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CONTENTS

THE *TWIN RIVERS*[1] CASE: OF HOMEOWNERS ASSOCIATIONS, FREE SPEECH RIGHTS AND PRIVATIZED MINI-GOVERNMENTS

By Paula A. Franzese[*] and Steven Siegel[**]

INTRODUCTION

One in eight New Jersey residents live in common interest communities ("CICs"),[2] a form of housing and community governance that encompasses planned housing developments,

[1] Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060 (N.J. 2007) [hereinafter *Twin Rivers*].

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The authors wish to thank Professor Frank Askin, counsel of record for the *Twin Rivers* plaintiffs, for his valuable insights and helpful comments.

[2] Edward R. Hannaman, *State and Municipal Perspectives - Homeowners Associations*, Rutgers University Center for Government Services Conference, at 2 (March 19, 2002) [hereinafter *Hannaman Report*].

condominiums, and housing cooperatives.[3] In the fastest growing parts of the State, CICs— particularly planned housing developments governed by *homeowner associations*—are the dominant form of new housing.[4] In 2002, it was estimated that the number of CICs in the State was growing at the rate of over six percent per year.[5]

The implications of this trend on the State's body politic are profound. Today, many larger CICs operate as an alternative to

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[3] In a planned single-family home development, a homeowner generally holds title to both the exterior and interior of a residential unit and the plot of land around it. The planned development association (often called a homeowners association) owns and manages common properties, which may include streets, parking lots, open spaces, and recreational facilities.

In a condominium, a homeowner holds title to a residential unit (sometimes just the interior of an apartment) and to a proportional undivided interest in the common spaces of an entire condominium property. A condominium association manages the common spaces, but does not hold title to any real property. A condominium property is usually situated in either a single high-rise apartment building or in attached housing units frequently known as "townhouses." In general, an owner of a condominium unit does not own, in individual fee, the ground under his or her unit, in contrast to the owner of a home in a planned single-family home development.

In a housing cooperative, the entire property is owned by a cooperative corporation, and the members of the cooperative own shares of stock in the corporation and hold leases that grant occupancy rights to their residential units. Housing cooperatives usually, but not always, are situated in apartment buildings. In the United States, the cooperative form of housing ownership is exceedingly rare, and is largely confined to owner-occupied apartment buildings in New York City.

[4] For example, the Twin Rivers community is located in Mercer County, a fast growing county in central New Jersey. As reported by the New Jersey Department of Community Affairs ("DCA"), greater than fifty percent of all purchasers of new homes in Mercer County in the years 1996-2000 were required to participate in a homeowners association. *See* Brief of Plaintiffs at 30, *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 890 A.2d 947 (N.J. Super. Ct. App. Div. 2006), *rev'd*, 929 A.2d 1060 (N.J. 2007) (quoting DCA records). Moreover, Plaintiffs argued that "[t]he current figures [on homeowners association participation in Mercer County] are probably closer to [seventy-five] percent since the statewide figures on community association participation increased by [fifty] percent between 1996 and 2000." *Id.*

[5] *Hannaman Report*, *supra* note 2, at 2.

traditional government with respect to a wide range of services. Many CICs maintain streets and parks, provide curbside refuse collection, operate water and sewer service, regulate land use and home occupancy, impose rules of general applicability on constituent homeowners, and collect fees from homeowners that are in many ways the functional equivalent of property taxes.[6] Not many years ago, those were the functions and services performed exclusively by local government.

Just as important, what was once public space has become private space. New Jersey has 566 municipalities.[7] Not too long ago, residents of those municipalities walked and drove on public streets, engaged in recreation and other activities in public parks, and held important meetings and gatherings in public squares. If present trends continue, New Jersey residents increasingly will live on private streets, will engage in recreation and other activities in private facilities, and will meet and discuss important issues in private "community centers."

Those trends lead inexorably to the conclusion that CICs play an increasingly central role in the daily life of New Jersey residents. New Jersey law, however, has continued to regard CICs as wholly private organizations that are largely exempt from any form of regulation or oversight. The *laissez-fare* approach to CIC regulation is reflected in the statutory law, which affords exceedingly few rights and protections to homeowners association residents, and in the common-law principles applied by New Jersey courts when resolving disputes arising over CIC governance.

In 1996, the New Jersey General Assembly appointed the Task Force to Study Homeowners' Associations. The Task Force was charged with making findings and recommendations "concerning the functions and powers of homeowners

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[6] *See* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 12-14 (1989) (hereinafter U.S. ADVISORY COMM'N REPORT).

[7] *See* New Jersey State League of Municipalities, http://www.njslom.org/njlabout.html.

associations."[8] In its Report, the Task Force put forth the following key finding:

> Current law provides . . .[homeowners association] boards great flexibility in their rulemaking and administrative powers. . . . [T]hese associations have traditionally been treated as corporations managing a business. *Some modification of this model appears to be necessary to address the increasingly governmental nature of the duties and powers ascribed to the homeowners association board.*[9]

Today, despite the Task Force's recommendations, the model remains unmodified. Legislation to reform CICs has not been enacted.[10]

On the judicial front, though, change is in the winds. The New Jersey Supreme Court recently decided *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association* ("*Twin Rivers*").[11] That case squarely addressed the scope and extent of free speech rights of residents of CICs. In turn, that critical issue forced the Court to first address the antecedent question: What is a CIC, and what legal paradigm should govern it?

In answering that critical question, the Court in *Twin Rivers* was confronted with a variety of doctrinal choices. Those choices included, most fundamentally, a robust expansion of constitutional doctrine to protect the free-speech rights of CIC residents. At the other extreme, the Court could have used the case simply as a means to ratify the application to CICs of

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[8] *Assembly Task Force to Study Homeowners' Associations Report*, January 1998, at 1, *available at* http://www.njleg.state.nj.us/legislativepub/reports/homeown.pdf [hereinafter *Assembly Task Force Report*].

[9] *Id.* at 2 (emphasis added).

[10] *See, e.g.*, Common Interest Community and Homeowner' Association Act, S. 308, 213th Leg. (N.J. 2008); New Jersey Uniform Common Interest Ownership Act, A. 1991, 213th Leg. (N.J. 2008) (pending legislation pertaining to homeowners associations and other common interest communities).

[11] 929 A.2d 1060 (N.J. 2007).

existing laws of contract and property. Those laws traditionally have been applied to CICs and, most importantly, to the conduct of their governing boards. Ultimately, the Court's resolution places it somewhere in the middle of that range, providing a framework for a new constitutional approach to free speech in the context of homeowners associations, while also making clear that traditional private law concepts remain fully applicable to homeowners associations. The Court, however, left the contours of the new constitutional framework largely undefined.

In this essay, we discuss the array of doctrinal choices that were before the Court. We then turn to analyze the somewhat ambiguous—yet exceedingly significant—doctrinal choice that the Court actually made. Although at first glance the *Twin Rivers* decision does not appear to constitute a bold proclamation of new doctrine, a more careful analysis of the Court's opinion reveals that the Court did indeed announce the framework of a new constitutional approach to CICs. That framework, although largely undefined in its details, provides a conceptual basis for a robust constitutional right of free speech and assembly applicable to CIC residents. In the following analysis, we describe the Court's new constitutional approach and identify the many critical questions that will need to be answered in future decisions by the Court.

I. RELEVANT ANTECEDENTS: FEDERAL AND STATE CONSTITUTIONAL FREE SPEECH DOCTRINE AS APPLIED TO PRIVATE PROPERTY

The critical question before the New Jersey Supreme Court in the *Twin Rivers* case was whether, and under what circumstances, residents of homeowners associations may invoke constitutional free speech protections against the actions of their governing boards.[12] Significantly, the constitutional question posed in *Twin Rivers* did not arise under the First Amendment of the Federal Constitution. Rather, the constitutional question concerned the application of the free speech guarantee of the New Jersey Constitution.[13]

[12] *Twin Rivers*, 929 A.2d at 1063.

[13] *Id.*

The free speech clause of the First Amendment and the counterpart free speech guarantee of the New Jersey Constitution are not identical. For example, although both the First Amendment and New Jersey's free speech guarantee apply to certain forms of *non-governmental* abridgement of speech and expression, the scope of New Jersey's protection is considerably more robust than that of the First Amendment.

