

LAWS4108: PUBLIC LAW

key

Start of topic

Section in code

Element

case

or (case)

WHAT IS PUBLIC LAW

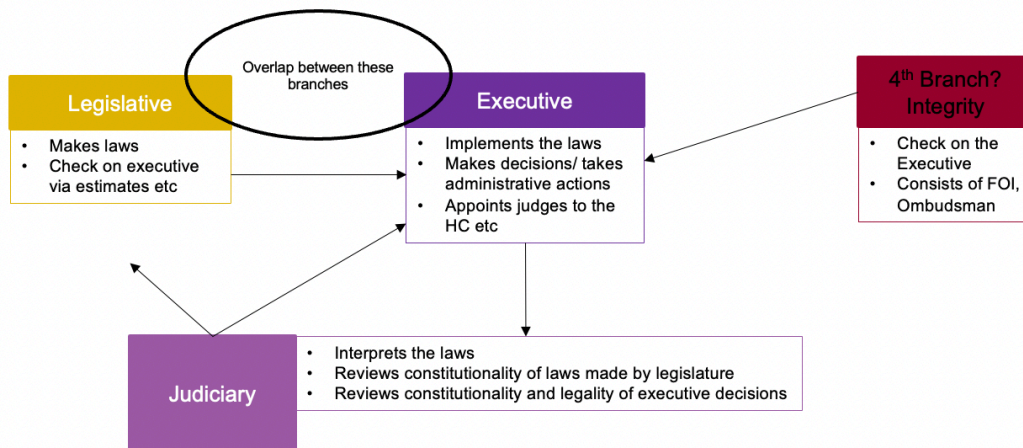
- The relationship between the individual and the state
- “that area of the law which is concerned with the scope, content and limits of official power, be it legislative, executive or judicial. So public law encompasses constitutional law and administrative law. In the Australian setting of written Commonwealth and State Constitutions, it is informed by the principle that there is no such thing as unlimited official power.”
 - Chief Justice Robert French, ‘Public Law: An Australian Perspective’, Scottish Public Law Group 6 July 2012, Edinburgh

WHAT IS A CONSTITUTION

- A blueprint for how governmental institutions should function, their limitations and how they will enact with another AND the fundamental rules for governing a political community
- It creates and empowers basic govt institutions
 - legislature, executive, judiciary
 - State and Federal governments
- It provides rules about the relations:
 - Between basic govt institutions
 - eg, can the courts strike down laws passed by parliament?
 - eg, should the State govts have power to raise their own armies?
 - AND between govt and the governed
- Written vs. unwritten constitutions
 - most countries have a ‘written’ constitution:
 - a central legal document that codifies the fundamental rules for governing the political community
 - some countries have an ‘unwritten’ constitution:
 - the basic rules for governing the political community are not codified in a central legal document
- Flexible vs. rigid constitutions
 - flexible constitutions:
 - can be amended like ordinary legislation
 - eg, NZ, Australian States (*mostly*)
 - rigid constitutions / ‘entrenched’
 - more difficult to amend than ordinary legislation
 - eg, s 128 in *Commonwealth Constitution* (double majority has to be met before constitution can be changed)

GOVERNMENTAL FRAMEWORK

- legislature: makes law
- Executive: implements the laws
- Judiciary: interprets the laws
- Integrity Branch: monitors government transparency, anti-corruption, proper conduct

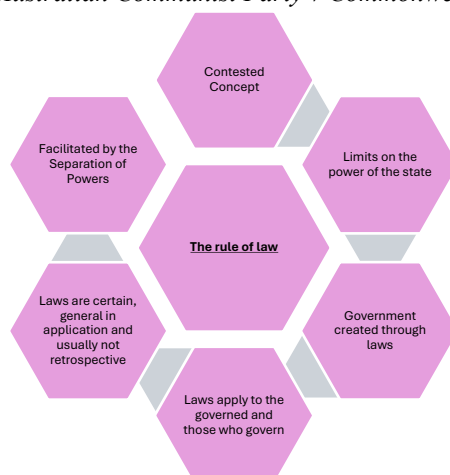


LIMITS ON EXECUTIVE POWER

- Constitutionality question (Constitutional Law)
 - Did the Parliament have the power to make the law which confers powers on the executive?
 - Example: Is this a law with respect to the marriage power?
 - Did the Executive have the power to make the decision under the Constitution?
 - Example: Is the Executive acting within the scope of its powers under s61?
- Legality question (Administrative Law)
 - Did the executive act within the scope of the powers conferred on them by a statute or delegated legislation? (Administrative law)
 - Example: Was the Minister's decision to refuse a visa within the scope of powers conferred on them by the Migration Act?
 - The constitutionality and legality questions are undertaken by the Judiciary as forms of judicial review- they are about whether the Parliament or the Executive had the power to do something, *rather* than whether the decision was right on its merits (merits review bodies like administrative review tribunals can review the correctness of a decision and remake that decision on the merits)

