SAFE INJECTION FACILITIES: A PATH TO LEGITIMACY

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I. INTRODUCTION

When President Obama proposed $1.1 billion in funding to combat prescription drug and heroin use, the White House noted that "[p]rescription drug abuse and heroin use have taken a heartbreaking toll on too many Americans and their families."[1] They were not wrong. In 2014, heroin overdoses were responsible for the death of 10,574 Americans, which is almost triple the amount of heroin related deaths from 2010.[2] A radical solution to this deadly epidemic has been popping up across Europe and now in Canada: safe injection facilities.[3] Of course, safe injection facilities are in direct contravention to most state and federal drug laws, however, to effectively defeat the heroin epidemic, United States courts must apply a heightened level of scrutiny to protect the equal protection rights of heroin addicts under the Controlled Substance Act.[4] Part II describes Safe Injection facilities, outlining the effectiveness of these facilities and focusing on Insite's story of

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[1] Office of the Press Sec'y, *FACT SHEET: President Obama Proposes $I.I Billion in New Funding to Address the Prescription Opioid Abuse and Heroin Use Epidemic,* THE WHITE HOUSE (Feb. 2, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/02/02/president-obama-proposes-11-billion-new-funding-address-prescription.

[2] DRUG ENF'T AGENCY, NATIONA'L HEROIN THREAT ASSESSMENT SUMMARY – UPDATED (June 2016), https://www.dea.gov/divisions/hq/2016/hq062716_attach.pdf.

[3] *See Consumption rooms for legal drug-taking around the world,* BBC (Apr. 18, 2013), http://www.bbc.com/news/uk-22200403. In sum, safe injection facilities offer heroin addicts a safe, clean environment surrounded by medical professionals who have the ability to reverse potential overdoses to inject their drugs. *About InSite,* INSITE FOR CMTY. SAFETY, http://www.communityinsite.ca/what-is-insite.html (last visited Oct. 31, 2017). Safe injection facilities ultimately provide drug users with access to healthcare information and the opportunity to seek treatment. *Id.*

[4] Leo Beletsky et al., *The Law (and Politics) of Safe Injection Facilities in the United States*, 98 AM. J. PUB. HEALTH 231, 231, 234 (Feb. 2008).

creation in Vancouver. Part III shows the way in which safe injection facilities can be implemented under local and state laws. Part IV discusses the implications of the federal government's power in relation to the Controlled Substance Act and the implementation of safe injection facilities, focusing specifically on the Attorney General's powers. Part V looks at the legal implications of the Attorney General's powers, drawing comparisons to *Canada v. PHS Community Services Society*,[5] and examining the manner in which courts could provide greater protections for heroin addicts whose rights to treatment are being blocked by the Attorney General's decisions under the controlled substance act.

II. SAFE INJECTION FACILITIES

A. What is a Safe Injection Facility

Before exploring the options for implementation, it is important to understand what exactly a safe injection facility (SIF) is. SIFs are places where drug users, generally users of heroin, are allowed to inject drugs[6] under the watchful eye of medical professionals who can administer overdose reversing drugs when necessary.[7] The most important function of SIFs is that they have the ability to connect drug users with abuse treatment professionals to help them change their habits and kick their addictions.[8] Lastly, SIFs with "frontline" services are able to help underserved communities, specifically these facilities will reduce interaction between certain populations with the police reducing the overall crime rate.[9]

These facilities have found popularity throughout the world, current through June of 2015, there are seventy-four facilities in fifty-five cities throughout the Netherlands, Switzerland, Germany, Spain, Denmark, Norway and Luxembourg with a study on these facilities recently approved in France.[10] Additionally,

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5 *See* Canada v. PHS Cmty. Servs. Soc'y, [2011] 3 S.C.R. 134 (Can.).

6 The drugs are not provided by the facilities, rather they are purchased by the user on their own time. Beletsky et al., *supra* note 4, at 231.

7 Kristen Maye & Kassandra Frederique, *Supervised Injection Facilities Are Safe Houses, Not Crack Houses*, HUFFINGTON POST (last updated June 22, 2016), http://www.huffingtonpost.com/kristen-maye/supervised-injection-facilities_b_10593978.html.

8 *Id.*

9 *Id.*

10 EUROPEAN MONITORING CTR. FOR DRUGS & DRUG ADDICTION, PERSPECTIVES ON DRUGS: DRUG CONSUMPTION ROOMS: AN OVERVIEW OF PROVISION & EVIDENCE

there is one facility in Australia.[11] The immediate impact of safe injection facilities was that they "provid[ed] a safe place for lower risk, more hygienic drug consumption without increasing the levels of drug use or risky patterns of consumption."[12] Overall SIFs helped to establish contact between this generally underserved population and healthcare and social service providers.[13] Other benefits included lower rates of public order issues and public complaints, entry and retention in treatment programs, and perhaps the best finding, lower rates of drug abusers with lower frequencies of drug use.[14] Much of the same data was reflected in studies performed on the facilities located in Australia.[15]

Another positive statistic that was reflected through studying European SIFs was that over a multitude of countries, many of the people who used the facilities and then entered rehab programs had no previous contact with service providers.[16] Additionally, these user demographics remained fairly consistent across all countries.[17] Because of their user base and what is offered, European SIFs are able to address more issues and public health concerns that programs utilized in North America such as needle exchange programs and HIV counseling are unable to reach.[18]

Canada, a country that is more culturally analogous to the United States, has one Safe Injection Facility: InSite.[19] Opening its doors in 2003, InSite, has 18,093 registrants with over 3 million visits, in 2015 alone there were 263,713 visits by 6,532 individuals.[20] Similar to the SIFs throughout Europe, research

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(last updated June 6, 2017), http://www.emcdda.europa.eu/system/files/publications/2734/POD_Drug%20consumption%20rooms.pdf.

11 *Id.*

12 DAGMAR HEDRICH, EUROPEAN REPORT ON DRUG CONSUMPTION ROOMS 47 (Feb. 2004), http://old.ntakd.lt/files/leidiniai/emcdda/kiti/7-Kiti_leidiniai/5-Report_on_drug.pdf.

13 FRANK ZOBEL & FRANÇOISE DUBOIS-ARBER, SHORT APPRAISAL OF THE ROLE & USEFULNESS OF DRUG CONSUMPTION FACILITIES (DCF) IN THE REDUCTION OF DRUG-RELATED PROBLEMS IN SWITZERLAND 4 (2004), http://citeseerx.ist.psu.edu/viewdoc/download?rep=rep1&type=pdf&doi=10.1.1.190.3214.

