The Residential Tenant's Right to Freedom of Political Expression

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> [An] area likely to be litigated concerns speech in private residential communities. The exercise of free speech rights may be especially vulnerable in privately owned or managed communities such as apartment and condominium complexes. . . . In these communities, all the common areas, including halls, stairs, elevators, paths, streets, parking lots, and other community facilities, are usually owned by a private corporation or individual. If left unregulated, the owner could restrict the rights of the residents to assemble, speak, demonstrate, or advocate within their own community.
>
> Justice Robert F. Utter[1]

I. INTRODUCTION

Three months before the publication of Justice Utter's comments, Virginia Paulsen, a residential apartment tenant living in Bellevue, Washington, filed a suit in King County Superior Court against her landlord, Seamark Properties, Inc.[2] Paulsen sought to establish her right under article I, section 5 of the Washington Constitution to post political campaign signs in the window of her apartment without the interference or attempted censorship of Seamark Properties.[3]

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1. Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment*, 8 U. PUGET SOUND L. REV., 157, 190 (1985).

2. Paulsen v. Seamark Properties, Inc., No. 84-2-15311-3 (King County Sup. Ct. April 9, 1985) (partial summary judgment entered) [hereinafter *Paulsen*]. The issue of damages is reserved for trial.

3. Complaint for Injunctive Relief, Damages, and Declaratory Judgment, *Paulsen* [hereinafter Complaint].

Virginia Paulsen signed a written lease with Seamark on June 13, 1982, in which she agreed to rent a two-bedroom apartment in the Westridge Apartments complex.[4] Her apartment was one of approximately eighty residential units located in eight buildings at the complex.[5] Paulsen's apartment had two windows overlooking 122nd Place N.E.[6] Paulsen moved into her apartment on July 7, 1982.[7]

In June or early July of 1984, Paulsen placed a political campaign sign in one of the windows of her apartment.[8] The sign proclaimed her support for a candidate in the Washington State gubernatorial primary to be held on September 18, 1984.[9] The cardboard sign measured two feet by three feet and was imprinted with the name of the candidate and the words "FOR GOVERNOR."[10] The sign was visible from the street, from the apartment complex parking lot, and from other tenants' residences.[11]

Toward the end of August, Paulsen placed a second sign in the other window on the west side of her apartment. The sign expressed her preference for a candidate for the United States House of Representatives.[12] This second sign was of the same size and construction as the first.[13]

On September 14, 1984, Paulsen was approached by the manager of the apartment complex. He informed her that the owner of the apartments had seen her campaign signs and that she was to take them down immediately.[14] Paulsen, fearing possible eviction if she refused to comply, did as she was told and immediately removed both campaign signs.[15] Four days later, Paulsen went to the apartment manager's office and requested an explanation for the owner's objection to her display of the political signs.[16] The manager showed Paulsen a copy of her lease agreement and pointed out the applicable

4. Findings of Fact and Conclusions of Law on Entry of Partial Summary Judgment for Plaintiff at 2, *Paulsen* [hereinafter FFCL].
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 3.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*

provision in rule 13 of her lease: "No signs or placards shall be posted in or about the apartment building without written permission of the Landlord."[17]

Paulsen asked for, and was given, the name and address of the corporate owner of the apartment complex so that she could write and request permission to display her signs.[18] That same day, Paulsen wrote to the president of Seamark Properties, Inc. asking for permission to display her campaign signs:

> My purpose in writing you is to ask for your written permission to continue having the signs in the windows indicating my political support. These signs have been up since July when I began working on the two campaigns. I have also held political meetings in my apartment. If you gave your permission, the signs would be removed when the polls close on general election day, which I believe is November 6, 1984.
>
> Were I renting [a] house or living in my own home, I would have these signs posted on my property. Since the property around my apartment does not belong to me, I thought that the windows were the next most appropriate place. I would appreciate having your written permission to continue posting these signs. Thanks for your attention to this matter.[19]

The next day, Seamark's president denied Paulsen's request with the observation that "[i]f we allowed one person to post a sign, we would have to allow everyone to do the same . . . ."[20]

On October 22, 1984 Paulsen filed suit in King County Superior Court, seeking injunctive relief, damages, and a declaratory judgment that Seamark had violated her right to freely speak under article I, section 5 of the Washington Constitution. The superior court agreed and on April 9, 1985, the court entered partial summary judgment in favor of Paulsen.[21] The court enjoined Seamark from preventing any tenant of the Westridge Apartments from displaying political campaign signs on the doors and windows of his or her apartment.[22] In addition, the court declared that rule 13 in Paulsen's lease agreement was an unlawful prior restraint on tenant freedom of

17. *Id.* at 4.
18. *Id.*
19. *Id.*
20. *Id.* at 5.
21. Order for Partial Summary Judgment, *Paulsen*.
22. *Id.*

political expression.[23] The issue of Paulsen's damages was reserved for trial.[24]

Virginia Paulsen's case is not unique. As Justice Utter predicted, tenants are "especially vulnerable" to censorship imposed by their landlords.[25] Every election year the Washington State chapter of the American Civil Liberties Union receives numerous complaints from tenants regarding landlord prohibitions against political campaign signs. This article will outline the arguments to be made on behalf of residential tenants who display political signs and who encounter threats of eviction, rent increases, and other forms of landlord opposition.

In Section II, we describe the development of the general principles of constitutional law applicable to disputes between property owners and tenants who wish to use the property owners' premises as a forum for the expression of the tenants' ideas and beliefs. Tracing the history of the United States Supreme Court rulings in this area, we analyze the waxing and waning of first amendment speech rights, the development of property-based first amendment speech rights, and the recognition of state constitutional free speech rights that are broader than their first amendment counterparts.

In Section III, we analyze the application of freedom of speech principles to disputes between landlords and residential tenants, when the tenants wish to display political signs on the leased property. Section III also presents and analyzes the arguments frequently relied upon by landlords. For the benefit of those tenants residing in states where state constitutional free speech rights have not been liberally construed, we discuss the common law property rights of tenants, citing reasons why those rights are superior to the property rights of landlords in the context of disputes over tenant political expression.

Finally, in Section IV, we conclude with an assessment of the public policy justifications for refusing to enforce contrac-

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23. *Id.*

24. *Id.* The case is still pending in King County Superior Court. Trial on the issue of damages will probably be held in 1987.

25. At the same time that Paulsen filed her lawsuit, another tenant filed a similar lawsuit against a Seattle landlord in Thompson v. Harrison, No. 84-2-15136-6 (King County Super. Ct. 1984) [hereinafter *Thompson*]. The plaintiff in *Thompson* leased a house for residential purposes. The defendant landlord refused to allow the tenant to post lawn signs endorsing a candidate for President of the United States. Shortly after the suit was filed, the landlord relented and gave the tenant permission to post the signs. The tenant voluntarily dismissed the suit.

tual waivers (such as rule 13 of the lease in *Paulsen v. Seamark*) of a tenant's right to freedom of political expression.

II. The Constitutional Analysis of Conflicting Private Property Rights and Speech Rights

A. The Rise and Fall of Marsh

In the beginning things were simple. First amendment free speech rights were enforceable against governments but not against private parties. There was no such thing as abridgement of free speech by a private party. All this changed with the 1946 Supreme Court decision of *Marsh v. Alabama*.[26]

In *Marsh*, Gulf Shipbuilding, a private corporation, operated a company town called Chicksaw, a suburb of Mobile, Alabama.[27] Gulf owned the town and employed a Mobile County sheriff as the town's policeman.[28] Gulf had written and posted notices in the town stores with a warning similar to rule 13 of Virginia Paulsen's lease agreement: "This is Private Property and Without Written Permission, No Street or House Vendor, Agent or Solicitation of any Kind Will Be Permitted."[29] In contravention of the notice, Grace Marsh, a Jehovah's Witness, entered the business district of Chicksaw, stood outside the post office, and distributed religious literature.[30]

Gulf warned Marsh that she could not distribute religious literature without a permit and that Gulf would not issue a permit to her.[31] Marsh objected that the company rule prohibiting the distribution of religious literature was unconstitutional, and she refused to leave the sidewalk outside the company post office.[32] The company policeman arrested her.[33] She was charged with and convicted of trespassing in violation of Alabama State law.[34]

The Alabama Court of Appeals affirmed, holding that since the Gulf Corporation owned title to the sidewalk where she stood, Marsh had trespassed upon private property. The

26. 326 U.S. 501 (1946).
27. *Id.* at 502.
28. *Id.*
29. *Id.*
30. *Id.* at 503.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 504.

court held that first amendment principles were inapplicable because the sidewalk had not been irrevocably dedicated to the town of Mobile.[35] The Alabama State Supreme Court denied review.[36] The United States Supreme Court reversed, holding that the first amendment did apply even though Marsh was distributing literature on private property without the landowner's consent.[37]

Justice Black, writing for the majority, first observed that if the title to the sidewalk had belonged to a municipal government, Marsh's conviction would be reversed because a municipally owned sidewalk is a traditional public forum where first amendment free speech rights must prevail.[38] Thus, private property owners in an ordinary town cannot constitutionally set up a municipal government and pass an ordinance prohibiting the distribution of religious literature. The question before the *Marsh* Court was whether one powerful property owner, acting alone, could do what other property owners, acting in concert, could not do. "Our question narrows down to this," wrote Justice Black: "[c]an those people who live in or come to Chicksaw be denied freedom of the press and religion simply because a single company has legal title to all the town?"[39]

Answering the question in the negative, Justice Black declared: "We do not agree that the corporation's property interests settle the question."[40] Black then advanced the theory that by "opening up" its property to the public, Gulf lost the right to claim absolute control over the activities conducted on its property: "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[41]

The company town of Chicksaw was open to the public. Black noted that the business center of Chicksaw "serves as the community shopping center and is freely accessible and open to the people in the area and those passing through."[42]

35. *Id.* (citing State v. Marsh, 21 So. 2d 558 (1945)).
36. 246 Ala. 539, 21 So. 2d 564 (1945).
37. *Marsh*, 326 U.S. at 509-10.
38. *Id.* at 504.
39. *Id.* at 505.
40. *Id.*
41. *Id.* at 506.
42. *Id.* at 508.

Recognizing that "[m]any people in the United States live in company-owned towns," the *Marsh* court held: "These people, just as residents of municipalities, are free citizens of their State 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."[43]

The Supreme Court concluded that the property rights of the Gulf Shipping Corporation had to be balanced against the free speech rights of Grace Marsh. In this weighing process, Justice Black decreed that courts must "remain mindful of the fact that the latter occupy a preferred position."[44] Black concluded that:

> [t]he circumstance that the property rights to the premises . . . were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute.[45]

In an eloquent concurring opinion, Justice Frankfurter echoed Black's pronouncement that property rights did not determine the scope of free speech rights: "Title to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations."[46]

After *Marsh* came the shopping center case of *Amalgamated Food Employees v. Logan Valley Plaza*.[47] In *Logan Valley*, members of a local food employees union picketed a privately owned shopping center to protest the employment of non-union workers in one of the shopping center businesses.[48] A Pennsylvania trial court issued an injunction prohibiting fur-

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43. *Id.* at 508-9.

44. *Id.* at 509.

45. *Id.*

46. *Id.* at 511 (Frankfurter, J., concurring). If *Marsh v. Alabama* were still good law today, cases like *Paulsen* would be relatively straightforward. Instead of a company-town case, Paulsen's lawsuit presents the question of whether the owner of a company-home can prevent the legal tenant from expressing his or her views. But, to paraphrase Justice Frankfurter, title to the home cannot control the civil liberties issues "precisely because a company-home rented to a tenant is still a home," even though the leasing of that home gives rise to a "congeries of property relations."

47. 391 U.S. 308 (1968).

