ATLANTIC CITY SPECIAL: WHETHER THE CASINO EXCEPTION TO THE NEW JERSEY SMOKE-FREE AIR ACT COMPORTS WITH THE NEW JERSEY CONSTITUTION'S GENERAL PROHIBITION OF SPECIAL LAWS

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April 14, 2006—Kelly's Tavern in New Brunswick, New Jersey. 11:50 P.M. Almost in unison, the patrons of the small corner bar light up cigarettes. The manager has announced that, come midnight, the ashtrays will be removed and smoking inside the establishment will be prohibited in compliance with New Jersey's new indoor smoking ban. Grumbles of contempt provide the soundtrack as the smoke grows so thick that patrons struggle to see the televisions across the bar. Ten minutes later, the clouds of silver begin to thin, as the tavern's employees make good on the manager's word and remove the ashtrays.[1] On April 15, at 12:00 A.M., Kelly's Tavern, like hundreds of other bars and indoor areas across the state of New Jersey, went smoke-free.[2]

September 8, 2006—The Tropicana Casino and Resort in Atlantic City, New Jersey. Midnight. A cascading array of colors, lights, and sounds, the classic overwhelming casino environment, provides the backdrop as throngs of excited gamblers try their luck at the countless games of chance on the casino floor. Just as shrieks of joy and moans of defeat fill the air, so too does a steady flow of cigarette and cigar smoke, creeping between the slot machines, hanging before the surveillance cameras, engulfing patrons and employees, locals and tourists alike. Nearly five months after the implementation of the New Jersey indoor smoking ban, tobacco smoke continues to

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[1] This information is from the author's personal experience.

[2] Allison Pries & Eric Hsu, *Smokers Cope with Ban; Others Relish Fresh Air*, THE RECORD (Bergen County, N.J.), Apr. 16, 2006, at A1 (stating that hundreds of bars across New Jersey observed the smokers' "last call" at midnight).

stand alongside gambling chips, free drinks, and artificial daylight as a mainstay of the Atlantic City casino experience.[3]

INTRODUCTION

As of October 1, 2007, twenty-three states did not allow smoking in restaurants, and seventeen states had similar bans for all bars.[4] The trend of enacting such bans is a relatively recent one, as the oldest took effect only fourteen years ago,[5] and over one-third of the bans took effect in the past two years.[6]

These statewide indoor smoking bans, while typically broad in their definition of establishments covered by the ban, generally provide for some narrow exceptions.[7] For instance, New York forbids smoking in all "places of employment[,] bars [, and] food service establishments."[8] However, this broad language is later narrowed in the statute by exceptions to the smoking ban for, among other establishments, "[r]etail tobacco businesses[,] [m]embership organizations . . . [and] [c]igar bars."[9] Likewise, the Colorado Clean Air Act's prohibition of smoking "in any indoor area" excludes casino floors and cigar bars from the statute's otherwise broad purview.[10]

As would be expected, the number of legal challenges to these statewide bans and their exceptions has grown, particularly in the form of federal constitutional challenges, as the bans have taken ef-

[3] This information is from the author's personal experience.

[4] AM. NONSMOKERS' RIGHTS FOUND., STATES AND MUNICIPALITIES WITH 100% SMOKEFREE LAWS IN WORKPLACES, RESTAURANTS, AND BARS 3, 4 (2006), http:// www.nosmoke.org/pdf/100ordlist.pdf. These numbers do not include those states that merely require separate areas for smokers in such establishments, nor do they include bans that allow for exceptions based on the size of the establishment. *Id.*

[5] Gene Borio, Tobacco Timeline: The Twentieth Century 1950–1999—The Battle Is Joined, http://www.tobacco.org/resources/history/Tobacco_History20-2.html (last visited Oct. 2, 2007); *see also* VT. STAT. ANN. tit. 18, § 1742 (2006).

[6] Borio, *supra* note 5; AM. NONSMOKERS' RIGHTS FOUND., *supra* note 4.

[7] *See, e.g.,* COLO. REV. STAT. § 25-14-204 (2006) (prohibiting smoking "in any indoor area," with statutory exceptions); MASS. ANN. LAWS ch. 270, § 22 (LexisNexis 2006) (listing more than twenty classes of indoor areas in which smoking is prohibited, including bars and restaurants); N.J. STAT. ANN. § 26:3D-58 (West 2006) (stating that "[s]moking is prohibited in an indoor public place or workplace," unless otherwise provided for in the statute).

[8] N.Y. PUB. HEALTH LAW § 1399-o (Consol. 2006).

[9] *Id.* § 1399-q.

[10] COLO. REV. STAT. §§ 25-14-204, -205; *see also, e.g.,* ME. REV. STAT. ANN. tit. 22, § 1542 (2005) (excluding, among other establishments, bingo halls and off-track betting facilities from otherwise broad indoor smoking prohibition); R.I. GEN. LAWS § 23-20.10-6 (2005) (excluding, among other establishments, retail tobacco stores, and smoking bars from otherwise broad indoor smoking prohibition).

fect across the country.[11] In New York, a lobbying group formed to promote the interests of smokers assailed the previously described smoking ban on a host of constitutional grounds, including substantive Due Process, procedural Due Process, Equal Protection, the Right to Travel, Freedom of Speech, and Freedom of Assembly.[12] Similarly, owners and operators of restaurants authorized to sell alcoholic beverages in Connecticut mounted a more narrow challenge to that state's indoor smoking ban and, more specifically, the statute's exception of casinos on Native American tribal lands and private clubs, alleging that the exception constituted a violation of federal equal protection.[13] However, while the number of these challenges has mounted, all have proven unsuccessful.[14]

On January 15, 2006, New Jersey joined the ranks of states enacting general prohibitions of smoking in indoor areas, including bars and restaurants, by passing the New Jersey Smoke-Free Air Act.[15] As have all other states with such bans, New Jersey scaled back the initially broad language of its general prohibition by classifying certain indoor areas as outside the scope of the statute.[16] Among the classes of indoor areas exempted from the statute are casinos.[17]

The purpose of this Comment is to analyze the New Jersey indoor smoking ban from a New Jersey constitutional standpoint. In particular, the Comment focuses on the exclusion of casinos from the statute's purview, and whether such an exclusion comports with the New Jersey Constitution's general prohibition of special, private, or local laws.[18] Part I gives a brief history of smoking bans in the United States, concluding with a more detailed look at the New Jersey Smoke-Free Air Act.[19] In Part II, the Comment examines the federal Constitutional challenges to state smoking bans and how those challenges have faired.[20] Part III lays out the New Jersey special law analysis that has evolved since the state prohibited such laws.[21] Finally, Part

[11] *See infra* notes 89–145 and accompanying text.

[12] New York City C.L.A.S.H. v. City of New York, 315 F. Supp. 2d 461 (S.D.N.Y. 2004).

[13] Batte-Holmgren v. Galvin, 2004 Conn. Super. LEXIS 3313 (Conn. Super. Ct. Nov. 5, 2004), *aff'd* Batte-Holmgren v. Comm'r of Pub. Health, 914 A.2d 996 (Conn. 2007).

[14] *See infra* notes 89–145 and accompanying text.

[15] N.J. STAT. ANN. § 26:3D-55 to -64 (West 2006).

[16] *Id.* § 26:3D-59.

[17] *Id.* § 26:3D-59(e).

[18] N.J. CONST. art. IV, § 7, ¶ 7.

[19] *See infra* notes 24–89 and accompanying text.

[20] *See infra* notes 90–145 and accompanying text.

[21] *See infra* notes 146–237 and accompanying text.

IV conducts a special law analysis of the New Jersey indoor smoking ban.[22] The Comment concludes that New Jersey's special law jurisprudence is unclear on a subtle yet vital element of the special law analysis, and that the resolution of this grey area will likely determine whether the New Jersey Smoke-Free Air Act's exclusion of casinos renders the statute an unconstitutional special law.[23]

I. HISTORY OF AMERICAN SMOKING BANS AND THE NEW JERSEY SMOKE-FREE AIR ACT

A. A Brief History of the Anti-Smoking Movement and State Smoking Bans in the United States

Tobacco use can be described as an American practice in virtually every sense. The world's first tobacco plant is believed to have grown in the Americas in approximately 6000 B.C.[24] Thousands of years later, Christopher Columbus's epic voyage revealed not only the presence of the Americas to the Old World, but also the presence of certain dried leaves that the natives showed an affinity for chewing or "drinking their smoke" through a pipe.[25] In 1619, when the first representative legislative assembly in the American colonies met in Jamestown, Virginia, the first law passed regulated the sale of tobacco.[26]

For nearly as long as tobacco has been used (at least by Europeans and American colonists), it has evoked disfavor and opposition. In 1604, King James I, an avid opponent of tobacco use, raised the duty on imported tobacco in England by 4000%.[27] The Vatican passed an indoor smoking ban of sorts by forbidding smoking in Roman Catholic basilicas.[28] Even in the American colonies, the birthplace of tobacco, smoking met opposition, as the colony of Massachusetts banned public smoking in 1632.[29]

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[22] *See infra* notes 238–85 and accompanying text.

[23] *See infra* notes 241–85 and accompanying text.

[24] Gene Borio, The Tobacco Timeline, http://www.tobacco.org/resources/history/Tobacco_History.html (last visited Oct. 2, 2007).

[25] RICHARD KLUGER, ASHES TO ASHES 9 (1996).

[26] Gene Borio, Tobacco Timeline: The Seventeenth Century—The Great Age of the Pipe, http://www.tobacco.org/resources/history/Tobacco_History17.html (last visited Oct. 2, 2007).

[27] KLUGER, *supra* note 25, at 10.

[28] *Id.* These anti-tobacco measures were considerably less drastic than those employed by Czar Alexis of Russia, apparently a staunch opponent of smoking, who exiled smokers to Siberia. *Id.*

[29] Borio, *supra* note 26.

Medical research on the effects of tobacco use is also long on history, if not agreement. The first medical report of the negative effects of tobacco use came from Samuel Pepys in 1665 after he observed a Royal Society experiment in which a cat died when fed a "drop of distilled oil of tobacco."[30] From that point until the twentieth century, conflicting accounts of tobacco's effects emerged, ranging from those touting tobacco's medical uses[31] to those depicting the plant's use as a serious health risk.[32]

In the 1940s, evidence that tobacco use leads to a variety of diseases came into clearer focus.[33] Influential studies conducted by Drs. Ernst Wynder and Evarts Graham revealed smokers to be at a greater risk of developing lung cancer and, later, that mice given tobacco tar stood a greater chance of developing malignant tumors.[34] The mounting evidence of the negative effects of smoking culminated in the 1964 Surgeon General's report on smoking and health, which concluded that smoking causes lung cancer.[35] These studies and reports received a wide public audience, as their results were published in such mass platforms as *The New York Times* and *Life* magazine.[36]

However, while the increased evidence and awareness of the causal link between cigarette use and cancer were undoubtedly major factors in the growth of the anti-smoking movement, the medical research most germane to the present-day anti-smoking legislation is that considering the effects of secondhand smoke.[37] The Surgeon General, with little supporting scientific evidence at the time, first reported the likely harmful effects of secondhand smoke in 1972.[38] Since then, while scientists have debated whether and to what extent secondhand smoke actually produces such harm, the public has grown less tolerant of smoking in public and the workplace, leading to restrictions by the government and private business.[39]

Even before the advancements in medical research, states had taken various measures to curb tobacco smoking, with varying levels

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[30] STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS 1 (1996).