14 *Id.*

15 MISC EVALUATION COMM., FINAL REPORT OF THE EVALUATION OF THE SYDNEY MEDICALLY SUPERVISED INJECTING CENTRE 2 (2003), http://www.indro-online.de/sydneyfinalreport.pdf.

16 HEDRICH, *supra* note 12, at 41.

17 *Id.*

18 Robert S. Broadhead et al., *Safer Injection Facilities in North America: Their Place in Public Policy & Health Initiatives,* 32 J. OF DRUG ISSUES 329, 347–48 (2002).

19 *About InSite, supra* note 3.

20 *Insite user statistics – 2015*, VANCOUVER COASTAL HEALTH, http://www.

reflects that InSite is effective in attracting the highest risk intravenous drug users and "in providing a hygienic environment where medical care and referral to addiction treatment can be provided on site, and where emergency response is available in the event of overdose."[21] Weekly use of InSite and contact with the InSite's counselors is also connected to quicker entry into a detoxification program.[22]

In 2016, Mayor Svante Myrick of Ithaca proposed the creation of an SIF, in doing so, he stated that he "knew that he had to do something drastic to confront the scourge of heroin in his city," and as such "was willing to take a chance and embrace the radical notion."[23] Myrick's plan called for the city council to vote to implement an SIF.[24] Mr. Myrick's plan ran into the same issue that most SIFs have to deal with: lack of public support.[25] State senator Tom O'Mara, a Republican whose district includes the city of Ithaca, called the idea "asinine," stating he "absolutely cannot support" a safe injection facility.[26] Overall, American attitudes towards drug addicts remains poor.[27] In a 2013 study conducted by Johns Hopkins, forty-three percent of respondents "were opposed to giving individuals addicted to drugs equivalent health insurance benefits to the public at-large."[28] When asked about the mayor's proposition, Niagara County Sherriff Jim Voutour highlighted another key issue facing SIFs, "Unless state law is changed . . . law enforcement is stuck."[29] To date, no movement

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vch.ca/Documents/Insite-user-statistics-2015.pdf (last visited Oct. 31, 2017).

[21] Evan Wood et al., *Do Supervised Injecting Facilities Attract Higher-Risk Injection Drug Users?*, 29 AM. J. PREVENTIVE MED. 126, 129 (2005).

[22] Evan Wood et al., *Attendance at Supervised Injecting Facilities and Use of Detoxification Services,* 354 NEW ENG. J. MED. 2512, 2513 (2006).

[23] *See* Lisa W. Foderaro, *Ithaca's Anti-Heroin Plan: Open a Site to Shoot Heroin*, N.Y. TIMES (Mar. 22, 2016), https://www.nytimes.com/2016/03/23/nyregion/fighting-heroin-ithaca-looks-to-injection-centers.html?_r=0.

[24] *Id.*

[25] *See O'Mara: "I was Appalled and Shocked" by Ithaca Heroin Plan*, WHCU RADIO (2016), http://whcuradio.com/news/025520-omara-shocked-appalled-ithaca-heroin-plan/.

[26] *Id.*

[27] *See Study: Public Feels More Negative Toward People with Drug Addiction Than Those with Mental Illness*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Oct. 1, 2014), http://www.jhsph.edu/news/news-releases/2014/study-public-feels-more-negative-toward-people-with-drug-addiction-than-those-with-mental-illness.html.

[28] *Id.*

[29] Jenn Schanz, *Law enforcement, public officials weigh-in on legal injection sites,* WIVB NEWS (last updated June 28, 2016, 6:06 PM), http://wivb.com/2016/06/28/law-enforcement-public-officials-weigh-in-on-legal-injection-sites/.

has occurred on Myrick's plan.[30]

Looking at the broader picture, SIFs throughout the globe, ranging from all parts of Europe, Australia and Canada all reach similar clients and reduce addiction rates across the board.

III. IMPLEMENTATION

A. Local Implementation

Sherriff Voutour's words do ring true, without changes to state law, it is almost impossible for a locality to implement changes such as this. But it is not completely impossible. Outside of safe injection facilities, local governments have enacted laws protecting LGBT residents, taxing plastic bags, and, perhaps most on point, creating needle exchange programs, all without express state approval.[31] These ordinances, such as the minimum wage rage that started in SeaTac, Washington, have spurred state governments to follow suit and enact similar legislation.[32]

For localities, the best method is to seek exemption from those state laws that criminalize the behavior.[33] However, gaining state acceptance, especially for a controversial issue such as SIFs, may not be feasible and this is where a local government may choose to act on their own. Depending on applicable state law, a locality or municipality may have the power to pass these laws on their own accord—for example New York's state constitution grants localities the power to pass laws to "regulate persons and property for the purpose of securing the public health, safety, welfare,

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[30] *See id.* However, the city of Seattle has recently taken the same steps to create a Safe Injection Facility in their city. Officials in Seattle have cited the same reasons that Mayor Myrick cited for their proposals. *See* Emily Mulder, *Seattle plans first safe drug-injection sites in the US*, AL JAZEERA (Apr. 11, 2017), http://www.aljazeera.com/indepth/features/2017/03/seattle-plans-safe-drug-injection-sites-170329085008446.html.

[31] Scott Burris et al., *The Legal Strategies Used in Operating Syringe Exchange Programs in the United States*, 86 AM. J. PUB. HEALTH 1161, 1164 (Aug. 1996); Steve Harrison, *Charlotte City Council approves LGBT protections in 7-4 vote,* CHARLOTTE OBSERVER (Feb. 22, 2016, 3:06 PM), http://www.charlotteobserver.com/news/politics-government/article61786967.html; *Bring Your Own Reusable Bag*, N.Y. CITY DEP'T OF SANITATION, http://www1.nyc.gov/assets/dsny/zerowaste/residents/carryout-bag-fee.shtml (last visited Oct. 31, 2017).

[32] Claire Cain Miller, *Liberals Turn to Cities to Pass Laws and Spread Ideas*, N.Y. TIMES (Jan. 26, 2016), https://www.nytimes.com/2016/01/26/upshot/liberals-turn-to-cities-to-pass-laws-and-spread-ideas.html.