48. *Id.* at 311.

ther picketing on grounds that the picketing constituted an unlawful trespass on the property of the corporate owner of the shopping center.[49] The Pennsylvania Supreme Court affirmed the injunction.[50] Relying heavily on *Marsh*, the United States Supreme Court reversed. The Court held that because the shopping center premises were open to the public to the same extent as the commercial center of a normal town, the shopping center owner could not curtail the union picketers' free speech rights by obtaining an injunction against the picketing.[51]

Justice Marshall began by summarizing the holding of *Marsh*, "that under some circumstances property that is privately owned may, at least for first amendment purposes, be treated as though it were publicly held."[52] Marshall also recognized that a landowner's power to exclude others from his property was normally "part and parcel of the rights traditionally associated with the ownership of private property."[53] Nevertheless, even though the exclusion of others from the owner's premises would normally be permissible, such an exclusion is unconstitutional when done for the purpose of excluding "those members of the public wishing to exercise their first amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put."[54]

In the phrase "generally consonant with the use to which the property is actually put," however, the seeds of destruction of the *Marsh* doctrine were sown. Justice Marshall went to some lengths to explain that the union picketing was "consonant" with the shopping center's general use. Marshall reasoned that the picketing was "directed specifically at patrons of [a supermarket] located within the shopping center, and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated."[55]

After *Logan Valley*, it was only a matter of time before the opportunity presented itself to cut back on the holding of

49. *Id.* at 312-13.
50. *Id.* at 313.
51. *Id.* at 325.
52. *Id.* at 316.
53. *Id.* at 319.
54. *Id.* at 319-20.
55. *Id.* at 320 n.9.

Marsh. Four years later, in *Lloyd Corporation v. Tanner*,[56] the Court addressed the issue of "the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations."[57] In *Lloyd*, the handbills that were distributed contained an invitation to a meeting of the "Resistance Community" to protest the draft and the war in Vietnam.[58] Because the war in Vietnam was unrelated to the operations of the shopping center, the Supreme Court held that there was no first amendment free speech right to distribute literature without the consent of the owners.[59]

The *Lloyd* Court placed a narrow construction on the concept of property "opened to the public." In both *Marsh* and *Logan Valley*, the Court had stressed that if any member of the public had physical access to the property, the property was "open" to anyone. But in *Lloyd*, the Court placed a "purpose" gloss on the concept of "open" property. Instead of focusing on whether physical access to the property was limited, the Court focused on the subjective intentions of the property owners that led to their decision to permit physical access. In *Lloyd*, the Court found that the shopping center owners allowed access to the public because they wanted people to come and shop, not because they wanted to create a forum for the discussion of foreign policy issues:

> The obvious purpose, recognized widely as legitimate and responsible business activity, is to bring potential shoppers to the Center, to create a favorable impression, and to generate goodwill. There is no open ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve.[60]

The *Lloyd* Court apparently feared the implications of a broad reading of *Logan Valley* because the Court derisively commented that the handbillers' interpretation of the phrase "open to the public" would, if accepted, "apply in varying degrees to most retail stores and service establishments across the country. They are all open to the public in the sense that

56. 407 U.S. 551 (1972).
57. *Id.* at 552.
58. *Id.* at 556.
59. *Id.* at 570.
60. *Id.* at 565.

customers and potential customers are invited and encouraged to enter."[61]

Finally, the *Lloyd* Court further tipped the scales in favor of property owners by elevating the status of property rights to a constitutional plane. Common law property rights, recognized by state law, enjoy constitutional protection. The protection is afforded under the fifth amendment, which prohibits the deprivation of property without due process of law: "[T]he fifth and fourteenth amendment rights of private property owners, as well as the first amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other."[62]

The *Lloyd* decision, had it endured, would have left American citizens with a first amendment free speech right that was relatively diluted, but a right nonetheless. Under the *Lloyd* Court's reasoning, one could not protest the Vietnam War at a Safeway grocery store, but one could protest the military's use of Boeing airplanes in the Vietnam War at a Boeing assembly plant. As long as one could connect the message with the private property forum, the *Lloyd* Court recognized the existence of a first amendment free speech right that could be exercised on private property.[63]

Lloyd, however, was short-lived. In *Hudgens v. National Labor Relations Board*,[64] union members picketed their employer's retail store which was located in a privately owned shopping center. When the owner's agent told them that they would be arrested for trespassing if they remained, the union members left. The union's message was connected with the normal use of the property being picketed. Thus, if the holding of *Lloyd* had been fairly applied, the picketers' first amendment rights would have prevailed against the property rights of the shopping center owner and his lessee, the union's employer. But surprisingly, the *Hudgens* Court held that *Lloyd* had overruled *Logan Valley* and that no first amendment free speech right existed at all. The *Hudgens* Court gave

61. *Id.*

62. *Id.* at 570.

63. In the context of a landlord-tenant dispute, *Lloyd* would have been of little benefit to someone like Ms. Paulsen. Unless she could connect the normal use of the Westridge Apartments with the gubernatorial and congressional elections, Ms. Paulsen would not have any cognizable first amendment right to post campaign signs.

64. 424 U.S. 507 (1976).

a perfunctory nod to the holding of *Marsh* by reserving a small exception for company-town cases, and proceeded to hold that the first amendment had no application to purely private disputes: "[W]hile statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself."[65]

Acknowledging that the *Lloyd* Court did not expressly overrule *Logan Valley*, the *Hudgens* majority nevertheless concluded, "[T]he fact is that the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*."[66] The *Hudgens* Court then blithely stated that it had an "institutional duty" to "follow the law." After invoking that sacred duty, the Court concluded that in this case "following the law" meant overruling *Logan Valley* since that is what the *Lloyd* decision had really done.[67]

In a dissenting opinion that may have provided the spark for future expansive readings of state constitutional free speech guarantees, Justice Brennan criticized the *Hudgens* majority for relying on "an overly formalistic view of the relationship between the institution of private ownership of property and the first amendment's guarantee of freedom of speech."[68] Brennan acknowledged that "the values of privacy and individual autonomy traditionally associated with" property ownership called for some recognition of the right of property owners to control the uses of their property.[69] However, Justice Brennan adhered to the idea developed in *Marsh* that once a private property owner uses his property in a manner that is not strictly private, he loses a degree of his autonomy.[70] Harkening back to the decision in *Munn v. Illinois*,[71] Brennan

65. *Id.* at 513.

66. *Id.* at 518.

67. *Id.* at 518. For further analysis of the death of *Logan Valley*, *see* Schauer, *Hudgens v. NLRB and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433 (1977); Recent Development, *Lloyd Corporation v. Tanner: Expression of First Amendment Rights in the Privately Owned Shopping Center*, 22 CATH. U.L. REV. 807 (1971); Note, *The Demise of Logan Valley and the Disguise of Marsh*, 61 GEO. L.J. 1187 (1973); Comment, *The Public Forum From Marsh to Lloyd*, 24 AM. U.L. REV. 159 (1974).

68. *Hudgens*, 424 U.S. at 542 (Brennan, J., dissenting).

69. *Id.*

70. *Id.*

71. 94 U.S. 113 (1877).

opined that private property becomes "clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large."[72] Because the public's interest in freedom of expression regarding business and labor relations was, in his opinion, substantial, Brennan concluded that the shopping mall owner's property interests must yield to the overriding public interest in freedom of expression.[73]

B. A Property Owner's Right to Remain Silent

At the same time that the *Lloyd* Court began to lean toward overruling *Logan Valley* and the elimination of first amendment rights enforceable against private parties, the Supreme Court began to recognize a new kind of first amendment right enforceable against government. This new type of free speech right gave property owners the right to use their property free from government orders compelling them to permit others to use their property for speech purposes. Because this right is a part of an owner's general property right to determine how his property is used, we refer to it as a "property-based" first amendment right to remain silent.

The first case to discuss a property owner's right to remain silent was *Wooley v. Maynard*.[74] George Maynard and his wife Maxine were followers of the Jehovah's Witnesses faith. They strenuously objected to a New Hampshire statute which made it a crime for a motorist to obscure the figures and letters on any vehicle license plate.[75] The New Hampshire Supreme Court interpreted the term "letters" to include the state motto.[76] Because that motto, "Live Free or Die," was repugnant to the Maynard's moral, religious and political beliefs they covered it up.[77] Mr. Maynard was then issued a citation for violation of the New Hampshire misdemeanor statute. The trial court found Maynard guilty and fined him $25.00.[78] Maynard continued, however, to cover up the state motto on his license plates. He was issued a second citation, was again found guilty, fined $50, and given a six-month suspended jail

72. *Hudgens*, 424 U.S. at 543 (quoting Munn v. Illinois, 94 U.S. 113, 126 (1877)).
73. *Hudgens*, 424 U.S. at 543.
74. 430 U.S. 705 (1977).
75. *Id.* at 707.
76. *Id.* at 707 (citing State v. Hoskin, 112 N.H. 332, 295 A.2d 454 (1972)).
77. *Wooley*, 430 U.S. at 707.
78. *Id.* at 708.

sentence.[79] Maynard informed the court that as a matter of conscience, he would not pay the fine. The court then sentenced Maynard to fifteen days in jail. Maynard served his sentence.[80]

Because Maynard still had no intention of complying with the law, he filed a civil rights suit in federal district court seeking an injunction and declaratory relief against enforcement of the New Hampshire statute.[81] A three-judge District Court granted the requested injunction.[82] The United States Supreme Court affirmed, holding that a state may not require an individual to participate in the dissemination of an ideological message by displaying the message on his private property in a manner and for the express purpose that the message be observed and read by the public.[83]

Relying on the flag salute case of *Board of Education v. Barnette*,[84] the Court reaffirmed the principle that the first amendment guarantees both the right to speak freely and the right to refrain from speaking at all.[85] The Court held that the New Hampshire statute effectively compelled the Maynards to "use their private property as a 'mobile billboard' for the State's ideological message . . . ."[86] This violated Maynard's first amendment right to remain silent and to refuse to participate in the dissemination of the message "Live Free or Die."

The *Wooley* Court also relied on its prior decision in *Miami Herald Publishing Company v. Tornillo*,[87] where the Court struck down a Florida statute that imposed a duty upon newspapers to publish the replies of political candidates whom they had criticized.[88] The *Miami Herald* decision appeared to

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79. *Id.*

80. *Id.*

81. *Id.* at 709.

82. *Id.*

83. *Id.* at 717.

84. 319 U.S. 624 (1943). The Court held that public school students could not be forced to salute the American flag in daily ceremonies.

85. *Wooley*, 430 U.S. at 714. *See also* Pacific Gas & Electric v. California Public Utilities Commission, — U.S. —, —, 106 S.Ct. 903, 909 (1986) (The Court held that a Utilities Commission's order requiring the utility company to place a third party's newsletter in billing envelopes impermissibly burdened the utility company's first amendment rights); and Harper & Row v. Nation Enterprises, — U.S. —, —, 105 S. Ct. 2218, 2230 (1985) (quoting Estate of Hemmingway v. Random House, 23 N.Y.2d 341, 348, 244 N.E.2d 250, 255 (1968)).

86. *Wooley*, 430 U.S. at 715.

87. 418 U.S. 241 (1974).

88. *Id.* at 258.

contradict the Court's prior decision in *Red Lion Broadcasting v. Federal Communications Commission*.[89] In *Red Lion*, the Court had upheld a federal regulation that compelled a privately owned radio station to furnish cost free reply time to an individual criticized in the course of a radio program. If privately owned radio stations could be compelled to allow free air time to people they criticized, why should privately owned newspapers not be subject to the same type of governmental regulation? One commentator has suggested that the key difference between radio stations and newspapers is that radio stations have no property interest in their broadcasting license:

> [B]y statute, . . . Congress had presumed to assert national ownership over the airwaves, further providing that no person, company or licensee could acquire any 'property' in those airwaves . . . . In Florida, there was, of course, no equivalent statute precluding conventional private ownership of the newsprint on which the Miami Herald was printed: that ownership was complete, it carried with it full first amendment protections, and the state right-of-reply statute was correspondingly an abridgement of the newspaper's private property rights and freedom of speech: to exclude access by third parties.[90]

Returning to landlord-tenant dispute over the display of political signs, we are faced with a conflict between two opposing property-based free speech rights. The landlord has title to the property; the tenant owns a leasehold interest in the home or apartment. Since both have property rights in the same premises, both have valid claims to first amendment property-based free speech rights. On the one hand, if the tenant wishes to display a campaign sign endorsing a particular candidate, the landlord arguably has a first amendment property-based right to prohibit the sign's display because the landlord does not wish to participate in the dissemination of the message. On the other hand, if the landlord wants to display a sign endorsing his candidate, the tenant arguably has a first amendment property-based right to prohibit the display because he does not

89. 395 U.S. 367 (1969).

90. Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, 43 LAW & CONTEMP. PROBS. 66, 77 (1980). Van Alstyne concluded that property rights are becoming an important source of free speech rights. "[T]he security of private property as an extension of oneself and the corresponding liberty of free speech with respect to ownership of that private property, is a clear and powerful development of the seventies." *Id.*

wish to participate in the dissemination of the landlord's message. Whose first amendment property-based free speech right is superior will depend, in part, upon an analysis of whose common law property rights are superior during the term of a lease. We shall later argue that the tenant's property right is superior because the common law rule allows the tenant the right to use the property for all lawful uses that do not constitute waste.[91]

C. State Constitutional Free Speech Rights

Wholly aside from federal constitutional free speech issues, the Supreme Court decided in *Pruneyard Shopping Center v. Robins*[92] that state courts could interpret state constitutional free speech provisions in such a manner as to recognize that state free speech rights are enforceable against private parties. Thus, even though *Hudgens* had put an end to the *Marsh* doctrine for purposes of the first amendment, state courts were free to endow their citizens with speech rights enforceable against private property owners.

In *Pruneyard*, the Court affirmed the decision of the California Supreme Court. The California high court held that the state constitutional free speech rights of private shopping center users were superior to the conflicting claims of the property owner.[93] The plaintiff in that case, Michael Robins, had been told to leave the shopping center because he had been soliciting signatures from the shopping center patrons for a petition addressed to the President of the United States.[94] The California court held that under the California Constitution, Robins had a right to use the property for collecting petition signatures, despite the objections of the shopping mall owner.

In upholding the state court decision in *Pruneyard*, the United States Supreme Court also addressed two fundamental constitutional questions concerning conflicts between free speech rights and property rights. First, the Court determined that it was constitutionally permissible for California to burden the property rights of the shopping center owner with

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91. *See infra* notes 186-192 and accompanying text.

92. 447 U.S. 74 (1980).

93. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).

94. *Id.* at 855. The petition voiced opposition to a United Nations resolution concerning "Zionism."

additional speech forum responsibilities.[95] The previous decisions in *Lloyd* and *Hudgens* had established that first amendment speech rights would not be extended to the users of a private shopping center. The reasoning of those cases did not, however, require that existing constitutionally protected property rights would preclude the states from imposing additional speech-related burdens upon private property owners.[96] Instead, the Court reasoned that because the the allocation of various property rights was within the authority of the states,[97] the states have a wide range of discretion in the exercise of this authority. With the announcement of the decision in *Pruneyard*, matters of conflicting speech rights and property rights became, in the first instance, subjects of state constitutional and legislative concern.[98] Thus, the first principle to be derived from *Pruneyard* is that the state courts and legislatures are the initial forum for the resolution of disputes concerning conflicting property interests and speech interests.

The second principle of *Pruneyard* concerns the constitutionality of the state's action in regard to the property-based

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95. *Pruneyard*, 447 U.S. at 81-85.

96. *Id.* at 81. The Court distinguished its holding in *Lloyd* on the grounds that "there was no state constitutional or statutory provision that had been construed to create rights to the use of private property by strangers. . . ."

97. *Id.* at 84. "Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance." *Id.* at 88 (Blackmun, J., concurring). However, the concurring opinion of one justice expressly disapproved of this statement of the law.

98. Many courts and commentators interpreted the Court's holding in *Pruneyard* as an invitation to include speech rights within the corpus of the "New Federalism." *See, e.g.*, Shad Alliance v. Smith Haven Mall, 106 A.D.2d 189, 194, 484 N.Y.S.2d 849, 853 (1985) ("The Supreme Court has encouraged states to place a greater emphasis upon the independent role of their own constitutions . . . ."); Cologne v. Westfarms Associates, 192 Conn. 48, 58, 469 A.2d 1201, 1206 (1984) ("This invitation to state courts to construe state constitutional guaranties to enhance freedom of expression above the minimum federal constitutional level. . . ."); Note, *Granting Access to Private Shopping Center Property for Free Speech Purposes*, 64 MARQ. L. REV. 507 (1981); Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L. J. 165 (1980) (hereinafter cited as *Private Abridgment*). Much has been written of the "New Federalism," the recent trend that bases civil liberties upon state-granted rights and policies. Two seminal articles are: Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) and Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976). On the subject of the role of freedom of expression in the "New Federalism," *see Developments in the Law, The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1398-1429 (1982) (hereinafter cited as *Developments*). A leading article was written on this issue by Professor Countryman in 1970. *See* Countryman, *The Role of a Bill of Rights in a Modern State Constitution: Why a State Bill of Rights?* 45 WASH. L. REV. 454 (1970).

first amendment speech rights of the property owner.[99] The shopping mall owner, relying on *Wooley v. Maynard*, argued that he had a first amendment right not to be forced by California to use his property as a forum for the speech of others.[100] The Supreme Court distinguished *Wooley*, however, on several grounds. First, New Hampshire had forced Mr. Maynard to openly display a message that was objectionable to him by requiring that he place it on his "personal property," his car. This property was used in his daily life.[101] A shopping center, however, unlike a car, is not a "personal" item, used only by its owner.[102] New Hampshire had refused to allow Mr. Maynard to cover the motto on the license plate. But in *Robins* nothing prevented the shopping center owner from disassociating himself from the message conveyed by the plaintiff by simply posting signs in the area where the handbillers stood, disclaiming any sponsorship of their message.[103]

Paradoxically, in the course of distinguishing *Robins* from *Wooley*, the Court observed that where Maynard alone had access to the use of his car, "the shopping center by choice of its owner is not limited to the personal use of [the owners]. It is instead a business establishment that is open to the public to come and go as they please."[104] This comment constitutes quite a retreat from the Court's earlier position in *Lloyd* that shopping center owners intend to open their premises to people who come to shop, but not to people who come to protest, proselytize or handbill.

In any event, the *Pruneyard* Court concluded that the state constitutional free speech right was superior to the first amendment property-based free speech right of the shopping center owner.

D. The Analysis of Conflicting Rights after Pruneyard

Our review of United States Supreme Court precedents is now complete. The conflict between landlords and tenants can be analyzed as a clash between rights. The tenant who is fortunate enough to reside in a state like California or Washington, where state constitutional rights are liberally construed,

99. *Pruneyard*, 447 U.S. at 85-87.
100. *Id.* at 85-86.
101. *Id.* at 87.
102. *Id.*
103. *Id.*
104. *Id.*

may have a state constitutional right to freedom of speech that is enforceable against private parties. That tenant is also endowed with a first amendment property-derived free speech right, based upon his property interest in the leasehold. Finally, the tenant has a common law property right to use the leased premises for any lawful use that does not constitute waste or nuisance.

On the landlord's side of the ledger, we have the property owner's traditional right to exclude others from the use of his property, subject only to the police power of the state.[105] The landlord also has a first amendment property-based free speech right. Therefore, the conflict is no longer one of property rights versus speech rights. Rather, it is a matter of both mutual and conflicting interests: the speech and property rights of the owner versus the speech and property rights of the invited public.[106]

It should now be evident that the distinction between "property rights" and "speech rights" is no longer a helpful one. Indeed, the United States Supreme Court has already recognized this in another context:

> The federal courts have been particularly bedeviled by "mixed" cases in which both personal and property rights are implicated, and the line between them has been difficult to draw with any consistency or principled objectivity. The case before us presents a good example of the conceptual difficulties created by the test.
>
> Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.[107]

The *Pruneyard* decision has revealed one method by which these conflicts might be resolved: an affirmative state

105. *Pruneyard*, 447 U.S. at 82 (citing Kaiser Aetna v. United States, 444 U.S. 164, 179-180 (1979)).

106. The interests are mutual since both parties have a contemporaneous interest in the same real property together with the property-based right to expression arising out of this joint property interest. The interests conflict when exercised in differing and mutually exclusive manners (e.g., where one party exercises his right by posting a particular political message and the other party exercises his right by excluding that particular message).

107. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

constitutional policy favoring individual expression.[108] Since *Pruneyard*, at least nine state courts have addressed this issue of speech and property rights as a matter of state constitutional, statutory or common law.[109] As in *Pruneyard*, six of these decisions involved speech activity on shopping center property.[110] Of the other three, two involved private university property,[111] and the last involved public fairgrounds.[112] To date, the courts have split evenly in the resolution of these cases.[113]

Many more jurisdictions will be addressing this issue in the near future.[114] Undoubtedly, a number of different private property forums will be considered in the course of these deci-

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108. Even without such a constitutional policy, however, it must be emphasized that substantial issues of rights to use remain; thus, state courts must investigate the property rights basis for the claim to free expression.

109. Cologne v. Westfarms Assocs., 192 Conn. 48, 469 A.2d 1201 (1984) (women's organization sought permission to solicit persons visiting shopping center to sign petitions in support of Equal Rights Amendment); Batchelder v. Allied Stores, 388 Mass. 83, 445 N.E.2d 590 (1983) (Congressional candidate sought permission to solicit signatures and distribute leaflets in a shopping center); Woodland v. Michigan Citizens Lobby, 128 Mich. App. 649, 341 N.W.2d 174 (1983) (citizens group restrained from soliciting shoppers, gathering signatures, distributing literature, and making speeches on premises of shopping center); State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980) (defendant prosecuted for trespass upon private property when he distributed and sold leaflets on private university campus); Shad Alliance v. Smith Haven Mall, 106 A.D.2d 189, 484 N.Y.S.2d 849 (1985) (anti-nuclear group sought permission to distribute leaflets on premises of shopping center); State v. Felmet, 302 N.C.173, 273 S.E.2d 708 (1981) (defendant charged with trespass when he solicited signatures for a draft protest in shopping center parking lot); Oklahomans for Life, Inc. v. State Fair of Oklahoma, Inc., 634 P.2d 704 (Okla. 1981) (anti-abortion group sought damages when state fair refused to allow exhibit of abortion educational materials); Commonwealth v. Tate, 495 Pa. 158, 432 A.2d 1382 (1981) (anti-war group prosecuted for defiant trespass when they attempted to distribute leaflets on college campus); Alderwood Associates v. Wash. Envtl. Council, 96 Wash. 2d 230, 635 P.2d 108 (1981) (Environmental Council enjoined from soliciting signatures and demonstrating in shopping mall).

110. *Cologne*, 192 Conn. at 52, 469 A.2d at 1203; *Batchelder*, 388 Mass. at 85, 445 N.E.2d at 591; *Woodland*, 128 Mich. App. at 651; 341 N.W.2d at 175; *Shad Alliance*, 106 A.D.2d at 190-96, 484 N.Y.S.2d at 850-51; *Felmet*, 302 N.C. at 177, 273 S.E.2d at 712; *Alderwood Associates*, 96 Wash. 2d at 231, 635 P.2d at 110.

111. *Schmid*, 84 N.J. at 541, 423 A.2d at 618; *Tate*, 495 Pa. 163, 432 A.2d at 1385.

112. *Oklahomans for Life*, 634 P.2d at 705-06.

113. Five courts have resolved the dispute in favor of the user of the property. *See Batchelder*, 388 Mass. at 93, 445 N.E.2d at 595; *Schmid*, 84 N.J. at 556-57, 423 A.2d at 626; *Shad Alliance*, 106 A.D.2d at 200-01, 484 N.Y.S.2d at 857; *Tate*, 495 Pa. at 175, 432 A.2d at 1390; *Alderwood Assocs.*, 96 Wash. 2d at 246, 635 P.2d at 117. Four courts have resolved the dispute in favor of the property owner. *See Cologne*, 192 Conn. at 66, 469 A.2d at 1210; *Woodland*, 128 Mich. App. at 654, 341 N.W.2d at 176; *Felmet* 302 N.C. at 178, 273 S.E.2d 712; *Oklahomans for Life*, 634 P.2d at 708.

114. At least 39 state constitutions contain free speech provisions that provide an affirmative individual right to speech. Utter, *supra* note 1 at 158 n.3 (listing the states with affirmative free speech language).

sions. These forums may include apartment complexes, planned communities, mobile home parks, nursing homes and agricultural labor camps.[115] In the following section, we discuss both the state constitutional basis[116] and the common law property rights basis[117] for the resolution of this issue, in the context of a landlord-tenant dispute in Washington State.

