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Regulating Slate Mailers: Consumer Protection or First Amendment Infringement

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Regulating Slate Mailers: Consumer Protection or First Amendment Infringement?

by

CAROL FEDERIGHI*

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Private slate mailers in California have become part of the biennial political process. For-profit businesses sell their "endorsements" to candidates and proponents of ballot measures and mail recommended slates to targeted voters. These mailers have become big business in California\(^1\) and a political necessity for many candidates.\(^2\) Many, however, are purposely deceptive. Mailers appearing to report official party recommendations sometimes endorse and carry campaign messages from members of the opposite party who have paid to be included.\(^3\) Candidates purchase spots on slates to exclude the opposition from them.\(^4\) Party luminaries who have not sought inclusion are sometimes linked with ballot measures they have opposed.\(^5\)

California’s Political Reform Act of 1974 (Title 9), as amended,\(^6\) requires that slate mailer organizations\(^7\) register with the Secretary of State\(^8\) and comply with extensive disclosure requirements.\(^9\) The Act also mandates that slate mailer organizations state on the mailings themselves that the mailings are not official party documents, that some candidates and ballot measure proponents have paid to be endorsed, and that appearance in the mailer does not imply endorsement of other candidates listed in the mailer.\(^10\) The Fair Political Practices Commission enforces Title 9 provisions through cease and desist orders and imposition of penalties of up to $2,000 per violation.\(^11\)

Despite the requirements of the Act, California’s slate mailers remain deceptive. Part I of this Note provides a brief overview of the operation of the slate mailer business in California and current regulations

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1. See Jack W. Germond & Jules Witcover, *Selling Endorsements to Top Bidders*, 22 Nat’l J. 1498 (1990); see also infra part I.A.
2. See Dean Murphy & Paul Feldman, *Cries of Foul Fill Political Air as Slate Mailers Arrive*, L.A. Times, Nov. 3, 1990, at A1; see also Mark Simon, *Slate Mailers: Selling Endorsements for Fun and Profit*, 20 Cal. J. 289, 290 (1989); see also infra parts I.B. and III.
4. See Murphy & Feldman, supra note 2, at A1; see also infra part III.
5. See, e.g., Prop. 31, UPI, June 2, 1986, available in LEXIS, Nexis Library, UPI File; Coalition ‘88 Issues Report Card on Campaign Slate Mailers, PR Newswire, Nov. 7, 1988, available in LEXIS, Nexis Library, Wires File; Murphy & Feldman, supra note 2; see also infra part III.
7. Defined as businesses that collect $500 or more and either support or oppose four or more candidates or ballot measures. *Id.* §§ 82048.3, 82048.4(a)(1)-(2).
8. *Id.* § 84106.5(a), (c).
9. *Id.* §§ 82048.4, 84106.5, 84108, 84219.
10. *Id.* § 84305.5(a)(2).
11. *Id.* § 83116.
which monitor the practice. Part II discusses the constitutional implications of regulating both political and commercial speech. Part III argues that slate mailer regulation is needed and constitutionally permissible. Part IV concludes that with minor modifications, California’s regulations could become a model for other states by striking an appropriate balance between freedom of expression and accurate voter information.

I

Slate Mailers

Slate mailers appear to be a uniquely California phenomenon. The size of the state, the expense of running campaigns in large districts with mobile populations, and the relative weakness of the political parties may help account for this fact. Nevertheless, because the practice is a lucrative one for the slate mailer organizations, it is reasonable to assume that slate mailers will spread to other states. Those states can thus learn from California’s experience.

A. The Slate Mailer Business

Slate mailers have been a part of the political landscape in California for the last decade. Sixty-seven for-profit slate mailer businesses registered with the state in 1992. These businesses sell their endorsements to candidates and proponents of ballot measures. The price of endorsements varies according to the office sought, how well the endorsed candidate or issue is featured, and the reputation and direct-mail operation of the slate mailer organization.

12. Jack Germond and Jules Witcover describe slate mailers as a “California invention” and mention no other states where the mailers are used. Id. See also Alan C. Miller, Mr. Inside & Mr. Outside: The Audacious Berman Brothers Built a Powerful Progressive Machine in California. But Can They Survive a New Political Order?, L.A. TIMES, March 29, 1992, (Magazine), at 18. California Common Cause Legislative Advocate Ruth Holden, whose organization has sponsored legislation to regulate slate mailers, was unaware of the practice in any other state. As of July, 1992, LEXIS and Westlaw contained no statutory references to slate mailers in any state other than California. Representatives of other organizations familiar with election practices nationwide, such as the Elections Center and the National Center for Policy Alternatives, were likewise unfamiliar with the practice outside California.

13. See Kenneth Reich, Slate Mailers—Real Story Often Appears in Fine Print, L.A. TIMES, Nov. 7, 1988, § 1, at 3. Some mailers have been around even longer. For example, “The Community Democrat” was founded in 1962. See Michele Fuetsch, Dymally in Legal Battle Over Mailer, L.A. TIMES, Nov. 18, 1990, at J1.


California's leading slate mailer organization is the Beverly Hills firm of Michael Berman and Carl D'Agostino (B.A.D.). Berman and D'Agostino's "'88 Voter Guide" collected more than $3.3 million from candidates and proponents of ballot measures for inclusion on B.A.D. slate mailers. In 1990, B.A.D.'s voter guide collected more than $3.6 million. B.A.D. and other slate mailer organizations tailor slates to specific voters. In 1990, B.A.D. mailed eight million slate cards and follow-up "mailograms" in the primary and nine million in the general election. B.A.D. targets mailings by legislative district, city, and county, and by voter inclination. There were 18,000 variations in 1988, according to D'Agostino.