[33] *See Needle Exchange Programs: Considerations for Criminal Justice*, THE CTR. FOR INNOVATIVE PUB. POL'Y, http://harmreduction.org/wp-content/uploads/2012/01/NEPcriminaljusticeCIPP.pdf (last visited Oct. 31, 2017).

comfort, peace, and prosperity of the municipality and its inhabitants."[34] Local health departments have also been tasked with the job of "continually and diligently endeavor[ing]" to better promote the health and prevent diseases of the locality while also developing and regulating the healthcare facilities to do so to the fullest extent of the law.[35] Other states allow municipalities to create health boards at the county, county-city and city level to adopt regulations "necessary to protect the health of the people or to effectuate the purposes of this chapter or any other law relating to public health."[36]

Under laws such as these, "municipalities have taken the position that drug laws were not intended to apply to bona fide disease control measures" such as needle exchanges.[37] Applying the same logic, prevention of disease control and purpose of public health, a locality could legally create a safe injection facility.

Another strategy available for local governments to utilize and operate without state approval is to pass a resolution declaring a health emergency, allowing the local health authority, mayor or other official to respond to the situation, as necessity requires.[38] Health emergencies have been declared to justify the use of needle exchange programs for many of the same reasons used to justify SIFs, such as the prevention of HIV/AIDS and to work to curb the epidemic of heroin epidemic.[39] Some call this the least "obtrusive way" to implement a SIF would be to extend the laws regarding needle exchange programs to encompass SIFs.[40] Declaring an emergency need not be done unilaterally and would be more effective if it were to be created with advice from local health authorities, local needle exchange programs and the police.[41]

The problem for localities is that most states have a local preemption law allowing the state to effectively override a city's

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[34] *Supervised Injection Facilities: Legal Considerations for New York*, SIF NYC, http://sifnyc.org/wp-content/uploads/2015/09/SIF-NYC-Legal-Briefing.pdf (last visited Oct. 31, 2017).

[35] Mich. Public Health Code Act 368, § 333.2433(1) (1978).

[36] Ky. Rev. Stat. §212.230(1)(c) (2006).

[37] Burris et al., *supra* note 31, at 1164.

[38] *Id*. *See* Darcy Costello, *House panel OKs needle-exchange bill*, THE J. GAZETTE (Jan. 26, 2017, 10:00 PM), http://www.journalgazette.net/news/local/indiana/House-panel-OKs-needle-exchange-bill-17479402. *See also Supervised Injection Facilities: Legal Considerations for New York*, *supra* note 34.

[39] Burris, *supra* note 31, at 1164.

[40] Beletsky et al., *supra* note 4, at 233.

[41] *Id.*

ordinance.[42] State preemption has happened with laws ranging plastic bag tax to business regulations, and conflicting state laws, specifically criminal laws, would more than likely take precedence.[43] This preemption occurred when Atlantic City attempted to operate a needle exchange program.[44] Although the city argued that the primary purpose of the ordinance was for preventing the spread of disease, the court ruled that because those working at the exchange facility were aware that the provided needles would be used to inject illicit drugs and they were in violation of state drug laws and the locality was effectively overruled.[45] However, this case comes with a caveat: under New Jersey law a locality cannot pass a law that is in conflict with a state law, which is precisely what the needle sharing ordinance did, paving the way for the court to find against the municipality.[46] In a 2002 ruling, the Southern District Court of New York found in favor of plaintiff drug users who were arrested while on their way to, or leaving, needle exchange programs in New York City.[47] The court looked at the purpose for the needle exchange programs, to combat HIV/AIDS and to remove dirty needles from the street, and construed the exemption from criminal law liberally, to find that the state law did not preempt the local law.[48] While there may be hindrances for localities, the battle to create needle exchange programs has highlighted that pursuant to state law an argument based on public health can be an effective way to take action where a higher legislative body will not.

C. State Implementation

Where localities find themselves at the mercy of state law, they also find that they have a very weak defense when federal law challenges their actions.[49] The state itself, however, has a more refined and strengthened avenue to create safe injection facilities

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[42] *See* Shaila Dewan, *States Are Blocking Local Regulations, Often at Industry's Behest*, N.Y. TIMES (Feb. 23, 2015), https://www.nytimes.com/2015/02/24/us/govern-yourselves-state-lawmakers-tell-cities-but-not-too-much.html?_r=0.

[43] *Id.;* Beletsky et al., *supra* note 4, at 233.

[44] State ex rel. Atlantic Cty. Prosecutor v. Atlantic City, 879 A.2d 1206, 1209 (N.J. Super. Ct. App. Div. 2005).

[45] *Id.* at 520.

[46] *Id.*

[47] Roe v. City of New York, 232 F. Supp. 2d 240, 244, 257–58 (S.D.N.Y. 2002).

[48] *See id.*

[49] Beletsky et al., *supra* note 4, at 233.

under the Tenth Amendment which grants the rights and powers "not delegated to the United States."[50] This has been termed "police powers," and

> [t]he application of police power has traditionally implied a capacity to (*1*) promote the public health, morals, or safety, and the general well-being of the community; (*2*) enact and enforce laws for the promotion of the general welfare; (*3*) regulate private rights in the public interest; and (*4*) extend measures to all great public needs.[51]

These police powers have specifically been applied to public health and courts and legislatures have continually affirmed public health actions that benefit the common public good.[52] While the effectiveness of SIFs is often debated, that does not preclude a state from drafting and approving health legislation to create SIFs based on the state's "independent assessment of the facts."[53] Authorizing a SIF through their legislative ability gives states the strongest defense in light of the Constitution.

Creating a SIF through the legislative process is not the only avenue that a state can take. Various states grant state agencies rulemaking powers that could be utilized to create SIFs in order to protect public health and welfare.[54] Outside of government agencies, a state's governor may have the ability to sign an executive order to create an SIF.[55] Enacting executive orders for

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50 U.S. CONST. amend. X.

51 Jorge E. Galva et al., *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REP. 20, 20 (2005).

52 *Id.* at 21.

53 Beletsky et al., *supra* note 4, at 233.

54 *See generally* N.Y. PUB. HEALTH LAW § 3381(4) (LEXIS through 2018) ("The commissioner shall . . . designate persons, or by regulation, classes of persons who may obtain hypodermic syringes and hypodermic needles without prescription and the manner in which such transactions may take place and the records thereof which shall be maintained."). This led the Commissioner of the New York State Department of Health to eventually enact an administrative regulation setting forth the requirements for creating and operating a hypodermic syringe and needle exchange program. *See* N.Y. COMP. CODES R. & REGS. tit. 10, § 80.135 (2017).