III. STATE COURT RESOLUTION OF THE RESIDENTIAL TENANT'S RIGHT TO FREE EXPRESSION

A. The Affirmative Constitutional Right to State Protection Against Private Abridgment of Freedom of Speech

In Washington, the Supreme Court has held that the state constitution protects a citizen's right to freedom of speech from both governmental and private intrusions. In *Alderwood Associates v. Environmental Council*,[118] a plurality of the Washington Supreme Court held that unlike the first amendment, article I, section 5 of the Washington Constitution has no "state action" requirement that must be met before the state constitutional guarantee of free speech comes into play.[119]

Article I, section 5 provides: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." In *Alderwood*, the Washington Supreme Court observed that, in contrast to the first amendment, article I, section 5 "is not by its express terms limited to governmental actions."[120] Relying upon prior decisions of the California and New Jersey Supreme Courts, the *Alderwood* plurality held: "[W]e choose to follow the approach of *Schmid* and *Robins* which recognizes that the 'state action' analysis of the fourteenth amendment is required by the language of the federal, but not the state, constitution."[121]

The plurality justices observed that article I, section 5 of the Washington Constitution is substantially similar to both the California Constitution, article I, section 2 and New Jersey

115. Utter, *supra* note 1, at 190.

116. *See infra* notes 116-183 and accompanying text.

117. *See infra* notes 184-210 and accompanying text.

118. 96 Wash. 2d 230, 635 P.2d 108 (1981).

119. Justice Dolliver, who concurred in the result, did not support this position. 96 Wash. 2d at 247, 635 P.2d at 118.

120. *Id.* at 240, 635 P.2d at 114.

121. *Id.* at 243, 635 P.2d at 115-16 (citing to State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980) and Robins v. Pruneyard, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74, (1980)).

Constitution, article I, section 6.[122] "In fact, section 5" of the Washington Constitution "was modeled after" the analogous California constitutional provision.[123]

In *Robins v. Pruneyard*,[124] the California Supreme Court held that its state constitution prohibited the owners of a private shopping mall from interfering with the attempts of high school students to solicit customer signatures for a petition voicing opposition to a United Nations resolution on "Zionism." Similarly, in *State v. Schmid*, the New Jersey Supreme Court held that a private college, Princeton University, could not prevent members of the United States Labor Party from distributing socialist literature on campus.[125] As Justice Utter noted in his plurality opinion in *Alderwood*, the New Jersey Supreme Court held that its state constitution "imposed upon the state government an affirmative obligation to protect fundamental individual rights."[126] The New Jersey court's analysis reflects a key distinction between the theoretical framework of state constitutions vis-a-vis the federal constitution.[127] The federal Bill of Rights manifests a single-minded purpose, to ensure freedom from governmental interference in private affairs. State constitutions manifest two purposes; to secure freedom from state governmental interference, and to impose an obligation upon state governments to protect citizens' freedoms against private abridgment as well.[128]

As Justice Utter has noted,[129] this second purpose of imposing an affirmative obligation of protection upon state governments is readily discernible in the Washington Constitution, article I, section 1, which provides: "All political power is

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122. The constitutions of these states both provide:

> Every person may freely speak, write, and publish his [or her] sentiments on all subjects, being responsible for abuse of this right. A law may not restrain or abridge liberty of speech or press.

CAL. CONST. art. I, § 2; N.J. CONST. art. I, § 6. Only the California Constitution contains the added words "or her."

123. *Alderwood Assocs.*, 96 Wash. 2d at 240-41, 635 P.2d at 114.

124. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980).

125. State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980).

126. *Alderwood Assocs.*, 96 Wash. 2d at 241 n.6, 635 P.2d at 115 n.6.

127. For a theoretical analysis of the *Alderwood* plurality opinion and the normative justifications for this distinction, *see* Skover, *The Washington Constitution 'State Action' Doctrine: A Fundamental Right to State Action*, 8 U. PUGET SOUND L. REV. 221, 240-250 (1985).

128. *See generally* Utter, *The Right to Speak, Write, and Publish Freely*, 8 U. PUGET SOUND L. REV. 157, 163-166 nn. 39-50 (1985) (hereinafter cited as Utter).

129. *Alderwood Associates*, 96 Wash. 2d at 241, n.6, 635 P.2d 115 n.6.

inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." Because the Washington State government was established "to protect and maintain individual rights,"[130] the scope of this protective shield must necessarily reach beyond governmental action to encompass protection against private interference with individual rights. To hold otherwise would amount to the paradoxical assertion that the state government was established solely to protect citizens against itself, an end which could most easily be achieved by doing away with state government altogether.

The *Schmid* decision of the New Jersey Supreme Court, like the *Robins* decision of the California Supreme Court, applied this theory of an affirmative governmental obligation when it held the state responsible for protecting freedom of speech against private abridgment.[131] Since the decision by the Washington Supreme Court in *Alderwood Associates*, courts of other jurisdictions have also adopted this position.[132]

Historical research concerning the origins of article I, section 5 also supports the conclusion that the framers of the Washington Constitution deliberately chose not to include any state action requirement. The first draft of article I, section 5 provided: "That *no law shall be passed* restraining the free exercise of opinion or restricting the right to speak, write or print freely on any subject."[133] But the second draft proposed by the Bill of Rights Committee "substantially altered the first draft of the free speech provision to eliminate the state action language."[134] As Justice Utter has commented, "[T]he adoption and subsequent deletion of the express state action requirement in the Washington Committee's first draft strongly suggest an awareness and rejection of such a requirement for the state free-speech provision."[135] Thus, the avail-

130. WASH. CONST. art. I, § 1.

131. State v. Schmid, 84 N.J. at 559, 423 A.2d at 628: "[T]he rights of speech and assembly guaranteed by the State Constitution are protectable not only against governmental or public bodies, but under some circumstances against private persons as well." *Id.*

132. *See* Shad Alliance v. Smith Haven Mall, 118 Misc. 2d 841, 462 N.Y.S.2d 344 (N.Y. Sup. Ct. 1983) (N.Y. Const. art. I, § 8); Batchelder v. Allied Stores International, 388 Mass. 83, 455 N.E.2d 90 (1983) (MASS. CONST., art. I, § 9); Commonwealth v. Tate, 495 Pa. 158, 432 A.2d 1382 (1981) (PA. CONST., art. I, § 7 and art. I, § 20).

133. *Tacoma Daily Ledger*, July 13, 1889, at 4, col. 3 (emphasis added).

134. Utter, *supra* note 128, at 174.

135. *Id.* at 177.

able legislative history buttresses the conclusion reached by the *Alderwood* plurality: article I, section 5 protects citizens against private abridgement of their right to freedom of speech.

B. Justifying the Imposition of Incidental Burdens on Landlords: The Compelling Societal Interest in the Promotion of the Freedom of Expression

The *Alderwood* doctrine is particularly appropriate in situations where private parties seek to place limitations upon speech in residential communities that are owned or managed by one party, and occupied by others. Justice Utter has recognized the danger to freedom of speech posed by landlords who seek to silence their tenants: "The exercise of free speech rights may be especially vulnerable in privately owned or managed communities, mobile home parks, nursing homes, and agricultural labor camps."[136] The vulnerability of the residential tenant is a direct result of the landlord's power to exact a high price for the exercise of the right to freely speak. The landlord who forces the tenant to accept eviction as the price for the expression of his political beliefs has the ability to impose a blanket of silence on all but the most zealous or affluent tenants.

In one Washington case involving landlord suppression of tenant political speech, a superior court judge ruled that the landlord's ability to impose a rule of silence on his tenants justified the recognition of the plaintiff tenant's right to assert not only her own free speech rights, but also the rights of her more timid tenant neighbors:

> The chilling effect that would otherwise be imposed on the tenants' freedom of speech justifies the recognition of [plaintiff's] standing to assert the rights of others. The fear of possible eviction is generally equivalent to the fear of loss of employment. Potential loss of one's residence, like loss of one's job, constitutes a serious potential injury that can have a grave chilling effect on the exercise of the right of freedom of speech.[137]

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136. Utter, *supra* note 128, at 190.

137. Findings of Fact and Conclusions of Law on Entry of Partial Summary Judgment for Plaintiff at 7, Paulsen v. Seamark Properties, Inc., No. 84-2-15311-3 (King County Super. Ct. April 9, 1985) (partial summary judgment entered) [hereinafter FFCL].

In addition to the vulnerability of residential tenants, the broad power of one landlord to silence a multitude of voices argues heavily in favor of constitutional protection against such landlord censorship. "If left unregulated, the owner could restrict the rights of the residents to assemble, speak, demonstrate, or advocate within their own community."[138] There is no sound reason why property owners should be given the power to silence property renters solely on the ground that the owner retains a property interest in the homes occupied by others. The bundle of rights associated with ownership of the fee interest in realty need not, and should not, carry with it a concomitant right to dictate to residential tenants what they can say while domiciled upon the land.

In *Alderwood*, the Washington Supreme Court held that in assessing the relative claims of property owners against the free speech claims of others, courts should employ a balancing approach that gives special deference to the exercise of free speech. The court looked to "the use and nature of the private property," the extent to which the property is "open to the public," and "the nature of the speech activity."[139] "The exercise of free speech is given great weight in the balance," the court said, "because it is a preferred right."[140] In *Alderwood*, the speech was related to the initiative process and the electoral system. The petitioner, the Washington Environmental Council, was attempting to collect signatures to place The Radioactive Waste Storage and Transportation Act of 1980 on the statewide ballot as Citizen's Initiative 383. The Washington Supreme Court plurality observed that since the petitioner's speech activity involved the initiative process, it took on "added constitutional significance."[141]

In two King County cases filed in the fall of 1984 by residential tenants against their landlords, the suppressed speech concerned political signs. The signs endorsed candidates for president and vice-president of the United States, for governor of the State of Washington, and for the United States Congress.[142] Speech of this nature, relating to general elections, deserves the highest order of constitutional protection; electo-

138. Utter, *supra* note 128, at 190-91.

139. *Alderwood Assocs.*, 96 Wash. 2d at 244, 635 P.2d at 116.

140. *Id.*

141. *Id.* at 245, 635 P.2d at 116.

142. Paulsen v. Seamark Properties, Inc., No. 84-2-15311-3 (King County Super. Ct. April 9, 1985) (partial summary judgment entered) [hereinafter cited as *Paulsen*];

ral speech, like initiative-related speech, has an independent claim to constitutional protection under the Washington State Constitution.[143]

It is well established that private property may, within constitutional bounds, be subject to state-imposed burdens or restrictions designed to further the general public welfare," so long as the restrictions do not amount to a taking without just compensation."[144] In *Robins*, the California Supreme Court held that its state constitution imposed constitutionally permissible burdens on property owners in order to promote and protect the rights of freedom of speech and freedom to petition: "To protect free speech and petitioning is surely a goal that matches the protecting of health and safety, the environment, esthetics, property values and other societal goals that have been held to justify reasonable restrictions on private property rights."[145]

In the context of residential leases, a landlord in Washington State is compelled, by both state and federal law, to offer the premises for lease to any member of the public, without discrimination on the basis of race, creed, sex, or national origin.[146] By placing property on the market for lease, a property owner invites the public to make use of his property. This opening of the property to the class of prospective tenants necessitates a corresponding response of state constitutional protection for tenants who seek to express their opinions on political issues while residing in the rented premises. As the Washington Supreme Court plurality held in *Alderwood*, "When property is open to the public, the owner has a reduced expectation of privacy and, as a corollary, any speech activity is less threatening to the property's value."[147]

In an analogous situation, the Washington Court of Appeals has recognized that "[w]here one opens one's home to the public by engaging in the rental of rooms therein for monetary gain, one must be deemed to have voluntarily subordinated personal privacy rights to those state interests

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Thompson v. Harrison, No. 84-2-15136-6 (King County Super. Ct. 1984) [hereinafter cited as *Thompson*].

143. *See infra* notes 159-171 and accompanying text.

144. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

145. Robins v. Pruneyard, 23 Cal.3d 899, 908, 592 P.2d 341, 346, 153 Cal. Rptr. 854, 859 (1979), *aff'd*, 447 U.S. 74 (1980).

146. *See* WASH. REV. CODE § 49.60.222 (1985).