RULE OF LAW

- 'Moreover, it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.'
- *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J)



REPRESENTATIVE GOVERNMENT

- Government by the people through elected representatives
 - o *Commonwealth Constitution*, s 7
 - ‘The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate...’
 - o *Commonwealth Constitution*, s 24
 - ‘The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.’
 - o *Constitution Act 1889* (WA), s 73(2)(c)
 - ‘members chosen directly by the people’
- chain of accountability from govt to the people
- key element: senior members of executive must be members of Parliament and are accountable to it
- Westminster system vs. presidential system?
- Constitutional basis? See eg s 64 and s 44 (carve out of (iv))
 - S 64 -> ministers must be members of parliament

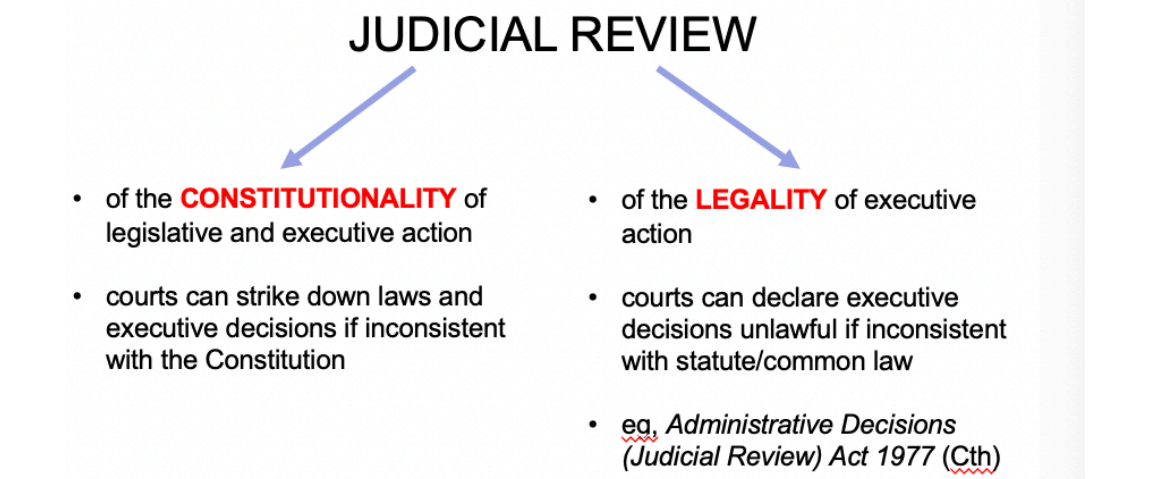
RESPONSIBLE GOVERNMENT

- Having the confidence of the lower house
- E.g. chain of accountability from the government to the people

SEPERATIONS OF POWERS

- differentiation of government functions/powers across different institutions
- Executive, judiciary and legislature

JUDICIAL REVIEW

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- The diagram titled 'JUDICIAL REVIEW' branches into two main categories of review:
- of the **CONSTITUTIONALITY** of legislative and executive action
 - courts can strike down laws and executive decisions if inconsistent with the Constitution
 - of the **LEGALITY** of executive action
 - courts can declare executive decisions unlawful if inconsistent with statute/common law
 - eg, *Administrative Decisions (Judicial Review) Act 1977* (Cth)
- - “The Australian Constitution assumes that, where a statute is enacted by an Australian parliament that exceeds the powers recognised or conferred by the Constitution, or infringes some express or implied constitutional limitation, any court (but in practice especially the High Court) has the power to declare the enactment to be unconstitutional and therefore invalid. The power of judicial review is a crucial means of ensuring that, where parliaments are invested with power, they operate within constitutional limits.”
 - o Blackshield & Williams, *Australian Constitutional Law and Theory* 6th ed, 3

