SULLIVAN, C. J., dissenting. I agree with the majority that the trial court had subject matter jurisdiction over this case despite the plaintiffs' failure to provide notice to all interested persons as required by Practice Book § 17-56 (b).[1] I disagree, however, that Public Acts 2003, No. 03-45 (P.A. 03-45), which amended General Statutes § 19a-342[2] to prohibit smoking in restaurants, cafés and certain other public facilities, but not in casinos and most private clubs, passes constitutional muster under the equal protection clauses of the state and federal constitutions.[3] Accordingly, I dissent.

In determining whether legislation complies with principles of equal protection, this court consistently has held that "[t]he relevant inquiry is whether the classification and disparate treatment inherent in the statute of repose legislation bears a rational relationship to a legitimate state end and is based on reasons related to the accomplishment of that goal. . . . [T]he [f]ourteenth [a]mendment does not deny to [s]tates the power to treat different classes of persons in different ways. . . . The equal protection clause of that amendment does, however, deny to [s]tates the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (Citations omitted; internal quotation marks omitted.) *Daily* v. *New Britain Machine Co.*, 200 Conn. 562, 577–78, 512 A.2d 893 (1986). For more than seventy-five years, this court has recognized that "classifications must be based on natural and substantial differences, germane to the subject and purpose of the legislation, between those within the class included and those whom it leaves untouched." (Internal quotation marks omitted.) *Blue Sky Bar, Inc.* v. *Stratford*, 203 Conn. 14, 28–29, 523 A.2d 467 (1987); see also *State* v. *Moran*, 264 Conn. 593, 608, 825 A.2d 111 (2003); *Rayhall* v. *Akim Co.*, 263 Conn. 328, 346, 819 A.2d 803 (2003); *Donahue* v. *Southington*, 259 Conn. 783, 795, 792 A.2d 76 (2002); *Barton* v. *Ducci Electrical Contractors, Inc.*, 248 Conn. 793, 814, 730 A.2d 1149 (1999); *Johnson* v. *Meehan*, 225 Conn. 528, 536, 626 A.2d 244 (1993); *Circuit-Wise, Inc.* v. *Commissioner of Revenue Services*, 215 Conn. 292, 301, 576 A.2d 1259 (1990); *Zapata* v. *Burns*, 207 Conn. 496, 509–14, 542 A.2d 700 (1988); *Ecker* v. *West Hartford*, 205 Conn. 219, 239 n.13, 530 A.2d 1056 (1987); *Daily* v. *New Britain Machine Co.*, supra, 577; *Eielson* v. *Parker*, 179 Conn. 552, 566, 427 A.2d 814 (1980); *Caldor's, Inc.* v. *Bedding Barn, Inc.*, 177 Conn. 304, 315, 417 A.2d 343 (1979); *Halabi* v.

Administrator, 171 Conn. 316, 322, 370 A.2d 938 (1976); *Gentile* v. *Altermatt*, 169 Conn. 267, 295, 363 A.2d 1 (1975), appeal dismissed, 423 U.S. 1041, 96 S. Ct. 763, 46 L. Ed. 2d 631 (1976); *Tough* v. *Ives*, 162 Conn. 274, 293, 294 A.2d 67 (1972); *St. John's Roman Catholic Church Corp.* v. *Darien*, 149 Conn. 712, 723–24, 184 A.2d 42 (1962); *Schwartz* v. *Kelly*, 140 Conn. 176, 181, 99 A.2d 89, appeal dismissed, 346 U.S. 891, 74 S. Ct. 227, 98 L. Ed. 394 (1953); *Francis* v. *Fitzpatrick*, 129 Conn. 619, 623, 30 A.2d 552 (1943); *State* v. *Cullum*, 110 Conn. 291, 295, 147 A. 804 (1929). This understanding of the constraints that the fourteenth amendment places on state legislatures is nearly as old as the amendment itself. See, e.g., *Gulf, Colorado & Santa Fe Railway Co.* v. *Ellis*, 165 U.S. 150, 155, 17 S. Ct. 255, 41 L. Ed. 666 (1897) (legislative classifications "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed").

