JOHN JUNG, ALCOHOL, OTHER DRUGS, & BEHAVIOR: PSYCHOLOGICAL RESEARCH PERSPECTIVES 68 (2d ed., 2010).

prescriptions run out, many are left with no option but to obtain the drugs illicitly.¹² For some, this means resorting to heroin.¹³

In 2017, over 15,000 people died from heroin overdoses alone.¹⁴ Although heroin can be sniffed or snorted, the most typical route of administration is intravenous injection.¹⁵ Injecting drug users (IDUs) are one of the country's most vulnerable populations, as they are often homeless and frequently have co-occurring mental health disorders.¹⁶ In addition to the personal danger of overdose, injection drug use brings with it other risky behaviors, such as needle sharing or use of dirty "works."¹⁷ These behaviors have led to the spread of infectious diseases, such as HIV and Hepatitis C, which is a major public health concern.¹⁸ Other public health dangers associated with intravenous drug use include skin infection, public use and overdose, and used syringes discarded in public spaces.¹⁹ The grave language associated with the reality of the opioid situation in the United States speaks to the void left by inadequate legal options for new and progressive treatment measures. Approaches currently being utilized are unsuccessful in battling the epidemic.²⁰

The "War on Drugs," along with our current criminalization and abstinence policies, has failed in slowing the opioid crisis,²¹ as evidenced

12. *Heroin Overdose Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/data/heroin.html> [<https://perma.cc/A3BW-58GW>]. "Past misuse of prescription opioids is the strongest risk factor for starting heroin use, especially among people who became dependent upon or abused prescription opioids in the past year." *Id.*

13. *Heroin: Overview*, NAT'L INST. OF DRUG ABUSE, <https://www.drugabuse.gov/publications/research-reports/heroin/overview> [<https://perma.cc/QM4G-5P27>]; see *Heroin Overdose Data*, *supra* note 12.

14. See *Heroin Overdose Data*, *supra* note 12.

15. *Id.*

16. See generally Ezra Susser et al., *Injection Drug Use Among Homeless Adults with Severe Mental Illness*, 87 AM. J. PUB. HEALTH 5 (1997), <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.87.5.854> (last visited Jan. 3, 2020).

17. *HIV/AIDS*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hiv/risk/idu.html> [<https://perma.cc/FXR3-E6B8>]. "Works" refers to the equipment necessary to use the drug of choice. For heroin users, this includes the syringes, needles, cookers, cotton, and water. *Getting Off Right, A Safety Manual for Injection Drug Users*, HARM REDUCTION COALITION 11, <https://harmreduction.org/wp-content/uploads/2011/12/getting-off-right.pdf> [<https://perma.cc/358S-ZYUX>].

18. *HIV/AIDS*, *supra* note 17.

19. See Mary Clare Kennedy et al., *Public Health and Public Order Outcomes Associated with Supervised Drug Consumption Facilities: A Systematic Review*, CURRENT HIV/AIDS REPORTS (2017).

20. See Burris et al., *supra* note 7, at 1096.

21. See Valerie A. Earnshaw et al., *Drug Addiction Stigma in the Context of Methadone Maintenance Therapy: An Investigation into Understudied Sources of Stigma*, 11 INT'L J.

by a 200% increase in opioid overdoses since 2000.²² Research shows involuntary abstinence—such as that predicated by incarceration, substance abuse treatment, or hospitalization—is ineffective in reducing use of heroin and other synthetic opioids, such as fentanyl, among IDUs.²³ In fact, brief periods of abstinence, followed by relapse, significantly increase a user’s risk of overdose.²⁴ Therefore, it has become imperative to take an approach that meets the user where they are rather than demanding abstinence.

Harm reduction is an approach to treating substance abuse that focuses on minimizing harms associated with addictive behavior for both the user and the wider community.²⁵ The concept of harm reduction is based on the notion that complete and immediate cessation of use is unrealistic, especially among IDUs.²⁶ The goal instead is to curtail the health risks associated with injection drug use, such as morbidity and mortality, the spread of disease, public use and nuisance, criminal activity, and other attendant risky behaviors.²⁷

The development of the harm reduction model in the United States has been described as “a conflict between multiple conflicting social/historical forces.”²⁸ On the one hand, there is social activism and evidence-based research promoting harm reduction methods; on the other, the “long tradition of moralistic condemnation” of illicit drug use.²⁹ The emergence of the medical model of addiction (the disease model) was—and remains—at odds with the stigma attached to illicit drug use, and

MENTAL HEALTH ADDICTION 110, 110–11 (2013) (discussing how the “war on drugs” contributes to the stigma attached to addiction). Stigma is a barrier to effective treatment. *Id.*

22. Melissa Vallejo, Note, *Safer Bathrooms in Syringe Exchange Programs: Injecting Progress into the Harm Reduction Movement*, 118 COLUM. L. REV. 1185, 1185 (2018).

23. *An Act Relative to Combatting Addiction, Accessing Treatment, Reducing Prescriptions, and Enhancing Prevention: Hearing on H.4033 Before the Joint Committee on Mental Health, Substance Use & Recovery*, 2018 Leg., 190th Gen. Ct. (Mass. 2018) [hereinafter *Combatting Addiction*] (testimony of the AIDS Action Comm., Inc.) (on file with author).

24. See Jonathan Giftos & Lello Tesema, *When Less is More: Reforming the Criminal Justice Response to the Opioid Epidemic*, 57 NO. 1 JUDGES’ J. 28, 28 (2018); see also *Combatting Addiction*, *supra* note 23.

25. Diane E. Logan & G. Alan Marlatt, *Harm Reduction Therapy: A Practice-Friendly Review of Research*, 66 J. CLINICAL PSYCHOLOGY 201, 201 (2010); Ming-sum Tsui, *The Harm Reduction Approach Revisited: An International Perspective*, 43 INT’L SOC. WORK 243, 245 (2000).

26. Tsui, *supra* note 25, at 245.

27. Leo Beletsky et al., *The Law (and Politics) of Safe Injection Facilities in the United States*, 98 AM. J. PUB. HEALTH 231, 231 (2008).

28. Don C. Des Jarlais, *Harm Reduction in the USA: The Research Perspective and an Archive to David Purchase*, HARM REDUCTION J. 1, 1 (2017).

29. *Id.* at 2.

especially to IDUs. This model asserts addiction is an illness and views abstinence as the only way, while society views addiction as an amoral personal choice.³⁰ Despite this conflict, harm reduction methods and interventions have proved efficacious, gaining widespread momentum in the substance abuse treatment field.³¹

A. *Evolution: From Methadone Maintenance to the SIF*

One of the first harm reduction measures borne out of the disease model was methadone maintenance therapy (MMT),³² and it remains the primary treatment approach to opioid addiction.³³ MMT showed “the possibility of reducing both individual and societal problems associated with drug use without requiring that users cease all . . . drug use.”³⁴ Additional medications, such as buprenorphine and naltrexone, have emerged as efficacious in the treatment of opioid addiction.³⁵ These medications, used in conjunction with behavioral therapies and counseling, form another treatment approach called Medication Assisted Treatment (MAT).³⁶ Critics assert MAT is merely drug substitution that still produces a long-term user.³⁷ However, research proves MAT successfully helps individuals sustain recovery from opioids, with the general goal of eventually weaning the individual off the medication altogether.³⁸

30. *Id.*; see generally PHILIP J. FLORES, GROUP PSYCHOTHERAPY WITH ADDICTED POPULATIONS: AN INTEGRATION OF TWELVE-STEP AND PSYCHODYNAMIC THEORY 65–95 (3d ed., 2007).

31. See generally Kathryn Hawk et al., *Reducing Fatal Opioid Overdose: Prevention, Treatment and Harm Reduction Strategies*, 88 YALE J. BIOLOGY & MED. 535 (2015).

32. SAMHSA, Dept. of Health & Human Serv., Medication Assisted Treatment for Opioid Addiction in Opioid Treatment Programs 16, https://www.asam.org/docs/advocacy/samhsa_tip43_matforopioidaddiction.pdf?sfvrsn=0 [<https://perma.cc/VN2C-QVYA>]. MMT was first approved for the treatment of heroin addiction in early 1970's. *Id.* at 18.

33. Mary-Ann Macswain et al., *Assessing the Impact of Methadone Maintenance Treatment (MMT) on Post-Release Recidivism Among Male Federal Correctional Inmates in Canada* 41 CRIM. JUST. & BEHAV. 380, 381 (2014).

34. Des Jarlais, *supra* note 28, at 2.

35. *Medication-Assisted Treatment (MAT)*, SAMHSA, <https://www.samhsa.gov/medication-assisted-treatment> [<https://perma.cc/K9XK-QLKB>].

36. *Id.*

37. *Medication and Counseling Treatment*, SAMHSA, <https://www.samhsa.gov/medication-assisted-treatment/treatment#medications-used-in-mat> [<https://perma.cc/RM6K-85R4>].

38. *Id.*

Further harm reduction measures emerged in the 1980s in response to the AIDS epidemic, primarily in the form of syringe exchange programs (SEPs).³⁹ SEPs are social programs that permit IDUs to exchange used syringes for clean ones with the purpose of reducing the risk of spreading infectious diseases, such as HIV and Hepatitis C.⁴⁰ SEPs were met with resistance as critics viewed them as condoning substance use.⁴¹ The federal government has maintained legislation preventing the use of any federal funds to purchase syringes intended for public distribution,⁴² and many states have paraphernalia laws criminalizing possession of syringes.⁴³ Despite early challenges, SEPs are now statutorily authorized in several states and have proven efficacious at reducing the spread of infectious diseases.⁴⁴

Most SEPs offer more than just clean needles. Services available to participants include education, access to addiction treatment, MAT, and peer support groups.⁴⁵ Some SEPs offer the additional service of post-consumption observation rooms.⁴⁶ These rooms provide a space for over-sedated individuals to be monitored by medical professionals as a preventive measure.⁴⁷ The SIF arises from the SEP, and would merely take current practices one-step farther.