PARLIAMENTARY SOVEREIGNTY

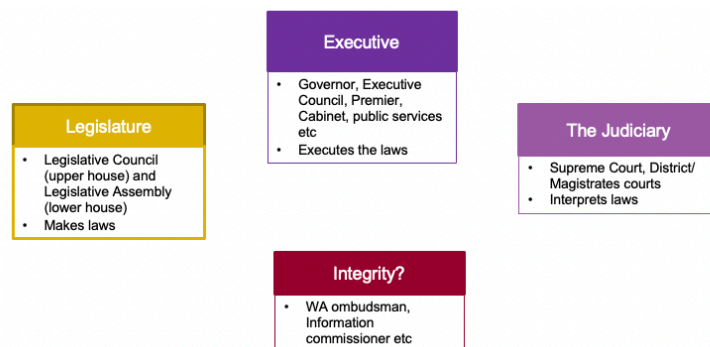
- ‘the right to make or unmake any law whatever’
- ‘no person or body is recognised ... as having a right to override or set aside the legislation of Parliament’

FEDERALISM

- Division of authority between central and regional governments sharing the same territory
 - Federal Government
 - State and Territory Governments
- Mechanism for resolving conflict:
 - Where a State law conflicts with a Commonwealth law, the State law is invalid to the extent of the inconsistency (s 109 Cth Constitution)
- Vertical division of power

WA CONSTITUTION

- part rigid / part flexible
 - contained in two statutes:
 - *Constitution Act 1889* (WA)
 - *Constitution Acts Amendment Act 1899* (WA)
 - 1889 Act scheduled to an 1890 Act of the Imperial (UK) Parliament
 - conferred self-government on WA colony
 - Why do we have two?
 - 1889 Act has a number of rigid provisions and did not want to trigger these to make changes... so made a new constitution (Amendment Act)
 - They have never been reconciled into one law
 - 1889 Act scheduled to an 1890 Act of the Imperial (UK) Parliament
 - conferred self-government on WA colony



S 51 Constitution

- “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to...”
- Therefore cannot make laws which directly contradict other provisions in the Constitution

“Until the Parliament otherwise provides” s51(36)

- E.g. s3: There shall be payable to the Queen out of the Consolidated Revenue fund of the Commonwealth, for the salary of the Governor-General, and annual sum which, until the Parliament otherwise provides, shall be ten thousand pounds
- Can be changed by ordinary legislation because expressly authorised to (does not trigger referendum process in s128)

REPRESENTATIVE GOVERNMENT

Cth Constitution: s 34 Qualifications of members

- **Until the Parliament otherwise provides**, the qualifications of a member of the House of Representatives shall be as follows:
 - (i) he must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen;
 - (ii) he must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

Cth constitution: s51 legislative powers of the parliament

- The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xxxvi) matters in respect of which this Constitution makes provision until the Parliament otherwise provides

- *COMMONWEALTH ELECTORAL ACT 1918* - SECT 163

Qualifications for nomination

(1) A person who:

- (a) has reached the age of 18 years;
- (b) is an Australian citizen; and
- (c) is either:
 - (i) an elector entitled to vote at a House of Representatives election;
 - or
 - (ii) a person qualified to become such an elector;

is qualified to be elected as a Senator or a member of the House of Representatives.

Qualification of s 44: Disqualification

- Any person who:
 - (i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or
 - (ii) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a by imprisonment for one year or longer; or
 - (iii) is an undischarged bankrupt or insolvent; or
 - (iv) holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; or
 - (v) has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons;
- CANNOT AMMEND s44 LIKE s34 BECAUSE IT DOES NOT CONTAIN THE WORD UNLESS THE PARLIAMENT OTHERWISE PROVIDES -> therefore can only be changed with referendum

WA V COMMONWEALTH (1975)

- **S 7:** The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate....

- **S 121**: The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.
- **S 122**: The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.
- Majority found that the representation of territories in the senate was constitutionally valid
 - HELD: Senate (Representation of Territories) Act 1973 (Cth) valid:
 - MAJORITY: Mason J, McTiernan J, Jacobs J & Murphy J
 - MINORITY: Barwick CJ, Stephen J & Gibbs J

THE RIGHT TO VOTE

- The franchise: who is able to vote at elections
 - **s 41** right of elective states: ‘No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth’.