[31] Borio, *supra* note 26. In the same year that Pepys was conducting his experiment, smoking was made mandatory at Eton to ward off infection and combat the bubonic plague. *Id.*

[32] *See* GLANTZ ET AL., *supra* note 30, at 1.

[33] *Id.*

[34] *Id.* at 25.

[35] *Id.* at 1.

[36] *Id.* at 25.

[37] *See id.* at 391.

[38] KLUGER, *supra* note 25, at 366.

[39] GLANTZ ET AL., *supra* note 30, at 391.

of success. As previously mentioned, Massachusetts had banned public smoking for a time during its colonial period.[40] The first organized anti-tobacco movement began as an adjunct to the temperance movement in the 1830s.[41] While cigarette use enjoyed a watershed period in the late nineteenth century due to the introduction of techniques for mass cigarette production,[42] opposition to cigarette smoking grew beyond that of other uses of tobacco,[43] leading to successful statewide restrictions. Between 1893 and 1909, fifteen states passed legislation that survived judicial scrutiny banning the sale of cigarettes.[44] However, this upsurge of anti-smoking sentiment was short-lived, as a combination of the beginning of World War I,[45] the growth of smoking among women,[46] and the disastrous attempt at the prohibition of alcohol rendered anti-smoking legislation unpopular.[47] In 1927, when Kansas dropped its ban on the sale of cigarettes, it was the last state in the period to do so.[48]

Evidence of the harmful effects of secondhand smoke breathed new life[49] into the anti-smoking movement in the 1970s. The year 1973 saw the passage of the first serious statewide anti-smoking legislation following the mid-century medical advancements, with Arizona banning smoking in libraries, theaters, museums, concert halls, and buses.[50] Two years later, Minnesota passed its much broader Clean Indoor Air Act,[51] prohibiting smoking in nearly all confined public places, including restaurants and workplaces, unless separate smoking areas were provided.[52] However, the shift toward greater regula-

[40] Borio, *supra* note 26.

[41] Gene Borio, Tobacco Timeline: The Nineteenth Century—The Age of the Cigar, http://www.tobacco.org/resources/history/Tobacco_History19.html (last visited Oct. 2, 2007).

[42] KLUGER, *supra* note 25, at 19.

[43] *Id.* at 37–40.

[44] Gene Borio, Tobacco Timeline: The Twentieth Century 1900–1949—The Rise of the Cigarette, http://www.tobacco.org/resources/history/Tobacco_History20-1.html (last visited Oct. 2, 2007).

[45] KLUGER, *supra* note 25, at 63–64. Cigarettes were the only form of tobacco that lent itself to use in war, as other forms were viewed as unmanageable, unsanitary, or generally bothersome. *Id.* The cigarette companies, aware of this reality, took great effort to seize upon the patriotic spirit of the day, heavily advertising their contributions of cigarettes to the soldiers in battle. *Id.*

[46] *Id.* at 65–66.

[47] *Id.* at 68.

[48] *Id.* at 69.

[49] Pun intended.

[50] ARIZ. REV. STAT. § 36-601.01 (LexisNexis 2006).

[51] MINN. STAT. § 144.411 to 144.417 (2005).

[52] KLUGER, *supra* note 25, at 374.

tion of smoking was slow; the anti-smoking statutes passed in Montana[53] and Nebraska[54] shortly after Minnesota's measure were far less comprehensive, and restrictive measures similar to that in Minnesota were vetoed by the governors of Illinois and Maine.[55]

Still, by 1986, thirty-five states had restricted smoking on public transit, thirty-one in elevators, twenty-nine in cultural and recreational facilities, twenty-seven in schools, and nineteen in libraries; twenty-two required segregated areas in public office buildings, and nine required such in private ones.[56] As a greater degree of agreement grew on the harmful effects of secondhand smoke, the anti-smoking movement took on a strategy of undercutting "the social support network for smoking by implicitly defining it as an antisocial act."[57]

In 1990, San Luis Obispo, California, became the first city in the United States to ban smoking in all public buildings including bars and restaurants.[58] Vermont passed a broad ban on indoor smoking in 1993,[59] becoming the first state in the modern era of smoking regulation to do so.[60] In the thirteen years since, fourteen states have joined Vermont, at least to the extent of passing broad smoking bans that include restaurants and do not allow for separate smoking areas, and eleven states[61] have extended such bans to bars.[62]

B. The New Jersey Indoor Smoking Ban

New Jersey passed the New Jersey Smoke-Free Air Act on January 15, 2006, with the statute taking effect on April 15 of the same year.[63] The statute declared the following findings as motivation for the measure:

> [T]obacco is the leading cause of preventable disease and death in the State and the nation, and tobacco smoke constitutes a substantial health hazard to the nonsmoking majority of the public; the separation of smoking and nonsmoking areas in indoor pub-

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[53] MONT. CODE ANN. § 50-40-101 to -120 (2005).

[54] NEB. REV. STAT. § 71-5701 to -5713 (2006).

[55] KLUGER, *supra* note 25, at 375.

[56] *Id.* at 557.

[57] *Id.* at 553.

[58] Borio, *supra* note 5.

[59] VT. STAT. ANN. tit. 18, §§ 1742–1746 (2006).

[60] Borio, *supra* note 5. Bars were originally exempt from Vermont's ban. *Id.*

[61] These eleven states include Vermont. VT. STAT. ANN. tit. 18, §§ 1742–1746 (2006).

[62] AM. NONSMOKERS' RIGHTS FOUND., *supra* note 4.

[63] N.J. STAT. ANN. § 26:3D-55 to -64 (West 2006).

> lic places and workplaces does not eliminate the hazard to nonsmokers if these areas share a common ventilation system; and, therefore, subject to certain specified exceptions, it is clearly in the public interest to prohibit smoking in all enclosed indoor places of public access and workplaces.[64]

Thus, the primary purpose of the statute, to prevent tobacco-related disease, particularly to the "nonsmoking majority of the public," is readily apparent.[65] No legislative purpose or justification is stated for the exceptions to the ban[66] beyond the implication that the public interest is not served by banning smoking in the exempt areas.[67]

The statute states that "[s]moking is prohibited in any indoor public place or workplace, except as otherwise provided in this act."[68] Included in the exceptions provided for by the act is "the area within the perimeter of . . . any casino . . . that contains at least 150 standalone slot machines, 10 table games, or some combination thereof approved by the commission, which machines and games are available to the public for wagering."[69] The casino exception applies only to gambling floors, not to other public areas that might be thought to be within the confines of the casino, such as enclosed bars and restaurants.[70] Because the New Jersey Constitution permits casinos only within Atlantic City,[71] the casino exception to the New Jersey indoor smoking statute effectively applies to only one narrow class of establishments in one geographic area.

The reaction to the New Jersey Smoke-Free Air Act at this relatively early point in the legislation's lifetime has by and large reflected the interests of those affected. Non-smokers generally supported the bill's passage and have largely sung its praises since

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[64] § 26:3D-56.

[65] *Id.*

[66] § 26:3D-55 to -64.

[67] § 26:3D-56.

[68] § 26:3D-58.

[69] N.J. STAT. ANN. § 26:3D-59. Other areas excluded from the statute include cigar bars and tobacco retail establishments. *Id.* Whether these exceptions render the statute a special law is beyond the scope of this Comment, although one potentially but not necessarily relevant difference between these establishments and casinos is that these establishments are not confined to a single municipality in New Jersey.

[70] *Id.*; *see also* Lisa Grzyboski, *Smoking Ban Challenge Fails*, COURIER-POST (Cherry Hill, N.J.), Apr. 14, 2006, at 1G (listing the covered and exempt classes of establishments).

[71] N.J. CONST. art. IV, § 7, ¶ 2.

enactment.[72] Smokers predictably, although not uniformly, have expressed dissatisfaction with the ban.[73] Bar and restaurant owners have taken varying stances on the legislation, with some welcoming the opportunity to offer a smoke-free environment without worrying about the loss of patrons to establishments that allow smoking,[74] while others braced for an overall decline in business,[75] particularly because the casinos remained an option for smokers.[76] At this early point, little conclusive evidence exists on the effect, if any, the ban has had on the business of New Jersey restaurants and bars, although the trend in other states implementing smoking bans has been that the more a business relies on liquor sales, the more negative an effect the ban has had.[77]

One aspect of the New Jersey indoor smoking ban that has garnered virtually unanimous enmity is the exception for casinos.[78] Proponents of the indoor smoking ban have criticized the exception as contrary to the spirit of the ban, which is meant to protect employees and the non-smoking majority from the ailments caused by second-

[72] *See, e.g.*, Pries & Hsu, *supra* note 2, at A1 (quoting a non-smoker characterizing the new law as an attempt to get smokers to respect the lives of those around them). *But see id.* (quoting non-smoker characterizing ban as "un-American").

[73] *See, e.g.*, Grzyboski, *supra* note 70, at 1G (smokers describing ban as "awful" and "unfair"); John Holl, *Customers May Follow Smoke out the Door*, N.Y. TIMES, Jan. 15, 2006, § 14NJ, at 6 (North Jersey smoker telling how he stopped going to New York after its smoking ban was enacted, and how he would now have to leave New Jersey); Pries & Hsu, *supra* note 2, at A1 (pack-a-day smoker describing the new law as an annoying imposition). *But see* Richard Pearsall, *New Restrictions Cause Only a Few Ripples for Businesses*, COURIER-POST (Cherry Hill, N.J.), Apr. 22, 2006, at 1G (smoker saying that when she wants a cigarette, she simply goes outside and has one); Pries & Hsu, *supra* note 2, at A1 (smoker explaining that the new ban will help him to smoke less).

[74] *See, e.g.*, Holl, *supra* note 73, at 6 (diner manager expressing gratitude for the ban, as she desired to have her diner smoke-free for years but feared losing smokers as customers); Pries & Hsu, *supra* note 2, at A1 (bar and grill owner excited that more young families will now frequent the establishment).

[75] *See, e.g.*, Grzyboski, *supra* note 70, at 1G (restaurant manager expressing worry that customers of smaller New Jersey pubs will forego those establishments for bars in Philadelphia, where no such smoking ban exists); Tim O'Reiley, *Bars Split on Smoking Ban: Will It Snuff Out Profits?*, DAILY RECORD (Morristown, N.J.), Apr. 13, 2006 (President of New Jersey Restaurant Association stating that certain establishments could face an initial decline in business of fifteen to forty percent, and bartender describing her clientele as ninety percent smokers and stating that the bar's management and employees are "freaked out about" the smoking ban and its effect on business).

[76] *See, e.g.*, Holl, *supra* note 73, at 6 (quoting an Atlantic City pub owner stating that "[t]his ban is going to annihilate [my business]," largely because casinos remain an option for smokers who wish to drink and smoke inside).

[77] O'Reiley, *supra* note 75.