The application of First Amendment protection to speech on private property is governed by the "state action" doctrine. The seminal case is *Marsh v. Alabama*,[14] in which the United States Supreme Court held that First Amendment protections extended to certain forms of private property held open for public use.[15] In particular, the Court in *Marsh* determined that the First Amendment was violated when the private owners of a company town prevented the distribution of literature in its downtown business district.[16] The Court, in essence, held that the company town had all the essential attributes of a municipality, and, accordingly, the private owner's action amounted to state action sufficient to trigger the application of the First Amendment.[17]

Two decades after *Marsh*, the United States Supreme Court considered the application of state action doctrine to privately owned shopping centers. In *Amalgamated Food Employees Union Local 509 v. Logan Valley Plaza, Inc.*,[18] the Court held that a privately-owned shopping center held open to the public was subject to the requirements of the First Amendment.[19] The Court noted that the Logan Valley Plaza shopping center was "clearly the functional equivalent of the business district . . . in *Marsh*."[20] That expansive reading of *Marsh* remained the law for fewer than ten years.

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[14] 326 U.S. 501 (1946).

[15] *Id.*at 509.

[16] *Id.* at 508-09.

[17] *Id.* at 506.

[18] 391 U.S. 308 (1968).

[19] *Id.* at 319.

[20] *Id.* at 318.

In *Hudgens v. NLRB*,[21] the Court expressly overturned *Logan Valley* and adopted a considerably more narrow reading of *Marsh*. Under this reading, it is not enough that private property held open for public use is the functional equivalent of a portion of a town, such as a town's business district. Significantly, the Court in *Hudgens* determined that, for constitutional purposes, an "entire town" must consist of a totality of major features, including "residential buildings, streets, a system of sewers, a sewage disposal plant and 'business block' on which business places are situated."[22] Under this reading, First Amendment guarantees do not apply to expressive activity undertaken in privately-owned shopping centers. The *Hudgens* standard remains the prevailing federal constitutional template.

Against this backdrop of federal constitutional doctrine, the New Jersey Supreme Court, in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*,[23] considered the application of the state constitution's free speech guarantee to privately-owned shopping centers.[24] The Court made it clear that New Jersey's free speech guarantee, unlike its federal counterpart, was "not limited to protection from government interference."[25] Instead, "[p]recedent, text, structure and history all compel the conclusion that New Jersey Constitution's right of free speech is broader than the right against governmental abridgement of speech found in the First Amendment."[26] New Jersey's right of free speech was "affirmative," and under certain conditions, protected free speech "even when exercised on . . . private property."[27] Applying the broad speech-protective principles of the state

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[21] 424 U.S. 507 (1976).

[22] *Id.* at 516 (quoting *Marsh*, 326 U.S. at 502).

[23] 650 A.2d 757 (1994).

[24] *Id.*

[25] *Id.* at 770.

[26] *Id.*

[27] *Id.*

constitution, the Court in *Coalition* determined that the state constitution's free speech guarantee applies, under certain circumstances, to speech and expression undertaken in privately-owned shopping centers.[28]

Coalition applied a three-part test to balance the relevant free speech and private property rights. That test requires that a court consider "(1) the nature, purposes, and primary use of such property, generally, its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property."[29] Applying those factors, the Court, in essence, concluded that privately-owned shopping centers were sufficiently "public" in character that the expressional activity at issue—leafleting—could not be unreasonably infringed by the owners of the shopping centers.[30]

In determining that New Jersey's regional shopping centers could, in effect, be deemed constitutional actors for purposes of the state constitution's free speech guarantees, the Court in *Coalition* carefully considered the dramatic growth of New Jersey's shopping centers in recent decades, and their assumption of a critical public role once exclusively played by downtown business districts. In this regard, it is instructive to quote at length from Chief Justice Wilentz's opinion:

> Statistical evidence tells the story of the growth of shopping malls . . . [F]rom 1972 to 1992, the number of regional and super-regional malls in the nation increased by roughly 800%.
>
> . . . .
>
> The converse story, the decline of downtown districts is not so easily documented by statistics. But for purposes of this case, we do not need

[28] *Id.* at 783.

[29] Coalition, 650 A.2d at 771 (citing State v. Schmid, 423 A.2d 615, 630 (N.J. 1980)).

[30] *Id.* at 775.

> statistics. This Court takes judicial notice of the fact that in every major city of this state, over the past twenty years, there has been not only a decline, but in many cases a disastrous decline. This Court further takes judicial notice of the fact that this decline has been accompanied and caused by the combination of the move of residents from the city to the suburbs and the construction of shopping centers in those suburbs. *See Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 512 Pa. 23, 515 A. 2d 1331, 1336 (1986) ("Both statistics and common experience show that business districts, particularly in small and medium sized towns, have suffered a marked decline. At the same time, shopping malls, replete with creature comforts, have boomed.").
>
> That some downtown business districts have survived, and indeed thrive, is also fact, demonstrated on the record before us. The overriding fact, however, is that the movement from cities to the suburbs has transformed New Jersey, as it has many states. The economic lifeblood once found downtown has moved to suburban shopping centers, which have substantially displaced the downtown business districts as the centers of commercial and social activity.
>
> The defendants in this case cannot rebut this observation. Indeed, the shopping center industry frequently boasts of the achievement. The industry often refers to large malls as "'the new downtowns.'" Note, *Private Abridgment of Speech and the State Constitutions,* 90 Yale L.J. 165, 168 n. 19 (1980) (citation omitted). It correctly asserts that "the shopping center is an integral part of the economic and social fabric of America." International Council of Shopping Centers, *The Scope of the Shopping Center*

Industry in the United Slates, 1992-1993, ix (1992).

Industry experts agree. One recent study asserted "[t]he suburban victory in the regional retail war was epitomized by the enclosed regional mall. . . . [Regional malls] serve as the new 'Main Streets' of the region—the dominant form of general merchandise retailing." James W. Hughes & George Sternlieb, *Rutgers Regional Report Volume III: Retailing and Regional Malls* 71 (1991). Beyond that, one expert maintains that shopping centers have "evolved beyond the strictly retail stage to become a public square where people gather[]; it is often the only large contained place in a suburb and it provides a place for exhibitions that no other space can offer." *Specialty Malls Return to the Public Square Image,* Shopping Center World, Nov. 1985, at 104.

Most legal commentators also have endorsed the view that shopping centers are the functional equivalent of yesterday's downtown business district. *E.g.*, James M. McCauley, Comment, *Transforming the Privately Owned Shopping Center into a Public Forum: PruneYard Shopping Center v. Robins*, 15 U. Rich. L. Rev. 699, 721 (1981) ("[P]rivately-owned shopping centers are supplanting those traditional public business districts where free speech once flourished."); Note, *Private Abridgment of Speech and the State Constitutions, supra,* 90 Yale L.J. at 168 ("[T]he privately held shopping center now serves as the public trading area for much of metropolitan America.").

Statisticians and commentators, however, are not needed: a walk through downtown and a drive through the suburbs tells the whole story. And those of us who have lived through this transformation know it as an indisputable fact of

> life, and that fact does not escape the notice of this Court.[31]

In light of those considerations, the Court in *Coalition* did not hesitate to conclude that shopping centers are, in effect, the new downtowns, and consequently, that the free-speech rights secured by the state constitution could not be denied or abridged merely by reason of their nominally private status. The Court held:

> The significance of the historical path of free speech is unmistakable and compelling: the parks, the squares, and the streets, traditionally the home of free speech, were succeeded by the downtown business districts . . . . Those districts have now been substantially displaced by [shopping] centers. If our State constitutional right of free speech has any substance, it must continue to follow that historic path.[32]

The *Coalition* Court's careful consideration of New Jersey's changing public/private dynamic seemed to provide a solid conceptual foundation to the resolution of the closely analogous constitutional question presented in *Twin Rivers*. In *Coalition*, the Court concluded that the "historical path of free speech"[33] had led from downtown business districts to privately-owned shopping centers, and that the "State constitutional right of free speech . . . must continue to follow that historic path."[34] Similarly, in *Twin Rivers*, the relevant constitutional question was whether the "historical path of free speech" has moved from *public* municipalities to *private* homeowners associations.

The New Jersey Supreme Court in *Twin Rivers*, however, declined to directly answer this critical constitutional question arising from the Court's analysis of the public/private dynamic

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[31] *Id.* at 766-68.

[32] *Id.* at 778.

[33] *Id.*

[34] *Id.*

in *Coalition*. Instead, the Court adopted an altogether different approach to the resolution of the constitutional issue.