This court also has recognized that a core purpose of the constitutional guarantee of equal protection is to prevent lawmakers from shielding the politically powerful from legislative burdens that have been imposed on other groups that are similarly situated, but politically weak. "[N]othing opens the door to arbitrary action so effectively as to allow [government] officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." (Internal quotation marks omitted.) *Wagner* v. *Connecticut Personnel Appeal Board*, 170 Conn. 668, 673, 368 A.2d 20 (1976). Indeed, the very essence of law, as distinct from arbitrary power, is that its burdens are generally shared, and are not selectively imposed on those who have the least power to resist.[4]

The majority now concludes that "legislation often embodies multiple purposes" and that it must "disavow any implication . . . that a statutory classification must be rationally related to the statute's *primary* purpose in order to survive an equal protection challenge." (Emphasis added.) See footnote 14 of the majority opinion. I agree that statutory schemes frequently attempt to balance the various interests of the persons and classes of persons that are affected by the scheme, and that a statutory classification that is rationally related to the protection or advancement of any of these interests will pass constitutional muster. It is clear, for example, that the Workers' Compensation Act, General Statutes § 31-275 et seq., attempts to advance the interests of employees in obtaining prompt and fair compensation for their work-related injuries while simultaneously protecting employers by precluding other causes of action against them and limiting the amount of the employee's recovery. See *Mello* v. *Big Y Foods, Inc.*, 265 Conn. 21, 26, 826 A.2d 1117 (2003) (workers' compensation "statutes compromise an

employee's right to a common law tort action for work related injuries in return for relatively quick and certain compensation"). I also recognize that it is not inconsistent with equal protection principles for the legislature to take " 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.' " *Federal Communications Commission* v. *Beach Communications, Inc.*, 508 U.S. 307, 316, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). A statutory provision that exempts a particular class of persons because subjecting it to the statute would not appreciably advance the purpose of the legislation *is* related to the statutory purpose. The majority has failed, however, to explain how the legislative classification created by P.A. 03-45 advances *any* purpose *of the statute*.

To the extent that the majority suggests that a statutory classification may pass constitutional muster if it promotes *any* legitimate state purpose, related to the statute or not, I strongly disagree. Any such conclusion is entirely inconsistent with more than seventy-five years of this court's precedent and finds no other support in the case law.[5] Under such a standard, *any* legislative classification that exempts a particular class of persons from legislation would be constitutional, because the state *always* has a legitimate interest in relieving its citizens of the costs and burdens of state regulation. Although it is well established that courts must give great deference to legislative classifications, it has never been suggested that we should give *absolute* deference to the legislature. If, for example, the legislature had determined that, in order to reduce the burdens imposed by P.A. 03-45, cafés and restaurants located in towns whose names contain an even number of letters would be exempt from the statute, surely that arbitrary classification could not be saved by the fact that it promoted a legitimate public interest.

I would conclude that there is no relationship between the classification created by P.A. 03-45 and the purpose of the statute. Indeed, I would conclude that the public interests identified by the majority in support of its conclusion that such a relationship exists,[6] namely, protecting the purported privacy interests of private club members and avoiding a confrontation with the Indian tribes, are purely illusory.

With respect to the exemption for private clubs, the trial court relied solely on the legislative history of P.A. 03-45 in support of its conclusion that the exemption was constitutional. Representative Art Feltman argued in support of the exemption for private clubs that "we consider these establishments to be the extension of people's private homes. They're membership organizations, people have to pay dues to belong to them, they have fixed memberships, and it's as if these people were gathering in their living rooms. And so that's why we consider this part of the private domain, not the public

domain. They are not open to the public." 46 H.R. Proc., Pt. 8, 2003 Sess., p. 2409. He also indicated that, "[t]he existing [private] clubs are not included in this bill. We consider them to be part of the private domain and what we're trying to regulate here is the public domain." Id., p. 2423. The trial court concluded that this classification was constitutional because "[p]rivate clubs and associations are frequently subject to different laws and legal requirements than public locations. The law recognizes that they can be regulated differently. The legislature's decision to exempt certain private clubs from the ban is a manifestation of this." In their brief to this court, the defendants[7] argue that the classification was justified because "members may have joined [private clubs] for a fee with the expectation that they could smoke . . . ."