39. Des Jarlais, *supra* note 28, at 2–3.

40. Vallejo, *supra* note 22, at 1190–91.

41. *Id.* at 1192.

42. Congress Ends Ban of Federal Funding for Needle Exchange Programs, *All Things Considered*, NPR (Jan. 8, 2016, 4:31 PM), <https://www.npr.org/> <https://www.samhsa.gov/medication-assisted-treatment-2016/01/08/462412631/congress-ends-ban-on-federal-funding-for-needle-exchange-programs> [<https://perma.cc/4VEP-2MDM>]. Federal funds are still prohibited from going toward the purchase of syringes themselves, but may be used toward other costs of maintaining a syringe exchange program. *Id.*

43. Vallejo, *supra* note 22, at 1196.

44. *Id.* at 1186; *see also* CONN. GEN. STAT. ANN. § 19a-124 (West 2017). Other states unofficially authorize the existence of SEPs through the use of discretion of police and local authorities. *Id.* *See also*, HAW. REV. STAT. ANN. § 325-112 (West 2013); MD. CODE ANN., HEALTH-GEN § 24–802 (West 2014); MASS. GEN. LAWS ANN. ch. 111, § 215 (West 2016). Many states with statutory authorization have decriminalized paraphernalia possession. *See, e.g., id.*

45. *See Substance Use Disorder Services*, BOS. HEALTHCARE FOR THE HOMELESS PROGRAM, <https://www.bhchp.org/specialized-services/addiction-services> [<https://perma.cc/6QDR-CU6D>]. Additionally, many states, such as Massachusetts, have initiated programs increasing public access to naloxone, an antidote for opiate overdose, which is available to users at such sites. 2018 Mass. Acts Ch. 208.

46. *SPOT*, BOS. HEALTHCARE FOR THE HOMELESS PROGRAM, <https://www.bhchp.org/spot> [<https://perma.cc/745T-TCHH>].

47. *Id.*

SIFs go by many names—drug consumption rooms, safe consumption sites, or safe injection sites.⁴⁸ No matter how referenced, the SIF is a harm reduction measure used successfully in numerous countries to combat opioid overdose deaths.⁴⁹ The SIF is a safe space where IDUs may go to self-administer an illicit substance, such as heroin, without fear of arrest.⁵⁰ Medical staff is present to provide sterile equipment, answer questions regarding safe injection practices, and provide emergency care in case of an accidental overdose.⁵¹ Additionally, SIFs serve as an access point to treatment and other wraparound services not readily available to IDUs.⁵²

SIFs provide a safer alternative for IDUs who are frequently forced into hiding out of fear of arrest, using in dark alleyways or “shooting galleries” to inject.⁵³ Their primary purpose is to prevent overdose deaths from opioid use.⁵⁴ Access to a SIF would prevent these accidental deaths and decrease risk to the community.⁵⁵ In fact, in the 120 or so SIFs active around the world, there has never been a single overdose death.⁵⁶ Moreover, studies indicate a reduction in other public dangers, such as discarded syringes and litter from other injection-related materials.⁵⁷

Additional research on efficacy reflects a positive impact on crime rates, public order, and access to services.⁵⁸ A cooperative relationship between law enforcement and the SIF as a public health initiative

48. See generally *Frequently Asked Questions*, *supra* note 3 (using terms such as “safe injection sites,” “supervised consumption rooms,” and “supervised consumption sites” interchangeably).

49. FINAL REPORT OF THE EVALUATION OF THE SYDNEY MEDICALLY SUPERVISED INJECTING CENTRE, MSIC EVALUATION COMMITTEE at 2 (2003) [hereinafter FINAL REPORT].

50. Burris et al., *supra* note 7, at 1100.

51. *Id.* at 1096.

52. See *Frequently Asked Questions*, *supra* note 3.

53. See *Alternatives to Public Injecting*, HARM REDUCTION COALITION (2016), <https://harmreduction.org/wp-content/uploads/2016/05/Alternatives-to-Public-Injection-report.pdf> [<https://perma.cc/T4BL-6M97>]. “Public injection is often a rushed practice in attempt to avoid detection and arrest.” *Id.*

54. See *Frequently Asked Questions*, *supra* note 3. Medical staff in these facilities only provides tips on safe injection procedures; they will not physically assist or inject a patient. *Id.*

55. FINAL REPORT, *supra* note 49, at 150.

56. See *Combatting Addiction*, *supra* note 23 (testimony of Brandon DL Marshal, PhD) (on file with Author); see also FINAL REPORT, *supra* note 49; Thomas Kerr et al., *Impact of a Medically Supervised Safer Injection Facility on Community Drug Use Patterns: A Before and After Study*, 332 *BMJ* 201 (2006).

57. *Combatting Addiction*, *supra* note 23 (testimony of Brandon DL Marshal, PhD).

58. *SIFs, DCRs and SCS*, HARM REDUCTION COALITION, <https://harmreduction.org/issues/sifs/> [<https://perma.cc/4T2L-HUXU>].

demonstrates an increase in public order.⁵⁹ By referring IDUs to SIFs, police are able to minimize concerns such as discarded needles while also decreasing the risk of HIV or other infectious diseases and violence amongst a generally hard to reach population.⁶⁰ Despite fears to the contrary, research suggests SIFs have not led to an increase in drug trafficking and dealing offenses in areas where they operate.⁶¹ However, instances of petty crimes, such as car theft, have decreased.⁶² These positive impacts, combined with the high probability of a decrease in opioid overdose deaths, speak to the vital role SIFs can play, especially in areas currently devastated by the opioid epidemic.

B. *Barriers to Implementation*

Notwithstanding widespread acceptance as an evidence-based harm reduction approach to preventing overdose deaths, the United States remains reluctant to allow SIFs to open in states that desire to use the strategy to protect the health of their citizens.⁶³ This reluctance is based largely on federalism tensions, specifically between federal laws that purportedly prohibit the concept of the SIF even when authorized by state legislatures.⁶⁴ The federal government argues that the supremacy of federal drug policy over state law explicitly prohibits SIFs from being introduced.⁶⁵ Unlike with medical and recreational marijuana, no state

59. Kora Debeck et al., *Police and Public Health Partnerships: Evidence From the Evaluation of Vancouver's Supervised Injection Facility*, SUBSTANCE ABUSE TREATMENT, PREVENTION & POL'Y (2008), <https://substanceabusepolicy.biomedcentral.com/track/pdf/10.1186/1747-597X-3-11>.

60. *Id.* at 3–4.

61. Evan Wood et al., *Impact of the Medically Supervised Safer Injection Facility on Drug Dealing and Other Drug-Related Crime*, SUBSTANCE ABUSE TREATMENT, PREVENTION & POL'Y 3 (2006), https://www.researchgate.net/publication/7059387_Impact_of_a_Medically_Supervised_Safer_Injecting_Facility_on_Drug_Dealing_and_Other_Drug-Related_Crime [<https://perma.cc/P6SR-22SY>]; *SIFs, DCRs and SCS*, *supra* note 58.

62. *See* Wood et al., *supra* note 61; *see also* FINAL REPORT, *supra* note 49, at 150 (noting no increase in drug-related crimes).

63. *See* Cylas Martell-Crawford, *Safe Injection Facilities: A Path to Legitimacy*, 11 ALB. GOV'T. L. REV. 124, 127–28 (2017) (discussing how a lack of public support significantly impacts the chances of effective implementation of SIFs). This article also discusses the issue of local authorities and municipalities who desire to open SIFs, but are preempted by state laws, demonstrating the layers of government that may impede harm reduction measures. *Id.*

64. *See infra* Parts II & III.

65. *See* Vernal Coleman, *Threat of Federal Enforcement Complicates Seattle's Proposed Supervised Injection Site*, SEATTLE TIMES (Aug. 31, 2018, 7:11 AM), <https://www.seattletimes.com/seattle-news/homeless/threat-of-federal-enforcement-complicates-seattles-proposed-safe-injection-site/> [<https://perma.cc/M6RA-Q2PG>]. *See*

has passed legislation that permits the implementation of a SIF,⁶⁶ and therefore, there have been no legal challenges regarding constitutionality.

Many states and municipalities across the country have proposed or considered legislation to authorize SIFs.⁶⁷ For example, in 2018 California passed legislation authorizing approval of overdose prevention programs in San Francisco; however, the governor vetoed the bill.⁶⁸ In other instances, the federal government has stepped in and threatened enforcement.⁶⁹ The federal government's hook is in the Controlled Substances Act (CSA), specifically § 856, and the commerce power.⁷⁰ The next section of this Note will review the CSA and pertinent sections before discussing the case law supporting the government's use of the commerce power to control state-level regulation of illicit substances.

II. THE CSA, THE "CRACK-HOUSE" STATUTE, AND COMMERCE POWER JURISPRUDENCE

Many states are evaluating the legal risks and implications of authorizing SIFs under state law,⁷¹ and, thus far, the threat of criminal or

generally Complaint, *United States v. Safehouse*, No. 2:19-cv-00519-GAM (E.D. Pa. Feb. 5, 2019), ECF No. 1.

66. See Bobby Allyn, *Judge Rules Planned Supervised Injection Site Does Not Violate Federal Drug Laws*, NPR (Last updated Oct. 2, 2019, 7:30 PM), <https://www.npr.org/2019/10/02/766500743/judge-rules-plan-for-safehouse-drug-injection-site-in-philadelphia-can-go-forward> [<https://perma.cc/H9FJ-FTAN>]. California passed legislation in 2018 only to have the governor veto the bill. Assemb. B. 186, 2017–2018 Reg. Sess. (Cal. 2018).