While many politicians privately wish commercial slate mailers could be abolished, the mailers have become a political necessity for many candidates and proponents of issues. Parties sometimes mail recommended slates, but these are sporadic and generally less well distributed than those disseminated by the for-profit businesses. Slate mailers are also less expensive than direct mail. Because they are among the least expensive ways to bring a candidate to the attention of voters, the mailers are particularly valuable to those who are not well known by the

16. Germond & Witcover, supra note 1; Simon, supra note 2, at 290.
17. Simon, supra note 2, at 290. In the general election, the California Trial Lawyers Association paid $1.3 million for a "Yes on 100" (insurance initiative) endorsement; Leo McCarthy's Senate campaign paid $300,000 for an endorsement; and the "Yes on Proposition 98" (school funding) campaign paid $200,000. Id.
18. Murphy & Feldman, supra note 2. Diane Feinstein paid approximately $500,000 to head B.A.D.'s "Democratic Voter Guide" for the 1990 primary. Germond & Witcover, supra note 1. Then-state senator John Garamendi paid B.A.D. $350,000 to be endorsed as state insurance commissioner, and opponents of the reapportionment initiatives paid B.A.D. $210,000 for a "No on Propositions 118 and 119" recommendation. Id.
19. Miller, supra note 12.
21. Miller, supra note 12. For example, B.A.D. makes assumptions based on whether a woman uses "Mrs. or Ms." and whether a resident owns or rents. Id.
22. Id.
24. See Germond & Witcover, supra note 1. The authors observe that the official party slate that endorsed then-Attorney General Van de Kamp for governor in the 1990 Democratic primary, for example, "didn't carry the weight" of the B.A.D. slate that endorsed Feinstein. Id.
25. Murphy & Feldman, supra note 2.
electorate, such as judicial aspirants. Voters, particularly the undecided, consider them important sources of information about elections.

Greater voter awareness of a candidate's name does not necessarily lead to greater understanding of what that candidate represents, however. Slate mailer organizations sometimes endorse candidates less for their views than for their pocketbooks. Some slate mailer organizations actually "shop around" their endorsements to the highest bidder.

The chief problem with slate mailers is that they are frequently deceptive. Slate mailers have misled voters by masquerading as official party endorsements when they are not, by misrepresenting public officials' positions on the issues, and by implying that candidates at the top of the ticket endorse others named on the slates. The California legislature has responded by regulating the industry to some extent.

B. Current Regulations

Legislation regulating slate mailers has been incorporated into California's Political Reform Act of 1974 (Title 9) since 1988. The Act defines slate mailers as mass mailings consisting of over 200 substantially similar pieces of unsolicited mail that support or oppose four or more candidates or ballot measures. Slate mailer organizations are entities that collect $500 or more to mail them.

Slate mailer organizations must register with the Secretary of State and comply with extensive disclosure requirements. Each must report the organization's name, address, and telephone number; the name, address, and telephone number of its treasurer and other principal officers; and the name of any individual, entity, or other person who

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27. Voters surveyed in 1990 by the Charlton Research Co., a Republican polling and strategy firm, ranked slate mailers ahead of television and radio spots, televised debates, newspaper endorsements, and state political party recommendations as a source of information about elections. Murphy, supra note 14.
28. See infra part III. This is not to say that slate mailers do not generally favor either predominantly Democratic candidates and causes or predominantly Republican ones. Carl D'Agostino, for example, claims that B.A.D.'s "Democratic Voter Guide" is "reflective of Democratic philosophies." Simon, supra note 2, at 291.
30. See infra part III.
33. Id. §§ 82048.3, 82041.5.
34. Id. § 82048.4.
35. Id. § 84108.
controls the organization. An organization must also reveal totals received and disbursed on behalf of every candidate or ballot measure during each campaign period. While the information may seem somewhat inaccessible to even the curious individual, it is frequently obtained and reported by the media.

Since 1988, the Act has required official slate mailer organizations to include the following Notice to Voters in eight-point type at the top or bottom of their mailers:

NOTICE TO VOTERS: THIS DOCUMENT WAS PREPARED BY —, NOT AN OFFICIAL POLITICAL PARTY ORGANIZATION. Appearance in this mailer does not necessarily imply endorsement of others in this mailer. Appearance is paid for and authorized by each candidate and ballot measure which is designated by an *

As of January 1, 1992, mailers must also print the party designation of any endorsed candidate whose party affiliation is different from the one the mailer appears to represent. The regulation is designed to discourage slate mailers that appear to represent a particular political party from endorsing members of other political parties. In addition, after January 1, 1993, each slate mailer must include among its disclaimers in the Notice to Voters that appearance in the mailer “does not necessarily imply . . . endorsement of, or opposition to, any issues set forth in the mailer.

If the Fair Political Practices Commission determines on the basis of a hearing that there has been a violation of any regulation, it must issue an order requiring the violator to cease and desist, file any reports or documents required, and pay a penalty of up to $2,000 for each violation.

36. Id. § 84106.5.
37. Id. § 84219(a)-(b).
38. The regulation requires the notice to be placed “[a]t the top or bottom of the front side or surface of at least one insert or at the top or bottom of one side or surface of a postcard or other self mailer . . . . [The notice] shall be in a color or print which contrasts with the background so as to be easily legible, and in a printed or drawn box and set apart from any other printed matter.” Id. § 84305.5(a)(2).
39. Id.
40. Id. § 84305.5.
to the General Fund of the state. Each violation apparently means each violation of any provision.44

C. Proposals for Reform

Additional proposals for reform have included banning slate mailers entirely,45 requiring authorization from political parties before distributing mailers appearing to be official party endorsements,46 and requiring written permission from candidates for the use of their names or pictures on slate mailers.47 These suggestions are not likely to survive a constitutional challenge.48 Instead, this Note proposes amending regulations to increase penalties for violations, to require that notices be printed in ten-point type rather than eight,49 and to mandate that a fourteen-point asterisk precede the Notice to Voters. This Note will argue that, with relatively minor changes, California's current slate mailer provisions could be a model for other states, properly balancing the right to freedom of expression with concerns for an informed electorate.