55 For example, Louisiana law states that the "authority of the governor to see that the laws are faithfully executed by issuing executive orders is recognized." LA. STAT. ANN. § 49:215(A) (LEXIS through 2017 legislation). Whereas Florida law provides that:

> The Governor is responsible for meeting the dangers presented to this state and its people by emergencies. In the event of an emergency beyond local control, the Governor . . . may assume direct operational control over all or any part of the emergency

public health reasons often come with restrictions however.[56] For example, the State Assembly of New Jersey objected to Governor McGreevey's Executive Order creating a needle exchange program in New Jersey under the Disaster Control Act.[57] The Governor believed that the needle exchange program was a proper response to the HIV/AIDs pandemic that he had deemed an "emergency." [58] Citing *Worthington v. Fauver*,[59] the Legislature opined that the HIV/AIDS pandemic was possibly too tenuous an "emergency" as described by the Act, and the case law and as such the Executive Order was open to attack.[60] Many statutes hold that these orders should be given the full authority of the law, and where they remain unchallenged would operate such as legislation would.[61] In sum, as long as a state executive agency has the statutory power to enact rules and regulations, or the governor of a state can show something amounting to an emergency, they will be afforded the discretion to create a SIF in their state to benefit the public health and protect the citizens of that state.

D. State Restriction

While state and local governments best understand how to treat opioid addiction, and the Constitution affords them the powers to do so in the interests of protecting public health, any such legislation would be subject to the Controlled Substance Act.[62] Generally speaking, legislation to create a safe injection facility would require changes to the state criminal code so that no one working in the facility is subject to arrest, however nothing prevents the federal government from arresting and charging such person for violating federal crimes under the Controlled Substance Act.[63] Additionally under 21 U.S.C. § 856, the "Crack House

> management functions within this state, and she or he shall have the power through proper process of law to carry out the provisions of this section.

FLA. STAT. §252.36(1)(a) (LEXIS through 2018 regular session).

56 Maxim Gakh et al., *Using Gubernatorial Executive Orders to Advance Public Health*, 128 PUB. HEALTH REP. 127, 130 (2013).

57 Letter from Albert Porroni, Legislative Counsel, N.J. State Legislature, to Hon. Joseph J. Roberts, Jr., Assemblyman (Oct. 15, 2004), http://njlegallib.rutgers.edu/ols/ols20041015.pdf.

58 *Id.*

59 Worthington v. Fauver, 440 A.2d 1128 (1982).

60 *See* Letter from Albert Porroni, *supra* note 57.

61 *See e.g.* FLA. STAT. §252.36(1)(a) (LEXIS through 2018 regular session).

62 *See* 21 U.S.C. § 801(5) (2012).

63 *See* 21 U.S.C. § 841 (2012).

Statute" of the Controlled Substance Act makes it a crime to "knowingly "open, lease, rent, use, or maintain" any place . . . for the purpose of . . . using any controlled substance."[64] It also makes it a crime to manage or control any place, whether or not a profit is made, for the purpose of using a controlled substance.[65] A safe injection facility by nature falls directly under this federal statute.

With the Controlled Substance Act being on point, Supreme Court precedents show that the federal government would be able to enforce this law over state laws. In *Gonzales v. Raich*,[66] the Supreme Court ruled that the federal government had the right, under the Commerce Clause, to criminalize and regulate the use of homegrown marijuana in states that had legalized marijuana for medicinal purposes.[67] The Supreme Court found that local use of medical marijuana (even where such use was purely intrastate) was part of a class of activities that impacted national markets.[68] *Gonzales v. Raich* joined a line of cases that further strengthened the Controlled Substance Act against state laws legalizing marijuana for medicinal use.[69] And this struggle between legalization under state law and violations of the Controlled Substance Act can be seen playing out in the eight states that have legalized marijuana for recreational use, and perhaps more analogous to safe injection facilities, the twenty-nine states, the District of Columbia, Guam, and Puerto Rico following their legalization of marijuana for medical purposes, as well the eight additional states that have legalized marijuana for recreational use.[70] In looking first at the eight states that have legalized marijuana for recreational use, the Justice Department under President Obama released a memorandum noting that marijuana is still an illegal drug under the Controlled Substance Act.[71] The

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64 21 U.S.C. § 856(a)(1) (1984).

65 *See* 21 U.S.C. § 856(a)(2) (2012).

66 Gonzales v. Raich, 545 U.S. 1 (2005).

67 *Id.* at 19.

68 *Id.* (The Court was not persuaded that these "markets" were illicit).

69 *See generally* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001) (finding that a medical necessity defense was not applicable to the Controlled Substance Act).

70 *State Medical Marijuana Laws*, NAT'L CONF. OF ST. LEGISLATURES (Sept. 14, 2017), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx; Melia Robinson, *It's 2017: Here's Where You can Legally Smoke Weed Now,* BUS. INSIDER (Jan. 8, 2017, 11:00 AM), http://www.businessinsider.com/where-can-you-legally-smoke-weed-2017-1.

71 *Justice Department Announces Update to Marijuana Enforcement Policy*, U.S. DEP'T OF JUST. (updated Oct. 8, 2014), https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy.

memorandum went on to state that if those states that have legalized marijuana failed to uphold the eight enforcement areas that the federal government aims to uphold then federal prosecutors will "act aggressively" to prosecute individuals for violating federal laws.[72] For those states that only have legalized medical marijuana, the Obama administration released a memo in 2009 encouraging federal prosecutors to refrain from going after anyone adhering to those state laws.[73]

Essentially, the only thing preventing the federal government from enforcing federal drug laws is discretion from the executive, and that discretion may soon dissipate.[74] While serving as the governor of Indiana, now-Vice President Mike Pence was faced with an alarming HIV outbreak in Scott County, however, Mr. Pence took almost two months to authorize a needle exchange program, citing moral reasons.[75] Attorney General Jeff Sessions has already intimated that he would not commit to "never enforcing federal law," when asked about his beliefs on medical marijuana.[76] Sessions has also publicly stated "[g]ood people don't smoke marijuana."[77] With the current administration indicating a potential change in state medical marijuana laws, a state's ability to create a safe injection facility requires the federal government to choose to not enforce the CSA.[78]

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[72] *Id.*

[73] *State Medical Marijuana Laws*, *supra* note 70.

[74] *See* Dan Diamond & Sarah Karlin-Smith, *After pledging to solve opioid crisis, Trump's strategy underwhelms*, POLITICO (Mar. 29, 2017, 3:34 PM), http://www.politico.com/story/2017/03/donald-trump-opioids-commission-executive-order-236654.