In Part II, we analyze the approach adopted by the Court. The Court's approach raises as many questions as it answers. Although the approach is not free from ambiguity, the Court unmistakably signaled its intention to apply constitutional constraints to homeowners associations when associations unreasonably abridge the speech of their residents. We consider some of the many implications that flow from this ruling.

In Part III, we delineate the constitutional road *not* taken by the Court. That road, succinctly stated, would have had the Court apply the spirit (if not the letter) of *Coalition*, to declare that the New Jersey Constitution properly applies to homeowners associations for the same reason that it applies to shopping centers: *i.e.*, the constitution must adopt to new realities as formerly public space becomes privatized. In particular, we advance the premise that the "historical path of free speech," so eloquently identified in *Coalition*, is leading away from *public* municipalities and leading toward *private* homeowners associations. We argue that that the Court, consistent with its holding in *Coalition*, should have "follow[ed] that . . . path."[35]

II. THE *TWIN RIVERS* DECISION: THE COURT'S DEPARTURE FROM THE *COALITION* DOCTRINE AND ITS ADOPTION OF A NEW *SUI GENERIS* FREE SPEECH STANDARD FOR HOMEOWNERS ASSOCIATIONS

The *Twin Rivers* case involved the application of free speech principles to a private community of approximately 10,000 residents.[36] The Twin Rivers development is comprised of homes, retail businesses, streets, and common areas.[37] The community has within it various commercial businesses such as

[35] *Id.*

[36] 890 A.2d at 953.

[37] *Id.*

dry cleaners, gas stations, and banks.[38] Several public facilities operated by the municipality are also located within Twin Rivers, including schools, a county library and a firehouse.[39] There are thirty-four private roads within the community that are open to public traffic.[40] In addition, a state highway runs through the development.[41] The homeowners association maintains the streets and common areas, provides street lighting and snow removal, and operates a refuse collection service.[42] It is vested with rule-making and enforcement powers. Violations of the rules are punishable by fines, which can range in amount from $50 to $500.[43] The homeowners association collects fees and dues from residents that are the functional equivalent of real estate taxes.[44]

The key free-speech issues in *Twin Rivers* involved the association's policies concerning the posting of signs and the use of the community room. The association's sign-posting policy permits each homeowner to "post a sign in any window of [his or her] residence and [to post a sign] outside in the flower beds so long as the sign was no more than three feet from the residence."[45] The policy also prohibits the posting of signs on community property.[46] The association's policy governing the use of its community room requires that a resident post the sum of $415, of which $250 constitutes a refundable security

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Twin Rivers, 929 A.2d at 1064.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

deposit.[47] Additionally, a resident desiring use of the room is required to procure a certificate of insurance.[48]

The critical question presented to the Court was whether the homeowners association's regulation of expressive activity is subject *exclusively* to the traditional private-law doctrines of contract and property, or is also subject to the requirements of the New Jersey Constitution. The Court held that a homeowners association's regulations are not subject *exclusively* to the private-law doctrines of contract and property. Rather, aggrieved residents may also seek constitutional redress.[49]

The *Twin Rivers* decision is not a model of clarity. A substantial portion of the Court's opinion is devoted to underscoring that homeowners associations generally should be treated as entirely private entities, and thereby principally governed by the traditional laws of contract and property. The Court found that the "nature, purposes and primary use of Twin Rivers' property is for private purposes."[50] Elsewhere in the opinion, the Court stressed that traditional private-law doctrines—such as the business judgment rule—are unquestionably applicable to the actions of homeowners associations.[51]

Although the Court reaffirmed the applicability of private-law doctrines to homeowners associations, it also recognized

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[47] *Id.*

[48] Twin Rivers, 929 A.2d at 1064. For a discussion of Twin Rivers' *present* policy concerning the use of its community room, *see infra* notes 105-113. Notably, Twin Rivers' present policy *precludes* the use of the community room for any "political purposes." Resolution 2004-05 of the Twin Rivers Homeowners Association, *Policy for Establishing Rules and Regulations for the Use of the Community Room*, ¶ 7. That policy (which was adopted during the pendency of the appeal of the *Twin Rivers* litigation to the Appellate Division) was not before the Supreme Court, and, consequently, the Supreme Court's decision did not pass on the reasonableness of the Association's policy banning all political use of the community room. *See infra* notes 105-107 and accompanying text.

[49] *Id.* at 1074.

[50] *Id.* at 1072-73.

[51] *Id.* at 1074-75.

that, in certain circumstances, residents may invoke the state constitution's free-speech protections against the actions of those associations. The lynchpin of the Court's opinion is this passage:

> We recognize the concerns of plaintiffs that bear on the extent and exercise of their constitutional rights in this and other similar common interest communities. At a minimum, any restrictions on the exercise of those rights must be reasonable as to time, place, and manner. Our holding does not suggest, however, that residents of a homeowners association may never successfully seek constitutional redress against a governing association that unreasonably infringes their free speech rights.[52]

The contingency of this language does not, at first glance, suggest that the Court was boldly proclaiming the recognition of a new constitutional right. Nevertheless, the Court's determination is clear and unmistakable: constitutional protections, under appropriate circumstances, *do apply* when homeowners associations abridge the free speech of their residents. That pronouncement represents a fundamental doctrinal clarification with respect to the status of homeowners associations in New Jersey.

Perhaps the most ambiguous and confusing aspect of the opinion is the Court's recitation of why the *Coalition* doctrine—*i.e.*, the established tripartite test for application of the state constitution's free speech clause—is *inapplicable* to homeowners associations. As noted, the *Coalition* test requires that a court consider "(1) the nature, purposes, and primary use of such property, generally, its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property."[53] In *Coalition*, the Court applied those factors and

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[52] *Id.* at 1074.

[53] *Id.* at 1068 (quoting State v. Schmid, 423 A.2d 615, 530 (1980)). *See also* Coalition, 650 A.2d at 771.

concluded that privately owned shopping centers are sufficiently "public" in character that the expressional activity at issue—leafleting—could not be unreasonably infringed by the owners of the shopping centers.[54]

By contrast, the Court in *Twin Rivers* determined that *none* of these factors applied to the Twin Rivers community. With respect to the first factor in the *Coalition* test—*i.e.,* the "primary use" of the property—the Court found that the "primary use" of Twin Rivers is "residential."[55] In so finding, the Court appeared to discount certain undisputed facts in the record, including the facts that the Twin Rivers community contains retail businesses and contains streets (including a State highway) open to public traffic.[56] Furthermore, the Court equated "residential" with inherently "private"—a determination made without explanation, and one that is inconsistent with the long held notion that streets held open to the public serve a vitally important function in connection with the rights of free expression and assembly.[57] Based on the foregoing

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[54] Coalition, 650 A.2d at 780-83.

[55] Twin Rivers, 929 A.2d at 1072.

[56] *See id.* at 1073.

[57] The branch of First Amendment jurisprudence known as the "public forum" doctrine is premised on the Supreme Court's recognition that speech conducted on streets—including streets situated in residential areas—is entitled to special protection and solicitude under the First Amendment. See, e.g., Schneider v. Irvington, 308 U.S. 147, 151-52 (1939); Hague v. Comm. of Indus. Orgs., 307 U.S. 496, 515-16 (1939) (Roberts, J., plurality opinion). The doctrine is generally confined to publicly owned streets and parks. But see Marsh v. Alabama, 326 U.S. 401 (1946) (applying limited free speech rights to a privately owned street situated in a "company town"). For a discussion of the United States Supreme Court's more recent narrow construction of the Marsh doctrine, see supra notes 18-22 and accompanying text.

The streets in Twin Rivers are not publicly owned streets, and thus are not literally traditional public fora under the First Amendment (unless the *Marsh* doctrine were to apply). However, for present purposes, the important point is that the Supreme Court's recognition of the public forum doctrine is grounded in the historical fact that the property in question—*i.e.*, streets held open for public use—is vitally important to the freedom of speech and assembly. Justice Roberts' famous plurality opinion in Hague v. Committee of Industrial Organizations is instructive:

determinations, the Court concluded that "the nature, purposes and primary use of Twin Rivers' property is for private purposes and does not favor a finding that the association's rules and regulations violated plaintiffs' constitutional rights."[58]

The Court also found that the Twin Rivers community did not satisfy the second *Coalition* factor. The Court held that there was no public invitation to use Twin Rivers' property. Here again, the Court discounted or disregarded the undisputed facts that the streets in the Twin Rivers community were open to public traffic and that there existed several retail businesses in the community.[59] Furthermore, the Court rejected the alternate

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> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague v. Comm. of Indus. Orgs., 307 U.S. 496, 515-16 (1939) (Roberts, J., plurality opinion).