R v Pearson: ‘Completely and utterly useless section’ -> because the high court has interpreted that s41 was only useful until 1902 because the commonwealth enacted the commonwealth franchise act which is now used to determine who has the right to vote. If you could vote at the state level doesn’t mean you could vote at the commonwealth

DIRECTLY CHOSEN

- **s 7**: The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate....
- **s 24**: The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.
- **16G electoral act 1907 (Cth)** Districts, how State to be divided into
 - (1) For the purposes of this section the Commissioners shall divide the number of electors by the number of districts, and the result of that division is referred to as the average district enrolment.
 - (2) The Commissioners shall divide the State into districts in accordance with the principle that, for each district, the number of electors that the district would have had at the relevant day must not be more than 10% greater, or more than 10% less, than the average district enrolment at the relevant day.
 - (3) If a district has an area of 100 000 square kilometres or more, subsection (2) does not apply but the sum of —
 - (a) the number of electors that the district would have had at the relevant day; and
 - (b) the large district allowance, must not be more than 10% greater, or more than 20% less, than the average district enrolment at the relevant day.
 - (4) In subsection (3) — large district allowance means 1.5% of the number of square kilometres in the area of the district.

QUALIFICATION OF VOTERS

- **s 8:** The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once.
- **s 30:** *Until the Parliament otherwise provides*, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once.
 - o Commonwealth parliament can rely on these sections for the qualification of voters

REGULATION OF ELECTIONS

- **s 9:** The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.
- **s 10:** *Until the Parliament otherwise provides*, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State.
- **s 31:** *Until the Parliament otherwise provides*, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives

Roach v Electoral Commissioner (2007) 233 CLR 162 [prisoners cant vote]

- Facts – the Electoral and referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth) inserts s93(8AA) into the Commonwealth Electoral Act 1918 – amendments provided that a person could not vote if they were serving a prison sentence (previously couldn't vote if serving a sentence 3+ years)
- Held – s 93(8AA) held to be constitutionally invalid by 4:2 majority
 - o By imposing a civil disability during any term of imprisonment takes **s93(8AA)** beyond what is reasonably appropriate and adapted for ('proportionate') to the maintenance of representative government – the net of disqualification is cast too wide
 - o Inconsistent with requirement of 'directly chosen by the people'
 - o *Due to changes historical circumstances including legislative history, ss 7 and 24 have come to be a constitutional protection of the right to vote. The constitution leaves it to the Parliament to define exceptions (not unconstrained). Because the franchise is critical to representative government, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people

Murphy v Electoral Commissioner (2016) 90 ALJR 1027

- Facts – provisions of Commonwealth Electoral Act 1918 (Cth) suspended processing of claims for enrolment and transfer of enrolment of persons otherwise eligible to enrol to vote in the period from 7 days after issue of writs. Argued that technological advancements meant that electoral enrolment should be possible right up to polling day
- Decision –
 - o Dismissed challenge to constitutional validity of provisions of Commonwealth Electoral Act 1918 (Cth)
 - o Distinguished from Rowe – denied the imposition on Parliament of an obligation to legislate to enhance the mandate
 - Not a challenge to a disqualifying provision targeting a particular class of persons (e.g. sentences prisoners)
 - Not challenge to a law removing an existing opportunity to enrol up to 7 days after issue of writs
 - o Found that a challenge to expand the franchise should be directed to Parliament, not court

Rowe v Electoral Commission (2010) 243 CLR 1 [shortening period from writ to close of rolls]