[75] *See* Megan Twohey, *Mike Pence's Response to H.I.V. Outbreak: Prayer, Then a Change of Heart*, N.Y. TIMES (Aug. 7, 2016), https://www.nytimes.com/2016/08/08/us/politics/mike-pence-needle-exchanges-indiana.html. Mr. Pence was finally persuaded to address the HIV emergency occurring in his state after a night of prayer, and extensive public outcry. *Id.*

[76] Tom Huddleston Jr., *What Jeff Sessions Said About Marijuana in His Attorney General Hearing*, FORTUNE (Jan. 10, 2017), http://fortune.com/2017/01/10/jeff-sessions-marijuana-confirmation-hearing/.

[77] *Id.*

[78] This is especially concerning considering a majority of people believe marijuana should be legalized. *Illegal Drugs,* GALLUP, http://www.gallup.com/poll/1657/illegal-drugs.aspx (last visited Nov. 7, 2017).

IV. THE FEDERAL SYSTEM

A. Introduction

While individual states and smaller localities have more intricate knowledge of the problems their citizens face, leaving them better equipped to create safe injection facilities, case law suggests that a federal challenge to state laws in the realm of health and the Controlled Substance Act tips in favor of the federal government, vitiating state law.[79] There are however more protections in place for federal laws that violate the Controlled Substance Act. For example, in 2014 a rider was attached to an appropriation bill forbidding the Department of Justice from expending funds to prosecute persons for violating the Controlled Substance Act while acting in their legal duty proscribed by state law.[80]

It is important to note that although states are the closest to healthcare and are more in tune with a region's needs, a stronger federal law will ensure that safe injection facilities could be placed wherever the need for one is greater.[81] It would further secure beneficial healthcare and treatment to all citizens of the United States regardless of which exit of the interstate they happen to live on.

B. The Controlled Substance Act

Although the Controlled Substance Act appears at odds with legalization of a drug, that is untrue, as §811(a) of the Controlled Substance Act gives the Attorney General the power to completely remove the substance (heroin) from any schedule or to transfer substances to different schedules.[82] Realistically, completely removing heroin from the Controlled Substance Act is not a feasible argument to make, and the same argument can be made for rescheduling of heroin.[83] Another, perhaps obvious manner

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[79] *See* Gonzales v. Raich, 545 U.S. 1 (2005).

[80] *See* United States v. McIntosh, 833 F.3d 1163, 1169 (9th Cir. 2016).

[81] Robert I. Field, *Why is Health Care Regulation so Complex?*, 33 P&T 607, 608 (Oct. 2008).

[82] 21 U.S.C. § 811 (2012). *See also* United States v. Wables, 731 F.2d 440, 450 (7th Cir. 1984) (finding that the judgment to reclassify drugs, specifically marihuana, is "reserved to the judgment of Congress and to the discretion of the Attorney General," and it was not within the court's purview to do such action).

[83] Additionally, that is not even the point of Safe Injection Facilities. The argument for SIFs acknowledges how deadly and addictive heroin has shown

that a safe injection facility could be created on the federal level is for Congress to pass a law either amending the Controlled Substance Act or authorizing an executive agency (such as the FDA) to create a safe injection facility.[84] Although these steps are currently occurring with marijuana,[85] they are coming, and only tentatively, after the positives, negatives, health benefits and health hazards of marijuana had been extensively researched, thus a piece of federal legislation, with minimal research conducted inside the United States is almost unthinkable.[86]

But that is not the end for SIFs, as the Controlled Substance Act allows the Attorney General, on his own volition or at the request of the Secretary, to "authorize the possession, distribution, and dispensing of controlled substances by persons engaged in research. Persons who obtain this authorization shall be exempt from State or Federal prosecution for possession, distribution, and dispensing of controlled substances to the extent authorized by the Attorney General."[87] Thus without needing to pass a new amendment, the Controlled Substance Act provides an outlet for the government through the Attorney General to create a safe injection facility for the purpose of research which would then give Congress the requisite research needed to pass a law described previously.[88]

C. Legal Challenges

The drawback to utilizing § 872(e) is that the Attorney General would be selecting a location to place the facility, and nothing in

itself to be, however, in legalizing possession a SIF would be able to provide a different form of treatment for those who suffer from this addiction. *See Supervised Injection Facilities*, DRUG POL'Y ALLIANCE, http://www.drugpolicy.org/issues/supervised-injection-facilities (last visited Nov. 7, 2017). Because the purpose of SIFs is to allow drug users a safe location to inject their own heroin, the staff of a SIF neither manufactures nor distributes any illegal substances, which bars SIFs from seeking exemptions under the very tantalizing 21 U.S.C. § 823(a)–(b). 21 U.S.C. § 823 (2012).

84 A bill has been proposed by two Oregon Democrats, Senator Ron Wyden and Representative Earl Blumenauer, to remove marijuana from the CSA, legalize it, and regulate it on the federal level. Andrea Noble, *Oregon Democrats Wyden, Blumenauer introduce legislation to liberalize federal marijuana law*, WASH. TIMES (Mar. 30, 2017), http://www.washingtontimes.com/news/2017/mar/30/ron-wyden-earl-blumenauer-introduce-legislation-li/.

85 *See id.*

86 *See Marijuana as Medicine*, NAT'L INST. ON DRUG ABUSE (rev. Apr. 2017), https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine.

87 21 U.S.C. § 872(e) (2012).

88 *Id.*

the law states that in doing so s/he must reach out to any one particular person in authorizing anything under the law.[89] The question then becomes would the federal government have the ability to create an SIF in a state? The answer is a tepid yes. The law (the Controlled Substance Act) would be valid under the Commerce Clause, although a safe injection facility is neither the use of the channels of interstate commerce nor an instrumentality of interstate commerce, it could potentially fall under the class of activities that substantially affect interstate commerce.[90] While the holdings in *Morrison* and *Lopez*[91] have restricted Congress's Commerce Clause power, the Court's holding in *Gonzales v. Raich* obfuscated the true power of the Commerce Clause.[92] And this new case precedent greatly aides the creation of SIFs, since in *Gonzales v. Raich* the Court found that provisions of the Controlled Substance Act was enforceable under the Commerce Clause, as legalized marijuana laws would impact supply and demand in national market, although such market is illicit.[93] One of the key concerns of the Court was that not only manufacturing but also possession of marijuana would impact the national market.[94] A safe injection facility would admittedly encourage possession of heroin, which would impact the national market, just as the possession of marijuana would, thus this would be an activity that substantially affects interstate commerce and the Commerce Clause would authorize Congress's use of this legislation.