[78] *See* Pearsall, *supra* note 73, at 1G ("The casino exception has become a lightning rod for the anger of smokers and nonsmokers alike . . . .").

hand smoke.[79] Opponents of the ban complain that the separate treatment casinos receive under the ban creates an unfair, unequal playing field in the competition for smoking patrons.[80] Both sides criticize the exception as "blatant favoritism for a powerful industry."[81]

Statements from the New Jersey legislators that passed the ban have done little to quell such criticism. As one *New York Times* article stated, "lawmakers who supported the ban say the casino exemption was essential to overcome opposition from the powerful casino industry and its allies in the Legislature's South Jersey delegation."[82] State Senator Joe Vitale, chairman of the Senate's health committee, stated that "[i]n a perfect world, the casino floors would be included, but [the state Senate and Assembly] just don't have the votes."[83] Likewise, Assemblyman Richard Merkt criticized the exception, characterizing it as a concession to "big business" while "small business" received "the back of the hand."[84]

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[79] *See, e.g.*, Editorial, *Going Smokeless, but Not Far Enough, Ban Should One Day Include Casinos*, HERALD NEWS (Passaic County, N.J.), Apr. 14, 2006, at B11 (saying that the ban should be extended to include casinos as a matter of universal health).

[80] *See, e.g.*, Grzyboski, *supra* note 70, at 1G (smoker characterizing the ban as particularly unfair considering the exemption of casinos); Holl, *supra* note 73, at 6 (Atlantic City pub owner explaining that the closer a bar is to a casino, the more negative the effect on that bar's business the ban will be).

[81] Pearsall, *supra* note 73, at 1G.

[82] Holl, *supra* note 73, at 6; *see also* Kaitlin Gurney, *N.J. Ban on Indoor Smoking Passes*, PHILADELPHIA INQUIRER, Jan. 10, 2006, at A1 [hereinafter Gurney, *N.J. Ban*] (describing lawmakers who regretted the casino exemption as conceding that the bill would not have passed without the exemption); Elisa Ung, *Smoking Ban Advances to a Final Vote*, PHILADELPHIA INQUIRER, Jan. 6, 2006, at B01 (describing an assemblywoman who sponsored the bill as regretting that the exemption of casinos was necessary).

[83] Kaitlin Gurney, *Odds Against Atlantic City, N.J., Casino Smoking Ban*, PHILADELPHIA INQUIRER, Dec. 4, 2005, at B01 [hereinafter Gurney, *Odds Against A.C.*].

[84] Gurney, *N.J. Ban*, *supra* note 82, at A1. The New Jersey Legislature did not release any hearing transcripts, debate transcripts, or witness testimony on the New Jersey Smoke-Free Air Act, making a more thorough determination of the justification of the casino exemption difficult. *See* New Jersey Legislature—Bills, http://www.njleg.state.nj.us/bills/BillView.asp (select "2004–2005" for "Legislative Session" under "Bill Search"; then search for "S1926"; then follow "S1926" hyperlink) (last visited Oct. 2, 2007) (containing links to the documents on file with the New Jersey State Library that comprise the legislative history of the Smoke-Free Air Act). The legislative history for the New Jersey Smoke-Free Air Act on file with the New Jersey State Library contains only the following: the bill as first introduced in the Senate, along with the sponsor's statement; a subsequent reprint of the bill before the Senate; the Senate Health, Human Services, and Senior Citizens Committee statement on the bill to the Senate; the statement of the bill to the Senate with Senate floor amendments; a subsequent reprint of the bill before the Senate; the Assembly Health and Human Services Committee statement on the bill to the Senate; the legislative fiscal

The New Jersey Casino Association, which lobbied vigorously against a smoking ban in casinos, commissioned a study that found that a Delaware smoking ban had a negative economic effect on the majority of racetracks equipped with slot machines in that state.[85] From this finding, which critics of the study dubbed "misleading,"[86] the study concluded that a smoking ban in New Jersey casinos would drive gamblers to other states and cost casino employees their jobs.[87] State Senator John Adler, who sponsored the legislation that would become the New Jersey ban, noted this study in observing that "[t]he state is allowed to draw rational distinctions about what it regulates and why it regulates it."[88] This line of reasoning—that the casino exemption constitutes a legitimate effort to protect the economic interest and vitality of the casinos—has been found by at least one federal district court outside of New Jersey to be sufficient to justify a casino exemption to a smoking ban similar to that in New Jersey.[89]

II. FEDERAL CONSTITUTIONAL CHALLENGES TO STATE SMOKING BANS

This Comment focuses on whether the New Jersey Smoke-Free Air Act's exception of casinos comports with the New Jersey Constitution. However, it is appropriate to examine briefly several federal constitutional challenges that have arisen against similar smoking bans and the exceptions therein for two reasons. First, at the risk of stating the obvious, any federal constitutional objection to another state's smoking ban, assuming sufficient similarity between that ban and New Jersey's ban, will be equally applicable in New Jersey. Second, and more germane to the focus of this Comment, New Jersey's special law analysis at least resembles,[90] and in some instances mir-

estimate; the bill as first introduced in the Assembly, along with the sponsor's statement; a subsequent reprint of the bill before the Assembly; and the Assembly Health and Human Services Committee statement on the bill to the Assembly. *Id.* The substance of these documents is essentially limited to the language of the bill in several of its incarnations. *Id.*

[85] Gurney, *Odds Against A.C.*, *supra* note 83, at B01.

[86] *Id.*

[87] *Id.*

[88] Kaitlin Gurney, *Group Sues over Casino Exemption*, PHILADELPHIA INQUIRER, Mar. 8, 2006, at B01 [hereinafter Gurney, *Group Sues*]; *see also* Gurney, *N.J. Ban*, *supra* note 82, at A1 (citing Adler's mention of the New Jersey Casino Association study).

[89] *See* Coal. for Equal Rights, Inc. v. Owens, No. 06-CV-01145, 2006 U.S. Dist. LEXIS 42723, at *17 (D. Colo. June 23, 2006).

[90] *See, e.g.*, Paul Kimball Hosp., Inc. v. Brick Twp. Hosp., Inc., 432 A.2d 36, 45 (N.J. 1981) (stating that "[a]n analysis similar to that used in the equal protection model has traditionally been applied to determine if legislation is proscribed as special").

rors,[91] a federal constitutional equal protection analysis, one of the primary grounds upon which smoking bans and their exceptions have been challenged.[92]

A. Substantive Due Process

The Fourteenth Amendment of the United States Constitution states, in pertinent part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[93] In *Washington v. Glucksberg*,[94] the Supreme Court of the United States explained that "[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. . . . The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests."[95] Opponents of the smoking ban have argued that the imposition of a blanket prohibition of smoking in indoor areas denies smokers such a fundamental right under the Constitution, that being the right to smoke.[96]

Glucksberg, however, also expressed the Court's traditional reluctance to expand the field of fundamental rights under the umbrella of substantive Due Process.[97] To balance the Constitution's protection of fundamental rights with this reluctance to so categorize asserted rights, federal courts subject the asserted right to a two-part test.[98] The asserted right must be defined precisely[99] and then be determined as "deeply rooted in this Nation's history and tradition"[100] to be deemed a fundamental right.[101]

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[91] *See, e.g.*, Robson v. Rodriquez, 141 A.2d 1, 6 (N.J. 1958) (explaining that "[t]he test of whether a law constitutes special legislation is essentially the same as that which determines whether it affords equal protection of the laws").

[92] *See infra* notes 158–63 and accompanying text.

[93] U.S. CONST. amend. XIV, § 1.

[94] 521 U.S. 702 (1997).

[95] *Id.* at 719 (citation omitted).

[96] *See, e.g.,* Thiel v. Nelson, 422 F. Supp. 2d 1024, 1028 (D. Wis. 2006) (involving a plaintiff who asserted a fundamental right to smoke in a mental institution); New York City C.L.A.S.H. v. City of New York, 315 F. Supp. 2d 461, 473 (S.D.N.Y. 2004) (describing a lobbying group formed to promote the interests of smokers that attacked smoking ban as a violation of a fundamental right to smoke under substantive Due Process).

[97] *Glucksberg*, 521 U.S. at 720.

[98] *Id.* at 720–21.

[99] *Id.* at 721; *see also* Reno v. Flores, 507 U.S. 292, 302 (1993); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277–78 (1990).

[100] Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

[101] *Glucksberg*, 521 U.S. at 720–21.

Under the *Glucksberg* analysis, the various indoor smoking bans clearly fail to violate any fundamental right. Defined precisely, the right asserted is not the right to smoke, but rather the right to smoke in indoor public areas.[102] Such a right does not carry the unequivocal support of American tradition and history.[103] Quite the contrary, opposition to tobacco use in its variety of forms, and particularly such use in public and indoor areas, dates back to American colonial times.[104]

Federal courts have been unanimous in their rejection of substantive due process challenges to indoor smoking restrictions. In *New York City C.L.A.S.H. v. City of New York*,[105] the United States District Court for the Southern District of New York expressly stated that smoking bans do not interfere with any fundamental right.[106] Likewise, in *Thiel v. Nelson*, the United States District Court for the District of Wisconsin also declared that "smoking is not a liberty interest protected by the due process clause."[107] Such a federal challenge would fair no better in New Jersey. [108]

[102] None of the statewide indoor smoking bans purports to restrict smoking by individuals in their private residences. *See, e.g.,* COLO. REV. STAT. § 25-14-205 (2006) (expressly excluding private residences from the reach of the smoking ban); ME. REV. STAT. ANN. tit. 22, § 1542 (2005) (same); N.J. STAT. ANN. § 26:3D-59 (West 2006) (same).

[103] *See generally supra* notes 29, 40–62 and accompanying text.

[104] *Id.*

[105] 315 F. Supp. 2d 461 (S.D.N.Y. 2004). As discussed earlier, the substantive due process challenge to the New York Smoking Ban contained therein was just one of many challenges to the ban, including those based on Equal Protection, the Right to Travel, procedural Due Process, the Privileges and Immunities Clause, and the First Amendment. *See supra* note 12 and accompanying text.

[106] *New York City C.L.A.S.H.*, 315 F. Supp. 2d at 482.

[107] 422 F. Supp. 2d 1024, 1030 (D. Wis. 2006); *see also* Gasper v. La. Stadium & Exposition Dist., 577 F.2d 897 (5th Cir. 1978) (holding that there is no fundamental right to prevent smoking in public places, but also recognizing that there is no fundamental right to smoke in public places).

[108] An alternative substantive due process challenge mounted in Colorado, a state similar to New Jersey in its broad ban of indoor smoking and exemption of casinos, asserted that the fundamental right violated was the right of establishments to allow smoking on their premises. Coal. for Equal Rights, Inc. v. Owens, No. 06-CV-01145, 2006 U.S. Dist. LEXIS 42723, at *23–24 (D. Colo. June 23, 2006). This challenge met the same fate as prior due process challenges, with the court stating, "[t]he notion that the right to allow smoking in one's bar or restaurant is a fundamental right, equivalent to the other rights the Supreme Court has deemed fundamental . . . is to say the least, far fetched." *Id.* at *24.

B. Regulatory Taking

The Takings Clause, a part of the Fifth Amendment of the Federal Constitution, states that no "private property [shall] be taken for public use, without just compensation."[109] In interpreting this language, the Supreme Court has extended the Takings Clause beyond physical appropriation or occupation of property, holding that "a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'"[110] Alternatively, or perhaps as an extension of this prior holding, the Court has declared that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[111] While these standards allow for highly subjective and consequently varying interpretations,[112] these general formulations of the regulatory takings analysis suffice for the purpose of a brief evaluation of state indoor smoking prohibitions.