43. CAL. GOV'T CODE § 83116 (West Supp. 1992). This provision was strengthened, effective January 1992. If the Commission determines after a hearing that a violation has occurred, it may now require the violator to cease and desist and pay a fine of up to $2,000 for each violation. Formerly, the statute specified the Commission could require a cease and desist order or a fine of up to $2,000.


45. See Pyle, supra note 31.


48. See infra part III.

II

Constitutional Issues Affecting Slate Mailer Regulation

A. Classification of Slate Mailers as Highly Protected or Less Protected Speech

I. Political Speech

Arguably, any regulation of slate mailers interferes with constitutional protections of free expression. The First Amendment of the United States Constitution declares that "Congress shall make no law . . . abridging the freedom of speech." While the amendment has never been enforced literally, its protections are far-reaching. California's constitution also guarantees free speech. The provision, which is "more definitive and inclusive than the First Amendment," proclaims that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

Since free political discourse is the hallmark of a free society, the First Amendment is especially protective of political speech. Regulation of political speech is suspect because of its potential for chilling legitimate public dissent. The United States Supreme Court in Brown v. Hartlage noted "there is practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs." The guarantee of free speech "has its fullest and most urgent application precisely to the conduct of campaigns for political office." An intelligent evaluation of candidates presupposes they

50. U.S. Const. amend. I.
51. The U.S. Supreme Court has recognized that certain speech is outside the protection of the First Amendment, e.g., speech "pursued as an integral part of criminal conduct," seditious speech, "fighting words," obscene speech, etc. See William B. Lockhart et al., Constitutional Law 645 (7th ed. 1991). See also Dennis v. United States, 341 U.S. 494, 503 (1951). "[A]n analysis of the leading cases in this Court which have involved direct limitations on speech . . . will demonstrate that both the majority of the Court and the dissenters in particular cases have recognized that [the right to free speech] is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations." Id.
52. The due process clause of the Fourteenth Amendment protects the right of free speech from state action. See Fiske v. Kansas, 274 U.S. 380 (1927).
59. Id. at 53.
have an "unfettered opportunity to make their views known." Free political discussion is also seen as a source of truth. "[T]he freedom to think as you will and to speak as you think," Justice Brandeis has claimed, "are means indispensable to the discovery and spread of political truth." °

"[T]he best test of truth," said Justice Holmes, "is the power of the thought to get itself accepted in the competition of the market . . . ." 62

Despite the high protection accorded political speech, regulation is permissible in certain circumstances. In evaluating whether a particular regulation of political speech is constitutionally permissible, a court balances the state's legitimate interests in regulation against the desirability of the free flow of information. 63 The Court recognizes that "[s]tates have a legitimate interest in preserving the integrity of their electoral processes." Nevertheless, "[w]hen a State seeks directly to restrict the offer of ideas by a candidate to the voters, the First Amendment . . . requires that the restriction be demonstrably supported by a compelling [state interest], and that the restriction operate without unnecessarily circumscribing protected expression." 65 There is no litmus test for determining which state election law restrictions are valid and which are invalid. A court must determine the legitimacy and strength of competing interests and consider the extent to which those interests make it necessary to burden the one claiming the constitutional right. 66

For example, Brown v. Hartlage 67 held that a Kentucky state statute prohibiting a candidate from offering material benefits to voters in exchange for their votes could not constitutionally apply to a candidate who merely promised to lower his own salary if elected. 68 Although a state can prohibit corrupt practices, it cannot prohibit a candidate from making such a generalized appeal to the voters. 69 "It is simply not the function of government to 'select which issues are worth discussing or debating.' " 70

The permissibility of regulating slate mailers as political speech, therefore, hinges on: (1) whether the state's interest in an informed elec-

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63. See Hartlage, 456 U.S. at 52-54.
64. Id.
68. Id. at 57.
69. Id. at 58.
70. Id. at 60 (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972)).
torate is compelling; (2) to what extent the regulations restrict the flow of ideas; and (3) whether the restrictions are narrowly drawn to avoid impinging on other protected speech.

2. Commercial Speech

Because slate mailer organizations pay for their mailers by charging ballot measure supporters and some candidates for their slates' endorsements, slate mailers may appear to be a form of commercial rather than political speech. This distinction is critical because political speech is protected to a far greater degree than commercial speech. While the Court has "rejected the highly paternalistic view that government has complete power to suppress or regulate commercial speech,"71 it distinguishes commercial from other forms of protected speech.

The Court defined commercial speech in Central Hudson Gas & Electric Corp. v. Public Service Commission as "expression related solely to the economic interests of the speaker and its audience" which "propos[es] a commercial transaction . . . in an area traditionally subject to government regulation."72 Thus the New York Public Service Commission regulation that banned an electric utility from promoting the use of electricity in its advertisements involved commercial, not political speech.73

Although the First Amendment prohibits content-based regulation in most contexts, it allows limited regulation of the content of commercial speech.74 The Court has characterized commercial speech as a "hardy breed" of expression, not overly susceptible to suppression by regulation.75 In addition, commercial speakers presumably know their markets and products and are thus better able to evaluate the accuracy of their message and the lawfulness of their activity than political speakers.76

The government may ban deceptive commercial speech because of its concern for truth in the commercial arena.77 For commercial speech

72. 447 U.S. at 561-62.
73. Id. at 561.
74. Id. at 564 n.6.
75. Id.
76. Id.
77. Id. at 563. The implication is that there is less concern for truthful information in the political arena (a somewhat dubious proposition) or that the opportunity for exposure of untruthful information is greater in the political context.
to be protected, it must concern a lawful activity and not be misleading. 78
The government may regulate even protected commercial speech if the
asserted governmental interest is substantial, the regulation directly ad-
vances that interest, and the regulation is no more extensive than neces-
sary to serve the purported objective. 79

B. Impermissible and Permissible Restraints on Speech

Nearly as critical as classifying slate mailers as either political or
commercial speech is ascertaining whether current regulations and those
proposed by this Note constitute an impermissible prior restraint, an in-
fringement on the right of free association, or justified disclosure.