In my view, the trial court, the defendants and the majority all have failed to articulate any "ground of difference *having a fair and substantial relation* to the object of [P.A. 03-45] . . . ." (Emphasis added; internal quotation marks omitted.) *Daily* v. *New Britain Machine Co.*, supra, 200 Conn. 578. Instead, they simply have begged the question by assuming that *any* difference between disparately treated classes justifies the disparate treatment. The defendants concede, and there is no dispute, that "the intent of [P.A. 03-45] was to protect employees, especially those with little choice as to where they work, from being subjected to [exposure to carcinogenic secondhand smoke] as a condition of their employment."[8] I cannot conceive of any rational relationship between this purpose and providing an exemption for establishments that purportedly were founded with the expectation that smoking would continue to be permitted there. There is no evidence in the record that private clubs have fewer employees than the establishments that are subject to the act or that their employees are somehow less susceptible to the ill effects of secondhand smoke than other employees.

Moreover, there is absolutely no evidence in the record that the members of the private clubs formed or invested in the clubs with the expectation that smoking would be allowed there or, if they did, that any such expectation was reasonable. Representative Feltman stated only that private clubs were exempted because they were not in the "public domain," but were like private "living rooms." Although I recognize that this court gives deference to legislative fact-finding, I do not believe that we must defer to a finding that is contrary to all common sense and experience. Living rooms in private residences do not by their nature require the presence of full-time employees or have continually changing membership lists, and generally do not welcome a stream of "guests" who are unknown to most, if not all, of the household residents.[9] For these reasons, private living rooms, unlike private clubs, generally are not subject to workplace safety and other health and

employment laws.[10] There simply is no basis for the conclusion that the members of private clubs had a reasonable expectation that they would be exempt from this particular law governing workplace safety, despite the fact that clubs generally are subject to the same laws as other employers.[11] See *Anchor Inn Seafood Restaurant* v. *Montgomery County*, Circuit Court for Montgomery County, Maryland, Docket No. 199692 (June 20, 2000), p. 11 (finding no rational basis for exempting clubs from smoking ban when clubs were subject to same health and safety regulations as nonexempt establishments), aff'd on other grounds, *Montgomery County* v. *Anchor Inn Seafood Restaurant*, 374 Md. 327, 822 A.2d 429 (2003).[12] The defendants have cited no authority for the proposition that unfounded expectations of privacy can form a constitutional basis for a legislative classification.

In any event, even if the members of private clubs have an investment backed expectation that the conditions under which they made their investment would continue, that does not distinguish them from the proprietors of the establishments that are subject to the smoking ban. Again, it is a matter of common sense and experience that many restaurants and cafés that are subject to the ban have built up regular clienteles over time, and those clienteles have certain expectations. If their expectations are thwarted by state regulation, the clienteles presumably will move on to unregulated venues where they can pursue their chosen activities unhampered. It is true that the clienteles will not suffer any loss of investment, but only because *the proprietors of the regulated establishments will bear the entire loss*. Thus, the difference between private clubs and nonexempt restaurants and cafés, in this context, is that, in private clubs, the loss of investment backed expectation for each individual member as a result of the smoking ban would be relatively small, but would be born by a relatively large number of individuals, while, in restaurants and cafés owned by a single individual, that single individual will bear the entire loss. It is beyond my comprehension why this distinction constitutes a rational basis for exempting private clubs.[13]

The defendants argue that "it does not violate equal protection for a legislature to address a problem one step at a time . . . ." See *Justiana* v. *Niagara County Dept. of Health*, 45 F. Sup. 2d 236, 242 (W.D.N.Y. 1999) (upholding constitutionality of partial smoking ban on ground that "a legislature can address a perceived problem incrementally if in its judgment that is the best way to address the problem"), citing *Federal Communications Commission* v. *Beach Communications, Inc.*, supra, 508 U.S. 316 (legislature " 'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind' "). As the defendants conceded at oral argument before this

court, however, if a legislative classification is not rationally related to the purpose of the legislation in the first instance, a claim that the legislature has taken an incremental approach to a perceived problem will not save the classification. For example, if it would be unconstitutional for the legislature to address the problem of excessive speed on state highways by setting a speed limit of fifty-five for all vehicles except for sports cars in which the owner had an investment backed expectation in driving at a high rate of speed, the classification would not be saved by a claim that sports cars eventually could be subject to the prohibition. Because I see no rational basis for the exemption to the smoking ban for private clubs, I would conclude that the state's "one step at a time" argument fails.