67. Assemb. B. 186, 2017–2018 Reg. Sess. (Cal. 2018) (vetoed by governor); S.B. 18-040, 71st Gen. Assemb., Reg. Sess. (Colo. 2018) (vote indefinitely postponed); S.B. 288, 2018 Reg. Sess. (Md. 2018) (reported unfavorably out of committee); S. 1081, 190th Gen. Ct. (Mass. 2018) (sent to study); S.B. 6254, 65th Leg., Reg. Sess. (Wash. 2018) (referred to committee).

68. Assemb. B. 186, 2017–2018 Reg. Sess. (Cal. 2018). Legislation has again been proposed in California, this time with likely support of the new Governor. Katie Zezima, *California Approves Supervised Opioid Injection Facility, Faces Federal Opposition*, WASHINGTON POST (May 25, 2019, 8:17 AM), https://www.washingtonpost.com/national/california-assembly-approves-supervised-opioid-injection-facility-faces-federal-opposition/2019/05/25/ca9910c6-7e4c-11e9-a5b3-34f3edf1351e_story.html [<https://perma.cc/F5V8-HPTZ>].

69. On February 5, 2019, the federal government filed a complaint seeking to enjoin the non-profit organization Safehouse from opening a SIF in Philadelphia. Complaint at 8, *United States v. Safehouse*, No. 2:19-cv-00519-GAM (E.D. Pa. Feb. 5, 2019), ECF No. 1. See also Regarding Proposed Injection Sites, *supra* note 7; Zezima, *supra* note 68.

70. Complaint at 8, *United States v. Safehouse*, No. 2:19-cv-00519-GAM (E.D. Pa. Feb. 5, 2019), ECF No. 1.

71. See Assemb. B. 186, 2017–2018 Reg. Sess. (Cal. 2018); SB18-040, 72 Gen. Assemb., Reg. Sess. (Colo. 2018); S. 288, 2018 Reg. Sess. (Md. 2018); S. 1081 190th Gen. Ct. (Mass. 2018); SB 6254, 65th Leg., Reg. Sess. (Wash. 2018).

civil liability for medical professionals and others involved with these programs has effectually prevented passage of affirmative legislation.⁷² As state legislatures consider the feasibility and potential ramifications of authorizing SIFs, there are important factors to consider—the textual hook in § 856, whether SIFs are in conflict with commerce power jurisprudence, and how the proposed legislation would stack up under federal preemption analysis.

The CSA establishes federal drug policy in the United States.⁷³ The CSA governs the manufacture, distribution, possession, and importation of both licit and illicit substances.⁷⁴ Within the Act, illicit substances are placed into schedules—a means of classifying the dangerousness and addictive potential of a substance.⁷⁵ The Supreme Court has described the CSA as “legislation that would consolidate various drug laws on the books into a comprehensive statute, provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs.”⁷⁶ This purpose, on its face, does not appear at odds with the concept of the SIF; however, one section of the CSA, in particular, poses a threat.

A. *The “Crack-House” Statute as a Response to the Crack Epidemic*

The “crack-house statute,” 21 U.S.C. § 856, is the section of the CSA that federal law enforcement typically cites as rendering the SIF illegal. The section states:

Except as authorized by this subchapter, it shall be unlawful to—
(1) knowingly open . . . or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance;
(2) manage or control any place . . . either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.⁷⁷

72. See Regarding Proposed Injection Sites, *supra* note 7.

73. 21 U.S.C. §§ 801–904 (2018).

74. *Id.*

75. 21 U.S.C. § 812 (2018).

76. *Gonzalez v. Raich*, 545 U.S. 1, 10 (2005).

77. 21 U.S.C. § 856 (2018).

The plain language of the statute suggests that a SIF would be in violation of federal law.⁷⁸ The purpose of the SIF is to allow individuals to safely inject previously obtained illicit drugs, meaning it would be opened for the purpose of making the space available for use of a controlled substance. However, examination of the legislative evidence surrounding Act's passage supports the argument that this section was not meant to apply to a medical facility utilizing evidence-based treatment practices.⁷⁹

Congress enacted § 856 as part of the overall drug legislation to prohibit the use and existence of so-called “crack-houses,” where cocaine was manufactured or used.⁸⁰ Despite the legislative evidence from the statute's enactment, courts have read its language broadly to include a variety of structures.⁸¹ Yet it appears the statute has rarely, if ever, been used in cases where the activity involved was merely personal use.⁸² Furthermore, the statute has not been interpreted in any case to apply to legitimate medical facilities, which, when authorized under state law, would be the form that the SIF would take.⁸³ In fact, a federal district court in Pennsylvania recently held that, based in part on the legislative evidence, § 856 does not apply to SIFs.⁸⁴ Although the district court's

78. See NORMAN SINGER & SHAMBIE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 45:8 (7th ed., updated 2018). “Plain meaning” interpretation considers “how the public to whom it is addressed understands the act.” *Id.*

79. Memorandum at 3, *United States v. Safehouse*, 2019 U.S. Dist. LEXIS 170912, at *58–67 (E.D. Pa. Oct. 2, 2019) (No. 19-0519), ECF No. 133 (“Although the language, taken to its broadest extent, can certainly be interpreted to apply to . . . safe injection site[s], to attribute such meaning to the legislators who adopted the language is illusory.”); see *Frequently Asked Questions*, *supra* note 3.

80. H. R. 5484, 99th Cong., 2nd Sess., 132 Cong. Rec. S13779 (daily ed. Sept. 26, 1986); Richard Belfiore, Annotation, *Validity, Constructions and Application of Federal “Crack-House Statute” Criminalizing Maintaining, Making or Distributing Controlled Drugs*, 116 A.L.R. FED. 345, § 2[a] (1993).

81. See *United States v. Christie*, 825 F.3d 1048, 1054 (9th Cir. 2016) (applying the statute to a religious ministry); *United States v. Hurt*, 137 F. App'x 192, 193 (10th Cir. June 29, 2005) (an apartment building); *United States v. Ramsey*, 406 F.3d 426, 428–29 (7th Cir. 2005) (a mobile home); *United States v. Bilis*, 170 F.3d 88, 89–90 (1st Cir. 1999) (a bar); *United States v. Tamez*, 941 F.2d 770, 773 (9th Cir. 1991) (a car dealership).

82. *Burris et al.*, *supra* note 7, at 1122 n.164.

83. Cases where medical facilities were charged under § 856 often involved the prescription of opioids outside the scope of legitimate medical practice. See *United States v. Lang*, 717 F. App'x 523, 546–47 (6th Cir. 2017); *United States v. Stegawski*, 687 F. App'x 509, 510 (6th Cir. 2017); *United States v. Sadler*, 750 F.3d 585, 592–93 (6th Cir. 2014).

84. *Safehouse*, 2019 U.S. Dist. LEXIS 170912. In denying the Government's Motion for Judgment on the Pleadings, the Judge reasoned that there was “no support for the view that Congress meant to criminalize projects” such as SIFs under § 856, and declined to expand the

decision is likely to be appealed,⁸⁵ it only strengthens the argument that the SIF is beyond the scope of the CSA and federal preemption.⁸⁶

B. *Commerce Power Jurisprudence*

The federal government's expansive regulatory policies, evidenced by the CSA, are founded on the government's power to regulate interstate commerce.⁸⁷ In *Gonzales v. Raich*, the Supreme Court considered the reach of the congressional commerce power as it pertains to state-level law legalizing the use of illicit substances.⁸⁸ In *Raich*, the court upheld enforcement of the CSA despite the legalization of medicinal marijuana under California law.⁸⁹ In 1996, California passed the Compassionate Use Act, legalizing the use of marijuana for medicinal purposes when "prescribed" by a licensed physician.⁹⁰ The Act permitted cultivation, distribution, and possession of medical marijuana by individuals under the care of a prescribing physician.⁹¹ *Raich* involved two California residents under the care of physicians who recommended the use of marijuana as

statute. *Id.* The judge did not analyze any other issue raised in the complaint or answer and counterclaims.

85. Statement of United States Attorney McSwain on Today's Opinion in the United States v. Safehouse Litigation, U.S. DEP'T OF JUSTICE (Oct. 2, 2019), <https://www.justice.gov/usao-edpa/pr/statement-united-states-attorney-mcswain-today-s-opinion-united-states-v-safehouse> [<https://perma.cc/3YDQ-CPU9>].

86. *See infra* Part IV. When it comes to statutory interpretation, the canons of construction favor plain meaning over legislative intent. Although the language of § 856 facially appears clear as to its meaning, there remains some ambiguity with regard to how the statute should be *applied*, since legislators at the time of drafting could not have "anticipate[d] all future circumstances and completely eliminate[d] the need for judicial interpretation." SINGER & SINGER, *supra* note 78, at § 45:2. Courts may consider legislative purpose and public policy when attempting to clarify a statute's intent or meaning. *Id.* at § 45.9. Additionally, courts may view a statutory provision in the context of the statute as a whole, even when the language of the provision appears plain on its face. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). Courts may also reject the "plain meaning" of a statute if that "meaning has led to absurd or futile results," or "merely [] unreasonable one[s]." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940). Construing the plain meaning of § 856 to apply to SIFs is arguably unreasonable due to the fact that they fall within the states' traditional police power of protecting the health and safety of citizens. *See infra* Part III.B & C.

87. U.S. CONST. art. 1, § 8, cl. 3; *see* HARRY L. HOGAN, FEDERAL CONTROLLED SUBSTANCES ACT (TITLES II & III, P.L. 91-513): SUMMARY AND LEGISLATIVE HISTORY, Rep. No. 80-74 EPW at 7 (1980).

88. *See Gonzales v. Raich*, 545 U.S. 1 (2005).