Justice Roberts' observation is certainly relevant to the precise issue that was before the Court in *Twin Rivers* when that Court applied the *Coalition* factors to the streets of Twin Rivers. As previously noted, it is undisputed that the streets in the Twin Rivers community—although owned by a private homeowners association—are held open to the public. *See* Twin Rivers, 890 A.2d at 953. It is therefore puzzling that the Court in *Twin Rivers*, in applying the first and second *Coalition* factors, summarily concluded—without any discussion whatsoever—that a "residential" street held open to the public is deemed "private" for purposes of the Court's analysis under the state constitution. Twin Rivers, 929 A.2d at 1072-73. That conclusion seems antithetical to the Court's prior expansive view of the extent of free speech rights secured by the New Jersey State Constitution as well as to the long-held notion that streets held open to the public (even when such streets are situated in residential areas) are of special significance with respect to the freedom of speech and assembly. *See* Coalition, 650 A.2d at 775-76.

[58] Twin Rivers, 929 A.2d at 1072-73.

[59] *Id.* at 1073.

theory of "public invitation" arising from the fact that members of the public may purchase or rent homes in Twin Rivers.[60]

Finally, the Court found that the Twin Rivers community did not satisfy the third *Coalition* factor. That factor "concerns the purpose of the expressional activity in relation to both the public and private use of the property."[61] The Court, examining the association's restrictions on sign posting and use of the community room, determined that "[P]laintiff's expressional activities are not unreasonably restricted."[62]

The Court concluded: "Neither singularly nor in combination is the *Schmid/Coalition* test satisfied in favor of concluding that a constitutional right was infringed here."[63] Because the *Coalition* doctrine is the Court's established constitutional standard applicable to the abridgement of free speech on private property, that determination could be understood to mean that an aggrieved homeowner's sole remedy against an association's speech-infringing regulations lies *exclusively* in the private-law doctrines of contract and property.

That is decidedly not the case. The Court in *Twin Rivers*, following its application of the *Coalition* test, went on to recognize the following separate and distinct constitutional standard that is applicable to homeowners associations' regulation of expressive activities:

> We recognize the concerns of plaintiffs that bear on the extent and exercise of their constitutional rights in this and other similar common interest communities. At a minimum, any restrictions on the exercise of those rights must be reasonable as to time, place, and manner. Our holding does not suggest, however, that residents of a homeowners association may never successfully seek constitutional redress against a governing

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[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 1074.

> association that unreasonably infringes their free speech rights.[64]

The Court in *Twin Rivers* left undefined the scope and application of this constitutional remedy.[65] Suffice it to say that it may well require many years of appellate litigation before the precise contours of this remedy are fully delineated.

For present purposes, some aspects of the *Twin Rivers* constitutional remedy can be readily inferred. The remedy appears to implicate an entirely new standard, wholly distinct from the established *Coalition* framework. It can be presumed that the standard is *sui generis* with respect to homeowners associations.

The remedy contemplates a test of reasonableness with respect to a homeowners association's regulation of the time, place and manner of expressive conduct. Perhaps the Court

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[64] Twin Rivers, 929 A.2d at 1074.

[65] The Court's application of its own "reasonableness" standard offers some clues with respect to the future application of that standard to the regulations of other homeowners associations. For example, the record in *Twin Rivers* reflected that the association allowed the posting of as many as two signs on each homeowner's property. The association also permitted door-to-door solicitation and distribution of leaflets. In the context of the issues presented in the case, the Court found the association's restrictions on expressive conduct to be reasonable, in light of the availability of the aforementioned alternate channels of communications.

Some New Jersey homeowners associations, however, may ban door-to-door solicitation and prohibit the posting of signs. In the wake of the *Twin Rivers* decision, such blanket prohibitions of expressive conduct by homeowners associations are unlikely to survive a Court challenge.

An important corollary to this point is the New Jersey Supreme Court's disposition of the matter in comparison to the disposition of the matter by the Appellate Division below. The Appellate Division in *Twin Rivers* remanded the case to the Law Division for a determination of whether the challenged regulations of the association were reasonable in light of the Appellate Division's newly announced constitutional standard. *Twin Rivers,* 890 A.2d 947. Although the New Jersey Supreme Court in *Twin Rivers* upheld the validity of the association's regulations (meaning that no remand was necessary), the Court's opinion strongly suggested that an outright ban of such channels of communications might be unreasonable as a matter of law. In this sense, the New Jersey Supreme Court's decision in *Twin Rivers* could be said to be more speech-protective than the decision of the Appellate Division below.

intended to incorporate by reference the well-settled approach to content-neutral government regulation of speech that has long been a part of First Amendment jurisprudence.[66] If so, questions abound as to whether that line of federal constitutional authority will be adopted unmodified, or instead tailored to account for any considerations peculiarly applicable to homeowners associations.

The most substantial unresolved question concerns the proper standard of review to be applied to speech-abridgement by homeowners associations. For example, under settled First Amendment doctrine, government regulation of speech in traditional public fora is subject to heightened judicial scrutiny.[67] In that context, government may enforce such reasonable time, place, and manner restrictions *only if* "the restrictions are content-neutral, are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication."[68] The following subsidiary questions thus arise in the particular context of homeowners associations: Should a street or a common area in a homeowners association be treated as analogous to a street or park owned by a municipality? Is a reasonable time, place, and manner regulation of expressive conduct in a homeowners association properly considered in light of pertinent provisions in the association's governing documents, or should regulation be considered under a uniform constitutional standard? Is First Amendment case law to be liberally invoked by analogy, or must New Jersey courts start afresh in fashioning a new framework for constitutional regulation of expressive conduct in homeowners associations?

Regardless of the answers to those questions, the most important conclusion to be drawn from *Twin Rivers* is this: the

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[66] *See infra* note 57 and accompanying text.

[67] *See* Madsen v. Williams Health Center, Inc., 512 U.S. 752, 790-91 (1994) (Scalia, J., concurring and dissenting) (distinguishing between various forms of heightened scrutiny as applied to speech in a public forum).

[68] United States v. Grace, 461 U.S. 171, 177 (1983); *see also* Thomas v. Chicago Park Dist., 534 U.S. 316, 323, n.3 (2002); Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992); Clark v. Comty. for Creative Non-Violence, 469 U.S. 288, 293 (1984); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981).

Court applied a First Amendment-type test to homeowners associations, notwithstanding that homeowners associations generally are not "state actors" under the Federal Constitution[69]

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[69] In what may qualify as the supreme irony of this litigation, the plaintiffs in *Twin Rivers* chose not to seek a federal constitutional remedy—*i.e.*, the *Marsh/Hudgens* test of "state action"—and instead sought relief only under the state constitution—*i.e.*, the *Coalition/Schmid* test of whether a private property owner is subject to state constitutional restraints with respect to the abridgement of speech. This strategic decision arose from the general understanding that the "state action" test under the Federal Constitution is less speech-protective and more difficult to satisfy than the *Coalition/Schmid* test under the New Jersey Constitution. *See supra* notes 13-29 and accompanying text. As matters turned out, the New Jersey Supreme Court determined that the Twin Rivers community did *not* satisfy the *Coalition/Schmid* test, although the Court did hold that the state constitution may provide redress against a homeowners association that unreasonably infringes free speech rights. *See* Twin Rivers, 929 A.2d at 1074.

The specific irony is this: Notwithstanding that the *Marsh/Hudgens* test under the Federal Constitution is less speech protective and more difficult to satisfy than the *Coalition/Schmid* test under the New Jersey Constitution, the Twin Rivers community would probably—on its face—satisfy virtually all of the elements of the *Marsh/Hudgens* test. That is to say: one potential outcome of this litigation—had a federal claim been pursued—would have been a determination that the Twin Rivers community satisfies the *Marsh/Hudgens* test, but (as, in fact, the Court in *Twin Rivers* actually held) does not satisfy the *Coalition/Schmid* test.

Under the *Marsh/Hudgens* test, a private community, in order to be treated as a "state actor," must be, in essence, the functional equivalent of an entire town. Hudgens v. NLRB, 424 U.S. 507, 516-17 (1976). Under this test, an entire town consists of certain essential physical elements:

> The question is, [u]nder what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on [a]ll the attributes of a town, [*i*].*e*., "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated."