I also disagree with the majority's conclusion that there is a rational basis for exempting casinos from the smoking ban. The majority bases its conclusion on two premises: first, the majority claims that it is unclear whether the legislature has the power to impose the smoking ban on a tribal entity and, second, the majority concludes that "tribal sovereignty can complicate state efforts to impose regulation on the tribes, even when the state clearly holds the legal power to do so." Neither premise survives scrutiny.

On October 1, 2003, the attorney general rendered a written opinion in response to an inquiry by Senator Louis C. DeLuca as to whether P.A. 03-45 applies to the casinos. In that opinion, the attorney general indicated that under § 14 of the state's gaming compacts with the Indian tribes, " '[t]ribal ordinances and regulations governing health and safety standards applicable to the gaming facilities shall be no less rigorous than standards generally imposed by the laws and regulations of the [s]tate relating to public facilities with regard to building, sanitary, and health standards and fire safety.' " The attorney general stated that, although the phrase " 'health and safety standards' " was not specifically defined in the compacts, "by its terms, [it] applies broadly to include all of the [s]tate's health and safety laws. The smoking ban legislation involves an obvious and important health issue, and therefore, implicates application of [this provision]." The attorney general concluded, however, that, because the legislature had not included the special liquor permits for casinos in the list of permits covered by P.A. 03-45, the state had not banned smoking in the casinos and, accordingly, the compacts did not require the tribes to ban smoking in the casinos.

It is perfectly clear, therefore, that the legislature has the power to include casinos in the smoking ban.[14] Moreover, I am not persuaded by the defendants' argument that, because the attorney general did not render this opinion until after P.A. 03-45 had been enacted, the legislature could not have known that it had such

power. Even if it were plausible that the legislature was not aware of the legal import of the gaming compacts, the defendants cite no authority for the proposition that the legislature's claimed ignorance of its own clear legal authority can form a constitutional basis for an otherwise unconstitutional classification.

Nor am I persuaded that the enforcement of the smoking ban in the casinos would be unduly complicated by the sovereign status of the tribes. The office of legislative research has indicated that, as of August 10, 2001, in order to enforce the provisions of the gaming compacts, the state had stationed at the two casinos thirteen liaison officers from the department of special revenue, nine liquor control agents and twenty-nine state police officers. Office of Legislative Research, Research Report, August 10, 2001, 2001-R-0635, p. 1. The office of legislative research also has indicated that "[t]he state assesses the tribes and the tribes reimburse it for all the direct and indirect costs associated with the casino-related functions the agencies provide." Id. There is absolutely no evidence in the record that the tribes ever have interfered with these agents of the state or resisted in any way the enforcement of the provisions of the gaming compacts requiring the casinos to comply with state health and safety laws.

The fact that other Indian tribes have resisted different, and at least colorably illegal, state regulations governing activities that take place within tribal territories where agents of the state are barred from entering for purposes of law enforcement does not affect my conclusion. See *New York Assn. of Convenience Stores* v. *Urbach*, 275 App. Div. 2d 520, 522, 712 N.Y.S.2d 220 (2000) (state's decision not to enforce regulations governing sale of cigarettes on tribal land had rational basis because tribes refused to cooperate with state and enforcement was impossible without tribes' cooperation).[15] The record in the present case provides no support for a conclusion that enforcement of the smoking ban in the casinos would face insuperable, or even mildly challenging, legal or practical barriers.