89. *Id.*

90. *See Compassionate Use Act*, Cal. Health & Safety Code § 11362.5 (West 1996). Doctors do not necessarily prescribe marijuana in the same way they do other medications; rather, the doctor *recommends* the use of marijuana for treatment of a condition. *Id.*

91. *Id.*

treatment for their medical conditions.⁹² Under the Act, the respondents were permitted to cultivate marijuana for personal, medicinal use. Nonetheless, federal agents seized the respondents' cannabis plants, and they subsequently commenced the action.⁹³

Applying its holding in *Wickard v. Filburn*,⁹⁴ the Supreme Court established that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would *undercut the regulation of the interstate market in that commodity*."⁹⁵ Therefore, Congress has the power to regulate the marijuana, even though it is for personal use only, because permitting small-scale cultivation would impact both supply and demand,⁹⁶ thereby undercutting the regulatory scheme.⁹⁷ This impact on the market represents economic activity.

The Court continually holds economic activity that substantially impacts interstate commerce falls within Congress's commerce power.⁹⁸ Conversely, the Court has held that *non-economic* activity does not fall within the commerce power.⁹⁹ In *United States v. Lopez*, the Court struck down the Gun-Free School Zone Act that prohibited the possession of firearms in a school zone.¹⁰⁰ There, Lopez was a twelfth-grade student who brought a concealed weapon to school and was charged under the Act.¹⁰¹ Lopez argued the Act was an overreach of congressional power.¹⁰²

In its analysis, the Court applied a three-part framework to identify categories of activity that Congress may regulate using its commerce power: (1) channels, (2) instrumentalities, and (3) those activities having

92. *Raich*, 545 U.S. at 7.

93. *Id.*

94. *Wickard v. Filburn*, 317 U.S. 111, 129–30 (1942) (holding that the cultivation of wheat for personal use was an intrastate activity having a significant impact on interstate commerce and thus fell under Congress's Commerce Power).

95. *Raich*, 545 U.S. at 18 (emphasis added).

96. *Id.* at 30–31. The Court finds that drug-related activities are "quintessentially economic." *Id.* Examining the definition of the word "economic" the Court includes production, distribution, and consumption as economic activity.

97. *Id.* at 18.

98. *Wickard*, 317 U.S. at 128–29; *United States v. Perez*, 402 U.S. 146, 151 (1971) (holding that loan sharking practices had a substantial effect on interstate commerce); *Monson v. Drug Enforcement Administration*, 589 F.3d 952, 952 (8th Cir. 2009) (holding that regulation of cultivation of industrialized hemp was within the government's commerce power).

99. *See generally* *United States v. Lopez*, 514 U.S. 549 (1995).

100. *Id.* at 551.

101. *Id.*

102. *Id.* at 552.

a *substantial effect* on interstate commerce.¹⁰³ The Court agreed with Lopez's argument because the Act failed the substantial effects test.¹⁰⁴ The Act was deemed not to be part of a broader regulatory scheme that would be "undercut unless the intrastate activity were regulated."¹⁰⁵ Going one step further, the Court distinguished the possession of a weapon on school property from an activity that arises out of a commercial transaction, which would, in the aggregate, impact interstate commerce.¹⁰⁶

The Court continued to distinguish regulation of economic versus non-economic activity in *United States v. Morrison*.¹⁰⁷ *Morrison* involved the question of whether a section of the Violence Against Women Act that provided for a civil remedy for victims of gender-motivated violence was constitutional.¹⁰⁸ The Supreme Court found the section in question, § 13981, to be an unconstitutional overreach of Congress's commerce power.¹⁰⁹ Applying the same analytic framework used in *Lopez*, the Court held that "gender motivated crimes of violence are not, in any sense of the phrase, economic activity."¹¹⁰ Despite an enormous number of congressional findings supporting the aggregate impact of gender-related violence on interstate commerce, the Court maintained its position.¹¹¹ Viewing the concept of the SIF through this precedential lens supports the argument that SIFs are congruent with commerce power holdings.

III. APPLYING COMMERCE POWER JURISPRUDENCE TO THE SIF SETS THE STAGE FOR VALIDATION

Parts I and II laid out the foundations for modern commerce power jurisprudence by examining three prominent cases. This Note will now relate those concepts to the SIF, and through careful analysis and application of the Supreme Court's holdings, argue that the SIF is non-

103. *Id.* at 559–61 (citing *Perez*, 402 U.S. at 155–56).

104. *Id.* The Court stated, "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.* at 560.

105. *Id.* at 561.

106. *Id.*

107. *See generally* *United States v. Morrison*, 529 U.S. 598 (2000).

108. *Id.* at 601–02. The case originated with a claim by a female college student that two male students raped her and that she was entitled to relief under § 13981 of the Violence Against Women Act. *Id.*

109. *Id.* at 617.

110. *Id.* at 613.

111. *Id.* at 614 ("Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.") (quoting *United States v. Lopez*, 514 U.S. 549, 557(1995)).

economic and therefore state-level SIF implementation would be a valid exercise of police power.

A. *SIFs are Consistent with the Supreme Court's Holdings in Raich, Lopez, and Morrison Because they are Non-Economic and Therefore Outside the Scope of Congressional Commerce Power*

The concept of the SIF and the state laws that would permit its functionality are not at odds with the holdings of *Raich*, *Lopez*, or *Morrison*. Possession and use of an illicit substance do not involve the channels or instrumentalities of interstate commerce.¹¹² Therefore, we are left to apply the “substantial effects test.”¹¹³ Under this analysis, SIFs do not substantially impact interstate commerce such that failure to prohibit the activity would “undercut the regulation” of the illicit drug market.

The consumption of otherwise-obtained illicit substances within the SIF would not have an economic impact on supply and demand, as did the cultivation of marijuana for personal use in *Raich*.¹¹⁴ In making this argument, it is imperative to stress the fact that the purchase of drugs that would be consumed in a SIF would occur independently of the SIF's existence. There is no evidence that the presence of the SIF increases the rates of purchase of illicit drugs.¹¹⁵ In fact, the presence of SIFs is more likely to decrease the amount of drugs consumed in the market by increasing access to substance abuse treatment and other vital services.¹¹⁶ Additionally, no evidence suggests that new users are enticed by the presence of SIFs¹¹⁷ or that SIFs attract additional users into the area.¹¹⁸

Further support comes from the fact that there is no cultivation on the part of the user as there was in *Raich*, which, in the Court's view, strengthened the connection to the interstate market.¹¹⁹ The logic of *Raich*, based on *Wickard*, turns on the point that an individual cultivates

112. United States v. Lopez, 514 U.S. 549, 559–61 (1995).

113. See *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (using the substantial effects test to determine that personal cultivation and use of marijuana impacts supply and demand, affecting interstate commerce).

114. *Id.* at 18.

115. Wood et al., *supra* note 61, at 3.

116. Burris et al., *supra* note 7, at 1101.

117. DAGMAR HEDRICH, EUROPEAN REPORT ON DRUG CONSUMPTION ROOMS 83 (2004), http://www.emcdda.europa.eu/attachements.cfm/att_2944_EN_consumption_rooms_report.pdf. New users would suggest an increase in demand.

118. See *id.* at 81. Research thus far has not produced data sufficient to evaluate a “pull effect.” *Id.*

119. *Gonzales v. Raich*, 545 U.S. 1, 30 (2005). The cultivation, even for personal use, impacted supply and demand of the commodity in the market. *Id.*

his own marijuana in lieu of purchasing it in the market.¹²⁰ No analogous application to the SIF exists. Although participants would possess illicit drugs, such possession would not stem from their cultivation of the product. Moreover, the Court in *Raich* was also concerned with the potential for homegrown marijuana to be diverted into illicit channels, thus falling into the “class of activities” substantially affecting interstate commerce.¹²¹ This concern is also inapplicable to the SIF as SIFs contribute in no way to the amount of drugs present in the market.¹²²

Opponents could argue that the SIF would “undercut” the purpose of the regulatory scheme—to “prohibit entirely the possession or use of substances listed in Schedule I, except as part of a strictly controlled research project.”¹²³ However, this argument is tenuous because the goal of the SIF actually works toward the *same* purpose as the regulatory scheme by increasing access to services such as detox, counseling, and medication-assisted treatment.¹²⁴ Furthermore, the volume of drugs that would be consumed in these facilities would simply be consumed elsewhere, most likely in a public space, presenting a danger to the community.¹²⁵

Further, the operation of a SIF differs from marijuana legalization schemes in that it does not involve a business, lending support to the SIF’s non-economic nature.¹²⁶ Both medical and recreational marijuana dispensaries operate as retail businesses,¹²⁷ and marijuana is viewed similarly to a commodity.¹²⁸ SIF participants would not purchase or

120. *Wickard v. Filburn*, 317 U.S. 111, 128 (1942). Home-grown wheat competes with wheat in the marketplace as it meets the need of someone who would otherwise purchase the wheat elsewhere. *Id.*

121. *Raich*, 545 U.S. at 22.

122. Wood et al., *supra* note 61, at 3 (discussing how research indicates no increase in drug trafficking, or use and supply offenses).

123. *Raich*, 545 U.S. at 24. Section 812 of the CSA established five schedules in which drugs and other substances are classified. Schedule I substances are those deemed to have high abuse potential, no legitimate medical purpose, and are not safe for use, even under medical supervision. 21 U.S.C. § 812(b)(1) (2018).

124. Burris et al., *supra* note 7, at 1101–03.

125. Kennedy et al., *supra* note 19.

126. Most facilities proposing to open SIFs, or to add it to its list of services, are non-profit organizations. See, e.g., *About, SAFEHOUSE*, <https://www.safehousephilly.org/about> [<https://perma.cc/DCY2-XFFZ>].

127. Dispensaries require business licensing within the state. See, e.g., MASS. GEN. LAWS c. 94G, § 5 (recreational) and MASS. GEN. LAWS c. 94I, § 2 (medical).

128. A commodity is defined as “an economic good” or a “product of agriculture.” *Commodity*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/commodity> [<https://perma.cc/P73W-DYT4>]. See *Wickard v. Filburn*, 317 U.S. 111, 128 (1942).

acquire the drug at the facility, and they would not pay to use the facility.¹²⁹ No economic activity occurs, merely consumption. The SIF fails the test because it would not have a substantial effect on the interstate market for illicit substances.