147. *Alderwood Assocs.*, 96 Wash. 2d at 244, 635 P.2d at 116.

which can be shown to be compelling."[148] A homeowner may racially discriminate with respect to those persons whom he invites to dinner in his own house. But a homeowner who does not live on the premises, and who invites the public to rent the home for residential purposes, cannot claim any constitutional right to discriminate against the tenants to whom he will rent on the basis of race. The homeowner's autonomy to control the uses of his property may be constitutionally subordinated to the compelling state interest in "the eradication of social disparity created by racial discrimination."[149] Similarly, the landlord's power to control the uses of his property may also be constitutionally subordinated to the compelling state obligation to affirmatively protect tenants wishing to exercise their freedom of speech.

Finally, the use of property as a residence weighs heavily toward tipping the *Alderwood* balancing scales in favor of tenants' free speech rights. If a tenant cannot express political views in his or her own home, without fear of landlord eviction or reprisal, then freedom of expression will be markedly curtailed. There is simply not enough affordable housing for all citizens to be able to own their own homes. If the *Alderwood* balancing scales tip in favor of landlords, the political arena will lose the speaking participation of the thousands of registered voters who rent their homes.

The 1980 United States Census collected the following information regarding the numbers of residential tenants in Seattle,[150] King County,[151] and Washington State:[152]

148. Voris v. Human Rights Comm'n., 41 Wash. App. 283, 290, 704 P.2d 632, 636 (1985) (court held that landlord engaged in unfair practice to refuse to enter into real estate transaction with person because of race).

149. *Id.* at 290, 704 P.2d at 636.

150. Bureau of the Census, U.S. Dep't of Commerce, Pub. No. PHC80-2-329, Census of Population and Housing, Seattle-Everett, Wash. SMSA Census Tracts, Table H-1, (1980).

151. *Id.*

152. Bureau of the Census, U.S. Dep't of Commerce, Pub. No. PHC80-S2-49, Census of Population and Housing Advance Estimates of Social, Economic and Housing Characteristics in Washington, Table H-1, (Supp. 1980).

Renter-occupied units in the City of Seattle:	107,518
Renter-occupied units in Seattle/King County:	188,885
Renter-occupied units in Seattle Standard Metropolitan Statistical Area (the Greater Seattle area comprises two counties, King and Snohomish):	233,142
Renter-occupied units in Washington State:	529,188

In summary, the residential nature of the property, the public invitation to rent the premises, the political nature of election-related speech, the large numbers of residential tenants, and the preferred position of freedom of speech in our governmental system, all weigh heavily in favor of recognizing tenants' claims to freedom of speech as superior to the property rights of landlords.

C. A Requirement of Advance Landlord Consent to Tenant Political Speech Activities Constitutes an Invalid Prior Restraint upon the Exercise of Constitutionally Protected Speech

Landlords may differ in their approaches to tenant political expression. Some may attempt to completely ban all political signs and messages, regardless of the content of the speech. Others may attempt to control tenant speech activities by requiring tenants to obtain their advance permission, thus establishing themselves as censors of tenant political expression. In one case litigated in King County Superior Court, a Bellevue landlord for an apartment complex included the following standard provision in all of his leases: "No signs or placards shall be posted in or about the apartment building without written permission of the Landlord."[153] Such "advance permission" requirements clearly constitute prior restraints that are constitutionally invalid.

In addressing this issue, the Washington Supreme Court has forcefully held that the "language of the Washington Constitution absolutely forbids prior restraints against the publica-

153. FFCL at 4, *Paulsen*.

tion or broadcast of constitutionally protected speech."[154] In *State v. Coe*, the court noted that "unlike the first amendment to the United States Constitution, the plain language of the Washington Constitution, article I, section 5 seems to rule out prior restraints under *any* circumstances . . . ."[155] Justice Utter, writing for a six justice majority, noted that this absolutist approach was consistent with the court's plurality ruling in *Alderwood Associates*, "that under Const. art. 1, section 5, free speech is a 'preferred right' when balanced against other constitutional rights."[156]

Prior restraints are presumptively unconstitutional.[157] The prohibition against prior restraints was designed to achieve "the abolishment of censorship . . ."[158] and there can be no valid justification for distinguishing between censorship imposed by courts and legislatures, and censorship imposed by one's landlord. If landlords were allowed to exercise prior restraint, then we might find ourselves subject to a new form of segregation, where Democrats must rent from Democratic landlords and Republicans must rent from Republican landlords, in order to "freely speak" on political issues, without fear of eviction or punitive rent increases.

The absolute ban against prior restraints imposed by article I, section 5 is not applicable to speech that is not constitutionally protected, such as obscenity[159] or fighting words.[160] But it is beyond dispute that a tenant's act of displaying political preference signs endorsing candidates and initiatives is constitutionally protected speech of the highest order. Thus, "advance permission" rules which purport to require prior

154. State v. Coe, 101 Wash. 2d 364, 375, 679 P.2d 353, 360 (1984).

155. *Id.* at 374, 679 P.2d at 359 (emphasis in original).

156. *Id.* at 375, 679 P.2d at 360 (citing *Alderwood Assocs.*, 96 Wash. 2d at 244, 635 P.2d at 116).

157. *Coe*, 101 Wash. 2d at 372, 679 P.2d at 358; State v. Reyes, 104 Wash. 2d 35, 43, 700 P.2d 1155, 1160 (1985) (statute prohibiting insulting or abusing teacher was overbroad and void for vagueness); State *ex rel.* Super. Ct. v. Sperry, 79 Wash. 2d 69, 76, 483 P.2d 608, 612 (1971) *cert. denied*, 404 U.S. 939 (1971) (trial court order limiting news coverage of criminal trial was limitation on reporter's freedom to write and was presumed constitutionally invalid).

158. *Coe*, 101 Wash. 2d at 376, 679 P.2d at 361 (quoting Dailey v. Superior Court, 112 Cal. 94, 97, 44 P.458, 459 (1896)).

159. *See* Seattle v. Bittner, 81 Wash. 2d 747, 757, 505 P.2d 126, 132 (1973) (citing Fine Arts Guild v. Seattle, 74 Wash. 2d 503, 445 P.2d 602 (1968) (distribution of obscene material)).

160. *See* State v. Reyes, 104 Wash. 2d 35, 41, 700 P.2d 1155, 1158-59 (1985) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

landlord consent to tenant political expression, clearly violate article I, section 5. Such rules are invalid prior restraints.[161] A landlord may, consistent with the language of article I, section 5, pursue a post-publication remedy when he can show an abuse of the right,[162] but he may not restrain speech for fear that abuses may occur. A tenant's mouth may "not be closed in advance for the purpose of preventing an utterance of his sentiments, however mischevious the prospective results of such utterance" may be.[163]

D. Landlord Restrictions on Tenant Speech Related to Elections Also Violates the Article I, Section 19 Guarantee of Free and Equal Elections

In *Alderwood Associates*, the plurality noted that the shopping mall owners' refusal to permit signature collection on their premises effectively impeded the initiative process. Thus, in addition to violating article I, section 5,[164] the shopping mall owner also violated article II, section 1(a), the initiative guarantee of the Washington Constitution.[165] The desire of residential tenants to post political campaign signs similarly impacts a constitutional guarantee designed to protect the integrity and freedom of our republican form of government. Initiatives speak to legislation and to a specific issue. General elections concern candidates for a specific position. Both concern the republican political process.[166]

Article I, section 19 bluntly provides: "All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

In the recent case of *Foster v. Sunnyside Valley Irrigation*

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161. In *Paulsen*, the Honorable Rosselle Pekelis invalidated such a rule, holding that it was "unconstitutional, null and void, because it violates article I, section 5 by requiring the advance written permission of the landlord before signs can be displayed. This constitutes an unconstitutional prior restraint on free speech." FFCL at 9, *Paulsen*.

162. *Coe*, 101 Wash. 2d at 374, 679 P.2d at 359.

163. *Id.* at 377, 679 P.2d at 361 (quoting Dailey v. Superior Court, 112 Cal. at 100, 44 P. at 460).

164. *Alderwood Assocs.*, 96 Wash. 2d at 239-40, 635 P.2d at 114.

165. The initiative guarantee set forth in amendment seven to the Washington Constitution provides: "The first power reserved by the people is the initiative."

166. *Alderwood Assocs.*, 96 Wash. 2d at 252-53, 635 P.2d at 120-21 (Dolliver, J., concurring).

District,[167] a unanimous Washington Supreme Court held that the rights of Washington citizens under article I, section 19 are substantially greater than the parallel rights guaranteed by the federal constitution.[168] The *Foster* court noted that the United States Supreme Court has upheld departures from the principle of one-person one-vote, required by the federal constitution, when the election at issue concerns special purpose municipal districts. In two of these cases, the Court has upheld laws which gave the right to vote to landowners only. The court reasoned that landowners were more impacted by the decisions that were rendered by the "special purpose" governmental agency.[169]

In *Foster*, the Washington Supreme Court criticized the rationale of these United States Supreme Court decisions. The Court found them to be "inconsistent with Const., art. 1, section 19" because they created two classes of citizens, landowners and non-landowners, without recognizing the impact that decisions of a water irrigation district agency would have on both classes:

> The . . . Court's narrow focus upon the original irrigation purpose of the district caused it to recognize only the interests of landowners. Yet the district also generated and supplied electricity to approximately 240,000 consumers and derived 98 percent of its total operating revenue from this activity. Thus, non-landowners, too, were significantly affected by the district's policies.[170]

The *Foster* court noted that the statute in question enfranchised landowners who used their land for agricultural or horticutural purposes, but not landowners who used their land for other purposes. The issue before the court was: "Can the [irrigation] district constitutionally accord greater weight to votes cast by some members of the class directly affected by district operations than it does to other members of this class?"[171] The *Foster* court concluded that such a voting proce-

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167. 102 Wash. 2d 395, 687 P.2d 841 (1984).

168. *Id.* at 404, 687 P.2d at 846.

169. Ball v. James, 451 U.S. 355 (1981) (electing power district's directors limited to landowners and voting power apportioned to number of acres owned); Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973) (limiting eligible voters to landowners does not violate the notion that every person's vote is equal when the activity being voted on falls disproportionately on the landowners).

170. Foster v. Irrigation Dist., 102 Wash. 2d at 409-410, 687 P.2d at 849-50.

171. *Id.* at 410-11, 687 P.2d at 850.

dure violates article I, section 19 "because it does not account for a class of persons significantly affected by the district's operations. It gives them no voice."[172]

Admittedly, residential tenants whose landlords forbid them to post political signs are not disenfranchised and are not in the same position as the non-landowners in *Foster* who were denied the right to vote. Both landlords and their residential tenants are free to cast ballots in general elections. But while residential tenants retain an electoral voice, their voice is, of necessity, a quieter and more subdued one. In the absence of a legal remedy against landlord suppression of tenant election speech, tenants cannot participate in the pre-election debate on equal terms with landlords and homeowners.[173] If courts were to uphold a landlord's right to censor or flatly prohibit the political expression of his tenants, then only landowners would enjoy the freedom to publicly endorse the candidates of their choice in their own residential neighborhood. This result would violate both the spirit and the letter of article I, section 19, because an election where one class of citizens is inhibited from participating fully in the election debate could hardly be deemed a "free and equal" election.

In *Alderwood Associates*, Justice Dolliver concurred in the result reached by the plurality because, as he saw it, the "overriding public interest . . . is to make the initiative process available to all."[174] Of course, the shopping mall owners in *Alderwood* had not and could not forbid the Washington Environmental Council from seeking to place an initiative on the state ballot. They could, however, impede and frustrate the process by making it more difficult for the council to collect the signatures that were necessary before the initiative could qualify for the ballot. Similarly, residential landlords cannot forbid their tenants from voting. But landlords can, unless forbidden by the courts, make it more difficult for their tenants to promulgate political views, thus decreasing the chances of suc-

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172. *Id.*

173. *Compare* Seattle v. State, 103 Wash. 2d 663, 670-71, 673, 694 P.2d 641 (1985) (although WASH. REV. CODE § 35.13.165 "does not directly limit the right to vote in annexation elections to property owners. . .[it] gives property owners the power to prevent an election by filing a petition." The Court held that the statute violated WASH. CONST. art. I, § 19.).

174. *Alderwood Assocs.*, 96 Wash. 2d at 252, 635 P.2d at 120 (Dolliver, J., concurring).

cess for candidates and causes endorsed or supported by tenants.