1. Prior Restraints

Since violations of Title 9 can result in cease and desist orders, 80
regulation of slate mailers at least theoretically involves prior restraint.
One of the chief purposes of the guarantee of free speech is to prevent
prior restraints on publication; such restraints are presumed constitution-
ally invalid. 81 This is especially true where the statements involve criti-
cisms of public officials. 82 In Wilson v. Superior Court, 83 the California
Supreme Court held that a preliminary injunction on the publication and
distribution of allegedly misleading and libelous statements made by a
political candidate about his opponent, the incumbent, was a constitu-
tionally impermissible prior restraint. 84 The court recognized that prior
restraints were permissible "under some extraordinary circumstances,"
such as preventing the wartime disclosure of military secrets. 85 But it
observed that it had not found any case where a court had upheld re-
straining publication of statements about the official conduct of public
officers on the grounds that the statements were false or deceptive. 86 Al-
lowing a court to determine whether drafts of a newsletter were suffi-
ciently "fair" to merit publication would put the court in the
impermissible role of censor. 87

Despite the strong language in Wilson, one California court of ap-
pearance in Drexel v. Mann 88 upheld a California statute that permitted

78. Id. at 563-64.
79. Id. at 566.
83. 532 P.2d 116 (Cal. 1975).
84. Id.
85. Id. at 122.
86. Id.
87. Id. at 120.
amendment or deletion of false or misleading statements in the official voters' pamphlet. Because the state had created the "unique vehicle of expression" for use by certain individuals, the voters' pamphlet was a "limited public forum." The state that created it thus had a compelling interest in the accuracy of the information published in it, an interest the court found more compelling than the candidates' interest in free speech within that forum. Because a candidate injured in an official voters' pamphlet had no way of responding to every voter receiving it, the court concluded that no remedy for an injured candidate short of prior restraint would be adequate. Candidates were still free to distribute misleading statements in other forums. The court cited with approval Patterson v. Board of Supervisors, upholding similar procedures for public examination of statements submitted to municipal and county voters' pamphlets on ballot measures. Although the California Supreme Court has granted review of Mann, a reversal would not affect slate mailers because slate mailers are not limited public forums created by the state.

Because slate mailers are not limited public forums, injunctions for violation of slate mailer regulations may be impermissible. Current regulations and those proposed by this Note, however, do not impose the same kinds of restrictions on content as those involved in Wilson. Enjoining publication because a candidate has said something is different from enjoining publication because he has failed to say something.

2. Restraints on Freedom of Association

A state may regulate expression more extensively when it does so for reasons independent of its content. The Constitution, for example, grants the states broad power to regulate the time, place, and manner of holding elections. This power does not, however, allow states to abridge fundamental rights such as the right of association. The right of association may be implicated in slate mailer regulation since the most recent requirements mandate disclosure of party affiliation where one party's candidate is included in a mailer apparently representing another party.

89. Id. at 894.
90. Id. at 894-95.
91. Id. at 895.
93. Id. at 257-60.
94. Mann, 278 Cal. Rptr. 887.
96. Id.
97. See supra part I.C.
In *Tashjian v. Republican Party*, the Supreme Court held unconstitutional a Connecticut statute requiring party membership of voters participating in a political party's primary election because the statute infringed on a party's right to freedom of association. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech," the Court declared. The right of the Republican Party to include independent voters in its primary outweighed the state's interest in limiting administrative costs. The Court also rejected the argument that a party's open primary promoted voter confusion because voters could not determine candidates' views unless they were elected solely by party members. "Our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues." The law was also objectionable because it restricted the flow of information, depriving a party and its members of the views of an important segment of the voting population.

Unlike the restrictions in the Connecticut statute, slate mailer disclosure requirements increase rather than diminish the flow of political information. In addition, slate mailer disclosure requirements do not prohibit inclusion of non-member candidates in "party" mailers. Regulations requiring disclosure of party affiliation may, however, inhibit a speaker's chance to be included in a particular mailer, because slate mailer organizations may be reluctant to "endorse" candidates identified as "another" party's members. Consequently, such regulation may be deemed to infringe upon a candidate's right of association.

3. Mandated Disclosures

Slate mailer regulation involves compelled disclosure, and disclosure can, in itself, seriously infringe on First Amendment association rights. Required disclosure of contributors to political campaigns, for example, can subject those individuals to possible harm. In *Brown v. Socialist Workers*, the Supreme Court held that an Ohio law requiring disclosure of the names and addresses of campaign contributors and recipients of campaign disbursements could not be applied to the Socialist Workers

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98. 479 U.S. 208 (1986).
99. Id. at 214.
100. Id. (quoting NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958)).
101. Id. at 218.
102. Id. at 220.
103. Id. at 221.
104. See Buckley v. Valeo, 424 U.S. 1, 74 (1975).
Party. Disclosure would make both contributors and recipients vulnerable to threats, harassment, and reprisals. Moreover, by "cripp[ing] a minor party's ability to operate effectively," disclosure would reduce the free flow of ideas in the political arena.

Courts have upheld disclosure requirements where the threat of harassment does not exist and important state interests are involved. State interests must survive "exacting scrutiny," however, and there must be a "relevant correlation" or "substantial relation" between the state's interest and the information that is required to be disclosed.

For example, the Court has endorsed regulations requiring strict disclosures of the sources of financial support. The Federal Election Campaign Act of 1971 requires political committees to keep detailed records of contributions and expenditures and to make quarterly reports. As amended in 1974, the Act required candidates to divulge the name and address of anyone who contributed more than ten dollars and the occupation and principal place of business of anyone who contributed $100 or more in one year. The Court upheld the provisions because they advanced compelling interests and met the "substantial relation" test. Disclosure, the Court noted, enables voters to evaluate candidates based upon their supporters, inhibits corruption by exposing large contribution sources, and enables detection of contributions violating statutory limits.