The Court in *Lopez* and *Morrison* held that Congress could not regulate non-economic activity.¹³⁰ As detailed above, the mere use and possession of an illicit substance in a SIF does not render the SIF economic in nature. Opponents of the SIF may argue that even if the consumption (as a non-economic activity) argument prevails, the possession of illicit drugs within the SIF would still bring it within the grasp of the CSA. Possession of opioids in a state-sanctioned SIF should be viewed similarly to the possession of a weapon in a school zone in *Lopez*, where the Court refused to tie such possession to the underlying economic transaction.¹³¹ There, the Court distinguished *Lopez* from its holding in *United States v. Bass*.¹³² *Bass* involved 18 U.S.C. § 1202(a) prohibiting possession of a weapon by a felon.¹³³ The statute in *Bass* expressly referred to one who “receives, possesses or transports in commerce or affecting commerce . . . any firearm.”¹³⁴ Conversely, the statute in *Lopez* did not contain similar language; therefore, the Court stated it had “no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.”¹³⁵ Similarly, applicable provisions of the CSA make no mention of interstate commerce.¹³⁶

Opponents may argue further that Congress explicitly stated in its findings within the CSA that there is always a connection with interstate commerce.¹³⁷ However, it is important to note that SIF participants would

129. See *Frequently Asked Questions*, *supra* note 3; *Insite: Supervised Consumption Site*, VANCOUVER COASTAL HEALTH, http://www.vch.ca/Locations-Services/result?res_id=964 [<https://perma.cc/T8E7-UP96>] (indicating that all funding is provided by Vancouver Coastal Health).

130. See discussion *supra* Part II.B. See generally *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

131. See *Lopez*, 514 U.S. at 561 (arguing that mere possession of a weapon in a school zone is non-economic).

132. *Id.* at 549.

133. *United States v. Bass*, 404 U.S. 336, 336 (1971).

134. *Id.* at 337.

135. *Lopez*, 514 U.S. at 562.

136. See 21 U.S.C. § 841 (2018) (possession).

137. 21 U.S.C. § 801(A)(3)–(6) (2018). Specifically, the findings state, “[l]ocal

be in possession of the drugs regardless, and the facility itself does not contribute. Only consumption is directly impacted, and that impact is merely one of setting. In this light, the possession and consumption, separated from the underlying transaction, must likewise be non-economic.

The Court has also refused to consider the aggregate impacts of non-economic activity.¹³⁸ Even if the Court was willing to do so, it would be a stretch to say that consumption or possession within a SIF could substantially impact interstate commerce, as there is no evidence that a SIF would impact the volume of purchase.¹³⁹ Besides, there are not likely to be many facilities to view in the aggregate due to the relatively small population of IDUs.¹⁴⁰

Furthermore, congressional prohibition of non-economic activities under the commerce power would fail rational basis review when applied to the SIF.¹⁴¹ In his concurrence in *Raich*, Justice Scalia states, “Congress’s authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce.”¹⁴² It is undeniable that eradication of illicit use schedule I substances is a legitimate—however unrealistic and, arguably, unattainable—goal. Still, research indicates that SIFs neither negatively impact the volume of illicit substances consumed, nor do they encourage or promote new users to begin consumption.¹⁴³

distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.” *Id.* at (4).

138. See generally *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

139. See *supra* Part I.A.

140. Amy Lansky et al., *Estimating the Number of Persons Who Inject Drugs in the United States by Meta-Analysis to Calculate National Rates of HIV and Hepatitis C Virus Infections*, 9 PLOS ONE, May 2014, at 1, 7, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4026524/pdf/pone.0097596.pdf> [<https://perma.cc/Y266-4VJ5>]. In 2011, the number of past-year users of injected drugs was 0.30%, or 774,434. *Id.* In 2017, the number of lifetime users of injected drugs, ages twelve and older, was 1.6%, or approximately 4.4 million. *Results from the 2017 National Survey on Drug Use and Health: Detailed Tables*, SAMHSA, tbls. 1.96A & 1.96B, <https://www.samhsa.gov/data/report/2017-nsduh-detailed-tables> [<https://perma.cc/5TY8-2EUS>].

141. Rational basis review is the least restrictive standard utilized by Courts in evaluating the constitutional claims, requiring only that the government have a legitimate state interest and that the means are rationally related. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 40 (2005) (Scalia, J. concurring).

142. *Id.*

143. HEDRICH, *supra* note 117, at 73, 83. Additionally, some facilities exclude addicted users who come to the facility wanting to inject for the first time. *Id.* at 10.

Therefore, prohibition of the SIF is not an appropriate means to achieve a legitimate goal, leaving the SIF within the Court's holding.

However convincing (or not) the argument that the SIF is consistent with commerce power jurisprudence may be, its fate is more uncertain than one would hope. The greatest risk to SIFs is the malleability of the substantial effects test, as judges are left with wide discretion in how they categorize activities.¹⁴⁴ Should the Court eventually be faced with the issue of determining the constitutionality of a state law authorizing SIFs, the particular political leanings of the Justices may dictate how the activity is classified.¹⁴⁵ Therefore, it may be more useful and predictable for states considering SIF legislation to conduct a thorough federal preemption analysis in preparation for a constitutional challenge. Should the Court determine that the concept of the SIF falls within the reach of the CSA, the language of enacted legislation will become incredibly important.

B. Application of the CSA to SIFs Violates the Tenth Amendment and States' Police Power to Regulate Medical Practices

The Tenth Amendment provides “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”¹⁴⁶ Those powers typically regarded as reserved to the states comprise what are commonly referred to as police powers—the state’s right to enact and enforce laws vital to the protection of public safety, health, and welfare.¹⁴⁷ These powers generally include, inter alia, employment,¹⁴⁸ state-level criminal sanctions, and the regulation of medical practices.¹⁴⁹ In these areas, state legislation carries weight over attempts at federal regulation.¹⁵⁰

It is well settled that states also have within their police powers the authority to regulate illicit substances and “[t]he right to exercise this power is so manifest in the interest of public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too

144. John C. Roberts, Jr., *The Siren Song of Federalism: Gonzales v. Oregon*, 12 HOLY CROSS J.L. & PUB. POL’Y 95, 107 (2008).

145. *Id.*

146. U.S. CONST. amend. X.

147. *Police Power*, BLACK’S LAW DICTIONARY (10th ed. 2014).

148. *Chamber of Commerce v. Whiting*, 563 U.S. 582, 588 (2011).

149. *Pack v. Super. Ct.*, 132 Cal. Rptr. 3d 633, 647 (Ct. App. 2011), review granted and opinion superseded sub nom. *Pack v. S.C.*, 268 P.3d 1063 (Cal. 2012).

150. In his concurring opinion in *Lopez*, Justice Thomas stated, “[W]e *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power” *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J. concurring) (emphasis in original).

firmly established to be successfully called in question.”¹⁵¹ In *Robinson v. California*, the Supreme Court discussed valid ways in which a state could regulate narcotics, including compulsory treatment, public education, and efforts to address the underlying socioeconomic problems that contribute to substance abuse.¹⁵² The Court stated, “the range of valid choice which a State might make in this area is undoubtedly a wide one.”¹⁵³ The SIF falls within this broad range of choice, and its fashioning as a medical facility ties it contemporaneously to the states’ authority to regulate medical practices.

The reach of the CSA in regulating medical practices is addressed in *Gonzales v. Oregon*.¹⁵⁴ In *Gonzalez*, the Court upheld a state law authorizing physicians to prescribe medications to terminally ill patients in order to hasten end of life.¹⁵⁵ The federal government argued that physician-assisted suicide was not a legitimate medical purpose and was in violation of the CSA.¹⁵⁶ The Court rejected this argument, instead giving weight to the idea that the CSA did not grant authority to “displace the states as the primary regulators of the medical profession, or to override a state’s determination as to what constitutes legitimate medical practice.”¹⁵⁷ The CSA’s only role in regulating medical practice is to prevent doctors from using their ability to write prescriptions to engage in drug dealing or trafficking.¹⁵⁸ Therefore, the CSA did not authorize the Attorney General “to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law.”¹⁵⁹

The Court’s holding in *Gonzalez* strengthens the argument that implementing a SIF is a valid use of police power. State laws authorizing a SIF program as a part of a medical facility that provides MAT, access to substance abuse treatment, and primary care, among other services, surely

151. *Robinson v. California*, 370 U.S. 660, 664 (1962) (quoting *Whipple v. Martinson*, 256 U.S. 41, 45 (1921)) (discussing valid ways in which a state could regulate narcotics within the state, and holding that the criminalization of addiction was not one).

152. *Id.* at 665.

153. *Id.*

154. *See generally* *Gonzales v. Oregon*, 546 U.S. 243 (2006).

155. *Id.*

156. 21 U.S.C. § 829(a). The CSA regulates physicians’ abilities to prescribe schedule II substances. *Id.*

157. *Gonzalez*, 546 U.S. at 253 (quoting Letter from Attorney General Janet Reno to Sen. Orrin Hatch, on Oregon’s Death with Dignity Act (June 5, 1998)).

158. *Id.* at 270.

159. *Id.* at 258.

fall under the category of legitimate medical practices.¹⁶⁰ Armed with authority to determine what constitutes legitimate medical practice, states have the right to implement policies and laws supporting the programs they deem necessary to protect the health and wellbeing of their citizens.