Id. at 516-17.

Notably, the Twin Rivers community–unlike most suburban subdivisions that are subject to governance by a homeowners association–contains a variety of retail businesses. Twin Rivers, 890 A.2d at 953. These retail businesses may be fairly characterized as a "business block" under the *Marsh/Hudgens* test. Hudgens, 424 U.S. at 516-17. Although the record in *Twin Rivers* does not make clear as to whether or not the community contains a "sewage disposal

and are not constitutional actors under the state constitution by operation of the *Coalition* standard. The necessary implication is that the Court in *Twin Rivers* determined that homeowners associations play an important role in the civic life of New Jersey, and thereby warrant a new standard—a constitutional standard—that reflects the special status of associations. The Court left for another day the delineation of that standard.

III. THE *TWIN RIVERS* DECISION AND THE CONSTITUTIONAL ROAD NOT TAKEN

The Court in *Twin Rivers* reached what we consider to be the correct result: Residents of homeowners associations, under appropriate circumstances, should be protected by the free-speech guarantees of the New Jersey Constitution when their governing boards unreasonably deny or abridge the right to engage in expressive conduct and assembly. Still, the *Twin Rivers* decision is unsatisfactory in many respects, because it lacks clarity and a firm underpinning in settled constitutional doctrine.

The Court's failure to anchor its decision in established constitutional doctrine is particularly unfortunate, because there is substantial precedent available and adaptable to the homeowners association paradigm. Had the Court availed itself of its own existing doctrine, its ultimate conclusions might well have been more principled and persuasive, and less fraught with ambiguity. We therefore turn to a delineation of the constitutional road *not* taken.

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plant" within its territorial limits, it is perhaps difficult to credit a literal construction of *Hudgens* such that the presence or absence of a sewage disposal plant should make a constitutional difference with respect to a determination of whether a community is the functional equivalent of a municipality. Of greater importance, the Twin Rivers community unquestionably contains almost all of the elements of the *Marsh/Hudgens* test that constitute the *sine qua non* of a town. *See supra* notes 36-44 and accompanying text.

In short, the Twin Rivers community might well qualify as a "state actor," for federal constitutional purposes, under the *Marsh/Hudgens* test. However, most New Jersey homeowners associations unquestionably would not qualify as a "state actor," since most associations do not contain retail businesses.

In *Coalition,* the Court did not hesitate to conclude that shopping centers are, in effect, the new downtowns, and, consequently, that the free-speech rights secured by the state constitution could not be denied or abridged merely by reason of the nominally private status of the shopping centers.[70] The Court in *Coalition* concluded that the "historic path of free speech" had led from downtown business districts to privately-owned shopping centers, and that the "State constitutional right of free speech . . . must continue to follow that historic path."[71] In *Twin Rivers*, the analogous constitutional question, in essence, was whether the "historic path of free speech" has moved from *public* municipalities to *private* homeowners associations.

The road not taken would have applied the spirit (if not the letter) of *Coalition*, to declare that the New Jersey Constitution properly applies to homeowners associations for the same reasons that it applies to shopping centers: *i.e.*, the constitution must adapt to the contemporary reality of the large-scale privatization of formerly public space. The "historic path of free speech," so eloquently identified in *Coalition*, has indeed shifted from *public* municipalities to *private* homeowners associations.[72] The Court in *Twin Rivers*, consistent with its holding in *Coalition*, "should [have] follow[ed] that path."

Important legal and political trends in New Jersey have transformed homeowners associations into full-fledged players in the intergovernmental system of service delivery and tax collection.[73] Closely related to this trend, homeowners associations are the inheritors of the realm of open public discourse that once was exclusively undertaken in town halls and on public streets. Today, that discourse often occurs in private "community centers" and on streets that are open to the

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[70] Coalition, 650 A.2d at 766-69.

[71] *Id.* at 778.

[72] *Id.*

[73] *See supra notes* 74-80 and accompanying text.

public[74] and maintained by the public with taxpayer dollars, yet nominally under the ownership of homeowners associations.

The scale and scope of the dramatic emergence of homeowners associations as quasi-governmental actors can only be summarized briefly here. New Jersey ranks among the leading states in the nation with respect to the number, prevalence, and growth of homeowners associations.[75] Approximately one million residents of the state live in common interest communities.[76] In 2002, the estimated number of association-related housing units in New Jersey was 494,000 and growing at the rate of approximately six percent per year.[77]

Many homeowners associations carry out such traditionally municipal functions and services as maintenance of streets and open space, collection of curbside trash, review of proposed architectural changes to homes and the promulgation of rules governing home occupancy.[78] These powers were once exclusively reserved to municipalities. Moreover, the broad powers granted by the New Jersey Legislature to homeowners associations include the power to levy fines and penalties

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[74] Some streets owned by homeowners associations are open to the public. Other association-owned streets are gated, thereby limiting access to association *residents* and their guests. However, in New Jersey, even restricted-access streets are maintained with taxpayer dollars. *See infra* note 95 and accompanying text. Furthermore, the fact that a street is not open to the public need not end the constitutional analysis, since the primary beneficiary of an enhanced constitutional remedy are the residents themselves. *C.f.* Marsh v. Alabama, 326 U.S. 501, 508 ("Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their [s]tate and country . . . . *There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen [in a public municipality*].") (emphasis added).

[75] David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 765, n.24 (1995).

[76] *Hannaman Report*, *supra* note 2, at 2.

[77] *Id.*

[78] U.S. ADVISORY COMM'N REPORT, *supra* note 6, at 3.

against unit owners,[79] a power that the New Jersey Appellate Division has expressly termed a "governmental power."[80]

The Twin Rivers community is itself illustrative of this trend toward privatization of traditionally municipal functions. Twin Rivers is home to 10,000 residents. The community has within it various commercial businesses such as dry cleaners, gas stations and banks.[81] Several public facilities operated by the municipality are also located within the borders of Twin Rivers, including schools, a county library and a firehouse.[82] There are 34 roads within the community that are open to public traffic. In addition, a state highway runs through the development.[83] The homeowners association maintains the streets and common areas, provides street lighting and snow removal, and operates a refuse collection service.[84] It is vested with rule-making and enforcement powers. Violations of the rules are punishable by fines, which can range in amount from $50 to $500.[85] The homeowners association collects fees and dues from residents that are the functional equivalent of real estate taxes.[86]

Why is this privatization occurring? Many factors have fueled the growth of homeowners associations.[87] Perhaps surprisingly, a principal factor is local government's deliberate

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[79] N.J. STAT. ANN. § 46:8B-14(d), 46:8B-15(f) (West 2007).

[80] Walker v. Briarwood Condo Ass'n, 644 A.2d 634, 638 (N.J. Super. Ct. App. Div. 1994).

[81] Twin Rivers, 890 A.2d 947, 953 (N.J. Super. Ct. App. Div. 2006), *rev'd*, 650 A.2d 757 (N.J. 2007).

[82] *Id.* at 953.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *See id.*

[87] *See* Steven Siegel, *The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government Land Use Policies That Eliminate the Legal Requirements to Privatize New Communities in the United States*, 38 URB. LAW. 859, 866-73 (2006).

policy choice to encourage the formation of homeowners associations as a means to load-shed its traditional obligation to provide certain services such as roadway maintenance and refuse collection.[88] Indeed, mounting evidence suggests that the establishment of a homeowners association is often a *requirement* of local government land use policy.[89]

The Township of Jackson's zoning code is illustrative of this trend. The township's ordinance requires the creation of a homeowners association in all residential developments in areas zoned as planned mixed use residential districts, multifamily housing districts and "planned retirement communities" districts.[90] The homeowners association is responsible for maintenance of common property, solid waste disposal and "the replacement, repair and maintenance of all private utilities, streetlighting, . . . sidewalks, landscaping, common open space and recreation facilities and equipment."[91]

Even when this form of municipal land-use policy is not expressly codified, the result is often the same. Municipalities simply can decide, on an informal basis, that a developer must establish a homeowners association as a condition of land-use approval. Developers have no choice but to acquiesce if they wish to obtain the necessary municipal approvals.[92]

Some residential developers have gone on the record and have spoken quite candidly of certain municipalities' informal practices to require the establishment of a homeowners association as a condition of land-use approval.[93] For example, a representative of one prominent New Jersey developer observed that "about one-half" of the state's municipalities impose requirements with respect to the establishment of a

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[88] *Id.* at 873-98.