Most states require author identification of campaign literature. These disclosure laws may inhibit individuals from disseminating their views. The public interests the laws serve, however, likely outweigh the risk of chilled expression. Such measures are supportable because they deter defamation and permit more accurate voter assessment of campaign literature. Carefully drawn laws requiring campaign literature disclosure should be constitutionally permissible.

The Court has invalidated disclosure requirements which sweep too broadly, however. A blanket prohibition on dissemination of anonymous

106. Id. at 97.
107. Id. at 98.
108. Buckley, 424 U.S. at 64.
109. See id. at 60-61.
111. Buckley, 424 U.S. at 63. In 1976, Congress amended 2 U.S.C. § 432(c)(2) to require that political committees divulge only the name and address of anyone who contributes in excess of fifty dollars.
112. Buckley, 424 U.S. at 66-68.
113. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1132 (2d ed. 1988).
114. Id.
115. Id.
116. Id.
campaign literature, for example, is unconstitutional. A Los Angeles ordinance prohibiting distribution of any handbills in any place under any circumstances which did not identify the name and address of the author and distributor was invalid "on its face." The Court noted that persecuted groups throughout history have had to resort to anonymous literature to be heard. While the state claimed the purpose of the ordinance was to identify those responsible for fraud, false advertising, or libel, the ordinance, in fact, barred all handbills, truthful as well as defamatory.

Similarly, in Schuster v. Imperial County Municipal Court, a California court of appeal held unconstitutional an Elections Code section prohibiting all anonymous political campaign literature other than mere support statements. Although the state has an interest in assisting the electorate's rational decision-making, the interest does not justify a blanket prohibition of all anonymous campaign literature. "[S]uch state interests can be furthered through more narrowly constructed statutes without the criminalization of anonymously uttering the truth."

C. Remedies for False or Misleading Speech

1. More Speech

Political speech is often not "truthful." Nevertheless, there are few remedies available to those injured by false or misleading political speech. "More speech, not enforced silence," is the constitutionally preferred remedy. "We depend for . . . correction," the Court has noted, "not on the conscience of judges and juries but on the competition of other ideas." The First Amendment "embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office." Arguably, problems associated with misleading slate mailers are best solved by candidate complaints and media disclosure. Because many mailers arrive shortly before an election, however, such disclosure can come too late.

118. Id. at 64.
119. Id.
121. Id. at 452.
122. Id.
125. Id. at 60.
2. *Tort Actions*

The Court has greatly limited damages a political candidate can recover for false or misleading speech related to official conduct. "[E]rroneous statement," the Court has declared, "is inevitable in free debate." In *New York Times Co. v. Sullivan*, the defendant newspaper published an advertisement which included some false statements about police action against civil rights demonstrators. The Court held that a state could not constitutionally award damages for a defamatory statement about a public person's official conduct unless the statement was made with "actual malice," i.e., with knowledge that the statement is false or with reckless disregard for the truth. Absent "actual malice," it is thus unlikely that an individual could maintain a defamation action against a slate mailer organization.

3. *Antitrust Legislation*

Antitrust legislation apparently does not provide a remedy for false or misleading political speech either. In *Eastern Railroad Conference v. Noerr Motors*, the Court held that a deliberately deceptive campaign by a group of railroads to influence legislation was political activity not prohibited by the Sherman Act's prohibitions against monopolies or restraints on trade. In *Noerr*, the railroads had hired a public relations firm, which circulated propaganda having the appearance of being the spontaneous declarations of independent groups.

Following *Noerr*, the Ninth Circuit held in *Rodgers v. Federal Trade Commission* that the Federal Trade Commission Act was not applicable to campaign activities. In affirming the dismissal of a case against opponents of an "anti-litter" campaign in Washington, the court rejected the argument that opponents had engaged in "unfair and deceptive practices in commerce." The court declined to apply commercial speech analysis to the conduct because its purpose was primarily political, e.g., to influence the electorate at large. The willful use of distortion or deception was irrelevant.

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127. *Id.* at 254.
128. *Id.* at 256-58.
129. *Id.* at 279-80.
131. *Id.* at 140.
132. 492 F.2d 228 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974).
135. *Id.* at 229-31.
136. *Id.*
In *O'Connor v. Superior Court*, a case involving a slate mailer, a court of appeal in California ruled that California's consumer protection statutes do not apply to political speech. Although he won the election, incumbent Phillip Wyman sued B.A.D. over its circulation of a slate mailer endorsing his opponent Lucinda O'Connor for the 34th district state Assembly seat. The mailer had been fast and loose with its quotes. State Senator Walter Stiern was quoted as saying, "Wyman wants to use [Kern County] for L.A.'s garbage dump," when Stiern had neither made the statement nor given permission for it to be attributed to him. Also without permission for the statement's use, the mailer falsely claimed that Joe Martin, state commander of the Veterans of Foreign Wars, had described Wyman as "no friend of veterans.

Wyman argued that California's Business and Professions Code should apply to campaign literature. Section 17500 of the Code declares it unlawful "for any . . . firm, corporation or association . . . to . . . disseminate . . . in any newspaper or other publication . . . any statement, concerning such . . . services . . . which is untrue or misleading." Noting that federal cases involving the Federal Trade Commission Act and the Sherman Antitrust Act have held that laws regulating business practices do not apply to political activity, the court concluded that California's statute does not apply to political speech. The court argued that the broad language of the provisions provided no standards for regulating First Amendment conduct and that the California legislature could have included political activity within the purview of the code if this had been its intention.

After the *O'Connor* decision, the California legislature passed regulations requiring a Notice to Voters on the face of slate mailers. Since all regulations on slate mailers are contained in Title 9 of the California Government Code, it appears the legislature intends the Fair Political Practices Commission to enforce complaints which fall short of private tort actions.