D. Proposed Changes to the Controlled Substance Act and Likelihood of Success

While it does appear possible to create a safe injection facility on the federal level, changes in the law, specifically to §872(e), are necessary to make the application and creation process more effective. § 872(e) places all of the power to make changes to the CSA in the Attorney General's hands.[95] Suggested changes to law

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[89] *Id.*

[90] United States v. Morrison, 529 U.S. 598, 609 (2000). *See* United States v. Lopez, 514 U.S. 549, 553–59 (1995).

[91] *Id.*

[92] *See* Gonzales v. Raich, 545 U.S. 1, 34 (2005) (Scalia, J., concurring).

[93] *Id.* at 18.

[94] *Id.* at 17.

[95] *See* 21 U.S.C. § 872(e) (2012). In fact, other sections of the law give the Attorney General such as rescheduling drugs, the sole discretion. *See, e.g.*, 21 U.S.C. § 811(a)(1) (2012).

are easy to make as one must look no further than the United States' northerly neighbors. The current law in the United States is similar to what Canada had around the time of the implementation of Insite, the SIF in Vancouver.[96] A few key differences are that § 56 of the CDSA vests the power in the Minister of Health, and allows the Minister to consider, in addition to scientific reasons, medical reasons and the public interest.[97] While the Controlled Substance Act vests sole discretion in the Attorney General, it allows for recommendations to be made by the Secretary of Health, however, adding language to mirror the Canadian law would grant the Attorney General wider discretion, and more of ability to effectuate change in the public interest.[98]

To allay fears that this language gives the Attorney General the power to quickly create a SIF, it is important to note that under the Canadian law, a rigorous evaluation plan needed to first be completed.[99] The plan, which delayed implementation for almost a year, needed to examine the impact InSite had on overdoses, the health of patrons to InSite, the extent to which social services programs were involved with the users, and all of the relative costs associated with intravenous drug use.[100] It was only upon completion of this plan that Minister of Health Tony Clement felt it appropriate to grant InSite a three-year exemption.[101]

A last suggested change comes again from the Canadian law. Both the original version of § 56 of the CDSA and § 872(e) are fairly arbitrary, as they provide minimal guidelines for decision-

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96 This section of law read:

> The Minister may, on any terms and conditions that the Minister considers necessary, exempt . . . any person or class of persons or any controlled substance or precursor or any class of either of them if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

Controlled Drugs and Substances Act, S.C. 1996 c. 19 (Can.).

97 *See id.*; 21 U.S.C. § 872(e) (2012).

98 *See* Controlled Drugs and Substances Act, S.C. 1996 c. 19 (Can.).

99 Neil Boyd, *Lessons From INSITE, Vancouver's Supervised Injection Facility: 2003–2012*, 20 DRUGS: EDUC., PREVENTION & POL'Y 234 (2003).

100 *Id.*

101 *Vancouver's INSITE Service and Other Supervised Injection Sites: What Has Been Learned from Research? - Final Report of the Expert Advisory Committee on Supervised Injection Site Research [Health Canada, 2008]*, GOV'T OF CANADA (Mar. 31, 2008), https://www.canada.ca/en/health-canada/corporate/about-health-canada/reports-publications/vancouver-insite-service-other-supervised-injection-sites-what-been-learned-research.html.

making.[102] In 2015, Canada's Conservative Party passed the "Respect for Communities Act," amending § 56 of the CDSA.[103] While this new legislation did set forth the criteria needed for a SIF, it also created a series of hoops that needed to be jumped through to create a SIF – hoops that critics of the bill claimed may be unconstitutional.[104] Since C-2 has been implemented, no other SIF has opened anywhere in Canada despite numerous attempts to do so.[105] While no change has yet to be made to the CDSA, as of February 7, 2017, C-37, a bill sponsored by Jane Philpott, had advanced through committee.[106] This bill would amend § 56 to include only five required criteria that must be met during the proposal of an SIF.[107] Again § 872(e) is barren of requirements, leaving the Attorney General as the only person aware of what is needed, but the language already exists.[108] If the language and criterion listed under §811 were added to an application under §872, it would make the decision decidedly less arbitrary while also giving applicants a basic understanding of what is required.[109]

The likelihood of federal action, however, seems bleak. All powers are vested in the Attorney General, who since his appointment has taken steps indicative of reviving the "War on Drugs" started by previous administrations.[110] Even outside the Attorney General, congressional actions seem unlikely, considering the political battle that has been waged over healthcare,[111] spending political capital to implement one

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102 *See* Controlled Drugs and Substances Act, S.C. 1996 c. 19 (Can.). *See also* 21 U.S.C. § 872(e) (2012).

103 Respect for Communities Act, S.C. 2015, Bill C-2 (Can.), http://www.parl.ca/DocumentViewer/en/41-2/bill/C-2/royal-assent/page-24.

104 Roshini Nair & Jon Hernandez, *Liberal government's refusal to repeal Bill C-2 'disappointing', supervised injection site advocate says*, CBC NEWS (last updated Aug. 24, 2016, 4:48 PM), http://www.cbc.ca/news/canada/british-columbia/supervised-injection-hurdles-1.3733942.

105 *See id.*

106 *Bill C-37: An Act to amend the Controlled Drugs and Substances Act and to make related amendments to other Acts,* OPEN PARLIAMENT, https://openparliament.ca/bills/42-1/C-37/ (last visited Nov. 11, 2017).

107 *Id.*

108 *See* 21 U.S.C. § 872(e) (2012).

109 *See* 21 U.S.C. § 811 (2012).

110 Sari Horwitz, *How Jeff Sessions wants to bring back the war on drugs*, WASH. POST (Apr. 8, 2017), https://www.washingtonpost.com/world/national-security/how-jeff-sessions-wants-to-bring-back-the-war-on-drugs/2017/04/08/414ce6be-132b-11e7-ada0-1489b735b3a3_story.html?utm_term=.cbd627e94e73.