[89] *Id.* at 887-98.

[90] TWP. OF JACKSON, N.J., ZONING CODE ch. 109, art. VI, §§ 109-46J, 109-48L, 109-49N (2007).

[91] *Id.* § 109-46J(2)(d).

[92] Siegel, *supra* note 87, at 895-98.

[93] *Id.*

homeowners association as a condition of land-use approval.[94] In many fast-growing parts of New Jersey, there is often little choice but to buy into the privatized regime of heretofore-municipal services now provided by homeowners associations.

We previously made reference to a report issued by a special Task Force of the New Jersey General Assembly in connection with homeowners associations.[95] The Task Force Report, issued in 1998, recommended comprehensive reform of the statutory regime governing homeowners associations. The report included the following key finding:

> Current law provides . . . [homeowners] association boards great flexibility in their rule-making and administrative powers. . . . [T]hese associations have traditionally been treated as corporations managing a business. Some modification of this model appear to be necessary to address the increasingly governmental nature of the duties and powers ascribed to the homeowners association board.[96]

Today, despite the Task Force's recommendations, the model remains unmodified.[97]

Not only do New Jersey's homeowners associations collectively perform more government-like services than ever before, those services are often paid for by New Jersey taxpayer,

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[94] *Id.* at 897 (citing Unpublished Written Statement of Steven Dahl, Vice President, K. Hovnanian Companies, Edison, New Jersey) (July 31, 2006).

[95] *Assembly Task Force Report*, *supra* note 8; *see also* text accompanying note 9.

[96] *Assembly Task Force Report*, *supra* note 8, at 2.

[97] In the ten years since the enactment of the Task Force report, many bills to reform state regulation of homeowners associations have been introduced in the Legislature. As of this writing, reform legislation is pending before the New Jersey Senate and the Assembly. *See e.g.*, Common Interest Community and Homeowner' Association Act, S. 308, 213th Leg. (N.J. 2008); New Jersey Uniform Common Interest Ownership Act, A. 1991, 213th Leg. (N.J. 2008). For a discussion of the relative merits of these bills pending before the Legislature, see *infra* note 125.

and not merely homeowner, funds.[98] Under New Jersey's Municipal Services Act, many homeowners associations receive direct public subsidies from local governments for the cost of maintaining the privately-owned streets situated on association property.[99] Although there are no current estimates of the total statewide cost for this benefit to homeowners associations, the New Jersey Office of Legislative Services estimated the cost as $62 million as of 1990, at a time when there were far fewer homeowners associations.[100] As of 2008, the statewide expenditure must surely exceed $100 million. This enormous public expenditure (for the provision of traditionally municipal services on "private" property) further undercuts the claim that homeowners associations are merely private entities.

In short, the legal and political trends of the past several decades suggest that New Jersey homeowners associations, consistent with more national trends: (1) are assuming many functions and services traditionally provided by municipalities; (2) are often performing those functions and services with the use of taxpayer funds; (3) are often the product of conscious and deliberate municipal land-use policy; (4) represent the standard template for new community development in many parts of the State; and (5) own networks of streets and open space that, if owned by a municipality, would serve as public forums for free speech and assembly.

As noted previously, more than one million New Jersey residents live in association-related housing. As developers continue to build even more of the same, the number of association-related housing units will continue to rise.[101] Indeed, it can be expected that, in certain fast-growing areas of New Jersey, association-related housing will be the only housing available or affordable to middle-income homebuyers.[102]

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[98] *See, e.g.*, N.J. STAT. ANN. § 40:67-23 (West 2007).

[99] *Id.*

[100] SENATE REVENUE, FINANCE AND APPROPRIATIONS COMMITTEE STATEMENT, *as reprinted in* N.J. STAT. ANN. § 40:67-23.2 (West 2008).

[101] *See supra* notes 4-5, 77 and accompanying text.

[102] EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENTS 11-12 ("In many rapidly growing areas . .

The foregoing facts (most of which are subject to judicial notice) would have provided a firm doctrinal underpinning for the vital constitutional decision actually reached in *Twin Rivers*. As previously noted, the Court in *Twin Rivers* held that residents of homeowners associations, under appropriate circumstances, should be protected by the free-speech guarantee of the New Jersey Constitution when association governing boards unreasonably deny or abridge the right to engage in expressive conduct and assembly. That holding is unquestionably the right result, but, as we have said, suffers from a lack of clarity and a firm underpinning in settled constitutional doctrine.

Chief Justice Wilentz's opinion in *Coalition* laid out a sound constitutional basis for the result reached in *Twin Rivers*. The free-speech clause of the New Jersey Constitution is broader than the First Amendment, and must be applied expansively. Thus, as the Court in *Coalition* made clear, "if our [s]tate constitutional right of free speech has any substance, it must continue to follow [its] historic path."[103] The "historic path of free speech"—just as surely as it has moved from public squares to privately-owned shopping centers—has moved, as well, from *public* municipalities to *private* homeowners associations. The Court in *Twin Rivers*, consistent with its holding in *Coalition*, should have "follow[ed] that historic path."[104]

IV. POSTSCRIPT: SPEECH REGULATION AT THE TWIN RIVERS COMMUNITY AFTER THE CONCLUSION OF THE LITIGATION

In the wake of the Supreme Court's decision, an action taken by the Twin Rivers Association trust administrator in late 2007[105] underscores both the conceptual shortcomings of the

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. nearly all new residential development is within the jurisdiction of residential community associations").

[103] Coalition, 650 A.2d at 778.

[104] *Id.*

[105] *See infra* notes 106-107 and accompanying text.

Court's decision and the very real difficulties experienced by community association residents at Twin Rivers and elsewhere. The trust administrator's action, unfortunately, places a substantial crimp on the ability of Twin Rivers' residents to engage in a meaningful dialogue with respect to issues of concern to all members of the community.

By way of background, the Twin Rivers Association Board in 2004 adopted a new policy governing the use of the community room that *precluded* the use of the room for any "political purposes."[106] Significantly, that policy was adopted during the pendency of the appeal of the *Twin Rivers* litigation to the Appellate Division, and, consequently, the policy was *not* contained in the record that was before either the Appellate Division or the Supreme Court. Thus, the Supreme Court's decision did not pass on the reasonableness of the Board's policy banning all political use of the community room. Instead, the Court merely held that the Board's content-neutral restrictions concerning the use of the community room (principally pertaining to the amount of a rental fee and security deposit) were reasonable.[107]

Against this backdrop, the Twin Rivers trust administrator denied a resident's post-litigation request seeking use of the community room for discussion of the upcoming board

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[106] Resolution 2004-05 of the Twin Rivers Homeowners Association, Policy for Establishing Rules and Regulations for the Use of the Community Room," ¶ 7. Although the Regulation *precludes* the use of the community room for any "political purposes," the Regulation expressly *authorizes* the use of the Room "for the development of educational, social, cultural and recreational programs under the supervision of the Trust." *Id.*, ¶ 1. Furthermore, the Regulation provides that the Community Room shall be made available to individual Twin Rivers residents as well as clubs, organizations and committees approved by the Trust." *Id.* Thus, the Regulation, on its face, evidences an intent to open up the Community Room to a broach range of speech and associational activities, but to exclude from such range of activities political speech and association.

[107] Twin Rivers, 929 A.2d at 1074. In particular, the Association's content-neutral restrictions governing the use of the community room included: (1) a policy that requires a resident to post the sum of $415, of which $250 constitutes a refundable security deposit; and (2) a policy that requires a resident to procure a certificate of insurance. *Id.* at 1064. *See supra* note 48 and accompanying text.

elections.[108] The action by the trust administrator was taken just four months after the Supreme Court's decision. The stated reason for the denial was that "use [of] the community room for political purposes cannot be approved."[109]

Recall that the Supreme Court in *Twin Rivers* held that a community association regulation is unconstitutional if it "unreasonably infringes the free speech rights of its residents."[110] The "unreasonable infringement" test is presently undefined.[111] However, as previously noted, it would appear likely that the test will be defined by reference to the corollary and analogous free speech rights that are secured by the First Amendment and that are applicable to speech in a government-controlled public forum.[112] If that assumption were correct, there can be no question but that a complete ban on political speech in a forum that was expressly designed for community-wide speech and associational activities amounts to an "unreasonabl[e] infringe[ment] of the free speech rights" of Twin Rivers residents.[113]

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[108] Letter dated November 26, 2007 of Jennifer L. Ward, Twin Rivers Trust Administrator, to Haim Bar-Akiva (on file with the authors). Haim Bar-Akiva was one of the plaintiffs in the *Twin Rivers* litigation.