137. 223 Cal. Rptr. 357 (Ct. App.), review denied, June 20, 1986.
138. *Id.*
139. *Id.* at 358.
140. *Id.*
141. *Id.*
142. *Id.* at 359.
143. CAL. BUS. & PROF. CODE § 17500 (West 1987).
144. *O'Connor*, 223 Cal. Rptr. at 360.
145. *Id.* at 361.
146. *Id.*
147. *See supra* part I.
III
The Case for Slate Mailer Regulation

A. Deceptive Practices of Slate Mailers

Despite the required disclosures and penalties for violations in Title 9, slate mailers remain misleading. The effectiveness of some mailers' "endorsements" of candidates and causes appears to lie principally in the mailers' ability to deceive. Only a careful reader will notice the eight-point Notice to Voters stating that the mailer is not official and that some candidates and supporters of ballot measures have paid for endorsement. The asterisk, required after the names of those who have paid to appear on a mailer, is especially easy to overlook because it is tiny and appears at the end of the last sentence of the notice. Deception is inevitable unless voters are aware that mailers are not official documents, that many candidates and ballot measure proponents have paid to be endorsed, and that appearance on the mailers does not constitute endorsement of other persons or issues listed.

Some slate mailers masquerade as official documents and misrepresent the views of candidates. Sometimes, mailers appear to carry official major party endorsements for members of the other major party who have paid to be included. Some recent examples include the following: For $5,000, Tom Campbell, Republican candidate for the 12th Congressional district, was endorsed on the 1988 "Democratic Voting Guide" which also recommended votes for Democratic presidential candidate Michael Dukakis and Democratic U.S. Senate nominee Leo McCarthy. "Your Republican Voting Guide" (Nov. 1990) endorsed Democrats Norman Waters for the state Assembly and Patti Garamendi for the state Senate. The mailer appeared official—the front side carried Ronald Reagan's picture and the name and polling place of the voter to whom it was addressed. Another "Republican" mailer, "The Republican Vote by Mail Project," endorsed Democrat Arlo Smith for Attorney General in 1990. A "Victory 88" mailer urged a vote for the "Republican Team" but endorsed a number of Democrats and took positions on some ballot measures which were contrary to the official Republican position. The pseudo-official mailers deceive less-aware voters by encouraging belief that "their" party endorses a candidate or issue it does not.

149. Id. § 84305.5(a)(2) (West Supp. 1992); see also supra part I.
150. Legislation made effective Jan. 1, 1992 may deter this practice. See supra part I.B.
151. Simon, supra note 2, at 289.
152. CITIZENS FOR REPUBLICAN VALUES, YOUR REPUBLICAN VOTING GUIDE, Calaveras Cty., Nov. 1990.
153. Murphy & Feldman, supra note 2.
154. Reich, supra note 13.
The 1992 mandate requiring party designations for endorsed candidates who are not members of the party apparently represented by the mailer should discourage the practice of supporting opposition candidates.\(^{155}\) The new regulation, however, does not cover situations where the opposition party has paid the slate mailer organization to make “no endorsement” in an important race.\(^{156}\) Candidates sometimes purchase spots on slates to keep the opposition off them. Supporters for Democratic candidate Arlo Smith paid “Your Republican Voter Guide” to withhold endorsement from his Republican opponent Dan Lungren.\(^{157}\) A headline on the guide declared the Republican “is not qualified to be Attorney General.”\(^{158}\) The California Republican Party filed an official complaint with the Fair Political Practices Commission\(^{159}\) but did not pursue it after Lungren won the election. Although it is impossible to know how many Republican voters were persuaded by the mailers that Smith, not Lungren, represented their party, the mailer sought to give them that impression.

Slate mailers sometimes imply that party luminaries have endorsed a measure they have opposed or that they oppose a measure they in fact endorse. In 1986, B.A.D., which is associated with Democratic causes, mailed a “Republican Team '86 Ticket” to registered Republicans urging them to vote for Republican incumbent George Deukmejian for governor. The same mailer also urged a “no” vote on Proposition 51, the “deep pockets initiative,” a measure Deukmejian and the Republican Party had endorsed.\(^{160}\) In 1988, “The Community Democrat” carried a banner headline stating that Los Angeles Mayor Tom Bradley recommended a “no” vote on Proposition 103 when he had, in fact, endorsed the proposition.\(^{161}\) Although Deukmejian opposed all five insurance measures, “Governor Deukmejian’s Official Ballot Recommendations,” mailed by the insurance industry which supported measures 101, 104, and 106, urged a “no” vote only on Propositions 100 and 103.\(^{162}\) Pro-choice candidates in 1992 primary races who failed to pay the “Pro-

\(^{155}\) It may not. It is certainly conceivable that some voters may be persuaded that their party has actually renounced its own nominee. For example, many prominent Republicans denounced the candidacy of Louisiana’s Republican gubernatorial candidate David Duke in 1990.


\(^{157}\) Murphy & Feldman, \textit{supra} note 2.

\(^{158}\) \textit{CITIZENS FOR REPUBLICAN VALUES, YOUR REPUBLICAN VOTING GUIDE, Nov.} 1990.

\(^{159}\) Murphy & Feldman, \textit{supra} note 2.

\(^{160}\) UPI, \textit{supra} note 5.

\(^{161}\) PR Newswire, \textit{supra} note 5. “The Community Democrat” was produced by Willard Murray, a 54th Assembly District candidate. \textit{Id.}

\(^{162}\) Reich, \textit{supra} note 13.
Choice Voter Guide" for endorsement risked having the mailer endorse an opponent who did pay. Voters were thus left with the impression that unendorsed candidates were not pro-choice. The uninformed voter is purposely misled by such practices.

Slate mailers are arguably no more deceptive than the campaign literature and stump speeches of individual candidates. Political hyperbole and even false allegations are known features of individual campaigns. Literature supporting an individual candidate, however, does not purport to be an official party slate. Moreover, organizations responsible for individual campaign publications are much more readily identifiable than those responsible for private slate mailers. Deceptive slate mailers, therefore, pose greater problems than deceptive speech by individual candidates.