In *First National Bank v. Bellotti* the United States Supreme Court extended to banks the first amendment right to spend money in political campaigns.[175] There is no sound reason why banks should have the freedom to advertise their political preferences free from governmental restraint, while residential tenants do not have the freedom to publish their political views free from restrictions imposed by private landlords. Justice Dolliver observed that "[i]mplicit in the initiative process is the need to gather signatures in a manner which does not violate or unreasonably restrict the rights of private property owners."[176] The same principle is true for general elections and political expression by residential tenants.

Implicit in the general election process is the need to foster political expression and debate in a manner that does not violate or unreasonably restrict the rights of residential landlords. The integrity of the electoral system is at issue, regardless of whether votes are being cast in favor of candidates or legislation. Without judicial protection against a landlord's censorship of tenants' political expression, elections will fail to be truly "free and equal" as mandated by article I, section 19.

E. Counterarguments of the Landlords

The *Alderwood* balancing test weighs the speech interests of tenants against the countervailing interests of landlords. In their defense, landlords have offered various justifications for their suppression of tenant speech. Most of the more common justifications have already been rejected by the courts in other cases involving free speech, and those remaining can be refuted. Landlords may claim their censorship is justified by the danger of misattribution, by the need to preserve the aesthetic appearance of the property, or by the desire to prevent vandalism. Moreover, landlords may contend that the existence of alternative residences excuses them from permitting speech activities on their premises. Each of these alleged justifications should be rejected by the courts.

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175. 435 U.S. 765 (1978).

176. *Alderwood Assocs.*, 96 Wash. 2d at 253, 635 P.2d at 121 (Dolliver, J., concurring).

1. Fears of Misattribution

The misattribution rationale was first expressed in *Pruneyard v. Robins*[177] in which the property owner claimed that if he permitted others to use his mall for speech activities, the public might mistakenly infer that the owner approved of, or endorsed, the views being expressed. The United States Supreme Court rejected this argument, noting that it was unlikely that misattribution would occur.[178] It is even less likely that a passerby would believe that political signs in the apartment windows were expressing the views of the apartment complex owner. Moreover, in *Pruneyard* the Court observed that property owners could always "expressly disavow any connection with the message by simply posting signs" that "disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law."[179] In *Alderwood Associates*, a plurality of the Washington Supreme Court expressly approved the reasoning in *Pruneyard*.[180] Because a landlord can fully protect himself against misattribution by posting a simple disclaimer, the danger of misattribution affords no sound justification for the suppression of tenant speech.

2. Aesthetics and the Appearance of the Neighborhood

Another justification commonly advanced by landlords in support of prohibitions against posting political signs on their property is the goal of promoting the aesthetic appearance of residential communities. Case law concerning government regulation of political signs provides guidance on how to respond to this argument.

In *Peltz v. City of South Euclid*,[181] the first major appellate decision involving municipal regulation of political signs, the Ohio Supreme Court struck down as unconstitutional a city ordinance that completely prohibited erecting political signs on both public and private property.[182] The City of South Euclid had attempted to justify the law as an anti-litter and anti-traffic hazard measure.[183] But the court rejected the aesthetic

177. 447 U.S. 74 (1980).
178. *Id.* at 87.
179. *Id.*
180. *Alderwood Assocs.*, 96 Wash. 2d at 245 n.9, 635 P.2d at 117.
181. 11 Ohio St. 2d 128, 228 N.E.2d 320 (1967).
182. *Id.* at 134, 228 N.E.2d at 324.
183. *Id.* at 132-33, 228 N.E.2d at 323-24.

defense of the ordinance as a litter prevention law because such an aesthetic goal was insufficient to justify a complete and total ban on policital signs. Instead, the court commented that a municipality must limit itself to less restrictive measures such as establishing sign setback requirements or imposing fines against property owners who litter the public streets with their signs.[184] The court also rejected the public safety justification offered by the city because political signs could not be shown to be a greater traffic hazard than other types of landscape features that regularly attract the attention of motorists.[185]

In *Ross v. Goshi*,[186] the island paradise County of Maui, Hawaii enacted a similar ordinance. The Maui ordinance outlawed all outdoor political campaign signs except for those signs that identified the headquarters of a political candidate. Citing the Ohio Supreme Court decision in *Peltz*, the United States District Court for Hawaii struck down the ordinance as violative of the first amendment.[187] The court rejected arguments concerning the need to preserve the natural beauty of the country on the ground that there were less drastic means available to achieve the governmental interest in promoting aesthetics.[188]

The town of Brookfield, Wisconsin enacted a municipal ordinance which met a similar fate in *Martin v. Wray*.[189] Brookfield did not ban all political signs, but did prohibit the display of campaign signs in residential areas. The district court in *Martin* was not persuaded that the desire to maintain an uncluttered appearance in residential neighborhoods could justify a ban on political signs.[190] In *Baldwin v. Redwood City*,[191] the Ninth Circuit struck down a similar ban on political signs in residential neighborhoods.

In 1981, the issue of municipal regulation of signs reached the United States Supreme Court in *Metromedia, Inc. v. San Diego*.[192] San Diego had enacted an ordinance which prohib-

184. *Id.*
185. *Id.* at 133, 228 N.E.2d at 324.
186. 351 F. Supp. 949 (D. Hawaii 1972).
187. *Id.* at 953.
188. *Id.* at 954-55.
189. 473 F. Supp. 1131 (E.D. Wis. 1979).
190. *Id.* at 1138.
191. 540 F.2d 1360 (9th Cir. 1970).
192. 453 U.S. 490 (1981).

ited all billboards that carried noncommercial messages. The Supreme Court held that the ordinance was unconstitutional on its face.[193] Although the Court recognized that San Diego had a valid interest in the "advancement of the city's aesthetic interests," such an interest was not sufficient to justify the complete ban on noncommercial billboard speech.[194] Recognizing that commercial speech was entitled to less first amendment protection than other forms of speech, the Court held that commercial billboard speech could be prohibited by local ordinance.[195]

Applying *Metromedia* to landlord-tenant disputes over the posting of signs, it is reasonable to conclude that a city could prohibit a residential tenant from posting commercial messages such as advertisements for babysitting or lawn mowing services, but could not prohibit a residential tenant from posting signs declaring his political views on upcoming elections.

Three years after *Metromedia*, however, in *City Council v. Taxpayers for Vincent*,[196] the Supreme Court distinguished *Metromedia* and upheld a Los Angeles municipal ordinance that prohibited posting signs on public property. Unlike the ordinance in *Metromedia*, the Los Angeles ordinance was held "content neutral" because it did not differentiate between commercial and political speech.[197] Moreover, the Los Angeles law did not prohibit the posting of signs on private property.[198] Instead, the prohibition was carefully limited to public property.[199] Justice Stevens, writing for the Court, noted that "by not extending the ban to all locations, a significant opportunity to communicate by means of temporary signs is preserved."[200] The dissenters in *Vincent* argued that there was an insufficient showing that "a significant number of private parties would allow the posting of signs on their property," and suggested that "common sense suggests the contrary at least in some instances."[201]

The majority in *Vincent* concluded that "[t]he problem

193. *Id.* at 521.
194. *Id.* at 510.
195. *Id.* at 520.
196. 466 U.S. 789 (1984).
197. *Id.* at 794.
198. *Id.* at 795.
199. *Id.*
200. *Id.* at 809.
201. *Id.* at 820 (Brennan, J., dissenting).

addressed by this ordinance—the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property—constitutes a significant substantive evil within the City's power to prohibit."[202] The majority held that posted political signs, like billboards "wherever located and however constructed, can be perceived as an 'aesthetic harm.' "[203]

The dissenters feared, however, "that aesthetic interests are easy for a city to assert and difficult for a court to evaluate." The difficulties arise from "the unavoidable subjectivity of aesthetic judgments—the fact that 'beauty is in the eye of the beholder.' "[204] Justice Brennan adhered to his view, expressed earlier in the *Metromedia* case, that " 'before deferring to a city's judgment, a court must be convinced that the city is seriously and comprehensively addressing aesthetic concerns with respect to its environment.' "[205]

By recognizing the importance of aesthetic interests, the decision in *Vincent* lends support to the arguments of landlords in the context of private disputes between landlord and tenants. But it is difficult to apply *Vincent* to the landlord-tenant situation for two reasons. First, it is difficult to gauge the adequacy of alternative methods of communication. The *Vincent* Court upheld a ban on posting signs on public property, with the understanding that private property sites would remain available. A landlord prohibition against tenant signs effectively eliminates the one private property site available to the tenant.[206]

Second, the ordinance in *Vincent* did not foreclose posting political signs on property which the proponent had a property interest. On the contrary, the City of Los Angeles simply forbade using property which belonged exclusively to the City of Los Angeles. But in the landlord-tenant situation, the con-

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202. *Id.* at 807.

203. *Id.* at 808 (quoting Metromedia, Inc. v. San Diego, 453 U.S. at 10).

204. 466 U.S. at 821-22 (Brennan, J., dissenting).

205. *Id.*

206. The First Circuit has distinguished *Vincent* on precisely these grounds. Matthews v. Needham, 764 F.2d 58 (1st Cir. 1985). The *Needham* court struck down a town bylaw that barred posting of political signs on residential property but permitted posting of commercial ones. *Vincent* was distinguishable because (1) that law prohibited posting of signs, regardless of content, and (2) the *Vincent* ordinance limited signs on public property, while the *Needham* bylaw touched private property. Private property, by its very nature, "may justify a greater degree of first amendment protection." *Needham*, at 61.

tested site "belongs" to both the landlord and the tenant because both have concurrent property interests in the same property.

While a partial ban on posting signs on public property survived constitutional attack in *Vincent*, total bans on posting signs on any property were invalidated in *Peltz* and *Ross*; and partial bans outlawing signs in residential districts were struck down in *Martin* and *Baldwin*. A landlord's prohibition on a tenant's right to post political signs in an apartment window seems most analogous to the residential neighborhood bans struck down in *Martin* and *Baldwin*.

If, under the first amendment, local governments cannot constitutionally prohibit posting political signs in residential neighborhoods, why should landlords be permitted to accomplish the same result by forbidding their tenants to post such signs? If the former practice violates the first amendment, then the latter practice should violate article I, section 5 of the Washington Constitution. Because state action is not always required to bring conduct under the protective shield of the state constitutional free speech provision,[207] it would be paradoxical and unacceptable to permit private landlords to impose a regime of political censorship on their tenants when such censorship powers are denied to governmental actors.

Parenthetically, it should be noted that some cities have implicitly recognized that the speech rights of the tenant are superior to the speech rights of the landlord. A Seattle Municipal Ordinance, for example, provides that: "No person shall place a temporary political sign on private property without the consent of the rightful occupier of such property."[208] The word "occupier" manifests a legislative determination that it is the *occupant* of the premises who has the paramount right to decide whether or not to display political signs. The occupant has the ultimate right to make the aesthetic determination of whether the neighborhood's appearance is harmed, enhanced, or unaffected by the posting of political signs. This right exists regardless of whether the occupant is the owner or a tenant. The appearance of a residential neighborhood that is posted with political messages may seem tarnished when viewed by a

207. For an alternative view that the Washington Supreme Court is more ambivalent in its approach to the "State Action" requirement, *see* Skover, *supra* note 127, at 244.

208. Seattle Mun. Ordinance § 2.24.050(B) (1985).

naturalist, landscape artist, or environmentalist. But the appearance of a vigorous and healthy participatory democracy, as expressed through the signs, is to some a cause for happiness. In the end, the tenant's concept of beauty should prevail on this issue.

3. The Potential for Vandalism

Political views can be controversial and unpopular views can spark a violent response. For that reason, landlords may attempt to justify a ban on political signs by arguing that political speech would or might lead to acts of vandalism that would damage the landlord's property. But it was settled long ago that speech which "stirs the public to anger, invites dispute [or] brings about a condition of unrest," is constitutionally protected so long as it does not involve "fighting words" or the immediate incitement of unlawful acts.[209] Speakers do not lose their free speech rights simply because their listeners may react in a hostile manner. If they did, vandals and rioters could effectively censor the views of anyone with whom they disagreed.[210]

The vandalism argument, advanced by landlords seeking to suppress tenant speech, may be factually accurate in some cases. Signs endorsing an unpopular candidate or cause may very well trigger a responsive act of vandalism resulting in damage to the property of the landlord. But the vandalism argument cannot prevail. As a variant of the "heckler's veto" theory, the "vandals' veto" theory must be rejected because its acceptance would constitute the beginnings of a form of fascism enforced by private parties instead of by the state. If the "vandals' veto" is sanctioned, then a violent and destructive minority could deny freedom of expression to the majority and an aroused majority could deny freedom of expression to a minority. Violence and destruction cannot become the currency which controls the marketplace of ideas.