- Rowe is seen as one of High Court's worst judgements, they were under pressure to decide prior to election and later took a lot of time to give reasons (suspected it was because they couldn't back up decision)
- Concerned with same set of 2006 amendments as in Roach, just different provisions
- Prior to the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth), the Commonwealth Electoral Act 1918 (Cth) had (since 1983 after R v Pearson; Ex parte Sipka) provided that there was a seven day period for enrolments, and transfers of enrolments, after the issue of the election writs
- Facts –
 - o 17 July 2010 – PM announced election for both houses
 - o 19 July 2010 – Governor-General, acting on Prime Minister's advice, prorogued the Commonwealth Parliament and dissolved the House of Representatives until 21 August 2010, and issued writs for the election
 - o At 8pm on 19 July 2010 – electoral rolls closed for new electoral enrolments – early closure adversely affected first plaintiff, Shannen Rowe.
 - o At 8pm on 22 July 2010 – electoral rolls closed for the purposes of enrolment transfers from one electorate to another – closure adversely affected the second plaintiff, Douglas Thompson.
- Issue – were the provisions of the 2006 amendment act (earlier closure of rolls) constitutionally invalid?
 - 1) Did the earlier closure of electoral rolls disentitle, disqualify or disenfranchise people who were otherwise legally entitled to vote?
 - 2) If the people were so disentitled, disqualified or disenfranchised, was this for a substantial reason?
 - 3) If yes, was this reason reasonably appropriate and adapted to serve an end consistent or compatible with the constitutionally prescribed system of representative government?
- Decision –
 - o Constitutionally invalid – ss 7 and 24 required elected representatives to be 'directly chosen by the people', which requires that the electoral system align with principles of representative government
 - o Majority –
 - Accepted that it was different to Roach as it did not remove an entire class of people from voting, BUT practical effect was to disqualify people who were otherwise entitled to vote (was this a substantial reason?)
 - Cth justified saying it was to prevent electoral fraud – no evidence of electoral fraud in Australia, no evidence to show that this would help reduce electoral fraud
 - Gummow + Bell found that ss 7 and 24 required a maximisation of franchise
 - French CJ argued that one people were entitled to 7 day period, you cannot 'wind it down' to 1 day (minority was critical of this, saw it as a plus of Parliament being able to do what they want)
 - o Minority –
 - People should do their civic duty and are responsible for their own matters, if they are not enrolled then it is their own fault & majority argued that there was no penalty (the Act put the civic right over legal duty to enrol by removing fines)
 - o s41 only protects rights to vote that existed at Federation
 - o Distinguished from Roach – this wasn't as 'blanket' as Roach, conditional disenfranchisement

Palmer v Australian Electoral Commission (2019) 93 ALJR 947

- FACTS:
 - o Challenge based on ss7 and 24 of the Cth Constitution to the AEC practice of publishing indicative two-candidate preferred count ('Indicative TCP Count') pursuant to s 274(2A)-(2C) of the Cth Electoral Act 1918 (Cth) while polling booths remained open in some jurisdictions. Argued practice 'would impermissibly distort the voting system in a manner that would compromise the representative nature of a future parliament'.
- HELD: Challenge dismissed by High Court.
- Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ:
 - o [40]: 'publication of the TCP Information does not constitute the Commission giving any imprimatur to any particular candidate or outcome.'
 - o [53] lack of factual basis for challenge and rejected argument that Indicative TCP Count would 'impermissibly distort the voting system in a manner that would compromise the representative nature of a future Parliament'.
- Gageler J:
 - o [66]-[67] 'Fundamental to the scheme of the Electoral Act, and inherent in the Commission's composition, was that the Commission be and appear to be apolitical or non-partisan... There would, in my opinion, have been an imminent departure from the scheme of the Electoral Act in that important respect were the timing of the proposed publication of the TCP Information by the Commission to have been likely to have favoured, or to have created an appearance of favouring, other candidates over the plaintiffs or other political parties over the United Australia Party. The difficulty for the plaintiffs was that neither effect was self-evident and neither effect was shown on the agreed facts or able to

Ruddick v Commonwealth (2022) 96 ALJR 367

- FACTS
 - o The case concerned amendments introduced by the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth) which constrained political parties from having confusingly similar party names, abbreviations or logos from earlier registered parties.
 - o The case raised arguments drawing on electoral implications as well as the implied freedom of political communication.
- Held

Gordon, Edelman and Gleeson JJ:

[111] 'None of the material in the special case demonstrates that the 2021 Amendments impair or burden the quality of any electoral choice by the people or the freedom of political communication. The Constitution does not confer upon political parties a licence to obtain votes by confusion...'

Kiefel CJ and Keane J:

[3]: 'The impugned provisions restrict or distort the informed choice of the people as electors, by preventing the presentation to them of a candidate's affiliation with their political party on a ballot paper, and by preventing the candidate from communicating that affiliation and what it entails to electors. There can be no substantial reason or justification for those restrictions, because the Act already provided the means by which any real likelihood of voter confusion could be ascertained and dealt with, in a manner which was effective for that purpose and did not burden the implied freedom of communication to the same extent.'