B. Recommended Strengthening of Current Regulations

1. More Prominent Disclosures

Disclosure of information is probably the most effective means of constitutionally combatting deceptive slate mailers. Disclosure promotes an informed electorate, an important governmental interest, without unnecessarily impinging on free speech. To be effective, however, mandatory disclosures on slate mailers must be prominent enough to be noticed, and penalties for infractions need to be sufficiently strong to deter noncompliance. The requisite notice would be far more legible in ten-point type rather than the currently mandated eight-point. The larger type should not unduly interfere with the mailer itself. Adding a fourteen-point asterisk at the beginning of the Notice to Voters would also be helpful. A large, prominently positioned asterisk would assist voters in understanding the significance of asterisks placed next to the names of candidates and ballot measures. Such modifications would help voters recognize that mailers are not official party documents, that appearance in a mailer does not necessarily imply endorsement of other candidates or issues in the mailer, and that some candidates and ballot measure proponents have paid to be endorsed.

163. Murphy, supra note 14.
164. The amendment to CAL. GOV'T CODE § 84305.5 that goes into effect Jan. 1, 1993—requiring mailers to include a disclosure that appearance in the mailer does not imply endorsement of, or opposition to, issues set forth in the mailer—should help voters recognize that endorsed candidates may or may not agree with the position the mailer has taken on statewide ballot measures. Cal. A.B. 1640, supra note 42.
165. This is the position taken by Carl D'Agostino of B.A.D. See Simon, supra note 2, at 291.
167. The text of mailers is invariably in type larger than 10-point.
2. Greater Penalties for Infractions

Although the legislature strengthened slate mailer regulation in 1991, the current penalties still insufficiently deter organizations that ignore particular code provisions. For example, a slate mailer organization that neglects to place the requisite Notice to Voters on its mailer would apparently be subject to a maximum fine of $2,000 if it fulfilled other requirements imposed by the Political Reform Act. For businesses receiving many times that amount from candidates and ballot measures, $2000 is a relatively small price for deception. Furthermore, once an election is over, misled voters and successful candidates have little incentive to pursue violations. Larger fines for failure to comply with disclosure regulations should help deter the potential violator.

C. The Challenge to Regulation: Slate Mailers as Political Speech

As a legislature can constitutionally ban misleading commercial speech, the permissibility of regulating slate mailers would not be an issue if the mailers were commercial advertisements. As Lawrence Tribe has observed, the line between political speech and commercial speech is not definitive. Justice Stevens has noted that it is not entirely clear if the defining feature is the content of the speech or the motivation of the speaker.

On the one hand, "advertising which 'links a product to a current debate' is not thereby entitled to the Constitutional protection afforded noncommercial speech." Mailed advertisements for contraceptives at issue in Bolger v. Young Drug Products Corp. contained a discussion of important public issues. Nevertheless, because the mailings were advertisements, made reference to a specific product, and were economically motivated, the Supreme Court concurred with the district court that the mailings were commercial, not political speech.

On the other hand, the Court has characterized businesses' direct remarks on public policy issues as political, not commercial speech. Government-regulated monopolies that comment directly on public is-

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168. See supra notes 40-44 and accompanying text.
169. This would apparently constitute only one violation. See supra notes 43-44 and accompanying text.
170. See supra part II.B.
173. Id. at 563 n.5.
175. Id. at 67-68.
sues enjoy First Amendment protections.\textsuperscript{177} Protected speech does not lose its status simply because a corporation is the speaker.\textsuperscript{178} In \textit{First National Bank of Boston v. Bellotti},\textsuperscript{179} the Court held that a film distribution company operating for profit was in the same position as for-profit publishers of books, magazines, and newspapers. As the Court has written, companies do not forfeit their First Amendment rights because of their profit motivations.\textsuperscript{180}

The fact that speech is in the form of an advertisement is not determinative either. The speech at issue in \textit{New York Times} was a paid advertisement, but this was completely irrelevant to its classification as protected speech. A different conclusion, the Court noted, would discourage newspapers from carrying such advertisements and shut off an important outlet for those who do not otherwise have access to the media. "[I]f the allegedly libelous statements would otherwise be constitutionally protected . . . they do not forfeit that protection because they were published in the form of a paid advertisement."\textsuperscript{181}

The fact that slate mailer organizations are businesses is, therefore, almost certainly irrelevant to the issue of their regulation. Presumably, slate mailers would be characterized as political rather than commercial speech. Slate mailers do not propose commercial transactions. Any promotion of slate mailer organizations themselves is indirect; the slates directly promote only candidates and ballot measures in political campaigns. Because they are clearly campaign literature, slate mailers are almost certain to receive the full constitutional protections accorded political speech.

Nonetheless, the more prominent disclosures on slate mailers recommended by this Note should be constitutionally permissible. The state has a compelling interest in an informed electorate, the proposed regulations' impact upon the flow of information is minimal, and the provisions are narrowly drawn to serve the state interest. In addition, current regulations and the minor modifications to them suggested in this Note constitute neither impermissible prior restraint nor infringement upon the freedom of association. Moreover, disclosure requirements pose no genuine risk of harassment to slate mailer organizations. Finally, the preferred constitutional remedy of "more speech" is inadequate.

\textsuperscript{177} Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 n.1 (1980).
\textsuperscript{178} Bellotti, 435 U.S. 765.
\textsuperscript{179} Id.
\textsuperscript{180} Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952).
D. The Constitutional Permissibility of Regulating Political Speech

1. The State's Interest in an Informed Electorate

The state's interest in an informed electorate is a compelling one. Clear identification of the sources of campaign literature helps the voter evaluate a statement's credibility and make a more informed decision at the polls.\textsuperscript{182} As the Court in \textit{Buckley} said, "[I]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course we follow as a nation."\textsuperscript{183} The state's interest in seeing that voters are not deceived by misleading mailers should outweigh a candidate's or slate mailer organization's desire to trick the voting public into thinking the mailer is something it is not, or into thinking a person supports a candidate or issue when he does not.