The defendants finally argue that "the relationship between the state and the tribes is complicated by economic and political concerns because the casinos contribute millions of dollars a year to the state's treasury."[16] They point out that the plaintiffs argued to the trial court that, " '[h]ad the smoking ban applied equally to bars and restaurants in clubs and casinos, neither the public act nor its sponsors would have survived the political fallout,' " and contend that, "[a]lthough there is no evidence that this concern was in fact the true basis for exempting casinos from the ban, it is clearly a conceivable, rational basis for the exemption." As I have indicated, far from being a rational basis for a legislative classification, legislative maneuvering to avoid the political fallout of imposing

burdensome legislation on a politically powerful group is precisely what the equal protection clauses of the state and federal constitutions were designed to prevent. See *Wagner* v. *Connecticut Personnel Appeal Board*, supra, 170 Conn. 673.

In summary, to the extent that the legislative classification created by P.A. 03-45 can be explained at all, it can only be explained, on the one hand, by purely speculative or simply unsupportable legislative fact-finding, or, on the other hand, by entirely improper political considerations. I recognize that "[t]he burden is on the [party] attacking the legislative arrangement to negative every conceivable basis which might support it . . . ." (Internal quotation marks omitted.) *State* v. *Long*, 268 Conn. 508, 534, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004). I continue to believe, however, not just *any* conceivable distinction between disparately treated groups that can be articulated may serve as a constitutional basis for a legislative classification. Rather, the distinction must be *rationally* related to a *legitimate* government purpose.[17] See *Daily* v. *New Britain Machine Co.*, supra, 200 Conn. 577. Sheer speculation and error are not rational, and selective avoidance of political fallout is not a legitimate legislative purpose. I would conclude that the exemption of private clubs and casinos from the scope of P.A. 03-45 violates the equal protections clauses of the federal and state constitutions. Accordingly, I dissent.

[1] The plaintiffs, Diane Batte-Holmgren, Gina MacDonald, John Woermer and Irving Nielsen, are owners of businesses affected by legislation banning smoking in restaurants, cafés and certain public areas.

[2] See footnote 3 of the majority opinion for the text of § 19a-342.

[3] The fourteenth amendment to the United States constitution, § 1, provides in relevant part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Article first, § 20, of the constitution of Connecticut provides in relevant part: "No person shall be denied the equal protection of the law . . . ."

[4] "It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but . . . the general law . . . so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society, and thus excluding, as not due process of law . . . [all] special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both [s]tate and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." (Internal quotation marks omitted.) *Hurtado* v. *California*, 110 U.S. 516, 535–36, 4 S. Ct. 111, 28 L. Ed. 232 (1884).

[5] The majority relies on this court's decision in *Daily* v. *New Britain Machine Co.*, supra, 200 Conn. 562, and *Blue Sky Bar, Inc.* v. *Stratford*, supra, 203 Conn. 14, in support of its contention that statutory classifications need not further the statute's *primary* purpose. As I have indicated, I have no quarrel with that conclusion. Those cases also clearly support a conclusion,

however, that a statutory classification must be related to *some* statutory purpose. The issue in *Daily* was whether employees who were injured by a defective product in the course of their employment constitutionally were entitled to the same procedural rights under the product liability statute as nonemployees who were injured by a defective product. *Daily* v. *New Britain Machine Co.*, supra, 575–76. In determining that a ten year statute of repose should apply to employees, the legislature reasoned, in part, that even after the expiration of the statute of repose, the employees could receive prompt compensation for their injuries under the workers' compensation act, without any need to prove fault or liability. Id., 579. This court specifically concluded that the classification rested "upon a difference having a fair and substantial relation to the object of the legislation"; id.; which, presumably, was to provide fair, orderly and efficient procedures for persons who are injured by defective products to obtain compensation for their injuries.

In *Blue Sky Bar, Inc.* v. *Stratford*, supra, 203 Conn. 25–26, this court considered the constitutionality of an ordinance that prohibited vending from motor vehicles, but not from fixed locations or nonmotor vehicles. The purpose of the ordinance was to protect the safety of children and to encourage the free flow of traffic. Id., 24. This court specifically concluded that "the challenged classification is rationally related to the purpose of the ordinance"; id., 28; because the town reasonably could have concluded that vending from nonmotor vehicles had "less of an impact on the free flow of traffic and presents less of an overall safety hazard to children than vending from motor vehicles." Id., 29.