The Court in *Gonzalez* does point to a provision of Title I of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (the CSA is Title II) indicating Congressional intent to allow for regulation of treatment for individuals with addiction.¹⁶¹ Initially, this may appear problematic for the SIF; however, the harm reduction measure is not merely addressing the addiction, but also the other public health risks associated with drug use.¹⁶² Additionally, most, if not all, substance abuse programs are regulated at the state level, and each program chooses which type of evidence-based practice it uses.¹⁶³ Harm reduction is one of the evidence-based practices available and is largely supported by the medical community as an efficacious approach to substance abuse treatment.¹⁶⁴ Furthermore, states' attempts to authorize SIFs through legislation would embody the desire to inform Congress of the need to shift toward more successful treatment approaches and address the stigma that stifles the use of lifesaving interventions.¹⁶⁵

Although this Note does not argue that it is a fundamental right to use illicit substances in a safe environment, many of the policy reasons and rationales of substantive due process jurisprudence speak to the ability of the state to regulate regarding the public health and welfare of its citizens, which would include a preventive health care measure like the SIF.¹⁶⁶ The

160. See *About Supervised Injection Facilities (SIFs)*, MASS. MED. SOC'Y (June 5, 2017), [http://www.massmed.org/Advocacy/Key-Issues/Opioid-Abuse/About-Supervised-Injection-Facilities-\(SIFs\)#.W_HH6i3MyL8](http://www.massmed.org/Advocacy/Key-Issues/Opioid-Abuse/About-Supervised-Injection-Facilities-(SIFs)#.W_HH6i3MyL8) [<https://perma.cc/2JA7-ZZF3>].

161. *Gonzalez*, 546 U.S. at 271 (citing 42 U.S.C. § 290bb-2a).

162. See *supra* Part I.A.

163. See generally NAT'L ASS'N OF STATE ALCOHOL & DRUG ABUSE DIRS., STATE REGULATIONS ON SUBSTANCE USE DISORDER PROGRAMS & COUNSELORS: AN OVERVIEW (2012), <http://www.hazelden.org/web/public/document/nasadadstateregulations.pdf>.

164. See *About Supervised Injection Facilities*, *supra* note 160.

165. Austin Raynor, *The New State Sovereignty Movement*, 90 IND. L.J. 613, 637 (2015) (“[S]tate statutes that permit conduct otherwise prohibited by federal law have the capacity to lessen the social stigma such conduct normally invites.”).

166. There is an argument to be made that a fundamental right to healthcare is emerging (or has emerged) and could be expanded to include the SIF as part of evidence-based substance abuse treatment. See Gregory D. Curfman, *King v. Burwell and a Right to Health Care*, HEALTH AFFAIRS (June 26, 2015), <https://www.healthaffairs.org/doi/10.1377/hblog20150626.048913/full/> [<https://perma.cc/E8ZQ-BB3J>]. “Strict scrutiny” is a standard of review used by courts in evaluating the constitutionality of laws that requires the government

state has a compelling interest in public health and safety of its citizens threatened by the opioid epidemic. The SIF is a narrowly tailored means to address the specific problem of overdose deaths and spread of infectious diseases within an underserved, at-risk population (generally homeless, mental health issues, etc.¹⁶⁷). Even if there is no fundamental right, the idea that a law should pass the muster of strict scrutiny speaks to its importance.¹⁶⁸

C. *A Brief Aside: Prosecutorial Discretion Regarding Marijuana Indicates a Policy Shift and Cedes Some Power to the States*

Even armed with the CSA and supporting case law from the Supreme Court, the federal government has shifted its policies of enforcement with regard to marijuana.¹⁶⁹ Similar to the emergence of widespread harm reduction methods, the development and acceptance of state-level marijuana legalization was slow and arduous.¹⁷⁰ The federal government's shift from enforcement against marijuana growers and dispensaries in states with legalization laws speaks to its willingness to allow states to be the "laboratories."¹⁷¹

Notwithstanding the Court's holding in *Raich*, the federal government has begun, over the years, to turn a blind eye to states' legalization policies.¹⁷² Thirty-three states and D.C. have legalized marijuana in one form or another, to include recreational and medicinal

to demonstrate it has a compelling interest and that the means are narrowly tailored. *See generally* Johnson v. California, 543 U.S. 499 (2005).

167. *See* HEDRICH, *supra* note 117, at 9.

168. The author recognizes the tenuous argument, and a full fundamental rights analysis is beyond the scope of this Note.

169. *See* Matthew A. Melone, *Federal Marijuana Policy: Homage to Federalism in Form; Potemkin Federalism in Substance*, 63 WAYNE L. REV. 215, 264–65 (2018), for a discussion on the troubling impacts of the federal government's lack of enforcement of its own laws.

170. *See id.* at 220–23 (comparing the shift in public attitudes regarding marijuana laws to that of same-sex marriage).

171. *See generally* James A. Gardner, *The "States-as-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475 (1996). Courts often use this metaphor to support a position that the government should "exercise restraint in displacing state law even when such displacement is concededly constitutionally permitted." *Id.* at 485 n.37. Interestingly, the legislative history of the CSA suggests there was "rising support for moderation of the Federal marihuana laws." *See* HARRY L. HOGAN, FEDERAL CONTROLLED SUBSTANCES ACT (TITLES II & III, P.L. 91-513): SUMMARY AND LEGISLATIVE HISTORY, Rep. No. 80-74 EPW at 50 (1980). The new policy shift may in part represent the realization of older, more moderate views.

172. Melone, *supra* note 169, at 265 (discussing how the federal government "categorically announce[d] it will not enforce a law under particular circumstances").

use, and generally decriminalized possession below a certain quantity.¹⁷³ The federal government has largely refrained from enforcing the CSA so long as states maintain robust legalization and regulatory schemes that ensure certain federal priorities are met.¹⁷⁴ Federal challenges to state laws have decreased and federal funds are prohibited from being used for enforcement purposes.¹⁷⁵ Moreover, despite the textual hook in the CSA, the federal government has not used, or minimally used, § 856 as a means for prosecuting marijuana dispensaries.¹⁷⁶ Marijuana dispensaries clearly fall under § 856—they are buildings or structures owned, rented, or operated with the intent to distribute a controlled substance. Yet there is minimal evidence of charges brought by the federal government against a

173. *State Marijuana Laws in 2019 Map*, GOVERNING, <https://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html> [[<https://perma.cc/HU45-6QKH>]. See ALASKA STAT. § 17.38.010 (2017); ARIZ. REV. STAT. ANN. § 36-28.1 (2018); ARK. CODE ANN. § 5-64-101, et seq. (West 2018); *Compassionate Use Act*, CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996); COLO. CONST. art. 18, § 16; CONN. GEN. STAT. ANN. § 21a-408, et seq. (West 2017); DEL. CODE ANN. tit. 16, § 4701, et seq. (West 2018); FLA. STAT. § 893.13, et seq. (2018); HAW. REV. STAT. § 329-121 (2018); 410 ILL. COMP. STAT. ANN. 310 (West 2014); LA. STAT. ANN. § 40:1046 (2018); ME. REV. STAT. ANN. tit. 22, § 2422 (2018); MD. CODE ANN., CRIM. LAW § 5-601 (West 2017); MASS. GEN. LAWS ch. 94G, § 1-21 (2017); MICH. COMP. LAWS ANN. § 333.27952 (West 2018); MINN. STAT. ANN. § 152.22 (West 2016); MO. REV. STAT. § 579.015 (2016); MONT. CODE ANN. § 50-46-301 (2017); NEV. REV. STAT. ANN. § 431A.010, et seq. (West 2017); N.H. REV. STAT. ANN. § 318-B:2-c (2017); N.J. STAT. ANN. § 24:6I-1 (West 2010); N.Y. PUB. HEALTH LAW § 3360 (McKinney 2018); OHIO REV. CODE ANN. § 3796.02 (West 2016); OKLA. STAT. ANN. tit. 63, § 420 (West 2018); H.B. 3400, 78th Leg. Assemb. (Or. 2015); S.B. 3, 2015 Reg. Sess. (Pa. 2015); R.I. GEN. LAWS ANN. tit. 21, § 21-28.6-4 (West 2018); H.B. 3001, 2018 Utah Laws 3d Sp. Sess. ch. 1 (Utah 2018); VT. STAT. ANN. tit. 18, § 4472-74 (2018); WASH. REV. CODE ANN. § 69.50.325 (West 2017); W. VA. CODE § 16-8A-1-17 (2017).

174. See Memorandum from James Cole, Deputy Att’y Gen., to all U.S. Attorneys (Aug. 29, 2013) [hereinafter Cole Memo]. Priorities include: preventing profits from sale from going to organized crime; sale to minors; intoxicated driving; diversion from states where marijuana is legal to those in which it is not; violence stemming from cultivation/distribution; growing on public land; and use and/or possession on federal property. *Id.* The government enforces the CSA in situations where there is noncompliance with the state’s regulatory scheme. *United States v. Campbell*, No. 17-30208, 2019 WL 384535, at *2 (9th Cir. Jan. 30, 2019) (finding the defendant was not in compliance with the strict state regulations regarding the cultivation of marijuana).

175. See Michael Rosenblum, *Rohrabacher-Blumenauer Amendment Included in Omnibus FY2018 Spending Bill*, THOMPSON COBURN, LLP (Mar. 28, 2018), <https://www.thompsoncoburn.com/insights/blogs/tracking-cannabis/post/2018-03-28/rohrabacher-blumenauer-amendment-included-in-omnibus-fy-2018-spending-bill> [<https://perma.cc/S8XY-QJVU>].

176. See, e.g., *United States v. Oakland Cannabis Buyers’ Co-op*, 532 U.S. 483, 491 (2001) (holding that medical necessity is not a defense to distribution charges). This case and many early cases were brought by the federal government seeking to enjoin dispensaries from distributing marijuana, claiming it was a violation of 21 U.S.C. § 841(a).

medical or recreational marijuana dispensary under the statute alone.¹⁷⁷ The lack of charges under § 856 may be due to the fact that the holding in *Raich* permitted enforcement of federal laws without the use of the § 856.¹⁷⁸ Nevertheless, the relative lack of enforcement speaks to the willingness of the federal government to support and even encourage prosecutorial discretion.