Opponents of smoking regulations argue, in this context, that the bans deprive bar and restaurant owners of economically beneficial use of their respective properties, or at least that the regulations frustrate the expectations the owners held upon investing in the property.[113] However, while the ever-evolving nature of takings analysis may render it a fertile field for federal challenges to state smoking bans,[114] it appears that one critical obstacle will hamper such challenges. Research on the effects of the bans on bar and restaurant revenue has come to no consensus that these prohibitions "frustrate

[109] U.S. CONST. amend. V.

[110] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978).

[111] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

[112] *See* Douglas W. Kmiec, *Institute of Bill of Rights Law Symposium Defining Takings: Private Property and the Future of Government Regulation: Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 995 (1997) (characterizing takings jurisprudence in general as a "1000-piece puzzle[]" and regulatory takings as an "ill-fitting piece[] left over from other puzzles long ago forgotten").

[113] *See, e.g.*, D.A.B.E., Inc. v. City of Toledo, 393 F.3d 692, 695 (6th Cir. 2005) (denying claims by plaintiff group of bar, restaurant, and bowling alley owners that an ordinance requiring the construction of separate smoking areas denied the plaintiffs economically viable use of their establishments).

[114] *See, e.g.*, Robert P. Hagan, Comment, *Restaurants, Bars and Workplaces, Lend Me Your Air: Smokefree Laws as Private Property Exactions—The Undiscovered Country for* Nollan *and* Dolan*?*, 22 J. CONTEMP. HEALTH L. & POL'Y 143, 149–50 (2005) (suggesting that the outcome of a Takings Clause challenge to state smoking bans is largely dependent upon how the argument is framed and, consequently, the standard that the court applies).

distinct investment-backed expectations,"[115] much less deprive restaurants or bars of "*all* economically beneficial uses,"[116] despite the dire contrary predictions of smoking ban opponents.[117] Considering the substantial presumption of validity of regulations passed under state police powers and attacked as regulatory takings,[118] it seems unlikely that the inconclusive research on the denial by smoking regulations of economically beneficial uses of property could support a takings challenge.[119]

In *D.A.B.E., Inc. v. City of Toledo*,[120] a group of bar, restaurant, and bowling alley owners challenged a city ordinance requiring that their establishments provide separate smoking lounges for their smoking customers on the ground that the ordinance amounted to a regulatory taking under the Federal Constitution.[121] On appeal, the United States Court of Appeals for the Sixth Circuit ruled that even if these establishments lost customers due to the regulation, this mere drop in customers would not be sufficient to demonstrate the denial of economically viable use of land necessary to render a regulation a taking.[122] While the Toledo regulation differs substantially from the New Jersey ban and other state bans discussed herein, the Sixth Circuit's reasoning that more than a mere drop in business is necessary to demonstrate a regulatory taking, particularly considering the inconclusive evidence on whether there is in fact any such drop caused by indoor smoking bans, would likely be applicable as a significant obstacle in a federal[123] challenge to these state bans.[124]

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[115] *Penn Cent. Transp. Co.*, 438 U.S. at 127.

[116] *Lucas*, 505 U.S. at 1019.

[117] *See, e.g.*, O'Reiley, *supra* note 75 (stating that "[p]ublished studies come to widely differing conclusions [regarding the effects of smoking bans on the business of bars and restaurants], largely reflecting the views of the groups that commissioned them," and describing the results of several such studies).

[118] *See* Kmiec, *supra* note 112, at 995 (describing the presumption of validity as "virtually insurmountable").

[119] *But see* Hagan, *supra* note 114, at 149–50 (suggesting that a takings challenge to these bans could be successful if framed as an exaction analysis, thus requiring a less deferential judicial standard). This analysis is beyond the scope of this Comment.

[120] 393 F.3d 692 (6th Cir. 2005).

[121] *Id.* at 694.

[122] *Id.* at 695.

[123] This Comment takes no position on the potential for success of a state regulatory taking challenge to the New Jersey Smoke-Free Air Act beyond noting that the Supreme Court of New Jersey has characterized New Jersey constitutional takings jurisprudence as "in general conformity" with federal constitutional principles. Gardner v. N.J. Pinelands Comm., 593 A.2d 251, 257 (N.J. 1991).

[124] *D.A.B.E., Inc.*, 393 F.3d at 695. The court also recited language used by the Supreme Court that would work against a takings challenge to state smoking bans. It said that "[e]ven if the ordinance 'prevent[ed] the most profitable use of [appel-

C. Equal Protection

Another federal constitutional ground upon which state smoking bans have been challenged, and one highly relevant to potential attacks to New Jersey's ban on state constitutional grounds,[125] stems from the Fourteenth Amendment, which states in pertinent part that "[n]o state shall . . . deny to any person[126] within its jurisdiction the equal protection of the laws."[127] The Supreme Court attempts to balance this principle with the reality that most legislation classifies individuals for separate treatment by requiring that, when "a law neither burdens a fundamental right[128] nor targets a suspect class . . . [, a legislative classification need only] bear[] a rational relation to some legitimate end" to comport with the Equal Protection Clause.[129] Under this analysis, the legitimate end need not be the actual purpose of the legislation, but rather any conceivable legitimate end.[130] Classifications deemed suspect and thus subjected to a higher standard of scrutiny are generally limited to those that distinguish based on race, alienage, national origin,[131] or gender.[132]

Proponents and opponents of indoor smoking bans argue that the exceptions that the bans generally provide for, such as the casino exception in New Jersey, arbitrarily classify and discriminate in favor of those entities to which the exceptions are granted—that is, that these classifications are not rationally related to any legitimate pur-

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lants'] property,' that would not be enough to establish a taking," and that "lost profits 'unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.'" *Id.* at 696 n.1 (quoting Andrus v. Allard, 444 U.S. 51, 65–66 (1979)).

[125] *See infra* notes 158–63 and accompanying text.

[126] "Person" as used in the Fourteenth Amendment has been interpreted to include more than individuals and would apply to enterprises challenging state smoking bans. *See, e.g.*, Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886) (interrupting counsel to halt argument on whether "person," as used in the Fourteenth Amendment, encompasses corporations, and holding that it does).

[127] U.S. CONST. amend. XIV, § 1.

[128] As already discussed, the state smoking bans involve no fundamental right. *See supra* notes 102–08 and accompanying text.

[129] Romer v. Evans, 517 U.S. 620, 631 (1996).

[130] U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980).

[131] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

[132] The Supreme Court expressly refused to equate "gender classifications, for all purposes, to classifications based on race or national origin" as subject to the highest equal protection scrutiny. United States v. Virginia, 518 U.S. 515, 532 (1996). Nonetheless, the Court held that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *Id.* at 531.

pose.[133] They contend that while the prohibition may promote a legitimate end—that of improved public health—the exception for certain indoor public areas in no way promotes such an end.[134] On its face, this argument seems self-evident; exceptions that allow continued smoking and the production of secondhand smoke in indoor areas could not be rationally related to the goal of promoting public health, as the exceptions do just the opposite.[135]

These equal protection arguments against smoking bans, however, fail to fully appreciate the deferential standard applied to classifications not involving a suspect class.[136] While the exceptions to the indoor smoking bans may not promote public health, classifications analyzed by the courts under a rational relationship test need not be rationally related to the stated, primary, or actual purpose of the legislation, but rather need only be rationally related to any plausible purpose.[137] Thus, in *Coalition for Equal Rights, Inc. v. Owens*,[138] the court found a plausible purpose of the Colorado indoor smoking ban's exemption of state casinos to be the economic protection of those casinos against the less regulated Native American casino competitors.[139] An exemption from the smoking ban, the court held, was rationally related to that end.[140] Likewise, a Connecticut court found the exception of Native American-run casinos[141] from the state's indoor smoking ban to be rationally related to concerns over the state's ability to enforce such a ban on Native American land, again a legitimate end, even if not the actual purpose of the legislation as a

[133] *See, e.g.,* Coal. for Equal Rights, Inc. v. Owens, No. 06-CV-01145 2006 U.S. Dist. LEXIS 42723 (D. Colo. June 23, 2006); Batte-Holmgren v. Galvin, No. CV044000287, 2004 Conn. Super. LEXIS 3313 (Conn. Super. Ct. Nov. 5, 2004); O'Reiley, *supra* note 75 (characterizing the exception as solely the result of favoritism of a powerful lobbying group).

[134] *Coal. for Equal Rights, Inc.*, No. 06-CV-01145, 2006 U.S. Dist. LEXIS 42723, at *15.

[135] *Accord* Editorial, *supra* note 79, at B11 (claiming that by excluding casinos, the New Jersey smoking ban does not go far enough in the protection of public health).

[136] *See* Heller v. Doe, 509 U.S. 312, 319 (1993) ("[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity."); New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("[T]his Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations.").

[137] U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980).

[138] No. 06-CV-01145, 2006 U.S. Dist. LEXIS 42723 (D. Colo. June 23, 2006).

[139] *Id.* at *17.

[140] *Id.*

[141] The conceivable legitimate purpose argument in this case would not be directly on point in New Jersey because New Jersey casinos are not on sovereign Native American lands.

whole or the exception.[142] Because at least one of these conceivable legitimate ends could similarly justify New Jersey's exception of casinos from its indoor smoking ban, a federal[143] equal protection challenge to the New Jersey ban would likely fail.

In fact, shortly before the New Jersey Smoke-Free Air Act took effect, the New Jersey Hospitality Industry for Fairness Coalition challenged the statute on equal protection grounds.[144] United States District Judge Chesler, in an unpublished ruling, held that a future lawsuit on such grounds would not succeed, and thus the state should not be enjoined from passing the law.[145]

III. NEW JERSEY SPECIAL LAW ANALYSIS

A. New Jersey Constitutional Treatment of Special Laws

The New Jersey Constitution states that "[n]o general law shall embrace any provision of a private, special or local character."[146] This general prohibition of private, special, or local[147] laws does not, however, completely preclude the possibility of such laws; the state consti-

[142] Batte-Holmgren v. Galvin, No. CV044000287, 2004 Conn. Super. LEXIS 3313, at *13–14 (Conn. Super. Ct. Nov. 5, 2004); *see also* Castaways Backwater Cafe, Inc. v. Marstiller, No. 2:05-cv-273-FtM-29SPC, 2006 U.S. Dist. LEXIS 60317 (D. Fla. Aug. 25, 2006) (finding that the Florida indoor smoking ban that excepted, among other areas, stand-alone bars, did not violate the Equal Protection Clause, as the economic considerations that supported the exception satisfied a rational relationship analysis).

[143] New Jersey's Constitution has been interpreted as containing an implicit Equal Protection Clause. Sojourner A. v. N.J. Dep't of Human Servs., 828 A.2d 306, 314 (N.J. 2003). Equal protection attacks on legislation under the New Jersey Constitution are not analyzed using the rational relationship test but rather a balancing approach that allows the courts "to examine each claim on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction." *Id.* at 315. While the federal and New Jersey tests weigh the same factors and often produce the same result, *id.*, the Supreme Court of New Jersey expressly declared that state equal protection principles provide New Jersey "citizens with greater rights . . . than those available under the United States Constitution." Lewis v. Harris, 908 A.2d 196, 220 (N.J. 2006). Whether the New Jersey Smoke-Free Air Act would survive state equal protection scrutiny is beyond the scope of this Comment.

[144] Grzyboski, *supra* note 70, at 1G.

[145] *See id.*

[146] N.J. CONST., art. IV, § 7, ¶ 7.