[109] *Id.*

[110] Twin Rivers, 929 A. at 1074.

[111] *See supra* note 65 and accompanying text.

[112] *See supra* notes 66-68 and accompanying text.

[113] If the Twin Rivers community were deemed a "state actor" for purposes of federal constitutional law, *see* notes 14-19 and 69, *supra*, then the actions of the Twin Rivers association board (hereafter "Association") would be subject directly to the strictures of the First Amendment. Under settled First Amendment principles, there can be no doubt that the Association's complete ban on political speech strikes would be struck down as unconstitutional. This is so for many reasons.

First, the Association's regulation purports to ban a particular category of speech and, as such, amounts to a content-based restriction. Under well-established First Amendment principles, content-based restrictions are subject to the most exacting scrutiny. *See* Perry Education Ass'n v. Perry Educators' Ass'n, 460 U.S. 37, 45 (1983). In particular, "a content-based prohibition [on speech] must be narrowly drawn to effectuate a compelling state interest" *Id.* at

V. TWIN RIVERS: THE ROAD AHEAD

Every path-breaking case has a human side, and the *Twin Rivers* case is no exception. Professor Frank Askin,[114] who represented the plaintiffs in *Twin Rivers* and who has represented many other aggrieved residents of associations, offered the following observation with respect to the litigants in *Twin Rivers*:

> In all of the disputes I am aware of, there is a total absence of trust between the [Twin Rivers] board and the complaining homeowner. In Twin Rivers, there is no love lost between the two sides. The

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45. Applying this stringent standard, a court almost certainly would invalidate the Association's sweeping content-based regulation.

Second, the content sought to be prohibited — *i.e.*, political speech — is the very category of speech which lies "at the core of what the First Amendment was designed to protect." Virginia v. Black, 538 U.S. 343, 365 (2003). More particularly, First Amendment jurisprudence distinguishes between different classes of speech, and holds that "[c]ore political speech occupies the highest most protected position . . . [in the] rough hierarchy . . . [of] constitutional protection." R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992). *See also* Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 187 (1999) (holding that protection of the First Amendment "is at its zenith" when regulation implicates political speech) (quoting Meyer v. Grant, 486 U.S. 414, 422 (1988). Because the Regulation authorizes the use of the community room for virtually all types of speech *except political speech*, see *supra* note 106, the particular content restriction here at issue strikes at the very heart of the vales secured by the First Amendment.

Third, the regulation is not merely a restriction on political speech; it is a complete ban on such speech. The regulation is thus overbroad, and could not satisfy a test that requires that any content-based limitation of speech be "narrowly drawn." Perry Education Ass'n v. Perry Educators' Ass'n, 460 U.S. 37, 45 (1983).

In short, the Regulation, on its face, would violate the First Amendment. Indeed, it is difficult to conceive of a speech regulation that is more offensive of First Amendment values than one—as here—that purports to impose a complete ban on political speech in a forum that was expressly designed for community-wide speech and associational activities.

[114] Frank Askin is a professor of law at Rutgers University School of Law-Newark. He is the director of the Rutgers Constitutional Litigation Clinic.

> complaining homeowners consider the board despotic and tyrannical—often with good reason. The Twin Rivers dispute flared because a couple of dissidents won election to the board with a campaign that relied heavily on lawn signs in violation of long-standing rules that were never enforced. As soon as the dissidents won, the majority of the board decided to enforce the rules for future elections.[115]

Consistent with the acrimony that attended the *Twin Rivers* litigation, the board's attorney stated that if residents are "not happy with [Twin Rivers] policies, they should look elsewhere to live."[116] This type of statement, unfortunately, is all-too-common among the boards and professionals who manage homeowners associations. The reports in the popular press and elsewhere are legion of homeowners associations in which boards have abused their power, and where a cottage industry of professionals get paid significant sums to oppose the rights of the very homeowners who pay their bills. [117]

One document contained in the appellate record of the *Twin Rivers* litigation is particularly revealing with respect to what precisely ails the present CIC paradigm, and why a new paradigm is required. The opinion of the Appellate Division in *Twin Rivers* devoted particular attention to a report by Edward Hannaman, the "association regulator" in the Bureau of Homeowner Protection of the New Jersey Department of Community Affairs ("the Hannaman Report").[118] The Appellate Division in *Twin Rivers* quoted the Hannaman Report as follows:

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[115] Interview with Frank Askin, Professor of Law, Rutgers School of Law—Newark, in Newark, N.J. (Feb. 19, 2007) (on file with the authors).

[116] Paula Franzese & Margaret Bar-Akiva, *Homeowner Boards Can't Exclude Democracy*, STAR LEDGER, Feb. 20, 2006, at 15.

[117] *See infra* note 123 and accompanying text.

[118] Twin Rivers, 890 A.2d at 955-56 (citing *Hannaman Report, supra* note 2).

> Hannaman said that complaints revealed an "undemocratic life" in many associations, with homeowners unable to obtain the attention of their board or manager. Boards "acting contrary to law, their governing documents or to fundamental democratic principles, are unstoppable without extreme owner effort and often costly litigation." Board members "dispute compliance" with their legal obligations and use their powers to punish owners with opposing views. "The complete absence of even minimally required standards, training or even orientation for those sitting on boards and the lack of independent oversight is readily apparent in the way boards exercise control."
>
> Hannaman described instances of abuse of power in some detail while conceding that there were "many good associations." He stressed, however that typically, power was centralized in boards, which acted as executive, legislature and judiciary.[119]

The Hannaman Report itself is notable for its candor and its breadth. For example, Mr. Hannaman states: "It is obvious from the complaints [to the state regulatory agency] that [home]owners did not realize the extent association rules could govern their lives."[120] Mr. Hannaman goes on to set forth at length numerous examples of abuse of homeowner rights by New Jersey CICs, and the ineffectual and inadequate safeguards that presently exist to prevent and remedy such abuse.[121] As to this point, the following extended quotation is instructive:

> Overwhelmingly, . . . the frustrations posed by the duplicative complainants or by the complainants' misunderstandings are dwarfed by the pictures

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[119] *Id.*

[120] *See Hannaman Report*, *supra* note 2, at 4.

[121] *Id.* at 4-5.

they reveal of the undemocratic life faced by owners in many associations. Letters routinely express a frustration and outrage easily explainable by the inability to secure the attention of boards or property managers, to acknowledge no less address their complaints. Perhaps most alarming is the revelation that boards, or board presidents desirous of acting contrary to law, their governing documents or to fundamental democratic principles, are unstoppable without extreme owner effort and often costly litigation.

Problems presented by complainants run the gamut from the frivolous (flower restrictions and lawn watering), to the tragically cruel (denial of a medically necessary air conditioner or mechanical window devices for the handicapped), to the bizarre (president having all dog owners walk dogs on one owner's property, air conditioners approved only for use from September to March. Curiously, with rare exceptions, when the State has notified boards of minimal association legal obligation to owners, they dispute compliance. In a disturbing number of instances, those owners with board positions use their influence to punish other owners with whom they disagree. The complete absence of even minimally required standards, training or even orientations for those sitting on boards and the lack of independent oversight is readily apparent in the way boards exercise control.

. . . [C]omplaints have disclosed the following acts committed by incumbent boards: leaving opponents' names off the ballots (printed up by the board) by "mistake"; citing some trivial "violation" against opponents to make them ineligible to run; losing nominating petitions; counting ballots in secret – either by the board or their spouses or someone in its employ – such as the property manager deciding to appoint additional board members to avoid the bother of

> elections; soliciting proxies under the guise of absentee ballots; holding elections open until the board obtains the necessary votes to pass a desired action; declaring campaign literature by their opponents to be littering; using association newsletters to aggrandize their "accomplishments" but forbidding contrary opinions by owners . . . ; routinely refusing to release owner lists to candidates-despite the board mailing owners (at association expense) their positions (it has become routine for the State to refer candidates to the municipal tax office to obtain the names of their fellow association owners); rejecting candidate platforms or editing them to conform to the board's idea of fair comment which includes eliminating any criticism of the board.[122]

The Hannaman Report is a significant indictment of the *status quo* system of CIC regulation in New Jersey. As a published statement of the State of New Jersey's "association regulator" entrusted with oversight of CICs in New Jersey, the Report and its findings cannot be ignored.