111 *See* Matthew Dickinson, *Was Obamacare a Mistake for Democrats?*, U.S. NEWS (Dec. 17, 2014, 10:05 AM), https://www.usnews.com/opinion/blogs/opinion-

contentious safe injection facility seems unlikely.[112]

V. THE STRONGEST PROTECTIONS: LEGAL CHANGES

A. Overview

In light of the Federal government's ability to effectively override action taken by a state or locality in implementing safe injection facilities, the strongest manner to protect those addicted to opioids would require granting protections via the courts. Protections have been extended to those drug addicts who are *recovering* from their drug addiction through statute, however, the key provision of recovering being that the individual was no longer using drugs.[113] In *New York City Transit Authority v. Beazer*,[114] the Supreme Court noted that denying certain jobs to those undergoing methadone treatment was not a violation of those individual's due process rights and noted that "it is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts of the classification as it is with respect to the classification as a whole."[115] However, where the addict is already employed an addict's act of asking the employer for treatment triggers statutory protections.[116] The key of *Beazer*, however, is that the Court was allowing employers to discriminate against those seeking jobs, not necessarily those seeking treatment.[117] Another key part of the *Beazer* decision was that it was predicated on the holding in

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blog/2014/12/17/some-democrats-say-obamacare-was-not-worth-the-political-cost. Additionally, after campaigning on repealing and replacing the Affordable Care Act, President Trump was unable to even get the bill to a vote in the House. Robert Pear et al., *In Major Defeat for Trump, Push to Repeal Health Law Fails*, N.Y. TIMES (Mar. 24, 2017), https://www.nytimes.com/2017/03/24/us/politics/health-care-affordable-care-act.html.

[112] This seems especially true considering the high percentage of Americans who believe drug addicts lack will power. Joseph Carroll, *Addicts' Family Members Say Lack of Willpower Top Addiction Factor*, GALLUP (Aug. 11, 2006), http://www.gallup.com/poll/24094/addicts-family-members-say-lack-willpower-top-addiction-factor.aspx.

[113] *See* Nisperos v. Buck, 720 F. Supp. 1424, 1427 (N.D. Cal. 1989) (discussing that plaintiff may only prevail in a wrongful termination if they can show "(1) that he is a handicapped person; (2) that he was 'otherwise qualified' for the position . . . and (3) that he was terminated because of his handicap.").

[114] N.Y. City Transit Auth. v. Beazer, 440 U.S. 568 (1978).

[115] *Id.* at 593.

[116] *See* Adams v. Persona, Inc., 124 F. Supp. 3d 973, 979 (D.S.D. 2015).

[117] *See Beazer*, 440 U.S. at 592–94.

Mathews v. Diaz,[118] where the Court claimed "[i]n this case, since appellees have not identified a principled basis for prescribing a different standard than the one selected by Congress, they have, in effect, merely invited us to substitute our judgment for that of Congress."[119] Where heroin addicts seek gain treatment for their addiction at a safe injection facility, the challenge would not be against prospective employers but against the Attorney General and how he chooses to interpret the Controlled Substance Act. To overcome the presumption that rational basis is the standard that must be proscribed to any challenges to the CSA, they will need to show that the Attorney General and the DOJ's failure to exempt safe injection facilities infringes upon drug addict's equal protection to seek treatment.[120]

C. Equal Protection

Where the Attorney General refused to authorize the creation of a Safe Injection Facility under the Controlled Substance Act, this becomes a violation of the equal protection rights of those drug addicts attempting to get treatment.[121] Facially, such a challenge to the statute would more than likely see the application of the rational basis test, which does not require that the government put forth any evidence for their statute.[122] Rational basis is the lowest level of scrutiny a court will apply to a law and only requires that "the challenged law must be rationally related to a legitimate government interest."[123] To raise the level of scrutiny, heroin addicts will need to establish that they should be viewed as a protected class.[124] Justice Harlan Stone famously created footnote 4 in the decision of *United States v. Carolene Products*.[125] Justice

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118 Mathews v. Diaz, 426 U.S. 67 (1976).

119 *Id.* at 84.

120 *See Symposium: Race, Drugs, and Law Enforcement in the United States,* 20 STAN. L. & POL'Y REV. 257, 279–80 (2009) (discussing how challenging drug laws on the basis of equal protection are not given a higher standard of review by courts).

121 *See* Rich McHugh & Ronan Farrow, *Safe injection sites are a radical new approach to battling addiction*, TODAY (May 17, 2017, 12:10 PM), https://www.today.com/health/safe-injection-sites-are-radical-new-approach-battling-addiction-t111585.

122 *See* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 135–36 (Fall 2011).

123 Legal Information Institute, *Rational Basis*, CORNELL L. SCH., https://www.law.cornell.edu/wex/rational_basis (last visited May 21, 2017).

124 *See* Strauss, *supra* note 122, at 135–37.

125 United States v. Carolene Products Co., 304 U.S. 144 (1938).

Stone argued that statutes prejudicing a "discrete and insular minorities" may need "more searching judicial inquiry."[126] This created the "political process" theory, wherein the Court would intervene to protect "unpopular and powerless minorities."[127] The court has utilized this mentality to protect African-Americans and other ethnic minorities that the "majority" has attempted to legislate out of further power.[128] The language the court used in *Romer v. Evans*[129] highlighted that although broad legislation that negatively effects certain groups may not be unconstitutional, where the law singles out a group or persons and causes "immediate, continuing, and real injuries," the law is unconstitutional.[130] In *San Antonio Independent School District v. Rodriguez*,[131] the Supreme Court described the "traditional indicia" of a suspect classes as those who were "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[132]

Even where a court does not want to elevate the level of scrutiny and create a new suspect class, the court could still apply rational basis "with teeth."[133] One of the first uses of this enhanced rational basis was in *Zobel v. Williams*,[134] where the court found that the Alaska statute granting benefits to state residents was not rationally related to a legitimate state interest.[135] The Court noted the low burden of the rational basis test, proceeding to state that the distinctions Alaska sought to make were not rationally related.[136] However, more directly on point, this standard was implemented in *City of Cleburne v. Cleburne Living Center, Inc.*[137] The Court in this case refused to acknowledge that people with disabilities were not a suspect class but struck down the city's

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126 *Id.* at 152 n.4.

127 EVAN GERSTMANN, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION 4 (1999).

128 *Id.*

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

130 *Id.* at 635.

131 San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

132 *Id.* at 28.

133 Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L. REV. 527, 540 (2014).