[147] Because private, special, and local have been interpreted as synonymous in the context of these constitutional provisions, this Comment will hereinafter refer to such laws simply as "special."

tution includes a process by which the legislature may pass such legislation.[148]

In *Vreeland v. Byrne*,[149] the Supreme Court of New Jersey described why many states have implemented general prohibitions of special laws:

> The legislative and judicial processes [have] developed along different lines . . . the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors. Over the course of time, as a result, the propensities of legislatures to indulge in favoritism through special legislation developed into a major abuse of governmental power.
>
> As the bulk of special laws grew, demands for reform became insistent, and constitutional prohibitions were enacted to limit the practice of enacting special legislation and to achieve greater universality and uniformity in the operation of statute law in respect to all persons.[150]

Thus, as the *Vreeland* court described, special law prohibitions, both in New Jersey and elsewhere, developed as a control on the tendency of legislatures to engage in favoritism and partiality, a tendency that would manifest itself in legislation passed for the benefit of particular groups.[151]

The New Jersey Constitution, except for the use of *special* as synonymous with private or local, does not define "special law," nor does it set any line between special and general laws.[152] However, New Jersey courts have been relatively consistent in their definition and analysis of special laws. In 1878,[153] the Supreme Court of New Jersey defined special laws as follows in *State ex rel. Van Riper v. Parsons*:[154]

> [S]pecial laws are all those that rest on a false or deficient classification; their vice is that they do not embrace all the class to which they are naturally related; they create preference and establish inequalities; they apply to persons, things or places possessed of certain qualities or situations, and exclude from their effect other

[148] N.J. CONST. art. IV, § 7, ¶ 8. The New Jersey Smoke-Free Air Act was not passed pursuant to this process. *See* N.J. STAT. ANN. § 26:3D-55 to -64 (West 2006).

[149] 370 A.2d 825 (N.J. 1977).

[150] *Id.* at 828 (quoting 2 SUTHERLAND, STATUTORY CONSTRUCTION § 40.01 (4th ed. 1973)).

[151] *Id.*

[152] *See* N.J. CONST. art. IV, § 7, ¶¶ 7, 8.

[153] New Jersey first precluded special laws governing certain subjects in 1875, and this prohibition passed with little change into the new state constitution in 1947. *Vreeland*, 370 A.2d at 828.

[154] 40 N.J.L. 1 (N.J. 1878).

> persons, things or places which are not dissimilar in these respects.[155]

While the definition and analysis have been formulated differently over the years, the substance of the *State ex rel. Van Riper* formulation remains essentially intact in New Jersey special law analysis.[156] *State ex rel. Budd v. Hancock*[157] further developed the *State ex rel. Van Riper* rule and sharpened the focus of the analysis on those parties excluded by a legislative classification, finding a law to be special when "by force of an inherent limitation, it arbitrarily separates some persons, places or things from others upon which, but for such limitation, it would operate. The test of a special law is the appropriateness of its provisions to the objects that it excludes."[158]

More recent formulations of the special law analysis have mirrored these prior cases. The most oft-cited case on New Jersey special law refers to both *State ex rel. Van Riper* and *State ex rel. Budd* in stating:

> In deciding whether an act is general or special, it is what is excluded that is the determining factor and not what is included. If no one is excluded who should be encompassed, the law is general. Another requirement of a general law is that it must affect equally all of a group who, bearing in mind the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves.[159]

Vreeland v. Byrne[160] likewise translated the early formulations into a method of special law analysis, with the first step being to "discern the purpose and object of the enactment," the second being "to apply it to the factual situation presented," before finally deciding "whether, *as so applied*, the resulting classification can be said to rest upon any rational or reasonable basis relevant to the purpose and object of the act."[161]

Comparisons between special law analysis and federal equal protection analysis naturally arise because both are concerned with clas-

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[155] *Id.* at 9.

[156] *See* Paul Kimball Hosp., Inc. v. Brick Twp. Hosp., Inc., 432 A.2d 36, 44–45 (N.J. 1981) (listing several formulations of the special law analysis, one of which cited *State ex rel. Van Riper* as support for its formulation).

[157] 48 A. 1023 (N.J. 1901).

[158] *Id.* at 1024.

[159] Harvey v. Bd. of Chosen Freeholders, 153 A.2d 10, 14 (N.J. 1959) (citations omitted).

[160] 370 A.2d 825 (N.J. 1977).

[161] *Id.* at 829. *See also* Mahwah v. Bergen County Bd. of Taxation, 486 A.2d 818, 826 (N.J. 1985) (applying *Vreeland* three-part test); Newark Superior Officers Ass'n v. Newark, 486 A.2d 305, 311–12 (N.J. 1985) (same).

sifications before the law. In fact, several New Jersey special law cases have equated the special law standard to an equal protection rational relationship standard, which legislation satisfies if it "bears a rational relation to some[162] legitimate end."[163] For instance, in *Robson v. Rodriquez*,[164] the Supreme Court of New Jersey expressly declared that "[t]he test of whether a law constitutes special legislation is essentially the same as that which determines whether it affords equal protection of the laws."[165] Likewise, while *Paul Kimball Hospital, Inc. v. Brick Township Hospital, Inc.*[166] toned down the language of *Robson* in referring to the tests as "similar" rather than "essentially the same," the opinion shortly thereafter employed principles common to the equal protection analysis, including that "an adequate factual basis for the legislative judgment [to create a particular classification] is presumed to exist" and that such legislative distinctions are strongly presumed to be constitutional.[167]

However, several of the aforementioned formulations of the special law analysis suggest a critical distinction from an equal protection rational relationship analysis. For instance, in *Vreeland*, the Supreme Court of New Jersey required as the first step in the special law analysis that "the purpose and object of the enactment," rather than any conceivable purpose, be discerned to determine if the classification in question rested upon a rational relationship to that purpose and object.[168] Even *Paul Kimball Hospital*, notwithstanding its allusion to the similarity of the equal protection and special law analyses and use of principles traditionally employed as part of the equal protection analysis, found the legislative classification at issue valid because

[162] As aforementioned, the legitimate end need not be the actual or primary purpose of the legislation, but rather any conceivable purpose. U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980).

[163] Romer v. Evans, 517 U.S. 620, 631 (1996).

[164] 141 A.2d 1 (N.J. 1958).

[165] *Id.* at 6.

[166] 432 A.2d 36 (N.J. 1981).

[167] *Id.* at 45; *see also* Phillips v. Curiale, 608 A.2d 895, 905 (N.J. 1992) (quoting *Robson* and reasoning that plaintiff's assertion that the statute in question denied him Equal Protection constituted a special law challenge); Mahwah v. Bergen County Bd. of Taxation, 486 A.2d 818, 827 (N.J. 1985) (quoting *Robson* and holding that, as in an equal protection rational relationship analysis, legislation containing a classification will be held valid if any conceivable basis justifies the classification); Harvey v. Bd. of Chosen Freeholders, 153 A.2d 10, 15 (N.J. 1959) (stating that a legislative classification is "presumed to rest upon a rational basis" in a special law analysis if any conceivable set of facts supports the classification).

[168] Vreeland v. Byrne, 370 A.2d 825, 829 (N.J. 1977).

it bore a rational relationship to "the purpose and object of the [legislation]," rather than merely any conceivable purpose.[169]

Admittedly, the difference between an analysis requiring a classification to bear a rational relationship to any conceivable purpose, a hallmark of the traditional rational relationship test, and one requiring a rational relationship to the stated, primary, or apparent purpose of a statute is a subtle one.[170] If the outcomes of New Jersey Supreme Court special law cases uniformly signaled that the traditional rational relationship test was being applied to determine the validity of a particular classification, then the subtle departures described in the previous paragraph from the equal protection model could easily be dismissed as insignificant linguistic imprecision, not reflective of the overarching holdings of the particular cases.[171] However, the Supreme Court of New Jersey has found classifications that would seem to meet a traditional rational relationship standard as invalid special laws,[172] inviting the suggestion that the special law standard is more demanding. As will be discussed,[173] the clarification of this grey area of New Jersey special law jurisprudence—whether a classification need be related to an actual purpose of a statute, or merely any conceivable purpose—is a critical one, as the determination will likely prove dispositive in the special law analysis of the New Jersey Smoke-Free Air Act.[174]

B. Representative Cases

A look at several New Jersey special law cases demonstrates both the lack of uniformity with which the court has applied the purpose aspect[175] of the special law analysis and the consequences of one formulation as opposed to the other. In *Harvey v. Board of Chosen Freeholders*,[176] for example, the Supreme Court of New Jersey not only de-

[169] *Paul Kimball Hospital, Inc.*, 432 A.2d at 46.

[170] *See supra* notes 156–69 and accompanying text.

[171] *See* New York v. United States, 505 U.S. 144, 207 n.3 (1992) (White, J., dissenting) (finding quotations from older cases alluded to by the majority to be mere "window dressing" in light of the many recent cases on the disputed issue that made no reference to the subject of these selective quotations).

[172] *See, e.g.,* Town of Secaucus v. Hudson County Bd. of Taxation, 628 A.2d 288 (N.J. 1993) (*see infra* notes 197–210 and accompanying text for a more thorough discussion of this case); *Vreeland*, 370 A.2d 825.

[173] *See infra* notes 238–85 and accompanying text.

[174] *Id.*

[175] *Purpose aspect* is the term this Comment will use to refer to whether the classification need bear a rational relationship to any conceivable purpose, or to the actual or apparent purpose.

[176] 153 A.2d 10 (N.J. 1959).

scribed the special law analysis in a manner nearly identical to a traditional rational relationship analysis, but clearly considered any conceivable purpose for the allegedly special legislation.[177] In *Harvey*, a supplement to a state pension statute provided that county freeholders could require any court attendant in the office of the sheriff who had served over twenty years and who was over sixty-five years of age to retire, provided that the attendant was a member of the state employee retirement system.[178] A court attendant forced to retire under the statute claimed that the exemption of employees not in the state retirement system rendered the statute an invalid special law.[179]

As previously discussed,[180] the oft-cited formulation of the special law analysis in *Harvey* focused on what is excluded from the purview of the legislation by the classification, and whether the law affects "equally all of a group who, bearing in mind the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves."[181] The opinion later clarified that the "purposes of the legislation" contemplated in the analysis are not limited to the legislature's stated or actual purposes, but rather "any conceivable state of facts which would afford reasonable support" for the classification.[182] Applying such a standard, the court held the classification to be valid, finding it conceivable, although not stated on the record, that "the legislature decided to exclude from retirement those over 65 and not members of the retirement system because the non-members would have no pension upon which to rely."[183] This classification, according to the court, was thus reasonably based on a balancing between the "financial ability to care for oneself and a policy judgment as to the desirability of limiting those over 65 in this type of hazardous work."[184]

Vreeland v. Byrne,[185] decided eighteen years later in a four-to-three decision, seemed to stray from the strict parallel between special law and equal protection analysis presented by *Harvey*. The challenged statute in *Vreeland* increased the salary of associate justices of the Supreme Court of New Jersey but denied that increase to any present member of the state senate or general assembly that was thereafter

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[177] *Id.* at 15.
[178] *Id.* at 13.
[179] *Id.*
[180] *See supra* note 159 and accompanying text.
[181] *Harvey*, 153 A.2d at 14 (citations omitted).
[182] *Id.* at 15.
[183] *Id.*
[184] *Id.*
[185] 370 A.2d 825 (N.J. 1977).

appointed to the bench.[186] When the governor nominated a member of the state senate to the court and the state senate confirmed the nomination, the validity of the statute took center stage.[187]

The *Vreeland* court applied a three-step approach to the special law analysis, determining first "the purpose and object of the enactment," then applying this determination to the facts presented, and finally deciding "whether *as so applied*, the resulting classification can be said to rest upon any rational or reasonable basis relevant to the purpose and object of the act."[188] The court determined the purpose of the statute to be solely to adjust judicial salaries.[189] Under the facts of the case, the statute would result in one justice, distinguished from the other justices only in that he had been a state senator at the time of the statute's passage, receiving a lower salary than the other justices.[190] This classification, the court concluded, did not rest upon a rational basis relevant to the aforementioned purpose, thus rendering the questioned statute unconstitutionally special.[191]

The dissent in *Vreeland*, apparently recognizing the divergence of the majority's application of the special law analysis from prior analyses more closely adhering to the traditional rational relationship model, identified a clearly "conceivable state of facts which would suggest a rational reason for the statutory exemption."[192] Conceivably, the dissent argued, the legislators that included the exception may well have wished to avoid the personal bias that the statute could have invoked if the judicial salary increases were made applicable to

[186] *Id.* at 827.