In 2013, former Deputy Attorney General James Cole issued a memo to all U.S. Attorneys addressing the exercise of prosecutorial discretion in enforcement of federal drug policies.¹⁷⁹ The memo encouraged discretion in states with appropriate legislative and regulatory schemes governing marijuana cultivation, distribution, and possession that mitigated the concerns of Department of Justice (DOJ).¹⁸⁰ The memo outlined the DOJ's primary objectives and priorities with regard to marijuana.¹⁸¹ The memo declares "[t]he primary question in all cases . . . should be whether the conduct at issue implicates one or more of the enforcement priorities,"¹⁸² indicating that if it does not, then prosecutors should restrict their pursuit of the case, saving valuable and limited resources.¹⁸³ This sort of policy shift on the part of the government, to not actively pursue purported violations of the CSA, lends weight to a more state-centric interpretation and application of the law and current jurisprudence in cases where support for the underlying state law or medical practice exists.

Parts II and III laid the foundational background of existing statutory and common law principles used to analyze the SIF as a valid exercise of state police power and discussed how the harm reduction measure would fare in light of the leading commerce power jurisprudence. Although this Note argues the SIF is beyond the scope of the CSA, should the Supreme

177. See *United States v. Lynch*, 2010 WL 1848209 (C.D. Cal. 2010). Cases involving charges against dispensaries typically implicate activity incongruent with state law. In *Lynch*, evidence suggested the defendant's business produced a profit and sold to individuals with no medical need. *Id.* at 9. However, threats of enforcement were made against landlords and mortgagees, and those did lead to many pre-emptive foreclosures. Charles Kreindler & Michael Emmick, *Got Pot? The Feds Try to Make Mortgage Banks Liable Under the Crack House Statute*, WHITE COLLAR DEF. BLOG (Jan. 19, 2012), <https://www.jdsupra.com/legalnews/got-pot-the-feds-try-to-make-mortgagee-008091/> [<https://perma.cc/NNT3-HY2A>].

178. See *supra* note 174 and accompanying text.

179. Cole Memo, *supra* note 174.

180. *Id.* (rescinded by Jeffrey B. Sessions, Memorandum for All United States Attorneys: Marijuana Enforcement (Jan. 4, 2018)).

181. See *supra* note 174 and accompanying text.

182. Cole Memo, *supra* note 174, at 3.

183. See *id.* The shifting political climate under Republican President Donald Trump led former AG Jeff Sessions to rescind the Cole Memo; however, it appears to be business as usual under the Cole Memo policy.

Court one day find otherwise, properly worded legislation will be vital to successful implementation of the SIF.¹⁸⁴ The final section of this Note discusses the federal preemption doctrine and applies the preemption framework to potential state laws authorizing the SIF concept.

IV. STATE-LEVEL SIF LEGISLATION AND THE FEDERAL PREEMPTION DOCTRINE

In light of recent challenges¹⁸⁵ and threats against proposed SIFs,¹⁸⁶ state-level legislative authorization would be optimal for implementing SIFs. Such legislation could come in the form of simply expanding SEP laws to include consumption or changes to the policies of a public health administrative body.¹⁸⁷ To date, no state has authorized legislation approving the implementation of SIF programs.¹⁸⁸ However, there is precedential support for the survival state laws presumably at odds with federal laws under the federal preemption doctrine.¹⁸⁹ Passing a federal preemption analysis would bolster the argument that the SIF is beyond the scope of the CSA.

The Supremacy Clause of the United States Constitution declares federal law the “supreme law of the land.”¹⁹⁰ However, when it comes to areas that are traditionally regulated by states, there exists a presumption against federal preemption.¹⁹¹ The Court has long assumed “that the historic police powers of the States [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress.”¹⁹² Therefore, when

184. It should be noted that with regard to state-level marijuana laws, the Supreme Court explicitly did not address the issue of federal preemption in *Raich*. Luke C. Waters, *Does Federal Law Preempt State Marijuana Law? Analyzing the “Conflict”*, COLO. LAWYER 34, 38 (2018), https://www.cobar.org/Portals/COBAR/TCL/Dec%202018/CLDec18_Features_Cannabis.pdf. The Court found federal supremacy solely through the commerce power. *Id.*

185. *See, e.g.*, Complaint, United States v. Safehouse, No. 2:19-cv-00519-GAM (E.D. Pa. Feb. 5, 2019), ECF No. 1.

186. Spencer Buell, *In Opening a Safe Injection Site, Somerville Would Call Feds’ Bluff*, BOS. MAGAZINE (August 14, 2019, 12:21 PM), <https://www.bostonmagazine.com/news/2019/08/14/somerville-safe-injection-site/> [<https://perma.cc/ZU6M-2NLV>].

187. Beletsky et al., *supra* note 27, at 233.

188. *See supra* note 66.

189. *See infra* Part IV.A.

190. U.S. CONST. art. VI.

191. *Viva! Int’l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 162 P.3d 569, 573 (Cal. 2007).

192. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 115–19 (1992) (Souter, J. concurring). The regulation of state-level criminal sanctions for illicit substances and medical practices are historically within

a state law is at odds with a federal law, we must undertake a federal preemption analysis to determine if the state law represents a valid exercise of its police powers.

A. *The Savings Clause Clearly Indicates Only a Conflict Would Trigger Preemption*

As discussed in Part II.A, the CSA governs federal drug policy in the United States.¹⁹³ The government challenges the concept of the SIF as being illegal under the CSA, specifically § 856, the “crack-house” statute.¹⁹⁴ However, examination of the legislative evidence leads one to view the SIF as outside the bounds of § 856.¹⁹⁵ Another provision exists within the Act that further supports the conclusion that the SIF is beyond the reach of the CSA—§ 903.¹⁹⁶ Section 903 contains the following language:

No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.¹⁹⁷

This “[a]pplication of State law” provision sets up the federal preemption analysis.

When evaluating for preemption under the CSA, courts have upheld state laws “[i]n the absence of unambiguous statutory language supporting a stay or evidence that Congress clearly intended that the federal government have exclusive jurisdiction.”¹⁹⁸ Federal preemption may be explicit within the language of the statute, or it may be implicitly stated.¹⁹⁹

states’ police powers. *Qualified Patients Ass’n v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 106 (Ct. App. 2010).

193. *See supra* Part II.A.

194. *See supra* Part II.A; *see also* Complaint at 5, *United States v. Safehouse*, No. 2:19-cv-00519-GAM (E.D. Pa. Feb. 5, 2019), ECF No. 1.

195. *See supra* Part II.A.

196. 21 U.S.C. § 903 (2018).

197. *Id.*

198. *City of Hartford v. Tucker*, 621 A.2d 1339, 1342 (Conn. 1993); *see also In re Belsha*, 343 N.Y.S.2d 481, 483 (N.Y. Fam. Ct. 1973) (holding the anti-preemption clause of the CSA did not preclude state prosecution or reserve such prosecution to the Federal government).

199. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

There are two types of implied preemption: (1) field preemption and (2) conflict preemption.²⁰⁰

The language of § 903 makes clear that Congress did not intend the federal government to have exclusive jurisdiction, and there is no explicit preemption of state law.²⁰¹ Next, the language must be examined to determine if there is any implicit preemption. Field preemption exists when Congress expresses intent to “occupy the field.”²⁰² In § 903, the language specifically states there is no such intent.²⁰³ Thus, a state law authorizing SIFs will only be invalidated by the CSA if it can be shown that the two are in conflict, meaning compliance with the state law will result in noncompliance with federal law.²⁰⁴

The question then becomes whether or not the concept of a state-authorized supervised injection facility can co-exist with the CSA as a whole.²⁰⁵ The general purpose and intent of the CSA is to provide meaningful, comprehensive regulation of the manufacture, distribution, possession, and importation of illicit substances.²⁰⁶ Courts have interpreted various other purposes, such as “to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.”²⁰⁷ In applying the conflict analysis to state and local marijuana laws, they often survive federal preemption because they do not prohibit the federal

200. *Id.* at 98–99 (holding that state occupational safety laws were in conflict with the Federal OSH Act because the language of the statute specifically required any state regulation to be submitted and approved by the Secretary).

201. *See* 21 U.S.C. § 903 (2018); *Robinson v. California*, 370 U.S. 660, 664 (1962). This assertion is strengthened by the fact that states have adopted state-level laws regarding the regulation and criminalization of illicit substances. *See, e.g.*, Massachusetts Controlled Substances Act, MASS. GEN. LAWS ch. 94C, §§ 1–49 (2017).

202. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”).

203. 21 U.S.C. § 903 (2018).

204. *Gade*, 505 U.S. at 109 (Kennedy, J. concurring); *Rice v. Norman Williams Co.*, 458 U.S. 654, 658 (1982).

205. *Gade*, 505 U.S. at 98. “Our ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a *whole*.” *Id.* (emphasis added).

206. *See generally* HARRY L. HOGAN, FEDERAL CONTROLLED SUBSTANCES ACT (TITLES II & III, P.L. 91–513): SUMMARY AND LEGISLATIVE HISTORY, REP. NO. 80-74 EPW, at 50 (1980).