Thus, the *Twin Rivers* experience is, unfortunately, far from unique. Within New Jersey as well as across the country, residents of homeowners associations have found themselves at odds with their governing boards, with litigation seemingly constituting the preferred remedy, rather than the remedy of last resort.[123] Ultimately, the true "costs" of these disputes are

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[122] *Id.*

[123] For example, in Arizona, Barbara and Dan Stroia paid nearly $8,000 to attorneys collecting what began as a $66 debt. The Stroias had not known of a $6 increase in quarterly charges, or a $30 one-time assessment. A lawsuit first sought $565. A month later, the Stroias tried to pay $850, and ultimately had to pay more than $7,000 more for disputing the fees. The association attorney blamed the family: "People just get emotional about things because it's their home. . . . The Stroias, unfortunately, reacted very emotionally." In Texas, Wenonah Blevins owed $814.50 in back dues, and said she never knew she faced foreclosure until after the association had sold her $150,000 home for $5,000. [A former official of the Community Association Institute] said the association "did everything right in the foreclosure, other than realize the lady is [82] years old." DAVID KAHNE, A BILL OF RIGHTS FOR HOMEOWNERS IN ASSOCIATIONS: BASIC PRINCIPLES OF CONSUMER PROTECTION AND A MODEL

far more than the economic losses. The costs extend, as well, to the intangible losses of reciprocal trust and a sense of community.[124] Certainly, the *Twin Rivers* case—and its back story—help to inform these considerations, and will be useful to continued attempts to meaningfully reform the CIC paradigm.

The *Twin Rivers* decision is thereby important for reasons beyond the Court's actual holding. The case has drawn considerable attention to the desultory state of the law of homeowners associations in New Jersey, and to the compelling need for statutory reform to protect the rights of the more than one million New Jersey residents who own homes in common interest communities. The *Twin Rivers* decision itself offers some welcome relief in the area of free-speech rights, but the free-speech rights of CIC residents is just one area of many that cry out for reform.

Legislation is required that would acknowledge the increasingly important role played by homeowners associations in the State's intergovernmental system.[125] Presently,

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STATUTE 5-7 (2006), *available at* http://www.aarp.org/research/legal/legalrights/2006_15_homeowner.html.

In North Carolina, a CIC homeowner was fined $75 per day because his dog exceeded the weight limitation imposed by the servitude regime. He was forced to declare bankruptcy after he was ultimately assessed $11,000 in fines. A Court eventually voided the foreclosure. Paula A. Franzese, *Does it Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, VILL. L. REV. 553, 574 (citing Laura Williams-Tracy, *Covenants Gain Clout in Neighborhood Governance*, CHARLOTTE BUS. J., Sept. 8, 2000, at 27).

In Florida, an association fined a homeowner for having an unauthorized "social gathering" when he was joined on his front lawn by two friends to chat. Bridget Hall Grumet, *Condo Board Says Three's a Crowd*, ST. PETERSBURG TIMES, Nov. 18, 2003, at 1B.

[124] *See, e.g.,* Paula A. Franzese & Steven Siegel, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 MO. L. REV. 1111, 1150-56 (2007).

[125] As of this writing, reform legislation is pending before the Senate and the Assembly. *See, e.g.,* Common Interest Community and Homeowner' Association Act, S. 308, 213th Leg. (N.J. 2008); New Jersey Uniform Common Interest Ownership Act, A. 1991, 213th Leg. (N.J. 2008).

Although it is beyond the scope of this Article to compare at length the relative merits of the two pending bills, it is our opinion that the Senate bill is, in

homeowners associations: (1) are assuming many functions and services traditionally provided by municipalities; (2) are often performing those functions and services with the use of taxpayer funds; (3) are often the product of conscious and deliberate municipal land-use policy; (4) represent the standard template for new community development in many parts of this State; and (5) own networks of streets and open space that, if owned by a municipality, would have served as provide traditional public forums for speech and assembly. In the face of these realities, it is simply untenable to continue a laissez-fare regime that presupposes that homeowners associations are wholly private organizations.[126]

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general, far superior to the Assembly bill. The Senate bill would make clear that "[homeowner] associations are quasi-governmental entities, subject to transparent government models, not merely the corporate business model . . . ." N.J. S. 308, at 87 (2008). Consistent with this express statement of legislative intent, the Senate bill would, among other things, (1) broaden state regulatory authority over homeowners associations; (2) establish a State Office of the Ombudsman with specific powers to assist governing boards and homeowners; (3) expand the requirement for alternative dispute resolution; (4) establish specific requirements for access to records by owners; (5) mandate audit requirements; (6) promulgate specific guidelines for open meetings by governing boards; (7) provide more flexibility for associations to maintain customized rules, provided that a majority of homeowners ratify such rules; (8) impose competitive bidding requirements on association contracts; (9) impose conflict-of-interest rules applicable to members of governing boards; and (10) impose a modest registration fee to be paid by each unit owner to pay for the increased cost of oversight and regulation. N.J. S. 308. These measures would amount to a much needed "bill of rights" for association owners, and would provide meaningful oversight of homeowners associations without unduly restricting the power of governing boards to carry out their duties and obligations. The Assembly bill, by contrast, lacks many of these essential reforms. N.J. A. 1991.

In a recently published article, we have identified and recommended additional measures to be included as part of a comprehensive statutory reform of homeowners associations. *See* Franzese & Siegel, *supra* note 124, at 1139-49.

[126] It is by no means inconsistent to assert the need for *both* judicial recognition of baseline constitutional rights in a particular context *and* a program of statutory reform that accomplishes similar purposes and objectives in that context. This is so for several reasons.

First, as discussed in the text above, the constitutional rights at issue in *Twin Rivers* (*i.e.*, speech and associational rights) are far narrower in scope than the full panoply of homeowner rights that can only be secured by statute.

VI. CONCLUSION

The most critical and far-reaching aspect of the *Twin Rivers* decision is this: the Court applied a First Amendment-type test to homeowners associations, notwithstanding that homeowners associations generally are not "state actors" under the Federal Constitution and are not constitutional actors under the New Jersey State Constitution by operation of the *Coalition* standard. The necessary implication is that the Court in *Twin Rivers* determined that homeowners associations play an important role in the civic life of New Jersey, and thereby warrant a new standard—a constitutional standard—that reflects their special place in the polity. Still, the Court left undefined the precise dimensions of its newly defined constitutional remedy, now applicable to residents of homeowners associations.

The *Twin Rivers* decision is also important for reasons that extend beyond the Court's actual holding. The case has

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As a practical matter, only the Legislature can implement such necessary reform measures as low-cost dispute resolution and the establishment of an ombudsman office to assist homeowners.

Second, the judicial recognition of constitutional rights and the enactment of new statutory rights are not contradictory developments in the law but rather are most often complementary. For example, even in those circumstances when the respective constitutional and statutory rights may overlap, the respective remedies are, by their very nature, separate and distinct.

Third, history has shown that enhanced constitutional rights often lead legislative bodies, at some future date, to enact statutes that implement or reinforce those constitutional rights. *Compare* Brown v. Board of Education, 374 U.S. 483 (1954) (holding unconstitutional state-sponsored racial segregation in public schools) *with* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 243 (codified at 42 U.S.C. §§ 2000a *et seq.*) (prohibiting racial discrimination in public education, employment and public accommodations). It is doubtful that Congress would have then enacted the Civil Rights Act had not the Supreme Court, ten years earlier, handed down the landmark *Brown* decision. *See generally* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND AMERICA'S STRUGGLE FOR BLACK EQUALITY (1976).

Similarly, it is to be hoped that the *Twin Rivers* decision itself—as well as the issues and controversies raised by this high-profile decision—may induce the New Jersey Legislature to enact much needed legislation to reform New Jersey homeowners associations.

highlighted the urgent need for statutory reform of the law of homeowners associations in New Jersey. Although the *Twin Rivers* decision is a landmark of New Jersey constitutional law in the area of free speech rights, much more must be accomplished in order to fully protect the rights of the more than one million New Jersey residents who own homes in common interest communities. Only comprehensive reform legislation can secure the full panoply of basic rights that residents of New Jersey homeowners associations need and deserve.[127]

[127] *See supra* notes 124 and 125.