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209. *See* Terminiello v. Chicago, 337 U.S. 1 (1949) (petitioner addressed an audience inside an auditorium outside of which was an angry crowd protesting the meeting).

210. *See* Gregory v. Chicago, 394 U.S. 111 (1969) (Supreme Court reversed the convictions of peaceful civil rights demonstrators who were arrested because of bystanders unruly conduct).

4. Alternative Residential Forums

A landlord who wishes to suppress tenant speech may contend that if his tenants wish to express their political views on their residential premises, then they should move to a home or apartment where the landlord does not object to such speech activity. This approach was implicitly rejected in *Alderwood Associates* by a plurality of the Washington Supreme Court. The initiative signature collectors in *Alderwood* could have moved to a different shopping center. Nevertheless the court held that the *Alderwood* plaintiffs were entitled to exercise their article I, section 5 rights at that particular shopping mall. Obviously, moving to a different shopping mall for an afternoon of leafletting is easier than moving to a different apartment when a general election approaches. Therefore, the existence of an alternative residential forum for electoral speech is not relevant to the *Alderwood* balancing approach. If it were relevant, the right to freedom of speech could be exercised only by those residential tenants who were willing to pay the price of relocating.

F. Property Rights Basis for Tenant's Right to Free Expression

Even if a state court refused to recognize an affirmative state constitutional right to individual freedom of speech that is protected against private abridgment,[211] the court cannot thereby rid itself of the conflict between the speech and property rights at issue. In landlord-tenant speech disputes, both parties have constitutionally recognized property rights.[212] In these disputes, since the property is jointly held by the landlord and tenant, the court must answer the question of which party has the paramount right of expression under property law.

The simple answer to this question is the universally rec-

211. *See, e.g.*, State v. Felmet, 302 N.C. at 178, 273 S.E.2d at 712 ("This court could . . . interpret our State Constitution to protect conduct similar to that of defendant . . . . However, we are not disposed.").

212. The leasehold interest of a tenant has been recognized as a compensable property right under the fifth and fourteenth amendments of the United States Constitution. *See* A.W. Duckett & Co. v. United States, 266 U.S. 149 (1924) (tenant was entitled to compensation for property taken by President for war purposes even though tenant not owner of property); Alamo Land and Cattle Co. v. Arizona, 424 U.S. 295 (1976) (holder of a leasehold interest is entitled to just compensation for the value of that interest when it is taken upon condemnation by the United States).

ognized principle that the tenant's leasehold interest constitutes the broadest possible grant of uses.[213] Thus, in the absence of complicating factors,[214] the presumption must be that the tenant's possessory interest includes the use of the property for speech purposes.

In Washington, the courts have long held that "during the existence of the lease a lessee is for all general purposes the owner of the demised premises."[215] The sole limitations implied by common law are that the uses may not be unlawful and they may not constitute waste.[216] Washington courts have found that only those uses which constitute nuisances are unlawful.[217] Waste is defined as the commission of an injury to the reversion by the person holding the possessory interest.[218]

It is inconceivable that a Washington court would hold that posting a political sign in the areas subject to the tenant's exclusive possessory interest constitutes an unlawful use. Since article I, section 5 guarantees that "every person may freely speak, write, and publish on all subjects," the use of property for speech purposes, far from being unlawful, is a protected use under the state constitution.

Regarding waste, Washington courts have looked for uses of the property that resulted in serious and permanent damage to the premises.[219] The exercise of freedom of expression does not cause serious and permanent damage to the property. There is little, if any, tangible injury done to property by the posting of a political campaign sign. A yard sign disturbs, at most, a few square inches of lawn; a window sign or door sign involves, at most, a small number of tape marks. In any event, these injuries can be easily remedied prior to the expiration of the lease. Other less tangible injuries, such as visual clutter, are transitory and unlikely to result in serious or permanent

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213. 51 C.J.S. *Landlord and Tenant* § 326, at 848 (1968) ("A lessee is entitled to use the premises for any lawful or valid purpose. . . .")

214. For a discussion of the primary complicating factor, a written lease restriction, see *supra* notes 238-250 and accompanying text.

215. Noon v. Mironski, 58 Wash. 453, 455, 108 P. 1069, 1070 (1910) (quoting 18 AM. & ENG. ENCY. LAW 2d, at 634) (date unknown).

216. *Noon*, at 455, 108 P. at 1070.

217. Ridpath v. Spokane Stamp Works, 48 Wash. 320, 93 P. 416 (1908) (jury question as to whether operation of machinery by lessee of ground floor of building constituted a nuisance when other floors of building used as hotel).

218. Stoebuck, *The Law Between Landlord and Tenant in Washington*, 49 WASH. L. REV. 291, 335 (1974).

219. *Id.* (citing as examples: tearing out floor, removing oven from foundry).

damage. Although the landlord might claim transitory damage to the market value of the property because of sign posting, the signs are still temporary in nature, and the apartment may be returned to its original state at the termination of the tenancy. This is all that the landlord is entitled to under his residual property rights in the apartment.

Moreover, the minimal "injury" caused to the property by the political sign posting is justifiable when weighed against the exercise of a constitutionally guaranteed right of freedom of expression. A use imbued with a constitutional right cannot be termed "unnecessarily injurious" to the property. The consumption of resources in the exercise of a constitutional right does not equate with unnecessary waste of the premises.

G. Privacy Rights Basis for Tenant's Right to Free Expression

In the context of article I, section 7 and fourth amendment privacy rights, Washington courts have recognized that it is the tenant, not the landlord, who holds the preeminent right to freedom from unreasonable searches. In the recent case of *State v. Mathe*,[220] the Washington Supreme Court held that a landlord was unable to give valid consent to a police search of the residential tenant's home. The court held that the constitutional right to privacy belonged to the occupant, not to the owner of the premises. Similarly, the Washington Court of Appeals has held that a hotel guest who rents a room has a right to privacy in his room which cannot be superseded by a consent to search that is given to the police by the hotel proprietor.[221]

Just as the superior privacy right to privacy is vested in the residential tenant, not in the landlord, so too the superior free speech right should be vested in the tenant and not in the landlord. This conclusion may be reached without any recourse to constitutional analysis. Putting aside article I, section 5, the issue may be resolved solely within the context of property law. The tenant has a property right to decide what use to make of the property during the term of the lease. This right insures that the tenant is free to use the property for any lawful purpose, whether it be planting corn or planting political yard signs.

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220. 102 Wash. 2d 537, 688 P.2d 859 (1984).

221. State v. York, 11 Wash. App. 137, 521 P.2d 950 (1974).

While the tenant's right is clearly superior to the landlord's right in those areas where the tenant has exclusive possession (e.g., the interior and exterior walls of the apartment),[222] the issue becomes more complicated if the tenant seeks to post a political sign in the common areas of the leased premises. Again, both the landlord and tenant have recognized property rights in these areas.[223] Although the landlord has the right to regulate the use of common areas, he may not do so in a manner which completely denies the tenant a lawful use of the area.[224] Neither may the landlord make use of the common areas in a manner which prevents a reasonable use of those areas.[225]

One scholar has described the tenant's ancillary right to the use of common areas in these terms:

> Suppose the ordinary situation in which a tenant leases an apartment . . . in a larger building. Obviously, he must have the use of certain portions of the premises that are under the landlord's general possession, such as hallways, stairways, elevators, and walkways, though the parties likely will not make specific provision for this use in their lease. It is unthinkable that the law would not protect the tenant's use of these parts of the landlord's premises and perhaps other uses that are necessary to the expected use and possession of the leased premises. To the extent he is thus protected, the tenant has a right, not merely a privilege, an easement or servitude, not merely a license.[226]

Since the tenant has a qualified property right to the use of the common areas, he is not restricted to posting his political signs on the walls or windows of his apartment. Particularly if his apartment is windowless on the sides facing public streets, or if his apartment is the last one on an upper floor corridor, the tenant may wish to post his sign in a more visible

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222. The tenant "ordinarily has the exclusive right to use the outer walls of that portion of the building so leased by him for the purposes of posting . . . notices thereon." 51 C.J.S., *Landlord and Tenant* § 329, at 853 (1968).

223. The tenant has an implied right of access in all common areas necessary for enjoyment of the exclusively held premises. The landlord has the right to reasonably regulate common areas; State v. Fox, 82 Wash. 2d 289, 510 P.2d 230 (1973); Konick v. Champneys, 108 Wash. 35, 183 P. 75 (1919).

224. *Fox*, at 293, 510 P.2d at 233.

225. *See* Lindbloom v. Berkman, 43 Wash. 356, 86 P. 567 (1906) (Washington Supreme Court disallowed landlord's leasing of common areas to nonresidents).

226. Stoebuck, *The Law Between Landlord and Tenant in Washington*, 49 WASH. L. REV. 291, 333 (1974).

common area. While he may impose reasonable regulations upon such uses, the landlord may not completely deny the tenant the use of the common area for this purpose.[227]

In *State v. Fox*,[228] the Washington Supreme Court has addressed the issue of landlord control over common areas in the context of a dispute where the tenant sought to exercise his constitutional right to confer with counsel. In *Fox*, the defendant, an attorney, drove through a gate that was clearly marked with a "No Trespassing" sign in order to meet with his clients who were migrant farm workers. The workers were housed in buildings located on the farm owner's private property. Before the attorney could reach his destination, he was arrested for trespassing. On appeal, the Washington Supreme Court reversed the trespass conviction and held that "Fox had a lawful right to be there."[229] Moreover, the court held that this right was derived from the first and fourteenth amendments to the federal constitution.[230] Thus, the *Fox* court impliedly held that a tenant's federal free speech rights cannot be curtailed by the judicial enforcement of a landlord's desire to prevent his tenants from communicating with others. This is true even though the landlord purported only to prohibit the attorney from entering the farm's common areas.

To determine what is a reasonable regulation of common areas, it is again useful to look at analogous federal case law dealing with permissible government regulation of political signs. Generally speaking, municipalities have been unsuccessful in imposing statutory time limits on the posting of political signs to periods such as the sixty days before an election.[231] Similarly, a landlord should not be able to limit his tenants' freedom to post political signs at any time prior to an election.

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227. *See* Konick v. Champneys, 108 Wash. 35, 41, 183 P. 75, 77 (1919) (landlord may not deny access to common areas to a delivery person on the premises at the tenant's request):

> It is not, of course, intended to be said that the owner of an apartment house may not make reasonable regulations governing the use of the entrance ways to the building . . . . But the regulations must be reasonable, they must not be so stringent as to amount to a practical denial of the right.

228. 82 Wash. 2d 289, 510 P.2d 230 (1973).

229. *Id.* at 293, 510 P.2d at 233.

230. *Id.*

231. Antioch v. Candidates Outdoor Graphic Service, 557 F. Supp. 52 (N.D. Cal. 1982) (60 days before election restriction on political signs violates first amendment); Orzio v. Town of North Hempstead, 426 F. Supp. 1144 (E.D. N.Y. 1977) (six weeks before election held unconstitutional); Van v. Travel Information Council, 52 Or. App. 399, 628 P.2d 1217 (1981) (60 days before election restriction held invalid).

On the other hand, where common areas are concerned, it would appear reasonable for a landlord to require tenants to remove election signs within a definite number of days after the election. Once the ballots are cast, the message of a political endorsement loses its power to influence the election outcome.

Limitations on the size of signs posted in common areas should be upheld as long as they are reasonable. The key criterion for judging whether such a limitation is reasonable is to determine how large the sign must be before the message is clearly legible to the public and passersby. This will vary depending upon the proximity of the premises to streets, parks, and businesses.