[187] *Id.* at 826–27. The special law provision at issue was not the broad prohibition of special laws absent a particular manner of public notification, but rather the absolute prohibition of special laws increasing or decreasing the term or tenure rights of public employees. *Id.* at 827. Additionally, the case was far more complicated than the typical special law challenge. *See id.* at 826–27. A group of taxpayer groups and state senators challenged the nomination, stating that it contravened a provision of the New Jersey Constitution that prohibited members of the state senate from being nominated during their term for any state civil office or position. *Id.* at 827. Both sides conceded that, were the state statute containing the judicial salary increase found to be unconstitutional as special legislation, the appointment would violate the state constitution in the manner argued by the plaintiffs. *Id*, at 827. Thus, while the judicial nominee would seem to be the party adversely affected by allegedly special legislation denying him a salary increase, he was among the parties defending the state statute as general legislation, as a contrary finding would render his nomination void. *Id.*

[188] *Id.* at 829.

[189] *Id.* at 828.

[190] *Id.* at 829.

[191] *Vreeland*, 370 A.2d at 829.

[192] *Id.* at 850 (Pashman, J., dissenting).

legislators that later took the bench.[193] The classification barring those that voted on the salary increase from taking part in the increase would clearly have borne a rational relationship to this conceivable purpose, the dissent contended, as the classification eliminated the possibility that personal bias directed the legislators' votes.[194] Thus, the dissent concluded, the law did not violate the prohibition of special laws.[195] Nonetheless, the majority rejected the argument concerning this conceivable purpose, instead focusing on the stated purpose of mere adjustment to judicial salaries and concluding that the distinction bore no rational relationship to this purpose.[196] The apparent split of the court in this case, on whether the classification need bear some rational relationship to the actual purpose of the legislation or merely to any conceivable purpose, accurately represents the divergent paths special law cases have taken at times in New Jersey.

The most recent New Jersey special law case also saw the Supreme Court of New Jersey split on its functional, if not nominal, adherence to a traditional rational relationship analysis in determining the reasonableness of the challenged classification.[197] In *Town of Secaucus v. Hudson County Board of Taxation*, the court considered a state law that exempted cities operating vocational programs for over twenty years in counties of certain population sizes and densities from payment of taxes toward county vocational schools.[198] Although the statute did not state so expressly, it effectively applied only to Bayonne,[199] allowing the city to pay a lower county tax rate due to its satisfaction of these requirements.[200]

The majority in *Town of Secaucus*, citing several special law cases including *Vreeland*, recited a special law analysis formula in line with a traditional equal protection rational relationship analysis.[201] Quoting *Budd*,[202] the court declared that a law is special "when, by force of an

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[193] *Id.*

[194] *Id.* at 850.

[195] *Id.* at 851.

[196] *Id.* at 829 (majority opinion).

[197] Town of Secaucus v. Hudson County Bd. of Taxation, 628 A.2d 288 (N.J. 1993). As in *Vreeland*, the special law provision at issue was an absolute prohibition, this one being the prohibition of special laws "[r]elating to taxation or exemption therefrom." *Id.* at 294 (quoting N.J. CONST. art. IV, § 7, ¶ 9(6)).

[198] *Id.* at 291.

[199] A law is not necessarily special because it applies only to a class of one. Paul Kimball Hosp., Inc. v. Brick Twp. Hosp., Inc., 432 A.2d 36, 46 (N.J. 1981).

[200] *Town of Secaucus*, 628 A.2d at 290.

[201] *See id.* at 294.

[202] State *ex rel.* Budd v. Hancock, 48 A. 1023, 1024 (N.J. 1901).

inherent limitation, it arbitrarily separates some persons, places or things from others upon which, but for such limitation, it would operate."[203] In determining whether the separation was arbitrary, the court stated that it need not limit its inquiry "to the stated purpose of the legislation, but should seek *any* conceivable rational basis" upon which the classification may rest.[204] The court then discerned two conceivable legitimate purposes to the legislation—avoiding double taxation of municipalities with their own vocational schools and promoting quality vocational schools in densely populated areas—but concluded its *Vreeland* analysis by holding that the exception of Bayonne bore no rational relationship to either of these two objectives.[205]

As in *Vreeland*, the *Town of Secaucus* dissent argued that the majority failed to consider adequately any conceivable purpose in its application of the special law analysis.[206] The lines drawn by the exception, the dissent contended, represented a reasonable attempt to relieve residents of municipalities of a certain population size and density with established vocational programs of the obligation of paying for a county vocational program of which those residents would be unlikely to avail themselves.[207] That the court did not find the boundaries of the classification reasonable was immaterial, the dissent continued, as "courts should not substitute their judgment for that of the Legislature in determining whether a legislative classification is rational."[208] In fact, the dissent emphasized, the majority expressly recognized at least a remote, and thus conceivable, possibility that the statute and exception related to the legislative purpose of promoting vocational programs in the most densely populated municipalities.[209] Because the conceivable purposes acknowledged by the majority formed a plausible basis for the contested exception, the dissent concluded, the majority erred in striking down the statute as an unconstitutional special law.[210]

One additional New Jersey trial court special law case warrants discussion in relation to the New Jersey indoor smoking prohibition, as the case concerns a statute that applies only to Atlantic City. In

[203] *Town of Secaucus*, 628 A.2d at 294.
[204] *Id.* at 294–95.
[205] *Id.* at 294–96.
[206] *Id.* at 305 (Stein, J., dissenting).
[207] *Id.* at 303.
[208] *Id.* at 305.
[209] *Town of Secaucus*, 628 A.2d at 305 (Stein, J., dissenting).
[210] *Id.*

Parking Authority of Atlantic City v. Board of Chosen Freeholders,[211] the plaintiff parking authority attacked as unconstitutional a state law that provided that:

> the "governing body of any county in which is located a municipality in which casino gaming is authorized" may adopt an ordinance or resolution creating a county transportation authority . . . . [The] county transportation authority shall have preemptive jurisdiction with respect to public transportation matters and shall be the exclusive instrumentality with responsibility for those services.[212]

In effect, this statute allowed for the dissolution of the existing municipal parking authority in Atlantic City,[213] the plaintiff, and established a new county public agency to carry out the same function.[214] Plaintiff parking authority asserted that the problems the legislature intended to solve with this statute, problems related to transportation, were not unique to Atlantic City, thus making the separate classification of Atlantic City for purposes of this statute arbitrary and in violation of the New Jersey Constitution.[215]

Atlantic City's unique New Jersey constitutional status injected the special law analysis in *Parking Authority of Atlantic City* with a novel issue—the "determination as to when it is appropriate to specifically classify Atlantic County as a unique area, based upon collateral problems which may arise as the result of casino gaming."[216] The court observed that the statute did not address a concern that is "inherently related" to gambling; rather, the legislation took aim at a problem "only derivatively the result of the implementation of casino gaming in Atlantic City."[217] While the separate constitutional treatment of Atlantic City in terms of gambling may serve as a tempting ground to justify other classifications, the court ruled that "the mere authorization of casino gaming in Atlantic City does not in and of itself justify the legislative classification contained in the County Transportation Authorities Act."[218] In other words, laws classifying Atlantic City for separate treatment do not survive special law analysis for the mere

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[211] 434 A.2d 676 (N.J. Super. Ct. Law Div. 1981).

[212] *Id.* at 679 (quoting N.J. STAT. ANN. § 40:35B-4, 6(a) (West 2006)).

[213] "Absent an organic change in the New Jersey Constitution, it is impossible for any other county to avail itself of the authority provided by the act." *Id.* at 681.

[214] *Id.* at 680.

[215] *Id.* at 681–82.

[216] *Id.* at 681.

[217] *Parking Auth. of Atlantic City*, 434 A.2d at 682.

[218] *Id.*

fact that Atlantic City is so classified in terms of gambling under the New Jersey Constitution.[219]

However, the court did not find Atlantic City's unique constitutional status immaterial to the special law determination.[220] Rather, it held that where the legislature directs a statute at a collateral problem resulting from the municipality's allowance of gambling, the statute's separate treatment of Atlantic City is reasonable "if a direct nexus can be established between the advent of casino gaming and the collateral problem created thereby."[221] As far as the statute at issue was concerned, the court found a sufficient nexus between the allowance of gambling in Atlantic City and the transportation problems posed by the resulting steady stream of visitors to justify separate classification of Atlantic City under the statute.[222]

No search for a conceivable purpose of the statutory classification in *Parking Authority of Atlantic City* was necessary, as the court found the classification contained in the statute to be reasonably related to the stated purpose of the legislation, to relieve Atlantic City of its unique transportation problems.[223] The opinion did recite the *Harvey* formulation of the special law analysis and noted, as virtually all special law cases do, the strong presumption of constitutionality for legislative classifications and the wide range of discretion the legislature is afforded in making such classifications.[224] However, the decision offered little overall insight regarding the purpose aspect of the special law analysis; the case's value in terms of this Comment centers squarely on the court's observations concerning the effect that Atlantic City's unique constitutional treatment plays in a special law analysis.[225]

C. Current Special Law Analysis

On one hand, the language of New Jersey special law analysis has remained relatively constant over the years. When the *Paul Kimball Hospital* opinion quoted *Van Riper* in characterizing special laws as those that "create preference and establish inequalities[,] . . . apply to persons, things or places possessed of certain qualities or situations, and exclude from their effect other persons, things or places which

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[219] *Id.*
[220] *Id.* at 684.
[221] *Id.*
[222] *Id.*
[223] *Parking Auth. of Atlantic City*, 434 A.2d at 684.
[224] *Id.* at 681.
[225] *Id.* at 680–85.

are not dissimilar in these respects,"[226] it cited a case over 100 years its elder. Similarly, *Town of Secaucus* recited a ninety-year-old special law analysis formulation when it drew language from *Budd*.[227] One might expect such continuity to create certainty as to the analysis employed in special law cases.