2. The Minimal Infringement on Protected Speech

Current and proposed disclosure regulations involve a minimal regulation of ideas. Mandating that slate mailer organizations disclose certain information does not constitute state "select[ion of] which issues are worth discussing or debating."\textsuperscript{184} While the 1992 mandate of party affiliation disclosure for candidates whose party differs from the one the mailer appears to represent may deter messages from opposition candidates, the regulation does not prevent them. Requiring organizations to divulge their identity and sources of support does not affect the issues the speaker may address nor the point of view the candidate may adopt. Current and proposed disclosure requirements do not prohibit candidates and ballot measure proponents from making whatever appeals they wish to make to voters. The \textit{Hartlage} Court invalidated regulations on political speech because the state attempted to \textit{limit} the content of a candidate's speech.\textsuperscript{185} Disclosure requirements, far from depriving anyone of information, increase what the voter knows about candidates and ballot measures.

3. The Close Nexus Between the Regulations and the Objective

Mandating legible notices to voters and requiring disclaimers that appearance in the mailer does not imply endorsement of or opposition to

\textsuperscript{183} 424 U.S. 1, 14-15 (1976).
\textsuperscript{184} Brown v. Hartlage, 456 U.S. 45, 60 (1982) (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972)).
\textsuperscript{185} Id. at 60. See supra part II.
any other candidate or issue set forth in the mailer directly promotes the end sought—helping ensure that deceptive tactics do not mislead voters. Such requirements are narrowly drawn; they apply only to slate mailers mailed by slate mailer organizations, not to all campaign literature. By requiring slate mailer organizations to notify voters that some candidates and ballot measure proponents have paid for endorsements and to clarify that the mailers are not official party documents, and that appearance in the mailer does not necessarily imply endorsement of other candidates or issues listed, the regulations are narrowly tailored to meet the specific problem that mailers are not what they appear to be.

4. The Absence of Concerns Associated with Prior Restraints and Intrusions on Freedom of Association

California legislators have proposed a number of reforms for slate mailers, many of which would not likely survive constitutional scrutiny. An outright ban on the publication of slate mailers, for example, would almost certainly be unconstitutional because slate mailers are protected speech. It is also likely that the courts would view as an impermissible prior restraint a statute that required written authorization from candidates before their names or pictures were used on a slate mailer or one that required a political party’s permission before a slate mailer organization could distribute mailers appearing to be official party endorsements. An organization is as free to endorse a candidate as an individual is. Moreover, it is difficult to justify why a party or candidate should serve as censor when the state must not.

Further disclosure requirements, on the other hand, should not constitute impermissible prior restraints because many of the concerns regarding prior restraints are not present. The Fair Political Practices Commission can issue cease and desist orders only after publication and circulation, not before. No censor views and rules on the permissibility of the materials before publication. The Commission must determine there is probable cause a violation has occurred and exacts penalties only after a noticed hearing. Because most mailers arrive late in a cam-
campaign, it is likely the election would precede any cease and desist order. Moreover, although current and proposed regulations mandate certain disclosures, they do not restrict what the speaker can say. The Commission cannot issue a cease and desist order because a slate mailer includes a false or misleading statement. The requirements permit voter awareness of the source of the speech and the nature of the endorsements; they do not prohibit the mailers from presenting their message.

Nor should the regulations pose an impermissible barrier to freedom of association. Mandated disclosures will interfere with one's right of association only to the extent that a slate mailer organization is deterred from endorsing candidates from different parties on the same slate. An organization publishing a single party slate may hesitate to promote candidates labeled as members of the opposition party. Significantly, the regulations do not prohibit a slate mailer organization from endorsing any candidate or issue it chooses.

Further, there seems little danger that clearer disclosure of the source of the literature and the names of candidates and ballot measure supporters who paid for endorsement would subject anyone to harassment. Slate mailer organizations, candidates for political office, and ballot measure sponsors are “main stream” groups, distinguishable from “fringe” groups subject to historical harassment such as the Socialist Workers Party. Admittedly, required disclosure of the sources of speech is distinguishable from required disclosure of the sources of political contributions. The political contributor does not “stand in the same shoes” as a pamphleteer, and leaflets and pamphlets have been “historic weapons in the defense of liberty.” Businesses that endorse major party candidates for a price as much as a conviction, however, are distinguishable from street-corner pamphleteers who voice unpopular views.

5. The Inadequate Remedy of “More Speech”

While the preferred remedy to false or misleading speech is more speech, the remedy is inadequate in the case of slate mailers. Candidate outcries and press coverage of violations can do much to alert the voter, but media coverage of slate mailer violations is sparse in the smaller papers, and press commentary on lesser known candidates is limited. Slate mailers generally arrive at the close of the campaign, too late for exposure of violations to have an impact on a political race. In these

instances, the remedy of "more speech" is inadequate. It is worth noting that Justice Brandeis' often quoted statement that "the remedy to be applied is more speech" was qualified by the words "[i]f there be time." Additionally, while the Court may have envisioned "more speech" as coming from sources other than the offending one, disclosures are a form of more speech. Certainly, they do not constitute "enforced silence."

IV
Conclusion

Freedom of speech is one of our most cherished values, and the First Amendment gives its greatest protection to political speech. Government regulation of political speech is permissible, however, if the state interest is sufficiently compelling and the regulation is narrowly drawn to serve that interest.

Regulating slate mailers is justified because the state has a legitimate interest in an informed electorate. Requirements that slate mailer organizations clearly inform the voter that mailers are not official documents, that some candidates and ballot measure proponents have paid to be endorsed, and that appearance in the mailer does not imply endorsement of other candidates or issues in the mailer are all narrowly drawn, reasonable methods for avoiding voter deception. Imposition of fines large enough to deter organizations from ignoring the requirements is also reasonable. Requiring adequate disclosure on slate mailers serves the public interest while preserving the right of candidates, ballot measure proponents, and slate mailer organizations to get their message to the voter. With relatively minor changes in current regulations, California's slate mailer provisions can serve as a model for other states.

196. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (emphasis added), overruled by Brandenburg v. Ohio, 395 U.S. 444 (1969).