The Ninth Circuit has upheld a municipal ordinance limiting individual political signs to a maximum size of sixteen square feet. However, the Ninth Circuit also struck down a provision that no more than eighty square feet of signs could be displayed on any one parcel of real estate.[232] One year later, the same court struck down a municipal ordinance that limited political signs in residential neighborhoods to a maximum area of four square feet.[233]

In the context of private landlord regulation of common areas, it appears these parameters would prove reasonable in most cases. A tenant would seldom require a sign larger than sixteen square feet in order to convey his message to other tenants using the common areas. But a size limitation of four square feet might effectively limit the tenant to rather short political messages. While a candidate's last name generally lends itself to a message of one or two words (e.g., "Elect Brooks" or simply "Brooks"), other political messages may require lengthier statements (e.g., "Oppose Apartheid, Support Divestiture and Trade Restrictions Against South Africa").

When a landlord imposes unreasonable restrictions on a tenant's speech use of a portion of the premises within the tenant's exclusive possession, the tenant has a cause of action against the landlord for disturbing his use of the premises.[234] The cause of action vested in the tenant is one for breach of

232. Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976).

233. Verrilli v. City of Concord, 548 F.2d 262 (9th Cir. 1977).

234. Aldrich v. Olson, 12 Wash. App. 655, 531 P.2d 825 (1975) (tenant counterclaimed against landlord for wrongful eviction); Conaway v. Time Oil Co., 34 Wash. 2d 884, 210 P.2d 1012 (1949) (a written painting agreement constituted a license, not a lease; thus lessors had full possession of their land).

the covenant of quiet enjoyment,[235] a covenant implicit within all residential lease agreements.[236] The remedies available to the injured tenant include a judgment for damages, injunctive relief, or both.[237]

Therefore, under conventional property law principles, a tenant has a remedy for landlord interference with his right to post political signs. This remedy exists regardless of whether the tenant has a constitutional remedy for the same injury. In Washington, and in other states that have accepted the *Robins* and *Alderwood Associates* theory of state constitutional protection speech against private abridgment of free speech, a tenant need not resort to property law in order to obtain relief from the courts. But in those states where this constitutional theory has been rejected, or where the theory has not yet been considered, a tenant may obtain virtually identical relief by raising the same issues in an action for breach of the covenant of quiet enjoyment.

IV. PUBLIC POLICY AND CONTRACTUAL MODIFICATIONS OF TENANT'S RIGHTS

Absent some overriding public policy interest, nothing prevents a tenant from contractually giving up his speech rights, whether constitutional or common law in nature. Common law property rules also can be modified by the terms of a lease so as to restrict the scope of the tenant's permissible uses of the property.[238] However, not all contractual modifications are acceptable to the courts. A number of important public policies may make certain contractual provisions judicially unenforceable. A well-known example is a covenant not to sell property to persons of a minority race, the landmark case being *Shelley v. Kraemer*.[239] On its face, *Kraemer* purports to find state action present in the judicial enforcement of a

235. Alexis v. Pittinger, 119 Wash. 626, 206 P. 370 (1922) (party blasting for landlord as independent contractor did not excuse landlord from disturbing tenant's peaceable possession).

236. Cherburg v. Peoples Nat'l. Bank, 88 Wash. 2d 595, 564 P.2d 1137 (1977) (landlord's refusal to repair unsafe outside wall constituted breach of implied covenant of quiet enjoyment).

237. Income Properties Inv. Corp. v. Trefethen, 155 Wash. 493, 508-09, 284 P. 782, 787 (1930), *aff'd sub nom.* Trefethen v. Niels Hansen Mfg. Co., 155 Wash. 702, 284 P. 787 (1930).

238. Stoebuck, *The Law Between Landlord and Tenant*, 49 WASH. L. REV. 291, 337 (1974).

239. 334 U.S. 1 (1948).

racially discriminatory private agreement. But a modern non-constitutional interpretation of *Kraemer* simply recognizes that some purely private contracts are unenforceable because they are in conflict with important public policies such as opposition to racial discrimination.

In the context of landlord-tenant speech disputes, three important public policies weigh heavily against judicial enforcement of lease provisions that purport to eliminate or unreasonably restrict a tenant's right to make political statements by posting signs on the property.

The first public policy, already expressed in the common law of property, opposes restraints on the uses of property. In construing a contractual limitation on the tenant's speech use of the premises, "all doubt must be resolved against the restriction and in favor of the free and unrestricted use of the property. . . ."[240] Thus, a generally worded restriction against posting signs should not be interpreted as preventing the tenant from posting political election signs. Instead, a generally worded prohibition should be construed as prohibiting signs of a type incompatible with a residential neighborhood, such as commercial signs, billboards, and neon signs. In the absence of an express written agreement, the general policy against restrictions on the use of property should cause courts to construe general lease provisions as allowing political signs compatible with a residential neighborhood.

The second public policy that militates against judicial recognition of contractual limitations on tenant speech is the general policy of free and uninhibited exchange of political messages. Even if the tenant lives in a state where the courts decline to construe constitutional free speech provision as protecting citizens against private abridgment, there remains a general public policy that favors political debate. Neither a constitutional nor a statutory right is required before a court can refuse to honor a contractual provision on public policy grounds. The Washington Supreme Court has held that a contract provision may be declared void if the nature of the provi-

240. Mt. Baker Park Club v. Colcock, 45 Wash. 2d 467, 470, 275 P.2d 733, 735 (1954) (restrictive covenant limiting use to residential purposes held not to bar construction of garage); *see also* Noon v. Mironski, 58 Wash. 453, 455, 108 P. 1069, 1070 (1910) (grocery business was legitimate use of property even though restriction in lease provided that premises were to be used "for purposes of conducting a bakery").

sion is "manifestly injurious to the public interest."[241] The court has declared various contract provisions void on the grounds that the provisions were in conflict with public policies against usury,[242] in favor of full compensation under insurance contracts,[243] and against private resolution of child custody disputes.[244] The public policy in favor of freedom of political expression is considerably more powerful than the public policy against usury. Rather, it is on par with the public policy against racial discrimination that the United States Supreme Court relied on when it to refused judicial enforcement of the racially restrictive property covenant in *Shelley v. Kraemer*.[245]

Moreover, a residential lease provision that conflicts with a public policy, such as that in favor of freedom of speech, should be even more vulnerable to judicial invalidation when it appears the landlord used his superior bargaining position to coerce his tenants into accepting the lease. A landlord should not be allowed to impose a standard form lease agreement on all of his tenants, and thereby to remove an entire community from the arena of political debate. The Washington Court of Appeals has held:

> The law has recognized that there is often no true equality of bargaining power in such [standard form] contracts and has accommodated that reality in construing them . . .. The characterization of a lease as an adhesion contract because exacted by reason of a gross disparity of bargaining power is to enable the court to protect the injured party from an unconscionable contract provision.[246]

Washington courts should not hesitate to hold that the public policy in favor of freedom of speech cannot be overcome by a residential landlord who offers housing to tenants on a

241. Motor Contract Co. v. Van Der Volgen, 162 Wash. 449, 454, 298 P. 705, 707 (1931) (quoting 13 C.J. 366, at 427 (1917)).

242. *Id.*; Whitaker v. Spiegel Inc., 95 Wash. 2d 408, 623 P.2d 1147, (1981), *modified*, 95 Wash. 2d 661, 637 P.2d 235 (1981) (credit constitutes "forbearance" within meaning of usury statute).

243. Grandview Inland Fruit Co. v. Hartford Fire Insurance Co., 189 Wash. 590, 66 P.2d 827 (1937) (appellant sought insurance money for full value of policy by virtue of the valued policy statutes Rem. Rev. Stat. § 7150, 7151 (1922)).

244. Campbell v. Campbell, 19 Wash. 2d 410, 143 P.2d 534 (1944) (decree of divorce with respect to the custody of children).

245. 334 U.S. 1 (1948).

246. Blakely v. Housing Authority, 8 Wash. App. 204, 212-13, 505 P.2d 151, 156 (1973) (quoting Standard Oil Co. v. Perkins, 347 F.2d 379 (9th Cir. 1965)).

take-it-or-leave-it basis, thus forcing tenants to forfeit their right to participate in election debates by posting political signs.

Finally, public policy in favor of political participation in a democracy militates against judicial enforcement of such lease provisions. Again, entirely aside from the issue of whether landlord censorship violates a state constitutional provision such as the article I, section 19 guarantee of "free and equal elections," it is sound policy to encourage all members of the public to participate in elections. This participation is not limited to the act of voting, but encompasses all political activity designed to stimulate public debate on the issues and the candidates.

This public policy is particularly compelling in the case of residential tenants, because available census data indicates that renters presently lag far behind homeowners in the realm of political participation. Renters comprise 35.6 percent of the housing units in the nation.[247] But, statistics indicate that homeowners are far more likely to be registered voters than tenants.[248] Also, homeowners are twice as likely to actually cast a vote as are their tenant counterparts.[249] Finally, renters are statistically poorer, and more likely to be minority members than are homeowners.[250] Thus it appears that if landlords are permitted to enforce lease restrictions against political signs, the population that is silenced will tend to comprise those who are predominantly poor, black, and politically inactive. It might be argued that because renters tend not to vote, they are less interested in posting election signs. But it could also be argued that if more renters were free to join the political debate by posting campaign signs, then more renters would be inclined to vote. Moreover, the minority of renters who do vote might stimulate their fellow nonvoting tenants to change their political ways.

In summary, sound public policies favoring freedom of

247. United States Bureau of the Census, 1980, *Census of Housing*, Vol. 1, Table HC 80-1-A1 and HC 80-1-B1.

248. 77.2% of all homeowners; 47.4% of all renters. U.S. Bureau of the Census, *Current Population Reports*, series P-20, No. 383 and earlier reports.

249. *Id.* (62.2 percent of homeowners compared to 31.9 percent of all renters.)

250. 67.4% of all whites own their own homes but only 44.4% of all blacks are homeowners. U.S. Bureau of the Census, 1980 *Census of Housing*, vol. 1, tables HC 80-1-A1 and HC 80-1-B1. The median income of a homeowner in 1980 was $19,800, whereas the median income of a renter was $10,500. U.S. Bureau of the Census, *Current Housing Reports*, H-150-83, American Housing Survey.

property use, freedom of speech, and political participation militate against the enforceability of lease provisions that purport to deny tenants the right to post political signs.

V. CONCLUSION

A tenant seeking to invalidate a landlord-imposed prohibition against posting political messages may advance a number of legal claims that vindicate the right to freedom of political expression. The tenant may claim that his common law leasehold interest gives him a property right to be weighed against that of the landlord. Both the tenant's leasehold and landlord's fee simple interest give rise to first amendment property-based speech rights. In assessing whose first amendment property-based speech right is superior, an examination of the common law of leases strengthens the tenant's position: a lessee has the right, during the life of the lease, to use the property for any lawful purpose, so long as the tenant does not commit waste. A tenant's common law property rights are, therefore, superior to those of the landlord's. As a result, the tenant's right to post political messages should prevail, unless the parties alter the common law by creating a contractual right of the landlord to veto or ban political expression.

Where there is such an express agreement, the tenant may be fortunate enough to live in a jurisdiction where the state constitution has been interpreted to provide protection against the private abridgment of speech. If so, he may combine his common law claim with a state constitutional claim. Where a balancing approach to competing free speech claims has been judicially approved, this will allow the tenant to strengthen his constitutional claim by pointing out that he, as well as the landlord, has a property right. Thus, the state constitutional claims should prevail over a landlord's claim that the tenant has contractually agreed to give the landlord censorship authority. Further, any such contract would be void as contrary to the public policy favoring freedom of speech guaranteed by the state constitution.

Additionally, the tenant may be able to make state constitutional claims based upon provisions guaranteeing "free and equal elections." Even in states where no such state constitutional provision exists, the general public policy in favor of vigorous political debate and citizen participation in elections will

support the tenant's use of the property for the communication of a political message.

In cases where there is no recognized state constitutional protection, the tenant may challenge a contractual provision in a lease on the ground that any direct suppression of political speech violates public policy: few public policies are as compelling as the policy in favor of citizen participation in elections. Also, a general public policy exists against restraints on the use of property. Both of these public policies are reflected in various state constitutional provisions and in the common law.

In summary, the tenant in his case against landlord censorship, can use constitutional, common law, and public policy arguments, that are based on both his free speech rights and property rights. A neat analytical separation of these arguments is impossible because all law, on some level, is an expression of one view of sound public policy. Thus, the tenant's right to freedom of political expression, upon close examination, provides an apt illustration of the law professor's adage: The law is a seamless web.