On the other hand, the analysis in relatively recent special law cases has seemed to vary, if not in form, then in substance, as to the purpose aspect of the analysis. This aspect is critical, as every formulation of the analysis requires some determination of whether the disputed classification is reasonable in terms of a legislative purpose.[228] The most recent special law case, *Town of Secaucus*, used the three-step special law analytical formula from *Vreeland* and at least recited that a court is not limited to the stated purpose of legislation but may consider any conceivable legitimate purpose in determining whether a classification is appropriate.[229] As was the case in *Vreeland*,[230] however, the majority in *Town of Secaucus* seemed to be far more critical of the legitimacy of conceivable purposes to the challenged legislation than the court had been in earlier special law cases, which applied a standard nearly identical to the highly deferential equal protection rational relationship model. [231] Each of these cases appeared to require that something more than a conceivable legitimate purpose serve as the basis for the challenged classification.[232] The passage of nearly fifteen years since *Town of Secaucus* without another New Jersey Supreme Court special law decision has only further obscured any conception of how courts are to apply the purpose aspect of the special law analysis.

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[226] Paul Kimball Hosp., Inc. v. Brick Twp. Hosp., Inc., 432 A.2d 36, 44 (N.J. 1981) (quoting State *ex rel.* Van Riper v. Parsons, 40 N.J.L. 1, 9 (N.J. 1878)).

[227] Town of Secaucus v. Hudson County Bd. of Taxation, 628 A.2d 288, 294 (N.J. 1993) (quoting State *ex rel.* Budd v. Hancock, 48 A. 1023, 1024 (N.J. 1901)).

[228] *See* Roe v. Kervick, 199 A.2d 834, 858 (N.J. 1964) (defining a law as general if it, among other things, "encompasses all of the subjects which reasonably belong within the classification"); Harvey v. Bd. of Chosen Freeholders, 153 A.2d 10, 14 (N.J. 1959) ("Another requirement of a general law is that it must affect equally all of a group who, bearing in mind the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves."); *State ex rel. Budd*, 48 A. at 1024 (asking whether the classification "arbitrarily separates some persons" and considering the "appropriateness" of a statute's provisions to those the statute excludes).

[229] *Town of Secaucus*, 628 A.2d at 294.

[230] Vreeland v. Byrne, 370 A.2d 825, 850 (N.J. 1977) (Pashman, J., dissenting).

[231] *Town of Secaucus*, 628 A.2d. at 305 (Stein, J., dissenting).

[232] *Vreeland*, 370 A.2d at 850 (Pashman, J. dissenting); *Town of Secaucus*, 628 A.2d at 305 (Stein, J., dissenting).

In the special law analysis of the New Jersey Smoke-Free Air Act, the observations from *Parking Authority of Atlantic City*, while not carrying the weight of law, shed some light on the special law consequences of Atlantic City's unique constitutional status.[233] The mere fact that the New Jersey Constitution affords Atlantic City separate treatment in regard to gambling does not justify, by itself, separate treatment in other regards.[234] In fact, even a law expressly aimed at a problem collateral to the allowance of gambling in Atlantic City requires a direct nexus between gambling and the problem.[235] A law classifying Atlantic City for separate treatment must at least have a conceivable, legitimate purpose to which the classification is rationally related,[236] and may require such a relationship to the law's actual purpose.[237]

IV. SPECIAL LAW ANALYSIS OF THE NEW JERSEY SMOKE-FREE AIR ACT

A. General Application

Since the Supreme Court of New Jersey has viewed the special law analysis as essentially unchanged over the past 100 years,[238] the court could apply any one of the several formulations of the analysis described herein to determine whether the New Jersey Smoke-Free Air Act, with its exception of casinos, constitutes a special law. The issue, in the language of the oldest New Jersey special law case,[239] is whether the indoor smoking ban embraces all members of the class—indoor public areas—that it is naturally related to, and whether the ban creates a preference for casinos and establishes inequalities for other indoor areas.[240]

Using the *Harvey* formulation, the class that is excluded—casinos—would be the crucial factor in the analysis.[241] If casinos should not be encompassed by the law, then the law is not rendered

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[233] Parking Auth. of Atlantic City v. Bd. of Chosen Freeholders, 434 A.2d 676, 682–84 (N.J. Super. Ct. Law Div. 1981).

[234] *Id.* at 682.

[235] *Id.* at 684.

[236] *Id.* at 680–84.

[237] *See supra* notes 168–74 and accompanying text.

[238] *See* Paul Kimball Hosp., Inc. v. Brick Twp. Hosp., Inc., 432 A.2d 36, 44 (N.J. 1981) (listing several formulations of the analysis, starting with the *Budd* formulation from 1901, as in agreement with one another).

[239] State *ex rel.* Van Riper v. Parsons, 40 N.J.L. 1 (N.J. 1878).

[240] *See id.* at 9.

[241] *See* Harvey v. Bd. of Chosen Freeholders, 153 A.2d 10, 15 (N.J. 1959).

special by virtue of the exclusion.[242] Another *Harvey* requirement for the ban to be considered a general law is that the indoor areas to which it is applied, bearing in mind the purpose of the legislation, must be distinguished from casinos by characteristics sufficiently marked and important to make them a class by themselves.[243]

Under the *Vreeland* formula, most recently used in *Town of Secaucus*,[244] the Supreme Court of New Jersey would first need to discern the purpose and object of the New Jersey Smoke-Free Air Act.[245] Then the court would have to decide whether the facts presented—the allowance of smoking in an indoor public area, casino floors, while smoking is disallowed in all other indoor public areas—demonstrate a rational basis relevant to the purpose and object of the act for the exception of casinos from the otherwise broad legislation.[246]

These restatements of the special law analysis in the context of the New Jersey smoking ban shed little light on the likely outcome of such an analysis. Rather, the outcome depends on whether the court requires the classification to bear a reasonable relationship to the actual or primary purpose of the legislation, or merely to bear such a relationship to any conceivable purpose.[247] Under either test, it is important to note that the mere fact that Atlantic City is distinguished by the New Jersey Constitution for separate treatment in the context of gambling likely does not render other separate treatment constitutionally permissible per se.[248] On the other hand, the mere fact that the law applies only to one municipality does not render it unconstitutionally special per se.[249]

B. Any Conceivable Purpose Analysis

If the Supreme Court of New Jersey interprets the purpose aspect of the special law analysis to allow for any conceivable purpose, then the New Jersey Smoke-Free Air Act will almost certainly be upheld as constitutionally valid. The stated and primary purpose of the

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[242] *See id.*

[243] *See id.*

[244] Town of Secaucus v. Hudson County Bd. of Taxation, 628 A.2d 288, 294 (N.J. 1993).

[245] *See* Vreeland v. Byrne, 370 A.2d 825, 829 (N.J. 1977).

[246] *See id.*

[247] *See supra* notes 175–210 and accompanying text (discussing cases such as *Harvey*, *Vreeland*, and *Town of Secaucus* that seem to employ the purpose aspect of the analysis in various manners).

[248] Parking Auth. of Atlantic City v. Bd. of Chosen Freeholders, 434 A.2d 676, 682 (N.J. Super. Ct. Law Div. 1981).

[249] Paul Kimball Hosp., Inc. v. Brick Twp. Hosp., Inc., 432 A.2d 36, 46 (N.J. 1981).

ban is to promote the public interest by protecting the "nonsmoking majority of the public" from the hazard of secondhand smoke in indoor public places and workplaces.[250] An argument that the exception of certain indoor areas is rationally related to this public health end, if possible, would clearly be strained. However, under this traditional rational relationship analysis, the exception does not become invalid for failure to bear a rational relationship to the stated purpose of the legislation.[251]

One could certainly conceive that the purpose of the casino exception to the Smoke-Free Air Act is to protect the economic interest of Atlantic City, a major New Jersey tourist attraction, against competing tourist areas that allow smoking in casinos.[252] The New Jersey Legislature expressly recognized the value of a thriving Atlantic City to the "general welfare, health and prosperity of the State" when it decided to use gambling as "a unique tool of urban redevelopment" for the city.[253] Furthermore, at least one study, albeit one that was sponsored by the New Jersey Casino Association and criticized by opponents of the casino exemption, concluded that a smoking ban in casinos would cause gamblers to choose other tourist destinations, costing the state millions in tourism revenue and costing thousands of casino employees their jobs.[254] Recognition that a smoking ban in casinos could undercut efforts to maintain Atlantic City's prominence as a tourist attraction[255] may have been balanced by the legislature against the public interest in protecting the nonsmoking majority from secondhand smoke[256] in enacting the Smoke-Free Air Act with the exception.

Finding a conceivable purpose for the exception of casinos to be the protection of tourism in Atlantic City,[257] the various formulations

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[250] N.J. STAT. ANN. § 26:3D-56 (West 2006).

[251] *See* Mahwah v. Bergen County Bd. of Taxation, 486 A.2d 818, 827 (N.J. 1985) ("[T]he court is not limited to the stated purpose of the legislation, but should seek *any* conceivable rational basis.").

[252] *See supra* notes 138–39 and accompanying text.

[253] N.J. STAT. ANN. § 5:12-1(b). The statute also states that "the restoration of Atlantic City as the Playground of the World and the major hospitality center of the Eastern United States is found to be a program of critical concern and importance to the inhabitants of the State of New Jersey." *Id.*

[254] Gurney, *Odds Against A.C.*, *supra* note 83, at B01.

[255] *See* Holl, *supra* note 73, at 6 (explaining casino operators fear that such a ban would result in gambler tourists deciding to go to Las Vegas or Native American-run casinos rather than Atlantic City).

[256] N.J. STAT. ANN. § 26:3D-56.

[257] A broader statutory purpose may exist in balancing the protection of public health with the economic interests of Atlantic City and other exempted areas.

of the special law analysis clearly favor the New Jersey Smoke-Free Air Act being upheld. Under the *State ex rel. Van Riper* test, the statute may still create a preference for casinos.[258] However, the class that the ban was meant for would not naturally embrace casinos, as the purpose of protecting the economic interest of Atlantic City would place a natural limit on the otherwise broad class.[259]

Likewise, in the language of *Harvey*, the conceivable economic interest purpose could dictate that casinos should not be encompassed by the law.[260] Bearing this purpose in mind, the indoor areas to which the ban is applied, or conversely, the indoor areas to which the exception is applied, would be "distinguished by characteristics sufficiently marked and important to make them a class by themselves."[261] The characteristic distinguishing casinos from essentially all other indoor public areas,[262] the importance of casinos to the economic interest of Atlantic City,[263] obviously bears a direct relation to the purpose of economic protection. Thus, interpreting the purpose aspect of the *Harvey* test to allow for any conceivable purpose clearly results in a finding that the New Jersey Smoke-Free Air Act withstands a special law attack.

Finally, the *Vreeland* analysis yields the same result. Allowing for any conceivable purpose, the court could discern the purpose, or at least a purpose, of the statute to be the protection of Atlantic City's tourist industry.[264] The facts presented—the allowance of smoking in an indoor public area, casino floors, while smoking is disallowed in all other indoor public areas—would then represent a perfectly rational result in terms of this purpose, reflecting the legislative decision that Atlantic City's casino floors must be exempted from the indoor smoking ban in order to achieve the purpose of economic protection.

The federal court decision in *Coalition for Equal Rights, Inc. v. Owens*[265] foreshadows this predicted outcome of a New Jersey special law challenge should the Supreme Court of New Jersey employ a traditional rational relationship approach. In *Owens*, the court found the economic protection of Colorado's casinos against less regulated

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[258] *See* State *ex rel.* Van Riper v. Parsons, 40 N.J.L. 1, 9 (N.J. 1878).

[259] *See id.*

[260] *See* Harvey v. Bd. of Chosen Freeholders, 153 A.2d 10, 15 (N.J. 1959).

[261] *Id.* at 14.