207. *Gonzales v. Raich*, 545 U.S. 1, 12 (2005); *see also* *Joe Hemp’s First Hemp Bank v. City of Oakland*, No. C 15-05053 WHA, 2016 WL 375082, at *3 (N.D. Cal. Feb. 1, 2016).

enforcement of the CSA; rather, they represent the state's decision to "not independently prohibit the conduct proscribed under the CSA."²⁰⁸

Similarly, here, there would be no glaring conflict between the CSA and a state law authorizing a SIF as to overall purpose. Distribution, manufacturing, and trafficking are not at issue: the sole object of the CSA's primary purpose at issue is possession. The SIF would not prohibit possession of an illicit substance, but it also would not *require* possession.²⁰⁹ Courts have upheld state laws that do not require an individual (or agency) to go against the CSA, and found preemption in cases where compliance with the state law does, in fact, require violation of federal law.²¹⁰

For example, in *Pack v. Superior Court*, the court struck down a city ordinance as preempted by the CSA.²¹¹ The ordinance mandated that lawfully permitted marijuana collectives have their product tested by independent laboratories, which in turn *required* an individual to possess and distribute marijuana—a clear violation of the CSA.²¹² Conversely, in *Ter Beek v. City of Wyoming*, the Michigan Supreme Court upheld the Michigan Medical Marijuana Act as not preempted by the CSA.²¹³ The court noted that while a provision prohibited the full incorporation of the CSA's marijuana prohibition, it did not *require* violation of the federal prohibition; therefore, the Act was not preempted by the CSA.²¹⁴

Similarly, a state law authorizing SIFs would not require any individual to violate federal law. One is not *required* to consume or even possess an illegal drug in order to utilize the services a SIF offers. Participants may utilize the facility for many other purposes: for

208. Patient Advocacy Coal. Found. (RIPAC) v. Town of Smithfield, No. PC-2017-2989, 2017 WL 4419055, at *7 (R.I. Super Ct. Sept. 27, 2017); see *City of Palm Springs v. Luna Crest, Inc.*, 200 Cal. Rptr. 3d 128, 133 (Cal. Ct. App. 2016) (“[T]he City’s regulatory program for medical marijuana dispensaries neither conflicts with federal law, nor stands as an obstacle to its purpose and objectives.”).

209. California’s Compassionate Use Act made it lawful to possess marijuana for medicinal purposes. *Compassionate Use Act*, CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996). Laws authorizing SIFs would not seek to legalize possession of illicit substances, they would merely not enforce their prohibition.

210. See *Pack v. Super. Ct.*, 132 Cal. Rptr. 3d 633, 648 (Ct. App. 2011), opinion superseded sub nom. *Pack v. S.C.*, 268 P.3d 1063 (Cal. 2012) (The California Supreme Court dismissed the appeal as moot because the ordinance at issue in the case was repealed by the city.). See also *Ter Beek v. City of Wyoming*, 846 N.W.2d. 531, 544–45 (Mich. 2014).

211. *Pack*, 132 Cal. Rptr. at 648.

212. *Id.* at 649–50.

213. *Ter Beek*, 846 N.W.2d. at 544–45.

214. *Id.*

observation after use elsewhere;²¹⁵ to obtain clean needles; to access wound care or other first aid; and to obtain access to services, counseling, or medication-assisted treatment.²¹⁶ Such a state law would merely provide immunity from state-level prosecution.²¹⁷ SIF legislation would “not frustrate the CSA’s goal of conquering drug abuse or controlling drug traffic.”²¹⁸ Rather it would demonstrate that “the people . . . chose to part ways with Congress only regarding the scope of [§ 856].”²¹⁹ Therefore, state authorization of the SIF would not be in conflict with the CSA and would not be preempted by it.

Admittedly, the argument against federal preemption becomes more arduous if focused on § 856, specifically. At first blush, opening and maintaining a property permitting the use of an illicit substance appears to be in direct conflict with the language of the provision. However, the *purpose* for opening and maintaining a SIF is not to simply permit the use of illicit substances—its true purpose is to act as a lifesaving overdose prevention measure, provide necessary services to which an at-risk population otherwise lacks access, and reduce other public health dangers associated with opioid addiction.²²⁰ This purpose cannot be reconciled as violative of a provision within a statute specifically intended to address the use of buildings as “crack-houses.”²²¹

215. See *SPOT*, *supra* note 46.

216. *Frequently Asked Questions*, *supra* note 3.

217. See HARM REDUCTION COMMISSION REPORT (2019), <https://www.mass.gov/files/documents/2019/03/01/Harm%20Reduction%20Commission%20Report%20%283-1-2019%29.pdf> (discussing the need for legislation to address criminal and civil protections for staff in SIFs) [<https://perma.cc/358S-ZYUX>].

218. *White Mountain Health Center, Inc. v. Maricopa County*, 386 P.3d 416, 426 (Ariz. Ct. App. 2016) (quoting *Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 141–42 (Ariz. 2015)) (internal citations omitted).

The state-law immunity AMMA provides does not frustrate the CSA’s goal of conquering drug abuse or controlling drug traffic . . . the people of Arizona chose to part ways with Congress only regarding the scope of acceptable medical use of marijuana. Possession and use of marijuana not in compliance with AMMA remain illegal under Arizona law.

Id. (quoting *Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 141–42 (Ariz. 2015) (internal citations omitted)).

219. *Id.*

220. See *supra*, Part I.A.

221. Michael E. Rayfield, *Pure Consumption Under the Federal “Crackhouse” Statute*, 75 U. CHI. L. REV. 1805, 1819 (2008) (stating congressional intent was to target “crackhouses, drug establishments set up to facilitate a significant amount of drug activity”) (internal footnote omitted); see Memorandum at 37–42 *United States v. Safehouse*, 2019 U.S. Dist. LEXIS 170912, at *58–67 (E.D. Pa. Oct. 2, 2019) (No. 19-0519), ECF No. 133 (analyzing the meaning of “purpose” within the statute and comparing it to the stated purpose of *Safehouse*).

B. *The CSA Would Not Preempt SIF Legislation Because the Commerce Power Does Not Confer onto Congress the Right to Regulate Legitimate Medical Practices*

The authority of federal preemption stems from one of Congress' enumerated powers. "So long as Congress acts within an area delegated to it, the preemption of conflicting state or local action . . . flow[s] directly from the substantive source of whatever power Congress is exercising."²²² The government's current argument is that the concept of the SIF violates the CSA, which is applied to the states under the commerce power.²²³ Not only does this Note argue that the SIF is non-economic in nature, it also asserts that the commerce power does not carry the authority to regulate as to legitimate medical practices.²²⁴ Although Congress acted within its power in enacting the CSA, applying it to this sort of medical practice is outside its scope. In *Oregon*, the Supreme Court held that the CSA had no general power to regulate medical practices, and any regulatory power granted was limited to prohibiting doctors from abusing their prescription writing powers for dealing narcotics.²²⁵ For this reason, framing the SIF as an overdose-prevention measure that is part of a broader approach to protecting public health and welfare is significant to the success of SIF legislation. Additionally, the presumption against preemption is strongest where the issues involve public health and safety as opposed to economic regulation.²²⁶

Properly crafted state-level legislation should survive federal preemption analysis and be a valid exercise of state police powers. The foregoing analysis is merely a framework within which states may consider the feasibility of authorizing legislation and predict outcomes if, in the future, enacted laws are challenged under the guise of federalism. Just as with other state-led initiatives (i.e., marijuana laws, SEPs), achieving the desired outcome will require brave legislative action.

CONCLUSION

The SIF concept is controversial, due in part to the stigma surrounding intravenous drug use and addiction in the United States, but

222. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1172 (3d ed. 2000).

223. See Complaint at 5, *United States v. Safehouse*, No. 2:19-cv-00519-GAM (E.D. Pa. Feb. 5, 2019), ECF No. 1.

224. See TRIBE, *supra* note 222, at 1180 n.5 (discussing how a state interest in a particular regulatory area will be preempted when Congress acts within its constitutional authority); see also *Gonzales v. Oregon*, 546 U.S. 243, 269–70 (2006).

225. *Gonzalez*, 546 U.S. at 269–70.

226. *In re Public Serv. Co.*, 108 B.R. 854, 870–71 (1989).

more directly due to the conflict between states' rights to regulate regarding public health and welfare of its citizens and federal law. Within the treatment field, harm reduction methods have become the increasingly utilized approach to treating opioid addiction.²²⁷ Federal laws have long encumbered harm reduction practices; though some evolved, others still stand as obstacles to providing effective, life-saving interventions to our most vulnerable populations.²²⁸

States and organizations that have contemplated legislation or proposed opening SIFs face the threat of prosecution by the federal government for violation of the CSA, which gets its teeth in application to state-level laws through the commerce power.²²⁹ However, thoughtful application of current commerce power jurisprudence indicates that the concept of the SIF is consistent with precedent and should be outside the reach of the CSA. Even if the argument is questionable, the statutory construction of the CSA allows for an interpretation based on legislative evidence that excludes the SIF from the "crack-house" statute, and would easily permit a carve-out explicitly for such facilities.²³⁰

Moreover, application of the federal preemption analysis leans toward a finding against preemption. Section 903 of the CSA explicitly leaves room for states to govern regarding drugs, and legislation that is drafted in a manner that does not require an actor to violate federal law should be sustained. Finally, the CSA should not preempt state-level legislation involving legitimate medical practices, as doing so would be outside the scope of the statute.

The argument that the SIF is a valid exercise of the state's police power should not be taken lightly. The idea of the "states as laboratories" is imperative to the ability to address and redress significant and serious issues at the state level.

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens

227. Kathryn Hawk et al., *Reducing Fatal Opioid Overdose: Prevention, Treatment and Harm Reduction Strategies*, 88 YALE J. BIOLOGY & MED. 255 (2015).

228. See generally Lawrence Gostin, *Law and Policy*, Proceedings Workshop on Needle Exchange and Bleach Distribution Programs (1994), <https://www.ncbi.nlm.nih.gov/books/NBK236633/> [<https://perma.cc/Y266-4VJ5>]; Vallejo, *supra* note 22, at 1185.

229. Federal Controlled Substances Act (Titles II & III, P.L. 91-513): Summary and Legislative History, Rep. No. 80-74 EPW at 50 (1980). See Complaint at 5, *United States v. Safehouse*, No. 2:19-cv-00519-GAM (E.D. Pa. Feb. 5, 2019), ECF No. 1.

230. See Martell-Crawford, *supra* note 63, at 136.

choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.²³¹

Federal agencies tend to be reluctant in considering new, controversial, and alternative methods to address serious problems.²³² Thus states, through appropriate legislation, should be empowered to employ measures believed to be effective with regard to these issues, such as the opioid epidemic, without interference from the federal government. The public health purpose behind permitting states to legislate regarding SIFs is so compelling it too should warrant the government non-action we now see with marijuana legislation.

231. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

232. Alan Greenspan, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019, 1043 (1988).