The United States Supreme Court's decisions in *Hodel* v. *Indiana*, 452 U.S. 314, 332–33, 101 S. Ct. 2376, 69 L. Ed. 2d 40 (1981), and *Federal Communications Commission* v. *Beach Communications, Inc.*, supra, 508 U.S. 313–14, also support a conclusion that statutory classifications must be related to a statutory purpose. The United States Supreme Court specifically found in those cases that the challenged statutory classifications were rationally related to the underlying purposes of the statutes. See *Hodel* v. *Indiana*, supra, 332–33 (statutory provision imposing more stringent restoration requirements for farmland mines than for steep slope mines was rationally related to purpose of preserving productive farmlands); *Federal Communications Commission* v. *Beach Communications, Inc.*, supra, 318–20 (statutory provision exempting buildings under common ownership or management from cable regulation was rationally related to purpose of promoting competition).

[6] As I have indicated, it is not entirely clear to me whether the majority concludes that there is a relationship between the classification and the purpose of P.A. 03-45 or that it is not required to identify any such relationship, as long as the classification promotes *some* public purpose. I would agree that relieving corporate citizens of the burdens of state regulation is a legitimate public purpose. I also cannot disagree with the tautology that exempting private clubs and casinos from P.A. 03-45 relieves them of the burdens imposed by the statute. As I have explained, however, I cannot agree that that purpose justifies the classification created by the statute.

[7] The defendants are the commissioner of public health and the attorney general.

[8] The majority suggests that I, alone, have identified the protection of employees as the primary legislative purpose of P.A. 03-45. As I have indicated, however, the agency responsible for enforcing the law, the department of public health, and its legal representative, the attorney general, have identified the protection of employees as the law's primary purpose. If the majority believes that the defendants' understanding is incorrect, or that there are additional public purposes underlying the legislation, it should state the reasons for its belief and identify those purposes.

[9] Indeed, notwithstanding the provisions of General Statutes § 30-23a; see footnote 11 of the majority opinion; it is a matter of common knowledge and experience that, in order to be served as a "guest" at a private club, a person need not be known personally by any member of the club.

[10] The trial court stated that "[p]rivate clubs and associations are frequently subject to different laws and legal requirements than public locations." It provided no examples of these different laws, however, and the state points to no such examples on appeal. Nor does my research reveal any instances in which private clubs are treated differently from other establishments under laws governing employment or workplace safety.

[11] The majority argues that statutory provisions provide a basis for the legislature's conclusion that private club members "possess an expectation

of privacy and control over their club" because the statutes require the clubs to limit their service of alcohol to members and their invited guests only and to maintain and file with the state a current list of members. That argument is purely conclusory. My very point is that the fact that the members of a private club are statutorily entitled to choose and to limit the club's membership reasonably cannot give rise to a reasonable expectation that the club will be exempt from any particular law governing workplace health and safety. Indeed, the legislature itself implicitly acknowledged as much when it determined that clubs whose permits were issued after May 1, 2003, would be subject to the smoking ban. I have no doubt that many private club members would prefer that their clubs be exempt from any burdensome state regulation. I fail to see, however, how that bare preference can form a constitutional basis for a legislative classification.

The majority continues to beg the question when it argues that " '[i]t is not the function of the court to alter a legislative policy merely because it produces unfair results' "; *Ecker* v. *West Hartford*, supra, 205 Conn. 241; immediately after pointing out that " '[i]f the classification *has some reasonable basis*, it does not offend the [c]onstitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.' " (Emphasis added.) *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 175, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980). Again, my point is that an entity's unfounded expectation that it will be exempted from general public laws cannot form a reasonable basis for any legislative classification. The fact that this law is patently unfair to restaurant and café owners—a point with which the majority appears to agree—does not form the sole basis for my argument that it is unconstitutional.

[12] The majority states that the reasoning of the court in *Anchor Inn Seafood Restaurant* "is not relevant to our current inquiry because, under Connecticut law, a private club is not necessarily a nonprofit organization, and the smoking ban exemption for private clubs does not distinguish based on the clubs' status in this regard." As the majority acknowledges, however, in concluding that the exemption of nonprofit clubs from the smoking ban had no rational basis, the Maryland court reasoned that the fact that the clubs were nonprofit did not rationally distinguish them from the nonexempt establishments in this context because *nonprofit entities were subject to the same general health and safety regulations as for-profit entities*. Similarly, in the present case, the purported privacy expectations of the members of private clubs do not rationally distinguish private clubs from nonexempt establishments when those privacy expectations have not prevented private clubs from being subject to other generally applicable laws governing employment and workplace safety.