[262] *See supra* note 69 (listing the other classes of establishments that are exempt from the ban).

[263] *See* N.J. STAT. ANN. § 5:12-1(b) (West 2006) (describing casinos as a "unique tool of urban redevelopment" for Atlantic City).

[264] *See* Vreeland v. Byrne, 370 A.2d 825, 829 (N.J. 1977).

[265] No. 06-CV-01145, 2006 U.S. Dist. LEXIS 42723 (D. Colo. June 23, 2006).

Native American competitors to be a conceivable purpose to which Colorado's exception of casinos from its indoor smoking ban was rationally related.[266] Were the Supreme Court of New Jersey to apply the traditional rational relationship test to the virtually identical New Jersey statute and exception, and in consideration of a virtually identical statutory purpose, the court would almost certainly come to an identical conclusion—the validity of the statute.[267]

C. Actual or Stated Purpose Analysis

If the New Jersey Supreme Court interprets the purpose aspect of the special law analysis to require a rational relationship to the actual or stated purpose of a statute, then the New Jersey Smoke-Free Air Act faces a far more significant obstacle in a special law challenge. While the protection of the state's economic interest in a thriving Atlantic City is certainly a plausible purpose for the statute's exception of casinos, the statute recites no such purpose or findings that would support such a purpose.[268] In fact, the scant[269] information available on the legislators' intent in including the exception suggests that the exception developed not as an economic consideration, but as a conciliatory gesture to "the powerful casino industry and its allies in the legislature's South Jersey delegation" in order to ensure passage of the bill.[270]

Admittedly, the casino lobby's intent in opposing the bill was likely purely economic.[271] One might argue that this economic, policy-based concern was transferred to the legislature in the legislature's adoption of the casino exception. However, no part of the legislative history indicates that the legislature made any determination

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[266] *Id.* at *17.

[267] *See supra* notes 251–65 and accompanying text.

[268] *See* N.J. STAT. ANN. § 26:3D-56 (reciting the legislative findings relevant to the smoking ban).

[269] *See supra* note 84 (explaining that the legislative history on the Smoke-Free Air Act contains no hearing transcripts, debate transcripts, or witness testimony, and is essentially limited to restatements of the bill's language).

[270] Holl, *supra* note 73, at 6; *see also* Gurney, *Odds Against A.C.*, *supra* note 83, at B01 (describing the "public-health advocates" of the smoking ban in the legislature as accepting the casino exemption as a political necessity in the face of casino lobby opposition despite the secondhand smoke hazards that casino employees face, and quoting the chairman of the senate's health committee describing the exemption as undesirable but necessary to secure the needed votes); Ung, *supra* note 82, at B01 (describing an assemblywoman who sponsored the bill as regretting that the exemption of casinos was necessary to secure the bill's passage).

[271] *See* Gurney, *Odds Against A.C.*, *supra* note 83, at B01 (describing the economic analysis that served as the foundation for the "formidable offensive" that the New Jersey Casino Association mounted against the New Jersey Smoke-Free Air Act).

on the potential economic harm to the casinos from the smoking ban or that such potential harm outweighed the recognized[272] benefits to public health that the smoking ban created.[273] Rather, the statements of legislators that supported the bill indicate simply that, considering the sway of the casino lobbying group in the state legislature, the exemption was a political necessity.[274] Since the mere appeasement of a powerful lobbying group is not a legitimate government purpose for legislation or an exemption thereto, and is in fact the very evil the New Jersey special law prohibition was meant to prevent,[275] the apparent or actual purpose of the New Jersey indoor smoking ban seems limited to the stated purpose, that being the protection of the nonsmoking majority's health.[276]

Limiting the special law analysis to this actual and stated purpose, rather than considering any conceivable purpose, tilts the analysis toward a finding that the New Jersey Smoke-Free Air Act constitutes unconstitutional special legislation. In the terms of *State ex rel. Van Riper*, the statute seemingly fails to embrace a class—casinos—to which the statute is naturally related, as casinos possess no quality relevant to the public health purpose of the statute that distinguishes them from other indoor areas.[277] Thus, the statute seems to "create preference and establish inequalities," rendering it an unconstitutional special law.[278]

The *Harvey* test similarly favors a finding of the New Jersey smoking ban's unconstitutionality when limited to the stated and apparent purpose of the statute. Focusing, as *Harvey* requires, on the class ex-

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[272] N.J. STAT. ANN. § 26:3D-56.

[273] *See supra* notes 82–84 and accompanying text.

[274] *Id.*

[275] Vreeland v. Byrne, 370 A.2d 825, 828 (N.J. 1977) (quoting 2 SUTHERLAND, STATUTORY CONSTRUCTION § 40.01 (4th ed. 1973)) (explaining that the very evils special law prohibitions developed to combat were the "propensities of legislatures to indulge in favoritism"); *see also* Gurney, *Group Sues*, *supra* note 88, at B01 (quoting Rutgers University School of Law Professor Robert Williams that "[i]n a political sense, th[e] distinction was completely rational, because it wasn't going to pass otherwise. But that's not the way it would be interpreted in a court of law.").

[276] N.J. STAT. ANN. § 26:3D-56. Even Senator Adler's rather tepid defense of the exemption, that "[t]he state is allowed to draw rational distinctions about what it regulates and why it regulates it," was made in reference to an equal protection challenge to the legislation, not a special law challenge. Gurney, *Group Sues*, *supra* note 88, at B01. As previously discussed, this defense may not be relevant to a special law analysis, as such an analysis may require the distinction to be rationally related to the stated or actual purpose of the legislation, rather than merely any conceivable purpose. *See supra* notes 168–69, 184–210 and accompanying text.

[277] State *ex rel.* Van Riper v. Parsons, 40 N.J.L. 1, 9 (N.J. 1878).

[278] *Id.*

cluded from the legislation,[279] it seems evident that the public health purpose offers no basis for casinos falling outside the legislation's scope. In other words, no "sufficiently marked and important" characteristics, "bearing in mind the [public health] purpose[] of the legislation," distinguish casinos from other indoor areas covered by the ban.[280]

Confining the *Vreeland* formula to the stated or actual purpose of a statute[281] would also very likely result in a finding that the New Jersey Smoke-Free Air Act violates the New Jersey Constitution as a special law. Such a limitation would dictate that the "purpose and object of the enactment," to be determined as the first step of the *Vreeland* analysis,[282] is the protection of the nonsmoking majority's health.[283] This purpose offers no rational or reasonable basis for the exception that the factual situation presents, that being the exception of casinos from a smoking ban encompassing virtually all other indoor areas.[284] As the dissents in both *Vreeland* and *Town of Secaucus* implied, a limitation of the special law analysis to exclude conceivable but unstated or unintended purposes to the challenged legislation dramatically increases the likelihood that the challenged legislation will be struck down as special.[285]

One state court has in fact evaluated a smoking regulation against a state constitutional prohibition of special laws. In *City of Tucson v. Grezaffi*,[286] an Arizona appellate court considered a smoking regulation requiring that restaurants have separate smoking areas,[287] but not making the same requirement of bars and bowling alleys.[288] The court described the test of an allegedly special law as follows:

> In order to withstand a challenge as special legislation, a law must meet each of the following criteria: it must bear a rational relationship to a legitimate legislative objective; any classification the

[279] Harvey v. Bd. of Chosen Freeholders, 153 A.2d 10, 15 (N.J. 1959).

[280] *Id.*

[281] The language of the test, requiring a determination of "the purpose and object of the enactment," and the application in that case would seem to suggest such a construction. Vreeland v. Byrne, 370 A.2d 825, 829 (N.J. 1977).

[282] *Id.*

[283] N.J. STAT. ANN. § 26:3D-56 (West 2006).

[284] *See Vreeland*, 370 A.2d at 829.

[285] *See id.* at 850 (Pashman, J., dissenting) (arguing that the majority's failure to consider any conceivable purpose led to its holding that the challenged legislation was special); Town of Secaucus v. Hudson County Bd. of Taxation, 628 A.2d 288, 305 (N.J. 1993) (Stein, J. dissenting) (same).

[286] 23 P.3d 675 (Ariz. Ct. App. 2001).

[287] *Id.* at 679.

[288] *Id.* at 682.

> law creates "must apply uniformly to all cases and to all members within the circumstances provided for by the law"; and the law "must be elastic, or open, not only to admit entry of additional persons, places, or things attaining the requisite characteristics, but also to enable others to exit the statute's coverage when they no longer have those characteristics."[289]

Using this test, the court found that the smoking regulation's separate treatment of bars and bowling alleys did not constitute a special law.[290]

Even ignoring the differences between New Jersey's smoking ban and the far more limited city ordinance at issue in *Grezaffi*, a subtle difference between the Arizona and New Jersey special law tests renders the Arizona appellate decision of little guidance to the New Jersey special law analysis of the Smoke-Free Air Act. Under the Arizona test, the challenged law must bear some rational relationship to a legitimate objective.[291] However, the test states no requirement that the disputed classification or exception have any rational relationship to that or any objective.[292] Hence, because the smoking regulation in Arizona was rationally related to the legitimate purpose of public health, the court did not consider whether the exclusion of bars and restaurants bore any relationship to that objective, or any objective.[293]

New Jersey, on the other hand, requires that the "classification can be said to rest upon any rational or reasonable basis relevant to the purpose and object of the act" for the statute containing the classification to be held valid as a general law.[294] Thus, unlike in Arizona, both the statute and any classification therein must be found to bear a rational relationship to at least some conceivable legitimate purpose for the statute to withstand a special law challenge.[295] Because of this higher standard in New Jersey, at least compared to the Arizona special law analysis as applied in *Grezaffi*, the Arizona appellate court's decision is of little significance to the New Jersey special law analysis

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[289] *Id.* at 683 (quoting Republic Inv. Fund I v. Town of Surprise, 800 P.2d 1251, 1257–58 (Ariz. 1990)).

[290] *Id.* at 683–84.

[291] *Id.* at 683.

[292] *See Grezaffi*, 23 P.3d at 683. While the requirement that the classification "apply uniformly to all cases and to all members within the circumstances provided for by the law" may inject some consideration of the reasonableness of the classification, the court in *Grezaffi* did not consider the factor in a manner parallel to the New Jersey requirement that the classification bear some rational relationship to the purpose of the legislation. *See id.*

[293] *See id.* at 683–84.

[294] Vreeland v. Byrne, 370 A.2d 825, 829 (N.J. 1977).

[295] *Id.*

of its smoking ban. Rather, the question remains one likely to be determined by clarification of the purpose aspect of the special law analysis by the Supreme Court of New Jersey.[296]

CONCLUSION

New Jersey's special law cases simply do not paint a clear picture of the analysis courts would apply to the New Jersey Smoke-Free Air Act.[297] Those cases that not only recite but also apply a traditional rational relationship analysis, considering any conceivable purpose as a basis for a classification, clearly weigh in favor of a finding that the smoking ban is a constitutionally permissible general law.[298] Those that either recite that same standard but apply a more stringent one, or simply require an actual or stated purpose to be considered as the only possible basis for a classification, lean in the opposite direction—that the New Jersey Smoke-Free Air Act violates the New Jersey Constitution as a special law.[299]

[296] *See supra* notes 248–86 and accompanying text.
[297] *See supra* notes 226–37 and accompanying text.
[298] *See supra* notes 250–67 and accompanying text.
[299] *See supra* notes 268–85 and accompanying text.