134 Zobel v. Williams, 457 U.S. 55 (1982).

135 *Id.*

136 *Id.*

137 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

ordinance using rational basis, finding that the ordinance could not be rationally related to the discrimination of the disabled residents.[138] Similar to *Cleburne*, the Canadian Supreme Court examined the Controlled Drug and Substance Act and in viewing the amalgam of information the Health Minister had at his disposal in evaluating Insite's application for renewal, the Court decided that in closing the facility the Minister was not acting "in accordance with the principles of fundamental justice."[139] In finding that it was not in accordance, the Supreme Court of Canada reversed the Minister's decision to not allow InSite to continue.[140]

This leaves a path for the Court. Drug addicts can show that the Attorney General and the Department of Justice serve as the majoritarian political process, they are the sole deciders to choose which drugs have a changed schedule or which drugs the federal government will prosecute.[141] In addition to the removal of drug addicts from the process of deciding on how the CSA is defined, plaintiff drug addicts have been unequally treated throughout history, often subjected to a stigma for being addicted to certain drugs.[142] In showing the traditional signs of a suspect class, drug addicts are entitled to a higher level of scrutiny to offer them the protection they are required from the Attorney General.[143]

Alternatively, if the court did not want to consider drug addicts a suspect class, then the *Cleburne* rational basis standard would be appropriate. This requires that the court actually look at the statute and if the purposes of the statute rationally relate to the discrimination.[144] The purposes of the Controlled Substance Act is to fight drug abuse in the United States, and denying the right to treatment to drug addicts who wish to utilize safe injection facilities for treatment does not keep in line with the goals of the statue.[145] Directly similar to the Supreme Court of Canada's decision, the unchecked powers of the Attorney General (Minister) do not rationally relate to the curbing abuse as safe injection

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138 *Id.* at 442.

139 Canada v. PHS Cmty. Servs. Soc'y, [2011] 3 S.C.R. 134 (Can.).

140 *Id.*

141 *See* discussion *supra* note 82.

142 *See* Lauren Villa, *Shaming the Sick: Addiction and Stigma*, DRUGABUSE.COM, http://drugabuse.com/library/addiction-stigma/ (last visited Nov. 7, 2017).

143 *See* discussion *supra* Part V.C.

144 Legal Information Institute, *Supra* note 123.

145 *See* discussion *supra* Part II.A.

facilities as a treatment plan.

That is however not to say that the Controlled Substance Act needs to be found unconstitutional. When the Canadian Supreme Court granted the exemption, they listed out several criteria that the Minister should use when making future decisions under s. 56 of the CDSA and said he must exercise discretion conforming to the Charter and generally "[w]here, as here . . . a supervised injection site will decrease the risk of death and disease, and there is little or no evidence that it will have a negative impact on public safety, the Minister should generally grant an exemption."[146] Applying these principles to the CSA, the Attorney General's failure to recognize some dispute in regards to the ability for medical treatment for a safe injection facility would not be in accordance to the goals of the CSA nor the principles of fundamental justice as set forth in the United States Constitution.[147]

VI. CONCLUSION

A. The Drawbacks

There are several different avenues that can be taken to create a safe injection facility and, in fact, one of those avenues was utilized in Seattle.[148] Seattle used their powers as a locality to enact this legislation and to protect the health of their citizens.[149] The drawbacks to localities is of course that they have the least protections in fighting off superseding laws at either the state or federal levels. Additionally, there is always the potential for an influx of drug users attempting to utilize SIFs on a city-to-city basis. Likewise, state governments are subject to federal laws, and in the realm of drug enforcement their willful ignorance of federal drug laws only lasts as long as the federal government chooses to allow the states to act in that manner. The contrast between state and local governments is that state governments have the Tenth Amendment granting them the broad powers to make laws for the

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146 Canada v. PHS Cmty. Servs. Soc'y, [2011] 3 S.C.R. 134, 192 (Can.).

147 *Id.*

148 Katie Zezima, *Awash in overdoses, Seattle creates safe sites for addicts to inject illegal drugs*, WASH. POST (Jan. 27, 2017), https://www.washingtonpost.com/politics/awash-in-overdoses-seattle-creates-safe-sites-for-addicts-to-inject-illegal-drugs/2017/01/27/ddc58842-e415-11e6-ba11-63c4b4fb5a63_story.html.

149 *See id.*

health and safety of their residents.[150]

The problem with kicking this issue to the federal government is layered. The federal government is not currently tracking towards legalizing safe injection facilities under the Controlled Substance Act, ensuring that no matter where you are on the highway you have the access to treatment, especially considering it is the Attorney General's power to make changes.[151] Outside the Attorney General, Congress does not seem to be in a position to want to act in this manner either, leaving the federal government a poor option to rely on for change.

Lastly, while the reliance on Canadian law feels as though it could be out of place, in *Roper v. Simmons*,[152] Justice Kennedy writing for the majority noted that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."[153] The belief that foreign law should be considered did draw the ire of many, with Justice Scalia writing that allowing the "so-called international community take center stage" meant the Court would be holding the views of American citizens to be "essentially irrelevant," and would erode those principles that were "distinctively American."[154]

Since the *Roper* decision, the Supreme Court has strayed away from international constitutional comparison, although Justice Breyer has made recent comments indicating that there may be a change to that line of thinking.[155] And even Scalia, who so ardently believed that reliance on foreign law was "totally inappropriate as

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[150] *See* Jake Sullivan, *The Tenth Amendment and Local Government*, 112 YALE L. J. 1935, 1935–36 (May 2003).

[151] *See* discussion *supra* Part IV.B.

[152] Roper v. Simmons, 543 U.S. 551 (2005).

[153] *Id.* at 578.

[154] *Id.* at 622, 624 (Scalia, J., dissenting). Scalia also took issue with the usage of foreign law, claiming that "[t]he Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decision." *Id.* at 627 (Scalia, J., dissenting).

[155] Robert Barnes, *Breyer says understanding foreign law is critical to Supreme Court's work*, WASH. POST (Sept. 12, 2015), https://www.washingtonpost.com/politics/courts_law/breyer-says-understanding-foreign-law-is-critical-to-supreme-courts-work/2015/09/12/36a38212-57e9-11e5-8bb1-b488d231bba2_story.html?utm_term=.205b53f3fb1c (quoting Justice Breyer as stating: "So when I compare that to what I actually see, I think something important is happening, and I think those who are talking about not citing foreign case law are basically barking up the wrong tree.").

a means of establishing the fundamental beliefs of this Nation," was amenable to its usage where it can be "relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores but, text permitting, in our Constitution as well."[156]

B. Where Do We Go?

With the federal government, a seemingly poor option for creating a safe injection facility, states utilizing their Tenth Amendment powers remains the best option for creation of SIFs, yet, a safe injection facility, while a form of treatment, has its users consuming drugs, meaning they would fail a drug test. This means that they would still be considered an active "drug user," and it would be acceptable to discriminate against those seeking treatment.[157] Furthermore, this would implicitly allow the federal government to utilize their powers under the Controlled Substance Act to override these state laws.[158] By elevating drug users to be a protected class, drug users' rights to receive treatment would be solidified, ensuring that addicts have the ability to continually have the protections they need.

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[156] Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting).

[157] *See* discussion, *supra* Part V.

[158] *See* discussion, *supra* Part IV.A.