[13] It does suggest a *political* motivation for the exemption, however. As long as any individual who wants to smoke while he drinks can find an establishment where he is allowed to do so, the burden imposed by the smoking ban on such individuals will be relatively light. Because there presumably are many more such individuals than there are proprietors of establishments that are subject to the ban, exempting certain establishments allows the legislature to gratify the political proponents of the ban while insulating itself from political backlash from opponents. As I have indicated, a primary purpose of the equal protection clauses is to prevent such politically motivated classifications.

[14] The majority, relying on *Rice* v. *Rehner*, 463 U.S. 713, 718–19, 103 S. Ct. 3291, 77 L. Ed. 2d 961 (1983), suggests that this power is not perfectly clear because a "sensitive and careful analysis [is] required to determine whether regulation of activities on tribal lands is permissible," and there has been no judicial determination on that issue. In *Rice*, however, the question was whether a particular state law unilaterally could be imposed on a tribal entity in light of general principles of tribal sovereignty and immunity. Id., 715. In the present case, the legislature was not confronted with that admittedly thorny issue. Rather, the question of whether it had authority to impose a smoking ban involved the construction of an agreement between the tribal entities and the state that was clear on its face.

[15] The court in *New York Assn. of Convenience Stores* stated that "[t]he record here clearly reflects such a state of facts, as it makes plain that the statutes cannot effectively be enforced without the cooperation of the Indian tribes. Because of tribal immunity, the [tribal] retailers cannot be sued for their failure to collect the taxes in question, and [s]tate auditors cannot go on the reservations to examine the retailers' records.

"Additionally, the [d]epartment [of taxation and finance (department)] cannot compel the retailers to attend audits off the reservations or compel

production of their books and records for the purpose of assessing taxes. In that regard, representatives of the [d]epartment engaged in extensive negotiations with the tribes in an effort to arrive at an acceptable agreement. Those efforts were largely unsuccessful and the vast majority of the Indian retailers refused to register with the [d]epartment. In further efforts to enforce the statute, the [s]tate attempted interdiction, i.e., interception of tobacco and motor fuel shipments and seizure of those shipments that were found to be in noncompliance with the [t]ax [l]aw. That strategy resulted in civil unrest, personal injuries and significant interference with public transportation on the [s]tate highways." *New York Assn. of Convenience Stores* v. *Urbach*, supra, 275 App. Div. 2d 522–23.

[16] The record reflects that, from the 1992–1993 fiscal year through the 2000–2001 fiscal year, the tribes contributed approximately $1.8 billion to the state pursuant to agreements with the state governing revenue from slot machines. Office of Legislative Research, supra, p. 1.

[17] The majority relies on *Coalition for Equal Rights, Inc.* v. *Owens*, United States District Court, Docket No. 06-CV-01145 (D. Colo. October 19, 2006), in support of its conclusion that P.A. 03-45 is constitutional. In that case, the United States District Court for the District of Colorado concluded that a smoking ban that exempted casinos did not violate the equal protection clause. Id., pp. 19–21. In reaching that conclusion, the court expressly rejected the plaintiffs' argument that a legislative classification must be substantially related to the purpose of the legislation. Id., p. 16. The court determined that the party challenging the constitutionality of a classification must show that it is "irrational and *completely* unrelated to *any conceivable* policy goal." (Emphasis added.) Id., p. 10. As I have indicated, up to now this court consistently, and in my view, correctly, has held that, to pass constitutional muster, legislative classifications must be rationally and substantially related to the purpose of the legislation.

As I have indicated, the legislature may, of course, address the worst aspects of a particular problem first. It is possible, for example, that the legislature could ban smoking in all elementary schools but not in colleges and universities on the ground that exposure to secondhand smoke is more dangerous to children than to adults. There is no suggestion in the present case, however, that the exemption of private clubs and casinos has any such purpose or effect.